

SOUTH AFRICA / JUDGMENT

M.H v C.A.H (342/2018) [2023] ZAECKMKHC 10 (12 January 2023) [2023] ZAECKMKHC 10

COURT

Eastern Cape High Court, Makhanda

BEFORE

Rugunanan

CASE / FILE NUMBER

342/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MAKHANDA

CASE

NO: 342/2018

In

the matter between:

M[...]

H[...]

Applicant

and

C[...]

A[...] H[...]

Respondent

JUDGMENT

Rugunanan J

- [1] The applicant, who represents himself, essentially seeks interdictory relief for a stay of execution pending an application to set aside a writ of attachment issued by the registrar of this court on 23 February 2022. The writ directs the sheriff ‘to attach and take into execution the incorporeal property, being the right title and interest in and to the [applicant’s] shares in a business known as Paint City, Port Alfred. The writ describes the business as a private company with registration number 2[...] and address at 4[...] C[...] Street.
- [2] The background culminating in these proceedings appears hereafter.
- [3] In a settlement agreement concluded between the parties and made an order of court on 30 April 2019 (the settlement order), the applicant (as defendant) undertook to pay to the respondent (as plaintiff) post-divorce spousal maintenance at the rate of R10 000 per month. An additional amount of R4 000 for maintenance and education would be paid in favour of one of four sons, then a minor, born of the marriage. At the time of the divorce the parties had a business trading as Paint City in which the respondent held shares approximately valued at R369 000. In the negotiations that culminated in the settlement, the shares were traded for the maintenance order granted in favour of the respondent. This resulted in the applicant acquiring sole ownership of the business. (Parenthetically, the applicant states in his replying affidavit that no formal shares were issued (or transferred) in his favour, and urges this court to deduce that he is the sole board member (presumably intended to mean sole proprietor)).
- [4] During November 2019 and due to lack of financial means as also the applicant’s grievance about legal costs and his protestation that his legal representatives caused him to sign the settlement agreement under duress, the applicant stopped paying the agreed amount of maintenance to the respondent. On his own version the applicant admits that he ‘reneged on payment’. He continued, however, paying the amount due to his son.
- [5] In June 2020 the respondent instituted contempt proceedings against the applicant for his contravention of the settlement order. On 2 November 2020 this court, per Lowe J, granted the contempt application. A coercive order, directing the applicant to pay the respondent the arrear amount of R124 454 in respect of his non-compliance with the maintenance component of the settlement order at the rate of R4 000 per month, was issued.
- [6] In a unanimous judgment of the full court of this division[1] delivered on 4 October 2022 (and from which I have extrapolated the above summary of the background to the matter), an appeal against the order given by Lowe J was dismissed.

- [7] Acting in the belief that the contempt proceedings are inextricably linked to his contention that he was obliged to agree to the settlement on an inflated maintenance amount, the applicant petitioned the Supreme Court of Appeal ('the SCA') for leave to appeal against the finding of the full court. He does so ostensibly on the basis that the petition to the SCA and his efforts in seeking to vary his maintenance obligations in the maintenance court in Wellington are concurrent processes which render the writ of execution *lis pendens*. His argument is that 'if the contempt judgment is overturned, then all the arrears will fall in the same unaffordable category'.
- [8] No detail or proof has been provided as to when the petition was lodged with the SCA, nor at what stage proceedings have reached in the maintenance court. That notwithstanding, I am of the view that the applicant's maintenance obligation as per the order incorporating the settlement of 30 April 2019 remains in force where it has not been varied or set aside by a competent court. The applicant does not appear to grasp that the issue in the contemplated appeal relates to his contempt of the order of court and not his obligation to pay, which obligation remains extant and does not render the writ *lis pendens*.
- [9] Evident from the material before this court is that it is not disputed by the applicant that his maintenance obligation in terms of the agreed order of settlement has not been varied. It is indeed evident from the facts set out in the founding affidavit that the applicant does not dispute the arrear maintenance sum owed, save for his ability to pay. In that regard he does not make candid disclosure as to what he earns from the business or what the value of his shareholding is.
- [10] In motion proceedings it is trite that an applicant must make out its case in the founding affidavit which must contain sufficient facts in itself upon which a court may find in the applicant's favour. The introduction by the applicant of new matter in reply (tangential as it is, and *inter alia* laying emphasis rather on the respondent's scale of living, her reliance on alcohol, and falsifications in a rule 43 application) to address the failing in the founding affidavit does not foster consistency with the contemporary approach adopted by the Constitutional Court in *South African Transport and Allied Workers Union and another v Garvas and others*[2] where it is emphasised that holding parties to their pleadings (in this instance their affidavits) is not pedantry – it is an integral principle of the rule of law and promotes legal certainty by conveying to an opposing party exactly what case they are required to meet.
- [11] Although maintaining that he is unable to provide a valuation of his share in the business, what stands out in the applicant's reply is the following assertion:

