REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 1930/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO [redacted]

Date: 2 August 2024 E van der Schyff

In the matter between:

Dr. Mothobi Godfrey Keele	Applicant
and	
Legal Practice Council	First Respondent
Kalipa Kagiso Mangaliso Mafungo	Second Respondent
Sheriff Pretoria Central	Third respondent

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for the setting aside of a writ of execution and the attachment carried out pursuant thereto, alternatively for the staying of a sale in execution. The applicant, a lay person, appeared in person. The first respondent abides the court's decision. The application is opposed by the second respondent.

[2] The application was initially launched in the urgent court. It was struck from the roll. On a reading of the affidavits, the following scenario unfolds:

i. A review application launched by the applicant against the respondents was dismissed with costs on 7 September 2022. The judgment with reasons was handed down on 23 August 2023 by Sardiwalla J. The applicant delivered an application for leave to appeal on 11 September 2023. The applicant received a notice of set down for the taxation of the Bill of Costs of the second respondent on 13 November 2023. The applicant subsequently filed a Notice of an Irregular Step in the Proceedings on 14 November 2023. I pause to note that the applicant is of the view that the taxation of the Bill of Costs amounts to an irregular step because the execution and operation of the order of Sardiwalla J was suspended due to the delivery of the application for leave to appeal. The taxation occurred on 29 November 2023, and the applicant avers that the taxation occurred 'notwithstanding the fifteen (15) days' he had to apply to the court for the complaint to be removed in terms of Rule 30(2)(c).

ii. The applicant received an email on 31 January 2024 from Sardiwalla J's registrar informing him that leave to appeal was granted to the Full Court. The appeal, however, lapsed on 28 February 2024. He sent an email to the second respondent on 28 February 2024 seeking an indulgence. He explained that he was in Bloemfontein at the Supreme Court of Appeal and requested to deliver the documents on 4 March 2024. The writ of execution was issued on 18 March 2024, and on 20 March 2024, the Sheriff attached the applicant's vehicle, a BMW 320i M Sport. On 30 July 2024 the applicant filed a notice of appeal, which includes a prayer for condonation for the lateness of the appeal.

[3] The applicant confirms that he received the notice of set down for the taxation of the bill of costs. However, instead of filing a notice of intention to oppose the taxation, he filed a notice in terms of Uniform Rule 30, and the taxation occurred in his absence.

[4] There are currently eight costs orders under different case numbers against the applicant. Counsel for the second respondent contends that the applicant is not entitled to litigate risk-free and in the absence of costs orders being executed against him.

Discussion

[5] The application is based primarily on the premises that (i) the taxation of the Bill of Costs constitutes an irregular step that negates the taxation and renders the taxed Bill of Costs unlawful; (ii) that he seeks condonation for the late filing of the notice of appeal and intends to proceed with the appeal of the judgment and order handed down in case number 1930/2021.

[6] The filing of a notice of leave to appeal suspended the operation and execution of the order handed down by Sardiwalla J in case number 1930/2021. If regard is had to Rule 30(2)(c), the taxation proceeded within the period that the applicant could have issued the Rule 30(1) application. Whether there is merit in the contention that it is irregular to set down a taxation while an application for leave to appeal is pending is beside the point. By proceeding with the taxation, the second respondent deprived the applicant of bringing a Rule 30(1) application.

[7] Although the applicant did not file a notice to oppose the taxation, the Rule 30(2)(b) notice was an indication of his opposition. The failure to file a notice of intention to oppose the taxation can be ascribed to the provision of Rule 30(2)(a), which allows a party to utilise Rule 30(1) only if that party has not taken a further step in the cause with knowledge of the irregularity. The second respondent failed to answer this issue in the answering affidavit.

[8] The vehicle in question has been attached for costs reflected in the Bill of Costs taxed under case number 1930/2021. I accept that other Bills of Costs have been taxed in other matters, but there is no indication that writs of execution were issued under other case numbers for the costs for which the applicant is responsible, or that the same asset was attached in terms of such other writs of execution.

[9] In the matter of *Stoffberg NO and Another v Capital Harvest (Pty) Ltd* ("*Stoffberg*")[1] Binns-Ward J stated the following regarding Rule 45A:

"*[26] The broad and unrestricting wording of rule 45A suggests that it was intended to be a restatement of the courts' common law discretionary power. The particular power is an instance of the courts' authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that* ***execution will be suspended where real and substantial justice requires that. 'Real and substantial justice' is a concept that defies precise definition, rather like 'good cause' or 'substantial reason'.*** *It is for the court to decide on the facts of each given case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment; and, if they are, on what terms any suspension it might be persuaded to allow should be granted.*" (My emphasis).

[10] The constitutional principle of access to justice dictates that a party who complains that an irregular step has been taken by another party be afforded the opportunity to place his complaint before a court for adjudication. 'Real and substantive' justice demands that a writ of execution issued on the premise of a Bill of Costs taxed in the absence of a party who raised an irregular step regarding the set down for the taxation in the midst of that party utilising the process provided for in Rule 30, be set aside.

[11] This order only relates to the writ of execution and subsequent attachment under case number 1930/2021.

---

[1] (2130/2021) [2021] ZAWCHC 37 (2 March 2021).

[12] The principle applies that costs follow success applies.

