FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A211/11

In matter between:

SOLAR SPECTRUM TRADING 120 (EDMS) BEPERK h/a CASH MANIA — **Appellant/Garnishee**

and

ANNA STAMIER — **1st Respondent/Judgment Creditor**

and

Johannes Casparus De Villiers — **Judgment Debtor**

CORAM: RAMPAI, et C. J. MUSI, JJ

HEARD ON: 20 FEBRUARY 2012

JUDGMENT BY: C. J. MUSI, J

DELIVERED ON: 1 MARCH 2012

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[1] This appeal originates from the magistrate's court for the district of Ficksburg. It is unopposed. On 25 March 2011, the magistrate made the following order against the appellant/garnishee:

> "1. The garnishee, Solar Spectrum Trading 120 Pty Ltd t/a

Cash Mania is ordered to pay the judgment creditor or her attorney on the amount that it paid over the garnishee between the dates of the section 65E order to wit 13 November 2009 and the 30th of November 2009 on or before 7 April 2011, failing which execution for the amount ordered and the costs of execution may be issued against the garnishee.

2. Matter postponed until 30 August 2011 for the said statements and further adjudication;

3. Costs stand over." Quoted without emendation.

[2] The appeal is primarily aimed against paragraph 1 of the aforementioned order.

[3] The judgment debtor, Mr. J C de Villiers, was called upon to appear before the magistrate, on 13 November 2009, in terms of section 65 A (1) (a) of the Magistrate Court Act 32 of 1944 as amended (the Act).[1]

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1 Section 65 (1) (a) reads as follows:

> "(1) (a) If a court has given judgment for the payment of a sum of money or has ordered the payment in specified instalments or otherwise of such an amount, and such judgment or order has remained unsatisfied for a period of 10 days from the date on which it was given or on which such an amount became payable or from the expiry of the period of suspension ordered in terms of section 48 (e), as the case may be, the judgment creditor may issue, from the court of the district in which the judgment debtor resides, carries on business or employed, or if the judgment debtor is a juristic person, from the court of district in which the registered office or main place if business of the juristic person is situate, a notice calling upon the judgement debtor or, if the judgement debtor is a juristic, a director or officer of the juristic person and in his or her personal capacity, to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable."

[4] At the hearing on 13 November 2009, the magistrate was satisfied that there is a debt due to the judgment debtor by the garnishee which may be attached in terms of section 72 to satisfy the judgment debt and costs or a part thereof.[2] He therefore ordered the attachment of the debt.[3]

[5] The magistrate's order reads as follows:

> "Mnr J. C. de Villiers word gelas om maandelikse betalings van R500 ten gesigte van die vonnisskuld en kostes te doen by die kantore van Snyman en Kie Prokureurs Ficksburg. Eerste betaling te geskied voor/op 15/12/09 en daarna voor/op die 20ste dag van elke daaropvolgende maand."
>
> I.t.v. art. 65 E (1) (b) gelees met art 72 van die Wet op Landdroshowe 32/1994 gelas die hof 'n skuldbeslag bevel vir

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2 Section 65 (E) (1) (b) reads as follows:

> "The court is satisfied – (b) that there is a debt due to the judgment debtor which may be attached in terms of section 72 to satisfy the judgment debt and cost or a part thereof, the court may authorize the attachment of the debt in terms of that section."

3 Section 72 of the Act reads as follows:

> "(1) The court may, on *ex parte* application by the judgment creditor or under section 65E (1) (b), order the attachment of any debt at present or in future owing or accruing to the judgment debtor by or from any other person (excluding the State), residing, carrying on business or employed in the district, to an amount sufficient to satisfy the judgment and the costs of the proceedings for attachment, whether such judgment has been obtained in such court or in any other magistrate's court, and may make an order (hereinafter called a garnishee order) against such person (hereinafter called the garnishee) to pay to the judgment creditor or his attorney at the address of the judgment creditor or his attorney, so much of the debt as may be sufficient to satisfy the judgment and costs, and may enforce such garnishee order as if it were a judgment of the court.
>
> (2) If, after any such garnishee order in respect of any debt has been granted, it is shown to the satisfaction of the court that sufficient means to maintain himself and those depended upon him will not, after satisfaction of the garnishee order, be left to the judgment debtor, the court shall set aside the garnishee order or amend it in such manner that it will affect only the balance of the debt over and above such sufficient means."

