

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **872/2005**

Heard: **15/10/2021**

Delivered: **21/01/2022**

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

MAGDALEEN STRYDOM NO

APPLICANT

and

AMANDA KRUGER

1ST RESPONDENT

THE MASTER OF THE HIGH COURT

2ND RESPONDENT

JUDGMENT

NOBANDA AJ

Introduction

[1] The applicant is the executrix in the deceased estate of the late Roberto Nel (the deceased) applying for the rescission of the Writ of Execution (the Writ) issued

against the deceased estate on 17 April 2021 for payment of arrear maintenance of the deceased's then minor child (M[...]). The applicant further seeks an order interdicting the first respondent from taking any further steps in relation to the execution against the deceased estate until such time as the liquidation and distribution account has been drawn up, completed and approved by the second respondent. No order is sought against the second respondent.

Background facts

[2] The deceased and the first respondent were divorced on 29 June 2005. A divorce incorporating the settlement agreement between the parties was granted by the Court. Clause 3 of the settlement agreement dealt with the maintenance of M[...]. To that end, clause 3 as translated provided:

"3.1. The Defendant undertakes to pay the amount of R500.00 per month to the Plaintiff for the maintenance of the minor child and to make/effect the first payment on or before the first day of every month. The maintenance amount shall yearly escalate at a rate equivalent to the Consumer Price Index with the first escalation on 1 November 2005.

3.2. The Defendant shall further be responsible for 2/3 of all school expenses/liabilities of the minor child.

3.3. The Defendant shall retain the minor child on his hospital plan for major medical expenses and all other medical expenses shall, equally, be paid by the Plaintiff and Defendant."

[3] The deceased passed away on 7 May 2014. Upon his death, the first respondent lodged a claim of arrear maintenance on behalf of M[...] against the deceased estate. The applicant rejected the claim. Subsequently, the applicant applied for a declaratory order¹ confirming that decision. In the alternative, the applicant sought the *quantum* of the claim to be determined. The first respondent opposed the application and brought a counter-application, seeking an order

¹ Case No.68/2019

compelling the applicant to accept the claim with adjustments, alternatively, for the court to determine the amount of the claim.

[4] After much deliberation on the issues not relevant to this application, Lever AJ held that the arrear maintenance of M[....] must be paid out by the deceased estate on the basis set out in prayer 3 of the divorce order and the associated deed of settlement. To that end, *Lever AJ* granted the order on 4 December 2020 in the following terms:

“1) The first respondent can recover arrear maintenance from the applicant in her position as executrix of the estate of the late Roberto Nel.

2) That such arrear maintenance is to be calculated in accordance with prayer 3 of the court order issued on the 29 June 2005 under case number 872/05...

3) That where appropriate such claims for arrear maintenance will be supported by appropriate documentary proof relating to such claim/s.

4) ...”

[5] Subsequent thereto, numerous correspondence was exchanged between the parties' attorneys wherein documents and calculations to support first respondent's claim were submitted. The applicant's attorney sought proof in respect of school fees paid by the first respondent prior to the deceased estate reimbursing her for those expenses.

[6] Following extensive negotiations between the parties' attorneys and on 16 March 2020 the applicant refused to pay the first respondent's claim, reiterating that the estate requires proof of arrear maintenance as well as expenses incurred by the first respondent in the form of vouchers and proof of payment.

[7] As a result, on 7 April 2021, the first respondent applied for a Writ of Execution (the Writ) in the amount of R183,950.79 against the deceased estate for M[....]'s general arrear maintenance and school fees. The Writ was served on the

applicant's attorneys on 28 April 2021. The Writ amount was subsequently amended to R172, 517.08 on 11 May 2021 after the first respondent filed an affidavit reducing the general arrear maintenance calculations after M[...] attained the age of majority in 2020. The Writ led to the present application.

Applicable legal principles

[8] The general principle is that a court will set aside a Writ of Execution if:

- (i) the writ does not conform with the judgement which warrants its issue;
- (ii) the judgement is not definite and certain;
- (iii) the *causa* for the judgement has fallen away.²

[9] The applicant's grounds for the setting aside of the Writ can be summarised as follows:

9.1 there is no proper quantification and proof provided by the first respondent for the claim;

9.2 there is a dispute as to the calculation or quantification of the amounts claimed;

9.3 the liquidation and distribution account has not been duly considered and approved by the second respondent.

9.4 the actuary has not been appointed for a proper quantification of the claim by the first respondent.

