

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 67305/13

In the matter between

GEORGE WOLFE

Applicant

And

PROFESSOR FRANCES P V R WHELPTON

Respondent

IN RE

PROFESSOR FRANCES P V R WHELPTON

Applicant

And

GEORGE WOLFE

Respondent



JUDGMENT

BAM J

1. The applicant, an attorney by profession, in an urgent application, applied for an order staying the respondent's warrant of execution in Case Number 67305/13 and preventing the removal of goods attached by the Sheriff, pending the finalization of the applicant's claim instituted against the Respondent under Case Number 47355/2015. The application is opposed. (Due to time constraints, there were more than 35 urgent applications on this Courts roll for this week, this judgement is not as comprehensive as what I would have preferred it to be.)
2. In August 2013 in an arbitration case concerning a claim by the applicant against the respondent. The issue turned upon the allegation that the respondent owed money to the applicant based on certain written agreements between the parties. The arbitrator ruled against the applicant, the agreements were set aside and a costs order was made against the applicant. The arbitrator's award was confirmed in the High Court in January 2015. The costs, taxed on 27 May 2015, were in the amount of R494 074.97. A warrant of execution was served on the applicant on 22 June 2015. The execution of this warrant is now at stake.
3. According to the applicant, on 22 August 2013, the last day of the arbitration and notwithstanding the outcome of the arbitration, the respondent "*once again*" acknowledged his indebtedness to the applicant and undertook to effect payment to the applicant. Arising from this undertaking the applicant, shortly after the arbitration, issued summons against

the respondent under Case Number 71082/13 claiming payment. An exception taken by the respondent was successful and on 8 June 2015 the applicant's Particulars of Claim was set aside. The applicant was granted 15 days to amend the particulars of claim. The applicant however decided to withdraw the particulars of claim in that case, and in its stead, on 26 June 2015, issued a new summons under Case Number 47355/15. The particulars of claim now simply mentioned a claim for the payment of money, which the applicant contends is a claim for payment of a liquid amount. The applicant's attorneys followed up this summons with correspondence directed to the respondent's attorneys informing them that they were not entitled to enforce payment of their costs (reflected in the warrant for execution) pending the outcome of the "*present litigation*" between the parties. It was further tendered by the applicant's attorneys to pay the said costs amount into its trust account pending the outcome of the litigation. This was clearly not acceptable to the respondent's attorneys and they addressed correspondence to the applicant's attorneys enquiring on what legal grounds they based their contention that the respondent was not entitled to enforce payment of his costs.

4. The applicant, whilst his attorney of record was absent, personally addressed correspondence to the respondent's attorneys stating that the purpose of the letter was to obviate the bringing of an urgent application and not to incur unnecessary costs. The grounds he relied upon were the following:
 - (i) The basis of the liquid claim he had against the respondent;
 - (ii) The doctrine of set off between his liquid claim and the amount of the respondent's taxed costs. It was pointed out that the applicant's claim was far in excess of the respondent's costs; and
 - (iii) The amount of the respondent's taxed costs.
5. The respondent's attorneys replied and, amongst others, stated that the respondent denied the claim as set out in the applicant's latest summons.
6. In his founding affidavit the applicant also stated that the intended removal of the goods attached, apparently his office furniture, is to cause him "*embarrassment and hardship*".
7. It appears that the main reason why applicant is not prepared to pay the respondent's costs at this point in time is the alleged substantial liquid claim he has instituted against the respondent.
8. The respondent, in his opposing affidavit, added some detail to the history of the litigation, and relationship, between the parties. In referring to the written agreements dealt with at the arbitration, he stated that these agreements, concerning payments to the applicant of "*vast*" sums of money when the respondent would receive compensation from the Kingdom of Swaziland for work done, were entered into as a result of "*unlawful threats*" by the applicant to harm him and his family. This was the reason why the arbitrator eventually made the order setting it aside. At the arbitration both the applicant and the respondent


testified about the legality of the agreements. The respondent said it was entered into as a result of extortion. After the applicant had testified, he agreed that the contested agreements should be set aside. The arbiter accordingly made such order, accompanied by the costs order in question.

