IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

REPORTABLE

CASE NO: CA227/2017
DATE HEARD: 30/01/2018
FURTHER HEADS OF ARGUMENT RECEIVED: 20 & 21 February 2018
9 March 2018
DATE DELIVERED: 27/03/2018

In the matter between

TRANSNET LIMITED **(Registration No: 1990/00090/06**	**APPELLANT**
and	
ED-U-COLLEGE (PORT ELIZABETH) (NPC) **(Registration No: 1995/011813/08**	**1ST RESPONDENT**
THE SHERIFF OF THE HIGH COURT, **PORT ELIZABETH**	**2ND RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] This is an appeal against an order of Mbenenge J (as he then was) in terms of which the execution of four costs orders against the first respondent (applicant in the court a quo) in favour of the appellant (first respondent in the court *a quo*) was stayed pending the finalisation of arbitration proceedings between the parties. The

second respondent played no part in this appeal and in this judgment I shall refer to the first respondent as the respondent.

[2] The respondent applied for condonation for the late filing of its heads of argument. The application was opposed by the appellant. I am satisfied that a satisfactory explanation was given by the respondent for the delay in filing its heads of argument. The heads of argument were of assistance to the court and no prejudice to the appellant was indicated. The application for condonation should therefore succeed.

Background

[3] The appellant is a State owned public company. The respondent is a learning institution, providing education to children from middle and lower income families. The appellant as lessor and the respondent as lessee entered into lease agreements in respect of two properties, known as Payne's Building and Harbour Board Building. The leases were concluded in 1996 and 2008 respectively. Over time litigation ensued, brought at the instance of the appellant. The first costs order was granted on 7 February 2012 when the appellant's claim for arrear rental for Payne's Building was settled and the settlement agreement was made an order of court. The respondent acknowledged its indebtedness to the appellant in the sum of R1 181 383.00, which was to be paid in monthly instalments. The second costs order was granted on 28 March 2013 when eviction (from Payne's Building) and liquidation proceedings (two separate applications) were settled and the settlement agreement was made an order of court. The third costs order was granted on 22

August 2014 when by agreement the respondent was evicted from both buildings and the respondent was to pay the costs of the application. The fourth costs order was granted presumably during 2015 (it was a 2015 case number) but there is no indication in the papers of the nature of the proceedings following which it was granted. However it is not in dispute that these costs orders were granted in favour of the appellant. All these costs were taxed by agreement in September 2015. The total amount of the costs allowed was R561 863.73.

[4] The arbitration proceedings referred to in the order of the court *a quo* arose from the settlement agreement which was made an order of court on 28 March 2013. The terms of the settlement agreement were as follows:

> "WHEREAS the parties are involved in two disputes, namely case no. 135/2013 ("the liquidation application") and case no. 212/2013 ("the eviction application") and whereas the parties have settled both disputes, they hereby record their agreement, which agreement they wish to be made an Order of Court.
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> 1. The Applicant hereby withdraws the liquidation and eviction applications.
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> 2. The Respondent tenders to pay the Applicant's taxed party and party costs of the liquidation application.
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> 3. The parties' respective auditors will endeavour to determine the amount owed by the Respondent to the Applicant, if anything, in respect of the lease of Payne's Building and the Harbour Building within fifteen working days of the Respondent's auditors being provided with all the necessary documentation requested by them.
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> 4. In the event of a party's respective auditors being unable to reach agreement within ten working days as to the amount owing, if anything, the parties agree that the Chairman of the Port Elizabeth District Region of the South African Institute of Chartered Accountants shall within five days appoint an independent auditor to determine the said amount, whose decision will be final and binding on the parties.

5. In respect of the eviction application the Respondent hereby undertakes to vacate Payne's Building and the Harbour Building by no later than 31 July 2013.

6. The Respondent tenders to pay the Applicant's taxed party and party costs of the eviction application.

7. The Respondent will be liable to pay monthly rental in respect of the Payne's Building and R33 000.00 in respect of the Harbour Building until such time as it vacates both buildings.

8. Lillian Niemann and Le Roux Niemann hereby give personal guarantees and undertake to stand surety and co-principal debtors for the due fulfilment by the Respondent of all its obligations, of whatever nature, to the Applicant and to Portnet Ltd. The said undertakings are attached hereto.

