

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

**Case No: 13703/06
13704/06**

In the matter between

Nu-Shelf Investments CC

Applicant

and

Strinivasaen Krishna Bangaar

First Respondent

The Sheriff Durban Central

Second Respondent

JUDGMENT

Delivered on: 11 April 2011

STEYN J

[1] The matter was argued on the issue of costs of the applications. The factual background to the applications is that the first respondent, an attorney of this court, represented the applicant in litigation. After his mandate was terminated he submitted a bill of costs to the taxing master, who after taxation issued a writ of execution against the Applicant for fees. Pursuant to the writ, an attachment of goods was made and the court on 20 August 2010 ordered that the writ be

stayed pending the finalisation of the applications.

On 15 November 2010 the first respondent withdrew his opposition by filling a Notice of Withdrawal of Opposition. The first respondent, however, never tendered any costs.

[2] On 11 March 2011, when the matter was argued the first respondent appeared in person and on behalf of the applicant Mr Broster appeared.

[3] The first respondent persisted in his argument that the writ was validly issued. He placed reliance on Rule 70 of the Uniform Rules of Court, in support of his submission. Mr Bangaar's argument goes as follows: Since Rule 70(1) allows for the taxation of a bill, such taxed bill should be considered as an order and henceforth it allows for a writ to be issued. In my view this contention fails to take account of the provisions of Rule 45.

[4] I am satisfied that Rule 45 of the Rules should be applied, more specifically Rule 45(1) and (2) that reads as follows:

- “(1) *The party in whose favour any judgment of the court has been pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided that, except where immovable property has been specifically declared executable by the court or in the case of a judgment granted in terms of rule 31(5) by the registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the registrar perceived therefrom that the said person has not sufficient movable property to satisfy the writ.*
- (2) *No process of execution shall issue for the levying and raising of any costs awarded by the court to any party, until they have been taxed by the Taxing Master or agreed to in writing by the party concerned in a affixed sum: Provided that it shall be competent to include a writ of execution a claim for specified costs already awarded to the judgment creditor but not then taxed, subject to due taxation thereafter, provided further that if such costs shall not have been taxed and the original bill of costs, duly allocated, not lodged with the sheriff before the day of the sale, such costs shall be excluded from his account and plan of distribution.”*

(My emphasis)

In terms of the rule an attachment should only be made on a bill of costs, duly taxed, if it rises from an order contained in a judgment. (See Herbstein and Van Winsen ‘The Civil Practice of the High Courts of South Africa, 5th ed, at 1024).

Such order or judgment is a pre-requisite to a writ being issued. In *Van Dyk v Du Toit en 'n Ander*,¹ Cille J held:

1 1993 (2) SA 781 (O).

“Daarop het eerste respondente die voormelde lasbrief tot uitwinning uitgeneem by die Griffier. Dit het natuurlik geskied op the basis dat sy wel ’n vonnis in haar guns het. Hofreël 45(1) stel dit as ’n voorvereiste vir die uitneem van so ’n lasbrief.”²

(My emphasis)

- [5] In the matter of *Bredenkamp v Comax Wholesalers (Pty) Ltd and Others*³ Corbett J, as he then was, stated it as follows:

“The other principle which to my mind is of relevance is that, generally speaking, a writ of execution can only be executed against property which belongs to the debtor or in which the debtor has some executable interest, and furthermore – this is almost too trite to be stated – that, generally, property cannot be made the subject of an order of attachment in pursuance of a writ of execution unless judgment has been taken against the debtor.”⁴

(My emphasis)

- [6] Given the circumstances it is clear from the withdrawal of opposition that the applicant was entitled to lodge the applications in protecting his rights. Once the opposition was withdrawn, it was justified to reasonably expect costs to follow the result. This did not happen in this case.

2 At 782 J – 783 A.

3 1965 (2) SA 876 (C).

4 At 879B-C.

[7] There is no longer any opposition to the applications, the rule issued is hereby accordingly confirmed. First Respondent is ordered to pay the costs, such costs to include the costs of the opposed application.

Steyn, J

Date of Hearing:	11 March 2011
Date of Judgment:	11 April 2011
Counsel for the applicant:	Adv J P Broster
Instructed by:	Mooney Ford Attorneys
Counsel for the respondents:	Mr Bangaar (in person)
Instructed by:	Henry Selzer Attorneys