IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 20/4/2016

CASE NO: 2016/22705

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

19/04/2016 .....
DATE SIGNATURE

In the matter between:

MPHEFHEDZI BUSINESS ENTERPRISE cc **APPLICANT**

and

MEMBERS OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR THE DEPARTMENT OF HEALTH, LIMPOPO **FIRST RESPONDENT**

THE MINISTER OF HEALTH **SECOND RESPONDENT**

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] In this urgent application the Applicant seeks a stay of execution of an order[1] granted by Mokgohloa J on 1 March 2016. The order was granted by the High Court of South Africa, Limpopo Division, Polokwane, under case number 450/2016. It is apposite to mention that the Second Respondent was not a party to the proceedings launched in the Limpopo Division.

BACKGROUND

[2] It is common cause between the Applicant and the First Respondent that the Applicant was awarded a contract in terms of which the Applicant was required to render laundry services to various hospitals falling under the auspices of the Mec for Health, Limpopo. As part of the contractual obligations that the Applicant had to execute; it was required at various intervals to collect dirty linen from hospitals mentioned in the Court order and to return such linen after it had been sterilized and cleaned. As a result of a breach of the contract by the Applicant and other complaints received, the First Respondent approached the Limpopo Division, Polokwane for an order suspending the contract.

THE LAW

[3] Uniform Rule 45A provides as follows:

"The court may suspend the execution of any order for such period as it may deem fit." Erasmus Superior Court Practice at D1 - 603 with reference to a number of decided cases, states the following:

'As a general rule the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where an injustice

[1] See in this regard Index page 441

would otherwise be done. Thus the court will grant a stay of execution where the underlying causa of the judgment debt is being disputed or no longer exits, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution. It has been held, that in particular circumstances, the court could, in the determination of the factors to be taken into account, in the exercise of its discretion under this rule, borrow from the requirements for the granting of an interlocutory interdict, namely that the applicant must show (a) 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 establish though open to some doubt; (b) that if the right is only prima facie established, there is a well-grounded apprehension or 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.'

GROUNDS OF OPPOSITION

[4] The Respondent in opposing the application raised several grounds in opposition, which grounds I list below as follows:

4.1 lack of urgency of the application;

4.2 abuse of court process;

4.3 lack of jurisdiction; and

4.4 failure on the part of the applicant to have satisfied the requirements for interim relief.

Lack of urgency of the Application

[5] The Applicant in paragraph 12 of its founding affidavit [2] addresses the *urgency* of the application. Therein the applicant sets out that pursuant to the court order granted by Mokgohloa J on 1 March 2016, the First Respondent instructed the Sheriff to execute in terms of such order on 16 March 2016. However, in the process of execution, the Sheriff attached linen belonging to other clients of the Applicant. Furthermore, as the order granted by Mokgohloa J is not appealable, the only avenue available to the Applicant is to challenge the terms of the underlying contract in the event of the Applicant succeeding with its pending rescission application. The rescission application was launched before the Limpopo Division on 3 March 2016.[3] In addition thereto, the Applicant alleges that the pending rescission application does not suspend the execution of the order and it is for this reason that an application in terms of Rule 45A was launched. It is further alleged that if the present application was to be enrolled in the ordinary motion roll it would defeat the object to be obtained by the pending rescission application as the order would already have been executed upon. Lastly the Applicant contends that it has good prospects of success with its pending rescission application and as such this application should be considered on an urgent basis.

[6] In opposition the Respondent alleges that the Applicant first became aware of the Court order on 1 March 2016 and that it remained supine until 17 March 2016, being the date upon which the current application was launched. The Applicant as a consequence was enjoined to account to the court what brought

[2] See in this regard Index page 92
[3] See in this regard Index page 395

about the delay in the launching of the present application and that it has failed to explain its inaction for the entire period of approximately 15 days. Furthermore, that as the Applicant has already launched a rescission application it ought to have explained to this court why it did not seek the relief sought in the present application simultaneously with the launching of the rescission application. It has failed to do so and it is for the above reasons that the Respondents contend that the Applicant has failed to demonstrate the harm or prejudice which is worthy of protection let alone that it should be protected on an *urgent* basis.

[7] An urgent application brought in terms of the provisions of Rule 6(12)(a), involves mainly the abridgment of times prescribed by the rules and, secondarily, the departure from established filing an sitting times of the court.[4] Urgency does not relate only to some threat to life or liberty; the urgency of some commercial interest may justify the invocation of the sub rule no less than other interest.[5]

[8] In evaluating urgency in the present application I considered that a litigant upon obtaining an order from a court has several options available to it, i.e. the abandonment of its order so obtained, the execution of the order or the utilization of the order as an inducement to settle the dispute between the parties. The Respondents before this court elected to execute their court order on 16 March 2016 and during such process had attached linen which belonged

[4] Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furnisher Manufacturers) 1977 (4) SA 135 (W) at 136H
[5] Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W) at 586G

to other customers of the Applicant. This execution of the court order was common cause between the parties and it thus became the trigger which resulted in the Rule 45A application being launched before this court. As a result I cannot agree with the submission made by counsel acting for the Respondents that the Applicant has failed to explain its inaction from 1 March 2016 to 17 March 2016 as *ex facie* the papers, the application was launched a day following the day of the execution of the court order.