9. If any amount is found to be due by the Respondent to the Applicant and/or Portnet Ltd it will be settled in full by 31 December 2013.

10. On the payment by the Respondent and/or Le Roux Niemann of all amounts owing to the Applicant and to Portnet Ltd the parties hereby agree that neither party will have any further claims of whatever nature the one against the other."

[5] Mrs Lilian Niemann, a director of the respondent, was the deponent to the respondent's founding and replying affidavits in the application. According to her, at the time the settlement agreement was concluded, the appellant was aware that the respondent was not indebted to it. She stated that the dispute about the respondent's indebtedness to the appellant arose from the appellant's failure to allocate certain payments made by the respondent and the appellant having incorrectly charged value added tax on municipal rates in respect of the properties.

[6] It seems that the arbitration proceedings have not got off the ground for various reasons. The parties' respective auditors did not agree on the amount owing to the appellant and the chartered accountants firm Mazars was appointed to determine the amount. There was a dispute about Mazars' terms of reference[1],

[1] This dispute concerned an interpretation of the settlement agreement of 28 March 2013.

extensions of time to file its answering papers were requested by the respondent and granted by Mazars, and the arbitration was suspended pending compliance by the appellant with Mazars' conditions for payment of the arbitration costs. The respondent's answering papers were eventually filed, and annexed to those papers were the calculations of an auditor which reflected, *inter alia*, that the appellant was indebted to the respondent in the sum of R1 610 796.45. According to Mrs Niemann, when the respondent entered into the settlement agreement which was made an order of court on 7 February 2012, she believed that the respondent was indebted to the appellant. She only learned the true position when she received the auditor's report reflecting an amount owing by the appellant to the respondent.

[7] The appellant then indicated that it intended applying to the High Court for a declaratory order determining the issues for arbitration. I interpose at this stage to say that this application was ultimately brought and heard, also by Mbenenge J, on the same day as the application to stay execution. Judgment in the declarator application was delivered on 21 February 2017 and judgment in the application to stay execution was delivered on 23 February 2017. In the declarator application Mbenenge J granted the following order:

> "[Mazars] is directed to determine the indebtedness of [Ed-U-College] in respect of outstanding rental payments for Payne's Building, from 1 September 2011 until the date this building was vacated, and to further determine the indebtedness of [Ed-U-College] towards [Transnet] in respect of the Harbour Building from the commencement of the relevant rental agreement until the date [Ed-U-College] vacated the Harbour Building."

[8] I should add here that in that application the respondent contended that its indebtedness in the sum of R1 118 383.00 was compromised by the settlement

agreement of 28 March 2013. Mbenenge J found that it was not compromised and that the respondent had not been freed from its obligation to pay that amount. In the application with which this appeal is concerned, the respondent still maintained that the settlement agreement of 28 March 2013 had superseded the agreement of 7 February 2012 but this was of course prior to delivery of the judgment on that dispute.

[9] By letter dated 29 June 2016 the appellant's attorneys demanded payment of the taxed costs. Thereafter the sheriff attempted to execute the writs of execution issued in respect of the costs orders.

[10] The respondent contended that it would be just and equitable for the writs to be stayed, that it had always maintained that it was not indebted to the appellant, and that the various actions and applications which led to the costs orders were vexatious from inception. Mrs Niemann pointed out that a year had passed since the respondent had filed its answering papers in the arbitration and contended that the appellant had decided to execute on the costs orders in an attempt to cripple the respondent financially, thereby restricting its ability to conduct business, and to avoid the "inevitable" outcome of the arbitration. Mrs Niemann was confident that the arbitration would result in the appellant being declared indebted to the respondent.

[11] The appellant did not admit that it was indebted to the respondent and further maintained that the respondent had no liquidated claim against the appellant which was due and payable, nor had it brought applications for the rescission of the various costs orders. At no stage during the various proceedings had the respondent

alleged that the appellant owed it money because of overpayment of rent, and the allegation only surfaced in the respondent's answering papers in the arbitration. According to the appellant, all that was referred to arbitration was the determination of rent owed to the appellant. The appellant was similarly confident that it would prove at the arbitration that the respondent was substantially in arrears with rent payments.

[12] With regard to the allegation of an ulterior motive in executing on the costs orders, the appellant maintained that it could not proceed with the arbitration until the application for a declarator had been adjudicated.

