



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 73083/2009

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 11 MARCH 2022

SIGNATURE

In the matter between:

RICHARD LAWTON KENNEDY

Applicant

and

NEDBANK LIMITED

First Respondent

SHERIFF OF THE HIGH COURT, KNYSNA

Second Respondent

J U D G M E N T

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] The applicant is facing sequestration in a pending application in the Western Cape Division of this Court. The sequestrating applicant in that application (Nedbank) was the plaintiff in the action in this matter and the current applicant was the first defendant. In the sequestration application Nedbank is relying on a *nulla bona* return obtained in respect of a writ of execution issued in this court. As stated at the commencement of argument on behalf of the applicant, in order to stave off his pending sequestration, the applicant needs to attack the said writ, which is what the current application is about.

[2] The history of Nedbank's litigation against the applicant:

The writ sought to be attacked and the nature of the attack must be seen in the context of the history of the litigation between the parties. Apart from the issue of joint and several liability of the two defendants in the preceeding action (of which the applicant is one), which issue I shall deal with later, most of the rest of the history is common cause. It is the following:

2.1 The cause of action relied on by Nedbank was the recovery of a home loan in respect of which the applicant and one John Melia (Melia) were the two borrowers. They also were the two mortgagors in respect of a bond passed over certain immovable property situated in Cedar Lakes Country Estate (the property) as security for repayment of the loan. The mortgagors had fallen in arrears with their payments and the full outstanding balance had been called up. None of this has been placed in dispute.

2.2 In the agreement of loan, the parties have agreed that "*In the event that the mortgagor comprises more than one person, whether natural or otherwise, all such persons will be liable to the bank jointly and severally and in solidum for the performance by the mortgagor of the mortgagor's*

obligations in terms of this agreement". This term was not disputed by the applicant.

- 2.3 The parties have further agreed that "*... the nature and amount of the mortgagor's indebtedness to the bank in terms of this agreement ... will at any time be determined and proved by way of a written certificate purported to be signed by a Manager or Accountant for the time being ... which certificate will upon the mere production thereof be binding on the mortgagor and be prima facie proof of the contents of such certificate and of the fact that such amount is due and payable in any legal proceedings against the mortgagor and will be valid as a liquid document against the mortgagor in any competent court*". This term was also not disputed by the applicant.
- 2.4 In the combined summons Nedbank stated that the action instituted was against both defendants, that is the applicant and Melia, jointly and severally. They were respectively cited as the first and second defendants.
- 2.5 The particulars of claim concluded as follows: "*Wherefore the plaintiff prays for judgment against the first and second defendants jointly and severally ...*".
- 2.6 After service of the combined summons, to which the particulars of claim and a copy of the loan agreement and the bond had been attached, the defendants delivered a notice of intention to defend the action.
- 2.7 Pursuant to this, Nedbank, in terms of the then applicable Rule 32 applied for summary judgment claiming judgment "*... in favour of the Applicant [Nedbank] on the grounds as stated in the summons against the 1st and 2nd Respondents ...*".

- 2.8 A set-down of the application for summary judgment was served on the applicants' attorneys on 18 March 2010 and on 12 April 2010 this court, by order of Makgoba, J (as he then was) granted an order against the applicant and Melia "*jointly and severally, the one paying, the other to be absolved*" for the payment of R1 314 349, 91 together with certain interest. The property was declared specially executable and costs on the scale as between attorney and client (as agreed in the loan agreement) was also granted.
- 2.9 On 27 May 2010, at the instance of Nedbank, the Registrar of this court issued a writ of attachment in respect of the property (the first writ). The writ, inter alia, stated that it was issued "*in satisfaction of a judgment debt and costs to be taxed plus Sheriff's fees and other costs obtained by the plaintiff against the Defendants jointly and severally, the one to pay, the other to be absolved, in this court on 12 April 2010 wherein the abovementioned immovable property was declared specially executable ...*".
- 2.10 The property was eventually sold in execution and transferred to the new owners. The proceeds of the sale however, left a shortfall and a balance owing in respect of the judgment debt.
- 2.11 Armed with a new certificate of balance for the outstanding amount, Nedbank's attorneys again approached the Registrar who, at their instance, issued a second writ reading now as follows: "*To: The Sheriff of the High Court. You are hereby directed to attach and take into execution the movable goods of Richard Lawton Kennedy and Francis John Melia, the aforementioned First and Second Defendants of ... Plettenberg Bay and of the same to be caused to realise by public auction the following: 1)*

Payment of the amount of R 879 688, 24 being the balance outstanding as per the Certificate of Balance attached hereto marked "A" ...".

