CASE NO: (P) A 191/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WEATHERLY INTERNATIONAL PLC **APPLICANT**

and

DAVID JOHN BRUNI AND IAN ROBERT McLAREN

(THE RECEIVERS) **FIRST RESPONDENTS**

DEPUTY SHERRIFF **SECOND RESPONDENT**

***CORAM*:** **SILUNGWE , AJ**

Heard on: 17th November 2009

Delivered on: 2011 September, 14

JUDGMENT

SILUNGWE, AJ: [1] This application is brought by the applicant by way of a notice of motion in which the applicant is praying for an order to set aside a writ of execution

(issued against the applicant) by the Registrar of this Court at the instance, and in favour, of the first respondents. In the alternative, the applicant seeks an order to suspend the said writ, pending any further litigation by any interested party. The applicant further seeks an order for costs against the first respondents. The application is, however, opposed by the first respondents.

[2] The history of this case is that, in terms of section 311 of the Companies Act (Act 61 of 1973) (hereinafter referred to as the Act), an offer of compromise entered into by Ongopolo Mining and Processing Limited (together with its subsidiaries) and its creditors was sanctioned by this Court on 19th June 2006. In terms of the offer aforesaid, the applicant as 'proposer', was constrained to make periodic payments to the first respondents for distribution to the creditors of Ongopolo Mining and Processing Limited. Clause 12 of the offer of compromise provides as follows:

> 'The proposer shall be entitled at any time and whether before or after the date of sanction, to cede, assign and delegate all its rights ad obligations hereunder'.

[3] The applicant alleges that, on 26th March 2009, it ceded and delegated all its rights and obligations, in terms of the offer of compromise, to Weatherly SMF St. Lucia Limited, having its registered address at 46 Micond Street, Castries St. Lucia, which accepted such nomination, by the signing of an agreement termed 'NOTICE OF APPOINTMENT'. On the same date, the applicants nominated the said Weatherly SMF St. Lucia Limited as "proposer " pursuant to the offer of compromise which accepted the nomination by signing the agreement aforesaid. On 29th May 2009, the applicant instructed its legal representatives to formally notify the

respondents of the said “cession, delegation and appointment”. Annexure RW6 shows that the legal representatives formally complied with the applicant’s instruction.

[4] On the 1st June 2009, the writ of execution was issued against the applicant, directing the second respondent “to attach and to take into execution, the movable property of the applicant and to cause to be realised by public auction, the sum of N$ 10 492 084.39.”

[5] Mr. Mourton, learned counsel for the first respondents, has raised two points *in limine,* the first of which is that it was improper for the applicant to have proceeded in terms of Rule 6(11) and that this application is to be regarded as a substantive application, not as an interlocutory one. Counsel thus submits that the application is defective because the provisions of Rule 6(5) (a) and (b), and of Rule 4(1) (a), have not been complied with. In other words, it is contended on behalf of the first respondents that the applicant was obliged to have followed the “long form” applicable in substantive applications, and not the “short form”. It is further asserted that the procedure followed by the applicant was prejudicial to the first respondents as they did not have sufficient time at their disposal to properly prepare for the opposing/answering affidavits. That being the position, the application is categorized as being procedurally wrong.

[6] However, Ms Angula, representing the applicant, contends, *inter alia,* that the application is not substantive in nature as it does not bring an end to the main

proceedings. It is further stated that, in any event, the application is incidental to pending proceedings as it is subordinate or accessory to the main proceedings in terms of which the warrant was issued.

[7] The starting point, and indeed, the central issue of the first point *in limine,* is whether this application is to be regarded as an interlocutory application or as a substantive one?. If it is to be regarded as an interlocutory one, it is likely to result in an interlocutory order. An interlocutory order is one granted by a Court on matters incidental to the main dispute, preparatory to, or during the course of litigation. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (pty) Ltd 1977 (3) SA 534*, the Appellant Division, when considering tests to be applied in determining whether or not an order is interlocutory, summarized the general affect of a line of cases in this regard, and said at 549F-550D:

> "In a wide and general sense, the term 'interlocutory' refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to or during the progress of the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as simple (or purely) 'interlocutory orders' or 'interlocutory orders proper' which do not. (See generally *Bell v Bell* 1908 T.S 887 at page 890-1; *Steytler, NO v Fitzgerald* 1911 AD 295 at pp 303,311,325-6, 342; *Globe and Phoenix Gold Mining Co. Ltd v Rhodesian Corporation Ltd* 1932 AD 146 AT PP 153, 157-8, 162-3; *Pretoria Garrison Institute v Davinish Variety Products (Pty) Ltd* 1948 (1) SA 839 (AD) at pp 850, 867).
>
> (b) Statutes relating to the appealability of judgements or orders (whether it be appealable with leave or appealability at all) which use the word 'interlocutory' or other words of similar impact, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making

it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation...This is so in the case of the very salutary provision under consideration in this case...

