

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

CASE NO: 37007/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 16 November 2023

In the matter between:

M[...]: E[...]

APPLICANT

and

M[...]: A[...] T[...]

RESPONDENT

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This is an opposed application for what initially appeared to be the stay of execution of a writ obtained by the Respondent against the Applicant but then turned out to be the setting aside of the said writ of execution.

[2] The Applicant was represented by Adv. R. Baloyi and the Respondent by Adv. L Van der Westhuizen.

[3] At the outset, the Court had to deal with the filing and uploading of supplementary affidavits and a reply to the supplementary affidavits without the leave of the Court. After hearing argument from both Counsel and Counsel for the Respondent abandoning her supplementary affidavit, the Court ruled that no regard will be had to the supplementary affidavits.

BACKGROUND FACTS

[4] A decree of divorce incorporating the settlement agreement was issued out of the Regional Court in Benoni on 11 December 2017.

[5] The following clauses of the settlement agreement, of relevance to this application, provide:

“4.1. The Plaintiff will take transfer of the Defendant’s undivided half share in the immovable property, including all obligations in respect thereof, on condition however that the Plaintiff pays an amount equal to one-half share of the balance of the market related value of the immovable property after payment of the mortgage bond and payment of the debt to Mrs V V Bambisa, Identity number [.....] in the amount of R130 154 00 from the market related value of the immovable property, to the Defendant on date of registration.

9.1. The parties agree that they are jointly responsible for payment of R107 154.00 (transfer costs) and R23 000.00 (painting) which the debt shall be paid as per clause 4.1 above.”

[6] The Applicant submits, which is common cause, that the Respondent obtained a writ of execution in the Regional Court for payment of the amount of R65 077 – 00 [sixty-five thousand and seventy-seven rand]. The regularity and legality of this writ forms the basis of Applicant’s application.

[7] The Applicant submits:

- 7.1. firstly, the time for the execution of the writ in terms of Section 63 of the Magistrate's Court Act¹, hereinafter referred to as 'the Act', had expired in that, 3 years had passed before issuing of the writ.
- 7.2. Secondly, the Applicant submits that the writ was issued without there being a Court Order issued in respect of the amount purportedly owed. Accordingly, so the Applicant submits, the writ is unlawful and stands to be set aside.
- 7.3. Thirdly, and perhaps interlinked with the second point, the Applicant submits that if any money is owed such money is owed to a Ms V V Bambisa, the mother of the Respondent and as such, the writ falls to be set aside on that ground as well.

[8] The Respondent in turn raised the issue of jurisdiction as a point *in limine* which point was dealt with only during Counsel for Respondent's submissions. Respondent submitted that the point was raised during the initial hearing of the urgent application but my sister, Khumalo J, without pronouncing on the jurisdiction point, struck the matter from the roll with costs.

ANALYSIS AND EVALUATION

[9] It is appropriate to deal with the jurisdictional point matter first and although, this Court heard full argument on the matter, if the jurisdiction point is valid, then that disposes of the matter, as argued by the Respondent.

[10] The Respondent had two issues to raise in respect of jurisdiction. Firstly, that the Applicant instituted this urgent application in this Court whereas the application should have been instituted in the Gauteng Division in Johannesburg. The Respondent submits that the divorce proceedings giving rise to the writ emanate from the Benoni Regional Court and therefore the Gauteng Division in Johannesburg is the appropriate Court.

¹ 32 of 1944, as amended

[11] It is convenient to deal with this submission or point first. This point has been adjudicated upon by this Division and this Division has pronounced that Pretoria and Johannesburg have concurrent jurisdiction². I align myself with such determination that Pretoria and Johannesburg have concurrent jurisdiction presently and accordingly, this point must fail.

[12] The second point related to jurisdiction raised by the Respondent is that the writ of execution was issued out of the Regional Court in Benoni and in terms of Section 62 of 'the Act', the Applicant was supposed to institute these proceedings in that Court.