[10] During argument, Counsel for the applicant Mr Olivier abandoned the applicant's heads of argument. Mr Olivier conceded that the ground raised by the applicant that she is unable to pay arrear maintenance until the liquidation and distribution account has been approved by the second respondent is unfounded in law. Similarly, Mr Olivier conceded that the general arrear maintenance claimed in

²LAWSA 3 (1) 351

the Writ as amended was payable and was actually paid by the applicant. What the applicant is disputing is the claim for school expenses claimed by the first respondent.

[11] Mr Olivier contended that in terms of Lever AJ's Order, not only should the first respondent provide documentary proof of those expenses but also, proof that she '*personally*' paid the amounts claimed in order to be '*reimbursed*' for those "*out of pocket*" expenses. Mr Olivier relied on the cases of ***Africa***³ and ***Butchart***⁴ for his contention. He argued that it is not disputed that M[...] attended those schools for which the documentary proof was submitted by the first respondent. However the documentary proof was not sufficient evidence. The first respondent has to first prove that she '*personally*' paid those amounts to be reimbursed the 66.6% of the amounts paid in accordance with the divorce court order.

[12] Mr Van Niekerk SC on behalf of the first respondent disputed the applicant's contention on the basis that nowhere in Lever AJ's judgment is it stated that the first respondent has to prove that she personally paid the school expenses neither do any of the two cases relied upon by the applicant's counsel require such.

[13] Mr Van Niekerk argued that Order 3 of Lever AJ's judgment only requires documentary proof relating to such claims to be provided and the first respondent has provided such proof when obtaining the Writ. That, in any event, the first respondent had indicated in a letter to the applicant's attorneys attached to her answering affidavit that the payment was made by her erstwhile husband, as a loan to her. Furthermore, that although initially the applicant was disputing the first respondent's claim as a whole, the applicant subsequently relented and eventually paid part of the amount claimed in the Writ, to wit, general arrear maintenance. Accordingly, Mr Van Niekerk submitted, there is no legal basis provided by the applicant for the Writ to be rescinded. He contended that for the Writ to be rescinded, the applicant must show that the issuing of the Writ was not competent in law.

³Africa v Africa 1985 (1) SA 792 (SWA)

⁴Butchart v Butchart 1997 (4) SA 108 (W)

[14] Mr Van Niekerk submitted that the Writ was validly obtained in that the first respondent sets out the basis for the amount claimed in the affidavit for the Writ. That in terms of paragraph 3.2 of the divorce court order, the deceased was liable for 66.6% of M[....]'s scholastic expenses. The first respondent attached proof of those expenses for the 2010 to 2017 and 2018 to 2020 periods. In addition, the first respondent provided the basis and calculations for the general arrears maintenance. The Writ was issued on that basis.

[15] With regard to the interdict, Mr Van Niekerk submitted that the applicant has failed to show any basis for the relief sought. He argued that the applicant came to Court contending that the Writ was not competent in law. However, the applicant now concedes that she has a duty to pay part of the amount claimed in the Writ which amount the applicant has subsequently paid.

Issues to be determined

[16] The issue to be determined is whether the Writ issued is competent in law. One of the grounds averred by the applicant implies that the amount claimed by the first respondent for arrear school fees cannot be easily ascertained.

[18] Lever AJ's Order required the first respondent to provide documentary proof in the form of vouchers for *inter alia* school expenses and related payments⁵. As submitted by Mr Van Niekerk, the first respondent submitted the documentary proof required. The documents confirmed that those fees were paid in full. The Writ for those expenses was issued on that basis.

[19] In ***Butchart***, the Court held that “*a writ may be validly issued based on an ‘expenses clause’ contained in a maintenance order on condition that the amount is easily ascertainable and is ascertained in an affidavit filed on behalf of the judgment creditor.*”⁶

[20] Essentially following *Butchart (supra)*, the requirements to issue a writ for these types of expenses are:

⁵Ibid

⁶At p. 115G

20.1 is the amount claimed by the judgment creditor an '*expense contained in a maintenance order*;

20.2 is the amount easily ascertainable;

20.3 is the amount ascertained in an affidavit filed to obtain the writ.

[21] Unquestionably school fees are 'expenses' contained in clause 3.2 of the settlement agreement relating to the maintenance of M[...] which were made an order of court. The amount claimed by the first respondent is easily ascertainable viz 66.6% of all school fees contained in the attached documentary proof from the various schools and that amount was ascertained in the affidavit filed by the first respondent to obtain the Writ. Accordingly, the applicant's reliance on this ground is unsustainable.

