IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 25718/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 11/09/2020 SIGNATURE:.....

IN THE MATTER BETWEEN:

COLETT BOOYSEN	Applicant
and	
ABSA BANK LIMITED	First Respondent
FIRST NATIONAL BANK	Second Respondent
THE SHERIFF, CENTRAL JOHANNESBURG	Third Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] This is an application for rescission of a default judgment granted by the Registrar of this Court ("the default order"), consequent upon which the applicant's bank accounts with the Second Respondent (“FNB”) were attached without any notice or warning to her. Despite her attempts to establish why her bank accounts had been attached and what steps she could take to have her access restored, it was only when she approached this court for urgent interim relief that the party responsible for this conduct, the First Respondent (“ABSA”), explained why it had caused her accounts to be attached in the first place.

[2] As a result, the applicant seeks relief on two grounds. Firstly, that this court should reconsider or rescind the default order granted against her and set it aside. Secondly, that this court should declare that ABSA’s attachment of her bank accounts was wrongful and that ABSA should be ordered to pay general damages to her as *solatium* for the harm caused by its conduct, or, alternatively, that the quantification of damages should be referred to trial for determination.

[3] Although these two claims are distinct, it was alleged in the applicant's founding affidavit they have a similar factual foundation and it is in the interests of the administration of justice that they are brought on the same papers and are heard concurrently. The applicant seeks no relief against FNB and the Third Respondent and neither of them opposes this application.

Factual background

[4] On or about 8 April 2005, Thuthuka Telecom CC (“the close corporation”), opened a cheque account with ABSA ("the cheque account") and it was afforded an overdraft facility on the cheque account.

[5] On or about 9 May 2005, the applicant's husband, Andre Booysen, to whom she was at the time married in community of property, signed an unlimited deed of suretyship in terms of which he bound himself as surety and co-principal debtor jointly and severally in favour of ABSA, for repayment on demand of any sum or sums owed by the principal debtor in terms of the overdraft on the cheque account.

[6] On the same day the applicant signed a form in terms of which she consented to the joint estate being bound by her husband's suretyship. Her consent, which was a legal requirement under the Matrimonial Property Act, 1984, translated by the applicant, reads as follows:
"My consent under the provisions of the Matrimonial Property Act, 1984, is necessary to incur the attached unlimited surety (inclusion of loan account cession) in favour of Thuthuka Telecom CC (2001/007296/23) on ABSA Bank Limited's normal terms and conditions by my spouse Andre with whom I am married in community of property. I hereby grant such consent and I acknowledge the liability of our joint estate in this regard."

[7] On 8 February 2013, the applicant and her husband divorced and the joint estate was dissolved by way of a settlement agreement made an order of court in terms of section 7(1) of the Divorce Act 70 of 1979. *Inter alia,* the settlement agreement stipulated that Mr Booysen would attain full ownership and interests in the close corporation and that the applicant would be released from any liability in connection thereto. After the divorce was finalised, the close corporation became insolvent and entered into liquidation on 21 January 2014.

[8] As at 10 December 2015, the outstanding balance on the close corporation's overdrawn cheque account was R430 197.05 plus interest at 11, 75% linked, per annum, capitalised monthly from 11 December to date of payment ("the outstanding amount"). On 10 February 2016 ABSA delivered, through its attorneys of record, a notice in terms of section 129(1) of the National Credit Act 34 of 2005, by registered mail to the applicant and Mr

Booysen at their residential address and chosen *domicilium citandi et executandi,* being 1120 Lepton Turn, Wilgeheuwel, 1736.

[9] On 29 March 2016, ABSA caused summons to be issued under case number 10434/16 against Mr Booysen, his other business partners who had stood surety for the business account of the close corporation and the applicant, in which it sought payment of the outstanding amount. In the summons the applicant was cited as the eighth defendant. She did not receive the summons or the section 129(1) notice, as she had not resided at the *domicilium* address since her divorce from Mr Booysen in 2013.

[10] On 7 March 2017, the Registrar granted the default order against the applicant and Mr Booysen, jointly and severally, the one paying the other to be absolved, for payment of the outstanding amount plus costs and Sheriff's fees ("the judgment debt"). On 12 April 2017 the Sheriff attempted to serve the default order on the applicant and Mr Booysen but since they did not reside there and were not known by the current owner, a return of non-service was issued. On 23 June 2017 the Sheriff served the writ of execution personally on the applicant at her residential address. On 22 July 2017 the writ of execution was served on Mr Booysen at his residential address.

[11] On 1 June 2018 ABSA's attorneys obtained a writ of execution (movables) from the Registrar directing the Sheriff to attach all the applicant's funds held in her bank accounts with FNB. On 13 June 2018 the Sheriff served the writ of execution (movables) on FNB as well as a notice of attachment under Rule 45(8) and 45 (12) attaching her right, title and interest in and to any or all her bank accounts held with FNB.

