

SOUTH AFRICA / JUDGMENT

Smith NO v Clerk of the Court, Pietermaritzburg (AR153/2016) [2017] ZAKZPHC 14; 2017 (5) SA 289 (KZP) (31 March 2017) [2017] ZAKZPHC 14

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Madondo DJP, Ploos van Amstel J

CASE / FILE NUMBER

AR153/2016

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

no: AR 153/2016

In

the matter between:

PEREGRINE

SAMUEL SMITH

NO APPELLANT

versus

THE

CLERK OF THE COURT,

PIETERMARITZBURG RESPONDENT

JUDGMENT

MADONDO DJP: (Ploos van Amstel J concurring)

- [1] The appellant appeals against the judgment of the learned Magistrate, Mrs P S Joubert, of Pietermaritzburg Magistrate's court dated 15 December 2015 in which she dismissed the applicant's application for an order reviewing and setting aside the respondent's refusal to issue and sign the emoluments attachment order and to direct the respondent forthwith to issue and sign the emoluments attachment order.
- [2] This appeal raises the main question whether an emolument attachment order authorised under an administration order must be issued by the clerk of the court which authorised its issue or by the clerk of the court which exercised jurisdiction over the garnishee. The appellant's appeal is grounded, firstly, upon the appellants' contention that the magistrate's court which acts as the supervisor of the execution of the administration order has exclusive jurisdiction to authorise, issue and amend or vary an emoluments attachment order. Secondly, the act of issuing the emoluments attachment order which is to be served on the employer of the judgment debtor cannot be performed by any clerk other than the clerk of the court which has authorised the issue of such order. According to the appellant it would lead to absurd results if the administrative function mentioned in section 74, especially in s 74A, 74D, 74I and 74Q of the Magistrate's Courts Act 32 of 1944 (the Act) would be performed by any clerk other than the clerk of the court supervising the execution of the administration order. Thirdly, that s 74I (5) (b) of the Act restricts the application of s 65J in administrations where emoluments attachment order are implemented, by specially ousting the general application of s 65J. The appellant contends that only specified subsections of s 65J would apply in administrations, namely subsections (4) to (8) and (10). Further, that s 65J (1) was never meant to apply to the emoluments attachment order as authorised in s 74 administrations, as it is irreconcilable with the statutory remedy of s 74 administrations.
- [3] The appellant is an attorney and is also a director of the firm of attorneys, Booysen & Co Inc., practising as such at 1A Holwood Park, corner Armstrong Avenue and Canegate Road, Umhlanga Rocks, Durban. The respondent is the clerk of the Pietermaritzburg

Magistrates' Court.

- [4] In addition to being an attorney, the appellant is the administrator appointed in terms of s 74 of the Act, and in terms of the administration order granted on 26 May 2015, in the present matter.
- [5] The appellant brought the review application in his capacity as an attorney and administrator in terms of s 13 (2) of the Act. As an administrator, his primary duty is to collect payments from debtors made in terms of the administration order and distribute such payments pro-rata amongst their creditors. The collection of such payments is made through emoluments attachment orders.

- [6] In terms of s 74 (1) of the Act should a debtor be unable forthwith to pay the amount of any judgment against him or her or to meet his or her financial obligations and having no sufficient assets capable of attachment to satisfy such judgment or meet such financial obligations, the court in which the debtor resides or carries on business or is employed, may upon application by the debtor make an order providing for the administration of his or her estate and for the payment of his debts in instalments or otherwise.
- [7] Where the administration order provides for the payment of instalments out of further emoluments or income, the court shall in terms of s 74D authorise the order in terms of s 65J so as to be able to attach emoluments or the court shall authorise the issue of a garnishee order under s 72 to attach debt owing or accruing to the debtor by or from any other person, excluding the State, in so far as either of the said sections is applicable.
- [8] The rationale behind an administration order is to supervise the monthly payments of the debt under administration and to distribute

the monthly payments fairly amongst the creditors. The administrator has a statutory duty to prepare an emoluments attachment order

against a debtor and his or her employer to ensure payment under the administration order.

If in addition to the administration order the court has authorised the issue of the emoluments attachment order and the debtor has failed to pay the debt, the administrator may in terms of s 74I lodge a certificate to this effect with the clerk of the court and the clerk of the court shall thereupon issue the emoluments attachment order.