[22] The ground that the claim has not been properly quantified and verified by an actuary was not pursued by Mr Olivier and correctly so, as it has no basis in law. Similarly and correctly so, Mr Olivier also abandoned the ground that the claim could not be paid until the liquidation and distribution account has been approved by the second respondent as having no basis in law.

[23] As indicated above, Mr Olivier submitted that it is not disputed that M[...] attended those schools. The contention is that the first respondent has to prove that she personally paid the school fees for her to be reimbursed for that amount. I agree with Mr Olivier that what the first respondent is claiming is '*reimbursement*' as the fees were paid in full, according to the documentary proof submitted by the first respondent for issuing the Writ. The deceased was liable for 66.6% of those expenses. Accordingly, *Butchart*⁷ (*supra*) and *Africa*⁸ (*supra*) support Mr Olivier's contention. The *Oxford English Dictionary* states that "*reimburse*" means '*repay money to a person who has spent or lost it*' and '*reimbursement*' has a similar meaning.

⁷At p. 114F-G and p.115F

⁸At p. 794D

[23] The issue then is whether the Writ is not competent in law if it was issued for ‘*reimbursement*’ of those expenses incurred by the judgment creditor? On the contrary, *Butchart* relied upon by the applicant support first respondent’s claim that a writ can issue by a judgment creditor for reimbursement of the expenses incurred under the maintenance order.

[24] In *Butchart*, the respondent had applied for a writ to recover medical expenses incurred for her and one of the minor children for which the appellant was liable in terms of a divorce maintenance order. Although the argument raised therein by the appellant that the order implied that the appellant make payment to third parties and not the respondent herself, which is not the applicant’s contention in *casu*, the principle enunciated there is that the judgment creditor may issue a writ to recover amounts expended by her or him from the judgment debtor in terms of an ‘*expenses clause*’ contained in a maintenance order provided the amount is easily ascertainable.

[25] In my view, what could defeat the first respondent’s claim, and accordingly the Writ issued, would be allegations and proof by the applicant that the amount claimed by the first respondent was either not payable or the amount was already paid by the deceased/applicant⁹. In such circumstances, the Writ would not be competent in law in that the ‘*causa*’ for the Writ would have fallen away¹⁰. That however, is not the applicant’s case. All that the applicant is alleging is that the first respondent should prove that she personally paid the school fees.

[26] The issue of who paid the fees is irrelevant, so long as it is not alleged that the deceased (or his representative), who had an obligation in terms of the divorce court order to pay those expenses, paid them. Only under the circumstances alluded to above would the Writ not have been competent in law to issue, and accordingly liable to be set aside. The applicant’s contention for the setting aside of the writ on this ground is therefore misconceived. In any event, as submitted by Mr Van Niekerk,

⁹Africa (*supra*) at p.794E-F

¹⁰Bekker NO v Total SA (Pty) Ltd 1990 (3) SA 159 (T) at 174I; Ras v Sand River Citrus Estates (Pty) Ltd 1972 SA 504 (T)

first respondent avers that she paid some of the school fees while other fees/expenses were paid by her erstwhile husband as a loan to her.

[27] The applicant conceded that what she seeks is a final relief in motion proceedings. To that end, the words of Corbett JA, in *Plascon Evans*¹¹ find application where he stated:

‘... , the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E-G, to be:

“...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.” (emphasis provided)

[28] As indicated above, there is no real or material dispute of facts between the parties. The applicant does not dispute that the school fees were paid. The only issue, not even a dispute, raised by the applicant is that the first respondent must first prove that she personally paid the schools expenses claimed. The first respondent alleges that she paid them. As such, the first respondent’s version has to be accepted.

[29] In any event, on the applicant’s own version, she has conceded that part of the amount claimed in the Writ, relating to arrear general maintenance has been paid. As such, the first respondent was entitled to issue the Writ, as submitted by Mr Van Niekerk. The Court in *Du Preez v Du Preez*,¹² cited with approval the decision in *Perelson v Druain*, 1910 TPD 458 that ‘ a writ of execution is not bad merely

¹¹*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-F

¹²1977 (2) SA 400 (C) at 403E-G

because it includes an amount in respect of which it is not competent to issue a writ, and provided that the writ is competent for part of the amount in respect of which it is issued it cannot be set aside. Accordingly, the applicant's claim ought to fail.

