REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29134/2011

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

11/9/2014
DATE

SIGNATURE

In the matter between:

RIORDAN, STEVEN	Applicant
and	
FIRST NATIONAL BANK LIMITED	First Respondent
RIORDAN, WENDY	Second Respondent
THE SHERIFF OF THE HIGH COURT, SANDTON SOUTH	Third Respondent

SUMMARY

Practice and procedure – Uniform Rule 45(8) of Uniform Rules of Court – writ of execution and attachment of incorporeal movable property – failure by the Sheriff to give notice in writing to the execution debtor in attaching and removing funds from his bank account – the attachment incomplete and invalid and set aside.

JUDGMENT

MOSHIDI, J:

[1] This application, brought on urgent basis, concerns the validity of the attachment of the applicant's movable incorporeal property in terms of Rule 45(8)(c) of the Uniform Rules. The movable property is in the form of funds in a Platinum Cheque Account held by the applicant at the First Respondent.

THE RELIEF CLAIMED

[2] In the notice of motion, aside from the claim to urgency, the relief claimed is broadly speaking framed in the following terms: Declaring that the attachment of the applicant's bank account is incomplete and irregular; setting aside the attachment of the bank account; and ordering the Sheriff of the High Court, Sandton South, to immediately repay all amounts attached and paid into its Trust Account held at First Rand Bank, Weirda Valley, to the applicant's aforesaid bank account. The applicant also claims for costs of suit in the event of opposition by any of the respondents. The second respondent was the only respondent to oppose the application. There is no doubt in my mind that the application deserves adjudication on urgent basis.

SOME COMMON CAUSE FACTS

[3] The following are common cause facts: The applicant resides at Unit 17 Balgowan Estate, Willowbrooke Place, Sandown, Sandton ("*the applicant's residential address*"). The applicant's residential address is situated within a boom-enclosed estate and access thereto is gained through the security guards at the entrance. At the time of the incident under discussion, the applicant was employed at Marsh Africa, 156-5th Street, Sandton ("*the applicant's place of employment*").

[4] The applicant and the second respondent were married to each other but they were divorced on 26 August 2011. At the same time, the parties entered into a Settlement Agreement which was made an Order of Court. In terms of clause 9.1 of the Settlement Agreement, the applicant agreed to pay rehabilitative maintenance to the second respondent in the sum of R18 000,00 (Eighteen Thousand Rand) per month for as long required by her commencing from the date of divorce. At the time of the divorce order the second respondent was a housewife and also pursuing tertiary education at university.

[5] It is also common cause that on 19 August 2014 the applicant attempted to withdraw money from his bank account at an ATM, but could not do so, the reason being that the account was frozen and a hold placed on all the funds at the instance of the second respondent under circumstances described next. The applicant paid the maintenance amounts to the second

respondent without any incidents until 14 February 2014 but stopped doing so after 1 April 2014 for reasons not relevant for present purposes. On 3 July 2014 and 11 August 2014 the second respondent caused to be issued writs of execution against the applicant's movable assets based on what she claimed to be arrear maintenance in terms of the Settlement Agreement. On 18 July 2014 and 11 August 2014 the Sheriff of the Court executed the writs by attaching the funds in the applicant's bank account and his right to withdraw any funds therein. Upon receipt of the writs of execution, the first respondent paid the moneys from the applicant's account to the Sheriff. The latter, in turn, acting on instructions from the second respondent, was instructed to pay the moneys into her attorney's Trust Account. Finally, it is also common cause that the notices of attachment were never served on the applicant, notwithstanding that the second and the third respondents were aware of both his place of residence and place of employment or contact details.

THE ISSUE FOR DETERMINATION

[6] Based on the above common cause facts, the only pertinent issue for determination in this application is the question whether the attachment was served on the applicant and/or whether it is valid and regular. For present purposes, all the other issues raised in the papers and in argument, such as why the applicant did not first approach the court for the variation of the Settlement Agreement before ceasing to pay the maintenance, and whether the applicant was in arrears when the writs of execution were issued etc, do not have to be determined in these urgent proceedings.

