



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT**

CASE NO: 837/2024

REPORTABLE

In the matter between

THE ROAD ACCIDENT FUND

Applicant

And

THE SHERIFF: EAST LONDON

First Respondent

MDUZULWANA ATTORNEYS INC

Second Respondent

SOUTH AFRICAN BOARD FOR SHERIFFS

Third Respondent

JUDGMENT

MHAMBI AJ

[1] In this application the applicant challenges the 1st respondent's decision to attach and remove its movable assets, despite, according to applicant being furnished with an

undertaking in terms of Rule 45(5) of the Uniform Rules of this Court. The 1st respondent is to be herein after referred to as the sheriff.

[2] Despite the points of law raised by the respondents ,the crux of this application is the interpretation of Rule 45(5) of the uniform rules.

[3] The applicant suggests a purposeful and contextual approach in interpreting rule 45(5). In this, the applicant relies on the decision in *National Joint Municipal Pension Fund v Endumeni Municipality*¹, I will deal more on this decision later in this judgment.

[4] The applicant contends: -

- a) The purpose of the rule is to relieve the judgment debtor of the burden of having its property attached and removed.
- b) The rule protects the interests of judgment creditor by preserving the attached property so that it is available to be sold in a sale in execution.
- c) If the judgment debtor has sufficient means to give an undertaking, the latter will be sufficient and will satisfy the requirements of rule 45(5).
- d) The instance, by the sheriff of a surety is merely elevating form over substance.

[5] The applicant further contends that, by virtue of it, filing an undertaking in terms of rule 45(5), the sheriff is prohibited from removing its movable property.

[6] In this accord, the sheriff contends that the applicant misapprehends rule 45(5) and that the purported undertaking is woefully non-compliant with that which is envisaged by the rule.

¹ 2012 (4) SA 593 (SCA) (16 March 2012)

[7] The 2nd respondent's contention is based on the defects at points from the applicant's Rule 45(5) undertaking and submits that the applicant misinterprets and misconstrues the purport of Rule 45(5) read with Rule 45(6).

[8] The 2nd respondent contends that the applicant's undertaking in and upon itself was defective in the following respects: -

- a) It contained no lists of items at all.
- b) It was not accompanied by any surety from someone with sufficient means.
- c) There is no undertaking to satisfy the judgment. The rule 45(5) undertaking was not worth the paper it was written on.

[9] The background to this application is as follows:-

[10] The 2nd respondent obtained a judgment on behalf of its clients against the applicant. The judgment was granted by default on 24 September 2023 for the payment of an amount of R2 135 218.00.

[11] Subsequent to non-payment, the 2nd respondent caused a writ of execution issued on behalf of its clients on 09 April 2024. On 24 April 2024, the sheriff armed with the previously mentioned writ of execution attached and removed certain items, (movable property) belonging to the applicant.

[12] The applicant gave the sheriff what it called an undertaking in terms Rule 45(5) of the Uniform Rules.

[13] The sheriff, according to the applicant ignored the undertaking and proceeded to remove the applicant's movable property.

[14] On 25 September 2024, the applicant requested the sheriff by letter to return the removed items, based its reason on the purported undertaking in terms of Rule 45(5). On instructions of the 2nd respondent, the sheriff proceeded to remove the movable items belonging to the applicant.

[15] The question to be answered is whether the undertaking by applicant constitutes an undertaking within the ambit of Rule 45(5).

[16] The undertaking filed by the applicant reads as thus: -

Form19
FORM OF SECURITY UNDER RULE 45 (5)
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

In the matter between:

LUNGELWA MACETYWA OBO LINGOMSO AND LUPHAWU *Plaintiff*

And

THE ROAD ACCIDENT FUND *Defendant*

WHEREAS by issued under virtue of the certain writ Case Number 43630/2019 of the High Court of South Africa, Gauteng Division, Pretoria, dated 8 April 2024 issued at the instance of L Mcetywa &Luphawu Macetywa against The Road Accident Fund.

The sheriff has seized and laid under attachment the undermentioned articles, namely:

Attachments schedule

Now, therefore, I, the said Acting RGM,(appointed as Acting Regional Manager) on behalf of The Road Accident Fund, hereby undertake to the sheriff East London High Court or her cessionaries, assigns or successors in office, that the

said property shall not be made away with or disposed of, but shall remain in possession of The Road Accident Fund and be produced to the sheriff East London High Court (or other person authorized by him to receive the same) on any other day when the same may be required in order to be sold, unless the attachment shall legally be removed.