2.12 Upon service and execution of the second writ by the Sheriff, the applicant, in addition to the return of service furnished by the Sheriff, signed a "*Nulla Bona Certificate*, reading as follows: "*I, Richard Kennedy, being the judgment debtor against whom the relevant judgment has been given, acknowledge that the Sheriff served on me a copy of the warrant, after exhibiting the original and explaining the nature and content thereof to me. He demanded from me, the judgment debtor, payment of the amount due thereunder to satisfy the judgment. I informed him that I, the judgment debtor did not possess any disposable property to satisfy the judgment. The consequences for signing the certificate, inter alia that – 1. My estate could be sequestrated ... have been set out to me. I, the judgment debtor am willing to sign this document and have no objection that it be forwarded to the instructing attorneys*". This certificate was signed by the applicant on 3 February 2020.

2.13 More than a year later, on 10 May 2021, the applicant launched the current application to set aside the second writ.

[3] The applicant's contentions

With reference to the heads of argument filed by Mr Kerr-Phillips on behalf of the applicant, with reliance on the applicant's founding affidavit, the applicant contends that:

3.1 The authenticity of the court order is challenged on the basis that:

- it is not stamped (this aspect was not proceeded with in argument).

- *ex facie* the cover of the court file judgment was granted jointly as opposed to jointly and severally.
- The order has been incorrectly typed and needs to be retyped “*to coincide with the order actually granted*”.

3.2 The validity of the second writ is disputed due to the fact that, according to the applicant, no certificate of balance was attached and there was “*no basis for the Registrar to determine ... whether the warrant has been issued for the correct outstanding balance*”. The further complaint was that Nedbank was required “*to issue a warrant in strict conformity with the underlying judgment and in substantial compliance with form 18 of the first schedule to the Uniform Rules of Court*”.

[4] The judgment

The attack on the judgment (as reflected in the order) suffers from a number of fatal defects:

4.1 Firstly, it is way out of time. The judgment, as reflected in the order, has been left intact during the whole execution process in respect of the property. Neither the judgment nor the order have been attacked during this whole process. Even in the writ of execution against the immovable property, the defendants were, at the conclusion of the writ, informed as follows: “*Kindly be advised that Rule 31(5)(d) provides that any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court*”. Despite this, no action has been forthcoming from the applicant. He also offers no explanation for the delay of his current application, which is in excess of a decade.

- 4.2 Secondly, there is no separate application to have the judgment, if it has erroneously been granted as being jointly and severally against the applicant and Melia as opposed to merely jointly as contended by the applicant, varied, corrected or rescinded. Similarly, there has been no attempt by the applicant to have the typed order, if it should have reflected only joint liability, corrected. Both the judgment (being for joint and several liability as confirmed by Nedbank in its answering affidavit) and the corresponding typed order are simply being collaterally attacked by the applicant in his affidavit and in argument on his behalf, but without any direct process directed at the judgment or order. Such a type of attack should not be countenanced. The *Oudekraal* rule finds application. It has been described in Van Loggenberg (Ed) *Erasmus: Superior Court Practice* at D1-522 as follows: “*An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done, the court order must be obeyed even if it may be wrong; there is a presumption that the judgment is correct*”.
- 4.3 Thirdly, the applicant produces no evidence to support his version. The reliance on the outside cover of a duplicate court file is dubious at best. Even the wording on the file cover, does not fully support the applicant’s contention. It reads “*Summary Judgment granted in terms of prayers 1, 2 and 3 of the Notice of Application*”. Having regard to the wording of the summons and the particulars of claim and the prayers claimed therein, read with the application for summary judgment, the overwhelming probabilities are that the judgment was granted as prayed for, catering for joint and several liability, and was correctly reflected in the court order. This probability accords with the abovementioned presumption.