[13] Section 62 (2) and (3) provide as follows:

“(2) A court (in this subsection called a second court), other than the court which gave judgment in an action, shall have jurisdiction on good cause shown to stay any warrant of execution or arrest issued by another court against a party who is subject to the jurisdiction of the second court.

(3) Any court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by itself, including an order under section seventy-two.”

[14] Respondent's Counsel submits that because the Applicant has placed reliance on Section 63 of 'the Act' in this application, he is bound by Section 62(2) and (3) of 'the Act'. As I understood the submission, Section 62(2) and by implication Section 62(3) is clear that a court as defined is another Regional Court. The definition section of 'the Act' defines a 'court' as:

“means a magistrate's court for any district or for any regional division”.

² AV v YV 2021 GPJHC 865; Petersen & Others v Bochum Foods (Pty) Ltd GPJHC 644; Isibonelo Property Services (Pty) Ltd v Uchemek World Cargo Link Freight CC & Ano 2023 GPJHC @ para 14

[15] Respondent's Counsel was asked by the Court to explain her jurisdictional point considering the inherent jurisdiction of the High Court. Respondent's Counsel responded by stating that what she meant is that this Court would have a discretion to hear the matter. This response, in my view, is the nub of this debate. As far back as 1953 this Court³ held as much, namely, a High Court should not refuse to hear such applications before it but should, in hearing it determine that costs be awarded on a Magistrate's Court scale.

[16] Accordingly, the second point on jurisdiction raised by the Respondent must also fail on the ground that this Court is entitled to hear this application and has the necessary jurisdiction.

[17] Let us then return to the merits of the application. The Applicant seeks relief in accordance with the Notice of Motion⁴. In my view, the only interpretation that can be given to the Notice of Motion is that Part A was finalised by my sister Khumalo J wherein she struck the matter from the roll with costs and what remains before this Court is Part B which provides:

- "1. The writ of execution issued by the Registrar of the Regional Court, Benoni, under case number GP/BEN-RC226/2015 on 13 June 2022 [be] declared unlawful and set aside.*
- 2. The Respondent be interdicted from issuing a writ of execution under Benoni, Gauteng Regional Court case number GP/BEN-RC226/2015 for an alleged debt in the amount of R65 099.00 and/or interest thereon without a Court Order.*
- 3. Costs against the Respondent on attorney and client scale"*

[18] The gist of Applicant's case has been set out above in paragraph 7. For convenience, it is repeated here:

³ Swanepoel v Roelofse 1953 (2) SA 524 at 526 B-C; See also Yekelo v Bodlani 1990 (3) SA (Tk) 970 at 975 D

⁴ Caselines: Section 001 from pages 1-4

The Applicant submits:

- 18.1. firstly, the time for the execution of the writ in terms of Section 63 of the Magistrate's Court Act⁵, hereinafter referred to as 'the Act', had expired in that, 3 years had passed before issuing of the writ.
- 18.2. Secondly, the Applicant submits that the writ was issued without there being a Court Order issued in respect of the amount purportedly owed. Accordingly, so the Applicant submits, the writ is unlawful and stands to be set aside.
- 18.3. Thirdly, and perhaps interlinked with the second point, the Applicant submits that if any money is owed such money is owed to a Ms V V Bambisa, the mother of the Respondent and as such, the writ falls to be set aside on that ground as well.

[19] The Respondent on the other hand contends that, firstly, the writ was obtained as a result of a settlement agreement between the parties that was made an order of Court. This settlement agreement contained the *causa* for the writ. Secondly, the three-year provision in 'the Act' is of no import because the Respondent paid her share of the debt into the trust account of her Attorney in 2021. Thirdly, interdictory relief in the present circumstances is not appropriate.

[20] It is convenient to deal with Respondent's third point first. I agree with Respondent's Counsel that the interdictory relief claimed by the Applicant in paragraph 2 of Part B of the Notice of Motion cannot be sustained. The effect of such relief is to adjudicate on an issue in the future and for another Court to be saddled with an interpretation of an Order of this Court, whilst not a bar, is in my view dubious and premature. It is not for this Court to spell out what another Court must do when faced with a matter placed before it and which might have merit.

