



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

CASE NO: A3059/2019

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
30/09/2022 	

In the matter between:

**SHERIFF FOR THE DISTRICT
OF ROODEPOORT SOUTH**

Appellant

and

**BRONWEN DAMONS
SHIRAD KARA
OMAR HARTLEY**

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

YACOOB J:

1. This is an appeal against a punitive costs order made against the appellant, who was acting in his official capacity in the circumstances leading to the order. The

appellant submits that the Magistrate misdirected himself in granting the punitive costs order, and exercised his discretion in a manner that was not judicial.

2. The facts in this matter are largely common cause. Only the first and second respondents participated in this appeal, and unless the context requires otherwise, I refer to them collectively as “the respondents”.
3. Because the question of whether a punitive costs order was justified is reliant to a large extent on the facts, I set them out here in some detail. Unfortunately, the facts were difficult to glean, both because of the way in which the papers were drafted, and the fact that the papers were uploaded on the Caselines portal in a way that made it difficult to find things.

FACTUAL BACKGROUND

4. The third respondent, now deceased, obtained judgment in the Gauteng Rental Housing Tribunal against the first and second respondents. They were to pay R38 000 in arrear rental and vacate the relevant premises by the end of August 2017. The respondents did not pay the amount due, and the appellant proceeded to attach certain items in satisfaction of the judgment, on 25 August 2017.
5. After items had been attached (but not removed), and on the same day, the respondents moved their goods, including both attached and unattached items, to a storage facility. The appellant was not informed where the goods were moved to. The second respondent removed BMW motor vehicle, which had also been attached, to an undisclosed place. The respondents deny that the motor vehicle was present when the attachment took place. It is unclear then how the appellant knew it existed.

6. According to the respondents, they were forced to move their belongings because they had to vacate the property and had nowhere else to keep their effects. They signed affidavits at the police station dated 25 August 2017 to this effect, and included the name of the place at which the goods were stored. They allege that they left a note on their door and also gave copies to the appellant. The appellant denies this, although not on oath.
7. On 29 September 2017, the appellant removed the goods that were in the storage facility. This included both attached and unattached goods. There is a dispute of fact about what happened on this date. According to the appellant the person in charge of the storage unit called the respondents to come and remove the unattached goods, they refused to come, and the appellant had to take all the goods, because the storage unit was unwilling to keep them. According to the respondents, they were only called after the appellant had removed everything.
8. The respondents then complained to the South African Board for Sheriffs, which then directed the appellant in writing to release the unattached items. 18 days thereafter, on 20 October, the appellant advised the Board that the respondents were welcome to fetch the unattached items, which were apparently personal items exempted from attachment in accordance with section 67(a) and (b) of the Magistrates' Courts Act, 32 of 1944, (inventory B) but that the remaining items (inventory A) were subject to interpleader proceedings.¹
9. On 20 February 2018 the appellant advised the board that the respondents were welcome to come and collect the items on inventory B, that they always had been, and that the interpleader proceedings had been stayed.

¹ Both the appellant and the respondents accuse each other of creating a person with an interpleader claim to stymie the other.

10. On 2 October 2018 the Board advised the appellant that the goods in inventory B must be released. The appellant's response on 4 October 2018 was that the goods in inventory B had always been available. The appellant now advised that another claimant had laid claim to the goods in inventory A. Of course this was not relevant to whether inventory B could be released.
11. According to the appellant, the respondents had consistently declined to collect only the unattached goods. They had insisted on retrieving all the goods, and if they could not get all the goods, they preferred to have nothing. The respondents deny this. The respondents insist that the appellant has never invited them to collect anything. According to the respondents, the appellant informed them that they could have the goods in inventory B if they brought in the motor vehicle.
12. On 12 December 2018 the appellant informed the respondents that he intended to dispose of property in his possession in terms of a warrant of execution. The respondents then approached court on an *ex-parte* basis and obtained a *rule nisi* preventing execution, with return date on 07 February 2019. The order did not set aside the attachment, but required that the goods be returned, and prevented the respondents from disposing of them.
13. The basis of the application was that the items were personal items and that the Board had directed their return. The inventory attached to the founding papers as SK2 contains very few items that could be construed to be personal items. Also, SK2 bears no resemblance to the list annexed to the third respondent's answering affidavit, or in appellant's inventory A and inventory B, which corresponds to some extent to the list annexed by the third respondent. Apart from it being submitted for the appellant that inventory B is the correct list, nothing was made by either party of the disparity. Nor was there any attempt to explain the disparity on affidavit.