(c) The general test as to whether an order is a simple interlocutory one or not was stated by SCHREINER, JA, in the *Pretoria Garrison Institute case*, *supra*, as follows (at p 870):

> '...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.'
>
> This test has been followed and applied in a considerable number of cases, including three in this court... ' "

The Appellant Division continued as follows at 550H-551A:

(e) At common law a purely interlocutory order may be corrected, altered or set aside by the judge who granted it at any time before final judgement; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is "*res judicata" (Bell v Bell, supra,* at pp 891-3. See also: *Brand v Smart* 2002 NR 63 at 66A-D).

[8] In applying the aforegoing principles to the present application, it is self-evident that, the first respondents' application for the writ of execution is what gave rise to the order that was given in their favour and against the applicant. That constituted litigation which is still continuing and is thus still in progress. Consequently, the applicant's application to set aside or suspend the writ of execution is a step in that litigation and, in a wide and general sense, it is caught by the term "interlocutory". In

other words, the application under consideration is an interlocutory application as opposed to a substantive one.

[9] I now turn to the contention advanced on behalf of the first respondents, namely, that it was improper for the applicant to have proceeded in terms of rule 6(11) as it (the applicant) ought to have used the "long form", not the "short form". This contention is flawed in the light of my ruling that the application is an interlocutory one. In any event, the practice in interlocutory applications is to use a "short form" of notice of motion in which the respondent should be cited. In this regard, the comments by *Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa*, 5th Ed, Vol 1, at 424-425, are germane:

> "(d) *Interlocutory Applications*
>
> There is no prescribed form of notice of motion of interlocutory applications. Rule 6(11) provides as follows:
>
> > notwithstanding the aforegoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavit as the case may require and set down at a time assigned by the registrar or as directed by a judge.
> >
> > The somewhat cumbersome procedure laid down in rule 6(5) need not be followed where the parties are already litigating. The practice is to use a short form of notice of motion similar to form 2, but citing the respondent".

An incidental comment is that an applicant is free to prescribe any reasonable period he or she deems fit between delivery of such an application and the hearing of it, but bears the risk of the respondent having inadequate opportunity to oppose the application (*SA Metropolitan Lewensversekeringsmaatskappy BPK v Louw NO*

1981(4) SA 329 (O) at 332 B-C). In this matter, as previously indicated, the parties are already litigating. In the circumstances, the procedure adopted by the applicant cannot be faulted. It follows that the first point *in limine* fails.

[10] The second and pivotal point *in limine* is that the applicant has not made out a *prima facie* case in that:

> ‘(a) the applicant was in arrears with its periodic payments in terms of the “offer of compromise”, even because the “cession and delegation agreement” was entered into between the applicant and Weatherly SMF St. Lucia Ltd.
>
> (b) the “cession and delegation agreement” entered into between applicant and Weatherly SMF St. Lucia Ltd is not binding on the first respondents as creditors in that the first respondents had not been a party to such “cession and delegation agreement... ”; and
>
> (c) the applicant, as debtor, remains the party responsible for payment of the periodic payments due to the first respondents in terms of the provisions of the “offer of compromise” ‘.

[11] Since the components of the second point *in limine* are intrinsically interwoven with the merits of the application, I propose to deal with them as such.

[12] The bone of contention between the parties is not the offer of compromise, but the alleged delegation. It is contended, on behalf of the applicant, that, as all the creditors to the offer of compromise agreed to, and are bound by, the terms thereof, no further consent is required to effect the delegation which is provided for in clause 12 of the said offer. In amplification, reference is made to *Securicor SA (Pty) Ltd and*

others v Lotter and others 2005 (5) SA 540 (E) which considered section 197 of the Labour Relations Act of South Africa. The portion of the case relied upon reads:

> "section 197 of the Labour Relations Act makes inroads on the common law principle that a contract of employment may not be transferred without consent of the employee, but it does not in my view confer any greater or lesser reciprocal rights and obligation upon either the employee or new employer than that which existed between the employee and the old employer"

It is thus not necessary, the argument continues, for the applicant to obtain further consent from the creditors as represented by the first respondents since such requirement for consent was done away with by the agreement embodied in the offer of compromise, in terms of clause 12 thereof. This raises the question whether the requirement of the creditors' consent was done away with by virtue of the agreement contained in the offer of compromise, as read with the provisions of clause 12 thereof. For reasons to follow, the answer is definitively in the negative.

