

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 13608/98

In the matter between:

FHP MANAGERS (PTY) LTD

Applicant

and

THERON N.O., SHANDO

1st Respondent

THERON N.O., FRANS JACOBUS SMIT

2nd Respondent

THERON, FRANS JACOBUS SMIT

3rd Respondent

JUDGMENT:

VAN REENEN, J:

This is an opposed application in terms of Supreme Court Rule 49(11) which provides as follows:

“Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review, or vary any order of court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order on the application of a party, otherwise directs.”

In terms of a written agreement of sale entered into on 29 May 1998, the applicant sold Section No 11 in a sectional title scheme known as H[...] I[...] [...] Two (the premises) to the AS and R Children's Family Trust (the trust) represented by Mr Frans Jacobus Smit Theron (hereinafter referred to as 2nd/3rd respondent), in his capacity as trustee, for an amount of R680 000. 2nd/3rd Respondent in his personal capacity bound himself to the applicant as surety and co-principal debtor for the due fulfilment by the trust of its obligations under the Agreement of Sale.

Pursuant to the terms of the Agreement of Sale the trust paid the applicant a deposit of R34 000; R10 000 in respect of certain movables; and occupational interest in an amount of R14667 for the period 11 May 1998 until 31 August 1998. The trust also paid an amount of R9372,60 in respect of transfer costs.

The trust took occupation of the premises on 11 May 1998. 2nd/3rd Respondent has occupied the property since that date and still does so.

As the trust failed to take transfer of the premises the applicant instituted opposed motion proceedings against it out of this court with a view to enforcing the terms of the agreement of sale. The matter was argued on 1 June 2000 before Duminy AJ who on 7 August 2000 granted judgment in favour of the applicant in the following terms:

“47.1 The trustees of the A S and R Children Family Trust (“the trust”) are directed to deliver to the offices of the applicant’s attorneys, Feinsteins, of [...] Floor, The A[...], 4[...] S[...] Avenue, Milpark, Johannesburg, within a period of 7 (seven) days after the grant of this Order, a bank guarantee required in terms of clause 4.1.2 of annexure “SS(4)” to the applicant’s founding affidavit in the sum of R646 000 (six hundred and forty six thousand rand), payable to Feinsteins as against registration of transfer in favour of the trustees of certain immovable property comprising Section 11, as described on Sectional Plan no. SS 1[...] in the scheme known as H[...] I[...] [...], together with an undivided share

in the common property in the aforesaid Scheme and an exclusive use area described as Parking Bay number P[...] (“the property”);

- 47.2 Failing compliance with the preceding paragraph the said trustees and the third respondent, jointly and severally with them are directed to make payment to the applicant in the sum of R646 000;
- 47.3 The said trustees are directed to sign all documents which are required for purposes of registration of transfer of the property to them, within a period of 7 (seven) days after the grant of this Order, failing which, the Sheriff of this Court or his lawful Deputy is authorised and directed to sign all documents and take all steps that may be required for the transfer of the property, in the name and stead of the trustees and at their cost;
- 47.4 The said trustees and third respondent, jointly and severally with them, are directed to effect payment to the applicant of the sum of R129,80 per day from 1 September 1998 to date of registration of transfer of the property in favour of the trustees;
- 47.5 The said trustees and the third respondent jointly and severally with them, are directed to pay the costs of this application, the one paying the other to be absolved pro tanto.”

Leave to appeal against the above order was sought but refused by the learned Judge. The Chief Justice, on petition, granted leave to appeal to a Full Bench of this Division.

A notice of appeal was timeously filed. The notice of appeal assails the validity of the Agreement of Sale on the basis that due to the fact that 2nd/3rd Respondent was an unrehabilitated insolvent he was disqualified to act as a trustee of the trust and therefore unable to enter into an enforceable agreement of sale and furthermore, that he was not properly authorised to have represented the trust as the special

resolution that authorised him to do so was signed by him only and not also by him and his co-trustee Mr Shando Theron the 1st respondent herein.

The noting of the appeal automatically suspended execution of the judgment of Duminy AJ so that execution thereof cannot be levied without the leave of this court.

The applicant seeks the following relief in this application:

- “1. Granting the Applicant leave to execute against the First, Second and Third Respondents, the order referred to in paragraph 47.4 of the written judgment of his Lordship Mr Acting Justice Duminy which was delivered in the above Honourable court on the 7th of August 2000 in Case No. 3608/98 between the parties in terms of Rule 49(11) of the Uniform Rules of the High Court. A copy of the said judgment is annexed to the founding affidavit marked “SS2”;
2. That in terms of Rule 49(12), unless the above Honourable Court so orders, that prior to such execution the Applicant be ordered to enter into such security as the parties may agree or the Registrar of the above Honourable Court may decide, for the restitution of any sum obtained upon such execution and that the Registrar’s decision shall be final in terms of the aforesaid rule of court;
3. That the costs occasioned by this application be costs in the cause of the pending appeal to the Full Bench of the above Honourable Court;
4. other and/or alternative relief.”

The applicant seeks leave to execute only that part of the order that relates to the payment of occupational interest at R129,80 per day from 1 September 1998 to the date on which the premises are transferred into the trust’s name. The amount that has accrued as at 31 March 2001, assuming that the Agreement of Sale is enforceable, is R12 241,40. The applicant also claims interest in an amount of R25296,29. That claim is being disputed.