14. The notice of appeal only deals with the magistrate's findings in regard to inventory B. Also, the interpleader of which the respondents complained in their founding affidavit refers specifically to items in annexure B, which does not correspond with SK2. The direction from the Board also refers specifically to the items in annexure B. The question becomes more interesting, because the inventory annexed as annexure B to the appellant's supplementary affidavit dated 3 April 2019 corresponds to SK2.
15. In the answering affidavit on 16 January 2019, the third respondent states that the attached items, inventory A, had already been sold, and the unattached items remained. However, he alleges that the attached items did not realize the amount required, and that the unattached items were now also attached. No proof of that attachment is annexed and the respondents in reply deny the attachment. The third respondent, rather oddly, denies any undertaking having been made about the unattached goods being returned. The third respondent also points out that the items could not constitute personal and household goods necessary to the respondents, since it took them over a year to bring the application.
16. Although both sides appear to be talking about the items that were initially unattached, the answering affidavit insists that a warrant is the ultimate authority and that the Sheriff is entitled to dispose of the goods. This despite the fact that there was no warrant applicable to the then unattached goods, assuming that the reference is to the items in inventory B.
17. The appellant and third respondent brought an urgent application to anticipate the return date, an order was granted apparently with a return date of 24 January 2019. On that date the order was set aside, partly because the application had been served on the respondents less than the required 24 hours in advance of the

hearing. The application for reconsideration was then heard on the same day as the return date. Another oddity is noted, that the draft order (which was then made an order and then withdrawn) in the anticipation application also refers to property listed in annexure SK2.

18. On 24 January 2019 the third respondent filed a supplementary affidavit stating, amongst other things, that the goods were still in the appellant's storeroom.
19. On 28 January 2019, the appellant elected to abide the court's decision. This was after the hearing on 24 January at which the magistrate made certain comments which warned the appellant that he may be overstepping his role as an officer of the court, and seemed to be taking too much of an interest in the matter.
20. Another supplementary affidavit was filed by the third respondent on 4 April 2019. This affidavit refers to a contempt allegation against the third respondent. He denies that he instructed the sheriff to proceed with a sale, and that another party, Mr Culhane, did this.
21. The appellant also filed a supplementary affidavit on 04 April 2019. In it he alleges that he received a warrant in a different case number, also against the first respondent, on 04 February 2019, and was then obliged to attach goods to satisfy the debt relevant to that warrant. The first respondent did not settle the debt and the appellant proceeded with the sale, as there was no interdict under that case number. The inventory annexed as annexure B to this affidavit corresponds to SK2. The notification to the first respondent of the warrant notes that the attachment and sale are relevant to both case numbers. The appellant does not annex any evidence of when he received this warrant.
22. The transcript of proceedings on 07 February 2019 is not part of the appeal record. It appears from the magistrate's judgment that the matter was postponed to 28

February and 7 March for the third respondent to obtain legal aid and his application for legal aid was unsuccessful.

23. At the proceedings on 14 March 2019, in which the appellant did not participate, the third respondent informed the magistrate that the goods had been sold, on 5 March 2019. The third respondent handed up documentation detailing the attachment and sale, and it was confirmed that these were documents that the first respondent had in his possession on the previous hearing date.

24. The matter was postponed to 25 March for judgment, but then again postponed to 09 April 2019 when confirmation was received that the goods had in fact been sold and were no longer in the appellant's possession. The goods that were sold correspond with SK2.

25. At the hearing on 09 April the appellant submitted that he had no need to inform the respondents of the date of the intended sale of their goods, that they were always welcome to collect their goods until the February attachment, but on the other hand that the goods were not necessary household goods protected from attachment (which then begs the question why they were not attached in the first place, and why the respondents were welcome to collect them). He did not abide by the order of court because these were not necessary goods and because he had to fulfil the "new" 2015 warrant.

26. Another factor worth noting is that throughout the proceedings in the magistrates' court, the appellant and the third respondent represented themselves, but the appellant permitted the third respondent to use his address as the sheriff as his address for service.

27. On 31 May 2019 magistrate gave judgment and made the order under appeal.

28. The magistrate found that inventory B coincides to a large extent with SK2. It is not clear how this finding was made, if what was before the magistrate was what was before this court. Nevertheless the magistrate found that the discrepancy between the lists is of no consequence for purposes of the judgment.
29. The magistrate found no merit in the appellant's contention that the items in inventory B were not necessary items in terms of section 67 of the Magistrate's Court Act, especially since the appellant himself did not attach them when the first attachment took place and also contended that the respondents had been welcome to collect them.
30. He found the appellant's version that the reason for non-compliance with the Board's directive was improbable, that the respondents had been invited to collect the items and did not, because the respondents then brought an application to court for the return of the items.
31. The magistrate found that there was no merit in the appellant's contention that the court order only applied to that particular case number and did not protect the goods from being sold in execution in any other case. The magistrate considered that no reasonable court would find that that was the case and that that was why the appellant could not find any authority to that effect. The magistrate found that the appellant proceeded with the sale "in direct contempt of the interim court order".
32. The court found that the order meant that execution should have been stayed on all matters in which the goods were attached, referring to *Brummer v Golfol Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) as authority.
33. The magistrate found the appellant's conduct to be malicious and much more than gross negligence, but rather recklessness amounting to *mala fides*. His opposition

of the application was vexatious. The magistrate therefore ordered the appellant to pay the costs on an attorney and client scale.

