IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION - MTHATHA) **Case No: 3657/2016**

In the matter between:

MEC FOR HEALTH, EASTERN CAPE PROVINCE **Applicant**

and

TENGILE TSOMO **Respondent**

JUDGMENT

MALUSI J:

[1] The applicant approached court to seek an urgent interim order to stay execution of a warrant against movable property. The application is vigorously opposed by the respondent.

[2] The background to the application is that on 21 May 2016 the respondent had instituted action for damages against the applicant for medical negligence by the applicant's employees at Bedford hospital, Mthatha. On 22 May 2018 the claim was settled and the agreement between the parties was made an order of court. The applicant was also ordered to pay the costs of the action on a party and party scale. It appears the amount of damages awarded in the sum of R1 051 394.00 was subsequently paid by the applicant.

[3] On 29 May 2018 the respondent served on the applicant a notice of taxation of his bill of costs. The applicant did not file an objection to any item on the bill of costs. The applicant's legal representatives aver that the notice of taxation was not brought to their attention by the administrative staff in their offices. On 26 June 2018 the Taxing Master taxed the bill and allowed the sum of R482 732.92 for costs.

[4] On 29 June 2018 the respondent's attorney sent by electronic mail the taxed bill to the applicant's legal representatives. When no response was forthcoming, a reminder was sent to the same representatives.

[5] On 1 August 2018 the respondent's attorney conveyed a warning to the applicant's legal representatives that applicant will apply for a warrant of execution if payment of the taxed costs was not received. This elicited no response from the applicant's legal representatives.

[6] On 13 August 2018 the applicant caused a warrant of execution against the respondent's property to be issued by the Registrar of this Court. A copy of the warrant of execution was sent to the head of legal services of the respondent on 14 August 2018. He responded on the same day indicating that he will investigate *'what is the bottleneck for payment of legal fees.'*

[7] On 17 August 2018 the Sheriff attached immovable property belonging to the respondent. It does not appear the attachment elicited any action on the part of the respondent.

[8] On 30 August 2018 the respondent's attorney sent a letter to the applicant's attorney annexing the warrant of execution and Sheriff's costs requesting that payment be effected. This elicited no response from the applicant's attorney.

[9] On 1 October 2018 the respondent's attorney informed the applicant's attorney that the Sheriff has been instructed to remove the

attached property. The applicant's attorney only enquired whether or not the requisite procedures have been followed in the execution of the warrant. On 2 October 2018 the Sheriff removed some of the attached property from the premises of the applicant. He indicated that he will return on 8 October 2018 to remove the rest of the attached property.

[10] The removal precipitated a flurry of activity by the legal representatives and employees of the applicant. On 5 October 2018 a letter was sent to the respondent's attorney requesting an indulgence to allow the release of the property, stay of execution and re-taxation of the bill of costs. On 11 October 2018 the application was launched when no favourable response was received to the request for an indulgence.

[11] The respondent filed a notice to oppose the application contemporaneously with an answering affidavit. The respondent subsequently filed a notice contemplated in Uniform Rule 35(12) requiring the applicant to produce a copy of the delegation of powers referred to by the deponent in the founding affidavit.

[12] Mr Kunju, who appeared on behalf of the respondent, submitted that the applicant had failed to provide the document

requested in the rule 35(12) notice. The applicant cannot rely on the document and consequently the application was not by the applicant but an official on a frolic of his own. Thus it must be dismissed on this basis as only the applicant is empowered by statute to bring the application.

[13] Mr Mbiko, who appeared on behalf of the applicant, submitted that these are not new proceedings but part of the earlier action proceedings. He argued that the deponent to the founding affidavit need not be authorized by the applicant.

[14] Mr Kunju's argument morphed into a challenge on the lack of authority by the deponent. He asserted that any founding affidavit in an application by a State official must contain an averment that he is authorized to bring the application.

[15] Uniform Rule 35(12) provides that:

"35(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice

shall not, save with the leave of the court, use such document or tape recording in such proceeding, provided that any other party may use such document or tape recording."

[16] It has been held that Uniform Rule 35(12) has an automatic, self-contained sanction of *'a negative nature, being to the effect that a party failing to comply with the notice shall not, save with the leave of the court, use the document in question, provided that any other party may use such document.'*[1] If a litigant is not satisfied with that sanction then resort may be sought in Uniform Rule 30A according to Hoerskool Fochville.

[17] Uniform Rule 30A provides:

*"**30A Non-compliance with rules***

(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

[1] *Centre for Child Law v The Governing Body of Hoerskool Fochville* [2015] 4 All SA 571 (SCA), 2016 (2) SA 121 at para 15.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."

[18] It must be pointed out that failing compliance with the notice, an application may be made to court and the court may make an appropriate order. It goes without saying that the time frames will be truncated as required by the particular circumstances.

[19] In this matter, the Rule 35(12) notice sought a document never referred to in the founding affidavit. The deponent stated:

"By virtue of my appointment and position in the department and the delegation of powers in the office of the MEC, Eastern Cape Province, I am duly authorizsed to depose to this affidavit on behalf of the Applicant."

[20] Clearly, the deponent refers to authorization to depose to the founding affidavit and not *'authorization to launch these proceedings as stated in the Rule 35(12) notice.'* In my view the failure to reply may be justifiable on this basis.