The applicant's founding affidavit

[12] The applicant states in her founding affidavit that she is a single mother of an eight-year-old child, and is employed by Mercedes Benz as a personal assistant. In and around 2013 she had heard that the close corporation had gone insolvent and would possibly enter voluntary liquidation proceedings.

She had no legal or financial interest in the close corporation and as she was not on amicable terms with her husband she was not aware of the final liquidation of the close corporation. She was not aware that it had defaulted on the overdraft facility owing to ABSA and she did not anticipate any claim against her. Since she had not received the notices or summons, she had not entered appearance to defend nor had she engaged with ABSA in regard to its claim.

[13] On 21 June 2017 she received a notice from the Sheriff attached to the gate of her residence asking her to contact him urgently. She telephoned the Sheriff and was informed that he would return the next day to attach her movable assets. At the time, she did not know what this meant or what this was in regard to. The Sheriff visited her home the following day and took an inventory of her movable assets.

[14] On 23 June 2017, the day after the Sheriff visited her home, the applicant was contacted by a representative from ABSA's attorneys. She was told that a default order had been granted against her and was supplied with the combined summons. She was further informed that ABSA's attorneys had been unable to contact her ex-husband and that they had turned to hold her and the other defendants liable for the judgment debt. In an email, she provided ABSA's attorneys with her ex-husband's contact details. She alleges that she understood at that time that they would thereafter pursue him for the judgment debt and would no longer seek to hold her liable given that the joint estate had been dissolved.

[15] Despite her request for ABSA's attorney's to contact her to resolve the Sheriff's attachment thereafter, the applicant did not hear back from them or ABSA, nor was she contacted by the Sheriff again. She assumed that ABSA's attorneys had successfully claimed the judgment debt from her ex-husband and the other defendants.

[16] In April 2018 the applicant approached SA Home Loans to apply for a small home loan to do renovations on her home. She was informed by a

representative of SA Home Loans that her application was declined on account of a court order being granted against her. The applicant states that she did not understand what this meant at the time and assumed that it was a vestigial record of the fact that an order had been granted against her. She alleges that had she been contacted or approached by ABSA's attorneys, ABSA or any other party during this period to discuss making payment of the judgment debt, she would have thought differently about the refusal of the loan.

[17] On 22 June 2018, when the applicant was trying to transfer funds within her FNB bank accounts to pay for petrol on her credit card, the transaction was declined. She had to arrange for a friend to come and pay for her petrol. She immediately contacted FNB and was advised that a garnishee order had been placed on her bank accounts by ABSA's attorneys, the effect of which was to freeze her out of all of her accounts. The fact that she was unable to access any of her funds in order to provide for herself and her minor child came as a complete shock to her. She had received no notice that on 13 June 2018 the Sheriff had served the writ of execution granted against her on her bank, FNB, as well as the attachment order issued under Rule 45(8) and 45(12) attaching her bank accounts. Prior to her accounts being attached, neither ABSA nor FNB had warned her about this.

[18] The applicant instructed attorneys who on 28 June 2018 sent a letter of demand to ABSA's attorneys requesting access to her bank accounts to be restored and requesting a copy of the notice of attachment. No response was forthcoming from them. On 11 July 2018 her attorneys brought an urgent application for interim relief seeking that the attachment of her bank accounts should be uplifted pending an application for reconsideration or rescission of the default judgment or order and/or the writ of execution. FNB filed an answering affidavit in which they stated that the hold on her account could not be uplifted in the absence of a court order to this effect. Despite the urgency of the matter, ABSA's attorneys filed their answering affidavit only two weeks later, on 23 July 2018, the day before the matter was to be heard. When the matter was heard on 24 July 2018, an order by way of consent was granted to

the applicant temporarily lifting the hold on her account until an application to resolve the dispute between the parties had been finally determined.

ABSA's answering affidavit

[19] ABSA alleges that on 27 June 2018 a notice of upliftment was served on FNB in terms of which the attachment of applicant's right, title and interest in her bank accounts was uplifted. The Sheriff's return of service is attached to the answering affidavit. The notice of attachment is not attached.

[20] ABSA notes that the applicant consented to her husband signing a deed of suretyship and acknowledged the liability of their joint estate. Notwithstanding this it denies that the applicant was or could be released from any liability towards it in connection with the close corporation. It still considered the joint estate to be liable.

[21] In regard to the urgent application ABSA alleges that the Sheriff's return in respect of the notice of upliftment was only received on 23 July 2018 and hence they were only able to file their answering affidavits in the urgent application on that day. They allege that by then in any event the applicant's access to her accounts had already been restored by virtue of the upliftment notice. In so far as the return of service of the notice only mentions Mr Marais, the first defendant in the default order, ABSA denies that this means the notice was only related to his bank account, and alleges that it clearly applied to the applicant as well.

