IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

JUDGMENT

CASE NUMBER: 2014/39212
HEARD: 10 JUNE 2015
DELIVERED: 12 JUNE 2015

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

In the matter between:-

OLMEX (PTY) LIMITED Applicant

and

KYRIACOU INCORPORATED First Respondent

MARIO KYRIACOU Second Respondent

JUDGMENT

HERTENBERGER, AJ:

[1] This is an application by the applicant to enforce payment in terms of an undertaking given by the respondents jointly, being a firm of attorneys and the relevant attorney in his personal capacity, to the applicant.

[2] The respondents in the application requested this court to condone the late filing of respondent's answering affidavit. I can find no reason to refuse such condonation as I do not agree with the argument advanced by the respondent that the respondents' opposition of this matter is without merit. Accordingly the condonation is granted.

[3] The applicant in this matter seeks a judgment in its favour based on a letter of undertaking written by the respondents in which the respondents undertake to "retain the amount of R211 605,75 in trust until such time as the dispute in the matter has been resolved, either by way of operation of law or agreement between the parties". It goes on further to state: "We trust you find the above in order and welcome you to contact us insofar as you may not be satisfied with the wording of this undertaking." The undertaking in this matter was given on instructions of the respondents' client, Zero Unlimited Earthworks CC ("Zero") in an attempt to avoid the winding up of Zero.

[4] It is undisputed between the parties that the undertaking was given on the 22nd of February 2013 by way of a letter. It is further undisputed that there was no response to the undertaking until the applicant's attorneys in a letter dated 23 September 2014 sought to enforce the undertaking against the respondents. By this time however, the respondents no longer held the funds in trust and Zero had already been wound up and a liquidator had been appointed. It is important to consider the events that took place from February 2013, when the undertaking was given to September 2014 when the applicant requested payment based on the undertaking.

[5] The applicant had launched an application for the liquidation of Zero in or during 2012. Zero opposed the application and the undertaking that is the topic of this application was given by the respondents in order to fend off the winding up application. The winding-up application was unsuccessful and the applicant's attempt to appeal same, as well as the petition to the Supreme Court of Appeal in respect thereof were likewise not successful. On 3 December 2013, the applicant issued summons and obtained a judgment by default against Zero for R536 067.90 on 28 January 2014. When the sheriff was instructed to execute the writ issued in respect of the default judgment on Zero, it became apparent that Zero had been wound up. The sheriff's

return in this regard is dated 27 May 2014. The applicant then through its attorney of record conducts various investigations, the result of which, do not assist this court greatly. What is curious though is that the first written contact between the respective parties comes in the form of a letter dated 23 September 2014 in which the applicant's attorney now seeks to call upon the respondents to honor the undertaking. The respondents' reply indicating that their client has been liquidated and that the respondent ought to contact the liquidator. At this time the monies where no longer in the possession of the respondents.

[6] The court has had regard to the argument by the applicant that the undertaking was made and ought to be honored. The respondents have argued that the undertaking constituted an offer, that had not been accepted and if acceptance was not a requirement, then the offer had to accepted within a reasonable time. See in this regard Oos-Vrystaat Kaap Bedryf Bpk v Van Aswegen 2005 (4) SA 417 (O) and Wissekerke and 'n ander v Wissekerke 1970 (2) SA 550 (A) at 557A It is on the latter basis that this court is convinced by the respondents' argument. The respondents advance on Zero's instruction the undertaking to avoid a winding up of Zero. Instead of engaging with the respondents on Zero's behalf, the applicant chooses the route of remaining silent in the face of the undertaking that was given and continuing with steps to have Zero wound up. These are the very steps that Zero wished to avoid by advancing the funds to be held in trust. So vehement is the applicant's attack on Zero that it does not end in its attempt until the Supreme Court of Appeal declines its petition. Only then does the applicant issue summons, obtain default judgment and seek to enforce the judgment through a writ of execution. Upon learning the status of Zero, the applicant does not immediately contact the respondents (and in saying so the court is not conceding that this would have changed the outcome of this matter), but continues with "investigations" for a further four months before writing to the first respondent and requesting the payment in terms of the undertaking.

[8] It appears to this court that the applicant had long since abandoned the right to claim against the respondents' undertaking. It was determined to see to it that Zero would be wound up. Summons was issued long after the undertaking was given and in fact only some time after the attempts to wind-up Zero had failed. The applicant did not even acknowledge the undertaking and upon obtaining judgment, chose to serve the writ on the premises of Zero. At the very latest at the time of the granting of the default judgment, the applicant ought to have contacted the respondents to obtain payment of the monies still in trust. The applicant seeks to rely on the judgment of Aero-duct Installations CC v Degaturn (Pty) Ltd t/a Profour Projects and another (2006) JOL 17631 (N) in an effort to convince this court that by placing the funds in trust with the first respondent, Zero had given up any right to recall these funds. The applicant's conduct of not having accepted the undertaking either conditionally or at all negates this argument. The fact that they did not respond at all is a clear indication that they had accepted the fact that the monies would not remain with the respondents forever. The respondent argued that the respondents had paid the monies to the liquidator who had been appointed for Zero and that even if this court ordered the respondents to pay the amount due, they could simply not perform. As the court does not find in favor of the applicant for the reasons stated above, it is not necessary for this court to make any finding in regard to this argument. In as far as the applicant is not successful, it follows that the applicant must pay the respondents costs.

In the result the following order is made:

(1) The application is dismissed;

(2) The applicant shall pay the costs of the respondent on the scale between party and party.

R HERTENBERGER

ACTING JUDGE OF THE HIGH COURT

1. Representation of Applicant : Adv. A Friedman

2. Representation of Respondent: Adv. W Strobl

3. Date Heard : 10 June 2015

4. Date Judgment delivered : 12 June 2015