32

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 21/9813

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

SIGNATURE 25/06/2021 DATE

In the matter between:

SICELO BENARD NGCONGO	1st Applicant
IEC CONTRACTORS CC T/A INDUSTRIAL ELECTRICAL CONTRACTORS	2nd Applicant
and	
VOLTEX (PTY) LIMITED	Respondent

In re:

VOLTEX (PTY) LIMITED	Applicant
and	
IEC CONTRACTORS CC T/A INDUSTRIAL ELECTRICAL CONTRACTORS	Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 11h00 on 25 June 2021

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The applicants seek a stay of execution of the winding-up order granted by this Court on 3 June 2021 ('*the winding-up order*'), pending the determination of the rescission of that order contained in Part B of the notice of motion. The application is brought in terms of Rule 45A alternatively section 354 of the Companies Act, 1973.

[2] The Applicants contend that the winding up order was granted in the absence of the second applicant ('*IEC*'), and without the knowledge of IEC or its sole member the first applicant.

[3] The Applicants argue that IEC has a *bona fide* defence to the respondent's ('*Voltex*') claim in the main proceedings.

Urgency

[4] Mr Bester SC, representing Voltex, argued that the matter is not urgent and that it should be struck off the roll

[5] In *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and others*,[1] the Gauteng Division (*per* Tuchten J) succinctly summarised the correct approach to dealing with urgent matters as follows: [2]

---

[1] [2014] 4 All SA 67 (GP).

[2] At para 64.

> 'It seems to me that when urgency is in issue the **primary** investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their case in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by Counsel acting for respondents, self-created urgency.' (emphasis added)

[6] The first applicant, also the deponent to the founding affidavit, says that his attorney of record received the winding up order from Voltex's attorneys of record, on 10 June 2021. That, to the best of his knowledge, liquidators have not yet been appointed. He also says that until a provisional or final liquidator is appointed, he, as the sole member of IEC, is unable to make any managerial decisions and is unable to take control of the business. The result of this state of affairs is that IEC is not entitled to conduct business until the winding-up order is stayed or a liquidator is appointed. Day-to-day expenses can not be paid. He draws attention to the obvious, being that the winding up of IEC has drastic consequences which include the change of status, divesting the corporation of control of its assets and breaking down precious trade relationships with its customers. He suggests that such harm is irreperable and that it grows with each passing day. Voltex has conceded that it is inherent in a liquidation application that certain consequences follow as a matter of law.

[7] Some of these consequences are relied upon by IEC in this application and, in the circumstances of this case, I am satisfied that the applicants will not obtain substantial redress at a hearing in due course and therefore conclude that the relief sought in Part A warrants this court's urgent attention.

The run up to the winding up application

[8] In Voltex's application for IEC's winding up, Voltex refers to a credit arrangement concluded in 2019 between IEC and Voltex. In terms of the credit application, IEC would purchase goods from time to time from Voltex on credit. Voltex alleges that over the period from December 2019 to November 2020, IEC purchased goods from the applicant to the total value of R3,836,149.53 ('*the alleged debt*') as set out in the statements of account attached to the founding affidavit marked "D1" and "D2". Voltex alleges that this amount has not been paid and in the circumstances and on 11 January 2021 Voltex caused a demand in terms of section 69 of the Close Corporations Act No. 69 of 1984 to be served on IEC by Sheriff at its registered address ('*the Letter of Demand*'). The Letter of Demand was responded to in a letter dated 2 February 2021 by Errol Goss Attorneys, IEC's attorneys. They explained that IEC is their client; denied that IEC is indebted to Voltex in the sum of R3 836 149.53; that Voltex was aware of this; that certain information had been sought which was still outstanding from Voltex; that Voltex had undertaken to provide the information sought that week; and that should Voltex proceed with the action threatened in its Letter of Demand being the winding up of IEC, then such letter would be brought to the attention of the court.

[9] Voltex's attorneys, Orelowitz Incorporated were thus aware that IEC was represented by Errol Goss Attorneys and expected the winding-up application to be defended.

[10] The application for the winding-up of IEC was issued on 26 February 2021 and served on IEC's registered and principal addresses on 18 March 2021.

