

SOUTH AFRICA / JUDGMENT

Boundary Spar Supermarkets (Pty) Ltd v Brown and Others (J2456/16) [2016] ZALCJHB 435; (2017) 38 ILJ 2337 (LC) (15 November 2016) [2016] ZALCJHB 435

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

J2456/16

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THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Of interest to other judges

Case no: j 2456/16

In the matter between:

BOUNDARY SPAR SUPERMARKETS (PTY) LTD Applicant and BROWN, E First Respondent
SIMANGU, V Second Respondent SMITH, S Third Respondent THE COMMISSION FOR
CONCILIATION, MEDIATION & ARBITRATION Fourth Respondent THE SHERIFF FOR LENASIA
NORTH Fifth Respondent KHUMALO, O Sixth Respondent THE SOUTH AFRICAN BOARD OF
SHERIFFS Seventh Respondent

Heard: 10 November 2016

Delivered: 15 November 2016

Summary: (Effect of order suspending writ and staying steps in execution – difference between a
staying further steps in execution and suspension of the writ per se)

REASONS

FOR JUDGMENT

LAGRANGE J

Introduction

- [1] This application is brought on an urgent basis. The order in this judgment set out in paragraphs [21] to [24] below was handed down on 15 November 2016. What follows are my reasons for the order made. It flows from a previous urgent application heard on 25 October 2016 in which the following substantive order was made:

“2. Pending the rescission application before the fourth respondent under case number GAJB 2974-16, the fifth respondent is restrained and interdicted from execution of any of the property of the applicant under the writ of execution held under case number GAJB 2974-16.

3. The writ of execution issued under case number GAJB 2974-16, is suspended and that any execution steps are stayed pending the outcome of the rescission application under case number GAJB 2974-16.

- [2] In this application, which the applicant says is simply a consequential urgent application following the non-compliance of the fifth respondent, the sheriff for Lenasia North, Mr O Khumalo (cited as the sixth respondent in his personal capacity), with the order handed down on 25 October 2016, the applicant seeks an order in the following terms on an urgent basis:

2.1 directing the fifth and sixth the respondents to return to the applicant a Golf GTI with registration number PW680 GP, owned by the applicant.

2.2 Directing the fifth and sixth respondent to pay the applicant the sum of R 8000.00.

2.3 A rule nisi be issue depending on the return date calling upon the respondents to show cause, why an order should not be made in the following terms:

2.3.1 that the fifth and sixth respondents are in contempt of the order of this court issued on 25 October 2016;

2.3.2 that the fifth and sixth respondents jointly and severally pay a fine as determined by this court, at the hearing of this matter;

2.3.3 directing the seventh respondent to investigate complaints of improper conduct by the fifth and sixth respondents in terms of section 44(1) of the sheriffs Act 90 of nineteen eighty-six; that the first and sixth respondents pay the applicant's costs.

- [3] No relief was sought against the first, second and third respondents. However, they all opposed the application as did the fifth and sixth respondents.

Urgency

- [4] In essence, the applicant contends that it obtained relief on an urgent basis when the order was handed down on 25 October and that the relief it obtained on an urgent basis is being denied because of the obstructiveness of the sheriff. It further claims that it acted promptly to ensure that effect was given to the order once it was handed down. Thus, the following

day the applicant attempted to retrieve the vehicle from the sheriff, but the sheriff said he was not prepared to return the vehicle and that he would not be threatened to do so. This led to a letter been sent by the applicant's attorney on 27 October in which the applicant's

rights to repossess the vehicle was asserted as well as its right to a refund of R 8000, which the applicant had paid to the sheriff who had purportedly demanded such payment as cover for his fees. The applicant warned that if the vehicle was not returned and the money refunded by the following day that, it would institute contempt proceedings.

[5] The sheriff took the letter of demand very personally and sent off a letter in reply the same day. In his letter he claimed that the applicant's attorneys were dragging his name through the mud and undermining his office. He then proceeded to explain that in the absence of the court expressly ruling that he had to return the vehicle or refund any money, the court order merely

prevented him from proceeding further with the execution of the writ pending the outcome of the rescission application at the CCMA.

