REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA 02/11/12

CASE NO: 28421/2010

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

02/11/2012
DATE

SIGNATURE

In the matter between:

LANISSA TRADERS HOLDINGS (PTY.) LTD. T/A MONEY MENTOR FINANCE	First Applicant
CHRISTO IAN CLIFFORD	Second Applicant
MARIA MIGNIONETE CRAUSE	Third Applicant
and	
ILLIAD AFRICA TRADING (PTY.) LTD.	Respondent
In re:	
ILLIAD AFRICA TRADING (PTY.) LTD.	Plaintiff
And	
LANISA TRADERS HOLDINGS (PTY.) LTD. T/A MONEY MENTOR FINANCE	First Defendant
CHRISTO IAN CLIFFORD	Second Defendant
MARIA MIGNIONETTE CLIFFORD	Third Defendant

J U D G M E N T

MSIMEKI, J

INTRODUCTION

[1] This application, brought in terms of Rule 45A of the Uniform Rules of Court, seeks an order suspending the execution of the order granted against the Applicants by Tuchten J, on 26 November 2010. The order was for payment of an amount of R1.978.338.92 together with interest thereon and costs by the Applicants to the Respondent. Leave to appeal against the judgment and order was refused by both Tuchten J and the Supreme Court of Appeal. The order is therefore final and should be complied with.

[2] **FACTS**

As stated in the introduction, there exists an order which is final. This has been followed by attachments of what the Applicants refer to as "tools trade". An amount of R2.700.000.00 has been deposited into the Trust Account of the Applicants' Attorney, Mr Finck, "*which is not to be withdrawn or paid out to any party* ***until such time as our clients' claims against yours are finalized***." (my emphasis). There has been correspondence between the parties' legal representatives relating to the stay of the execution of the court order. The Applicants alleged that the Respondent made undertakings which it failed to honour while the Respondent denies this. The Applicants allege that because they have instituted a damages claim against the Respondent which exceeds the amount they have been ordered to pay, the court should exercise its discretion and stay the execution of the order by the Respondent. The

Respondent contends that the two actions should be treated separately because under case number 28421/2010, which relates to the order, the order is final only to be followed by its execution. Under case number 77144/2010, the Respondent contends, the claim is unliquidated and will take at least a year or two to have an outcome. It is the Respondent's contention that there is no reason why the execution of the order should be stayed or suspended. The Respondent is anxious to have the order executed while the Applicants are desirous of having the execution suspended.

[3] **THE ISSUE TO BE DETERMINED**

The issue to be determined is whether the execution of the order should be suspended or not.

[4] **COMMON CAUSE FACTORS**

These are that:

1. The order of 26 November 2010 is final as leave to appeal has finally been refused by the SCA.
2. The validity of the order is not being contested.
3. The Applicants have not brought this application for the setting aside of the writ of execution or the attachments already effected.
4. An amount of R2.700.000.00 is held in trust not to be withdrawn or to be paid out to any party until such time as the Applicants' claims against the Respondent are finalized.

5. The Applicants have provided additional security in the form of R2.700.000.00 to pay the Respondent should they fail in their action which, according to them, will render the attachment on movables unnecessary.
6. The parties agreed that the matter is urgent.

[5] It is the Applicants' contention that the First Applicants' business will be destroyed should the attached items be removed. This, according to the Applicants, is the reason for the application. The reason, in my view, is surprising. The Applicants are prepared to leave the R2.700.000.00 for as long as their claim or their action for damages remains unresolved. One, in an instance such as this, would expect the Applicants to pay the money that is now due owing and payable to the Respondent and keep the balance in trust pending the resolution of their matter. If the money will be used to pay the Respondent should their action fail, why then is it difficult to use the money to settle the debt. This does not seem to make sense. If they win, they will get the money from the Respondent. If they lose they will use the R2.700.000.00 to pay the Respondent. This then begs the question: Why is the money not used now when less will be paid? If the money is, indeed, used now the business of the First Applicant will not be destroyed. After all this is the reason for the application.

[6] Mr Du Preez for the Applicants submitted that undertakings were made by the Respondent on three occasions.

Firstly he submitted that the first undertaking was made in a letter dated 31 August 2012 which is annexure "CC5" appearing on page 157 of the paginated papers. The undertaking relates to the removal of the attached items or goods which are listed in the inventory. Indeed, the undertaking was made and the goods were not removed.

Mr Du Preez submitted that the second undertaking is contained in annexure "CC6" which is a letter dated 3 September 2012 from Applicants' attorneys to Respondent's attorneys. In argument, Mr Du Preez submitted that the Respondent had failed to deal with what they regard as an undertaking, which reads:

"*In the meantime, we confirm your undertaking that you will not proceed with further execution steps before communicating with our offices in writing.*"

The reading of the Respondent's Answering Affidavit discloses that that was indeed, denied. Regarding the third undertaking, Mr Du Preez submitted that the undertaking was to be found in a letter from the Applicants' attorneys, annexure "CC10", addressed to the Respondents attorneys dated 13 September 2012 appearing on page 160 of the paginated papers. The relevant portion reads:

"*our client shall deposit the sum of R2.700.000.00 into our trust account tomorrow and proof thereof shall be forwarded to you immediately upon receipt thereof into our trust account. This deposit shall be placed into an interest bearing investment in terms of Section 78 (2A) pending the outcome of our clients' claims against yours. The aforesaid deposit shall,*

as per our undertaking, not be withdrawn or paid out to any party until such time as our clients' claims against yours are finalized".