THE APPEAL

34. The notice of appeal relies on the following grounds. The idiosyncrasies in punctuation and grammar are those of the appellant.

- “1. The Magistrate was wrong in finding that the Appellant knew he was acting against the provisions of Section 67 of the Magistrate’s Courts Act 32 of 1944 by attaching the goods referred to under Inventory B.
2. The Magistrate was wrong in finding that the Appellant declined unjustifiably to comply with the directive from the South African Board for Sheriffs to release the goods referred to under Inventory B.
3. The Magistrate was wrong in finding that the Appellant acted in willful contempt of an interim court order by proceeding to sell the items under Inventory B in execution.
4. The Magistrate ought to have found that the Appellant understood that the goods subject of Inventory B were not exempted from attachment in terms of Section 67 of the Magistrate’s Courts Act.
5. The Magistrate ought to have found that the Appellant did seek to comply with the directive of the Board, but such attempts were repeatedly defeated by the conduct of the Second Respondent up until the warrant of execution in *GA Culhane v S Kara* (case number 1972/15) which precluded subsequent compliance.
6. The Magistrate ought to have found that the Appellant acted in accordance with the order of the Court in case number 1972/15, having

informed the Respondents in advance of his intention to comply with the Court's order in that matter and was not, therefore, in willful contempt of the interim order.

7. The Magistrate was wrong to find that the Appellant had acted with malice as the Appellant's subjective belief, which was not unreasonable, was that he was acting correctly within the applicable law at all material times."

35. It is clear that the magistrate was incorrect in finding that inventory B and SK2 were the same. However, and only for the purpose of this judgment, I consider the discrepancy insignificant, save to the extent that it is relevant to the notice of appeal. It is equally clear that the question whether inventory B contained items exempted or protected from attachment is irrelevant.

36. What is relevant is that there was a court order which required the return of the items in SK2 to the respondents, and that the appellant sold an inventory corresponding to SK2 despite the existence of that order.

37. The appellant is the party who explicitly brought inventory B into the proceedings, and did not respond at all to the application, which was really about SK2. He then went on to sell those items listed in SK2. It may well be that the respondents were not above board with the court since it is clear that SK2 does not comprise a list of items protected from attachment. Nobody could contend, for example, that 170 bras, 35 handbags and 212 pairs of trousers are necessary for their daily living.

38. However, that was not something for the appellant to question. There was a court order, and he was bound by it until and unless it was set aside. The only way in which he would not have been bound would have been if, on the return date, it was

not confirmed. The proper facts ought to have been placed before the court, instead of a contradictory and irrelevant muddle.

39. It follows that paragraphs 1, 2 and 4 of the notice of appeal fall away. The magistrate's findings about whether inventory B fell within section 67 is irrelevant. Paragraph 5 is also irrelevant and cannot succeed, since the Board of Sheriffs' directive dealt with inventory B.

40. Paragraph 3 is relevant but only in respect of whether the magistrate was correct in finding that the appellant acted in wilful contempt of an interim court order. The question of the sale of the items in inventory B is irrelevant to that court order. Paragraphs 6 and 7 are also relevant to whether the appellant's actions warranted a punitive costs order, as they deal, albeit collaterally, with the correctness of the contempt finding.

41. The questions for this court to deal with, as I see it, are whether the 2015 warrant superceded the court order, and whether the appellant acted *bona fide* in selling the goods in execution of that warrant. If either of those questions is answered in the negative, it is my view that the magistrate's costs order cannot be interfered with.

42. In argument it was submitted for the appellant that the question was not simply about the grant of a punitive costs order, but of a punitive costs order against a functionary. The question of *bona fides* is all the more applicable in answering that question.

DOES THE 2015 WARRANT SUPERCEDE THE *RULE NISI*?

43. The judgment relied upon by the magistrate for finding that the stay of execution related to all matters in which the goods were attached, *Brummer v Gorfil Brothers*

Investments (Pty) Ltd 1999 (3) SA 389 (SCA), does not provide authority for that principle. It does however, provide some guidance regarding whether court processes are being abused, which is relevant to a litigant's *bona fides*.

