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

CASE NO: 2019/41365

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED. NO
DATE: 18 October 2021

In the matter between:

W[....] D[....] Applicant

and

A[....] D[....] Respondent

JUDGMENT

Weiner J

Introduction

[1] The applicant in this matter sought, as a matter of urgency, that pursuant to the provisions of Uniform Rule 45A—

(a) A warrant of execution, issued on 23 August 2021 (the 'warrant'), be set aside on the grounds that:

(i) The respondent, when applying for the warrant, failed to make a full disclosure to the registrar of this Court;

(ii) The respondent fraudulently obtained the warrant on a false version;

(iii) The debt upon which the respondent relies has been extinguished, alternatively, is disputed, for the reasons set out in the applicant's affidavit.

(b) Alternatively, staying the execution of the warrant, on the grounds mentioned above, pending the finalisation of an action for declaratory relief that the debt has been extinguished and/or set-off, and that the applicant is no longer indebted to the respondent on the grounds set out in the warrant.

[2] The applicant thus sought final relief alternatively interim relief. As will appear below, in my view, the applicant has not made out a case for interim relief. I therefore find it unnecessary to deal with whether he has made out a case for final relief.

Background

[3] The parties were divorced on 31 January 2020, and an agreement was concluded between the parties. Clause 11 of the agreement states:

'LUMP SUM PAYMENT TO PLAINTIFF BY DEFENDANT IN RESPECT OF ACCRUAL CLAIM

The parties agree that according to the calculations and determination of the Defendant's 50% share of accrual of the Plaintiff's estate, the Plaintiff will pay the amount of R2 000 000.00 (Two Million Rand) within a period of 12 (twelve) months which excludes interest for this period, to the Defendant.'

[4] In relation to the R2 million owed, the respondent's attorney made demand in respect thereof. The applicant's attorney on 1 March 2021 stated in a letter that, '[I]t is our Clients instructions that this amount has now been settled and our Client has no further obligation, financially or otherwise towards you in your personal capacity.' No details of why the obligation was deemed settled were furnished.

[5] The applicant's attorneys were informed on 7 April 2021 in a letter that the indebtedness had not been settled. On 7 April 2021, the applicant's attorneys responded to the letter wherein it was then contended that the Settlement Agreement had to be amended. The respondent was requested to provide

documents substantiating the calculation of the accrual. No further action was taken by the applicant in this regard.

Requirements: urgency, interim interdict, the stay of the warrant

[6] The warrant was issued on 23 August 2021, and executed on 6 September 2021. The applicant states that he only became aware of the warrant on 7 September 2021, when an amount of R37 000 was removed from his bank account.

[7] The notice of motion was issued as one of urgency on 8 September 2021, and set down for 14 September 2021. In the notice of motion, the applicant afforded the respondent until 9 June 2021 (obviously a typographical error meaning to refer to 9 September 2021) before 12h00 to file the answering affidavit. Thus, no time was left for the filing of the replying affidavit in terms of the practice in this division.

[8] In the present matter, the respondent was only able to file its answering affidavit on 10 September 2021, that is, the Friday preceding the Tuesday on which the matter was to be heard. The applicant then took three days to file its replying affidavit, and did so on Monday, 13 September 2021, one day before the hearing.

[9] In terms of paragraph 18 of Chapter 9.23 of the Gauteng Local Division Johannesburg Practice Manual dated October 2018 ('the Practice Manual') read with paragraph 183 of the Judge President's Revised Consolidated Directive of 11 June 2021 dealing, *inter alia*, with court process during the national state of disaster ('the Revised Consolidated Directive'), the relevant papers were to have been filed by 12h00 on 9 September 2021, i.e. the Thursday preceding the Tuesday on which the matter was to be heard. Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of the obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed papers by the previous Thursday.

[10] Many practitioners launch urgent applications without taking account of the Practice Manual and the Practice Directives. In addition, an applicant seeking urgent redress from court, must make out a case for urgency in its founding affidavit. The well-known authority of *Luna Meubelvervaardigers (Edms) Bpk v Makin & Another t/a Makin Furniture Manufacturers* bears repeating:

'The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.'[1] [emphasis added]

[11] It was clearly not possible to ensure that all the affidavits could have been filed by 12h00 on the preceding Thursday, as that was the date provided in the notice of motion for the filing of the answering affidavit. Even if the answering affidavit was filed on time, no time was provided for a reply to filed timeously. As it happened, the answering affidavit was only served on Friday, 10 September 2021. It is inconceivable that the application could have been determined in compliance with the Practice Manual and Revised Consolidated Directives.

