REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

31/08/2017
DATE

SIGNATURE

Case No.**29071/2016**

In the matter between:

TYRES 2000 (JETPARK) (SA) (PTY) LIMITED Applicant

and

CENTRAL AFRICAN ROAD SERVICES (PTY) LIMITED Respondent

In the appeal between:

TYRES 2000 (JETPARK) (SA) (PTY) LIMITED Appellant

and

CENTRAL AFRICAN ROAD SERVICES (PTY) LIMITED Respondent

In *re*:

CENTRAL AFRICAN ROAD SERVICES (PTY) LIMITED Applicant

and

TYRES 2000 (JETPARK) (SA) (PTY) LIMITED First Respondent

PIRELLI TYRE (PTY) LIMITED Second Respondent

JUDGMENT

OPPERMAN J

1. This is an application by the applicant for urgent interim relief (Part A) staying the execution of an order in terms of rule 45A, pending the outcome of an appeal by the applicant. The appeal is to be heard on 19 February 2018.

2. On 17 February 2017 an order was granted by Gautschi AJ against the applicant in favour of the respondent for payment of an amount of R 506 929.50 together with interest and costs. On 16 March 2017, the applicant was granted leave to appeal to the Full Court against the order on the basis that "*the appeal would have a reasonable prospect of success*" as envisaged in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. The applicant filed a notice of appeal on 3 April 2017, but failed to comply with the provisions of rule 49 of the Uniform Rules of Court by not timeously filing a power of attorney, security for the respondent's costs of appeal and by erroneously filing the transcribed *argument* in the opposed motion court, instead of the *record* of appeal.

3. The applicant filed security for the respondent's costs on appeal on 3 August 2017. A power of attorney and the correct record of appeal was served on the respondent and filed with the registrar on 14 August 2017.

4. It is clear (and common cause between the parties) that in the absence of an order condoning the non-compliance with the rules and an order reinstating the appeal, the appeal has lapsed.

5. On Friday 11 August 2017, the applicant addressed a letter to the respondent informing it that the applicant's oversight in regard to the prosecution of the appeal would be remedied and that an application for condonation and reinstatement of the appeal would be instituted by no later than Monday 14 August 2017. The respondent refused to withhold the execution of the order.

6. The applicant accordingly approached this court for urgent interim relief staying the execution of the order pending the outcome of the application for condonation and reinstatement of the appeal as well as the appeal, all of which is sought in Part B of the notice of motion.

7. Rule 45A of the Uniform Rules of Court provides:

> ' Rule 45A Suspension of Orders by the Court
>
> The court may suspend the execution of any order for such a period as it may deem fit.'

8. As a general rule the Court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done.[1] The Court will generally grant a stay of execution where the underlying *causa* of the judgment debt is being disputed.[2]

9. The general principles for the granting of a stay in execution were summarised as follows in *Gois t/a Shakespeare's Pub v Van Zyl* 2011 (1) SA 148 (LC) at 155H-156B[3]:

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1 Bestbier v Jackson 1986 (3) SA 482 (W) at 484I
2 Le Roux v Yskor Landgoed (Edms) Bpk 1984 (4) SA 252 (T) at 257B-C
3 Firm Mortgage Solutions (Pty) Ltd v ABSA Bank 2014 (1) SA 168 (WCC) at 170F/G

'A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.

(a) 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.

(b) The court must be satisfied that:

(i) The applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent; and

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

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

(d) The court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the causa is in dispute.'

10. The applicant was granted leave to appeal to the Full Court against the whole of the judgment, on the basis that "*the appeal **would** have a reasonable prospect of success*" as envisaged in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. The *causa* underlying the judgment is accordingly clearly in dispute.

11. The respondent opposed the urgent interim relief sought by the applicant in terms of Part A of the notice of motion, but elected not to file an answering affidavit. It delivered a notice in terms of rule 7 of the Uniform Rules of Court in terms of which the respondent "*challenges the authority of the deponent, Maartin Strydom, to the founding affidavit* " and states as follows in the said notice:'

1. (*The respondent*) does not dispute the power of attorney given to Strydom, but disputes the authority given to Strydom to institute (lodge) the urgent application and the prosecution thereof on behalf of (*the applicant*) as is required in terms of section 66 of the Companies Act 71 of 2008; and

2. (*The respondent*) does not dispute the power of attorney given to Strydom, but disputes the authority given to Strydom to institute the appeal

proceedings and the prosecution thereof on behalf of (*the applicant*) as is required in terms of section 66 of the Companies Act, Act 71 of 2008.

