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

Case number 3547/2006

LEONARD ARANGIES — FIRST APPLICANT
BEN KNOETZEN — SECOND APPLICANT

And

BUSINESS PARTNERS LTD — RESPONDENT

JUDGMENT DELIVERED ON 15 DECEMBER 2017

THULARE AJ

[1] This is an application for the setting aside of a warrant of execution issued in favour of the respondent against the applicants. The applicants also seek an order condoning their non-compliance with time frames after they were granted an opportunity to bring this application, arising out of their urgent application to restrain the respondent from proceeding with a section 65 enquiry of the Magistrates' Court Act, 1944, in Stellenbosch.

[2] The respondent opposes both applications. The respondent's case is that the applicants' are only galvanized into action when the respondent takes action in

furtherance of execution of the judgment, and that the applicants are involved in dilatory tactics employed to stave off execution, which constitutes abuse of process. Should the court find that the writ is invalid or unenforceable for any reason, then the respondent's alternative is a conditional counter-application for the revival of the judgment granted in its favour and to the extent necessary for the issue of a new writ pursuant thereto. The applicants' application for condonation was granted and argument on the application for setting aside the warrant of execution was heard.

[3] On 8 August 2006 summary judgment was granted against both applicants, as sureties and co-principal debtors, jointly and severally the one to pay the other to be absolved, for payment of sums of money and interest, plus costs on attorney and client scale. Gaduron Trading 1014 (Pty) Ltd (Gaduron), which was the first defendant in that application and against which judgment was also granted, is not a party to the current application.

[4] A writ of execution was issued by the Registrar of this Court on 2 May 2007. At that time, the chosen *domicilium citandi et executandi (domicilium)* of Gaduron, which was type written on the writ of execution, was at B. Street, Stellenbosch and/or […] O Street, Schuilplaats, Stellenbosch. The *domicilium* of the first applicant was type written as […] O. Street, Schuilplaats, Stellenbosch and that of the second applicant was type written as […] M Street, Brackenfell. The writ bore the official date stamp of the Registrar of this Court, a stamp of Mr T Yalezo indicating his office as Registrar of this Court and his signatures.

[5] Correspondence from the respondent's attorneys to the respondent on 15 May 2007 indicated that the progress report for that day was that the respondent's attorneys had instructed the sheriff to attach the movable assets and not to remove. The respondent relies on this correspondence as evidential material to indicate that it did take steps to execute the writ and that it did not sit back for nine years. The respondent cannot trace the sheriff's return in this regard. Not only is there a new sheriff in Stellenbosch, but the sheriff's office informed the respondent that returns are only kept

on their systems and archives for five years. The respondent's submission is that the writ was executed between 2 May and 31 August 2007.

[6] On 2 October 2007, the applicants made a payment of R220 000-00 to the respondent after the applicants had sold their store, and the applicants sought to negotiate that the payment be in full and final settlement of the total judgment debt. The respondent refused the applicants' request for the amount paid to be a full and final settlement, and advised the applicant's accordingly.

[7] On 5 February 2016, an amended writ was issued by the Registrar. The only alterations that happened in those amendments were the change of the *domicilium* of Gaduron and both applicants. *"No 1 Drostdy Centre"* was endorsed in handwriting on top of B. Street, and B. Street was deleted with a stroke of a pen in relation to Gaduron. *"No […] M. Street, Stellenbosch"* was endorsed in handwriting on top of, and […] O. Street, Schuilplaats, Stellenbosch was deleted with a stroke of a pen in respect of first applicant. *"No […] G. Close, La Rochelle, Bellville"* was endorsed in handwriting on top of, and 13 Magnolia Street, Brackenfell was deleted with a stroke of a pen. On top of the three amendments only, appears the official date stamp of the Registrar of this Court, and the signature of Pieterson as Registrar of this Court.

[8] The applicants raised two issues. Firstly, the applicants rely on superannuation of a judgment after three years from the date on which it was pronounced, where the judgment creditor did not proceed with execution steps. The second issue is whether an issued writ of execution remains in force if the judgment became superannuated. As the applicants put the second issue differently, it was whether the superannuation of a judgment is the exception to the rule that a writ of execution may be executed at any time without being renewed until judgment has been settled in full.

[9] At the time of the judgment and the issue of the writ, Rule 66 of the Uniform Rules of Court read as follows:

"66 Superannuation

(1) After the expiration of three years from the day whereon a judgment has been pronounced, no writ of execution may be issued unless the debtor consents to the issue of the writ or unless the judgment is revived by the court on notice to the debtor, but in such a case no new proof of the debt shall be required. In the case of judgment for periodic payments, the three years shall run, in respect of any payment, from the due date thereof.

(2) Writs of execution of a judgment once issued remain in force, and may, subject to the provisions of subparagraph (ii) of paragraph (e) of sub-section (2) of section three of the Prescription Act, 1943 (Act 18 of 1943), or subparagraph (ii) of paragraph (a) of section 11 of the Prescription Act, 1969 (Act 66 of 1969), at any time be executed without being renewed until judgment has been satisfied in full."