[6] On 31 October, the applicant responded reiterating its demand and also disputed that the sheriff was entitled to use the R 8000 to defray his costs, as his letter appeared to suggest. In his letter, the sheriff had stated: "I further point that during the execution I hire contractors to assist with removal and they have accordingly been paid." (emphasis added). What particularly alarmed the applicant was that, the vehicle had been delivered to the premises of the sheriff by the applicant and no other goods had been removed. Moreover, it appeared that the sheriff was of the view that he was entitled to use the R 8000.00 to defray expenses before any fees he might levy had been subject to taxation. This was evident from an earlier letter he had written to the applicant on 21 October in which he had stated: "I will not be threatened by debtors in the execution of my duties. The payment of R8000.00 is for my costs and will not be refunded." I note in passing that the sheriff made no mention of the money being held in trust at that stage and the sentiment expressed does not suggest someone who is just preserving funds as security.

[7] This application was launched on 1 November

2016. I am satisfied that given the time between the order been handed down on 25 October and the launching of the application, that the applicant was not dilatory and that it held a bona fide belief that the sheriff was acting in breach of the order it had obtained on that date on an urgent basis. In the circumstances I am satisfied that the application should be heard on an urgent basis.

Merits

Refund of R 8000.00

- [8] The applicant claimed that it had only paid the sheriff R 8000.00 because the sheriff demanded that amount for his fees under threat of removing more critical assets of the applicant. The applicant had only been able to persuade the sheriff not to remove its cash registers which were clearly essential for the conduct of its business when it persuaded the sheriff to accept the attachment of the vehicle. It is concerned that the sheriff may utilise the money which she is supposed to hold in trust, before he is entitled to levy any charge against it.
- [9] The sheriff claims that at the time that the vehicle was handed to him by the applicant that he advised that the applicant was liable for the execution costs which included storage costs and that this amount was estimated at R 8000.00. The applicant was advised to pay the money to the sheriff's trust account which he did. In his answering affidavit, he reaffirms that she is liable to pay contractors from the proceeds of execution and asserts that if the applicant is of the view that the amount of R 8000 is high, they should request the cost of execution be referred for taxation. The applicant points out that the amount of 8000 is considerably higher than the sheriff's own estimate of costs in mid-October, which amounted to 3500 of which, a fee of 3000 was estimated for towing, a cost which the sheriff did not actually incur because the vehicle was delivered to him by the applicant. In his replying affidavit, the sheriff makes no attempt to explain the discrepancy or to that, the amount also took account of storage costs. In this regard, it was submitted by his attorney that the reference to the R 8000.00 "excluding" storage costs in the sheriff's answering affidavit should have read "including", but there is no affidavit explaining this apparent error.
- [10] In terms of s 143(5) of the Labour Relations Act, 66 of 1995 ('the LRA'), for the purpose of enforcing or executing an award, the award must be treated as if it were an order of the Magistrate's Court. Rule 39 (1) of the magistrates' court rules state:

"(1) Unless otherwise ordered by the court, the costs and expenses of issuing a warrant and levying execution shall be a first charge on the proceeds of the property sold in execution and may so far as such proceeds are insufficient be recovered from the execution debtor as costs awarded by the court."

In the circumstances, it is difficult to understand on what legitimate basis the sheriff could demand payment of the cash amount of R 8000-00 over and above the attachment of the vehicle the value of which amply covers the value of the award (R 114, 064.51) and costs in the amount of R 8000-00. The fact that the sheriff kept emphasising his liability to pay contractors, raises a reasonable

apprehension that he might use the R 8000-00 to reimburse himself for any costs incurred before any proceeds had been received from the sale in execution, should that occur. Moreover, in terms of the instruction issued to the sheriff by the CCMA to execute the award, the CCMA makes it clear that in the event the sheriff is unable to recover all his costs the CCMA will pay his reasonable costs on receipt of a detailed invoice.

- [11] Moreover, it is not for the judgement debtor to have to dispute the amount of R 8000.00 in anticipation of the sheriff incurring such costs and levying them against the amount held in trust. No costs due and owing by the applicant until such time as a sale in execution has taken place and the sheriff has been unable to recover his costs from the sale of execution and has demanded payment of any shortfall from the applicant on presentation a taxed bill of costs.

