IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 10391/2016

In the matter between:

PREMIUM & CLAIMS ADMINISTRATORS (PTY) LTD	Applicant
and	
SHERIFF FOR THE DISTRICTS OF STELLENBOSCH AND KUILS RIVER SOUTH	First Respondent
NEW NATIONAL ASSURANCE COMPANY LTD	Second Respondent

JUDGMENT DELIVERED ON 29 NOVEMBER 2016

GAMBLE, J:

INTRODUCTION

[1] In January 2005 the applicant issued summons against the second respondent in the High Court in Pietermaritzburg for damages flowing from the alleged cancellation by the latter of an agency agreement between those parties, such

damages alleged to be of the order of R 57m. The matter has proceded in fits and starts for a variety of reasons which are not relevant to this application. Suffice it to say that there have a number of delays occasioned by procedural problems on both sides.

[2] The matter was eventually set down for trial in the Pietermaritzburg High Court from 4 to 16 March 2013 but could not run because of late discovery on the part of the applicant. As a consequence Steyn J postponed the matter *sine die* and directed the applicant to pay the second respondent's wasted costs arising out of the postponement on the scale as between attorney and client, such costs to include the costs of two counsel and the costs of the application to postpone.The second respondent thereafter prepared its bill of costs in relation to the postponement and eventually on 3 March 2015 taxed a massive R632 024,86 which, it is common cause, is due and payable by the applicant but remains unpaid. Pursuant to the applicant's failure to settle that bill, the second respondent commenced execution steps against the applicant.

[3] A writ of execution for the attachment of movables was issued by the Registrar in the Pietermaritzburg court on 11 March 2016. In light of the fact that the applicant's registered office is in Stellenbosch, the writ was made out for the attention of the first respondent herein. It directs the first respondent to act as follows –

> "***YOU*** *are hereby directed to attach and take into execution the movable goods, including (in terms of rule 45 (8)) the incorporeal property of the abovementioned Judgment debtor (sic) comprising the Judgment Debtor's right, title and interest in its action instituted against the above-*

mentioned Judgment Creditor in the above Honourable Court under case number 508/2005 to the value of R 632 024.86, which the Plaintiff recovered in taxed costs granted by the Taxing Mistress of the above Honourable Court on 3 March 2016, besides all your costs hereby incurred. "

[4] The first respondent acted accordingly and on 31 May 2016 rendered a return of service in the following terms -

"*Subsequently, after I demanded payment of the amount due, I was informed by the abovementioned that the Judgment Debtor was unable to pay the amount claimed or any sum. The Judgment Debtor's claim under case number 508/05 was accordingly placed under judicial attachment.*"

THE APPLICATION TO STAY

[5] The applicant now requests this court to exercise its discretion under Rule 45A to stay the execution process. It bases its application on the contention that the attachment constitutes an abuse of the court's process which should not be tolerated. The applicant's sole shareholder and director, Mr Stefanus Visser, says the following in the founding affidavit –

"*26. [The second respondent] is a large and profitable insurance company. [It's] latest available Statement of Financial Position as at 31 December 2014... records that [its] total assets exceed R816.6 million, which include cash and*

cash equivalents exceeding R262.6 million. By contrast, [the applicant] is impecunious, it has ceased to trade and has no assets other than the claim against [the second respondent]. It is submitted that any alleged prejudice that [the second respondent] may suffer if the stay application is granted would be negligible compared to the severe prejudice that [the applicant] would suffer if the stay is refused and [it's] right to claim damages from [the second respondent] is acquired by [the second respondent] or a third party."

Elsewhere in the affidavit Mr Visser contends that the financial collapse of the applicant's business is as a direct result of the second respondent's repudiation of the agency agreement with it. As I understand the position, in terms of that agreement the applicant was, *inter alia,* contracted to conclude short term insurance policies and settle claims on behalf of the second respondent.