- 5.1 Rule 45(1) reads as follows: “*A judgment creditor may, at his or her own risk, sue out of the office of the Registrar, one or more warrants of execution thereof, corresponding substantially with form 18 of the first schedule*”.
- 5.2 The applicant contends that it was not open to Nedbank to have relied on a certificate of balance in order to indicate to the Registrar for which amount of outstanding balance the writ should be issued and that an affidavit explaining the amount would have been necessary. There is no such requirement in the rule.
- 5.3 Although the use of a certificate has been contemplated in the loan agreement and although the amount claimed in the writ is in respect of a judgment, there is in principle no material difference between a manager or accountant of Nedbank calculating and verifying the amount due on a loan account, taking into account interest debited and payments received and the same manager or accountant verifying the balance in respect of the same loan account after payments have been received, (such as the proceeds of the sale in execution of the property), albeit that the loan account has now been converted into a judgment debt. In addition hereto, there is the argument that this is what the parties have agreed to in clause 15.3 of the loan agreement quoted in paragraph 2.3 above.
- 5.4 In any event the risk attendant upon the issue of a writ is upon the judgment creditor and the Rule does not prescribe how such creditor should calculate or confirm the amount due. In the circumstances of this case, that risk was assumed by calculating the balance in the same fashion as the creditor has done, in accordance with the agreement between the parties, when judgment was initially sought. This was acceptable to the court at the time when judgment was granted and that acceptance had not been attacked by

the applicant. Without any substantive basis for a new attack, a similar certificate should in my view, be sufficient for purposes of the issuing of a writ. In my view, it has correctly been accepted by the registrar.

- 5.5 The issue of whether of a copy of the certificate has in fact been attached or not is also, in my view, a red herring. The probabilities (and the Sheriff's return) point to not only the existence of the certificate of balance (as annexed to Nedbank's answering affidavit) but also the attachment thereof.
- 5.6 This brings me to the issue of "substantive compliance" with the Rules. The applicant correctly contends, with reliance on *Sacks v Katz* 1955 (1) SA 67 (T) that this is what Rule 45 contemplates. However, the applicant insists on "strict conformity" beyond substantive compliance.
- 5.7 The "conformity" that the applicant may rightly insist on, is conformity with the underlying judgment. This is not the same as requiring "strict conformity" with a form. To do so, would be to prefer form (literally) over substance. The applicant appears to conflate the two issues.
- 5.8 The purpose of a writ is to instruct a Sheriff to proceed to demand compliance with a court order and to levy execution in respect thereof. It is an instruction to the Sheriff obtained from the registrar at the instance of a judgment creditor.
- 5.9 In my view, the substantial requirement of the writ is therefore that it may not instruct the sheriff to recover from the debtor more than what is due to the creditor in terms of the judgment. There must be strict conformity with this requirement. The only further requirement is that the form of the instruction must, in the words of Rule 45, be "substantially" in accordance with form 18.

5.10 The “draft” contained in form 18 may be used with such variations as the circumstances may require. See: the Commentary on Rule 45 in Van Loggenberg (Ed), *Erasmus: Superior Court Practice* at D1-594A – D1-595.

5.11 It has also been held by our courts that the terms of the actual judgment need not be reflected in the writ and in fact, form 18 does not require that. See *Du Preez v Du Preez* 1977 (2) SA 400 (C) and *De Clerk v Sheriff of the High Court, Empangeni* 1994 (3) SA 564 (D).

5.12 The evaluation of whether the writ in question was “substantially” in accordance with form 18 or whether there should have been stricter conformity, as insisted on by the applicant for the writ to be valid, must be considered in the context of the facts of this case. In the present instance the applicant as judgment debtor:

- knew of the judgment.
- has left the judgment intact for more than decade.
- knew about the first writ of execution.
- was aware that the property declared executable in terms of the judgment had been sold in execution in terms of the first writ.

5.13 In the absence of any indication to the contrary (and the applicant has produced none), it is clear that the second writ has satisfied the requirements of Rule 45 as well as substantively the requirements referred to above. It has adapted the wording of form 18 as far as necessary in order to claim the balance of what had already been recovered and no more. The certificate does not even purport to have added any interest to that balance.

The writ therefore contained all the elements of what was needed to inform the sheriff what to do and what to recover. At the time of service thereof, the applicant as judgment debtor was equally so informed and did not then object to the writ. In fact, he responded to the demand contained therein by furnishing the “*Nulla Bona Certificate*”.