[7] The obvious starting-point is the provisions of Rule 45(8)(c) of the Uniform Rules of Court. However, prior to dealing with the latter Rule in full, mention should be made of one general practice. This is that if incorporeal property, whether movable or immovable is to be attached, it may be so attached without the necessity of a prior application to Court[1]. (See in this regard *Ormerod v Deputy Sheriff, Durban*[2], and LAWSA[3].

[8] Rule 45(8)(c) goes on to provide as follows:

> "*(c) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,*
>
> *(i) the attachment shall only be complete when –*
>
> *(a) notice of the attachment has been given in writing by the Sheriff to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose deeds registry the property or right is registered, and*
>
> *(b) the Sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;*
>
> (ii) *the Sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached.*" (underlining added)

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[1] See Rule 45(8) of the Uniform Rules.
[2] 1965 (4) SA 670 (D) 672A
[3] Vol 4 (3rd ed para 387 at 255)

[9] The provisions of Rule 45(8)(c) make it perfectly clear and peremptory that the attachment of incorporeal property, such as in the instant matter, (funds in a bank account), shall only be complete when notice of the attachment has been given in writing by the Sheriff to all interested parties. (See *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683C-D, where the peremptory nature of a Court Rule was discussed.) There is no doubt that in the instant matter, the applicant is an "*interested party*". See for example, *S A Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd*[4], in the context of the Mineral and Petroleum Resources Development Act 28 of 2002. In my view, conduct which is clearly *mala fide* and not in compliance with this rule for whatever flimsy reasons and an abuse of court process, ought not to be countenanced by the Courts. The applicant is clearly an interested party since it is his account and funds which have been attached.

[10] The facts in *Simpson v Standard Bank of SA Ltd*[5], were to some extent similar to the facts in the present matter. There, the applicant's husband had also agreed, when a final order of divorce was granted to pay maintenance to the applicant and for a minor child of the marriage. The Settlement Agreement, incorporating the said maintenance, was also made an order of court. At some stage, later the applicant became aware that her ex-husband had deposited a substantial sum of money with the respondent bank. The applicant launched an urgent application, without notice, in which she asked the Court for an order directing the respondent bank to make payment to her

[4] [2011] 4 All SA 168 (SCA) paras [30] and [31]
[5] 1966 (1) SA 590 (W)

show cause why the amount claimed should not be paid over to her or the deputy-sheriff on her behalf. In declining to grant the order sought, and at 592A-B of the judgment, the Court said:

> "*A perusal of the Rules of Court relating to writs of execution indicate that in all cases where attachments are made, notice of the attachment is to be given to the judgment debtor save where he cannot be found. It follows that notice should, if possible, be given to her ex-husband as he is the judgment debtor. There is nothing before me to indicate that he cannot be traced in Johannesburg.*"

The Court also discountenanced and jettisoned the procedure followed by the applicant's ex-wife in seeking the relief. In the present matter, applicant's counsel also relied on *Stratgro Capital (SA) Ltd v Lombard NO*[6]. In that case, Mpati P, at para [16] held that:

> "*By reason of the rule 45(8)(c)(i)(a), an attachment of the right, title and interest of a litigant in an action will only be complete once the sheriff has given notice of the attachment in writing 'to all interest parties'. This rule is couched in wide terms and there seems to be no reason to regard the appellant, whose claim in the main proceedings was attached, as not being an 'interested party' as contemplated therein.*"

At para [17] of the judgment, the Court went on to say:

> "*I therefore conclude that the appellant was clearly an interested party as envisaged by rule 45(8)(c)(i)(a) in regard to its claim against the Trust, which was purportedly attached, and the failure to give it notice resulted in the attachment being incomplete. It follows that the subsequent sale in execution was null and avoid.*"

[6] 2010 (2) SA 530 (SCA), also reported at [2010] 3 All SA 27 (SCA).

At para [19] of the judgment, the Court said:

> "*The conclusion I have reached, i.e. that the failure to give notice to the appellant resulted in the attachment being incomplete, renders a consideration of all the other contentions advanced on behalf of the appellant unnecessary. It suffices merely to state that the actual attachment process is in itself suspect. It is doubtful whether there was compliance with the requirements of rule 45(8)(c)(i)(b). However, I express no firm view on this issue.*" (footnote omitted)

See also *Lutuli v Harsh and Another*[7], and *Badenhorst v Balju, Pretoria Sentraal en Andere*[8], where writs of attachment were declared invalid for failure to comply with the provisions of Rule 45 of the Uniform Rules.