[11] The application was not mailed to Errol Goss Attorneys. This is not a legal requirement but in the light of the present pandemic and the fact that many businesses are operating remotely, to say nothing of collegiality and simple courtesy between people, I would have expected that to occur given the exchange of correspondence referred to hereinbefore. This is particularly so as Errol Goss Attorneys had placed themselves on record on 2 March 2021 as the attorneys for three sureties which Voltex sought to hold liable in terms of a combined summons issued on 28 January 2021 out of this Court under Case No. 3532/21, for payment of the very same debt demanded in the letter of demand and the winding-up application. A plea was filed on 9 April 2021. The existence of a bona fide disputed debt is tacitly conveyed by the use of action proceedings.

Rule 45A

[12] An application for the rescission of a court order does not automatically suspend its execution.[3] To suspend the execution of an order, an applicant may bring an application under rule 45A, which provides that the Court '*may suspend the execution of any order for such period as it may deem fit.*'

---

3 *Hlumisa Technologies (Pty) Ltd and another v Nedbank Ltd and others* 2020 (4) SA 553 (ECG), at paras 14–15.

[13] Mr Shepstone relied on the principles to the stay of execution as set out in *Gois t/a Shakespeare's Pub v Van Zyl*,[4] where the Labour Court held:[5]

> '(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.'

[14] Paragraph (e) of the quoted principles in *Gois* ie that the court should not concern itself with the merits of the underlying dispute, attracted much criticism by Mr Bester. Mr Shepstone argued that this implied that the *prima facie* right the applicants needed to show in this application was that they had a right to apply for a rescission whereas Mr Bester contended that such a construction would entitle

---

4 2011 (1) SA 148 (LC).

5 At 155H–156B.

everyone always to a stay. I do not intend analysing this argument but will assume without finding that Mr Bester's construction of rule 45A is correct and that what the applicant has to show is more than merely that it is in circumstances which, prima facie, would merit a rescission of judgement. In short, I adopt for purposes of this judgement, without accepting, Mr Bester's version of the applicable test. Not having had the benefit of heads of argument from Mr Bester have had to rely on my notes of his oral argument for my understanding of his submissions and the authorities upon which he relies.

[15] Mr Bester and Mr Shepstone were in agreement that an applicant seeking to assert a right justifying a stay of execution, had to satisfy the requirements for the procurement of an interim interdict as the relief under rule 45A is akin to that of interim interdictory relief. The requirements for interim interdictory relief are well established. The applicant must establish a *prima facie* right to the relief sought, in the face of an injury reasonably apprehended, where the balance of convenience favours the interdict sought and there is no other adequate alternative remedy in the circumstances.[6] Where they parted ways was on the nature of the prima facie right. Mr Shepstone contended that paragraph (e) of *Gois* (supra) entitled it to simply show a 'right to apply for a rescission' whereas Mr Bester argued that the applicants should engage with the merits of the rescission and should persuade the court on the merits of the rescission application, albeit only on a *prima facie* basis. The applicant need not succeed in the rescission itself - that would make getting *interim* relief pointless for in that case one would simply proceed to the final relief of rescission and that was not what was being sought by Mr Shepstone on behalf of his client.

---

[6] *Setlogelo v Setlogelo* 1914 AD 221.

[16] As already indicated I will assume without finding that Mr Bester's approach is correct.

The Rescission

[17] In the rescission hearing (part B of the notice of motion) the applicants will have to provide a reasonable explanation for their default, show that their application is brought *bona fide*, and be able to show that they have a *bona fide* defence/s to Voltex's claim which *prima facie*, has some prospect of success. I would presume that the *prima facie* right that an applicant in a stay application under rule 45A has to show, is something less than what has to be shown in the rescission application – another construction would lead to the same test being applied twice, once in the stay application and once in the rescission application.

[18] The first applicant explained that on 18 March 2021, at approximately 9h23 the Sheriff attended at the offices of IEC to serve court papers. He emphasized that the registered address and principal place of business are across the street from one another. The receptionist, Ms Phendile Mashabela ('*Ms Mashabela*') accepted a large bundle of papers through the gate of the principal place of business, namely, 27 Boyd Road, Brenthurst, Brakpan. The registered address of IEC is a parking lot. The first applicant stated that the Sheriff did not come onto the premises, nor did he ask to display any documents on a notice board at either of the premises. He says that the Sheriff did not inform Ms Mashabela that a copy of the court papers was for service on the employees of IEC (this is contradicted in the sheriff's return verified in a confirmatory affidavit received from him). Ms Mashabela took the bundle of the court papers and placed them in a lockable cupboard which is under her control for safe keeping.