[6] The first respondent has filed a notice to abide while the second respondent opposes the application to stay. In the answering affidavit Mr Azim Mahomed Bacus, a manager in the legal department of the second respondent, complains that one of the consequences of granting a stay is that the applicant will be in a position to litigate "*without fear of any cost consequences*" and that the applicant *"wants to proceed with the action without paying a cent towards a substantial costs order."* He denies that the attachment of the claim is an attempt to *"out-litigate"* the applicant and he goes on to say that the second respondent is merely doing what it is fully entitled to do in seeking to satisfy a validly granted costs order.

[7] Mr Bacus confirms that it is the intention of the second respondent to sell the applicant's claim against it to settle the costs order and after referring to the plea filed in the main action, he makes the following allegation :

> *"31.....I respectfully contend that there is no merit whatsoever in the applicants claim against the second respondent in the action."*

[8] In the reply, Mr Visser observes that the second respondent's admission that it intends to sell the applicant's contractual claim (allegedly worth R57 million) to satisfy a costs order for R632 024.86 has the effect that the claim will be sold for a maximum of 1,1% of its alleged value. He says further –

> *"6. The sale in execution will severely prejudice the Applicant as it will lose its entire right to claim damages caused by the Second Respondent's unlawful repudiation of the agreement. By contrast, any prejudice by a temporary stay to the Second Respondent, which has vast cash reserves, will be minimal.*
>
> *7. The Second Respondent is in fact attempting to use a process designed to obtain satisfaction of a costs order for the ulterior purpose of putting an end to the litigation against it. This amounts to an abuse of the process of Court.*
>
> *8. The sale in execution in (sic) a public auction of a claim for R57 million in order to recover costs amounting to 1.1% of the value of the claim, would not be in keeping with the constitutional values of justice and fairness. It would also prevent the Applicant from exercising its constitutional right in terms of section*

34 of the Constitution to have its dispute with the Second Respondent decided by the Court.....

12. I deny the Second Respondent's unsubstantiated allegation that the Applicant's claim has 'no merit whatsoever', which allegation is contradicted by its stated intention to sell the claim in execution in (sic) public auction to recover the taxed costs."

THE APPROACH IN AN APPLICATION TO STAY

[9] Rule 45A grants this court a wide discretion to suspend an order for execution, which discretion is limited only by the consideration that it must be exercised judicially. The authorities in this regard are clear: the court will grant a stay of execution where a real and substantial injustice would otherwise eventuate.[1] An obvious instance where an injustice might eventuate is where the execution process is utilized by a creditor for an ulterior purpose. The leading case in that regard is *Brummer*[2] where similarly an attachment was made by a judgment creditor of a judgment debtor's interest in his own action against the judgment creditor with the clear intention of limiting the judgment debtor's further right of recourse at trial against the judgment creditor.

[10] In *Brummer*, the Supreme Court of Appeal was not, as a matter of principle, opposed to such a tactic being persued. Rather, the majority of the court

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[1] Graham v Graham 1950 (1) SA 655 (T) at 658; Strime v Strime 1983 (4) SA 850 (C) at 852 A-C; Whitfield v van Aarde 1993 (1) SA 332 (E) at 337F.

[2] Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere 1999 (3) SA 389 (SCA)

held that the mere application of a particular court procedure for a purpose other than that for which it was primarily intended was typical, but not complete proof of, *mala fides* on the part of the judgment creditor. In order to prove *mala fides* the further inference that an improper result was intended was required. The court held that the application of a particular court procedure (for a purpose other than that for which it was primarily intended) was thus considered to be a characteristic, rather than a definition, of *mala fides* on the part of the party seeking to execute.