Signed at East London on this 23rd Day of April 2024

Obo JUDGEMENT DEBTOR

Full names: Lance Johnstone

WITNESSES:

1. _____

Xolani Lamani

2. _____

Ms_Nosithembele Myataza

[17] There is a need to look at Rule 45(5) in its original form, it reads:

RULE 45(5):

45(5) "Where any movable property has been attached by the sheriff, the person whose property has been so attached may, together with some person of sufficient means as Surety to the satisfactions of the sheriff, undertake in writing that such property shall be produced on the day appointed for the sale thereof, unless the said attachment shall sooner have been legally removed, whereupon the Sheriff shall leave the property attached and Inventoried on the premises where it was found. The Deed of Suretyship shall be as near as may be in accordance with form 19 of the first schedule."

Subrule 6 provides:-

45(6): -

“If the Judgment Debtor does not, together with a Surety, give an undertaking as aforesaid, then unless the execution creditor otherwise directs, the Sheriff shall remove the said goods to some convenient place of security or keep possession thereof on the premises where they were seized, the expense whereof shall be recoverable from the judgment debtor and defrayed out of the levy”.

[18] The rule is invoked when two scenarios exists” –

- a) There must be existence of a judgment, the judgment debtor must have failed to satisfy the judgment.
- b) The judgment creditor armed with the judgment and the writ of execution, must have instructed the Sheriff to proceed and enforce the judgment through execution.

[19] Form 19 of rule 45(5) reads as follows: -

FORM 19

FORM OF SECURITY UNDER RULE 45(5)

In the High Court of South Africa

(.....Division)

In the matter between:

Plaintiff

Defendant

Whereas by virtue of certain Writ of Supreme Court of South Africa,

Division, dated the day of 19....., issued

at the instance of A.B. against C.D. fthe

*Sheriff has seized and laid under attachment the undermentioned articles,
namely:*

10 Oxen

1 Plough

1 Harrow

etc, etc, etc

Now, therefore, we the said C.D. and G.H.,

of

*a(occupation), as surety from him, bind
ourselves severally and in solidum, hereby undertaking to the said sheriff or his cession-
aries, assigns or successors in office, that the said goods shall not be made away with
or disposed of, but shall remain in the possession of the said C.D. under the said
attachment, and be produced to the said sheriff (or other person authorized by him to
receive the same) on the day of 19..... (the day
appointed for the sale), or on any other day when the same may be required in order to
be sold, unless the said attachment shall legally be removed, failing which I, the said
G.H., hereby bind myself, my person, good and effects, to pay and satisfy the sum of
.....(estimated value of the effects seized) to the said sheriff, his cessionaries,
assigns or successors in office, for and on account of the said A.B. in witness whereof
we, the said C.D. G.H., have hereunto set our hands on this day
of..... ..*

C.D.

.....

Judgment Debtor

G.H.

.....

Surety

.....

Sheriff

[20] On the basis of the parties' contentions in respect of interpretation of rule 45(5), it is apposite for this court to deal with the rules of interpretation as appearing hereunder.

[21] The words of Wallis JA are enough to define the purpose of interpretation as he says:-

He begins in paragraph 18 by stating that²:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself' against, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

Wallis JA then goes on to say at paragraph 19 of the judgment that:³

² 2012 (4) SA 593 (SCA)

³ Emphasis added.

All this is consistent with the ‘emerging trend in statutory construction’. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Donges NO another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere.

And lastly at paragraph 20:⁴

Unlike the trial Judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, ‘the intention of the contracting parties’, because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an inquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself. Despite their use by generations of lawyers to describe the task of interpretation it is doubtful whether they are helpful. Many judges and academics have pointed out that there is no basis upon which to discern the meaning that the members of parliament or other legislative body attributed to a particular legislative provision in a situation or other legislative body attributed to another legislative provision in a situation or context of which they may only dimly, if at all, have been aware. Taking Parliament by way of example, legislation is drafted by legal advisers in a ministry, redrafted by the parliamentary draftsmen, subjected to public debate in committee, where it may be revised and amended, and then passed by a legislative body many of whose members have little close acquaintance with its terms and are motivated only by their or their party’s stance on the broad principle in the legislation. In those

⁴ Emphasis added.

circumstances to speak of an intention of parliament is entirely artificial. The most that can be said is that in a broad sense legislation in a democracy is taken to be a reflection to the views of the electorate expressed through their representatives, although the fact that democratically elected legislatures sometimes pass legislation that is not supported by or unpopular with the majority of the electorate tends to diminish the force of this point.