[21] Furthermore, the deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to an affidavit. It is the institution of the proceedings and the prosecution

thereof which must be authorized.[2] As such even if the Rule 35(12) notice related to the document referred to in the founding affidavit, in my discretion such a document is irrelevant and need not be provided.[3]

[22] Even if I were wrong, there was no Rule 30A notice filed by the respondent which would be the jurisdictional factor for the court to consider the failure to reply to the Rule 35(12) notice. In exercising my discretion it appears that absent the Rule 30A notice there is no scope for the court to intervene.[4]

[23] I have considered the authorities relied upon by Mr Kunju for the proposition that there must always be an averment to the effect that the deponent is authorized. In my view these are distinguishable. The present matter has the same case number as the action proceedings. It was served by applicant's attorneys on the respondent's attorneys and not initiated in the manner provided in Rule 6 for new applications. The respondent did not complain that the applicant had taken any irregular step. It appears to me the action for damages will only be finalized once the damages and costs

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[2] *Ganes & Another v Telkom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624F-H, *Firstrand Bank Ltd v Fillis & Another* 2010 (6) SA 565 (ECP) at para 13.
[3] *Hoerskool Fochvill ibid* at para 18.
[4] *Hoerskool Fochville ibid* at para 17 and the authorities cited therein.

awarded by court are paid in full. On these facts the application is not new proceedings which needed to be authorized by the applicant.

[24] Mr Kunju submitted that the application lacks urgency. If there is any, it is self-created by the applicant who knew about the warrant of execution since 14 August 2018 as outlined above.

[25] Mr Mbiko argued that urgency arose on 2 October 2018 when the Sheriff removed the applicant's property. Before that date there was none. He also pointed out that the applicant has advertised a sale in execution scheduled for 25 October 2018 which also creates urgency for the matter to be heard.

[26] In my view the matter is urgent. The scheduled sale was six days away from the date of hearing. There is imminent harm to the applicant if the sale proceeds. The applicant may suffer serious financial consequences if the sale goes ahead.

[27] It appears to me the applicant satisfies all the requirements for grant of an interdict. The practice in this division is to either grant or refuse a final interdict when a matter has been fully argued. The argument in this matter was protracted and full as it spread over two days.

[28] The property removed belongs to the applicant. He has a clear right for it not to be sold in a flawed legal process. Mr Mbiko contended that the process of execution was vitiated by procedural irregularities. He relied on the State Liability Act and the judgment in *Nyathi v MEC for Health, Gauteng & Another* 2008 (5) SA 94 (CC) 2008 (9) BCLR 865 (CC).

[29] I find merit in the argument. It appears the execution is invalidated by the procedural irregularities in failing to comply with the procedures laid down in Nyathi. The flawed execution constitutes an injury committed against the applicant.

[30] There is no other satisfactory remedy available to the applicant. He has indicated he intends to apply for a review of the taxed bill of costs. He would not get relief from any other remedy.

[31] It is necessary to convey my displeasure at the conduct of the applicant before the application was launched. The respondent had done everything possible to obtain payment of the costs from applicant. The correspondence displays indifference by officials of the applicant. The application was eminently avoidable if the applicant's officials handling the matter had acted with diligence and professionalism. The respondent's attorneys had taken all the

necessary steps to request payment without having to execute the warrant. I intend to award costs to the respondent as a mark of my disapproval of the conduct of the officials. I am not persuaded that the conduct is so *'reprehensible'* to deserve a costs order on a punitive scale as requested by Mr Kunju.

[31] In the result the following order will issue:

31.1 The attachment and the removal of the applicant's motor vehicles, namely, Toyota Hilux 4X4 with Registration No: [….], Chevrolet Aveo with Registration No: [….], Ford Icon, 1.6 with Registration No: [….] and Isuzu Truck 400 with Registration No: [….] be and is hereby declared unlawful;

31.2 The respondent be and is hereby directed to immediately release to the applicant, the applicant's motor vehicles or state movable property referred to in the above paragraphs at no costs at all to the applicant;

31.3 The respondent be and is hereby interdicted and restrained from further unlawfully interfering with the applicant's possession of the aforesaid motor vehicles or state movable property referred to above paragraph 3.1;

31.4 The respondent be and is hereby interdicted and restrained from advertising for sale in execution scheduled for 25 October 2018 the applicant's motor vehicles or state movable property referred to in the above paragraphs;

31.5 The respondent be and is hereby interdicted and restrained from selling the applicant's motor vehicles or state movable property referred to in the above paragraphs on a sale in execution scheduled to take place on Thursday, 25 October 2018;

31.6 The sale in execution scheduled to take place on Thursday, 25 October 2018 be and is hereby stayed pending the finalization of the review application to be instituted by the applicant of the respondent's taxed bill of costs;

31.7 The applicant be and is hereby directed to institute the review application of the respondent's taxed bill of costs within 10 days of this order. Failure to do so will cause the above orders to lapse and the respondent will be entitled to initiate the execution process on the taxed bill of costs.

31.8 In the event the applicant incurs any costs, being the storage costs, costs of removal, transportation costs or

any costs whatsoever, the respondent is held liable for such costs and is directed to pay all such taxed costs within 14 days from the date of taxation.

31.9 The applicant is ordered to pay the respondent's taxed or agreed costs on a party and party scale.

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JUDGE OF THE HIGH COURT

***Appearances*:**

For the Applicant:	Adv Mbiko *instructed by*
	State Attorney
	94 Sission Street
	Fort Gale
	MTHATHA
For the Respondent:	Adv Kunju *instructed*
	Mgweshe Ngqeleni Inc
	No 18 Park Road
	MTHATHA

Heard on:	16 & 17 October 2018
Judgment delivered:	19 October 2018