[10] Rule 66(1) is capable of an interpretation that superannuation determined the time during which a writ of execution may be issued, and that once the writ had been issued within three years, superannuation could be avoided. If it was that simple, it would follow that because judgment was obtained on 8 August 2006 and the writ was issued on 6 June 2007, the writ was issued within three years of the judgment and that as a result the respondent had avoided superannuation.

[11] Counsel for the applicants', Mr Montzinger, referred this court to authorities to the effect that a warrant of execution, even though issued within three years, unless it was acted upon within the determined time period, that issue could not save a judgment from superannuation [*Rigg v Strydom* 1914 CPD 583; *Bezuidenhout v Deyzel* 1915 CPD 458]. Both authorities dealt with the position in the magistrates' courts.

[12] Interpreting section 63 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) which is almost in similar terms to Rule 66(1), the court said the following in *Absa Bank Ltd v Snyman* 2015 (4) SA 329 (SCA) at paras 14 and 15:

"[14] … In the case of a judgment sounding in money, the result was that the execution sale had to occur within that period. I agree with the author DE van Loggerenberg of Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa *10 ed (2012) vol 1, in his commentary on s 63, that the later cases also reflect the correct interpretation of this section. Purely on the basis of logic the legislature's intent could hardly have been that a judgment creditor can delay execution of a judgment indefinitely as long as he or she had obtained a warrant of execution within three years and caused it to be reissued on a regular basis thereafter. Secondly, the legislature must be presumed to have been aware of the law, as represented by these later decisions, when the Magistrates' Courts Act was promulgated in 1944. Thirdly, the Afrikaans text, which was signed by the executive, renders the position even clearer. It provides:*

"Ten uitvoerlegging teen goedere kan nie uit hoofde van 'n vonnis geskied *na verloop van drie jaar vanaf datum waarop dit gefel is … nie …" [My emphasis.]*

[15] Properly construed, s 63 therefore provides that a judgment sounding in money becomes superannuated, unless the execution sale takes place within three years of that judgment. Hence the date on which the warrant of execution is issued is of no consequence. It goes without saying that rule 36(5) cannot change the meaning of s 63 of the Act. It follows that the date of reissue of a warrant under this rule cannot avoid superannuation once the three- year period from the date of judgment elapses. In this context it is equally of no consequence. Extension can only occur by order of court, …"

[13] If this was a matter from the magistrates' courts, Mr Motzinger's argument on the first argument of superannuation would have merit. The warrant under the judicial spotlight in search for justice in this matter, however, is the one issued in the High Court. The matter, in my view, turns on the effect of Rule 66(2) on Rule 66(1), as both then read. Section 11(a)(ii) of the Prescription Act, 1969, to which Rule 66(2) refers, provides as follows:

*"**11 Periods of prescription of debts***

The periods of prescription of debts shall be the following:

(a) thirty years in respect of – …

(ii) any judgment debt;"

As I understand Rule 66(2), a writ of execution issued by the Registrar of a High Court remains in force and may be executed at any time without being renewed until the judgment has been satisfied in full for as long as that debt has not prescribed.

[14] In *Western Assurance Co. v Caldwell's Trustee* 1918 AD 262 at 271 it is said:

"Every Court has an inherent right to prevent an abuse of its process in the form of frivolous or vexatious litigation (Reichel v Magrath, 14 AC 665)."

At 272 the court proceeded as follows:

"This inherent right to prevent vexatious litigation has been recognized and freely exercised in South Africa. It is the principle which underlies the interference of our Courts with lawsuits where the costs of prior proceedings remain unpaid. In some cases such interference has been expressly confined within the limits of that principle (e.g. Van Ryn Mines v Cooper*, 1911 T.P.D.) 37. In others it has been extended without definite reference thereto (e.g.* Thacker v Fourie*, 14 SC 123), --- but without discussion of or reliance upon any other principle. This inherent right has also been exercised in regard to litigation which was calculated, as and when prosecuted, to hamper the administration of justice (*Attorney-General re Jefferson v Raynor*, 27 NLR 1. 45)."*

At 274 the court continued:

"It is a power, however, which, as was said by Lord HERSCHELL, ought to be sparingly exercised, and only in very exceptional cases."

While, at 275 the court said:

"Thus LINDLEY, L.J., in the case of in re Payne *(23 Ch. D. 288) said: 'We must act on principle, and the principle is that a person ought not to be harassed by vexatious litigation.'"*

[15] Rule 66(2) provide that the time limit within which execution of a writ issued by the Registrar is to be concluded is 30 years. In my understanding of Rule 66(1), the judgment would become superannuated by the effluxion of time for want of execution if the writ was not issued within three years. In my view, against the background of the terminology employed in both Rule 66(1) and 66(2) as they read then, it is not advisable to lay down a general rule in the manner prayed for by the applicants, to wit, in the sense that a judgment of a High Court superannuates after three years from the date in which it was pronounced, where the judgment creditor did not proceed with execution steps within those three years if the writ was issued within that period. In my view, the circumstances of each case must be investigated, ventilated and pronounced upon before a decision can be arrived at.