- [9] On 26 May 2015 the Pietermaritzburg Magistrates' Court granted an administration order against the debtor. The debtor under administration resided in the district of Pietermaritzburg and was employed by the True Blue Foods (Pty) Ltd, having its head office and paymasters' office at 33 North Coast Road, Durban. The Court appointed the appellant as the administrator in the matter.
- [10] In terms of the administration order the same Court also authorised the emoluments attachment order to attach the emoluments of the judgment debtor. In June 2015 the appellant requested the respondent to issue the authorised emoluments attachment order. However, on 10 June 2015 the respondent refused to issue the emoluments attachment order on the ground that the garnishee address fell outside the jurisdiction of the Pietermaritzburg Magistrate's Court. The appellant then took the refusal by the respondent on review at the court a quo, and he also sought an order directing the respondent to issue and sign the emoluments attachment order. At issue, at the court a quo, was whether an emoluments order authorised under an administration order must be issued by the clerk of the court having jurisdiction over the employer. The appellant's review application was dismissed with no order as to costs.

[11] The first question for decision is whether an emoluments attachment order, authorised under an administration order, must be issued by the clerk of the court having jurisdiction over the garnishee. The answer to this question hinges on the interpretation of the provisions of the Act relating to the granting of the administration order, authorisation and issue of the emoluments attachment order and a garnishee order in order to attach any emoluments of debt present or in future, owing or accruing to the debtor, by or from his or her employer or any other person, excluding the State.

[12] The administration order is made at the instance of the debtor by the court in which the debtor resides or carries on business or is employed if the debtor concerned is unable forthwith to pay the amount of any judgment against him or her and not having sufficient assets capable of attachment to satisfy such judgment. The administration order provides for the administration of the debtor's estate and for the payment of his debts in instalments or otherwise. See s 74 (1).

[13] The main purpose of s 74 is to protect the debtors with small estates, usually those who are poor and either illiterate or

uninformed about the law or both. See *Coetzee v Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison and others*

[1995] ZACC 7; 1995 (4) SA 631 (CC).

[14] In *Bafana Finance Mabopane v Makwakwa and another* 2006 (4) SA (SCA) par 14 the Supreme Court of Appeal held that an administration order whether made in terms of s 74 or s 65 is indeed a form of protection for the debtor, designed to ward off legal action and execution proceedings by eviction and serve the public interest.

[15] The immediate effect of an administration order is something akin to the institution of a *Concursus Creditorum*. 'The hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration The claims of each creditor must be dealt with as it existed at the issue of the order.' *Walker v Syfret* NO 1911 AD 141 at 146.

The conflicting interests of the creditors are thus managed by the administrator for the benefit of the general body in a manner that seeks to achieve a fair distribution of the debtor's income.

[16] The Act makes a clear distinction between a garnishee order in terms of which execution is levied against a 'debt owing to the judgment debtor', and emoluments attachment order in which specific amounts of 'emoluments' of the judgment debtors are regularly paid to the judgment creditor by the judgment debtor's employer. See also *University of Natal, Pietermaritzburg v Ziqubu* 1999 (2) SA 128 (N) at 130 A –B.

[17] Section 61 of the Act which defines the terms 'emoluments' and 'debts' provides:

'In this chapter –

‘emoluments’ includes –

- (i) salary, wages or any other form of remuneration, and
- (ii) allowances, whether expressed in money or not; and ‘debts’ includes any income from whatever source other than emoluments’.

Garnishee proceedings in order to attach a debt are dealt with under s 72 and rule 47 (of the Magistrates’ Court Rules) whereas emoluments attachment proceedings under s 65J and rule 46. As a consequence, a debtor’s emoluments cannot therefore be attached under the provisions of s 72.

[18] In terms of s 74D where the administration order provides for the payment of instalments out of future emoluments or income, the court shall authorise the issue of an emoluments attachment order in terms of s 65J in order to attach emoluments at present or in future owing or accruing to the debtor by or from his or her employer. Section 74D, as the empowering provisions, is clear and mandatory, ‘the court shall authorise the issue of an emoluments attachment order in terms of s 65J.’

[19] Section 65J (1) (a) provides:

‘(1) (a) subject to the provisions of subsection (2), a judgment creditor may cause an ... emoluments attachment order to be issued from the court of the district in which the employer of the judgment debtor resides, carries on business or is employed or if the judgment debtor is employed by the State; in which the judgment debtor is employed.’

The emoluments attachment order can attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer, when the judgement was obtained from the court concerned or in any other court. The emoluments attachment order is executed against the garnishee as if it was a court judgment and it gives the judgment debtor, the garnishee or any interested party an opportunity to dispute the existence of validity of the order or correctness of the balance claimed. See s 65J (5).

[20] Section 74D makes the provisions of s 65J the only route through which emoluments attachment orders against the debtor’s

employer can be issued, in the event of the administration providing for the payment of instalments out of future emoluments or income. This is quite evident from the heading allocated to the section in question, authorising the issue of emoluments attachment or garnishee

orders.

- [21] This also holds true even with regard to s 65E which deals with the proceedings initiated under s 65A. Section 65E (1) (c) confers power on the magistrate's court to authorise the issue of an emoluments order by virtue of s 65J (1) for the payment of the judgment debt and costs by the employer or the judgment debtor out of the emoluments owing or accruing to the judgment debtor concerned.
- [22] The learned Magistrate at the court a quo correctly found, in my view, that the provisions of s 65J are clear. The section provides that only the court of the district in which the employer or the judgment debtor resides, carries on business or is employed, or if the judgment debtor is employed by the State, in which the judgment debtor is employed, has jurisdiction to issue an emoluments attachment order. See also *MBD Securitisation v Booi* 2015 (5) SA 450 (FB) para 35.
- [23] It is the contention of the appellant that the issuing of the emoluments attachment order from another court other than the court that authorised its issue, increases costs as a local attorney has now to be instructed to issue the order. The provisions of s 74 are designed to obtain some form of concursus creditorum easily, quickly and inexpensively. See *Fortuin v Various Creditors* 2004 (2) SA 570 (C) para 7.
- [24] Administration is the form of protection which may, in certain circumstances, be forced upon the debtor for his or her own good. The requirement that the emoluments attachment order be issued from the court which has jurisdiction over the employer, in my judgment, is aimed at saving the judgment creditor from instituting proceedings of the same nature in various forums. The reason for this was stated in *S v Gwala and others* 1969 (2) SA 227 (N) at 229 B – C as follows:
- ‘magistrates are appointed, in terms of section 9 of the Magistrate's Courts Act, 32 of 1944, for particular districts and sub-districts and that they exercise their power, in terms of section 12, only in the district for which they have been appointed.’
- [25] In terms of s 12 (1) (b) the magistrate exercises his or her power only in the district for which he or she has been appointed. The appellant's argument in this regard is that by necessary implication, the power to authorise the issuing of an order would include the power to issue an order. It is trite that the order issued by the magistrates' court in respect of a person not residing or carrying on business or employed in an area falling within its jurisdiction, will not be effective against such person for lack of jurisdiction to grant such relief. For s 28 (1) of the Act grants jurisdiction to the magistrates' court only in respect of a person who resides, carries on business or is employed within the district.
- [26] The next question for decision is whether the emoluments attachment order be issued by the clerk of the court that has authorised it, the appellant submits that the intention of the legislature is to task a specific court with the duties of supervising an administration order, and a requirement that an emoluments attachment

order be authorised under an administration order be issued out of a different court would be dissonant with the principle. According to the appellant an emoluments attachment order that is to be served on the judgment debtor's employer, must, therefore be issued out by the clerk of the court that authorised the administration. Ultimately, the appellant contends that the respondent had no valid ground to refuse to issue an order granted by its own district court. Therefore, the refusal was irregular and it should, accordingly be set aside.

[27] In terms of s 13 (1) of the Act the clerk of the court is appointed by the magistrate of the district in which the court is situated. A clerk appointed in one district cannot, therefore, conduct the administrative functions of a court from another district. In the present case, the respondent being the clerk of the court of Pieter-maritzburg Magistrate's Court was in law not authorised

to issue an emolument attachment order in respect of the judgments debtor's employer who was resident in the area falling within the jurisdiction of Durban Magistrate's court; and its conduct in refusing to issue such order was accordingly not irregular and reviewable in terms of s 13 (2) of the Act. This section provides for the review of a refusal by the clerk of the court to do any act which he or she is by any law empowered to do.

[28] However, the appellant in his capacity as an administrator has in terms of s 74I (3) a statutory duty to pursue with the issue and service of an emoluments attachment order against a debtor and his or her employee in order to enforce payment under the administration

order. In order to achieve this purpose the appellant is in terms of rule 46 of the Magistrate's Court Rules required to obtain a certified copy of the administration order and lodge this with the clerk of the court of the district, where the debtor's employer resides, carries on business or is employed, and obtain an emoluments attachment order from such court under a new case number. The clerk which has jurisdiction to issue an emoluments attachment order is that of the Durban Magistrate's Court as the debtor's employer has its registered office and paymaster's office there.

[29] Rule 46 reads:

'When an emoluments attachment order is issued by a judgment creditor out of any court other than the court in which the judgment or order was obtained, a certified copy of the judgment or order against the judgment debtor or shall accompany the affidavit or affirmation or certificate referred to in s 65J (2) (b) of the Act.'

[30] In terms of s 65J (3) an emoluments attachment order must be prepared and signed by the judgment creditor or his or her attorney, signed by the clerk of the court and served on the employer by the sheriff in the manner prescribed by the rules for the service of process.

[31] In my opinion, the costs of the procedure contemplated in rule 46 (1) would not be significantly more than if the order is issued by the court that authorised it.

- [32] Section 65J(1) (b) (ii) confers legal force on an emoluments attachment order and obliges the employer as the garnishee to make payment to the judgment creditor or his or her attorney until the relevant judgment debt and cost have been paid in full. Without that provision an emoluments attachment order would not create any legal obligation upon the judgment debtor's employer to pay emoluments over to the judgment creditor or his or her attorney.
- [33] I now turn to deal with the question whether the general application of s 65J is ousted by s 74I of the Act. The appellant contends that in terms of s 74I the employer is obliged to pay emoluments over to the administrator and the administrator is not required in terms of s 65J (1) (b) (ii) to enforce an emoluments attachment order. According to the appellant s 74I (5) (b) restricts the application of s 65J in administrations where emoluments attachment orders are implemented, by declaring that only specified subsections of s 65J would apply in administrations. On appellant's submission s 74I
- (5) (b) provides that only the provisions of subsections 65J (4) to
- (8) and (10) shall apply mutatis mutandis to this emoluments attachment order under s 74 of the Act.
- [34] The appellant has further argued that the provisions of subsections 65J, 74I (2) and 74 (5) (b) were inserted by sections 6 of Act 63 of 1976, however s 74 (5) (b) was substituted a few years later by s 4 of Act 28 of 1981. According to the appellant the maximum *lex posterior priori* derogate meaning the later enactment revokes the earlier one, should be applied. A statutory provision clearly inconsistent and irreconcilable with its preceding hierarchically equal or subordinate counterparts revokes them to the extent of such inconsistency and irreconcilability. In the applicant's submission in reconciling the contradiction effect should be given to the later provision, namely s 74I
- (5) (b) and not the earlier provision.
- [35] According to the appellant s 74 deals comprehensively with emoluments attachment orders in administrations. Section 65J (1)
- (a) has been specifically excluded by s 74I (5) (b). Section 65J (3) is in contradiction with s 74 (4) of the Act.
- [36] Section 74(5) provides:
- '5 (a) When an emoluments attachment order or garnishee order referred to in subsection (3) has been served on the garnishee, he shall be obliged to pay to the administrator the amounts concerned as provided by the order
- (b) The provisions of section 65J (4) to (8) and (10) shall mutatis mutandis apply to the emoluments attachment order referred to in paragraph (a) in such application any reference in the said provisions to the judgment creditor shall be construed as a reference to the administrator.'

[37] Section 74I (3) deals with the scenario where the court has authorised the issue of an emoluments attachment order or a garnishee

order and has suspended such authorisation conditionally and the debtor fails to comply with the conditions of suspension. The

administrator may lodge a certificate to this effect with the clerk of the court, and the clerk of the court shall thereupon issue the emoluments order or garnishee order, as the case may be.

[38] Upon proper construction, s 74I (5) (a) only gives legal force to the emoluments attachment order referred to in subsection (3). These are orders that have already been authorised, issued and or served and suspended on certain conditions and the debtors failed to comply with the conditions of suspension. The subsection does not deal with the authorisation and issue of an emoluments attachment order per se. The emoluments attachment order shall only have such legal force if it has been served on the garnishee. Section 74I (5) (b) states that the provisions of s 65 (4) to (8) and (10) shall mutatis mutandis apply to such emoluments order. In my judgment such provisions operate exclusively from all the provisions of s 65J only in that

limited scope where the issue of an emolument attachment order has been authorised issued and served on the judgment debtor or debtor's employer, whatever the case may be, and suspended before implementation on certain conditions and the debtor failed to comply with such conditions.

Further, the section does not relate to the emoluments attachment order referred to in s 74D. In fact, s 74I relates to the payments by the debtor in terms of the administration order. This is evident from subsection (1) of the section which provides:

‘(1) The debtor shall, subject to the provisions of this section, pay the administrator the amounts weekly or monthly or other payments that he is required to make in terms of the administration order.’

[39] In the premises, the learned magistrate could not be faulted in finding that the entire provisions of s 65J apply in the present

case. The applicant is still battling to get the authorised emoluments attachment order issued against the debtor's employer which in terms of s 74D should go by the route of the provisions of s 65J. The provisions of s 65J (4) to (8) and (10) do not operate in isolation or exclusively from the rest of the provisions of s 65J.

[41] It is also the contention of the appellant that the Constitutional Court in *University of Stellenbosch Legal Clinic and others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and others; Mavava Trading 279 (Pty) Ltd & others v University of Stellenbosch Legal Clinic and others* 2016

(6) SA 596 (CC), held the provisions of s 65 J (2) to be inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996

(the Constitution) and invalid to the extent that they allow for emoluments attachment order to be issued by a clerk of the court

without judicial oversight. Section 65 J (2) provides;

‘An emoluments attachment order shall not be issued –

- (a) unless the judgment debtor has consented thereto in writing or the court has so authorised whether on application not the court or otherwise and such authorisation has not been suspended; or
- (b) unless the judgment creditor or his or her attorney has first –
 - (i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and

(ii) filed with the clerk of the court an affidavit or an affirmation by the judgment debtor or a certificate by his or his attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since the date and the balance owing and declaring that the provisions of subparagraph (1) have been complied with on the date specified therein.

[42] Only the provisions of s 65J (2) (a) and 2 (b) (i) were held to be inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial oversight over the issuing of any emoluments attachment order against a judgment debtor. The Constitutional Court held with regard to s 65J (2) (a) that where a judgment debtor has consented thereto in writing and the emoluments attachment order is issued without any court intervention, there is no judicial oversight.

[43] The word “or” in s 65J (2) was severed and in its place the word “and” was read in. This was done in order to ensure that under subsection (2) (a) an emoluments attachment order will not be issued unless the judgment debtor has not only consented to it in writing but also the court has authorised its issue.

[44] In s 65J (2) (b) (i) the word “will” was severed and the word “may” was read in, in its place. The court held that this was necessary to acknowledge the fact that whether or not an emoluments attachment order will be issued is not certain as it will depend upon the courts’ exercise of discretion.

[45] Subsection (2) (a) should now read:

‘an emoluments attachment order shall not be issued –

- (a) unless the judgment debtor has consented thereto in writing and the court has so authorised after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended.’ or

[46]

- (b) unless the judgment creditor or his or her attorney has first –

- (i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order may be issued if the said amount is not paid within ten days of the date on which that registered letter was posted.

[47] Judicial oversight over the issue of an emoluments order is mandatory. See *Gundwana v Steko Development CC and others* 2011

- (3) SA 608 (CC). In terms of s 74Q the court has judicial oversight even after the issue and service of an emoluments attachment order. This section states that the court under whose supervision any administration order is being executed has jurisdiction to reopen the proceedings at the instance of the debtor or employer and suspend, amend or rescind the administration order which includes the emoluments attachment order. See s 74Q (1). If it appears to the court that the debtor is unable to pay any instalment, it may on good cause shown suspend the order for such period and on such conditions as it may deem necessary or amend the instalments to be paid in terms thereof.

[48] This shows that the Act has granted the court under whose supervision the administration order is being executed the power to vary, suspend and amend or rescind the terms of the administration order as it deems reasonable and necessary. The provisions which the Constitutional Court held to be inconsistent with the Constitution and invalid to the extent as they also not provide for judicial oversight, i.e. s 65J (c) (a) (b) (i) are not relevant for decision in this matter since the *University of Stellenbosch* case is distinguishable from the present case. In such case, an emoluments attachment order was authorised by the court and therefore

there was judicial intervention and hence oversight.

[49] Further, even if the decision in the *University of Stellenbosch* case was to be relevant and applied in the present case the Constitutional Court order regarding the inconsistency and invalidity

of the provisions in question was held to be prospective and not retrospective. In the circumstances, I am not satisfied that the

appellant has made a case for the relief sought.

Order

[50] In the result, the following order is made:

The appeal is dismissed with costs.

MADONDO DJP

I agree

PLOOS VAN AMSTEL J

Date reserved:

6 March 2017

Date delivered:

31 March 2017

For Applicant:

Adv C J Mouton

Instructed by:

Booyesen and Co Inc.

Ref: P Smit/PC 9796

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Instructed by:

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Ref: 116/001403/16/S//P22hvl

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