I shall for purposes of this judgment assume, without deciding, that it is permissible in terms of Rule 49(11) for a court to direct that execution may be levied in respect of only part and not the whole of an order granted by it.

The criteria applicable to an application of this nature have been fully set out by Corbett JA (as he then was) in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977(3) SA 534 (A) at 545 B – 546 C and do not necessitate repetition. The purpose of the rule regarding the automatic suspension of a judgment as soon as an appeal has been lodged, is to prevent irreversible harm to an intending appellant in the event of the appeal succeeding. A court has a wide general discretion, based on what is just and equitable in the circumstances of a particular case, to decide whether or not execution should be permitted to be proceeded with. A court may furthermore determine the conditions upon which any right to execute pending an appeal should be exercised. It should be borne in mind that the four factors enumerated in the **South Cape Corporation** case at 545 E – G do not constitute a **numerus clausus**, but are merely factors that should ordinarily be taken into consideration by a court in exercising its discretion. It was held in the **South Cape Corporation** case that the onus to show the existence of special circumstances justifying execution pending an appeal rests on the applicant irrespective of whether the judgment is one **ad pecuniam solvendam** or **ad factum praestandum**.

In my view the applicant has failed to show that it will suffer irreparable harm or prejudice should leave to execute be refused. All that is likely to happen is that the applicant's claim against the trust would have escalated by a further approximately R27000 by the time the appeal is heard in January/February 2002. Depending on whether the appeal succeeds or not the applicant will be able to recover all amounts payable in respect of occupational interests **ex contractu** or an appropriate amount of money in respect of the trust's occupation of the premises based on another legal causa.

As regards the trust's ability to pay any amounts it may be liable for in respect of its occupation of the premises, the highwater mark of the applicant's case is that it verily believes that the respondents may not be able to pay it the amount which it is

entitled to. Despite the fact that those averments have not been specifically denied, they are of doubtful evidentiary value in that they constitute inferences and conclusions unsupported by the primary facts on which they are based. (See: **Bezuidenhout v Otto and Others** 1996(3) SA 339 (W) at 344 J – 345 E). Despite their doubtful evidentiary value the said averments, in my view, are sufficient to dispel the prima facie inference that the providing of security **de restituendo** would protect the appellant against irreparable harm or prejudice and obviate the need on the part of the trust to adduce evidence to the existence of special circumstances (See: **South Cape Corporation** case at 548 D – G).

As the reason for the automatic suspension of a judgment as soon as an appeal is noted, is the avoidance of irreparable harm or prejudice to the intended appellant, a court considering an application in terms of Rule 49(11) should have regard to whether the **status quo ante** could be restored in the event of the appeal being upheld (See: **Kalahari Salt Works (Pty) Ltd and Another v Bonne Fortune Beleggings Bpk** 1973(4) SA 471 (NC) at 476 H – 477 C). In the case of a claim sounding in money the mechanism by which any potentiality of irreparable harm to an intending appellant is obviated is to make execution subject to the providing of security **de restituendo**. That objective is clearly achievable if the intended appellant is capable of meeting the claim in full. In the absence of the ability of meeting the claim in full, an applicant, unless precluded from doing so by the court's order, could proceed to levy execution against the intended appellant's corporeal- and incorporeal movables and also immovables. It is notionally possible that an applicant could attach and sell in execution the intended appellant's interest in the pending appeal and thereby procure the termination of an appeal that might have merit (See: **Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere** 1999(3) SA 389 (SCA) at 418 B – H). It would also be possible to resort to the sequestration of the intended appellant's estate as a recognised form of execution (See: **Wilkens v Pieterse** 1937 CPD 165 at 170; **Moldenhauer v De Beer** 1959(1) SA 890 (O) at 892 F) and bring the provisions of Section 75 of the Insolvency Act, No 24 of 1936 into play. On the facts of the instant case, at best for the applicant, I have been left in doubt that the providing of security **de restituendo** would obviate the potentiality of irreparable harm or prejudice to the trust should execution of paragraph 47.4 of the order of Duminy AJ be permitted.

An extra-ordinary feature of the litigation between the applicant and the Trust is that although the upholding of the latter's contention will nullify the legal basis upon which it, and through it 2nd/3rd respondent may occupy the premises, it has continued to do so since 11 May 1998. That conduct on the part of the trust is difficult to reconcile with a **bona fide** intention of seeking a reversal of the judgment of Duminy AJ and is susceptible of an inference that the proceedings were opposed and the appeal lodged for some ulterior purpose such as to gain time. Any temptation to construe the trust's aforementioned conduct as a barometer of its own negative perceptions of its chances of success on appeal must however yield thereto that the Chief Justice by having granted leave to appeal on petition took a favourable view of its prospects of success on appeal.

In view of the foregoing I have not been convinced that I should exercise my discretion and grant the relief claimed in prayer 1 of the Notice of Motion and accordingly the application is refused, as is the belated request to order the trust to provide security for the payment of any amounts due in respect of occupational interest.

In this matter I have decided to deviate from the general rule that a substantially successful party is entitled to his or her costs. In my view the trust, by occupying the premises whilst assailing the validity of the Agreement of Sale in terms of which it originally became entitled to do so, without making any payments in respect of occupational interest, is acting opportunistically and unacceptably. In order to signify my disapprobation of the trust's conduct no costs order is made.

D. VAN REENEN.