Rescission of the default order

[22] Applicant's counsel, Mr Gotz SC, submitted that the default order was granted by the Registrar against the applicant on the basis of flawed pleadings. There were at least two material averments in ABSA’s particulars of claim that were entirely incorrect. These are that the applicant and her husband were still married in community of property despite the fact that that they had long been divorced and the joint estate had been dissolved; and that

the applicant had personally stood surety for the debt of the close corporation when in fact she had simply consented to her husband binding the joint estate when he registered his suretyship for the close corporation's debts.

[23] ABSA's attitude was (despite the above material flaws having been brought to their attention) that the default order was correctly granted against the applicant and that she was liable for the debts of the close corporation in terms of his suretyship, which bound the joint estate. It appears to now concede in its answering affidavit that the joint estate was liable in terms of the deed of suretyship, and the applicant was not personally liable. In these circumstances, counsel for ABSA, Mr Reyneke, correctly conceded that the rescission application should be granted. It cannot thus be disputed that the material averments on which the default order was obtained were factually incorrect and did not sustain a cause of action. In these circumstances, it is appropriate that the default order is set aside in terms of Rule 42(1)(a) as having been erroneously granted.

Condonation

[24] An application in terms of Rule 42(1)(a) has to be brought within a reasonable time.[1] The applicant seeks condonation for the late filing of this application and ABSA persists in its opposition in this regard. Mr Reyneke submitted that the applicant had been aware of the default judgment for about a year when she was informed by SA Home loans in 2018 that there was a judgment debt against her. Despite this, she took no action, and she furthermore terminated the settlement negotiations with ABSA following the interim interdict. Hence her delay in instituting these proceedings should not be condoned.

[25] In *Melane v Santam Insurance Co. Ltd,* [2] the Court held that the following should be considered in determining whether condonation for lateness should be granted:

[1] See *inter alia*: *First National Bank of South Africa v Van Rensburg N.O* 1994 (1) 667 (T).
[2] 1962 (4) SA 531 (A) at 532B-E.

"[T]he basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked."

[26] It is clear from the pleadings that the applicant first became aware of the default order on 23 June 2017 after the Sheriff had contacted her, and she then liaised with ABSA's attorneys and provided them with the contact details for her ex-husband. Despite her request for ABSA's attorney's to contact her to resolve the Sheriff's attachment of her movable property, they did not revert to her, and she, as layperson, justifiably assumed that the matter had been resolved with her ex-husband and the other defendants. Other than the time when SA Home Loans declined her loan on the basis of a court order recorded against her (which she understood to be a vestigial record of the default order), the first time she came to learn that ABSA still intended to pursue, and was pursuing, a claim against her was a year later when her bank accounts were suddenly frozen on 22 June 2018.

[27] Mr Gotz submitted that from this point on she took legal steps timeously to seek the rescission of the default order. This is clear from the factual background. On 24 July 2018, interim relief was ordered which *inter alia* made provision for a period in which the parties would negotiate and try to reach settlement before an application for rescission would need to be launched. On 10 September 2018, the applicant and ABSA's attorneys met for a roundtable settlement discussion where *inter alia* it was agreed that:

27.1 The negotiation period would be extended;
27.2 ABSA would supply a recalculation of the debt based on certain issues raised in the discussion;
27.3 Either party could unilaterally declare that the matter had become incapable of being settled thus ending the negotiation period and triggering the need to institute the rescission application as contemplated in the interim order.

[28] As of early December 2018 however, ABSA had still not reverted with a recalculation of the debt that the applicant would have owed until the divorce. As such, given this further delay and the applicant's desire to bring the matter to resolution given her vulnerability as a single mother of a minor child, she terminated the negotiation period and brought this rescission application.

[29] I agree with Mr Gotz that the applicant should be excused for initially trying to resolve the matter with ABSA without resorting to litigation unless it became absolutely necessary. In any event, it was ABSA's own prolonged delays in finalising the settlement negotiations process that led to her terminating the discussions in order to seek finality. Accordingly, I find on the *Melane* (*supra*) test that the lateness should be condoned and the applicant has provided a good explanation for the delay.

Was ABSA's conduct wrongful?

[30] Mr Gotz submitted that ABSA's attachment of the applicant's bank accounts without notice to her, without the requisite evidence to sustain a writ of execution, and without judicial authorisation, was unlawful. As a result, in the one month during which her bank accounts were attached and she was entirely unable to access her savings or monthly income, she needlessly suffered distress, anxiety and embarrassment and is entitled to general damages.

[31] In assessing this ground for relief it is trite that a party who wishes to claim general damages for wrongful attachment must demonstrate that there

was an attachment of property; and that this was done without lawful justification or judicial authority.[3] The harm which the law seeks to relieve in a claim for wrongful attachment is the anguish, embarrassment and indignity of the unlawful deprivation of one's property and rights. To this end, a claim for general damages as *solatium* for the anguish suffered may be provided as a remedy.