CONCLUSION

[11] In applying the above principles, and on a proper interpretation of the provisions of Rule 45(8)(c), and based on the largely common cause facts of this matter, I conclude that the attachment was irregular and invalid. There was no notification of the attachment given to the applicant in writing. The contentions of the second respondent to the contrary are without any merit. On her own version, on 26 and 27 June 2014, the Sheriff attended at the applicant's place of residence, and was advised allegedly by the security guards at the gate that the applicant was not there. At the applicant's place of employment, the Sheriff was allegedly informed that the applicant was abroad. There is no evidence of this before me. To compound matters, the

[7] 1956 (2) SA 586 (W)
[8] 1998 (4) SA 132 (T)

Sheriff's returns of service in executing the writ on the bank on 24 July 2014 and on 18 August 2014 both read that:

> "*The attachment is not yet completed as satisfaction of the writ was not demanded from the defendant (please favour me with the defendant's/plaintiff's address particulars).*"

The reference by the Sheriff to "*the plaintiff's address particulars*", in the return of service was clearly incorrect. It was only on 22 August 2014 that the Sheriff served the writ and notice of attachment on the applicant personally at his place of employment. The founding affidavit was commissioned on 20 August 2014, and the notice of motion was issued by the Registrar of this Court the following day, i.e. 21 August 2014. On these facts, the application must succeed.

[12] At the conclusion of argument on 26 August 2014, I conveyed to the parties that I was inclined to grant the relief sought by the applicant. For the record, counsel for the second respondent elected to argue the matter without presenting written heads of argument. This, in spite of the court's invitation to her to do so. I also stood the matter down in order to allow the parties to reach some agreement on the other outstanding issues, such as future financial obligations and costs, in the event of the applicant succeeding. Both counsel appeared the following day and conveyed that no agreement could be reached, in particular on the issue of costs. This was rather unfortunate since certain arrear maintenance payments may have accrued to the second respondent in the interim. The applicant insisted on a costs order against the second respondent. The applicant was, in my view quite correctly so, entitled

to adopt such attitude as indicated immediately below. This must be so in spite of the fact that the second respondent is reportedly still unemployed and busy pursuing her studies.

COSTS

[13] I am convinced that, in the exercise my discretion on the issue of costs, the general rule should apply, i.e. that the costs should follow the result. The applicant sought no order for costs in the event of the application not being opposed. It was opposed, strenuously for that matter. The applicant had warned the second respondent well in advance that he would not be continuing to pay her the rehabilitative maintenance as envisaged in the Settlement Agreement, for reasons advanced by him. She chose to ignore this, and instead proceeded to instruct the Sheriff to attach and freeze his bank account contents in the full knowledge that his monthly salary is paid into the account. This was, in my view, unreasonable. The second respondent was not *bona fide*. (*Cf* in this regard, *Ormerod and Deputy Sheriff, Durban* (*supra*) 675. For these reasons, I firmly believe that the second respondent ought to pay the costs on the party and party scale only. The conduct of the first respondent the bank, in not informing their client, the applicant, of the attachment in time until he rather fortuitously stumbled upon it at the ATM on 19 August 2014, as described above, remains a worrisome matter. However, both the bank and the Sheriff took no part in these proceedings.

ORDER

[14] In the result the following order is made:

1. The attachment of the applicant's bank account, held at First National Bank with account number 50656792105 and with branch code 254605 is incomplete, irregular and is hereby set aside.

2. The sheriff of the High Court, Sandton South, is ordered to immediately and without any delay to repay all amounts attached and paid into its Trust Account held at the First Rand Bank, Weirda Valley with account number 62379823430 with branch code number 260950, under the above case number, to the applicant's aforesaid bank account.

3. The second respondent is ordered to pay the costs of the application on the party and party scale.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	27 AUGUST 2014
DATE OF JUDGMENT	1 SEPTEMBER 2014