



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 70623/11

(1)	REPORTABLE:	☒	YES
(2)	OF INTEREST TO OTHER JUDGES:	☒	YES/NO
(3)	REVISED.		
	2012.04.19		
	DATE		SIGNATURE

17/4/12

In the matter between:

CENTWISE 153 CC
SIFISO ZIMBANDI

First Applicant
Second Applicant

and

TONRAIS CC
MARY HELEN HATTINGH
FRED HATTINGH
THE SHERRIFF OF ZOUTPANSBERG
MR MIKE VERMAAK IN HIS OFFICIAL
CAPACITY AS SHERIFF OF ZOUTPANSBERG
TRANSNET LTD

First Respondent
Second Respondent
Third Respondent

Fourth Respondent
Fifth Respondent

J U D G M E N T

MAKGOKA, J:

[1] On 22 March 2012 I made the following order:

1. The first and/or third respondents are ordered to return to the applicants, all goods that were released to them by the sheriff on 3 November 2011.
2. The first and /or third respondents are ordered to return to the applicants, all goods attached but not removed by the sheriff between 28 – 31 October 2011, which remained at the premises situated at 38 Grobler Street, Louis Trichardt.
3. To facilitate paragraphs 1 and 2 of this order, the fourth respondent is ordered to furnish the applicants with an inventory of all the goods attached from the premises, whether such goods were removed or not;
4. The Registrar is directed to bring a copy of this judgment to the Board of Sheriff for such Board to consider whether the conduct of the sheriff in this matter was proper;
5. The first, second and third respondents are ordered to pay the applicants' costs;
6. There is no costs order as between the applicants and the fourth respondent.

I undertook to furnish the reasons later. Here are the reasons.

[2] The applicants seek, on an urgent basis, the return of certain goods presently in the possession of the first and/or second and/or third respondents. An ancillary relief is sought against the fourth respondent (the sheriff). The relief sought by the applicant is opposed by all of the first to fourth respondents. The fifth respondent is not a party to these proceedings. For convenience sake, I shall refer to the first, second and third respondents simply as "the respondents" and to the fourth respondent as "the sheriff".

[3] The facts are simple and largely common cause. On 22 June 2009 the first applicant entered into three agreements with the first respondent. The first was for the sale of a business in terms of which the first applicant purchased from the first respondent a business known as Sunrise Foods, consisting of equipment, assets, stock in trade, business name and estate commission. The purchase price was for R490 000. Clause 20 of this agreement vested ownership of the goods in the first respondent until the full purchase price had been paid by the first applicant. The second agreement was a sub-lease agreement in terms of which the first respondent sub-let to the first applicant, the premises from which the business was conducted. The first respondent in turn, rented the property from Transnet, the fifth respondent. The third agreement concerned the sale of a motor vehicle in terms of which the first respondent sold to the first applicant a used motor vehicle for an amount of R55 000.

[4] During or around October 2011, Transnet obtained judgment against the first and second respondents for arrear rentals in respect of the premises on which the first applicant was a sub-tenant in terms of the sub-lease referred to above. Two warrants were issued pursuant to the judgment: one for eviction, and the other for attachment of goods. The warrants were executed during the period 28 – 31 October 2011, during which the some of the first applicant's goods on the premises were also attached and removed, pursuant to a lien that Transnet had on all the property on the premises. Included in the goods attached by the sheriff, were the items that the first applicant bought from the first respondent in terms of the first sale agreement. Furthermore, there were items that were brought onto the property brought by the second applicant which had nothing to do with the agreements

between the parties. Some of the attached goods were not removed. The first and second respondents were simultaneously evicted from the premises.

[5] On 2 November 2011, the second applicant served an interpleader summons on the office of the sheriff, laying claim to the goods attached during the execution of the warrant of attachment. The interpleader summons was also served on the attorney representing the first, second and third respondents.

[6] On 3 November 2011 the sheriff released the attached goods after the first respondent had satisfied the judgment debt. The sheriff released the goods by removing them from his storage and placing them on the sidewalk in front of the erstwhile leased premises. He could not return them to the premises as there was also a warrant of eviction. The sheriff then handed the property attached in terms of the warrant, to the third respondent. These the third respondent removed or on after 3 November 2011. At the time when the sheriff handed all the attached goods to the third respondent on 3 November 2011, he purportedly also gave the third respondent written permission to remove those goods still on the premises, which had not been removed. This is the nub of the dispute between the parties.

[7] The applicants contend that since the sheriff was informed of the first applicant's claim to the property, the sheriff should have, when releasing the goods, returned them to first applicant, and that the third respondent acted *mala fide* in receiving the goods from the sheriff and not handing them over to the first applicant. The

contention here is that those goods were in the lawful possession of the first applicant when they were attached and on release by the sheriff, they should have reverted to the first applicant.

