IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

26/01/2016

CASE NO: 2380/2003

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between

J V W **APPLICANT**

and

H V W **RESPONDENT**

JUDGMENT

MALI AJ:

[1] This is an opposed application in terms of Rule 45A of the Superior Court Act 2013. The applicant seeks an order setting aside the Warrant of Execution ("writ")

issued by this honourable court in favour of the respondent.

[2] The parties were married to each other and the said marriage was dissolved by the court order on 14 March 2003. The settlement agreement between the parties was incorporated into the Court Order. The relevant terms of the settlement agreement are as follows:

> 2.1. *"ONDERHOUD*
>
> *3.1 Die VERWEERDER sat onderhoud betaal ten aansien van die minderjarige kinders in die bedrag van R750, 00 per maand, per kind vanaf 1 Maart 2003 en daarna voorlop die 7 de dag van e/ke daaropvolgende maand. Dit is 'n uitdruklike oorenkoms tussen die partye dat die skoolfonds, betaalbaar ten opsigte van die minderjarige kinders , ingesluit is by die bedrag onderhuid, aldus betaalbarr.*
>
> *3.2 Die VERWEERDER onderneem om die minderjarige kinders as afhanklikes op sy mediesefonds geregisteer te hou en aanspreeklik te wees vir a/le redelike noodsaaklike mediese, tandheelkundige, oogkundige en apteek uitgawes ten opsigte van die minderjarige kinders en sat toesien dat a/le voordele voortspruitend uit gemelde fondse die minderjarige kinders toeval.*
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>
> *3.3 Die partye kom verder ooreen dat a/le bybetalings enlog koste aan gemelde mediesefonds deur die VERWEERDER betaal sat word.*
>
> *3.4 Indien die EISER ophou om 'n lid van die medisefonds te wees sa; doe EISER aanspreeklik wees vir die redelike en noodsaaklike, chirurgiese, oftamalogiese en ander verwante mediese uitgawes, ten aansien van die minderjarige kinders."*

[3] In terms of the settlement agreement the applicant was ordered to register the minor children on his medical aid as beneficiaries, and to be responsible for all their medical expenses. The parties later verbally agreed that the respondent register the

minor children as beneficiaries in her own medical aid fund. The applicant would then re-imburse the respondent for the monthly premiums which became due to the respondent's medical aid account and for shortfalls that are not covered by the medical aid.

[4] As from January 2012 the minor children were registered on respondent's medical aid scheme and the applicant was to make payment of the monthly premium in the amount of R552.00 per month to the respondent. On 18 November 2013 the applicant found a writ issued in favour of the respondent affixed to the gate of his home. The writ was for the amount of R31 535.21.

[5] The issue for determination is whether the amount of R31 535.21 reflected in the writ is what the applicant would have been responsible to pay towards the minor children's medical expenses not covered by the medical aid and that validating the writ in question.

[6] Rule 45 A provides as follows:

"The court may suspend the execution of any order for such period as it may deem fit."

[7] *"As* a *general rule the court will grant* a *stay of execution where real and substantial injustice requires such* a *stay or, put otherwise, where injustice will otherwise be done. Thus the court will grant* a *stay of execution where the underlying cause of the judgment debt is disputed or no longer exists, 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 interim interdict, namely that the applicant must show (a) 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 only 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 or she*

ultimately succeeds in the establishing of his or her right; (c) that the balance of convenience favours the granting of interim relief,· (d) that the applicant has no other satisfactory remedy." See Erasmus Superior Court Practice at 81-330- B1-330A.

The above is supported by case law.

[8] The test has been succinctly laid down in **Dumah v Klerksdorp Town Council 1951 (4) SA 519 (T)** as follows:

"The court must consider what would be just and equitable as between the parties and, if it considers that, regard being had to the factors, the execution must be stayed, then it is proper to exercise its discretion in favour of the stay".

[9] In **Cooper v Feinstein (1129/02) [2005] ZAWCHC 28** Ndita AJ as she then was stated as follows:

"It appears from what the learned authors discuss that the circumstances in which the courts will grant or refuse the application for suspension of writ of execution vary from case to case depending on the circumstances of each case. There is therefore no hard and fast rule."

[10] The pleaded basis for the relief is that the writ has not been issued in conformity with the order because the respondent is seeking payment of something that is not covered by the court order. Secondly that all monies which were due to the respondent that came to the applicant's attention were paid.