Mr Du Preeze submitted that instead of answering the letter dealing with the undertaking, the Respondent's distorted the information by referring to the urgent application and not the finalization of the Applicants' claim. This in no way means that the Respondent made such an undertaking. Indeed, if such an undertaking had been made the Respondent's Attorneys would not have proceeded to have the R2.700.000.00 paid into the Applicants' trust account attached. No document shows that the Respondent or his attorneys undertook not to proceed with further attachments or not to proceed with the execution of the order pending finalization of the Applicants' claim.

[7] The court, on 26 November 2010,had an occasion in its judgment under case 28421/2010 when dealing with the application for summary judgment, to consider the defence which was purportedly raised by the Second Applicant (then the Second Defendant) in the affidavit resisting the summary judgment application. The affidavit specifically referred to two contractors, A.B Mthombeni and S. Gumede to whom the Respondent was said to have gone and with whom it was said to have directly dealt with breaching the non-disclosure and non-circumvention agreement. The Second Applicant, in the affidavit opposing the summary judgment application, further alleged that by breaching the said agreement, the Respondent caused the Applicant to suffer damages amounting to the sum in excess of R6.000.000.00. The defence that the Second Applicant

purportedly raised did not satisfy the court which then granted summary judgment against the three defendants jointly and severely the one paying the other to be absolved.

[8] **RULE 45A**

The rule provides:

"*The court may suspend the execution of any order for such period as it may deem fit.*" The Court, apart from the provisions of this rule, has an inherent discretion to order a stay of a sale in execution (**Graham v Graham 1950 (1) SA 655 at 658. Whitfield v Aarde 1993 (1) SA 332 (E), De Witt v De Witt 1995 (3) SA 700 (T)**). However, this discretion, which is not limited, has to be exercised judicially by the court. A stay of execution is generally granted where real and substantial justice requires such a stay. These are instances where, according to the circumstances of the matter, injustice will result if the stay is refused. (**Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd and Another 1981 (2) SA 407 (W) at 411 E and Standard Bank of South Africa Ltd and Another v Malefane: In re Malefane v Standard Bank of South Africa Ltd and Another 2007 (4) SA 461 (TK) at 466A-D and Erasmus: Superior Court Practice Page B1-330 [Service 38, 2012] – B1 – 330A**). A stay of execution is granted where the underlying causa of the judgment debt is disputed or no longer exists. (**Whitfield v Van Aarde (Supra) at 337G**) or where an attempt is made to use for ulterior purposes the machinery relating to the levying of execution. (**Whitfield v Van Aarde (Supra) at 339C).** It has been said that, in particular circumstances, in

determining the factors to be considered in the exercise of the discretion under the rule, the court could borrow from the requirements for the granting of an interim interdict. These are that an applicant must show:

1. that the right which is the subject of the main action and which he or she seeks to protect by reason of the interim relief is clear or is **prima facie** established though open to some doubt;
2. that if the right is only **prima facie** established, there must be a well-grounded apprehension of irreparable harm to the applicant if the interim relief is refused and he or she ultimately succeeds in the establishing of his or her right;
3. that the balance of convenience favours the granting of the interim relief;
4. that there is no other satisfactory remedy.

The general principles to be considered by the court which has to decide whether or not to grant a stay of execution are well summarised in the case of **Gois t/a Shakespear's Pub v Van Zyl and Others 2011 (1) SA 148 (CLC) at 155H – 156B**.

These are that:

1. A stay of execution will be granted where real and substantial justice requires it or where injustice would result should the stay in execution be refused.
2. Except where the applicant is not asserting a right, but attempting to avert injustice, the court will be guided by considering the factors usually applicable to interim interdicts.

3. The court must be satisfied that:

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

   3.2 irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right

4. If there is a possibility that the underlying causa may ultimately be removed, irreparable harm will invariably result, this is an instance where the underlying causa is the subject matter of an ongoing dispute between the parties.

5. The sole enquiry is simply whether the causa is in dispute as the court is not concerned with the merits of the underlying dispute.

[9] There is an issue of page 16, which has become page 202A coming between pages 202 and 203. The page came up just before Mr Du Preez and Mr Mulligan started with their arguments and submissions. Mr Du Preez asked why the page was only surfacing that morning when the Applicant had in the reply raised the fact that the Respondent had not dealt with "CC6" on page 160 of the paginated papers as well as paragraphs 9.12 and 9.13 in the founding affidavit. The issue of the missing page, in my view, is neither here nor there.