[22] In my view, the process of interpretation is an objective one and not a subjective one. I say this because the interpretation has to consider the purpose rather than the context, however, the purpose should not be inconsistent with the purpose of which the rule was designed for, in this context, rule 45(5), in order to achieve the purpose of which rule 45(5) was designed, I have to look at the plain language used in the rule itself.

[23] The applicant makes the allegation that the sheriff ignored the undertaking and nevertheless removed the applicant's movable goods.

[24] The applicant addressed a letter to the sheriff requesting the return of the movable goods, owing to the above understanding given in terms of section 45(5). A second letter was sent to the sheriff, this time requesting reasons for the refusing to comply with Rule 45 undertaking.

[25] The applicant resorts to legal argument in the founding affidavit and argues that the decision by the sheriff is unlawful and in contravention of Rule 45(6) and the sheriff is only permitted to remove removable goods if there is no 45(5) undertaking.

[26] The sheriff filed an Answering affidavit wherein she points out to the court that the RAF, applicant, misinterprets and misconceive the purport of Uniform Rules 45(5) and 45(6).

[27] The undertaking in and upon itself was defective in the following respects:

- a. it contained no lists of items at all.
- b. it was not accompanied by any surety from someone with sufficient means. He refers to *Mannatt and Another v de Kock and Others* (18799/2018) [2020] ZAWCHC 10 (21 February 2020), para 13, where the court held that the undertaking must be accompanied by a **third-party surety**.
- c. there is no undertaking to satisfy the judgment debt or to pay the value of the attached items.

[28] Given these defects, it is hardly not surprising that the sheriff was not satisfied with the Rule 45(5) undertaking. The rule 45(5) undertaking was not worth the paper it was written on. In terms of the rule 45(5), the undertaking must be to the satisfaction of the sheriff.

[29] The sheriff goes on to state that on a proper interpretation of Rule 45(5):

- a. The Rule goes to property that had been lawfully attached and where the sheriff is in the process of removing.
- b. The judgment debtor (or a person with sufficient means) may approach the sheriff with a Rule 45(5) Notice and must undertake to bring the attached property to the sale in execution.
- c. The sheriff must utilize a discretion in considering the Rule 45(5) undertaking and only if satisfied that she can leave the property in possession of the judgment debtor. The sheriff has no obligation in law to leave the property simply because an undertaking has been sent.
- d. Rule 45(5) does not halt the execution or suspends the execution process. The applicant should have embarked on Rule 45A proceedings. Rule 45(5) does not stay the execution.
- e. Rule 45(6) enjoins the sheriff to continue with the removal of the goods unless the judgment creditor intervenes and directs that the sheriff must

not remove the items so attached. This rule does not conder any rights on the judgment debtor.

- f. When property is attached by the sheriff in execution, a *pignus praetorium* is created. This means that the goods are placed in custody of the sheriff, an officer of the court.

[30] Having considered the parties' contentions, it is clear that the parties differ on interpretation of rule 45(5), and that regard had to be whether the undertaking by the applicant complies with the impugned rule.

[31] It is by now trite that when a legislative provision is to be interpreted, consideration should be given to the language used in the light of the ordinary rules of grammar and syntax, a sensible meaning should be preferred rather than sensible one, as elucidated by the Constitutional court in Endumeni judgment.

[32] This must be viewed together with what the Constitutional court said in *African Christian Democratic Party v Electoral Commission and Others*⁵, it was held that the adoption of the purposive approach in our law has rendered absolute all previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision. The question was thus whether the applicant did Constitutional compliance with the statutory provisions viewed in the light of their purpose.

[33] In such circumstances the court in Molokwane warned that a narrowly textual and legalistic approach is to be avoided.⁶

[34] Recently, the SCA in *Minister of Police v Thamsanqa Ronny Miya*,⁷ referring to African Democratic Party Constitutional court decision⁸, emphasized that the purpose of

⁵ 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) para 25.

⁶ Minister of Police v Samule Molokwana (730/2021) [2022] ZASCA 111 (15 July 2022) para 16

⁷ (1250/2022) [2024] ZASCA 71 (06 May 2024) at para 12,

⁸ Supra footnote

the impugned section must be fulfilled, and if it is fulfilled, a mechanical approach is to be deprecated.