Return of the vehicle

- [12] As mentioned above, the applicant delivered the vehicle to the sheriff for the purposes of attachment. It seems the sheriff had previously intended to attach and remove the applicant's cash registers, which obviously would have prevented the applicant from trading. Although the vehicle was ample security for the award, the applicant clearly considered it a lesser evil to leave that as security with the sheriff than equipment critical to the conduct of its business. For present purposes all that matters is that the vehicle was being held as security by the sheriff.
- [13] The crux of this matter, which also affects the sheriff's right to retain the R 8000.00, leaving aside the dubious claim he made to reimburse himself, is the interpretation of the urgent order set out at paragraph [1] above. Simply put, the sheriff argued that the effect of the order was simply that the status quo at the time of the order being made in relation to the steps already taken to execute the award up to that point remained as it was and he was merely prevented from taking any further steps in the execution process. Consequently, he was still entitled to retain possession of the vehicle and monies made over to him by the applicant, assuming in regard to the latter that he actually had no intention of reimbursing himself immediately for costs incurred from the cash but intended to keep it in trust.
- [14] The applicant on the other hand argues that the order required the sheriff to immediately uplift any attachment of its goods and monies and return the same to it.
- [15] Before turning to the interpretation of the order, it is important to emphasise a couple of legal principles in the law pertaining to the execution of writs. Firstly, the process of execution is an ongoing one.

"Mr Strauss submitted that, once a writ has been executed, there is no execution which can be stayed.

I cannot agree. In the first place execution is a continuing process and is not complete until the judgment creditor is placed in

possession of that which the court has awarded him. Thus, in a judgment sounding in money, not until the goods of the judgment

debtor, where necessary, have been attached, removed, the sale in execution duly advertised, the goods sold, and the proceeds, if sufficient, paid over to the judgment creditor. An example is the case of *Swanepoel v Roelofz and Others* 1953 (2) SA 524 (W) where in pursuance of a writ of execution certain fixed property of the judgment debtor was attached and actually sold in execution but, before transfer could be effected in the name of the buyer, the Court interdicted such transfer. Execution was not yet complete.”[1]

Thus, once a writ is issued, a chain of events constituting the execution process is set in motion. In this matter, the process had reached the stage where goods and cash had been attached and were being held in the custody of the sheriff. Secondly, the effect of an attachment is to create a judicial lien over the property attached, which has been expressed thus:

“I can do no better than to refer to I the judgment of His Lordship Mr Justice Kotzé in Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co 1922 AD 549 at 558 - 559:

'It will also be desirable, before referring to s 201 of the Companies Act, to consider the law on the subject of the right possessed by a judgment creditor who has arrested the goods of his debtor under a writ of execution. While an ordinary arrest of property under the Roman-Dutch law gives no preference, an J arrest effected on property in execution of the judgment creates a pignus praetorium or to speak more correctly, a pignus judiciale , over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court. They pass out of the estate of the judgment debtor, so that in the event of the debtor's insolvency the curator of the latter's estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent's estate.”[2]

(emphasis added)

[16] Thirdly, the source of the sheriff's authority for all the actions taken pursuant to the writ is the writ itself. In *Weeks and Another v Amalgamated Agencies, Ltd* [3], the A.D. said in respect of the Messenger of the court who fulfilled the function of the Sheriff at that time:

“Now the Messenger is an officer of the court to executes the orders of the court. v Leeuwen ad Peckium: Deel XXIV.2 says of the Deurwaerders, The Messengers of the Higher Courts (but the principles also apply to Messengers of the Lower Courts) : ‘Sunt enim executors, manus regis et ministeriales judicis.’ And Voet (V.i.62), speaks of them while discharging their functions as representing the Judge ‘cujus mandato instructi sunt.’ But he points out that they are not protected and may be resisted when they either have no mandate will go outside the limits of their authority (mandates fines). ... The writ is the authority of the Messenger for the attachment, and as all arrests are odious he must at his peril remain strictly within the four corners of the writ,(v Leeuwen R. – D. Law V. vi. 12).”