[32] On this basis, Mr Gotz submitted that a declaration of unlawfulness in the present matter is justified by the following:

32.1 Firstly, the facts and circumstances relating to ABSA's attachment of the applicant's bank accounts;

32.2 Secondly, that such attachment was without judicial authority and therefore wrongful;

32.3 Thirdly, ABSA's strict liability for the wrongful attachment regardless of fault;

32.4 Fourthly, the harm the applicant suffered during her one month ordeal of being denied access to her bank account, and the justification for an award of general damages, alternatively that the quantification of damages be referred to trial.

The facts and circumstances relating to the attachment of applicant's bank accounts

[33] The facts establish that the applicant was not given notice of the attachment order obtained by ABSA. She only learnt of it from FNB on 12 July 2018 when it filed its answering affidavit to the urgent application. ABSA and its attorneys had, up until the day before the hearing of the urgent application, not served the attachment order on her nor had it responded to her requests for access to her accounts and information about how her accounts had come to be attached.

[34] ABSA's answering affidavit in the urgent application for the first time provided an explanation. It averred that :*"[a]ll the judgment debtors opposed*

[3] Neethling, Potgieter and Visser, "Law of Delict", 6th ed at 345.

the attachments and commenced with negotiations to make arrangements for repayment of their debt towards ABSA Bank". The applicant denies that this applies to her. She alleges that: *"[w]hile I cannot speak for the other defendants, this was completely untrue in my own case. At no stage had I entered into such negotiations with ABSA Bank and this was clearly a misstatement.*"

[35] Further, ABSA averred that, *"[a]ll the Defendants against whom attachment [sic] were made, however insisted that the funds were needed for their businesses and that the attachments should be uplifted."* Again the applicant states that while this may have been true for the other defendants, it was manifestly untrue in her own case. Not only had did she have no such interaction with ABSA, but it was her personal bank accounts that were frozen.

[36] In regard to the upliftment ABSA alleges that: *"[a]fter negotiations . . ABSA Bank Limited instructed on the 21st June 2018 that the attachments be uplifted against all Judgment Debtors ... In that regard, a copy of the email sent to the Sheriff of Johannesburg South who effected this specific attachment dated 27 of June 2018 is attached hereto... it is a specific instruction to the Sheriff to uplift all the attachments."* It attached to its answering affidavit a return of service from the Sheriff indicating that the attachment had already been uplifted on the 27 June 2018. It alleged that as of that date the attachment of the applicant's "*right, title and interest in and to any or all accounts"* held with FNB had been uplifted.

[37] However, as is set out in the applicant's founding affidavit, the annexures ABSA attached do not support these averments at all. Firstly, the alleged email sent to the Sheriff to "uplift all attachments" is in fact an email sent to Nedbank, with the Sheriff on carbon copy, directing Nedbank to release the attached funds. As the applicant was not a customer of Nedbank, she states that it was entirely unclear why ABSA believed this email was relevant to her or supported its averments. Secondly, the Sheriff's return of service for the notice of upliftment does not mention the applicant at all. The

only party it mentions is "Marais Roelof Jacobus Petrus", the first defendant and FNB as the garnishee bank.

[38] The applicant avers that when these inconsistencies were pointed out to ABSA's legal representatives at the hearing of the urgent application, they were insistent that in fact such notice was sufficient. In particular they submitted that in practice, upliftment notices need simply name the first defendant and the case number and then the bank which received such notice would know that it applied to all defendants in that matter. As a result, ABSA's representatives claimed that it was FNB's fault that the attachment of her bank accounts was not lifted.

[39] Mr Gotz submitted that given that ABSA has failed to attach a copy of the notice of upliftment to its papers and that FNB confirmed that after a diligent search it was unable to locate a notice of upliftment from ABSA, the only reasonable inference to draw in the circumstances is that ABSA failed to adequately instruct FNB or the Sheriff to uplift the attachment of the applicant's bank accounts. As such, given that no documentary or confirmatory evidence is provided by ABSA to substantiate its version in the face of clear evidence that the hold on the accounts remained, its allegations can justifiably, on the authority of *Plascon Evans* Ltd v Van Riebeeck Paints (Pty) Ltd and *Wrightman t/a JW Construction v Headfour (Pty) Ltd & Another,* [4] be rejected on the papers.

[40] Mr Reyneke submitted that that although the heading of the return of service only makes reference to Mr Marais, the actual notice of upliftment did in fact contain a reference to the applicant. In any event, he submitted that the Sheriff's return confirms that the notice of upliftment was served on FNB on 13 June 2018, which ABSA had done in respect of her on humanitarian

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.
Wrightman t/a JW Construction v Headfour (Pty) Ltd & Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 12.

grounds, and which meant that she was only deprived of her bank accounts for five days. ABSA could therefore not be blamed for the conduct of FNB in failing to uplift her accounts. Furthermore, ABSA's conduct was not without lawful justification, since it had on 7 March 2017 obtained a valid default judgment against four defendants, including the applicant, and it was entitled to proceed against them. In these circumstances, Mr Reyneke submitted that ABSA's conduct was not wrongful, and it accordingly could not be held liable for any damages the applicant may have suffered.