The court *a quo's* judgment

[13] Mbenenge J considered the submission of the appellant that the respondent was essentially raising set-off against the appellant's costs orders. Having considered the requirements for set-off, the learned judge found that the respondent's claim was not liquidated, and was an unliquidated claim to be determined by the arbitrator in the future.

[14] He went on to consider whether he could nevertheless exercise his discretion in favour of staying the execution of the costs orders. He referred to a court's inherent power to suspend the execution of orders in appropriate circumstances and to Uniform Rule 45A which provides that a court may suspend the execution of any order for such period as it may deem fit.

[15] In exercising his discretion in favour of the respondent, the learned judge stated at paragraphs [20] to [22] (footnotes omitted):

> "[20] Whilst courts have previously been loath to grant a stay of execution to merely avoid injustice and inequity, the courts have now become benevolent, and the general rule is to grant a stay of execution where real and substantial justice requires such a stay or, put differently, where injustice will otherwise be done.
>
> [21] What the applicant is seeking is an order staying execution with a view to enabling the applicant to await the result of the arbitrator in the hope that he will decide in the applicant's favour and find that the applicant does not owe the first respondent any money. The applicant says that if there is no stay it will suffer irreparable prejudice and harm. Much as there is no certainty that the arbitrator will decide in the applicant's favour and the alleged prejudice and irreparable harm may be said to be speculative, the court is not at this stage concerned with the merits of the underlying dispute – the sole enquiry is simply whether the *causa* is in dispute.
>
> [22] I find that an injustice would be done were I not to grant relief sought. All impediments to the final disposal of the arbitration proceedings relevant to this matter have been removed. It remains for the arbitrator to reconvene the proceedings and bring same to a logical conclusion."

Discussion

[16] In *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (CLC) Waglay J (as he then was) set out the general principles for the granting of a stay of execution at paragraph [37] as follows:

> "(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
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> (b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.
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> (c) The court must be satisfied that:
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> (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and

(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed, ie where the underlying *causa* is the subject-matter of an ongoing dispute between the parties.

(e) The court is not concerned with the merits of the underlying dispute — the sole enquiry is simply whether the *causa* is in dispute."

[17] In the present matter the respondent was not asserting a right but attempting to avert an injustice. That injustice is expressed as an inability to conduct its business because execution prior to a decision in the arbitration proceedings would devastate it financially. Effectively it is saying that a decision in the arbitration in its favour might or will ameliorate or even extinguish its indebtedness to the appellant and it would suffer irreparable harm if execution took place without waiting for a favourable decision in the arbitration.

[18] The respondent's difficulty in my view is that a decision in the arbitration will not have the effect for which the respondent contends. The arbitrator's terms of reference do not allow for a decision that the appellant is indebted to the respondent, with a corresponding award. The terms of reference, as pronounced upon by Mbenenge J, are restricted to deciding how much, if anything, is owed by the respondent to the appellant. Those terms of reference find their origin in the settlement agreement which was made an order of court on 28 March 2013. There was no suggestion whatsoever in that agreement that the appellant might be indebted to the respondent. Even if the arbitrator decides that nothing is owed by the respondent, it will still be indebted in full to the appellant in terms of the costs orders. Unlike cases where related proceedings of some sort are still to be

determined in the future, which may have some ameliorating effect on the order sought to be executed or remove the *causa* of the order, thus preventing prejudice or irreparable harm[2], in this matter the costs orders are distinct from the arbitration proceedings.

[19] It was submitted on behalf of the respondent that it did have a counterclaim in the arbitration. I do not agree. The terms of reference do not provide for one and as was submitted on behalf of the appellant, a counterclaim cannot be initiated by arbitration proceedings. It was submitted in the alternative that even if the arbitrator was not entitled to direct the appellant to pay respondent, the arbitrator would still be entitled to conclude that the respondent does not owe the appellant anything, on the basis that the appellant is indebted to the respondent. In that case, so it was submitted, the respondent would be entitled to recover such amount in subsequent proceedings. In my view such a scenario introduces a speculative and indefinite character to the respondent's contention that an injustice will result if execution is not stayed. This is not a matter where an application for rescission is pending (*Gois t/a Shakespeare's Pub v Van Zyl and Others*), or a decision on costs (*Santam Ltd v Norman and Another*) or a review of taxation (*Bestbier v Jackson and Another*), or an appeal (*Soja (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd and Another*) (supra/fn2 above).