I am not aware of any residual authority the sheriff has to retain custody of the property of the judgment debtor in the absence of a writ he is entitled to enforce, and none of the respondents' representatives could explain to me what the source of such authority could be. It is difficult to understand how the judicial lien on the applicant's property created by the writ, can remain legally effective unless the court order clearly intended that.

[17] Often in cases like this, the court will merely stay any further steps being taken in the execution of the writ without actually suspending the operation of the writ itself. In such instances, the court is merely pausing the execution process subject to it possibly proceeding at a later date if certain conditions are met or certain events occur, all of which will be identified in the order. Two uses of the word ‘stay’ are worth bearing in mind here, viz:

“I. verb intrans. 1 a cease going forward; come to a halt. ...

II verb trans. 13. Stop, delay, prevent (an action or process, something which is begun or intended) ; spec in LAW, postpone or prevent the immediate enforcement of (an order)...”[4]

[18] However, in this instance the order not only stayed ‘any execution steps’ pending the outcome of the rescission application but also suspended the writ itself. The words ‘suspend’ and ‘stay’ are often used interchangeably, but they are not necessarily always synonymous. Thus, while a suspension can also merely refer to a temporary deferment of an action, it also can entail holding certain rights or obligations temporarily

unenforceable. Thus the OED lists among the many meanings of the ‘suspend’ the following:

“I With ref. to cessation.

1. Verb trans. Debar, esp. temporarily from a function, position, activity, or privilege (Foll by from, of)....
2. Verb trans. Debar, esp temporarily; bring to a (temporary) stop; put in abeyance; make temporarily inactive....”

What these meanings convey is that suspension also can refer to halting a state of authority. This potestative connotation of the word ‘suspend’ gives it a character which goes beyond merely pausing an action in progress. The order in question used both words and suspended the writ, the source of the sheriff’s power for anything done pursuant to the writ.

[19] Although the order did not expressly order the sheriff to return the vehicle or the cash, the suspension of the writ, as opposed to its mere stay, deprived the sheriff for the duration of the suspension of the authority to exercise the court’s lien on the property. At the very least he had no current legal basis for retaining the property without the applicant’s consent. If the suspension of the writ is lifted, nothing prevents the sheriff from proceeding to re-attach property under the writ because his authority to pursue the execution will have been restored. Consequently, I am satisfied he was obliged to return the applicant’s

vehicle and the cash that should have been held in trust once the applicant demanded it be returned.

[20] I accept however that the sheriff might in good faith, have misconstrued the effect of the order and for that reason I will not refer his action in refusing to return the property to Board of Sheriffs. Nevertheless, I note that the combative tone in some of the sheriff's correspondence to the applicant's attorneys was unwarranted and was inappropriate for an officer of the court fulfilling an enforcement function of the court, who ought not to become personally invested in the matter.

Order

[21] The normal forms and time periods contained in the Rules of this court are dispensed with and the application is dealt with as one of urgency.

[22] The fifth and sixth respondents must immediately return a Golf GTI with registration number VPW 680 GP to the applicant.

[23] The fifth and sixth respondents must immediately refund the applicant the sum of R 8000-00 (eight thousand rand).

[24] The parties must all pay their own costs.

Lagrange J

Judge of the Labour Court of South Africa APPEARANCES

APPLICANT:

APPLICANT:

A G Heyns instructed by Garden-Stewart Attorneys

FIRST & THIRD RESPONDENTS: D Brown instructed by Khumalo Attorneys

SECOND RESPONDENT:

M Khumba of Khumalo Attorneys

FOURTH & FIFTH RESPONDENTS: G Mathopo of Mathopo Attorneys

[1] O'Sullivan v Mantel & Another 1981 (1) WLD 664 at 667.

[2] Simpson V Klein No And Others 1987 (1) SA 405 (W) at 408I-409A. See also Reynders V Rand Bank Bpk 1978

(2) SA 630 (T) at 635D-F.

[3] 1920 AD 218 at 225.

[4] Shorter Oxford English Dictionary, OUP Press, 6th edition at 3010.

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Prepared on 11 October 2026 · Esheria