[13] It seems likely that the passage relied upon by the applicant's legal representative from *Securicor's case, supra,* which was decided pursuant to the Labour Relations Act of South Africa, could have introduced an element of confusion vis-a-vis the requirements of delegation. In *Froman v Robertson* 1971 (1) SA 115 (AD), the Appellate Division properly said at 122E-G:

> "There is no doubt that generally speaking, a contractual obligation cannot effectively be transferred from the debtor to a third person by agreement unless the creditor consents thereto and agrees to accept the third person as his debtor in substitution of the original debtor...Such a transfer, therefore,

involves the concurrence of the three parties concerned and is properly termed a 'delegation' which is a species of novation ... Although the term 'cession' is sometimes used with reference to a transfer of obligations, particularly in cases where it is sought to substitute some third person for a party under a contract containing reciprocal rights and obligations, this is strictly a misnomer in that ordinary rights can be ceded and obligations not"

In *Jacobsz v Fall 1981 (2) SA 863*, the following passages were quoted with approval at 869A-B:

"'it is trite law that as a general rule rights may be ceded by a creditor without the consent of the debtor, but obligations may not be delegated by a debtor without the consent of the creditor'. Watermeyer, J (as he then was) said in *Milner v Union Dominions Corporation (SA) Ltd 1959 (3) SA 674 (C) at 676F:*

'It is trite law that generally speaking, rights may be freely ceded without reference to the debtor, but that obligation may not be handed over to someone else without the concurrence of the creditor'. Broome JP in *Morning & Cullen v King* 1954 (2) SA 51 (N) at 54A'."

Christie summarised the term 'delegation' well in Christie, *The Law of Contract in South Africa,* 5th Ed, in these terms, at 462:

"Delegation

Delegation is a form of novation by which, by agreement between all concerned, a third party is introduced as a debtor in substitution for the original debtor, who is discharged. Its nature was well expressed by Mullin J in Van *Achterberg v Walters* 1950 (3) SA 734 (J) at 745:

'This was no mere consent to a cession of rights under the lease leaving the obligations of the lessee (Stohr) unimpaired and involving no privity of contract between the appellant and the respondent.(Cf Wessels, *Law of Contract*, vol 1, section 1721). Stohr was being

> discharged and a new debtor taken in his place. This was a novation by way of delegation and necessitated a new contract to which the creditor, the original debtor and the debtor proposed in his place had all to be parties. The creditor has to agree to accept the new debtor in place of the old. ... the agreement may be that the new debtor shall be bound by all the conditions, which were binding on the old debtor, or there may, as here, be a variation of the conditions; but there can be no novation by delegation (of which the assignment of rights and liabilities under a lease is an example) without agreement between the creditor and the assignee. If this agreement is recorded in writing the ordinary rules precluding the variation of written agreements by oral evidence must apply.'
>
> The essence of delegation being the intention to transfer the burden of the debt irrevocably from the original to the new debtor, it follows that after it has taken place the creditor can sue the new but not the original debtor".

[14] In the light of the aforegoing, what transpired in the present case may be categorized as a poor attempt at achieving delegation. It is apparent that the applicant assumed, quite wrongly, of course, that exercising the power of delegation conferred by clause 12 of the offer of compromise, without actually obtaining the consent of the creditors (represented by the first respondents), was enough! In the circumstances, the creditors were kept out of the picture in so far as the purported delegation was concerned. Evidently, it was not enough for the third party (Weatherly SMF St. Lucia Ltd) to accept to take on the applicant's obligations as 'proposer' in terms of the offer of compromise, in the absence of the creditors' consent of the third party as a worthy substitution. In other words, there was no tripartite contractual relationship involving the creditors – whose consent mattered the most – the applicant who was not only the debtor but also the 'proposer' and the third party by

way of a substitute. In conformity with the general rule, while the creditors' rights may be freely ceded without reference to the debtor, the debtor's obligations can not be assigned to a third party without the consent of the creditor.

[15] Ultimately, therefore, the applicant's obligations in the matter remain intact as the purported delegation came to nothing. In view of the conclusion I have come to, it is unwarranted to consider a further issue raised by the first respondents, namely that the purported delegation lacked authority (it being submitted that Roderick John Webster, the applicant's chief Executive officer who signed the agreement on behalf of the applicant as well as on behalf of Weatherly SMF St. Lucia Ltd, did not have authority to have entered into the cession and delegation agreement, either on behalf of the applicant or on behalf of Weatherly SMF St. Lucia Ltd).

[16] In the result, I make the following order:

1. The first respondent's first point *in limine,* namely, that the application is not an interlocutory application but a substantive one is unsuccessful;

2. The first respondents' second and principal point *in limine*, namely, that the applicant has failed to make out a *prima facie* case (as the purported delegation was a sham) is upheld.

3. The applicant's application to set aside the writ of execution or alternatively, to suspend it, is, therefore, refused with costs.

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SILUNGWE, AJ

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