REPUBLIC OF SOUTH AFRICA

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

CASE NO: **29277/2015**

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

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

Hyprop Investments Limited
(Registration number 1987/005248/06) **First Applicant**

Abland (Pty) Ltd
(Registration number 1996/012517/07) **Second Applicant**

And

NSC Carriers and Fowarding CC **Respondent**

JUDGMENT

Van der Linde, J:

Introduction: the issues

[1] This is an application for the liquidation of the respondent close corporation. A final order alternatively a provisional order is sought. The applicants' unpaid claims against the respondent are comprised of two judgments for capital amounts and four taxed bills of costs. The six dates concerned range from 13 January 2009 to 27 July 2011.

[2] These claims follow on a successful cancellation of lease and eviction orders that the applicants obtained against the respondent on 12 April 2010. The respondent had leased two business premises from the respondent in terms of two lease agreements. The respondent's member, Mr Costa, was a surety in respect of both lease agreements. Money judgments were also granted against the respondent and Mr Costa.

[3] The resistance against relief sought, which is shored up by a counter-application for a stay of the liquidation application pending the final determination of the respondent's damages action (referred to below), falls into three parts. The first part is that the respondent has taxed and allowed bills of costs in its favour against the applicants, and these should be set off against the applicants' claims. Since the asserted set-off still leaves, on the respondent's version, an amount of R1 447 377,95 owing by the respondent to the applicants, nothing more need be said about this defence.

[4] The second part of the resistance is that there is an action pending in this division under case number 13612/2011 by the respondent, by Mr Costa (whose sequestration is sought in a parallel application), and by two other close corporations against the applicants and F Gouws and N Greenstone, for damages amounting to some R4million arising from alleged fraudulent misrepresentations which had induced the two lease agreements. The argument is that if successful, the judgment will extinguish any indebtedness owed to the applicants. The respondent thus submits that equity and the interests of justice demand that the liquidation application be stayed pending the trial action.

[5] The third part of the resistance is that not all the respondent's goods and movables that were present on the leased premises and were attached by the sheriff have been accounted for. These goods and movables have a value of some R6,5million. It is alleged that the value of the missing goods and movables exceeds the debts of the respondent to the applicants.

[6] No action has been instituted by the respondent against the applicants for any asserted culpable damages on the part of the latter, or for any appropriate declaration concerning the sheriff's attachment and subsequent execution, and this defence too may be set aside for present purposes. In particular, there is no claim in the pending fraud action for any relief related to this asserted conduct. An action, if one avails, may be pursued by the respondent's liquidators.

[7] The real issue of substance raised by the respondent is the impact of the pending trial action on the applicants' application for liquidation. On this score Mr Kairinos, SC who appeared for the respondents in both the liquidation and the sequestration application under case number 15/29278 (they were heard together), advanced certain factors that weighed, he submitted, in favour of a stay of the liquidation and sequestration applications. I deal with those that were pertinent.

<u>The procedural inequity of the fraud cause having to be by way of trial action</u>

[8] The argument here was that the trial action was instituted in 2011. The applicants' eviction case was brought on motion. It was followed by the respondent's unsuccessful applications for leave to appeal to both the court a quo and the Supreme Court of Appeal. The latter refusal only came in 2011. The submission was that although the respondent's fraud action could have been instituted earlier, it waited for the SCA outcome. No other reasons or handicap was advanced.

[9] But the argument was that if the applicants' had proceeded by trial action, the respondent would have been entitled under rule 22(4) to obtain a stay of the main action, pending the

determination of the trial action. Also, if the applicants had brought their liquidation application by trial action, the same procedural entitlement was there to be availed by the respondent. It is thus being prejudiced by dint of the procedural quirk that operates against it.