[8] The respondents, on the other hand, deny that the first applicant had been spoliated, as the property was removed pursuant to a due process by the sheriff, on the strength of a warrant of eviction and a warrant of execution obtained by Transnet, in execution of a judgment properly obtained against the first and second respondents. It is further contended that the conduct of the sheriff in later handing the goods over to the third respondent, could not amount to spoliation of the applicants. In any event, the respondents contend that they were entitled to retain the goods in terms of clause 20 of the first agreement as the applicants had failed to pay full price for the goods in terms of the first agreement. Furthermore, they contend that the first applicant had failed to pay the rentals in terms of the sub-lease, and that it had further failed to pay the instalment in respect of the car. The first, second and third respondents on that basis, argue that the first applicant was not entitled to the return of the goods "even if the process was flawed".

[9] During argument, I invited Mr *Maritz*, for the respondents to state the basis at law, entitling the respondents to retain possession of the goods. Mr. *Maritz* submitted that given the fact that the applicants, on the respondents' argument, cannot rely on spoliation (as it is contended that the applicants were not spoliated when the sheriff attached the goods, and were not in peaceful possession when the

sheriff released the goods) the respondents were under no obligation to state the basis on which they retain the possession of the goods handed to them by sheriff.

[10] This submission is untenable. It should be borne in mind that among the goods which the first and third respondents are having in their possession, are the goods that were brought onto the premises by the second applicant, which have nothing to do with the agreement between the parties. No doubt this should be returned to the applicants. The respondents have no basis to possess them, and they have furnished none. With regard to those goods the respondents allegedly possess in terms of clause 20 of the first agreement, the short answer is that that clause does not permit of self-help remedy, allowing the respondents to take the law into their hands. For them to exercise the right in terms of that clause, they had to obtain a court order.

[11] In my view, it does not matter what the applicants call the remedy they seek. Fact is, they have placed undisputed facts before court which indicate that the respondents have engaged in a form of objectionable self-help by taking the law into their own hands. Whether one calls it spoliation or *parate executie*, it does not matter. This court cannot countenance a patently unjust and unlawful conduct to persist. The matter must be resolved without legal niceties. To do so on the basis of labels pinned to a set of facts would be unnecessarily technicist.

“So technical an avoidance of correcting a manifest injustice may be regarded as morally questionable. It is also unsound according to the principles of law” –

As was stated at para 16 in *Roestorf v Johannesburg Municipal Pension Fund* (235/11) [2012] ZASCA 24 (23 March 2012), dealing with an overly technical point.

[12] In my view, the situation is analogous to where the sheriff had attached property in terms of a warrant, and the judgment later rescinded. See in this regard, *Janmat and Another v Bhana*¹, *Maisel v Camberleigh Court (Pty) Ltd*², *Lottering v SA Motor Acceptance Corporation (Pty) Ltd*³, *Standard Bank of SA v Peyper & Fourie*⁴. Mr Maritz sought to distinguish these authorities on the basis that where judgment had been rescinded, it was a nullity, from which no rights could accrue, whereas in the present case the judgment still stands although the judgment debt had been satisfied. I see no real distinction between the two situations in terms of the real effect. In either situation the sheriff loses any further right to persist with the attachment and possession of the goods. The end result is the same, whether the goods are released from attachment pursuant to a rescission of judgment or satisfaction of the judgment debt. See also *Potgieter v Du Plessis*⁵.

¹ 1951 (2) SA 496 (T)

² 1953 (4) SA 371 (C)

³ 1962 (4) SA 1 (E)

⁴ 1924 (CPD 118

⁵ 1978 (1) SA 751 (C)

The case against the sheriff.

[13] As would be clearer in the order I am about to make, the contention by the sheriff that he should only have been cited as a party that might have interest, is not sustainable. The sheriff, as set out below, conducted himself in a manner that could have created an impression in the minds of the applicants that he was not impartial and detached.

[14] It should be recalled that in the summary of facts, I stated that the second applicant informed the sheriff of the first applicant's claim to the attached goods, and even served an "interpleader summons" on the sheriff. The sheriff simply ignored it. What should have been the sheriff's conduct when he received the first applicant's claim to the attached goods?

[15] Rule 39(4) of the Magistrates Court Act 32 of 1944, provides that if any property attached in execution is claimed by any third party as his or her property the sheriff shall deal with matter as provided in rule 44. The provisions of rule 39(4) are couched in peremptory terms and impose a duty on the sheriff to act in terms of rule 44. The sheriff has no residual discretion. See in this regard *Barclays Western Bank v Upington Paneelkloppers (Edms) Bpk*⁶, *Sheriff Pretoria East v Meevis* 2001⁷.