[41] Mr Reyneke submitted further that the consent order granted in the application before Van der Linde J referred to the attachment order to the "*extent that it is still in place*". This reflected ABSA's view that the attachment had already been uplifted when the notice of upliftment was served on FNB. Mr Reyneke submitted further that because ABSA acted on the default order, the attachment was not unlawful and it was entitled to proceed to attach the accounts in terms of Rule 45(8) and (12). However, this submission, as Mr Gotz pointed out, does not take into account the fact that ABSA's failure to serve the attachment order on the applicant rendered the subsequent attachment of her bank accounts legally invalid.

[42] Mr Gotz relied on the authority of *Schmidt v Weaving,*[5] where although the Supreme Court of Appeal dealt with an attachment of a member's interest in a close corporation it referred with approval to the judgment of Innes CJ in *Reinhardt v Ricker and David*: [6]

"[T]he essential to be observed in all cases of the attachment of debts is that the debtor should receive due notice, so that he may be warned not to discharge his obligation to his original creditor, and so that he may have an opportunity of coming to the Court for relief in case he wishes to raise the question of the validity of the debt, or any lien, discharge or other matter which would operate in his favour."[7] Furthermore, in *South Africa Congo Oil Company (Pty) Limited v Identiguard International (Pty) Limited* the Supreme

[5] 2009 (1) SA 170 (SCA).
[6] 1905 TS 179.
[7] 2009 (1) SA 170 (SCA) at para 15.

Court of Appeal held that Rule 45(12)(a) envisaged “two separate jural acts": an attachment of the debt and service upon the garnishee of the prescribed notice.” [8]

[43] On the first ground I am in agreement with Mr Gotz that, while the return of service from the Sheriff is not disputed by the applicant, there is no evidence that the notice of upliftment served on FNB in fact contained a reference to the applicant. No reason is provided why the notice of upliftment could have been obtained from the Sheriff if ABSA was unable to locate it. The applicant was, on the facts, as Mr Gotz put it, summarily "unbanked" without notice by ABSA since it is not disputed that the writ of execution and attachment order were not served on the applicant. The authorities cited make it clear that a garnishee order without proper notice is invalid. In my view this renders ABSA's conduct wrongful and the writ of execution (movables) a nullity.

[44] Having determined the first ground relied upon to establish ABSA's wrongfulness, I am not required to determine the additional self standing basis for unlawfulness on the grounds that the writ of execution (movables) and subsequent attachment order that led to the freezing of the applicant's bank accounts was unlawful as it was obtained without judicial oversight. However in these circumstances I consider it necessary to do so.

The attachment was without judicial authority and therefore unlawful

[45] In regard to legal justification for the execution order, Mr Reyneke submitted that it was issued in terms of rule 45(8) and 45(12) of the Uniform Rules and was validly issued. Judicial oversight, he submitted was not required to justify the attachment of the applicant's account. Furthermore, unlike the execution of immovable property, Rule 45(8) makes it clear that attachment of incorporeal property does not require judicial oversight. The Registrar issued the order and no further application was necessary before ABSA could attach the applicant's bank accounts. Mr Gotz correctly conceded

[8] [2012] ZASCA 91 at para 22.

that insofar as ABSA relies on just cause, this cannot disputed since ABSA had obtained the default order.

[46] Mr Gotz however, in relying on the lack of judicial authorisation as self-standing basis for unlawfulness, submitted that ABSA should have approached a court for the attachment order on the basis of the *ratio decidendi* in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* [9] ("*Stellenbosch*"), where the Constitutional Court held that emoluments attachment orders issued without court authorisation are inconsistent with the Constitution. Thus, in the absence of judicial authority the attachment, he submitted, of the applicant's bank accounts was wrongful, and it caused injustice, *iniuria* and harm to the applicant.

[47] The *Stellenbosch* decision, Mr Gotz submitted, followed preceding similar decisions including *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others,* [10] where at paragraph [55] the Constitutional Court defined the phrase "*judicial oversight*" as denoting a decision by a court, following a consideration of relevant facts. It held unambiguously that *"[e]ven if the process of execution results from a default judgment the court will need to oversee execution against immovables."* The *Stellenbosch* ratio was moreover confirmed by the Constitutional Court in *Members of the Executive Council for Health and Social Development v DZ*.[11] There the Constitutional Court held that *"judicial oversight is constitutionally necessary whenever execution against property of the judgment debtor is contemplated. This would apply even where what falls to be the subject of execution is a sum of*

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[9] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016).