[11] Counsel for the applicant urged the court to find that the attachment of that party's right, title and interest in its claim against the second respondent was indeed an abuse of the court process. He referred to *National Potato Co-Op*[3] where Southwood AJA dealt in detail with relevant authorities on the point –

> *"[50]..... It has long been recognised in South Africa that a court is entitled to protect itself and others against the abuse of its process (see Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 271; Corderoy v Union Government (Minister of Finance) 1918 AD 512 at 517; Hudson v Hudson and Another 1927 AD 259 at 268; Beinash v Wixley 1997 (3) SA 721 (SCA) at 734D; Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere 1999 (3) SA 389 (SCA) at 412 C-D), but no all-embracing definition of 'abuse of process' has been formulated. Frivolous or vexatious litigation has been held to be an*

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[3] Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA) at [50]

abuse of process (per Innes CJ in Western Assurance v Caldwell's Trustee (supra) at 271 and in Corderoy v Union Government (Minister of Finance) (supra) at 517) and it has been said that 'an attempt made to use for ulterior purposes machinery devised for the better administration of justice' would constitute an abuse of the process (Hudson v Hudson and Another (supra) at 268). In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of mala fides. In order to prove mala fides a further inference that an improper result was intended is required. Such an application of a court procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition, of mala fides. Purpose or motive, even a mischievous or malicious motive, is not in general a criterion for unlawfulness or invalidity. An improper motive may, however, be a factor where the abuse of the court process is in issue. (Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere (supra) at 412 I-J; 414 I-J and 416B). Accordingly, a plaintiff who has no bona fide claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process (see Beinash and another v Ernst & Young and others 1999(2) SA 116 (CC)...in para [13].) Nevertheless it is important to bear in mind that courts of law are open to all and it is only in

exceptional cases that a court would close its doors to anyone who wishes to prosecute an action (per Solomon JA In Western Assurance Co v Caldwell's Trustee ....at 273-4). The importance of the right of access to courts enshrined by s 34 of the Constitution has already been referred to. However, where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with bona fide disputes (Beinash and Another v Ernst & Young and Others (supra) in para [17])."

[12] Earlier in that judgment Southwood AJA commented generally on the importance of access to justice in the context of s 34 of the Constitution :

"[43] In my view this approach is consistent with the right enshrined in s 34 of the Constitution: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. On a number of occasions the Constitutional Court has emphasised the importance of this right: It is of cardinal importance and requires active protection and courts have a duty to protect bona fide litigants (Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC)...in para [17]); the 'untrammelled access of the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom' (Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as

Amicus Curiae) 2001 (4) SA 491 (CC)...in para [23]); it is the foundation for stability of an orderly society and it 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help': it is a 'bulwark against vigilantism, and the chaos and anarchy which it causes' (Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC)...in para [22]; it is fundamental to a democratic society that cherishes the rule of law (First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another 2000 (3) SA 626 (CC)... in para [6])

[13] Relying on these authorities, counsel for the applicant argued that it was not in dispute that the applicant was using the legal process properly in the pending action proceedings in Pietermaritzburg having invoked a just claim for a significant amount of damages based on a breach of contract allegedly perpertrated by the second respondent. Further, counsel submitted that the second respondent had abused the process of its execution by diverting the legal process from its true course so as to achieve an improper end, namely, to terminate the action proceedings instead of satisfying the costs order already granted and taxed in its favour.

[14] As to the existence of *mala fides,* it was argued that this criterion is to be found in the fact that the second respondent had applied the execution process for a purpose other than that for which it was primarily intended i.e. to satisfy the costs order. It was further submitted that the second requirement for *mala fides* can be found to have been established by inferring from the answering affidavit of the second

respondent that it intended an improper result by pursuing execution proceedings, namely, its declared intention to sell the applicant's claim against it in circumstances where, to the knowledge of the second defendant, the proceeds of any such sale would manifestly not satisfy the costs order granted in its favour: the sole purpose being to terminate the action proceedings against it without affording the applicant an opportunity to ventilate the merits of the dispute in a court of law.

[15] Accordingly, it was argued that since an abuse of the court process is placed in issue by the applicant in the present case, second respondent's improper motive is a factor which must be taken into account in determining whether its intended sale of the applicants claim indeed constitutes an abuse of the process of court.