⁶ 1986 (2) SA 409 (NC)

⁷ 2001 (3) SA 454 (SCA)

[16] Rule 44 deals with interpleader claims. It reads:

1. (a)
- (b)
- (c)
 - (i)
 - (ii)
 - (iii)
2. (a) Where any person other than the execution debtor (hereinafter in this subrule referred to as the 'claimant') makes any claim to or in respect of property attached by the sheriff in execution of any process of the court or where any such claimant makes any claim to the proceeds of property so attached and sold in execution the sheriff shall require from such claimant to lodge an affidavit in triplicate with the sheriff within 10 days from the date on which such claim is made, setting out –
 - (i) the claimant's full names, identity number and occupation;
 - (ii) the claimant's residential address and business address or address of employment; and
 - (iii) the nature and grounds of his or her claim substantiated by any relevant evidence.
- (b) (i) Within 15 days after the date on which the claim is made the sheriff shall notify the execution creditor and all other sheriffs appointed for that area who have submitted certificates referred to in rule 39(2)(c) of the claim.
- (ii) Simultaneously with the notice referred to in subparagraph (i), the sheriff shall deliver one copy of the claimant's affidavit to the execution creditor and one to the execution debtor.
- (c) (i) The execution creditor shall, within 10 days of receipt of notice of the claimant's claim and affidavit, advise the sheriff in writing whether he or she admits or rejects the claimant's claim.
- (ii) If the execution creditor gives the sheriff notice within the period stated in paragraph (i) that he or she admits the claim, he or she shall not be liable for any costs, fees or expenses afterwards incurred and the sheriff may withdraw from possession of the property claimed.
- (3) (a) If the execution creditor gives the sheriff notice that he or she rejects the claim, the sheriff shall within 10 days from date of such notice prepared and issue out a summons in the form prescribed for that purpose in Annexure a calling upon the claimant and the execution creditor to appear on the date

specified in the summons to have the claim of the claimant adjudicated upon.

[17] Clearly the sheriff failed to comply with the provisions of rule 39(4). That the first applicant himself had prepared an interpleader summons, does not avail the sheriff and it is irrelevant to the question whether the sheriff complied with his peremptory statutory duty. It does not divest him of that duty. See in this regard *Ketsikeli v Velapi* 1923 CPD 119 where it was held that only the sheriff, not the claimant(s) or execution creditor can take out an interpleader summons in those circumstances, and an interpleader summons taken out in such circumstances by any person other than the sheriff is illegal and irregular.

[18] When the sheriff released the property, he was also obliged to inform the applicants. He did not. Rule 39(b) provides:

- (b) The sheriff shall give notice in writing of a withdrawal of attachment and of the time and date thereof to the execution creditor, the execution debtor, all other sheriffs appointed for that area or any other sheriff who has submitted a certificate referred to in subrule (2)(c) **and to any other person by whom a claim to the property attached has been lodged with him or her:** Provided that the property shall not be released from attachment for a period of four months if a certificate referred to in subrule (2)(c) or an unsatisfied warrant of execution lodged under subrule (2) remains in the hands of the sheriff.

(my emphasis).

[19] When the sheriff released the attached property, he already knew that the applicants had laid a claim to the attached property. Therefore the claimants were

clearly the persons envisaged in rule 39(3)(b). The sheriff has, in this regard, also failed to observe the clearly peremptory provisions of the rule.

[20] I therefore hold take a view that the sheriff has *prima facie*, contravened rules 39(3) and (4) as well as rule 44 (2) (a) (b) and rule 3(a) of the Magistrate Court rules. His conduct should therefore be referred to the Sheriff's Board for further investigation.

[21] To sum up: the first and third respondents should return to the applicants the goods that were attached by the sheriff. Costs should follow the cause between the applicants and the first and third respondents. The second respondent made common cause with the first and third respondent. There was no substantial *lis* between the applicants and the sheriff. Although I have *prima facie* found the sheriff to have acted contrary to the law, I have decided not to make any costs order against him.

[22] The above reasons resulted in the order referred to in para 1 of this judgment.



TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD : 7 MARCH 2012

JUDGMENT DELIVERED : 19 APRIL 2012

FOR THE APPLICANTS : ADV N DE V DUVENHAGE SC

INSTRUCTED BY : HAMMANN-MOOOSA INC,
PRETORIA

FOR THE 1ST, 2ND & 3RD RESPONDENTS : ADV J D MARITZ SC

INSTRUCTED BY : VENTER ATTORNEYS,
PRETORIA

FOR THE 4TH RESPONDENT : ADV L D SCHOLTZ

INSTRUCTED BY : KERN & DEKKER ATTORNEYS
PRETORIA

NO APPEARANCE FOR THE FIFTH RESPONDENT.