⁵ 32 of 1944, as amended

What this Court can do and will do is to determine the validity and lawfulness of the writ issued out of the Regional Court. To repeat, the relief claimed in prayer 2 is unsustainable and must fail.

[21] In deciding on Applicant's first point mentioned above it is convenient and appropriate to quote the provisions of Section 63 'the Act':

"Execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except upon an order of the court in which judgment was pronounced or of any court having jurisdiction, in respect of the judgment debtor, on the application and at the expense of the judgment creditor, after due notice to the judgment debtor to show cause why execution should not be issued."

[22] The first part of the abovementioned section calls for a determination of whether there is a judgement in the present matter and whether three years have expired within the meaning of the section. Accordingly, a writ of execution may only be issued, in the first instance against the property of the debtor and secondly, a Court must have pronounced on the debt by issuing an order regarding same.

[23] As indicated above, a decree of divorce incorporating the terms of the settlement agreement was issued out of the Regional Court, Benoni. It is common cause that this order was issued on 11 December 2017. The writ was issued on 13 June 2022⁶. The *causa* for the writ forms the dispute between the parties.

[24] Does the Applicant's argument hold water? In other words, can it be submitted that the R65 099-00 is not a debt owed to the Respondent but rather her mother, Ms V V Bambisa. Clause 4.1 and 9.1 make it clear that Ms V V Bambisa loaned money to the Applicant and Respondent. The Respondent submits the money owed to her mother, as per the settlement agreement is the responsibility of both her and the Applicant.

⁶ Caselines: Section 002-25

[25] Whilst that might be the Respondent cannot make out that she is the judgment creditor and entitled to a writ of execution for payment of R65 099-00. It is also not this Court's duty to set out how the Respondent should go about claiming any monies owed to her by the Applicant. The objective evidence just does not support the version of the Respondent.

[26] Accordingly, the writ falls to be set aside on the grounds that the amount of R65 099-00 is not a debt owed to the Respondent and the Regional Court, Benoni, could not issue the writ as they did.

[27] The final issue raised by the Respondent in answer to Applicant's submission that the three-year period required by Section 63 of 'the Act' had expired need not entertain this Court further because the writ has already been held to be unlawful for the reasons set above.

COSTS

[28] The Applicant has requested punitive costs. Counsel for the Applicant submitted that the Respondent must have known that she could not execute on the basis put forward to the Registrar of the Regional Court, Benoni, but proceeded nonetheless. The Applicant submits further that he should not be put out of pocket for the ill-advised actions of the Respondent.

[29] It is trite that the award of costs in any action or application is a discretion that vests in the Court. However, this discretion must be exercised judicially. I have considered the submissions by both the Applicant and the Respondent and have decided that the Applicant has made out a case for punitive costs and that costs must be awarded to the Applicant on an attorney client basis.

[30] However, this Court must also decide whether the costs to be awarded should be on the magistrate's court scale or the high court scale. This is so because in paragraph 15 above, the precedents set out therein indicate that instead of non-suiting a party for bringing the application in High Court, such Court should rather consider awarding costs on the magistrate's court scale. I align myself with

such determination and decide that the costs must be awarded on the magistrate's court scale.

CONCLUSION

[31] For the reasons set above, I am of the view that the Applicant has made out a case for the setting aside of the writ of execution issued out of the Regional Court, Benoni, on 13 June 2022.

[32] Accordingly, the following Order will issue:

- a). The writ of execution issued by the Registrar of the Regional Court, Benoni, under case number GP/BEN-RC226/2015 on 13 June 2022 is declared unlawful and hereby set aside;
- b). Respondent is to pay the Applicant's costs of this application on the Magistrate's Court scale and on an attorney and client scale.

G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **16 November 2023**.

Date of virtual hearing: 24 October 2022

Date of judgment: 16 November 2023

Appearances:

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