[9] An application brought in terms of Rule 45A is substantive in nature. It provides for different requirements which have to be met in order for a litigant to succeed with it. It follows that the relief sought in terms of the rule need not be sought simultaneously with the launching of a rescission application, or with the launching of any other application. Where a litigant elects to bring a separate and distinct substantive application in terms of Rule 45A, such litigant cannot be penalised for making such an election. This has been the avenue selected by the Applicant and such avenue did not of necessity call for an explanation. The Applicant is cited as a business enterprise and it follows that in the ordinary course of business it would have a commercial interest to protect. In appropriate circumstances such protection of commercial interest may be sought on an *urgent* basis. It is for the cumulative reasons alluded to above, that I conclude that the application was urgent under the circumstances which justified the invocation of Rule 6(12)(a).

Lack of jurisdiction

[10] Section 21 of the Superior Courts Act[6] regulates which person over whom and matters in relation to which Divisions have jurisdiction. The section is listed herein below for ease of reference and it reads as follows:

" *21* ***Persons over whom and matters in relation to which Divisions have jurisdiction***

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

[6] Act 10 of 2013 commencing on 23 August 2013

(3) Subject to section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction."

[11] Before this court, the Second Respondent is cited as follows:

"The Second Respondent is the MINISTER OF THE DEPARTMENT OF HEALTH OF THE REPUBLIC OF SOUTH AFRICA, a Minister of the Department of Health in the National level and or a Political head responsible for the administration of the Department of Health in the National level under whose auspices the Department of Health resorts, with its principal place of business in PRETORIA, GAUTENG PROVINCE whose full and further particulars are unknown to me."

[12] From the citation of the Second respondent it is apparent that the Second respondent is an *incola* of this court and if one has regard on the submissions made by counsel acting on behalf of the Applicant, the Second Respondent has purely been joined in these proceedings, because on a national level it has an interest in these proceedings. Be that as it may, with reference to section 21, this court has jurisdiction over the person of the Second Respondent.

[13] It is common cause between the parties, that the First Respondent and the Applicant neither reside nor are they domiciled within this court's jurisdiction. Further, neither has the cause of action arose within this court's area of jurisdiction. In relation to the First Respondent, Chapter 6 of the Constitution, Act 108 of 1996, specifically section 103 thereof, designates the various

provinces in the Republic and through section 104 vests legislative authority of a province in the provincial legislature. Section 125 specifically stipulates that executive authority of a province is vested in the Premier of that province and the Premier together with other members of the Executive Council, exercises executive authority over a province.

[14] The First Respondent in her *nomine officio* is a member of the Executive Council, responsible for the Department of Health in the Limpopo Province, a provincial department constituted in terms of section 7(2)(b) of the Public Service Act, Act No. 103 of 1994 and listed in Column 1 of Schedule 2 thereof.

[15] Having regard to the above, it is apparent that the First Respondent functions independently from other spheres of government.

[16] In addition to the above, section 6 of the Superior Courts Act stipulates that the High Court of South Africa consists amongst others of the following Divisions, namely in terms of section 6(1)(c) the Gauteng Division, with its main seat in Pretoria and in terms of section 6(1)(e) the Limpopo Division, with its main seat in Polokwane.

[17] Section 6(3)(e) further provides, that the Minister responsible for the administration of justice must, after consultation with the Judicial Service Commission, by notice in the Gazette, determine the area under the jurisdiction of a Division, and may in the same manner amend or withdraw such notice.

[18] Section 50(2) provides that the Gauteng Division shall also function as the Limpopo and Mpumalanga Divisions, respectively, until by notice published in terms of section 6(3) in respect of those Divisions comes into operation. Government Gazette No. 39601 was published on 15 January 2016, which set out the areas of jurisdiction which falls under the Limpopo Division and this publication brought about an end to the transitional arrangement provided for by section 50(2).

[19] During the hearing of the matter, counsel acting on behalf of the Applicant was unable to refer this court to any authority to support his argument that this court had the necessary jurisdiction to entertain this application and as such could not take the matter any further.

[20] In light of the above, and given the fact that the Second Respondent was not a party to the proceedings launched in the Limpopo Division, I conclude that this court lacks the necessary jurisdiction to adjudicate this application. This ground of opposition I find, disposes of the application in its entirety and as such I find it unnecessary to express an opinion on the remaining merits of the application.

COSTS

[21] In respect of the appropriate costs order to be awarded, Counsel appearing on behalf of the Respondents had argued that as courts are public institutions under severe pressure, court rolls should not be congested by unwarranted proliferation of litigation. This application it was argued is unmeritorious and it is for this reason that counsel had sought a costs order against the deponent of

the founding affidavit and the instructing attorney of the applicant, the one paying the other to be absolved.

[22] Given the fact that this court lacks the necessary jurisdiction to entertain this application, I am of the opinion that a punitive cost order would be appropriate under the circumstances.

ORDER

[23] In the result the following order is made:

23.1 The application is dismissed with costs awarded on an Attorney and Client scale.

C. J. COLLIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR APPLICANT:	ADV RAMAPHOSA INSTRUCTED BY: THIKHATHALI MASHIKA ATTORNEYS
FOR FIRST, SECOND & THIRD RESPONDENTS:	ADV MOTSHWENE INSTRUCTED BY: STATE ATTORNEY, PRETORIA
DATE OF HEARING:	24 MARCH 2016
DATE OF JUDGMENT:	19 APRIL 2016