

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 30037/2015

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	.....
DATE	SIGNATURE

In the matter between:

**KAAPVAAL TRUST (PTY) LTD**

Applicant

And

**ANÉ DE WET**

First Respondent

**THE SHERIFF OF THE REGIONAL COURT  
FOR THE REGIONAL DIVISION OF GAUTENG**

Second Respondent

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**J U D G M E N T**

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**MAKUME, J:**

[1] The Applicant launched an urgent application in terms of Rule 6(12)(a) of the Uniform Rules of Court on the 25<sup>th</sup> August 2015 seeking the following orders:

1.1 That execution of the judgment granted by the Regional Court for the Division of Gauteng under Case Number 2014/2138 on 8 December 2014 and the warrant of execution issued pursuant thereto be stayed pending finality of the Applicant's appeal to this Honourable Court against the said judgment.

1.2 That the Respondent who opposes this application shall bear the costs of this application.

[2] The First Respondent in opposing the granting of the application filed his answering affidavit. The Applicant replied thereto and the matter was enrolled for hearing in the urgent court before me on the 27<sup>th</sup> August 2015.

### BACKGROUND FACTS

[3] On the 8<sup>th</sup> December 2014 the Regional Court, Johannesburg granted summary judgment against the Applicant wherein the Applicant was ordered to pay the First Respondent an amount of R212 602, 78 plus costs and interest.

[4] The Applicant noted an appeal against that judgment. The appeal was set down for hearing in this Division on the 4<sup>th</sup> August 2015.

[5] On the 4<sup>th</sup> August 2015 the appeal could not be proceeded with after the First Respondent had raised an objection to the Applicant's late filing of its heads of argument contrary to the practice manual and there being no substantive application for condonation for the late filing of the heads. The Appeal Court struck the appeal from the roll and ordered the Applicant to pay costs.

[6] The Applicant applied to the Registrar of this Court for reinstatement of the appeal and on the 19<sup>th</sup> August 2015 the Registrar notified the Applicant in writing that the date of the 20<sup>th</sup> October 2015 has been allocated for the hearing of the appeal.

[7] On the 20<sup>th</sup> August 2015 the Second Respondent who is not opposing this application attended at the premises of the Applicant situate at 74 Siemert Street, Doornfontein armed with a writ of execution directing the Second Respondent to demand payment of the amount of R212 602,78 upon failure of which to attach property of the Applicant and sell same in execution to raise the amount of R212 602,78.

[8] The Sheriff could not execute as he was shown a notice by the Applicant's Director one Olgar that the appeal had been reinstated for hearing on the 20<sup>th</sup> October 2015.

[9] On the 21<sup>st</sup> August 2015 the Applicant launched this application.

### URGENCY AND THE MERITS

[10] In opposing the application the First Respondent argues that the application is not urgent, that urgency is self-created and prays that the application be struck off from the roll with costs.

[11] Secondly the Respondent argues that the Second Respondent did not make any attachment and therefore there is no reason or basis for the Applicant to approach to the court.

[12] As far as the merits are concerned the Respondent argues that the appeal has lapsed and that there is as yet no substantive application directed at the reinstatement of the appeal as well as an application for condonation for the late filing of the appeal and/or the heads of argument.

[13] I start with urgency. It is common cause that once a writ of execution has been issued it remains valid and can only be held back by agreement with the judgment creditor or an order of court. In this instance the fact that no attachment was made by the Sheriff does not preclude the Respondent if he so wishes to re-issue the writ of execution with instructions that the Sheriff proceed to the Applicant's premises and make an attachment.

[14] It is trite law that once an appeal is filed against a judgment that serves to suspend execution of a judgment or order until such time that the appeal is dismissed. A judgment creditor against whose judgment an appeal has been noted and who wishes to execute same must approach court for leave to execute.

[15] In this matter the Respondent's view is that the appeal has lapsed due to the failure of the Applicant to comply with the Rules and practice manual and that he is accordingly free to execute. It is this view by the Respondent which makes the application urgent and I accordingly find in favour of the Applicant in this regard.

[16] As regards the merits the Respondent delved at great length into the fact that the appeal had lapsed and says that the fact that a date has been allocated for reinstatement of the appeal is irrelevant what should have long happened is that after the appeal was struck off on the 4<sup>th</sup> August 2015 the Applicant should have first applied for reinstatement as well as for condonation for the late filing of the appeal before applying for a date of reinstatement. There is no merit in that argument. The correct procedure is that as stated by the Applicant in argument that it is the Court of Appeal that must hear the application for reinstatement of a lapsed appeal.

[17] It was held in the matter of *Melame v Santam Insurance Co Ltd* 1962 (4) SA 531 that in deciding whether sufficient cause has been shown in terms of the Rules of Court for condonation or non-compliance with the Rules the

court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides.

[18] The court that must decide the prospects of success of the reinstatement application is not this urgent court it is the Appeal Court that will be sitting on the 20<sup>th</sup> October 2015.

[19] The Respondent in pursuit of his defence of no prospects of success on appeal referred me to the case of *S v Pillay* 1978 (2) SA 772 (N). That case dealt with the situation where the Appellant sought to amend his grounds of appeal at the last moment. The Respondent raises this defence on the basis that the Appellant on the 4<sup>th</sup> August 2015 sought to introduce a new ground of appeal and they say such new ground of appeal has no prospects of success.

[20] My view as regards this point is once more that the Respondent has missed the purpose of this application it is not to look at the prospects of success. The aim of this application is to put out a fire pending the hearing of the appeal.

[21] I am accordingly persuaded that the Applicant has satisfied all the requirements of an interdict. This application shall accordingly succeed and I see no reason why the Respondent should not pay the costs of having opposed this application.

[22] The order that I make is as follows:

- (a) The application is urgent.
- (b) The Warrant of Execution issued in Case Number 2014/2132 Regional Court Division of Gauteng is hereby stayed pending finalisation of the appeal to this Court.
- (c) The First Respondent is ordered to pay costs of this appeal on a party and party scale.

DATED at JOHANNESBURG on this 8th day of SEPTEMBER 2015.

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**M A MAKUME**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING	27 <sup>th</sup> AUGUST 2015
DATE OF JUDGMENT	8 <sup>th</sup> SEPTEMBER 2015
APPLICANT'S COUNSEL	ADV: B Hitchings
INSTRUCTED BY	MESSRS SENEKAL SIMMONDS INC 19 Riley Road Bedfordview Tel: 011 450 3084 Ref: Mr J Warffemius
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