[19] He continues to explain that later that day, at approximately 13h00 Ms Mashabela left for Polokwane, her hometown, on compassionate leave and then lists the ill that befell Ms Mashabela during the following weeks. She only returned to the office on 14 April 2021 by which time she had forgotten about the court papers that the Sheriff had served. On 10 June 2021, Ms Mashabela received a call from Mr Roger Fordyce asking if she had signed for court papers from the Sheriff on 18 March 2021. It was then that she realised that she had forgotten to bring to the attention of management the court papers that were served on her. She immediately arranged for the court papers to be delivered to the offices of Errol Goss Attorneys. Voltex was quite vocal in its criticism of IEC's explanation for its default in opposing the liquidation application. There is some merit in the criticism that no explanation has been forthcoming to explain the irrational step of simply locking the papers into the cupboard and not drawing it to the attention of management. But that can be ventilated and be considered during the hearing of part B. In any event, the applicants have asked for leave to supplement their papers and presumably this feature will be addressed. For now, the applicants have cleared this hurdle.

[20] In respect of the defence, the applicants raise 3 defences being that the debt is disputed, that IEC is solvent and that the liquidation application had not been served on employees. Once again, Voltex has raised some criticisms which can be dealt with at the hearing of Part B for now it suffices to say that the sensible rule of practice laid down in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[7] should be decisive (at this stage) being that if you want to claim a debt you know is disputed, you should claim the debt by way of action. A portion of the debt is disputed and in addition, it is stated that their has been an over payment.

---

[7] 1956 (2) SA 346 (T) at 347 - 348

[21] If the stay is not granted, a liquidator will be appointed, who will take control of IEC, and realise its assets for creditors. The harm to IEC is self evident. What is more, it is harm that does not in and of itself sound in damages. The applicant has no other alternative remedy in the circumstances. The balance of convenience plainly favours the interdict sought. There is no prejudice to Voltex should the order be stayed. It will have its day in Court. I requested the parties to agree to a timeline for the filing of papers and to approach the registrar for a date for the hearing of the matter. Although Voltex opposes the granting of the stay, its legal representatives co-operated with this process. This order will be handed down on 25 June 2021 and the hearing of the Part B relief will be on 16 August 2021. The anticipated duration of the stay is not unreasonable. There is not any real prejudice to the liquidation process, which was only recently sanctioned by this Court.

[22] The object of rule 45A is to obviate real injustice. In my view and given the circumstances of this case, Voltex ought to have notified Errol Goss Attorneys of the winding-up application. There were two parallel court processes running where the sureties were defending the claim, had filed a plea and the principal debtor (IEC) was being liquidated without notice to the attorneys representing the sureties, the very same attorneys who had responded to the Letter of Demand and who had stated expressly that any winding-up application will be opposed. Even if not a legal requirement, in my view, the failure to have sent the winding-up application by email to Errol Goss Attorneys and to have sought the relief without notice to them, is legal practice which in my view, is sailing very close to the wind on an ethical front.

Order

[23] I accordingly grant the following order:

23.1. This matter is heard as one of urgency in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court and the failure of the applicants to comply with the forms and services provided for in the Uniform Rules is condoned.

23.2. Pending the final determination of Part B of this application, the order of court granted on 3 June 2021 for the winding-up of the second applicant is stayed.

23.3. The applicants shall take steps to set down Part B of this application for hearing for the week commencing 16 August 2021.

23.4. The parties are entitled to file further papers for the hearing of Part B, as follows:

23.4.1. The applicants are required to file their supplementary founding affidavit by 30 June 2021;

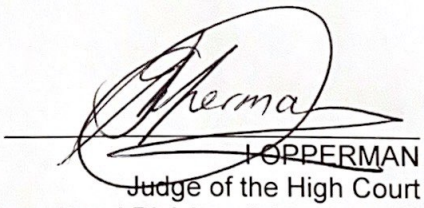
23.4.2. The respondent is required to file its answering affidavit by 9 July 2021;

23.4.3. The applicants are required to file their replying affidavit by 16 July 2021;

23.4.4. The applicants are required to file their heads of argument by 23 July 2021;

23.4.5. The respondent is required to file its heads of argument by 30 July 2021.

23.5. The costs associated with Part A are costs in the cause for determination by the court hearing Part B of this application.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicants: Adv R Shepstone
Instructed by: Erroll Goss Attorneys
Counsel for the respondent: Adv A Bester SC
Instructed by: Orelowitz Incorporated
Date of hearing: 22 June 2021
Date of Judgment: 25 June 2021