[20] I am of the view therefore that the respondent laid no proper foundation for contending that an injustice would be done if execution was not stayed.

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[2] See for example *Gois* (*supra*), *Santam Ltd v Norman and Another* 1996 (3) SA 502 (C), *Bestbier v Jackson and Another* 1986 (3) 482 (WLD), *Soja (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd and Another* 1981 (2) SA 407 (WLD).

[21] This brings me to a consideration of the exercise of the court a quo's discretion. In *Whitfield v Van Aarde* 1993 (1) SA 332 (ECD) Nepgen J, with reference to the court's inherent discretion to stay execution, stated at 337F-G:

> "Of course, the discretion which a Court has must be exercised judicially, but it cannot be otherwise limited, for example by stating that such discretion can only be exercised in favour of a judgment debtor in certain circumscribed circumstances."

[22] It is so that an appeal court's power to interfere with the exercise of the court a quo's discretion is limited. In *Oakdene Square Properties v Farm Bothasfontein (Kyalami) and Others* 2013 (4) SA SCA at paragraph [18] Brand JA, in dealing with a party's contention that the court's authority to interfere with the decision of the court a quo was limited, stated as follows:

> "The contention has its roots in the well-established principle that a court of appeal is not allowed to interfere with the exercise of a discretion merely because it would have come to a different conclusion. It may interfere only if the lower court had been influenced by wrong principles of law, or a misdirection of fact, or if it had failed to exercise a discretion at all."

[23] In my view the learned judge committed a misdirection of fact with regard to what might be achieved by the respondent at the arbitration proceedings, in relation to the costs orders. He found that an injustice would be done if execution was not stayed pending the decision of the arbitrator and, as I understand his judgment, was of the view that a finding by the arbitrator that the respondent did not owe the appellant any money would somehow assist the respondent in relation to the costs orders. As I have already said, such a decision by the arbitrator would not change the position with regard to the costs orders. They would still be payable in full. A further misdirection of fact occurred when the learned judge stated that the sole

enquiry was whether the *causa* was in dispute. The *causae* of the costs orders were not in dispute. The respondent referred to the previous proceedings as vexatious from inception but as stated by the appellant, no applications for rescission have been brought, nor did the respondent indicate that it intended to apply for rescission of any of the orders. It is important to remember in this regard that in the declarator application it was found that the debt of R1 118 383.00 had not been compromised. The respondent's contention in its statement of claim in the arbitration that the appellant was indebted to it was made prior to Mbenenge J's declaratory order.

Is the order of the court a quo appealable?

[24] We invited submissions from Counsel for the parties on this question. Owing to the short notice given to them, we allowed argument on the merits, with heads of argument to be filed later on the question of appealability. We are grateful to Counsel for their further heads of argument in this regard.

[25] This was an interim order, pending the finalisation of the arbitration proceedings. Effectively, in terms of the order, the appellant could execute once the arbitration was finalised, whatever decision was made by the arbitrator.

[26] It was submitted on behalf of the appellant that it was in the interests of justice that the appellant be allowed to appeal the order. Reference was made to *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) where the following was stated at paragraph [40]:

> "The common-law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativized the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability."

[27] Counsel for the appellant supported this submission by referring to the fact that the stay of execution was unrelated to the arbitration proceedings or the issues in the arbitration proceedings.

[28] It was further submitted that the order was final in effect because the court which granted the order will never be in a position to reconsider the order, or discharge it.

[29] On the contrary it was submitted on behalf of the respondent that the order was not final in effect and was intended to lapse on the happening of a predetermined future event. Further, so it was submitted, the order was not definitive of the rights of the parties because the rights of the parties were not in issue. The costs orders remained in force and enforcement was merely suspended as a procedural measure. The order also did not have the effect of disposing of any part of the relief claimed in the arbitration proceedings, because the costs orders will remain intact. Finally it was submitted that the order is susceptible to alteration by the court a quo. The situation was postulated where the arbitration proceedings could not be finalised owing to the conduct of the respondent. In such an event, so it

was submitted, the appellant would be entitled to re-enrol the matter for a reconsideration of the court a quo's procedural ruling in the interests of justice.