9. The ruling by the arbiter reads as follows:
(Annexure A to the answering affidavit.)
 1. The agreements concluded between the parties on June 11th 2004, July 20th 2004, May 23rd 2008, and September 21st 2010, are hereby set aside.
10. Despite this ruling by the arbiter, which was confirmed in the High Court on 23 February 2015, the applicant issued summons against the respondent based on the very same agreements that were set aside. The applicant however alleged that he had withdrawn the arbitration and was now claiming payment of 20% of the amounts received by respondent, to the maximum of 20 million US Dollars.
11. The respondent said these allegations were false and further denied that he, after the arbitration, as alleged by the applicant, admitted his liability to pay the applicant 20% of the moneys received from Swaziland.
12. After the successful exception the applicant failed to amend his Particulars of Claim but delivered a Notice of Amendment indicating that his initial claim was now replaced by a claim for payment of 20% of 100 million US dollars within 2 weeks from 31 August 2013. This caused the respondent to file a Notice of Objection, and on 12 June 2015 the applicant's Particulars of Claim were set aside with leave granted to the applicant to amend his pleadings. The court ruled that the applicant should apply to the court for leave to amend. The applicant, however, then withdrew that action and proceeded to issue a fresh summons against the respondent.
13. During argument before this Court, Adv de Beer, appearing for the applicant submitted that the only issue pertaining to the merits of the application to be considered is whether the applicant's claim as set out in his present Particulars of Claim is liquid. Mr de Beer argued that the claim is indeed for a liquid amount, and, accordingly, that the applicant is entitled to set off in respect of the payment of the costs now claimed by the respondent in terms of the warrant of execution and the eventual successful claim for payment of the liquid claim. This situation justifies the applicant's application for the staying of the warrant of execution in question. Concerning the dispute of facts, which Mr de Beer conceded existed in respect of the question whether any amount is in fact owed to the applicant by the respondent, Mr de Beer argued that it should be ignored and disregarded by this Court. That dispute of facts, Mr de Beer contended, is something the court eventually trying the case between the applicant and the respondent will be called upon to decide.

14. Adv vd Merwe SC, appearing for the respondent contested that the amount now claimed by the applicant in his latest claim against the respondent is a liquid amount. Mr vd Merwe further contended that the factual disputes between the parties are of cardinal importance, pointing out the glaring discrepancy concerning the basis of the applicant's claim, being the alleged agreements which had been set aside by the arbitrator, and confirmed in the High Court.
15. Considering the circumstances alluded to above, it is, in my view, of importance to take into account that material factual disputes exist between the parties. The applicant, at all relevant times, was patently aware of the existence of these disputes. The disputes surely affect the core of the litigation between the parties. The argument that these disputes are immaterial to the present application is fallacious and without substance.
16. In the circumstances referred to above the applicant is not "*entitled*" as claimed, to have the warrant for execution stayed. It would clearly be prejudicial to the respondent to grant that order.
17. In view thereof that the applicant has tendered to pay the costs amount into a trust account means that he is in fact able to do so. That being the case it is very peculiar that the applicant also complains about the attachment of his furniture. It seems to be quite easy for the applicant, without any prejudice to himself, simply to pay the outstanding costs in order to get rid of the attachment. The applicant alone is to be blamed for this predicament and his complaint concerning the attachment of his office furniture.
18. The applicant dismally failed to substantiate the application and it has to be dismissed.
19. In respect of costs it has to be taken into account that the applicant is an attorney and not a lay person. He very well knew what the consequences of a frivolous application, which this undoubtly is, could entail. Accordingly I agree with the respondent's submission that a punitive costs order should be granted.

ORDER

1. The application is dismissed.
2. The applicant is ordered to pay the costs on an attorney and client scale, including the costs of senior counsel.


A J BAM JUDGE

9 July 2015