[10] **CASE NUMBERS 28421/10 AND 77144/10**

The Respondent obtained a final order under case number 28421/10. The Applicants instituted an action against the Respondent under case number

77144/10. The Applicants in paragraph 7.2 of the founding affidavit, allege that the Respondent's claim in respect of the summary judgment granted under case number 28421/10 was in respect of goods sold and delivered by the Respondent to the four entities referred to in paragraphs 6.2.1 – 6.2.4 of the founding affidavit. This appears on page 17 of the paginated papers, and that was in terms of the business model that was designed by the Second Applicant which according to him, forms the basis of the Applicants claim against the Respondent. Mr Mulligan in his submission, explained the incorrectness of the allegation. The explanation goes this way: The Applicants signed acknowledgements of debt on 26 March 2010 and the acknowledgements of debt form the basis of the Respondent's claim against the Applicants. The four entities namely, Mosama Builders and Civil Enterprises CC; Segabokeng Building Construction CC; Kgalemo Construction CC and Ntateng Trading II CC only concluded agreements with the First Applicant on 5 June 2010 after the acknowledgements were concluded. In paragraph 21 of the affidavit opposing summary judgment application, the Second Applicant in the current matter (the Second Defendant under case number 28421/10 said: "*Plaintiff's claim against First Defendant as set out in its particulars of claim arose out of goods ordered by and delivered to A B Mthombeni and Sam Gumede two of the SMME contractors, at their special instance and request.*"

The Second Applicant in this matter alleged in paragraph 26 of his affidavit opposing summary judgment application that the Respondent (in this application) had concluded a joint venture agreement with the contractor,

Sam Gumede despite the non-circumvention and non-disclosure agreement between the Respondent (Plaintiff under case 28421/10) and the First Applicant (First Defendant under case 28421/10) and started dealing directly with the contractor supplying him with the building material which, according to the Second Applicant, constituted a material breach of the agreement between the First Applicant and the Respondent.

What I find glaring in this application is the omission of Gumede and Mthobeni from the Applicants' papers. No explanation has been forthcoming.

[11] Mr Mulligan submitted that case number 28421/10 and case number 77144/10, because of the explanation that he proffered, are two actions which are completely separate. This, according to him, demonstrates lack of **bona fides** on the side of the Applicants. The submission, in light of what is clear from the papers, seems to have merit.

[12] According to Mr Mulligan, the payment of the R2.700.000.00 appears to be an attempt to pay security "when it is too late". It is not clear why the amount is not used to pay the Respondent to avoid and avert what the First Applicant fears the most, namely, the destruction of the First Applicant's business. If the Applicants are successful under case number 77144/10, they will receive enough money to cover the money that will have been used to pay the Respondent. If the Applicants lose the action, the money held in trust is still to be used to cover their indebtedness at that stage. Pursuing this application when there is money that the

Applicants can use immediately to pay the Respondent appears to me to be an exercise which is neither useful nor helpful.

[13] Mr Mulligan submitted that neither the Respondent nor its attorneys could have given the undertaking that the execution of the order would not be proceeded with until the First Applicant's claim against the Respondent was finalized. He submitted that there would be no need to pay the R2.700.000.00 if such an undertaking was made. I agree. The amount was paid on 13 September 2012 while "CC6" is dated 3 September 2012 which is, indeed, a date that precedes the payment of the amount. Mr Mulligan finally submitted that the reading of the correspondence and the answering affidavit as well as the probabilities do not demonstrate that an agreement as contended for by the Applicants was ever reached. I agree.

[14] The court under case number 28421/10 granted an order which has become final. There is nothing to demonstrate the contrary. The Applicants are not challenging the validity of the order. The validity of the attachments is not challenged either. Instead, the attachments are to remain intact until the Applicants' claim is finally dealt with. The R2.700.000.00, according to the Applicants, is also there to ensure that the Respondent is covered if they loose the action under case number 77144/10. There is no explanation why the R2.700.000.00 should not, in the interim, be used to pay the Respondent to avoid what worries the First Applicant. The Respondent is armed with a valid and a final order. It is not proper, in my view, that the Respondent be blamed for wanting to

execute the order. It is perfectly within its right to do so. It cannot be expected to wait for another year to two before it endeavours to get the money which should have been paid already. Real and substantial justice, in the circumstances of this matter, demand that there be no stay or suspension of the execution of the valid and final order. I have found the cases that Mr Du Preez referred the court to not helping the Applicants at all in the circumstances of the current matter.

[15] I, in the light of the facts and the circumstances of this matter, have decided to exercise the discretion that I have against granting a stay of execution of the order in terms of Rule 45A of the Uniform Rules of Court pending the outcome of the proceedings instituted in this court under case number 77144/10.

[16] **COSTS**

Normally costs follow the result. Mr Du Preez and Mr Mulligan addressed me on the question of costs. I have considered their submissions and have come to the conclusion that the Applicants should pay the costs of the application on a punitive scale.

[17] The following order, in the result, is made:

1. The application is dismissed with costs on the scale as between attorney and client.
2. The Applicants are jointly and severely liable for the costs of the application the one paying the other to be absolved.

MSIMEKI M.W
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

Counsels for applicant:	Advocate M.D. Du Preez S.C.
	Advocate Z.F. Kriel
Counsel for respondent:	Advocate S.L.P Mulligan
Attorneys for applicant:	Finck Attorneys
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Date heard:	26 October 2012
Date of judgment:	