12. Rule 7 of the Uniform Rules of Court provides *inter alia* as follows:

'Rule 7 Power of Attorney

(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

13. When a person's authority (in litigation) is challenged, the requirement of the subrule is that the person concerned shall satisfy the Court that he is authorised so to act. This the person concerned may do by adducing an acceptable form of proof and not necessarily by filing a written power of attorney. In the event of any of the parties being a company, a resolution of such company that the proceedings have been properly authorised, may constitute such proof.[4]

14. The subrule requires that the Court must be satisfied that authority exists at the time when proof of it is proffered: there is nothing in the rule which suggests that the Court is required to investigate the validity of past acts in the context of the authority to act.

15. Rule 7(1) is only concerned with the mandate of an attorney to act in instituting or defending legal proceedings on behalf of a party and to act in matters incidental to such proceedings.[5]

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4 Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W)
5 Eskom v Soweto City Council 1992 (2) SA 703 (W)

16. The practice of unnecessarily challenging the authority of individuals to bring applications has been decried.[6] In applications it is the institution of proceedings and the prosecution thereof which must be authorised. It is irrelevant whether the deponent has been authorised to depose to the founding affidavit.[7]

17. The respondent served a notice in terms of rule 6(5)(d)(iii) of its intention to raise the following questions of law:

1. Does the power of attorney and the resolution (appendices C-1 and C-2 hereto) authorise the deponent, Maartin Strydom ("Strydom"), to the founding affidavit in the application, to institute the proceedings envisaged in PART A and PART B of the notice of motion and to prosecute same on behalf of the applicant, as is required in terms of section 66 of the Companies Act 71 of 2008?
2. Without derogating from the generality of the previous question:
   - 2.1. is the explanation by Strydom pertaining to his duties as legal practitioner in conducting the appeal of the applicant persuasive?
   - 2.2. has the applicant set out a clear right or a prima facie right deserving the protection of an interdict as per Part A of the notice of motion?
   - 2.3. has Strydom in his affidavit set forth any essential information which may enable the Court to assess the applicant's prospect of success on appeal to substantiate the request for condonation in PART B of the notice of motion?
   - 2.4. Can it be said that Strydom has the necessary locus standi to lodge / institute this Application?
   - 2.5. can an appeal that has lapsed, as in casu, be resurrected by an application as set out in Part B of the notice of motion?'

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6 Eskom *supra* at 705C and 705H-I
7 Ganes v Telecom Namibia Limited 2004 (3) SA 615 (SCA) at 624G-I

18. The respondent's counsel was at pains to explain that the challenge was in truth not a rule 7 challenge at all but rather a challenge on the following excerpt from Mr Strydom's affidavit read together with the resolution filed and dated 14 August 2017 wherein he stated:

a. *"I am the applicant's duly appointed attorney of record herein.* ***I am duly authorised to institute this application*** *and to depose to this affidavit on behalf of the applicant." (My emphasis)*

19. Reliance was placed on Section 66(1) of the Companies Act 71 of 2008 which provides as follows:

> *"The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."*

20. And also on Henochsberg on the Companies Act 71 of 2008, Vol 1 (issue 5) 253-257 which deals with the topic of directors and legal proceedings involving companies. The learned authors comment:

> *"The directors' powers under S66 enable them to cause the company to participate in legal proceedings. For this purpose that must authorize the institution of the proceedings and the prosecution thereof (Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624). They must also authorise one of their number or someone else (e.g. a manager or the secretary) to represent the company in such proceedings."*

21. The resolution passed by the board of directors of the applicant on 14 August 2017 provides that they had resolved that:

1. the Company appeal the judgement handed down case number: 29071/2017 in the Gauteng Local Division of the High Court, Johannesburg;
2. the Company bring a condonation application to condone the failure by the Company to properly prosecute the appeal as well as an urgent application for the stay of the order granted under case number 29071/2017;
3. Maarten Strydom from Strydom M Attorneys shall be authorized to appeal the judgement handed down under case number: 29071/2016 in the Gauteng Local Division of the High Court Johannesburg.
4. the Company ratify all previous steps taken for the above matter and agree to ratify all and whatsoever Maarten Strydom shall have lawfully done or cause to be done;
5. Christopher Gavin Hurly shall be authorized to sign a Power of Attorney empowering Maarten Strydom for this purpose.'

