

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

Case No: 46045/2009

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
1/04/2011	
DATE	SIGNATURE

In the matter between:

INVESTEC PRIVATE BANK

(a division of **INVESTEC BANK LIMITED**)

Applicant

and

JOHANNES JACOB PIETERSE

1st Respondent

THE SHERIFF FOR THE DISTRICT OF

PRETORIA, SOUTH EAST

2nd Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] On 29 July 2009 the applicant had brought an urgent application against the first respondent seeking certain relief set out below. The court granted an interim order coupled with a rule nisi returnable on 1 September 2009. The applicant is seeking confirmation of the rule and the first respondent is opposing the relief sought. The rule nisi reads as follows:

- "1. THAT the first respondent shall forthwith disclose to the second respondent alternatively his designated representative, further alternatively the Sheriff for the district of Tzaneen the whereabouts of the movable property as described in annexure "A17" to the applicant's founding affidavit.
2. THAT the second respondent alternatively his designated representative, further alternatively the Sheriff for the district of Tzaneen, is authorised and directed to forthwith take possession of the movable property described above in paragraph 2 where ever it may be found.
3. THAT the orders in paragraphs 2 and 3 alternatively 4 above are to operate as an interim order with immediate effect subject to the following:
 - a) that a rule nisi be issued, calling upon the first respondent to show cause if any, to the above Court on 1 September 2009 at 10h00 or so soon thereafter as the matter be heard, why the order in paragraphs 2, 3, 4 and 5 should not be confirmed;
 - b) that this order together with the founding papers be served on the respondent personally forthwith;
 - c) the first respondent is to deliver his answering affidavit, if any within ten (10) Court days from the date of service hereof and the applicant is to file its replying affidavit, if any, within ten (10) Court days of the filing of the first respondent's answering affidavit;
4. THAT in the event that the first respondent not comply with paragraphs 2, 3 and 4 above, that the applicant be permitted to approach the above Court on the same papers for an order of contempt of Court."

[2] It appears that the first respondent is a former employee of the applicant. During his employment, the first respondent was granted certain credit facilities in the form of an Investec private Bank Card (**the card**). The card was to be used by the first respondent subject to certain terms and conditions, inter alia, that on his termination of employment with the applicant he would settle any outstanding amounts on the card due to the applicant. The first respondent chose as his *domicilium citandi et executandi* address 32 South Street, Centurion Hills. This address was later changed to 101 Ndumu Close, meadow Glen Estate, Moreleta, Pretoria.

[3] When the first respondent's employment was terminated he did not settle the outstanding amounts due, a total amount of R 87 449.12, to the applicant. As a result the applicant instituted legal proceedings for the recovery of the amounts in the Pretoria Magistrates Court despite demand being made for him to pay. On 6 May 2009 the Magistrates Court granted a default judgment against the first respondent. On 8 May 2009 the Court issued a warrant of execution against the property of the first respondent.

[4] In his return of service the Sheriff indicates that on 14 May 2009 he had gone to 101 Ndumu Close, meadow Glen Estate, Moreleta, Pretoria where he found a certain Miss Badenhorst who identified herself as the first respondent's girlfriend. After identifying himself and serving the execution papers to Miss Badenhorst, the Sheriff had taken the inventory and valuation of the movables in the house to the value of the judgment debt.

[5] Miss Badenhorst appears to have subsequently claimed that the movable property inventoried by the Sheriff on 14 May 2009 was her property. The Sheriff issued an interpleader summons calling upon Miss Badenhorst to prove her claim of ownership of the attached movables. However this summons could not be served on Miss Badenhorst as she and the first respondent had vacated the premises at the *domicilium* address. The attached movables were also removed. The first respondent was eventually traced at 10 Aqua Vista Flats, Aqua Street, Tzaneen. The removal of the movables from Pretoria to Tzaneen led to the launching of the urgent application and the interim relief granted. On 30 July 2009 the first respondent was served with the order of 29 July 2009 and the original attached movables were removed and stored by the Sheriff in Tzaneen, pending the finalisation of this matter.

