REPUBLIC OF SOUTH AFRICA

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

CASE NO: 19729/2013

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

20/2/2015
DATE

SIGNATURE

In the matter between:

DLAMINI ADVISORY SERVICES (PTY) LTD	1st Applicant
ZOLILE ABEL DLAMINI	2nd Applicant

and

SHERIFF OF THE HIGH COURT	1st Respondent
DOBSA SERVICES CC	2nd Respondent

JUDGMENT

VICTOR J:

[1] When this matter was argued in the Urgent Court there were literally 25 minutes available for the matter as one of the counsel had to rush to the airport. The 2nd respondent sought leave to hand in written submissions. My clerk telephoned him to see if he wanted to argue further before me because

of the time difficulty he was faced with. He stated that he would abide by his heads of argument, that is Adv Seleka. So I have taken the additional heads of argument into account.

[2] In relation to these further written submissions I have received a letter from the applicant's attorney who wanted to point out something in paragraph 17 of the 2nd respondent's submissions. I make a point of this because I do not want there to be any misunderstanding between the parties as to what I have taken into account and what I have not and to make sure that there is no prejudice to the 2nd respondent because of the rush.

[3] The applicants in this matter, by way of urgency, seek to interdict the 1st and 2nd respondents from taking any further steps to remove goods pursuant to a writ of attachment, which was effected by the 1st respondent on 26 November 2013.

[4] This matter has a long history. It is clear from this urgent application that the applicants have, by correspondence and discussion, done whatever they could to try and avoid bringing this urgent application. However, it must be noted that the applicants have been dilatory in launching this application. It was quite clear from the end of October 2013 that the 2nd respondent in these proceedings was not amenable to a stay of execution in respect of the removal of the goods and that there would be no amicable accommodation by the respondents. That was also clear from the litigation itself where the judgment was taken and the circumstances that ensued thereafter.

[5] In this stay of execution application the applicants make out the case that if the furniture were to be removed from the offices of the 1st applicant they will not be able to continue their business and if the furniture and household goods are removed from the home of the 2nd applicant he will be

left without furniture for his family. The further submission is made that in the event that the Deputy Sheriff removes the goods they will be packed into a storeroom, the goods will gather dust and their value will simply deteriorate.

[6] The applicants had given an undertaking that they will not remove any of the goods that are attached by the Deputy Sheriff. The 1st applicant is a well-established company and there is no suggestion, in my view, in these papers that the 1st applicant and indeed the 2nd applicant will act in breach of that undertaking. When it came to the notice of the applicants that judgment had been taken what ensued then was a misunderstanding about the applicant's attorney of record's email address. The summons was sent to the wrong address and it was only on 23 October 2013 that they found out about the judgment and it would appear that they did so receipt after emailing the summons. They took the matter no further and did not follow up with the attorney as to whether he was attending to the matter. It transpired ultimately that the applicants had sent the summons to the wrong email address and this has caused a considerable delay.

[7] Having regard to the merits of the rescission application, however, I have to weigh the delay of a couple of weeks in bringing this application and whether at the end of the day the applicants could succeed in having the judgment rescinded. The 2nd respondent rendered forensic investigative services. The 1st applicant had a contract with government and there was a delay in paying for those services. What happened then is that the 2nd respondent refused to hand over the forensic report and this resulted in the 1st applicant not being able to claim the fees from government in the absence of the report. This happened in January 2010. The services were rendered towards the end of 2010. Part of the forensic report was withheld in January because of the late payment of the invoices. Both parties knew that because it was a new government contract that there would in all probability have been a delay in payment.

[8] As a result of the dispute about payment the forensic report was not handed over and the contract was cancelled based on the 2nd respondent's repudiation of the contract.

[9] What is important as to the merits of the claim is clause 2.31, the arbitration clause, which reads as follows:

> 'Unless any such dispute is settled amicably by conciliation it shall be referred by either party to arbitration. Failure by the parties to agree on the appointment of an arbitrator the President of the Arbitration Association of South Africa shall appoint the arbitrator. The parties shall be bound by any arbitration award rendered as a result of such arbitration as a final adjudication of the dispute and binding on both parties.'

[10] There appeared to be some acrimony between the attorneys and the litigants and they could not agree on an arbitrator. Instead of enforcing the provisions of clause 2,31 of the terms and conditions and approaching the President of the Arbitration Association of South Africa to appoint an arbitrator, the 2nd respondent decided to come to court where he obtained a default judgment. It was pursuant to that default judgment that the writ of execution was issued. The applicants now seek to stay the removal of the goods.

[11] I was referred to various cases by both parties, both parties addressed me fully on the law in respect of what should be done in circumstances such as these. It was never the applicant's case that once a rescission application was launched it ipso facto stopped the writ of execution. The respondents submitted and referred to the case of *United Reflective Converters [Pty] Ltd v Levine* 1988 (4) SA 460 (W) at 460B a judgment of Roux J which of course is in support of the trite principle that a rescission application does not stay the execution proceedings.

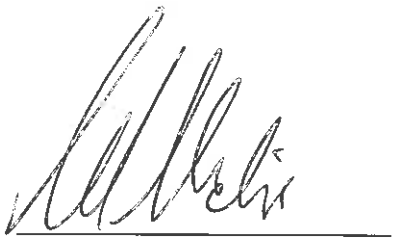
[12] I have a discretion in this matter as to whether to grant the relief sought by the applicants that is simply to stay the removal of the goods. By virtue of the defence to the cause of action to which I have referred fully, it seems to me that the applicants do have a good case particularly in relation to the arbitration clause. But the defence goes much further than that. The forensic report was not delivered and what is more, there was a claim for monies for payment for services which quite clearly were certainly not rendered.

[13] I can also see that in respect of those invoices that were paid there was a huge debate about the nature of the amount apportioned to the services rendered. There is a substantial dispute between the parties particularly on what each month's invoice should have been.

[14] Claim A is for services rendered in February. It is common cause that there has been no forensic report for February 2011 because by that stage the relationship had already broken down.

[15] In Claim B that is for services rendered for the month of March, there again there does not seem to be a forensic report for that month and the same goes for April 2011. In those circumstances the applicants had not been able to claim back the money from the state in the absence of forensic reports. That necessitated them to cancel the contract and to appoint another forensic investigator.

[16] In the result the applicants application must succeed and I grant an order in terms of the draft marked X which I have initialled and dated. I have changed prayer 2 to read, the costs of this urgent application are reserved for determination at the rescission application.



M VICTOR

JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG