

SOUTH AFRICA / JUDGMENT

Baphalaborwa Projects CC v T and L Civil Electrical Contractors CC and Others (45610/2018) [2024] ZAGPJHC 630 (8 July 2024) [2024] ZAGPJHC 630

COURT

South Gauteng High Court, Johannesburg

BEFORE

K Strydom

CASE / FILE NUMBER

45610/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 45610/2018

1. REPORTABLE:

NO

2. OF

INTEREST TO OTHER JUDGES: NO

3. REVISED:

NO

8 July 2024

In

the matter between:

BAPHALABORWA PROJECTS
CC
APPLICANT
and
T & L CIVIL
ELECTRICAL CONTRACTORS CC
1ST RESPONDENT
THE SHERRIFF OF THE
JOHANNESBURG EAST
2ND RESPONDENT
STANDARD BANK OF SOUTH
AFRICA
3RD RESPONDENT
ORDER

1. The usual forms
of notice and service are dispensed with and the Application is
regarded as one of urgency in terms of
Rule 6(12) of the Uniform
Rules of the Court.
2. The attachment
of the bank account at Standard Bank Account number 0[...] is
irregular and is set aside
3. The 2nd
Respondent is ordered to, within 2 hours of service of this order,
release the account attached at Standard Bank Account number
0[...]
4. In the event
that the 2nd Respondent fails to comply with paragraph 2
supra, the 3rd Respondent is ordered to restore full
title, access and use of the bank account of the Applicant
under number 0[...]
to the Applicant.
5.
The 1st
Respondent is ordered to
pay the Applicant's costs on an attorney-own client scale.

JUDGMENT

K. STRYDOM, AJ

Introduction

1. The Applicant, on an urgent basis, applied for a stay of execution, however during argument it became apparent that the relief sought is rather for an order setting aside the attachment of its bank account held by the 3rd Respondent, by the 2nd Respondent pursuant to a writ issued by the 1st Respondent.

2. In 2018, following a building contract dispute, an adjudicator has made an award in favour of the first Respondent. On the 30th of June 2023, this Court ordered that the Applicant is bound by the Adjudicator's determination and ordered it to effect payment of R2 626 285,93 to the 1st Respondent in terms thereof.
3. An application for leave to appeal was filed by the Applicant on or about the 13th of June 2023.
4. On the 20th of March 2024, the First Respondent issued a writ directing the 2nd Respondent to "...attach, remove, and take into execution the movable goods/property..." of the Applicant and to realise same at public auction for the amount due. ("the first writ").
5. The return of service read as follows:

On this 02 day of April 2024 at 11:38 I served this WRIT OF EXECUTION AND ORDER upon..., apparently a responsible employee and apparently not less than 16 years of age, in control of the principal place of businessby handing to the firstmentioned a copy thereof after explaining the nature and exigency of the said process.

RULE 4(1)(a)(v)

I was unable to make an attachment at the given address as the defendant is renting a fully furnished property..... She stated that the defendant has no feed property and the vehicles are still under bank finance.....

Further, it is hereby certified that at the above address, the amount of R2 616 285 93 had been demanded from financial manager. Financial manager, however, informed that she had no money or attachable assets to satisfy the said warrant or a portion thereof No movable goods/ disposable assets were pointed out either, or could be found by me: after a diligent search and enquiry at the given address.

Therefore my return is one of NULLA BONA, in respect of the given address, it is not known whether Defendant has any assets at any other address.

It is hereby further certified that financial manager has been requested in terms of section 66(8) to declare whether she has any immovable property which is executable on which the following answer had been furnished: Defendant has no fixed property.

6. On the 14th of May 2024, the 1st Respondent on an urgent ex parte basis approached this Court for an anti-dissipation order interdicting and restraining the Applicant from withdrawing or transferring any amounts and generally conducting any debit transactions from its bank accounts. The application was dismissed for lack of urgency. According to the answering affidavit, in dismissing the application Fisher J "...reasoned that the application should not have been an ex parte application, the application was not urgent, the 1st Respondent has an alternative remedy to simply issue the relevant writ against the Applicant."

7. On the 7th of June 2024 the 1st Respondent issued a writ directing the 2nd Respondent to attach and take into execution the amount of R2 616 285.93, held in the bank account of the Applicant by the 3rd Respondent. The return of service, dated 14 June 2024 indicates that it was served on a team leader of the 3rd Respondent by handing a copy and explaining the nature and process thereof in terms of Rule 491(a)(v). The account was duly attached. (“the second writ.”)
8. On the 29th of June 2024, the 3rd Respondent informed the Applicant that the account had been so attached.
9. On the 2nd of July 2024, the present application was launched.

Issues

10. As the account attached is a company account from which staff salaries are to be paid, I held that the Applicant succeeded in proving urgency.
11. The Applicant primarily argued that, as leave to appeal had been filed, the 1st Respondent was barred from execution by virtue of the provisions of Section 18(1) of the Superior Court Act 10 of 2013.
12. The Respondent argues that the application for leave to appeal has lapsed and therefore no longer constitutes a bar to execution in terms of the judgment. As a result it argued that the Applicant did not meet the requirements for an application to stay execution, not for the granting of an interdict.
13. Having briefly perused the papers, prior to hearing argument, I drew the parties attention to the provisions of Rule 45(8) in respect of attachment of incorporeal properties and afforded them an opportunity to have regard to same insofar as it affected the regularity of the present attachment by the 3rd Respondent.

Arguments and findings

“Lapsing” of the leave to Appeal

14. The 1st Respondent seemingly conflated the provisions relating to appeals with those relating to leave to appeals. Rule 49(1)(b) requires that an application for leave to appeal be filed within 15 days of judgment, failing which, the Court may, on good cause shown extend said period (i.e give condonation).
15. “Lapsing” is mentioned in the Rules within the context where leave to appeal has been granted and the Appellant failing to within 60 days after delivery of the notice to appeal, apply for a date for hearing of the appeal (Rule 49(6)(a)).

16. Contrary to argument by counsel for the 1st Respondent, Rule 49 does not oblige the Applicant to set the leave to appeal down for hearing within a specified period. As it will be relevant for my finding on costs, the practice directives of this division provide recourse to a party in cases where it asserts the leave to appeal procedure is followed purely for purposes of delaying execution:

“33.10. If the applicant does not apply for the allocation of a date for hearing of the application for leave to appeal within a period of 7 days after the judgment has become available, the respondent may so apply. The application is made by directing a letter to the registrar in charge of civil appeals. At the same time the respondent must upload a copy of the judgment to the electronic court file. The respondent must forthwith forward a copy of the letter to all the other parties to the application for leave to appeal.”[1]

17. The application for leave to appeal accordingly has not “lapsed” and the 1st Respondent is barred from proceeding with execution by virtue of the provisions of Section 18(1) of the Superior Court’s Act.

Regularity of the attachment

18. Even though my finding supra is dispositive of the merits of the application, a brief analysis of the regularity of the attachment itself is necessary.
19. Attachment of a bank account in terms of Rule 45(8) would only be complete once the sheriff has taken possession of the writing or document that evidences ownership of the property or the right, and requires notice to all interested parties.
20. In casu, the 1st Respondent, despite being granted the opportunity to do so, could not provide proof that the Sherriff had taken possession of the writing or document that evidences ownership of the bank account.
21. Secondly, it was not disputed that the Sherrif had not given notice of the attachment to the Applicant. The peremptory nature of this provision was confirmed in *Riordan v First National Bank Limited and others*:^[2].

“[9] The provisions of Rule 45(8)(c) make it perfectly clear and peremptory that the attachment of incorporeal property, such as in the instant matter, (funds in a bank account), shall only be complete when notice of the attachment has been given in writing by the Sheriff to all interested parties.”

22. A further concern is the specificity of the wording of the second writ. As was held in *MEC for The Department of Public Works and Others v Ikamva Architects and Others*^[3]:

“[73] Put differently, the purpose of Uniform Rule 45(8) is simply to authorise attachment of a particular class of property (incorporeal rights) where the judgment creditor previously first had to obtain the leave of the court to execute against such property,⁸⁰ and to regulate the way incorporeal rights are attached. What it does not do, is to give the judgement creditor the right to choose which of the judgement debtor’s movable property must be attached by the sheriff. The rule, in other words, does not serve as authority for the judgement creditor to choose to only attach a particular incorporeal right

belonging to the judgment debtor, and to authorise the registrar to issue a writ that limits the authority of the sheriff to the attachment of specific movable incorporeal property. Subrule (8) cannot derogate from the issuing of a writ as envisaged in subrule (1), in substantial compliance with Form 18.”

“[75] The writ is the source of the sheriff’s authority for all actions taken pursuant to the writ.[86] The sheriff derives authority to act from the writ itself and enjoys no residual authority. The manner in which the writ was framed in this instance undoubtedly contributed to the sheriff failing to comply with the proper process during execution. As indicated, the sheriff in this case was ‘Directed to attach and take into execution sufficient funds in the Department of Health’s Standard Bank account’ (own emphasis) and proceeded accordingly. There is no suggestion that the department was afforded the opportunity, in terms of Uniform Rule 45(3), to point out sufficient movable property, other than the bank account, to satisfy the writ. A judgment debtor should not be deprived of this opportunity before the sheriff searches for property and proceeds to attach so much of the judgment debtor’s movables as is sufficient to satisfy the writ.”

23. Insofar as the 1st Respondent was of the view that the second writ was a “re-issue” of the first, they are clearly mistaken. There had been a time lapse of more than two month’s between the first and the second writs. The nulla bona status of the first writ did not countenance non compliance with provisions of Rule 45(3) when issuing the second writ in terms

of Rule 45(8).

24. Counsel for the 1st Respondent submitted that it was entitled to direct the Sherriff to attach the bank accounts specifically by virtue of the provisions of Rule 45(12)(a). Neither the Sherriff’s return, not the writ issued, gives an indication of which subrule was intended. The two subrules are distinct and cannot be used in conjunction with each other.
25. Rule 45(8)(c) does not envisage the attachment of actual monies but rather the right to the money in the bank account, which right must be realised by its sale at a sale in execution.[4] Rule 45(12)(a), on the other hand creates a garnishee procedure, dealing with execution against debts which are accruing to the

judgment

debtor. As was stated in Ikamva:

“The subrule obliges the debtor of the judgment debtor, referred to as ‘the garnishee’ to pay the amount it owes to the judgment debtor directly to the judgment creditor. Payment by the garnishee operates as a discharge pro tanto of the garnishee’s obligation to the judgment debtor. Should the garnishee refuse or fail to comply with a notice delivered to it by the sheriff requiring payment by the garnishee to the sheriff, the sheriff must notify the judgment creditor, who may then call the garnishee to appear before court to show cause why he should not be ordered to make payment to the sheriff. An attachment in terms of subrule (12) does not envisage the sale of the right that underlies the debt owing or accruing by way of a sale in execution.”

26. The writ of execution clearly indicates that the Sherrif was directed to “..attach and take into execution...” the amount due as held in the bank account and to “..pay the sum plus costs...” to the 1st Respondent. From the wording it is evident that attachment in terms of Rule 45(8) (c) was required and not in terms of Rule 45(12)(a). In any event, even if Rule 45(12)(a) was intended, there is no evidence the requirements of such attachment had been fulfilled.
27. By virtue of the aforementioned, the attachment of the Applicant’s bank account by the 2nd Respondent was irregular.

Costs

28. The 1st Respondent has argued that, should I grant the application, no order should be made as to costs, alternatively that costs should be on a party and party scale with Counsel’s fees at Scale A. It was submitted that all steps taken by it were done in a bona fide attempt to enforce payment of an award which was due to it. Great emphasis was placed on the fact that the Applicant has attempted to frustrate its entitlement to payment by inter alia, failing to timeously set the leave to appeal down for adjudication.
29. The Applicant contends for costs on a attorney client scale as the 1st Respondent has blatantly flouted the provisions of the Rules.
30. The 1st Respondent had first attempted to obtain an anti-dissipation order before Fisher J on an urgent ex parte basis. No mention of the leave to appeal application or the alleged lapsing thereof was made in that application. Any mention by the esteemed Judge Fisher to a re-issue of the writ (if in fact made) should be understood within that context. The bona fides of bringing the application without full disclosure of this fact is highly dubious.
31. Unable to find satisfaction in the ex parte application, the 1st Respondent then instructs the Sherriff to irregularly execute against the Applicant’s bank account. No notice is given of the attachment to the Applicant. The effect is that the 1st Respondent obtains its relief sought in the ex parte application by employing such an irregular stratagem.
32. The notice of motion in casu warned the 1st Respondent that, should they oppose, costs on an attorney own client scale would be sought against them. Despite the founding affidavit in the present application pertinently indicating that the first Respondent was barred from execution by virtue of the filing of the application for leave to appeal, the 1st Respondent, on the 4th of July 2024, still opposed the present application. Their reliance on the “lapsing” of the leave to appeal was blatantly misguided.
33. Insofar as the Applicant may have been recalcitrant in pursuing the leave to appeal application, the 1st Respondent could have, in terms of the practice directives have applied for a date for hearing thereof. Instead, it embarked on a course of what can only be described as impermissible self-help.
34. In *Mkhatshwa and Others v Mkhatshwa and Others*,^[5] the Constitutional Court explained the rationale behind costs on an attorney-own client scale as follows:

“[20] The primary underlying purpose of any costs award is to minimise the extent to which a successful litigant will be out of pocket as a result of litigation that she or he should not have had to endure. Indeed, this Court has recognised that costs orders often do not even achieve this objective, and fall short of assisting the successful litigant in fully recovering her or his expenses. It follows that, at times, it may be just and equitable to award costs on a punitive scale, not just to punish vexatious litigation, but also to assist the successful litigant in recouping their often substantial expenses.”

35. In casu, the attachment of the Applicant’s bank account was not only impermissible but also highly irregular. I can see no reason why the Applicant should not be fully indemnified for the needless expense incurred in having to bring the present application.
36. As a result, the following order is made:
4. In the event that the 2nd Respondent fails to comply with paragraph 2 supra, the 3rd Respondent is ordered to restore full title, access and use of the bank account of the Applicant under number 0[...] to the Applicant.
5. The 1st Respondent is ordered to pay the Applicant’s costs on an attorney-own client scale.

K STRYDOM

ACTING JUDGE OF THE

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Judgment

reserved: 5 July 2024

Judgment

delivered: 8 July 2024

Appearances:

For the Applicant:

Adv JSC Nkosi

Instructed by: Siwani Attorneys c/o Maboyi Glenco Attorneys

For the Respondents:

Adv Nevhutanda

Instructed by: Myburgh Relenala Attorneys c/o Mulamula Attorneys

[1] REVISED CONSOLIDATED PRACTICE DIRECTIVE 1 OF 2024 COURT OPERATIONS IN THE GAUTENG DIVISION with effect from 26 February 2024 (amended on 12 June 2024)

[2]

[2014] ZAGPJHC 195 (1 September 2014)

[3] MEC for The Department of Public Works and Others v Ikamva Architects and Others (235/2021)

[2022] ZAECBHC 13; [2022] 3 All SA 760 (ECB); 2022 (6) SA 275 (ECB) (17 March 2022). (“Ikamva”) The recent SCA decision in this matter did not deal with this aspect of the full Court’s judgment. See: MEC for Department of Public Works and Others v Ikamva Architects CC and Others (867/2022) [2024] ZASCA 95 (13 June 2024)

[3] MEC for The Department of Public Works and Others v Ikamva Architects and Others (235/2021)

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[4] Ormerod v Deputy Sheriff, Durban 1965

(4) SA 670 (D) at 673C-H, approved in Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd 2004

(1) SA 284 (SCA) para 6.

[5] Mkhathswa and Others v Mkhathswa and Others [2021] ZACC 15 – references omitted

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