5.14 Accordingly, the application for the setting aside of the writ mentioned in the notice of motion must fail.

[6] Costs

6.1 In the loan agreement, the parties had agreed that all the amounts that Nedbank “... *may pay or incur pursuant to the agreement due to the mortgagor’s default, ... including legal costs on the attorney and client scale*” will be payable by the applicant and Melia. Such a costs order was accordingly duly included in the initial summary judgment order. Nedbank now claims a similar order in this application.

6.2 Over and above any contention based on contract, I am of the view that there is a separate and independent substantive reason why the applicant should pay the costs of his unsuccessful application on the scale as between attorney and client. In the founding affidavit, the applicant makes it very clear that it was only when faced with sequestration proceedings in the Western Cape Division, that he (for the first time) raised his attack on the order granted in this court and similarly for the first time raised his attack on the validity of the writ in question. He raised these aspects in his answering affidavit in the sequestration proceedings and now complains that despite this, “...*the first respondent [Nedbank] is seemingly intent upon finalising the Western Cape sequestration proceedings and as such continues to rely on the warrant and the alleged nulla bona return ... I have*

no option but to bring this application to set aside the warrant now”, that is almost a year after service thereof.

- 6.3 The applicant was quite content to point out to the sheriff, when the second writ was served and when he was asked whether he had disposable assets or not, that he had none. He was equally content to even sign the certificate referred to in paragraph 2.12 above, but now that Nedbank seeks to rely on these disclosures and statements made by the applicant, he launched this application. The inescapable conclusion is that the application was not launched as a result of a *bona fide* objection to the formulation of the summary judgment order or the form of the writ, but solely to avoid the consequences thereof as well as the applicant’s own responses thereto and in an attempt to stave off the pending sequestration of his estate.
- 6.4 The application was therefore launched and pursued for a reason ulterior to the relief sought. Put differently, the application was not pursued because the applicant was concerned about the writ (after his certificate of *nulla bona*, he had no further concern with the writ), but for the reason that he wants to oppose his sequestration application.
- 6.5 The applicant has furnished this court with a copy of his answering affidavit in the Western Cape sequestration application. In it, no mention is made of the certificate mentioned in paragraph 2.12 above. In fact, contrary to that certificate, the applicant stated in his answering affidavit in the sequestration proceedings that he has other immovable properties and that the net value thereof “*is more than sufficient to satisfy any alleged outstanding judgment debt owing ...*”. He went further to concede that such properties constitute disposable assets. He then goes further to state that the return of the sheriff is attacked because it was made in execution of a writ which does not cater for joint liability (only). He put it as follows:

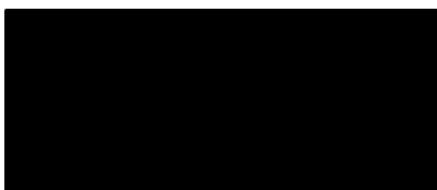
“the warrant of execution is therefore incorrectly drawn in the sense that I am not solely indebted to the applicant [Nedbank] for the alleged total balance of R 879 688.20. At best, I am only liable for 50% of whatever is found to be owing. The warrant of execution falls to be set aside and if the applicant persists with this application, I intend bringing an application to set aside the warrant of execution in High Court of South Africa, Gauteng Division, Pretoria” (my underlining).

6.6 So the position is that when the sheriff sought to execute the second writ, then, quoting from his return, *“Kennedy Richard Lawton informed me that he has no money or disposable assets or property inter alia wherewith to satisfy the warrant or any portion thereof ...”* but when faced with a sequestration application, the applicant suddenly has disposable assets and moreover seeks to have the writ set aside, should Nedbank proceed to rely on his responses thereto. The argument that the second writ only referred to movables, does not explain the answer given to the sheriff and neither does it explain the wording of the *“Nulla Bona Certificate”*.

6.7 The applicant’s conduct amounts to dishonest litigation and an abuse of court processes. I therefore have no hesitation in awarding the costs which follow the event of his unsuccessful application, on the scale as between attorney and client.

[7] Order

The application is dismissed with costs on the scale as between attorney and client.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 7 March 2022

Judgment delivered: 11 March 2022

APPEARANCES:

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