[10] CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004).

[11] *Member of the Executive Council for Health and Social Development, Gauteng* v DZ obo WZ (CCT20/17) [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) (31 October 2017).

money."[12]

[48] It is useful to quote the entire rationale of the *Stellenbosch* judgment, written by Cameron J for the majority: (footnotes omitted):

"[129] There are two major differences with the first judgment. First, we differ on an issue of principle. The first judgment assumes, without affirming definitively, that the Constitution requires judicial supervision when orders issued from a court are executed and finds that this is how the contested provision ought to be properly interpreted. The High Court in striking down the contested provision went further. It pointed out that this Court's judgments have repeatedly found that where an applicant seeks an order to execute against or seize control of the property of another person, there must be judicial oversight. To my mind, the High Court was right. This is not a principle that should merely be assumed in deciding this case. It has been established in the jurisprudence of this Court that execution of court orders is part of the judicial process. It requires judicial oversight. Though previous cases dealt with debtors' homes, the principle underlying them was that judicial oversight of the execution process against all forms of property is constitutionally indispensable. Clearly then, the fundamental principles relating to the proscription against self-help flowing from the section 34 right of access to courts apply, with equal force, to the execution process. I would therefore affirm the breadth of the High Court's approach.

[130] Indeed, this case is a prime example of why judicial oversight over the execution process is required. An emoluments attachment order may deal with the enforcement of a judgment debt, but it is a substantive decision in itself. By granting an order that a debtor will pay the debt through her wages, the court is deciding how the debt will be paid. A decision on the means of paying a debt can often be as important as the debt itself – and parties may contest the means of payment, even when they do not dispute that the debt itself must be paid. A large debt payable through lenient means may be less burdensome than a small debt payable in one go.

[12] Ibid at para 86.

[131] An emoluments attachment order is clearly burdensome. It severely constricts the autonomy of the debtor to decide how she will pay off the debt. It is also inflexible as it does not adapt to the debtor's changing circumstances from week to week. It goes directly off a debtor's wages – and these wages will often form the means for the debtor's day-to-day survival. These are all important considerations to be borne in mind when deciding whether an emoluments attachment order should be granted. What is more, a debtor's personal circumstances may well have changed in the interim between when a judgment debt is entered and ordered to be paid in instalments and when an emoluments attachment order is sought. It is, therefore, crucial that these considerations are taken into account at the time the emoluments attachment order is sought.

*[132] All this accentuates the importance of the High Court's encompassing approach to execution against property and the constitutional necessity for judicial supervision over it. The broader approach takes fuller account of the harsh effects in the absence of judicial oversight, acknowledging that they threaten the livelihood and dignity of low-income earners, a distinctly vulnerable group in our society. Even though Jaftha and Gundwana dealt with the section 26 right of access to housing, they find analogous application here, where indigent debtors run the risk of losing a part of their only property – their monthly income".(*Own emphasis)

[49] What is of further relevance in regard to the applicant however, is the *ratio* in *Stellenbosch* that the lack of judicial oversight results in the denial of rights entrenched in the Constitution: *[133] Primarily, the debtor's section 34 right of access to court is breached by an execution process not sanctioned by a court. Moreover, taking away the basic income that indigent debtors rely on for subsistence, without court supervision, rubs right up against the right to dignity (which underlies all the socio-economic rights of housing, food and health care). It may also implicate the protection against arbitrary deprivation of property afforded under section 25."*

[50] Mr Gotz correctly conceded that there are two distinctions between the

Stellenbosch approach, its predecessor decisions,[13] *Member of the Executive Council for Health and Social Development, Gauteng v DZ*, and the present matter. Neither distinction however interferes with the applicability of the principles entrenched in these cases to the applicant's situation. Firstly, the *causa* in *Stellenbosch* arose under Section 65J of the Magistrates' Court Act (Act 32 of 1944), whereas ABSA's case against the applicant is in terms of Rule 45(12) of the High Court. The second difference is that *Stellenbosch* deals with garnishee orders and in the applicant's case the attachment of her bank accounts.

[51] As regards the first distinction Mr Gotz submitted that the two provisions are analogous and the *Stellenbosch* principle applies equally to emoluments attachment orders under both the jurisdictions. If this was not the case it would lead to the anomalous position that there would be greater protection for an individual whose debt is sought to be recovered in the Magistrate's court than a judgment debtor whose debt arises from High Court proceedings.

[52] As regards the second distinction Mr Gotz submitted that a garnishee order attaching a portion of a debtor's salary is fundamentally the same as execution through the freezing of a bank account. Both orders address a third party to ensure that it transmits funds due to the debtor, to the creditor; It would clearly be inimical to the principles of *Stellenbosch* to suggest that the two orders do not require the same judicial oversight. The *ratio* therefore equally applies to the attachment of emoluments and/or bank accounts in the High Court as a matter of principle.