[35] Regard be to the present dispute, at best is to interpret the words used in rule 45 (5) and accompanying sub rule (6) in their original context. This will assist in ascertaining the purpose for which the rule was designed for, the plain language used in the rule will assist in this regard.

[36] Furthermore, the constitutional court has made it clear in *African Church Democratic Party v Electoral commission and others*,⁹ when interpreting any legislation, the purpose of the impugned section must be fulfilled, and if it is fulfilled, a mechanical approach is to be deprecated.

[37] Regard also be to the facts of this case; I am tempted to follow Innes J approach as it was in *Venter V Rex*¹⁰ in which he stated what became the golden rule of statutory interpretation as follows:-

“[W]hen to give the plain words of a statute to [an] absurdity so glaring that it could never have been contemplated by the legislation, or when it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations that the court is justified in taking into account, the court may depart from the Effect to remove the absurdity and to give effect to the true intention of the legislature”.

[38] In analysing this golden rule, author and advocate, Kessler Perumalsamy¹¹, suggests four things to be considered in interpretation:-

⁹ Supra fn

¹⁰ 1907 TS 910 914-915

¹¹ The life and Times of Textualism in South Africa, University of the Western Cape, RSA, 5 November 2019.

- a) Find the literal meaning of a word. This may be achieved by looking at the dictionary meaning of a word or phrase. [own emphasis added]
- b) If the literal meaning is absurd, vague or ambiguous, we may depart from that meaning.
- c) But when we depart from the literal meaning we have to give a word a meaning intended by the legislature.
- d) The meaning intended by the legislature can be determined only in limited context, in this Kessler refers to *Rex v Detody*¹².

[40] This accords with what Mogoeng CJ suggested in *Afriforum V University of the Free State*¹³ :-

“Some of the key interpretive orders that have by now become trite are the textual or ordinary grammatic meaning, context, purpose and consistency with the constitution. Context comes into operation where the ordinary grammatical meaning is not particularly helpful or conclusive. And contextual interpretation requires that regard be had to the setting of the word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located”.

[41] After having considered the authorities I have cited above, I now turn to scrutinize the wording of rule 45(5).

¹² 1926 AD 198 229

¹³ 2018 2 SA 185 (CC) at para 43

[42] Subrule 5 has the words “*a person of sufficient means*” and the words “*surety*”. The two words read together indicate that the rule intends a person other than the judgment debtor with sufficient means to pay the judgment debt and stand as surety on behalf of the judgment debtor.

[43] The purpose of the subrule is to ensure that the judgment debt is satisfied in order to avoid attachment of the goods belonging to the judgment debtor. I disagree with the submission by the applicant that the applicant itself can do the undertaking only to ensure that the attached goods will be available as and when the sheriff wanted them for the purposes of sale in execution, I disagree. This will defeat the purpose and the context to which the rule was intended. In my view the rule is intended to secure the payment of the principal debt beyond ensuring the presence of the attached goods as and when the sheriff needs them, the use of the word “ **surety**”, or a person of **sufficient means** denotes some one else other than the judgment debtor, that’s the purpose of the rule, any interpretation beyond that, in my view may perpetuate an illegality.

[44] Form 19 itself, has a heading : “ **FORM OF SECURITY**”, and has a space for the signature of the judgment debtor and that of the surety, clearly the form is designed for the undertaking not only to be signed by the judgment debtor but also by the person with sufficient means standing as surety to satisfy the judgment. This aligns with the purpose of the rule.

[45] Having said that, clearly the undertaking by the applicant does not comply with subrule 5 of rule 45, nor does it comply with form 19, subrule clearly states that the undertaking must be as near as possible to form 19, which that of the applicant fails to meet this threshold.

[46] Because I have dealt with the main issue for determination in this application, I see no basis to deal with the points of law as raised by the respondents. Consequently, this application should fail, I am not persuaded that the applicant has to be punished

with punitive costs order, the subject of this matter falls within the interpretation of the law in which case, the applicant is within right to have his version of interpretation.

[47] In the result, the following order issues:

ORDER:

- 1. This application is dismissed with costs on scale A of the uniform rule 67A.**

M. MHAMBI
JUDGE OF THE HIGH COURT (acting)

APPEARENCES :

Mr. V.S. Notshe SC , with her T.N. Mlambo: counsel for the applicant

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 Hatfield, Bridge
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DATE HEARD: **23 January 2025**

JUDGMENT DATE: **24 April 2025**