[12] The question that then arises is whether the applicant has established that the irreparable harm to himself is so dire that his non-compliance with the Practice Manual, Directives and case law, should be condoned?

[13] In the determination of the factors to be taken into account in the exercise of its discretion under Rule 45A, a court may utilise the requirements for the granting of an interim interdict, namely that the applicant must show:[2]

(a) that the right which is the subject of the main action and which he seeks to protect by reason of the interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;

(b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in the establishing of his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.

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[1] *Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137E-F.
[2] *Knox D'Arcy Ltd and others v Jamieson and Others* 1995 (2) SA 579 (W) at 592H–593D.

[14] The requirements for a stay of execution, summarised in *Tony Gois t/a Shakespeare's Pub v Van Zyl* are that:[3]

'(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.

(b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.

(c) The court must be satisfied that:

(i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and

(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, ie where the underlying *causa* is the subject-matter of an ongoing dispute between the parties.

(e) The court is not concerned with the merits of the underlying dispute - the sole enquiry is simply whether the *causa* is in dispute.'

[15] The approach to be adopted by courts in determining whether an applicant is entitled to interim relief or not was set out in *Webster v Mitchell* in the following terms:[4]

'…. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary

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[3] *Tony Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (LC) at 155H–156B.

[4] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief….'

[16] The answer to the question posed in paragraph [12] above, must be answered in the negative. Firstly, the applicant's version, having regard to the history of this matter, cannot pass the test set out in *Webster*. The probabilities are not in his favour There is a clear dispute of fact relating to the deduction/set-off claimed by the applicant. He has not, before this application, raised the issue of deductions/set-off in any detail. There was no mention in his affidavit of an agreement on this issue, nor that he ever informed the respondent that he was deducting these amounts from the R2 million. He wished to have the settlement agreement set aside for other untenable reasons. He did nothing further in this regard. He only raised the issue of the validity of the warrant belatedly.

[17] In regard to irreparable harm and no alternative remedy, on the applicant's own version, the respondent, through her membership in Holding 15 Van Der Westhuizenshoogte CC is valued at R180 000 000. The applicant is the sole member of WAW Xport & Trading CC (the CC), which is a transporter of mining products. According to the respondent, who was employed by the CC, it owns approximately 18 trucks and has 16 sub-contractors with their own trucks, totalling a fleet of approximately 78 trucks. The CC has an average turnover of approximately R25 million per month. The applicant also earns an income of some R200 000 per month from an insurance brokerage business of which he is the sole proprietor. The applicant failed to deal with or dispute these allegations in his replying affidavit.

[18] In my view, the irreparable harm alleged by the applicant has not been established. He is a man of means and has other resources other than the bank account which the Sheriff has attached. In addition, he has alternative remedies (such as a claim from the respondent, which would be met having regard to her assets).

[19] In the replying affidavit filed on 13 September 2021 (to which the respondent did not have an opportunity to respond) and in the heads of argument, the applicant

belatedly submitted that that that upon his attorney's inquiring about the matter, it became evident that the respondent had issued a 'garnishee order' pursuant to Rule 45(8) and 45(12) and the failure by the respondent (and her attorneys) to apply to court for an order authorising the attachment of the applicant's bank account, rendered the attachment unlawful and a nullity. This was not raised in his founding affidavit and the respondent has not had an opportunity to deal with it. It is trite that 'it is…imperative that a litigant should make out its case in its founding affidavit, and certainly not belatedly in argument.'[5] For these reasons (and in view of the failure to establish urgency) I do not deem it necessary to deal with this argument.

Accordingly, the following order is made:

1. The matter is struck off the roll for lack of urgency and a failure to comply with the Practice Directives of this Division.

2. The applicant is to pay the costs.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 18 October 2021.

Date of hearing: 15 September 2021
Date of judgment: 18 October 2021
Appearances:
Counsel for the applicant: Adv. S McTurk

[5] *My Vote Counts NPC v Speaker of The National Assembly And Others* 2016 (1) SA 132 (CC); [2015] ZACC 31 para 177; see also *Quartermark Investments (Pty) Ltd V Mkhwanazi and Another* 2014 (3) SA 96 (SCA); [2013] ZASCA 150 para 13 where it was stated: 'It is trite that in motion proceedings affidavits fulfil dual role of pleadings and evidence. They serve to define not only the issues between the parties but also to place the essential evidence before the court. They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit.'

Attorney for the applicant:	Rémon Gerber Attorneys Incorporated
Counsel for the respondent:	Adv. WF Wannenburg
Attorney for the respondent:	Esthe Muller Incorporated
	c/o Couzyns Incorporated