[11] The applicant avers that the amount of R31535.20 reflected in the writ is incorrect because it includes the amount already paid by him. Furthermore that the terms of the agreement was that any amount that is not covered by the medical aid should be paid by the applicant. According to the applicant the amount paid by him included in the writ is the amount of R640.00 being the arrears on the monthly premiums which the applicant paid albeit subsequent to the issue of the warrant. The alleged arrears arose from the yearly escalation of the medical aid monthly

premium by R64.00 per month. The applicant's argument is that he only became aware of the said amount when he got the writ. This is because the respondent never informed her about the said monthly increase. The respondent could not gainsay the applicant's version.

[12] The applicant further states that the amount allegedly not paid by the applicant as has been included in the total amount of the writ is covered by the medical aid because it was paid from the Medical Savings Account ("MSA") and not refunded and or paid by the respondent. According to the documents annexed by the respondent (see page 47 of the paginated bundle) MSA is defined as follows:

"Medical Savings Account Health Wallet previously known as Medical Savings Booster Portion not payable= The amount for which neither you or the scheme is responsible".

[13] The respondent's argument is that the intention of the agreement was that the applicant was to be responsible for all expenses and or claims not covered by the Medical Aid. Furthermore that the amount in the writ includes maintenance of the minor children, therefore the writ was properly issued. However from the contents of the affidavit in support of the warrant of execution there is no allegation in respect of cash contribution of the maintenance. The respondent makes reference to the explanatory notes by the Medical Aid at page 104 of the bundle. Under code 276 the following is recorded:

"Ons het nie u eisbedrag betaal nie, omdat die fondse in u Mediese Spparrekening is en u nog nie die Jaarlikse Drempel bereik het nie. U is self verantwoordelik vir die uitstaande bedrag.

[14] The respondent ' argument is that the amounts not paid by the Medical Aid as explained in Code 276 were paid by her as they were deducted from her portion of the medical savings plan. The applicant does not dispute the interpretation of the explanatory notes but his argument is that the amounts under code 276 do not add up to the total amount of the writ.

[15] I now turn to consider the cogency of the application. During the argument it became apparent that the dispute centres on the accuracy of the calculations leading to the total amount claimed in the writ of execution. I therefore adjourned the hearing to allow the parties to re- work their calculations. The respondent's practice note detailing the calculations was filed on 4 November 2015 subsequent to the applicant's practice note of same.

[16] The applicant's detailed calculation in respect of the amount that was not covered by the medical aid is the amount of R9 223.68 in respect of both minor children. The respondent's calculations amount to a total of R21212.97. The said amount still does not tally with the amount of the writ, which is R31 535.21. The respondent's total amount includes MSA amount of R17417.83. The respondent does not dispute that the said amount was not refunded by her to the medical aid and she neither challenges the explanation offered by her own medical aid scheme that she and the scheme are not responsible for payment. It is not clear from the respondent's calculation which portion has been deducted from her savings plan as alleged by her.

[17] Having regard to the above I am inclined to borrow from the requirements for the granting of an interim interdict. In *casu* the applicant has successfully established the requirements of an interim interdict as alluded in paragraph 6 *supra.* In the circumstances it is just and equitable to suspend the execution of the writ against the applicant.

COSTS

[18] The respondent stated that in the event that the applicant is successful he should not be allowed costs. This is because the applicant delayed the prosecution of the matter. Her argument is that as at 14 March 2014 the matter was ripe for hearing and the applicant failed to set down the matter.

[19] The applicant's counter argument is that as early as 3 February 2014 the matter was set down at his own instance; respondent having failed to file the opposing affidavit. The respondent filed the opposing affidavit on 11 February 2014

subsequent to the matter having been set down. The applicant did not oppose the late filing by the respondent.

[20] It is trite law that costs follow the result. In *casu* I find no reason to deviate from the established legal principle.

[21] In the result I make the following order:

1. The writ of execution issued under case 2380/2003 is suspended until such time the respondent has finally determined the debt owing by the applicant to the respondent; there after the parties are granted leave to approach this court on the same papers, supplemented as the circumstances may require for further appropriate relief.
2. The respondent is ordered to pay costs of the application.

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NP MALI ACTING JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPLICANT: Adv N Erasmus
Instructed by: CONRAD SCHULZ INCORPORATED

FOR THE RESPONDENT: Adv L Van Rooyen- Steenkamp
Instructed by: Harvey Nortje Wagner & Motimele Attorneys
Date of Hearing: 13 October 2015
Date of Judgment: 29 January 2016