ORDER

In the result, the following order is granted:

1. **The writ of execution issued in case number 1930/2021, and the subsequent attachment of the applicant's BMW 320i M Sport premised on the writ of execution issued in case number 1930/2021 is set aside, with costs.**

[redacted]

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:	In person
For the second respondent:	Mr. K. Mafungo
Instructed by:	Mafungo Attorneys
Date of the hearing:	31 July 2024
Date of judgment:	2 August 2024

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 1930/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[redacted]

Date: 26 August 2024 E van der Schyff

In the matter between:

Dr. Mothobi Godfrey Keele Applicant

and

Legal Practice Council First Respondent

Kalipa Kagiso Mangaliso Mafungo Second Respondent

Sheriff Pretoria Central Third respondent

AMENDMENT OF ORDER GRANTED ON 2 AUGUST 2024

Van der Schyff J

Introduction

[1] Rule 42(1)(b) provides that a court may *mero motu* vary an order in which there is an ambiguity, or omission to the extent of such ambiguity or omission.

Background

[2] I granted the following order on 2 August 2024 in the current matter:

> 'The writ of execution issued in case number 1930/2021, and the subsequent attachment of the applicant's BMW 320i M Sport premised on the writ of execution issued in case number 1930/202 is set aside, with costs.'

[3] The order followed an application for the setting aside of a writ of execution and the attachment carried out pursuant thereto, alternatively for the staying of a sale in execution.

[4] The application, instituted by Dr. Keele, was primarily based on the premise that the taxation of a Bill of Costs, that preceded the issue of the writ of execution, and that followed an order granted by Sardiwalla J in terms whereof a review application that was instituted by Dr. Keele, was dismissed with costs, constituted an irregular step that negates the taxation and renders the taxed Bill of Costs unlawful.

[5] I found that the taxation occurred after Dr. Keele gave notice of an irregular step on receipt of the Notice of Taxation, and before the procedure provided for in Rule 30 was allowed to run its course. I clearly stated that the question of whether the taxation of the Bill of Costs indeed constituted an irregular step was not decided.

[6] I stated in paragraph 10 the judgment that:

> ''Real and substantive' justice demands that a writ of execution issued on the premise of a Bill of Costs taxed in the absence of a party who raised an irregular step regarding the set down for the taxation in the midst of that party utilising the process provided for in Rule 30, be set aside.'

Discussion

[7] Pursuant to the judgment and order being handed down on 2 August 2024, and after Mr. Mafungo's application for leave to appeal was dismissed, Mr. Mafungo sent a letter to my office. The letter is dated 7 August 2024. In the letter, Mr. Mafungo referred to paragraph 11 of the judgment, where it is stated that the order relates only to the writ of execution and subsequent attachment under case number 1930/2021. He interprets paragraph 11 to mean that the taxed Bill of Costs, being the underlying cause for the writ, was not set aside. He referred to the decision in *Firestone South Africa (Pty) Ltd v Gentiruco* AG 1977 (4) SA 298 (A), where the Supreme Court of Appeal explained that the court may clarify its orders if on a proper interpretation of the meaning thereof remained ambiguous or otherwise uncertain. In paragraph 6 of the letter, he wrote:

> 'For the avoidance of doubt and uncertainty by any party affected by the order, clarity is sought from her Ladyship as to whether Her Ladyship's judgment of the 2nd of August 2024, in any way affects or is intended to affect the rights which accrued the Second Respondent by virtue of the Taxing Master ascertaining the amount of the costs awarded by Sardiwalla J at the taxation conducted on 29 November 2023.'

[8] I subsequently notified the parties that I intend to clarify the issue by amending the order granted on 2 August 2024 to provide that the taxed Bill of Costs, being the underlying cause for the issue of the writ of execution issued in case number 1930/2021, be set aside.

[9] To my surprise, I received a subsequent email, dated 23 August 2024, from Mr. Mafungo, wherein he claims that neither Dr. Keele nor himself made an application to vary the order, and that I am *functus officio* to amend the order. I received a follow-up email on the same date from Mr. Mafungo wherein he expressly stated that it is not appropriate for me to receive new submissions and pronounce on issues pleaded by way of affidavit before the Supreme Court of Appeal, since he filed an

application for leave to appeal to the Supreme Court of Appeal after I dismissed his application for leave to appeal on 7 August 2024.

[10] Rule 42 is clear. A judge may *mero motu* vary and order in which there is an ambiguity or omission, to the extent of such ambiguity or omission. I notified the parties of my intention to vary the order to ensure that all parties whose interests may be affected have notice of the order proposed.

[11] Since the setting aside of the writ of execution issued under case number 1930/2021 was ordered on the premise that the Bill of Costs was taxed before the procedure provided for in Rule 30 was allowed to run its course, it automatically follows that the taxation of the bill of costs was irregular and that the taxed Bill of Costs should be set aside. The emphasis in paragraph 11 of the judgment of 2 August 2024 that the order relates only to the writ of execution and subsequent attachment under case number 1930/2021 was included because it was stated during an argument that a number of writs of execution were issued against Dr. Keele.

[12] It was an omission on my side not to include an order setting aside the taxed Bill of Costs in the order handed down on 2 August 2024. This omission lies at the root of the perceived ambiguity. As indicated in the judgment, I am of the view that by proceeding with the taxation, the second respondent deprived the applicant of bringing a Rule 30(1) application. This necessitates that the taxed Bill of Costs be set aside.

[13] This exposition and the amended order are to be provided to the Supreme Court of Appeal, which will consider the application for special leave to appeal.

ORDER

In the result, the order granted in case number 1930/2021 on 2 August 2024 is amended to read as follows:

1. **The taxed Bill of Costs, which forms the subject matter of the writ of execution issued in case number 1930/2021, is set aside.**

2. **The writ of execution issued in case number 1930/2021, and the subsequent attachment of the applicant's BMW 320i M Sport premised on the writ of execution issued in case number 1930/2021 is set aside, with costs.**

[redacted]

E van der Schyff

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:	In person
For the second respondent:	Mr. K. Mafungo
Instructed by:	Mafungo Attorneys
Date of initial judgment:	2 August 2024
Date of amendment of the order:	26 August 2024