'In a forced sale the business will only realise a percentage of the value of stock. The net stock value being in the region of R350 000

after deduction of creditors. By way of example, FNB no longer extends value in a balance sheet for these types of assets when

calculating NAV (Net Asset Value) but in the past would attribute no more than 50%. So if I were to place value right now for the purpose of raising funds urgently I would value at around R175 000. At auction the value raised on this type of asset is around 35% if we are lucky and that is before auctioneer's fees. The sale of the shares will not raise the funds required although I believe they will not sell at all. I do not seek to raise any loans purely because I am of the opinion that neither the business nor I can afford further debt.'

[12] Here too, the detail and insight into the applicant's shareholding is scant and subjective, and even if one may as an exceptional

circumstance[3] allow for the fact that the applicant is a layperson and hence depart from the approach of the Constitutional Court, the applicant's

assertions in reply evince a failure to demonstrate personal inability to pay.

[13] He argues rather that the provisions of section 65(e) of the Magistrates' Courts Act[4] should apply to the high court where section 45 of the Superior Courts Act[5] – which deals with property not liable to be seized in execution – has not come into operation.

[14] Section 65(e) of the Magistrates' Courts Act protects from seizure, attachment and sale, property described as 'tools and implements of trade' in so far as they do not exceed in value the amount of R2 000. Assuming, without deciding, that the relevant provision in the Magistrates' Courts Act does apply, the applicant, neither in argument nor in his papers, has demonstrated that his shares qualify as property falling within the scope of the exemption specified as 'tools and implements of trade'. It is therefore unnecessary to consider the constitutional challenge to the threshold amount of R2 000.

[15] On the material before me indications are that the applicant is cognisant of the eventuality that the writ will enable the respondent to sell off his shares (put otherwise, his interest in the business) to recover monies owing by him in respect of arrear maintenance and costs.

[16] Although this theme pervades the case he presents both in his heads of argument and in his affidavits, the obligation to pay maintenance is not disputed and it is common cause that the order of 30 April 2019 from which the obligation stems remains extant. Accordingly no basis under uniform rule 45A is laid for suspending the writ arising from the execution of that order.

[17] A reading of the notice of motion indicates that the purpose of seeking a stay of execution is for bringing an application to set aside the writ in question. Counsel for the respondent, Mr Miller, correctly submitted that the proper procedure for setting aside a writ of execution is by application to set it aside and not by application for an interdict against its execution.[6]

[18] The applicant's recourse to interdictory proceedings to obtain a stay obliges him to establish, inter alia, that he has a clear right (where a final order is sought) or a prima facie right (where interim relief is sought). The lack of candid disclosure as to what applicant earns from the business (or what the value of his shareholding is) and the fact that the order of 30

April 2019 remains in force do not establish a right, prima facie or otherwise, to the relief being claimed. I also consider that the lis pendens argument, for reasons already dealt with, does not assist the applicant in establishing such a right. Accordingly, where the applicant has failed to establish this requirement, interdictory relief is not competent.[7]

- [19] I turn to the question of costs. Mr Miller, who appears as pro bono counsel for the respondent has submitted in his heads of argument that what the applicant seeks from this court on his perceived basis of equity, is an inequitable order that preserves his property at the expense of the respondent and allows the applicant to avoid his obligations in terms of an order of court to which he has consented and has been found to be in contempt of. On the one hand the applicant opposes the attachment and sale of his shares; on the other hand his papers indicate that he has made a written offer to transfer to the respondent 'full ownership of the business' with stock valued at R450 000 in full and final settlement of maintenance for herself and their son and 'rescission of the contempt judgment and cancellation of all arrears and legal fees'[8]. The illogicality in the applicant's approach is self-evident and necessitates no further comment. Mr Miller submitted further that the application constitutes an abuse of process for the reason that the applicant has been shown to have not made out a case for the relief sought. For these reasons costs on a scale as between attorney and client are sought.
- [20] I do not take issue with these submissions.
- [21] My own observation is that these proceedings are vexatious. They were launched in a notice of motion dated 28 April 2022 directing that the matter be heard on 6 May 2022 as one of urgency on truncated time frames. No certificate of urgency was filed as is required by the rules of practice in this division. The founding affidavit does not explicitly set forth the circumstances that rendered the matter urgent nor does it deal with the issue of substantial redress in due course.
- [22] In response to these failings on issue of urgency, the applicant asserts in reply: 'No application for urgency has been made as I have worked within the confines of the general rules of court'. It bears mentioning that the applicant's conduct by engaging in an exercise of self-help by stopping payments for maintenance invited trenchant comment from the full court, the judgment of which purposely mentions that he demonstrated 'an arrogant attitude'. That attribute of his conduct is similarly evident by his riposte and in his approach to this matter.
- [23] A further manifestation of the applicant's abuse of the process of this court is evident from a filing notice dated 19 October 2022. The notice merely indicates that supplementary evidence is filed in support of the present application and is unaccompanied by a notice of motion. I was not addressed by the applicant on the relevance, if any, of such evidence and given the manner in which the present application was instituted, as also the fact that the applicant was not candid in his affidavits before this court, I have refrained from perusing the supplementary evidence. The evidence is contained in a lengthy affidavit. It is not the

task of this court to search for material which may augment the applicant's case and which should have been properly introduced in his founding papers. Courts are a public resource under severe pressure.[9] It does not bode well for a litigant such as the applicant to introduce matter that may broaden the scope of and unnecessarily

labour the issues for determination while maintaining silence about it. The respondent's argument was confined strictly to the merits of the present application without traversing the supplementary material. On reflection, I think this was a sagacious course to have adopted.

[24] In the circumstances the following order

issues:

The application is dismissed with costs which are to be paid by the applicant on the scale of attorney and client.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

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Makhanda

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Date heard:

17 November 2022.

Date delivered:

12 January 2023.

- [1] M[...] H[...] v C[...] A[...] H[...]l, Unreported Case No. CA 231/2021 (ECD, Makhanda) 4 October 2022.
- [2] 2013
- (1) SA 83 (CC) para 114.
- [3] Bayat and Others v Hansa and Another 1955
- (3) SA 547 (N) at 553D; see also Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another 1980 (1) SA 313 (D&CLD) at 315E-H and 316A
- [4] Act 32 of 1944, as amended
- [5] 10 of 2013
- [6] Erasmus Superior Court Practice, Vol 2 D1-605.
- [7] Sabena Belgian World Airlines v Ver Elst 1980 (2) SA 238 (WLD) at 243A-D.
- [8] Replying affidavit, annexure 'RA10'.
- [9] Savvas Socratous v Grindstone Investments 134 (Pty) Ltd [2011] ZASCA 8 para 16.

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Prepared on 13 October 2026 · Esheria