

SOUTH AFRICA / JUDGMENT

Patel v Netsianda Inc Attorneys and Another (722/2019) [2024] ZALMPTHC 13 (8 February 2024)

[2024] ZALMPTHC 13

COURT

Limpopo High Court, Thohoyandou

BEFORE

BF Gededger

CASE / FILE NUMBER

722/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

LOCAL

DIVISION,

THOHOYANDOU)

CASE

NUMBER: 722/2019

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED.

Date:

08/02/2024

BF

GEDEDGER AJ

In

the matter

between: PATEL
MUSTAKIM
ISMAIL
Applicant
and
NETSIANDA
INC
ATTORNEYS
First
Respondent
THE
SHERIFF: THOHOYANDOU
Second
Respondent

JUDGMENT

GEDEDGER AJ:

- [1] This application follows an order granted by this division on 10 February 2020 in terms of which the Defendant in the proceedings, namely the Road Accident Fund, conceded merits 100% in favour of the Plaintiff, who is now the Applicant in these proceedings.[1]
- [2] It is common cause that the Applicant (Plaintiff in the action proceedings) was legally represented by the First Respondent (Netsianda Inc Attorneys) as his attorney of record during the trial proceedings.[2]
- [3] It is not in dispute that during merits stage of the action proceedings the Applicant had struggled to get feedback regarding the proceedings as he could not get hold of his legal representatives (Netsianda Inc Attorneys).[3]
- [4] Due to the afore stated difficulties, the Applicant as the Plaintiff caused the litigation mandate he had previously give to Netsianda Inc Attorneys to be terminated.[4]
- [5] Thereafter on 24 August 2020, the Applicant as the Plaintiff appointed Makamu & Munyai Inc as his attorneys of record and tasked them with the mandate to finalise the remainder of the litigation, specifically the quantum proceedings.[5]
- [6] Subsequent to the above mentioned termination of mandate, an arrangement was made between the Applicant's present attorneys of record (Makamu & Munyai Inc) and his erstwhile attorneys (the First Respondent), in terms of which Makamu & Munyai Inc undertook to pay the First Respondent's taxed and allowed bill of costs in the amount of R232 349.84 upon the finalisation of the Plaintiff's matter against the Road Accident Fund.[6]

[7] Of particular importance is what is paragraph 3 of the aforementioned letter in which is recorded that:

"Although we would have admired to put a time period thereof, the recent management has made litigation more strenuous and prolonged and as such, it will be unwise of us to furnish you with the exact date on when such payment will be made."

[8] It is necessary that I should point out that "the recent management" as mentioned in the latter refers to the management of the Road Accident Fund.

[9] It is not in dispute that the above mentioned arrangement was duly accepted by the First Respondent (Netsianda Inc Attorney).[7]

[10] Subsequent to several correspondences between the First Respondent and Makamu & Munyai Inc, regarding the outstanding payment of the taxed and allowed bill of costs in the amount of R232 349.84 which Makamu & Munyai Inc has undertaken to pay upon the finalisation of the Plaintiffs matter against the Road Accident Fund

the First Respondent got frustrated and caused a Writ of Execution to be issued against the Applicant. [8]

[11] A Writ of Execution is a court order that directs the Sheriff of the Court to attach and take into execution the movable goods of the Execution Debtor and to cause same realized into a sum of money which shall be given to "the Plaintiff" as the judgment creditor to satisfy the terms of the Court's judgment.

[12] The words "Plaintiff" as used in the preceding paragraph implies and refers to the judgment creditor as per the court order or judgment that preceded a Writ of Execution.

[13] Upon closer reading of the court order forming the basis of the judgment debt, it is clear that the Applicant is the Plaintiff in the action proceedings and the judgment creditor in whose favour the court order was granted, and the Road Accident Fund is the judgment debtor.

[14] It is the case of the Applicant that Writ of Execution is fatally defective in that it was not supported by a primary judgment or order, in which the Applicant has been declared a judgment debtor.

[15] It is contended by the First Respondent that it is entitled to such a Writ of Execution because the Applicant and/or its attorneys of record has failed to make payment of the taxed and allowed bill of costs as per the arrangement made with Makamu & Munyai Inc, the present attorney of record for the Applicant.

[16] The First Respondent does not dispute that the judgment debt as per the primary court order has to be executed against the Road Accident Fund as the Defendant the action proceedings.

- [17] It is not necessary to determine who between the Applicant's present attorney of record and his erstwhile attorneys is entitled execute or implement such underlying court order.
- [18] However, what is of relevance is that any subsequent Writ of Execution emanating from the primary court order (order in the action proceedings) should and ought to have been issued against the Road Accident Fund, the Defendant and judgment debtor in terms of the primary court order.
18. The Writ of Execution against the Applicant was issued contrary to the provisions of Rule 45(12)[9] which provides for an attachment of debt which is owing or accruing from a third person to the judgment debtor:

"Whenever it is brought to the knowledge of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor, the sheriff may, if requested thereto by the judgment creditor, attach the same, and thereupon shall serve a notice on such third person, hereinafter called the garnishee, requiring payment by him to the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may, upon any such payment, give a receipt to the garnishee which shall be a discharge, pro tanto, of the debt attached."

- [19] Of relevance is that there is no evidence to suggest that the Applicant is a third party contemplated in Rule 45(12) from whom the debt is due and payable to the judgment debtor (the Road Accident Fund).
- [20] Accordingly, it is my respectful view that in the action proceedings that preceded this application, any subsequent Writ of Execution emanating from the primary court order (in the action proceedings) should and ought to have been issued against the Road Accident Fund, the Defendant and judgment debtor in terms of compliance with the primary court order.

VALIDITY OF THE WRIT OF EXECUTION

- [21] It is not in dispute that the Writ of Execution served before the court was based on the court order granted against the Road Accident Fund as the Defendant and judgment creditor.
- [22] It is also common cause between the parties that the Writ of Execution was not preceded by any claim as against the Applicant. There is nothing further to suggest that the First Respondent has obtained judgment against the Applicant prior to the issuing of the writ.
- [23] It is my respectful view that the aforesaid Writ of Execution which formed basis of this application and which was served before the court is irregular and invalid as it is not supported by a court judgment or order against the Applicant. Put differently the First Respondent was not a party (a litigant) in the action proceedings and as such it cannot cause itself to be joined as a party (litigant) without leave of the Court.

- [24] It is my understanding that a Writ of Execution is intended to facilitate the service and execution of process, and not to create locus standi and jurisdiction, as seem to be the case herein where the First Respondent caused itself to be joined as a party (litigant) to the action proceedings without first obtain leave of the Court.
- [25] The position in our law therefore appears to be that a Sheriff or deputy sheriff can, on the strength of a Writ of Execution, attach the Defendant's property which is under the control of a third, but owing or accruing from such third party to the judgment debtor, the court is powerless to enforce a Writ of Execution order against the third person and to recover the property as such party is not the judgment debtor.
- [26] If regard is being had of the above, the Applicant in the present case was required to follow the costly process of having to issue summons against the Applicant in order to secure a court judgment thus making the Applicant a judgment debtor prior to the issuing of a Writ of Execution as against the Applicant, who would have been declared a judgment debtor by the Court.
- [27] In the absent of the process mentioned in the preceding paragraph the Writ of Execution was not the correct procedure to be relied upon by the First Respondent.
- [28] Accordingly, there exists no causa giving rise to the Writ of Execution. Ordinarily in these circumstances an applicant would be entitled to have the writ set aside.[10]
- [29] There is no evidence adduced by the First Respondent upon which this application can be dismissed.
- [30] The writ of execution have been issued although has not been carried into effect and, until it is set aside, it exist. The circumstances in which it was issued and the facts relevant thereto are before me upon the evidence adduced by the Applicant and not rebutted by the First Respondent.
- [31] For the

reasons

already stated the writ fall to be set aside inasmuch as the causa giving rise to the writ not exist and has never existed. Therefore the writ cannot validly have been issued.

- [32] This understanding should be able to extinguish the First Respondent's argument opposing the relief sought by the Applicant in this application.

- [33] Suppose I am wrong in reaching the conclusion above; the Applicant should still succeed for the reason that the Applicant was not a Defendant and judgment debtor in the action proceedings and the fact that the First Respondent has failed to show that the Writ of Execution served before the Court was issued subsequent to a judgment or court order against the Applicant.
- [34] The First Respondent has raised a point in limine, to the effect that this application was not founded on any grounds of urgency and should for that reason be dismissed. For reasons which will be apparent from what is set out herein above I do not consider it necessary to deal with the point raised in limine.
- [35] I turn now to deal with the question of an appropriate cost order to be made. Costs, it is trite, are within the discretion of the court. In exercising that discretion a court takes into account the circumstances of the matter, the issues adjudicated and the results of such adjudication, the conduct of the parties and what would be fair and just between the parties.
- [36] The obtaining of the writ of execution for purposes of attaching the Applicant's property and inappropriate given the absence of a judgment or court order granted against the Applicant. In these circumstances I consider that it would be appropriate for the First Respondent to bear the costs.
- [37] I therefore conclude that the Writ of Execution served before court is irregular and invalid as it is not supported by a court judgment or order against the Applicant.
- [38] In the result I make the following orders:
- [39.1] The Writ of Execution issued on the 04th October 2022 is hereby declared irregular and invalid and accordingly set aside;
- [39.2] Any execution in sale by the Thohoyandou Sheriff of the movable property of House No: 619/33 Block F, Thohoyandou is hereby declared invalid, and thereby set aside;
- [39.3] The costs of this application shall be borne by the First Respondent

BF GEDEDGER

Acting Judge of the High Court of South Africa,

Limpopo Local Division, Thohoyandou

APPEARANCES: For the Applicant: Adv Sioga Instructed by: Makamu & Munyai Attorneys For the Respondent: Adv Mamitwa Instructed by: Netsianda Inc Attorneys

- [1] See copy of the Court Order annexed to the Application as appears on page 77 of the paginated papers.
- [2] See para 4.3 of the Founding Affidavit
- [3] See para 4.5 of the Founding Affidavit

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- [4] See para 4.6 of the Founding Affidavit
- [5] See para 4.7 of the Founding Affidavit
- [6] See para 2 of Annexure "PM15" being a letter dated 13 December 2021 addressed by Makamu & Munyai Inc to Netsianda Inc Attorneys.
- [7] See para 24 of the Opposing Affidavit filed of record by the First Respondent
- [8] See para Annexure "PM16" being a Writ of Execution
- [9] Of the Uniform Rules of Court
- [10] See *Le Roux v Yskor Landgoed (Edms) Bpk en Andere* 1984(4) SA 252(7) at 257; *Wichman v Standard Bank van Suid Afrika* [2002]1 All SA 558 (7) at 560).
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Prepared on 9 October 2026 · Esheria