[53] In addition, the Supreme Court of Appeal has applied the requirement of judicial oversight to garnishee orders: *South Africa Congo Oil Company*

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[13] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004). At [55] the Constitutional Court defined the phrase "*judicial oversight"* as denoting a decision by a court, following a consideration of relevant facts. It held unambiguously that "[E]ven if the process of execution results from a default judgment the court will need to oversee execution against immovables."

(Pty) Limited v Identiguard International (Pty) Limited. [14] The SCA held that an attachment in the form of a garnishee order "*only followed upon an application to court on notice to the debtor and the creditor in respect of the debt and upon the court sanctioning the issue and service of the garnishee order."* The SCA clearly linked this rule to the common law:

"Rule 45(12) must be viewed against the backdrop of the common law and the procedural position that obtained immediately before its introduction. Under the common law a special application to court was always required in order to attach the debt owing by a third person to the judgment debtor."[15]

[54] The Constitutional Court's reasoning is clear: in order to pass constitutional muster and have legal force, a writ of attachment requires judicial oversight. But for such oversight, the writ of attachment is a nullity. Moreover, the failure to provide an opportunity to the applicant to make representations as to how any amount she might have been liable for could have been paid, stripped the attachment order of a key jurisdictional requirement. This further rendered the attachment order wrongful and a nullity, as Mr Gotz submitted. I agree.

Strict liability applies to wrongful attachment

[55] Liability for the wrongful attachment of property is strict. A claimant need not prove fault on the behalf of the respondent.[16] Both counsel were *ad idem* on this point. Mr Gotz referred in this regard to *Meevis v Coetzee* [17] were De Villiers J held after a review of the authorities that a claimant need not establish fault in a claim for wrongful attachment. In reference to this principle the court referred to and approved of the statement of law by the learned author Neethling who stated:

"In the case of wrongful attachment of property the conduct concerned takes place without any justification or judicial authority whatsoever. Such wrongful

[14] *South Africa Congo Oil Company (Pty) Ltd v Identiguard International (Pty) Ltd* (710/11) [2012] ZASCA 91; 2012 (5) SA 125 (SCA) (31 May 2012).
[15] Ibid at [16].
[16] Neethling, Potgieter and Visser "Law of Delict", 6th ed at 345.
[17] [1998] 2 All SA 602 (T). The correctness of the judgment was upheld on appeal to the SCA in *Coetzee (Sheriff, Pretoria East) v Meevis* [2001] 1 All SA 10 (A).

conduct makes the defendant liable without further ado. Fault (intent or negligence) is unnecessary to found liability. Accordingly the defendant cannot raise mistake or absence of consciousness of wrongfulness as a defence – he is liable without fault."

[56] ABSA must therefore be held strictly liable for its wrongful attachment of the applicant's bank accounts.

The applicant's entitlement to general damages

[57] In my view, given ABSA's wrongful and unlawful conduct in the circumstances it should have offered a *solatium* to the applicant and was in fact given a further opportunity at the commencement of this hearing to so. In the absence of such an offer, it would be appropriate to refer the quantification of the applicant's general damages claim to a trial court for determination. In making this submission Mr Gotz relied on *Cadac (Pty) Ltd v Weber-Stephen Products Co And Others* [18] where the SCA confirmed that in appropriate cases a court might make a determination on the merits of the dispute and postpone the quantum of the amount of the claim for later adjudication by way of a referral to trial.[19]

[58] This approach is equally applicable to declaratory relief such as is sought *in casu.* The court held in this regard :

[13] I cannot see any objection why, as a matter of principle and in a particular case, a plaintiff who wishes to have the issue of liability decided before embarking on quantification, may not claim a declaratory order to the effect that the defendant is liable, and pray for an order that the quantification stand over for later adjudication. It works in intellectual property cases albeit because of specific legislation but in the light of a court's inherent jurisdiction to regulate its own process in the interests of justice – a power derived from common law and now entrenched in the Constitution (s 173) – I can see no justification for refusing to extend the practice to other cases. The plaintiff may run a risk if it decides to follow this route because of the court's discretion in

[18] *Cadac v Weber-Stephen* (530/09) [2010] ZASCA (16 September 2010); 2011 (3) SA 570 (SCA).
[19] Endorsed in this division in *Levenson v Fluxmans Incorporated* 2015 (3) SA 361 (GJ) at para 8.

relation to interest orders. It might find that interest is only to run from the date when the debtor was able to assess the quantum of the claim.[15] *Another risk is that a court may conclude that the issues of liability and quantum are so interlinked that it is unable to decide the one without the other.*

[14] Once the principle is accepted for trial actions there is no reason why it cannot apply to application proceeding. In Modderklip,[16] *which was brought on notice of motion, this court issued an order for the determination of the quantum of damages based on the formulation used in Harvey Tiling. The order of the Constitutional Court was in this regard identical.*[17] *The fact that the order related to 'constitutional' damages does not affect the procedural principle.*

[59] It was submitted by Mr Gotz that this is such an appropriate case in that, but for ABSA's improbable version that it served the notice of upliftment on FNB 27 June 2018, the essential facts of the attachment are common cause. Furthermore, given the costs which the applicant would incur, as a layperson with limited means, in pursuing action proceedings to try the merits (which are essentially legal in nature), it was submitted that it is in the interests of the administration of justice that such a referral should be made.