[10]The rule of course says that the defendant *"may"* refer to the claim in reconvention, and may then *"request"* that judgment in convention be postponed. The rule then also goes on to say: *"Judgement on the claim shall … thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders…".*

[11] It seems fair to recognise that there is certainly some procedural advance, because had these proceedings been by way of action, and had this rule been invoked, the applicants, not the respondent, would have had to make the running. The applicants would have had to bring the application not to stay the main claim for liquidation.

[12]I am not persuaded, nor did Mr Kairinos so argue, that this would have changed the onus, if this is a relevant consideration in a mater in which the court has a discretion. It seems to me that the respondent, who has an unliquidated damages fraud claim, would still bear the onus of showing why the matter should be stayed.

[13]But even if this is wrong, the point remains that the court still has a discretion, whether or not the procedure is by way of trial action or on motion. And that is the central issue to be decided in the present matter.

[14] What does weigh with me in this regard, is the absence of an acceptable explanation for having waited until 2011 before the fraud action was instituted. Of course, the respondent is entitled to wait until just before its claim is extinguished by prescription. But the concomitant concern is that justice delayed is justice denied.

[15]If such an action, delayed for a substantial period of time, is then later invoked further to delay execution of a money judgment, the respondent's delay must carry with it the risk of

not procuring a delay in the execution of the judgment. After all, the respondent's case still has to be proved; the applicants' case has been proved and pronounced.

The stay application is a substantive application

[16] The central point advanced here was that the court was not faced just with a liquidation application in respect of which a provisional order could be granted. The stay application, if successful, was a substantive barrier to a provisional order. Put differently, the liquidation application could not be decided on a provisional basis without deciding the stay application on a substantive, final basis.

[17] In addition, the point was made, in the context of the sequestration application of Mr Costa, that if the respondent's resistance in the liquidation application was good, it would follow that the surety's resistance ought also to be good.

[18] I don't agree, with respect. It seems to me that this court is quite entitled and able to issue a provisional order and postpone the stay application for the return day. I also don't accept that the surety's fortunes (or misfortunes) necessarily follow those of the creditor. But as it happens in this matter they probably do.[1]

The real reason for the applications is to stifle the fraud action

[19] This is an attractive argument, because a court will instinctively resist any conduct that seeks to cover up fraud. But that proposition is only valid as far as it goes. Here the applicants have money judgments. They are entitled to execute them. The respondent is offering to pay them.

[20] The real difficulty with the argument is that it is really quite incapable of being assessed finally, one way or the other. The applicants are equally able to assert that the pot is calling the kettle black; that the real reason for the fraud action is to suppress execution of the money judgments.

[1] Mr Kairinos' heads of argument for the surety came to one substantive page.

Irregularity in the execution process

[21] This is the argument concerning the goods and movables that have been attached. It has been dealt with above and nothing more need be said about it here.

The question of security

[22] Here the argument was that the applicants' in fact had security; this took the form of the goods and movables that were attached by way of the landlord's hypothec. Had the execution process and the sale in execution not gone awry, the applicants' judgment would have been satisfied.

[23] I am afraid that this argument really revisits the points already made concerning the alleged flawed execution process.

Kalil v Decotex (Pty) Ltd[2] and Clipsal Australia (Pty) Ltd and Others v Gap Distributors and Others[3]

[24] Of the judgments relied on by Mr Kairinos, these two were pertinent. The first one concerns the nature of the respondent's resistance in liquidation proceedings. It holds that the respondent need only dispute the creditor's claim on bona fide and reasonable grounds.

[25] Its application to the present matter is more problematic for the respondent. The respondent in fact, in the present matter, does not dispute the applicants' claim at all. It merely says that it has a claim which, if successful, will extinguish the applicants' claim. But that contingency has not been established.

[26] Indeed, the respondent seeks to invoke the fact of the contingency to avoid the payment of an admitted debt. This is a power which a court has; and that brings one to Clipsal.