[16] The decision by the second respondent to direct the sheriff to specifically attach the applicant's claim against it raises the anterior question, why? It must be that the second respondent knows that the applicant has no other assets, whether movable or immovable, capable of attachment. The cliam itself is said by the applicant to be worth many, many millions and therefore worth persuing. But the claim only has value if proved on a balance of probabilities. And, to achieve that end the co-operation of the applicant (and Mr Visser in particular as a witness) is critical. How else is the second respondent likely to establish, for instance, the facts relevant to the breach which the applicant will need to prove, or the substantial loss of income alleged by the applicant in the particulars of claim?

[17] It does not require much by way of imagination to conclude that the second defendant does not have a realistic prospect of acquiring any co-operation

from Mr Visser, the very person that accuses it of destroying his business. And, one must therefore ask rhetorically whether there is any realistic prospect either of the second respondent permitting a genuine third party to bid successfully at the auction of the right? It is, in my view, unlikely that the second defendant would ever wish to allow a claim against it to be successfully persued and so the only realistic scenario is that the second respondent will ensure that it acquires effective control of the applicant's claim against it so as to remove a significant thorn in its side.

[18] The second respondent's tactic is therefore designed to occasion permanent financial prejudice to the applicant – a situation which Southwood AJA stressed was to be judicially deprecated. In the circumstances I am persuaded that the attachment by the second respondent in this case is *mala fide* and a manifest abuse of process.

[19] In conclusion I would add that it is uncontested that the applicant has commenced proceedings for recovery of substantial damages which it says effectively wiped out its business. The second respondent does not suggest that the applicant's claim is *mala fide,* or that the initiation of those proceedings is tainted by improper motive. By all accounts, the claim is properly brought and the applicant deserves the opportunity (of course within its means to finance such litigation[4]) to ventilate the issues and bring the matter to finality. In addition, the second respondent has not demonstrated that there are any exceptional circumstances which justify the closing of the doors of the court to the applicant by permitting the attachment to stand, the sale

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[4] The papers show that the applicant is being assisted by legal representatives who are acting in terms of a contingency fee arrangement and it is fair to conclude that they are satisfied as to the existence of a *prima facie* case.

in execution to proceed and its right of access to court so jealously guarded under the Constitution to be eliminated in the process.

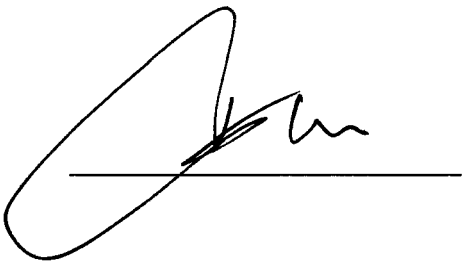
[20] In my view the applicant is entitled to have its right to bring its claim to finality protected, particularly in the circumstances where there is a possibility (as alluded to by Mr Visser in the replying affidavit) that the repudiation of the agency contract was intentional and designed to bring the applicant to its knees. Unless the second respondent can attach other assets belonging to the applicant, the right to recover its taxed costs will necessarily have to be held in abeyance pending the trial. This will not operate unduly harshly against a company with the sort of resources to which Mr Visser has referred and, at the end of the day, if the applicant is successful in the main claim the second respondent will be able to apply a set-off of the costs award against any damages that are proved against it.

ORDER OF COURT

IT IS ORDERED THAT:

A. Execution of the writ dated 11th of March 2016, including the judicial attachment and/or sale in execution of the applicant's claim in case number 508/2005 (Kwazulu-Natal Division, Pietermaritzburg) and payment by the applicant of the second respondent's taxed costs dated 3 March 2016, ~~be~~ is stayed pending a date not less than 14 days after the final determination of case number 508/2005.

B. The respondent shall pay the costs of this application.



GAMBLE J

Appearances:

For the Applicant: Mr J van Dorsten

Instructed by: Marais Muller Hendricks Inc (P Niemann)

For the Second Respondent: Ms S Mahomed

Instructed by: Larson Falconer Hassan Parsee Inc. (Y Hassan)