[30] With regard to an order interdicting the first respondent from taking any further steps in executing against the deceased estate until the liquidation and distribution account has been finalised and approved by the second respondent, Mr Olivier has already conceded that the ground has no basis in law. As such, the applicant has failed to make out a case for the order sought. Similarly, this claim too ought to fail.

Costs

[31] Counsel for the first respondent Mr Van Niekerk argued that applicant's attorney, Mr Cilliers, should be put on terms on why he should not be ordered to pay costs *de bonis propriis* on the basis that huge amounts of costs could have been avoided had the applicant complied with the provisions of Rule 41A (2) (a) of the Uniform Rules (the Rule).

[32] I raised this issue with the applicant's Counsel, Mr Olivier, on the reason why the Rule was not complied with, particularly on the facts of this case. As indicated above, there was no real dispute raised by the applicant in the papers. This matter could have been dealt with in mediation and could have saved not only costs but the Court's time. As indicated to both Counsel, the Rule was meant to deal with cases such as the one before Court. In my view, had the applicant complied with the provisions of this Rule, the matter would have been long resolved.

[33] This Rule is made not only to save parties from paying exorbitant costs usually associated with litigation but more so, in my view, to relieve the court to deal with matters that cannot be easily resolved by any other means other than the court. For these reasons, in my opinion, the courts should be more proactive in ensuring strict compliance with this Rule.

[34] Mr Olivier was not able to address me on this issue save to argue that the first respondent should have filed an 'irregular step application'. That, however, does not

assist the applicant, as the Rule clearly requires every applicant/plaintiff to comply with it when instituting any action/application proceedings.

[35] On the facts of this case, I agree with Mr Van Niekerk that a huge amount of costs (including the Court's time), would have been saved, had the applicant, through her attorney, complied with the Rule.

[36] In the alternative to costs *de bonis propriis*, Mr Van Niekerk argued that costs on attorney and client scale be awarded against the applicant because of her *mala fides*. Mr Van Niekerk submitted that there was no *mala fides* on the part of the first respondent as averred by the applicant. He argued that all that the first respondent did was to give effect to Lever AJ's judgment. On the other hand, the applicant was the one with *mala fides* as this matter could have been long resolved had she co-operated, as evidenced by the correspondence sent to her attorney. The first respondent, through her attorneys, has been trying to resolve the matter after Lever AJ's judgment from mid-February 2021 to no avail. Some of the first respondent's letters were not even responded to at all until 16 March 2021. As evidenced by that letter, the letter addresses issues raised in the first respondent's letters of 17 February, 4 March, 8 March and 11 March 2021.

[37] Furthermore, as alluded to hereinbefore, the applicant does not raise any real or material dispute in her papers, notwithstanding that she brought the application. The issues raised by the applicant on the reasons why she refused to entertain and pay the first respondent's claim were mostly abandoned. In addition, it should also be borne in mind that by the time the matter was heard, the applicant had also paid part of the amount claimed in the Writ, which she was initially still reluctant to pay, despite Lever AJ's judgment that the deceased estate was liable to pay. I can go on and on but it is not necessary as the facts speak for themselves.

[38] Without making any findings on the *mala fides* or otherwise of the applicant's conduct, the conduct of the applicant and her attorney as indicated above, leaves much to be desired. For the sake of bringing this matter to finality, I am reluctant to grant the initial order suggested by Mr Van Niekerk, lest it causes unnecessary delay in finalising the matter to the prejudice of the first respondent.

[39] In the light thereof, I make the following order:

- a. The application is dismissed;
- b. The applicant is ordered to pay the first respondent's costs on an attorney and client scale.

P.L NOBANDA

ACTING JUDGE OF THE HIGH COURT

Counsel for the applicant: Adv J Olivier

Applicant's Attorneys: Cilliers & Associates Attorneys
Suite 11, Diaz Office Park
Beach Boulevard West, Diaz Beach
Mossel Bay
6500
Tel: (044) 072-0020
Fax: (044) 692-0594
Email: johan@c-law.co.za; admin@c-law.co.za
Ref: J CILLIERS/MAT157

Counsel for the 1st respondent: Adv J G Van Niekerk SC

1st Respondent's Attorneys : Engelsman, Magabane Inc
9 Bishops Avenue, Labram
Kimberley
8301
Tel: (063) 832-8134
Fax: (063) 832-2362
Email: annelouise@engelsman.co.za

Ref: KRU101/0001/F.ENGELBRECHT/ms