44. In argument, both written and oral, the appellant made no submission that, as a matter of law, the 2015 warrant superceded the court order, or permitted the appellant to sell the goods in execution despite the existence of the court order, because it was for a different case. Instead, the submission was that this was the appellant's interpretation and that by selling the goods in execution of a different case number he would not be acting in a contemptuous manner. At worst, the submission was, the appellant was misguided.
45. This, of course, is relevant to the question of the appellant's *bona fides*, but not to what the law requires of the sheriff to do in such circumstances.
46. The only authority to which the appellant was able to refer us was *Deputy Sheriff Cape Town v South African Railways & Harbours* 1976 (2) SA 391 at 396D-F, that a writ is an absolute justification for what is done in its pursuance, even if a judgment is later set aside, and that a court does not have to enquire into the validity of an order when issuing a writ.
47. In my view this supports the position that, if there is a court order, the sheriff is bound by it even if he thinks it is wrong, and that the appellant's conduct in refusing to return the goods in accordance with the *rule nisi*, and before they were attached under the 2015 warrant, was in itself contemptuous of the court.
48. It is not necessary in this case to make a finding on a general principle regarding whether an order staying execution of one warrant affects the execution of another warrant on the same property or goods. This is because of the facts of this matter.

49. The appellant submitted that he had to execute on the 2015 warrant before the return day because the Magistrates' Court Act requires him to do so without unreasonable delay. This is of course not the case. However, Rule 8(2) of the Magistrates' Court Rules does require the sheriff to execute process without any unreasonable delay. The question then arises what delay would be unreasonable. No submissions were made on that.
50. Certainly, I cannot see that waiting until the issue before the court was dealt with by that court would have been unreasonable delay. The appellant had also waited much longer before attempting to execute on the warrant in this case, so his sudden haste might be construed as unreasonable.
51. The appellant alleged (without annexing any proof) that he received the 2015 warrant on 04 February 2019. The warrant is annexed to the appellant's affidavit of 3 April 2019, explaining why he had proceeded with the sale. The warrant is dated 23 April 2015 and has various stamps on it, all with 2015 dates. The warrant was therefore almost four years old when it was allegedly received by the appellant.
52. Section 63 of the Magistrates' Court Act requires that execution must be issued within three years of a judgment being given. The Supreme Court of Appeal has held that in addition to the writ or warrant being issued, the execution sale must take place within three years of a judgment, even if the warrant was not stale.² The judgment and the warrant were therefore superannuated, and the 2015 warrant was not valid and did not require the appellant to act immediately.
53. The appellant's contention on oath that it was "impossible" for him to comply with the *rule nisi* is therefore incorrect on three counts: one, the 2015 warrant, on his

² *Absa Bank Ltd v Snyman* 2015 (4) SA 329 (SCA) at [15]

own version, came to him long after he ought to have complied with the *rule nisi*; two, it was invalid, and three, there was nothing to force him to act on that warrant with the haste with which he did, and which he had not applied to the original warrant with which this matter is concerned. The averment was clearly made cynically and *mala fide*.

54. The answer to the first question, then, is that the 2015 warrant did not supercede the *rule nisi*.

DID THE APPELLANT ACT *BONA FIDE*?

55. It is clear from what is set out above that the appellant could not have *bona fide* held the impression that he was “obliged” to sell the goods in execution of the 2015 warrant before the return date.

56. Taking into account that the appellant does not provide any evidence of how and when he came into possession of the 2015 warrant, and the apparently unusual haste with which he executed on it, as well as the fact that the 2015 warrant was in any event for a superannuated debt, it is clear that, not only did the appellant not act *bona fide*, but that a conclusion that he acted *mala fide* is justified. It is extremely unlikely that the appellant is not aware of the law as it applies to warrants and writs of execution.

57. An examination of the facts as they emerge, and of the appellant’s own averments and conduct, suggests strongly that the appellant executed on the 2015 warrant in order to “catch out” the respondents, who had given him so much trouble, regardless of the fact that doing so was inconsistent with the Magistrates Courts Act and disrespectful to the court. The picture that emerges is very much of a

person who wanted to find a way around the nuisance the respondents and the court was causing him, and did so.

58. The appellant's attitude toward the court is, in my view, exacerbated by the confusion he caused with the various inventories, muddying the waters rather than assisting the court as might be expected by someone who is part of the machinery of the justice system.

59. The appellant was not *bona fide* carrying out his duty and is not entitled to any protection an official doing so would have against a costs order.

CONCLUSION

60. For the reasons set out above, I am satisfied that the magistrate exercised his discretion in awarding costs judicially and that the order should not be interfered with. We make the following order:

"The appeal is dismissed with costs."



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



T. MODISE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Appellant: B A Morris with N L Buthelezi
Instructed by: Patelia Attorneys INC

First and Second Respondents in person.

Date of hearing:	26 October 2021
Date of judgment:	30 September 2022