[30] In my view, even applying earlier common law principles to be applied to the question of appealability, the question can be decided in the appellant's favour. It has often been emphasised that not only the form but the effect of the order must be considered in deciding whether or not it is appealable. There are cases where interim or interlocutory orders have been found to be final in effect.

[31] One such case is *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* [2004] 4 All SA 410 (SCA). In this matter an interim order was made by the court a quo to the effect that one of the appellants was to take all necessary steps to procure the return of an aircraft to South Africa, pending the finalisation of an action by the respondent against the appellants. In considering whether this order was appealable, Streicher JA stated as follows at paragraphs [21] to [24] (footnotes omitted):

> "[21] As in *African Wanderers Football Club Ltd* (*supra*) the issues in the interdict proceedings in *Cronshaw* (*supra*) were the same as the issues which were to be decided in a trial. Schutz JA stated that, intrinsically difficult as it was to decide whether a decision was "interlocutory" or "final", there had to be a rule and that rule was stated by Schreiner JA in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870 to be:
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> > ". . . a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit', or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing".
>
> [22] The present case is distinguishable from *African Wanderers Football Club Ltd* and *Cronshaw*. Whether or not the aircraft should be returned to South Africa and whether or not the other orders relating to the aircraft should be granted is not an issue in the action pending which the interdict was granted. In these circumstances, coupled with the fact that an application for an interim interdict is a proceeding separate from the main proceedings pending the determination of which it was granted (see *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) [also reported at [1996] 3 All SA 669 (A) –

> Ed] at 359H read with 357C) the test in Pretoria Garrison is wholly inappropriate to determine whether the present order granted is final in effect and thus appealable.
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> [23] In determining whether an order is final it is important to bear in mind that "not merely the form of the order must be considered but also, and predominantly its effect" (*South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H, and *Zweni* at 532I).
>
> [24] The order that steps be taken to procure the return of the aircraft to South Africa, as well as the other orders relating to the aircraft, were intended to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the court *a quo*. For these reasons they are in effect final orders. Some support for this conclusion is to be found in *Phillips and others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at paragraph (17)–(22) [also reported at [2003] 4 All SA 16 (SCA) – Ed] in which it was held that a restraint order in terms of the Prevention of Organised Crime Act 121 of 1998 which was considered to be analogous to an interim interdict for attachment of property pending litigation, was final in the sense required by the case law for appealability."

[32] Another such case is *JR 209 Investments and another v Pine Vila Estates; Pine Villa Estates v JR 209 Investments* [2009] 3 All SA 32 (SCA). In this case an interim interdict was granted in terms of which the purchaser and the developer were prohibited from proceeding with the establishment of a township as a whole, pending the final adjudication of an action. However the dispute between the parties only related to one portion of the township. Harms ADP and Mhlantla AJA (as she then was) at paragraph [26] found that:

> "The right to develop the township as a whole is not an issue that would be decided by the trial court and [the order] was consequently final in effect even if only for a limited period."

[33] In the present matter the granting of the costs orders and the right to execute the costs orders are not issues to be decided in the pending arbitration proceedings and the application to stay execution was a proceeding separate from the arbitration.

[34] Further, I do not see how the application could be reconsidered by the court a quo, as was submitted on behalf of the respondent. The order was not merely procedural: it intruded on the appellant's right to execute a judgment in its favour. The judgment linked the costs orders to the outcome of the arbitration and the application was decided on its merits. A reconsideration as suggested would not change that position, because the appellant would in effect be seeking an indulgence on the assumption that the original order was correct.

[35] I am therefore satisfied that the order granted by the court a quo was final in effect, even if only for a limited period, and appealable.

[36] In the result the following order will issue:

36.1 Condonation for the late filing of the respondent's heads of argument is granted.

36.2 The respondent is to pay the costs of the application for condonation on an unopposed basis.

36.3 The appeal is upheld with costs

36.4 The order of the court a quo is set aside and substituted with the following order:

"The application is dismissed with costs."

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J.M. ROBERSON
JUDGE OF THE HIGH COURT

I agree,

_____

G.G. GOOSEN
JUDGE OF THE HIGH COURT

I agree,

_____

N. MSIZI
ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of Appellant: Adv. J.G. Rautenbach S.C.
Instructed by: Netteltons, Grahamstown

Appearing on behalf of Respondent: Adv. J.D. Huisamen S.C.
Instructed by: Huxtable Attorneys, Grahamstown