Costs

[60] Applicant prays for costs for this application as well as the costs incurred in the urgent interim application be awarded to the applicant on the attorney-client scale given ABSA's obstructionist conduct in resolving this matter. Mr Reyneke however submitted that the costs reserved at the urgent application should not be for ABSA's account.

[61] Mr Gotz submitted that the following considerations should be taken into account:

61.1 ABSA's failure to notify the applicant that the dispute was still unresolved after she had given ABSA's attorney's her ex-husband's details and requested that they revert to her;

61.2 ABSA attached the applicant's bank account without warning after almost a year had passed without any contact;

61.3 ABSA failed to reply to the letter of demand sent on behalf of the

applicant during her ordeal and made no effort at all to contact her to explain or discuss the attachment of her bank accounts;

61.4 Despite having given ABSA just under two weeks' notice to prepare for the interim application, it filed its answering affidavit the afternoon before the hearing. This unjustifiably prejudiced the applicant's in their preparation for the hearing;

61.5 ABSA included a number of problematic claims in its answering affidavit in the urgent application, which were false. These include allegations to the effect that the bank accounts were in fact already unfrozen when the applicant approached the Court for urgent relief (a claim Mr Gotz submitted was so manifestly absurd as to be insulting) and misstatements about having negotiated with her;

61.6 ABSA failed to provide a recalculation statement in a reasonable time period, an exercise central to the negotiation process. The evidence it attached as proof that it was at the "final stages" of recalculating the applicant's alleged indebtedness towards ABSA at the time the negotiation period was terminated is practically no more than a bank statement of the close corporation's debts. Further, the statement is dated is dated 20 September 2018, which is almost three months before the roundtable settlement negotiations were terminated.

[62] I am of the view that punitive costs are justified given the conduct of ABSA and/or its attorneys in the unfortunate situation to which the applicant was subjected. What is in my view eminently clear from the factual background is that this conduct was characterised by a complete disregard of and indifference to the human dignity and socio-economic rights of the applicant. The fundamental indignity to which she was subjected could have ceased at the stage when she was forced to bring the urgent application, or even prior thereto, but ABSA instead delayed the period for negotiations of a settlement agreed in the interim order, causing further uncertainty to the applicant. There can be no doubt that the *ratio* of the Constitutional Court in *Stellenbosch* that constitutional rights of dignity and access to justice are infringed by obtaining an attachment order without judicial authorisation is applicable to the applicant, and that as a single mother with a minor child

court she was placed at extreme risk in being denied access to her finances in the circumstances which prevailed in this matter. The conduct of ABSA was indeed unfortunate in relation to her, and in my view warrants the highest sanction of this court.

Order

[63] In the premises, I make the following order:

1. The Applicant's non-compliance with the time periods stipulated in the Uniform Rules is condoned in terms of Rule 27(3).

2. The default judgment and order of 7 March 2017 under case number 10434/2016, issued against the Applicant, is hereby set aside, and the applicant is granted leave to oppose the action within 30 days of the date of this order;

3. The writ of execution (movables) of 1 June 2018, issued in case number 10434/2016, against the Applicant is declared a nullity and set aside.

4. The attachment of the Applicant's bank accounts on 22 June 2018 is declared to be wrongful and unlawful.

5. The First Respondent is liable for the wrongful and negligent attachment of the Applicant's bank accounts.

6. The quantification of the Applicant's claim is referred for trial in respect of which:
6.1 The notice of motion in this application is to stand as simple summons and the First Respondent's notice of opposition as notice of intention to defend.
6.2 The Applicant/Plaintiff is to file a declaration within 30 days of the date of this order.
6.3 Thereafter the normal rules relating to the filing of pleadings and preparation for trial will apply.

8. The First Respondent is ordered to pay the costs of both this application and the costs of the urgent application of 24 July 2018 for interim relief under case number 2018/25718 on the attorney-client scale.

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U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date of hearing: 24 August 2020. Heard by videoconference as per the Consolidated Directive of the Judge President of 11 May extended to 15 September 2020.

Date of judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by being uploaded onto the CaseLines digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 11 September 2020.

Appearances:
Counsel for the Applicant: A. Gotz SC with M. Laws

Instructed by: Africa & Associates, Roodepoort

Counsel for the First Respondent: A. Reyneke

Instructed by: Tim du Toit & Co. Inc, Pretoria