[6] On 30 March 2010, being the extended return date of the rule, the matter was further postponed and the rule extended to 10 May 2010. It appears that the matter was postponed as the first respondent has, in his answering affidavit, alleged that the applicant should set off the amount claimed against monies the first respondent claims were due to him on his termination and were not paid to him. The court further ordered, *inter alia*, that the applicant should file an affidavit setting out the amounts paid to the first respondent in respect of monies due to him as at the date his employment was terminated.

[7] At the hearing of this matter, and as it appears from the first respondent's heads of argument, it appears that the issues raised by the parties in their papers in support and against the confirmation of the rule has become moot. There has been compliance with the interim order in that the attached movables which were removed to Tzaneen are now in the possession and under the control of the Sheriff and the rule is now susceptible to be discharged.

[8] What remains to be determined is the issue of costs. The return date of the rule was initially 1 September 2010. On that date the matter was postponed to 30 March 2010 and the rule extended. The reason for the postponement was for the applicant to prepare and file an affidavit setting out monies which were due to the first respondent when terminated and which were paid to him as a result. The matter was again postponed to 10 May 2010 and the rule extended. On 10 May 2010 and after the affidavit as directed by the court on 30 March was filed, it appears that the first respondent had disputed the amounts set out in the affidavit as his pension payout. As a result there was a further postponement to the opposed roll and extension of the rule to 16 August 2010.

[9] It is the submission of the applicant that it is entitled to the costs for launching the urgent application and for the various postponements. It is contended on behalf of the applicant that since the moveable property which was attached by the Sheriff was the only assets the first respondent had in order to satisfy the judgment granted in favour of the applicant on 6 May 2009, it had no alternative but to institute an urgent application when it discovered that the first respondent had vacated the domicilium address with the attached assets and without leaving a forwarding address even though the first respondent was aware that the process of executing the warrant of execution had already started. The Sherriff had already attached the assets and the assets, for all intents and purposes, were at the time of their removal vested on the Sheriff. The assets could not be removed without the consent of the Sheriff. It was further contended that the subsequent postponements were as a result of the first respondent trying to include the issue of the pension payout which was not relevant to the issue at hand. If the first respondent felt that he was short-changed, he could have used other remedies available to him to contest the payout. The applicant is asking for costs on an attorney and client scale.

[10] It was submitted on behalf of the first respondent that there was no need for the matter to be in court on the day this matter was heard as the interim order of 29 July 2010 had been complied with. The parties should have reached a settlement as to how the issue on costs should be resolved rather than coming to court.

[11] It is trite that costs follow the suit. The party who is substantially successful is entitled to be awarded the costs for the urgent application and the postponements which had occurred. It is abundantly clear that the applicant, in view of the conduct of the first respondent had no option but to bring the urgent application in order to safeguard its interests. As argued by counsel for the applicant, the only assets of the first

respondent available to the applicant in order to satisfy the judgment order it had obtained against the first respondent, were the assets found by the Sheriff at the *domicilium* address on 8 May 2009 and which were inventoried and attached as per a court order. The first respondent removed the assets well knowing that they were attached by the Sheriff. Furthermore, the relief sought by the applicant in the urgent application has been satisfied in that the assets are now in the possession and control of the Sheriff, where they should have remained but for the actions of the first respondent. Furthermore, the first respondent, by bringing up the question of his pension payment has contributed to the escalation of the costs in these proceedings since the satisfaction of the judgment order had nothing to do with his pension payout. As correctly pointed out by counsel for the applicant, the applicant is not responsible for the pension payouts. The pension fund contracted to the applicant is.

[12] I am, therefore of the view that the applicant has been substantially successful in these proceedings and is entitled to the costs, including the costs occasioned by the postponements on a client and attorney basis.

[13] Accordingly the following order is made:

1. The rule *nisi* issued on 29 July 2009 is hereby discharged;
2. The first respondent is directed to pay the costs of the urgent application and the costs occasioned by the postponements on 1 September 2009, 30 March 2010 and 10 May 2010 on an attorney and client scale.


NP MNGQIBISA-THUSI
Judge of the North Gauteng High Court