[27] Clipsal is a judgment in which the Supreme Court of Appeal set aside a narrow discretion exercised by Joffe, J in the court a quo in which the learned judge stayed a contempt of court application. A narrow discretion is one with which a court of appeal can interfere: *"… only if*

[2] 1988 (1) SA 943 (AD)
[3] 2010 (2) SA 289 (SCA)

the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself."[4]

[28] It is instructive to consider the reasons why Streicher, ADP (then) came to the conclusion to which he did:[5]

"[20] The court below held that 'eise van geregtigheid' indicated that the contempt application should be stayed pending the outcome of the review application because if the contempt application 'were to be determined prior to the review application, enforcement of a court order could be ordered in circumstances where the enforcer of the court order was not entitled to the court order in the first instance'. The court would, according to Joffe J, in the circumstances 'knowingly compound the problem'. He added that the determination of the review was important insofar as issues of mala fides and wilfulness were concerned.

[21] However, the outcome of the review application is irrelevant to the question whether the respondents were acting in contempt of court. In terms of the court order Gap Distributors and Trust Electrical Wholesalers are interdicted from infringing registered design A96/0687. That court order is a final order and has to be obeyed even if it is wrong as is alleged by the respondents. Should the review application be successful and the registration of the design be set aside, the interdict would come to an end as there would no longer be a registered design, but until that happens the interdict stands and has to be obeyed. As was said by Herbstein J in Kotze v Kotze 1953 (2) SA 184 (C) at 187F - G:

'The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.'

[22] In its judgment the court below itself refers to Culverwell v Beira 1992 (4) SA 490 (W) at 494A - E where Goldstein J said that orders of court have to be obeyed until set aside and that chaos may result if people were allowed to defy court orders with impunity. It also refers

[4] Clipsal at paragraph [19].
[5] At paragraph [20], [21], and [22].

to the judgment of Froneman J in Bezuidenhout v Patensie Sitrus Beherend Bpk 2001 (2) SA 224 (E) at 228F - 230A where, relying on Culverwell and Kotze, Froneman J said that an order of a court of law stands and must be obeyed until set aside by a court of competent jurisdiction. Having done so with apparent approval and having stated that it is obliged to apply the judgment of this court, it is inexplicable how it could then, on the basis that the judgment could be wrong, have considered the outcome of the review application to be of any relevance to the contempt application."

[29] In this matter the money judgments in favour of the applicants against the respondent as well as Mr Costa is beyond challenge. That is a factor that, in my view, weighs more heavily against a stay, and in favour of both a liquidation and a sequestration order, than the factors advanced in favour of a stay; quite apart from the responses that have been put up against those above.

[30] In my view the application for a stay should be dismissed, and provisional orders of winding-up and of sequestration should follow. In the result I make the following order:

(a) The respondent's counter-application for a stay of the main application is dismissed with costs.

(b) A provisional winding-up order hereby issues in the usual form of a rule nisi, returnable on a date to be arranged with the registrar, calling upon all interested parties to show cause before this court why a final winding-up order should not be granted; and why it should not be ordered that the costs of the opposed winding-up application should be costs in the insolvent estate.

(c) This order is to be served:

(i) On the respondent at its registered address;

(ii) Publication in the Government Gazette;

(iii) Publication in The Star newspaper;

(iv) On SARS;

(v) On all known trade unions representing the respondent's employees.

WHG van der Linde
Judge, High Court
Johannesburg

For the applicant: Adv. M. Nowitz (083 444 9716)
Instructed by: Nowitz Attorneys
5th Floor, Hyde Park Corner
Cnr Jan Smuts Avenue & William Nicol Drive
Johannesburg
Tel: 011 325 5300
Ref: Mr. L. Nowitz/aa H248

For the respondents: Adv. G Kairinos, SC (082 565 6695)
Instructed by: E. DA C. Luiz Attorneys
1st Floor, 5 Grays Terrace Road
Kensington
Johannesburg
Tel: 011 616 2664
Ref: Mrs E. Luiz/PL/N133/3009(5)

Date of hearing: 5 May 2016
Date of judgment: 13 May 2016