[16] The applicants' prayers amount to the respondent being placed in a far worse position than a litigant who did not at all issue a writ within three years of a judgment, whose judgment would have superannuated in terms of Rule 66(1). Rule 66(1) required of a judgment creditor who wanted to issue a writ after three years of the date of judgment to explain the reasons for the delay to the debtor, who might consent to the issue of the writ, or to explain such reasons for the delay to the court, which might revive the judgment after hearing the debtor on such application by the creditor. The applicants simply ask for this court to slam its doors in the face of the respondent through their claim of superannuation, and by extension suggesting that the respondent is vexatious. They seek condemnation of the respondent without the respondent even being afforded an opportunity to be heard on the reasons for their delay. The *audi alteram partem rule* is a sacred rule of our law (*Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11 at 38) and should not be denied lightly. The applicants seek to gain an advantage to which in law, but for the delay, they are not entitled, to wit,

that of a blanket denial of the respondent to exercise its benefits, privileges and rights provided by law.

[17] Fairness of court processes, which processes include execution of judgments, in my view, includes appropriate time periods within which various steps have to be taken. It includes an honest and straightforward but also reasonable, acceptable and just assertion of arrangements of conduct to complete and finalise court processes. The conduct of the litigants should be reasonable and justifiable. There has to be safeguards against injustices. Those in whose favour judgments have been granted and who unduly delay execution for unexplained long periods of time, must face up to the fact that undue delay is at their own risk if it amounts to impediment of progress in the administration of justice.

[18] It follows that, in my view, a litigant cannot just sit back, abuse the process of court by an undue long delay of the execution of a writ simply because such writ remain in force for 30 years. The reasons for the long delay would assist the court in determining whether the delay is reasonable and justifiable. Where there has been a considerable lapse of time between the date of judgment and the execution of the writ, it is in the discretion of the court to allow such execution [*Bernstein v Bernstein* 1948 (2) SA 205 (W)]. In *Molala v Minister of Law and Order and Another* [1993] 3 All SA 255 (W) the court said at 258:

"The approach which I am bound to apply is therefore not simply whether more than a reasonable time has elapsed. It should be assessed whether a facility which is undoubtedly available to a party was used, not as an aid to the airing of disputes and in that sense moving towards the administration of justice, but knowingly in such a fashion that the manner of exercise of that right would cause injustice. The issue is whether there is behavior which oversteps the threshold of legitimacy. Nor, in the premises, can plaintiff be barred simply because defendants were prejudiced. The increasingly difficult position of the defendants is a factor which may or may not assist in justifying an inference that plaintiff's intentions were directed to causing or to increasing such difficulties. But the enquiry must remain directed towards what plaintiff intended, albeit in part by way of dolus eventualis*. The increase in defendants' problems is, secondly, a factor insofar as the Court, on an overall view of the case, is to exercise a discretion about how to deal with a proven abuse of process."*

[19] Around 15 May 2007 the respondent and their attorneys were already in discussion with the office of the sheriff around the process of execution in relation to the

judgment. The sheriff was instructed to attach but not to remove the movable assets. The writ was also before the Registrar on 6 June 2007. The facts also show that the parties were in discussion around the satisfaction of the judgment. Amongst others it was agreed that the proceeds of the sale of the business, Gaduron, would be used, and in fact R220 000-00 was paid on 2 October 2007 to the respondent, as part of the satisfaction of the judgment. There are no facts to sustain a conclusion that the respondent at any stage abandoned the part of the judgment that remained unsatisfied.

[20] In my view, there was an amendment and not a re-issue of the writ. Issue includes receipt of court process by the Registrar from the litigant who is filing; allocation of a case number and/or registration of that process under the case number on the court registers; signature and stamping of such documents by the Registrar as acknowledgement of legal industry; and handing back the process to an appropriate court official for further attention; and where appropriate, archiving of the duplicate originals in the court records. The writ was already issued on 2 May 2007. Only the addresses of the applicants were amended on 5 February 2016.

[21] The respondent sought amendment of the writ in relation to the addresses of both applicants, in order to pursue execution of the judgment. The inescapable conclusion is that amongst others, the applicants changed addresses in relation to both their places for purposes of service of court processes from the date on which the writ was issued. There is no indication that the applicants kept the respondent informed of their change of address at all times in the nine years they are complaining of. It cannot safely be said that the respondent was at all times aware of where to find both applicants in furtherance of execution of the judgment. A fugitive from justice cannot, when found, be heard to claim a benefit from the period of his hiding.

[22] I am not persuaded that the judgment granted in favour of the respondent superannuated. I am also not persuaded that the respondent's pursuit of the satisfaction of the judgment amounts to abuse of court process under the circumstances. Where the judgment remained unsatisfied and the debtors changed addresses without any

indication that he informed his creditors, and the debtor did not contemporaneous with the granting of judgment have sufficient means to satisfy a judgment, the debtor cannot be heard to complain of undue delay in execution of a writ, to which such debtor is contributory.

[23] For these reasons I make the following order:

1. The application to set aside the writ of execution issued by the Registrar on 2 May 2007 is dismissed with costs.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT