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REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 30169/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
16/3/2022

In the matter between:

THE SHERIFF AFRICAN BOARD OF SHERIFF

Applicant

And

MAUREEN NOZINDABA CIBE

First Respondent

NEDBANK LIMITED

Second Respondent

MARTHA CORNELIA MAGDELINE

Third Respondent

VAN DER MERWE NO

Fourth Respondent

JUDGMENT

MAKUME, J:

[1] This judgment is about whether the Applicant is entitled to freeze the business bank account of the first Respondent held with Nedbank, the second Respondent, being account number [....].

[2] The Applicant says that the purpose of the order being sought above is to enable the Applicant firstly, to investigate the first Respondent's failure to distribute proceedings of a Sale in Execution in respect of certain immovable property and secondly to add such failure as a further charge in a pending disciplinary action against the first Respondent.

[3] It is necessary to set out a brief narrative of certain facts and circumstances that gave rise to this litigation which bears on the question to be decided by me.

COMMON CAUSE ISSUE

[4] The Applicant is the South African Board of Sheriffs a statutory body established in terms of Section 7 of the Sheriffs Act No 90 of 1986 its function is to regulate the activities of persons appointed as Sheriff. It has disciplinary powers over the activities of such persons relating to their business.

[5] On the 2nd October 2018 in this Court Millar AJ granted an order at the instance of the Applicant in terms of which the third Respondent who like the first Respondent is a Sheriff was appointed as a *curator bonis* to manage and control the first Respondent's Trust Account pending the outcome of a disciplinary enquiry instituted against the first Respondent.

[6] When the order by Millar AJ was granted it was on the basis the first Respondent had made herself the subject matter of an investigation into improper conduct in terms of Section 43 of the Sheriffs Act. In the judgment by Millar AJ it is only the administration and control of the first Respondent's Trust Account that was placed in the care of the third Respondent as *curator bonis*. The first Respondent was allowed to retain her Fidelity Fund Certificate entitling her to continue practicing

as a Sheriff. It was further ordered that the interim order directing the Minister of Justice to suspend the first Respondent be discharged. That judgment stands and was never appealed against.

[7] The disciplinary action was postponed on two occasions at the instance of the first Respondent and by the year 2020 Covid Regulations dealt it a further blow especially in December 2020 when at a hearing the chair-person had to recuse himself on noticing that he knows the first Respondent after she had unmasked.

[8] During or about April/May 2021 the first Respondent in her capacity as the Sheriff for Soweto attended to a Sale in Execution in respect of a property situated at Protea Glen Extension 1, Soweto (Case No 9330/2019). The proceeds of the sale were paid into the first Respondent's business account and not the Trust account as it should have been in accordance with the Rule 46 (13) of the Uniform rules of Court.

[9] On the 10th June 2021 the third Respondent addressed a letter to the Applicant in the following words:

“Attached hereto a letter from Glover Kannieapan Inc that is self-explanatory as well as proof of payment of the deposit and balance of purchase price. Kindly note that both amounts were paid into Mrs Cibe's business account during 2020. I am not in possession of the R410 000.00 to pay the proceeds of the registered property. Kindly request Mrs Cibe to pay the R410 000.00 into the Trust Account to enable me to proceed with payment.”

[10] The attorney's Glover Kannieapan were the attorneys of the Judgment Creditor First Rand Bank in the matter and they addressed a letter to the Applicant's attorneys Messrs Macrobert Attorneys on the 15th June 2021 informing them that they informed the first Respondent by letter dated the 16th April 2021 that transfer had taken place on the 12th April 2021 and asked for her distribution account in terms of Rule 46 (14) which they have not as yet received.

[11] On the 29th June 2021 Mabesele J in the urgent Court granted an ex-parte order against the Respondent in the following terms:

11.1 An interim order was granted with immediate effect returnable on the 24th August 2021 at 10h00 or as soon thereafter as the legal representative of the Applicant may be heard when reasons may be advanced as to why this order should not be made final:

- a) That leave be granted to bring this application ex-parte.
- b) That the second Respondent (Nedbank Limited) immediately upon service of this order “freeze” the first Respondent’s bank account with account number [...].
- c) The bank account mentioned above be frozen until notification from Nedbank.
- d) The third Respondent be appointed *curator bonis* to administer and control the first Respondent’s bank account namely [...].
- e) The third Respondent shall have the same duties and powers in respect of aforesaid bank account that were granted by Millar AJ on 21 November 2018 under case number 35570/2018.
- f) That the first Respondent be prohibited from handing or operating on the bank account held with Nedbank with account number [...].
- g) Prayers (d) (e) (f) be of effect pending finalisation of the disciplinary enquiry instituted against the first Respondent.
- h) That this order be served on the Respondents.

- i) That the affidavit and annexures of the Applicant be served on the Respondents and that they be informed of their right to apply to have the interim order anticipated or reconsidered, subject to the provisions of Rule 6 of the Uniform Rules of Court.

[12] On the 29th June 2021 the first Respondent anticipated the return date and filed her opposing affidavit and the matter served before me on the 9th July 2021 when I gave an order discharging the ex-parte order by Mabesele J dated the 29th June 2021 and directed that the Second Respondent Nedbank unfreeze the first Respondent's business bank account being account number [...]. Further that the Applicant pay the first Respondent's party and party costs. What follows is my reason for that order.

[13] It needs be recorded that this was not the first time that the same Applicant had approached this Court on an urgent ex-parte basis. It did so on the 2nd October 2018 under case number 35570/2018. In that matter the Applicant sought an order suspending the first Respondent, withdrawing her Fidelity Fund Certificate and placing her Sheriffs Trust Account under curatorship. The orders sought were granted and a Rule Nisi was issued calling upon the first Respondent to show cause why these should not be made final on the 29th November 2018.

[14] Millar AJ in a well-reasoned judgment discharged the Rule Nisi and substituted it with an order placing the trust account of the first Respondent under the control and supervision of the third Respondent. In that order the Court granted the first Respondent access to and entitlement to all such records as may be necessary for the discharge of her functions as a Sheriff and matters ancillary thereto.

[15] It is common cause and not disputed that after the third Respondent had been placed in control of the Trust Account of the Sheriff for Soweto West being the first Respondent there were problems with the bank. For example, on the 7th October 2020 Mrs Cibe the First Respondent addressed an email to the third Respondent as follows:"

“As per the telephone conversation kindly confirm that the Trust Account is working as tomorrow we have auction for immovable property.”

[16] This situation was like that since 2018 when the order was granted in respect of the Trust Account. The question is how was the first Respondent expected to conduct her business when the Trust Account was not operating.

[17] This issue about difficulties in the operation of the trust account was not mentioned in the Applicant's founding affidavit. It is trite law that when a litigant approaches Court on an *ex-parte* basis it is like making application for a default judgment which therefore requires the applicant to make full disclosure of all relevant facts.

[18] The Applicant's failure to make mention of the difficulties with the trust account was in my view disingenuous hence the speculative inference that the Applicant relies on.

[19] The Court in **Lamont v Lamont 1933(2) PH B35 (W)** held that the Applicant in *ex-parte* applications must set forth concisely the nature and extent of the claim, the grounds upon which it is based and upon which the Court has jurisdiction to entertain the claim. And in **Schlesinger v Schlesinger 1979 (4) SA 342 (W) 348C-354A** it was held that the Applicant must observe the utmost good faith in placing material facts before the Court.

[20] In this matter the Applicant failed to place before the Court that the Trust account which was under the control of the third Respondent had been closed when there was unconfirmed rumour that the first Respondent had passed away. This only surfaced in reply which process is not permitted as an Applicant in motion proceedings must make out his or her case in the Founding Affidavit.

[21] In paragraph 3.1 of its Founding Affidavit the Applicant sets out what it aims to achieve by this application namely:

a) to protect the interest of attorneys and members of the community by preventing the first Respondent from transacting on her business account number [...].

b) to ask the Court to approve the third Respondent as *curator bonis* of the business account mentioned above.

[22] As a basis for the above the Applicant says it is because the first Respondent has made herself the subject matter of an investigation into improper conduct in terms of Section 43 of the Sheriffs Act *inter alia* due to trust fund irregularities. Hence the requirements to freeze the business account.

[23] For the Applicant to amongst others succeeds in this application it must set out the jurisdictional facts embodied in Section 43 of the Sheriffs Act which jurisdictional facts amounts to improper conduct.

[24] Section 43 must be read together with Section 24 of the Sheriffs Act which reads as follows:

“24(1) If in the opinion of a competent Court sound reasons exist for doing so that Court may upon application of the Board or any person having a direct financial interest in an account mentioned in Section 22 (1) or (2) prohibit the Sheriff concerned from dealing with the said account in any manner.”

[25] It is common cause that the accounts mention in Section 22 (1) or (2) is the trust account not the business account and in particular Section 22 (2) has reference to “an investment or other interest bearing account.” There is nowhere that mention is made of a business account.

[26] It is not disputed that on the 4th November 2020 Attorneys C Mabunda acting on instruction of a purchaser Mr Moeketsi deposited proceeds of a Sale in Execution that was conducted by the first Respondent into the first Respondent’s business account and on the 29th June 2021 when this application was launched the first

Respondent paid that amount into the Trust Account controlled by the third Respondent. That should have brought an end to the application. Notwithstanding that the Applicant persisted with the application on spurious and ill-founded grounds.

[27] It was therefore not surprising that on the same day that the *Rule Nisi* as granted the first Respondent took step in terms of Rule 6 (8) which reads as follows:

“Any person against whom an order has been granted *ex-parte* may anticipate the return day upon delivery of not less than twenty-four-hour notice.”