(3) Any order under this section may at any time for good cause be suspended, amended or rescinded by the court

> enige toekomstige opbrengste verskuldig deur Solar Spectrum Trading 120 (Edms) Bpk h/a Cashmania van McCabestraat, Ficksburg aan Mnr. J.C. de Villiers."

[6] The attachment order was issued on 10 December 2009.

[7] On 19 December 2009 the sheriff attempted to serve the said order on Mrs. Elizabeth De Villiers at the business address of the garnishee. She informed the sheriff that there were no funds due to the judgment debtor by the garnishee and that the judgment debtor was no longer in the employment of the garnishee.

[8] On 21 December 2009 the sheriff again attended at the business premises of the garnishee and served the order on Mrs. Elizabeth De Villiers.

[9] Pursuant to the provisions of section 72 (3) read with rule 47, Mrs. Elizabeth De Villiers filed an affidavit wherein she – in her capacity as manager of the garnishee – denied that the garnishee is or would in future be in possession of money due to the judgment debtor.[4]

4 The relevant parts of rule 47 reads as follows:

[10] After a skirmish between the judgment creditor's and the garnishee's attorneys the magistrate ordered that Mrs. Elizabeth De Villiers should testify.

[11] She confirmed the content of her affidavit to the effect that there are no moneys due to the judgment debtor by the garnishee. According to her, the judgment debtor worked on commission basis for the garnishee but his services were terminated after the order was granted but before it was

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"(7) Such order shall be served upon the garnishee and upon the judgment debtor and shall operate as an attachment of the debt in the hands of the garnishee.
(8) The judgment debtor and the garnishee may appear on the day fixed for the hearing of the application, but may not question the correctness of the judgment on which the application is based.
(9) If the garnishee does not dispute his indebtedness to the judgment debtor, or allege that he has a set-off against the judgment debtor or that the debt sought to be attached belongs to or is subject to a claim by some other person, or if he shall not appear t show cause as provided in subrule(5), the court may order the garnishee to pay the debt (or such portion of it as the court may determine) to the judgment creditor or his attorney on the dates set out in the said order; and should the garnishee make default, execution for the amount so ordered send costs of the said execution may be issued against the garnishee. The provisions of rules 36 to 43, inclusive shall *mutatis mutandis* apply to execution in terms of this subrule.
(10)If the garnishee disputes his liabilities to pay the said debt or alleges that he has any other defence, set-off or claim in reconvention which would be available to him if he were sued for the said debt by the judgment debtor, the court may order the garnishee to state, orally or in writing, on oath or otherwise, as to the court may seem expedient, the particulars of the said debt and of his defence thereto and may either hear and determine the matters in dispute in a summary manner or may order-
(a) that the matters in issue shall be tried under the ordinary procedure of the court, and
(b) that, for the purpose of such trial, the judgment creditor shall be plaintiff and the garnishee the defendant, or vice versa.
(11) If the garnishee alleges that the said debt belongs to or is subjected to a claim by some other person the court may extend the return day and order such other person to appear and state the nature and particulars of his claim and either to maintain or relinquish it, and may deal with the matter as if the judgment creditor and such other person were claimant in interpleader in terms of rule 44.
(12) If the judgment debtor alleges that the judgment has been satisfied or is for some other reason not operative against him, or that the garnishee is not indebted to him, the court may try the issue summarily.
(13) After hearing the parties or such of them as appear the court may –
(a) order payment by the garnishee in terms of subrule (9);
(b) declare the claim of any person to the debt attached to be barred;
(c) dismiss the application;
(d) Make such other order as may be just.

served on the garnishee.

[12] During cross-examination she testified that she is married out of community of property to the judgment debtor. When she was confronted with a print - out from the deeds registry, to the effect that she is married in community of property; she could not explain the discrepancy. She testified that she does not know who the directors of the garnishee are. Although she stated in an affidavit that she was a director she disavowed being director. According to her she manages a shop belonging to the garnishee and she compensates herself. She does not know who her employer is.

[13] She presented a book wherein she recorded that the last commission paid by the garnishee to the judgment debtor was on 30 November 2009. When she was asked who requested her to keep records of the commission paid to the judgment debtor she initially testified that the company (garnishee) instructed her to do so. When she was pressed for a sensible answer she was constrained to admit that it was the judgment debtor.