22. It is argued that paragraph 3 of the resolution provides Mr Strydom with the necessary authority to launch the appeal against the judgment under case number 29071/2016 but that no such authority is granted to Mr Strydom in connection with the current urgent application in respect of part A or part B. In amplification hereof, it is pointed out that paragraph 4 of the resolution relates to paragraph 3 of the resolution and the ratification of all steps taken by Mr Strydom relates only to the appeal and not to the current urgent application.

23. In my view, the point is without substance. A court is entitled to look at everything before it to determine whether a litigant has been authorized to launch proceedings. In this matter, the applicant's authority was, prior to this urgent application being launched, never in issue. Indeed, the respondent does not

dispute that the applicant authorized the appeal. What happened in this matter is that the applicant's attorney bumbled through the appeal procedure. Had he complied with the rules, the issue of his authority in this context would never have come up for consideration. I am satisfied that he is authorized to prosecute the appeal. The respondent too has conceded this. That being so, it must follow that Mr Strydom is authorized to bring this urgent application to suspend the order forming the subject of the appeal and I so find.

24. The respondent is restricted to the undisputed evidence of Mr Strydom as set out in the founding affidavit in the application in regard to its foresaid notice in terms of rule 6(5)(d)(iii) and as such the applicant's version as set out under oath by Mr Strydom in his founding affidavit being devoid of anything inherently improbable, self-contradictory or incredible, must be accepted as correct.

25. Mr Strydom says under oath: *'I am duly authorised to institute this application and to depose to this affidavit on behalf of the applicant.'* There is nothing before me to gainsay this. Indeed, that which is before me, supports such assertion and I so find..

26. The respondent also raised the argument that the matter lacks urgency in that the applicant had failed to set forth explicitly the circumstances which it averred rendered the matter urgent and the reasons why it claimed that it could not be afforded substantial redress at a hearing in due course. It is so that the applicant did not comply with the practice directives in this regard. It is unfortunate that it did not. Be that as it may, in this instance the applicant may be forgiven for not doing so as the respondent provides the necessary proof. The respondent has indicated quite unequivocally that it is executing on the judgment, this in the face of the fact that the judgment is the subject-matter of an ongoing dispute between the

parties and the very Court which granted the judgment has pronounced that reasonable prospects exist that another court would upset the judgment i.e. remove the underlying causa.

27. The respondent is, of course, entitled to its judgement as speedily as the law will allow, but as that judgement is not yet final and as the prejudice to the applicant in having the judgement executed while it is still making bona fide but erroneous endeavours to have its appeal heard, in the present circumstances, this outweighs the prejudice to the respondent in having to await payment (which may of course not be forthcoming if the appeal is successful) until the appeal is heard. The requirements for a stay are satisfied.

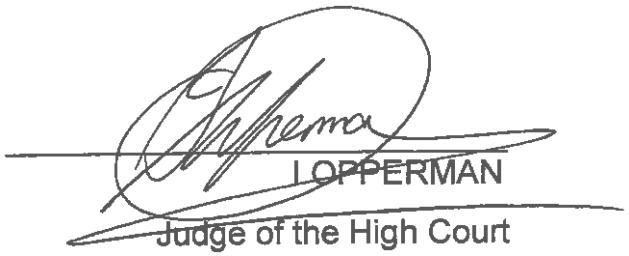
28. As the applicant is seeking an indulgence there is no reason why the respondent should have to pay the costs. However, the grounds of opposition were flimsy indeed. In the exercise of the Court's discretion I determine that each party should pay their own costs.

29. I accordingly grant the following order:

29.1. The matter is enrolled as an urgent application;

29.2. The execution of the order granted under case number 29071/2016 on 19 February 2017 in terms of which the applicant was ordered to pay the respondent (respondent in the appeal and applicant in the main application) an amount of R506 929.50 together with interest and costs, is stayed pending the final determination of Part B of this application;

29.3. The costs of Part A of this application are to be borne by each party paying their own costs..



I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 22 August 2017

Judgment delivered: 31 August 2017

Appearances:

For Applicant: Adv HP West

Instructed by: Strydom M & Ass.

For Respondent: Adv WC Carstens

Instructed by: Marius Swart Attorneys