[28] The first Respondent has raised three points in *limine* namely that the application was not urgent secondly that it was not necessary to have brought this application by way of an *ex parte*. Lastly failure to cite the first Respondent in her representative capacity. It is interesting to note that Millar AJ in the previous application, lamented and criticised the Applicant and found that the Applicant conducted itself in a contrived manner by approaching the Court on an *ex parte* basis.

[29] The whole application was never urgent and was based on speculation and rumours. It has not been set out what will happen if the business account is not frozen on an urgent basis. The Applicant has not set out why it believes it will not get relief in the normal motion court.

[30] As far as it concerns the third point in *limine* I am satisfied that in the founding affidavit the first Respondent is correctly cited in her representative capacity as the Sheriff for Soweto West.

[31] The first Respondent's business account is not regulated by the Sheriffs Act there is accordingly no right or authority which empowers the Applicant to exercise control of that account. The Applicant's control is confined to the trust account as set out in Section 22 (1) & (2) read together with Section 43. This should bring an end to the litigation. The Applicant lacks the necessary *locus standi*.

[32] The Applicant in its own words at paragraph 3.4 of the founding affidavit speaks about trust fund irregularities which amount to improper conduct in terms of Section 43 of the Sheriffs Act. There is no mention of any other account to justify the Applicant's claim to have jurisdiction over the business account.

[33] Even if it could be argued that the amount when it was paid into the business account was in fact trust money that still does not clothe the Applicant with authority at must the Applicant seeks to rely on "a real possibility" and that "attorneys and or members of the public may be severely prejudiced by the first Respondent's conduct".

[34] The Applicant does not say how attorneys and or members of the public may be prejudiced if the business account is not frozen. The use of the word may clearly indicate speculation. There are no facts to support that suspicion.

[35] The facts upon which this application is predicated vis-a-vis the particular monies in question relating to the Sale in Execution such have been transferred into the trust account and there is accordingly no reason to freeze the first Respondent business account and hand same over to the third Respondent. The matter has become moot.

[36] The Applicant seeks interdictory relief and must therefore satisfy all requirements for such relief being a clear or *prima facie* right, apprehension of irreparable harm, balance of convenience and lastly no satisfactory or alternative relief. The relief that the Applicant seeks has an element of final relief in that its uplifting depends on occurrence over which the first Respondent has no control. This is evidence by the fact that since the Trust account has been placed in the control of third Respondent it is now almost four years and the issues are nowhere near finality.

[37] PRIMA FACIE RIGHT

It is trite law that an Applicant for an interdict must show a right which is being infringed or which he apprehends will be infringed and if he does not do so the

application must fail (See **Coolair Ventilation Co. (SA) (Pty) Ltd vs Liebenberg and Another 1967 (1) SA 686 (W)**). In this matter the Applicant being a creature of statute is not clothed with the right to seek relief concerning the first Respondent's business account.

[38] APPREHENSION OF IRREPARABLE HARM

(i) As regards this requirement the Applicant has to show that it is reasonable to apprehend that injury will result.

(ii) The first Respondent paid the amount into the trust account. It is therefore inconceivable to still argue if irreparable harm when the subject matter has been resolved. The application also fails on this aspect.

[39] BALANCE OF CONVENIENCE

In the matter of **Minnaar vs Oberholzer Liquor Licencing Board and Another 1955 (1) SA 681 (T) at 684 A- B** it was held that a Court must weigh the prejudice the Applicant will suffer if the interim interdict is not granted against the prejudice to the Respondent if it is. If there is greater possible prejudice to the Respondent, an interim interdict will be refused.

[40] The first Respondent conducts business through her business account it is used to pay salaries as well as office overheads. The balance of convenience clearly favours the first Respondent.

[41] SATISFACTORY ALTERNATIVE RELIEF

(i) It is trite law that in every case of an application for an interdict *pendente lite* the Court has a discretion whether or not to grant the application. It exercises their discretion upon a consideration of all circumstances and particularly upon consideration of the probabilities of success of the Applicant in the action.

(ii) In this matter the Applicant and or the third Respondent made no effort to consult with the Respondent to resolve the issue they chose to run to Court on an urgent *ex parte* basis when there was no need for such hurried procedure. The first Respondent has expressed her view that there is a conspiracy to rid her of that position.

[42] CONCLUSION

(i) The Applicant has failed to prove its entitlement to the relief it seeks and must accordingly fail.

(ii) The order granted on the 9th July 2021 by me is hereby confirmed.

Dated at Johannesburg on this 16 day of March 2022

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 09TH JULY 2021
DATE OF JUDGMENT : 17TH MARCH 2022

FOR APPLICANT : ADV
INSTRUCTED BY : MESSRS

FOR RESPONDENT : ADV
INSTRUCTED BY :