[14] The magistrate, correctly in my view, rejected her evidence. It is clear that she is an inveterate liar who would stop at nothing in order to protect her husband. It is clear that the scheme or scam was to use the company – as a separate person – in order to avoid paying the judgment debtor's debt. Mr Benade, for the garnishee, conceded that her evidence is untrustworthy.

[15] This matter raises several questions. Firstly, was the garnishee properly before the court? Secondly, having rejected Mrs. Elizabeth De Villiers' evidence, could the magistrate find that the garnishee did not pay the money to the judgment debtor? Lastly, if the entry in her book to the effect that the last payment to the judgment debtor was made on 30 November 2009 is true, could the magistrate order the garnishee to pay the judgment creditor an amount already paid to the judgment debtor? A negative answer to any of the questions raised above will dispose of this appeal.

[16] A company is an artificial person which can only function through a human agency. The company must appoint a

human agency that will be its “directing mind and will”.[5] In **Anderson Shipping v Guardian National Insurance**[6] Nicholas AJA said the following:

> “Being a corporation, Anderson does not have a mind, and hence cannot itself have knowledge. The knowledge of a company can only be the knowledge of the directors and managers who represent the directing mind and will of the company, and control what it does… Subordinates, who merely carry out orders from above, do not speak and act as the company and do not represent the ‘directing mind and will of the company’… Their knowledge is not *per se* the knowledge of the company. In the present case, the Gaurdian did not attempt to identify the persons who represent ‘the directing mind and will’ of Anderson. It did not establish that Ross was such a person. Although he was styled “begryfsbestuurder’, it was not shown that he was anything other than one of the people in the company who, in **Denning L.J’s** words in the **H L Bolton** case supra, ‘are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will.”

[17] In this matter there was no proof before the magistrate that Mrs. Elizabeth De Villiers was the “directing mind

5 See Henochberg on the Company’s Act: Meskin vol I p392-393
6 1987 (3) SA 506 (AD) at 515 H to 516 B.

and will" of the garnishee. In fact she expressly said that she does not know who the director/s of the garnishee is. There is no evidence that she was authorised to represent the garnishee. There is therefore no evidence that the garnishee was before the magistrate. The magistrate was supposed to satisfy himself that the garnishee or its representative is properly before him before making any order against it.

[18] The magistrate rejected Mrs. Elizabeth De Villiers' evidence to the effect that the garnishee paid the judgment debtor his commission before the attachment order was served on it. I will assume for purpose of this discussion that the garnishee was properly before the magistrate and properly represented by Mrs. Elizabeth De Villiers. If her evidence is rejected then there was no evidence before the magistrate to the effect that the garnishee did not pay the judgment debtor the commission owed between 14 November 2009 and 30 November 2009. The magistrate could not make the order in the absence of such evidence. The objective evidence, i.e. the entry in the book to the effect that the

last payment to the judgment debtor was on 30 November 2009 was undisputed.

[19] As stated in the preceding paragraph the evidence relating to the book entry is undisputed. It is undisputed that the attachment order was only served on 21 December 2009. I will go so far as to say that the garnishee became aware of the attachment order on 19 December 2009. The question is still whether the garnishee can and should be held liable to pay money in terms of an attachment order that it was unaware of when it paid the commission to the judgment debtor? In my view that answer is an emphatic no. To suggest the contrary, as the magistrate did, would be tantamount to punishing the garnishee for acting innocently by complying with the terms of the agreement between it and the judgment debtor without having any knowledge of the attachment order. The garnishee cannot be made to pay twice. The Act and rules do not make provision for such a procedure or order.

[20] In my view all three questions must be answered in the

negative and the appeal should therefore succeed.

[21] The garnishee was legally represented in the court *a quo*. It went to court with the primary objective of misleading it. It sent a person who was not its 'directing will and mind'. That person had no information to assist the court in coming to a just finding in the matter. The appeal is before us today because of the lies and dishonest behaviour of the garnishee. This is a matter in which we should show our displeasure by not granting a costs order in the garnishee's favour irrespective of the fact that it was successful on appeal.

[22] I accordingly make the following order:

(a) The appeal is upheld with no order as to costs.

(b) Paragraph 1 of the magistrate's order is deleted.

C.J. MUSI, J

I concur.

RAMPAI, AJP

On behalf of the Appellant: Adv BENADE
Instructed by: Du Toit Louw Botha Inc
Ficksburg

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