



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 4796/22

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

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SIGNATURE

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DATE

In the matter between:

ALPHEUS MALEMA PHETO

Applicant

and

**THE SHERIFF OF THE HIGH COURT, RANDBURG
N.O.**

First
Respondent

(Mr Amos Nkuna)

**MERCEDES-BENZ FINANCIAL SERVICES SOUTH
AFRICA (PTY) LTD**

Second
Respondent

REASONS FOR ORDER

AC BASSON, J

[1] This was an urgent application in terms of which the applicant (Mr Alpheus Malema Pheto – “*the applicant*”) sought an order to stay the writ of execution issued by this Court under case number 48359/2019 in terms whereof the first respondent (the Sheriff of the High Court: Randburg NO – “*the Sheriff*”) was authorised to take possession of a luxury motor vehicle which is currently in the applicant’s possession (Part A). The application is also brought on the basis of the *mandament van spolie*. The application was opposed by the second respondent (Mercedes-Benz Financial Services South Africa (Pty) Ltd - “*Mercedes*”).

Brief exposition of the facts

[2] On or about 15 April 2016 the applicant entered into a written instalment sale agreement (“*the agreement*”) with the second respondent in terms whereof the applicant purchased a motor vehicle against payment of a deposit of R102 500.00 and the first installment of R12 635.01 on 1 June 2016 and thereafter 59 equal installments monthly payments of R12 635.01 each consecutive month. A final payment of R 305 551.56 was payable on 1 May 2021.

[3] It is an express term of the agreement that, should the applicant fail to make any payments as per the terms of the agreement, the full balance owing by the applicant to Mercedes under the agreement would immediately become due and payable.

[4] It is common cause that the applicant went into arrears during the existence of the agreement and thus breached the agreement. This resulted in Mercedes instituting legal proceedings against the applicant and cancelling the agreement pertaining to the vehicle. Mercedes also obtained judgment against the applicant for the cancellation of the agreement and for the return of the vehicle. The Court issued an attachment order in terms of which the Sheriff was authorised to take possession of the applicant’s vehicle. Mercedes

was also authorised to sell the goods and to credit the proceeds towards the reduction of the debt owed to Mercedes. Mercedes was also granted leave to apply on the same papers duly supplemented to seek an order for damages.

[5] Summons was served on the applicant who failed to enter a notice of intention to defend. The order referred to was granted on 15 October 2019. As a result of the order granted, a warrant of attachment was issued on 11 September 2019. The vehicle was subsequently attached, and Mercedes took possession of the vehicle.

The subsequent agreement

[6] The applicant then approached Mercedes with a request to retain possession of the vehicle. During October 2019 the parties then entered into a written agreement (*"the subsequent agreement"*) in terms of which it was agreed that the applicant *temporarily* retain possession of the vehicle against the payment of certain sums: (i) The parties expressly agreed that the applicant will make payment in the amount of R42 200.00 being an amount equal to the arrears amount. (ii) The applicant agreed that it is indebted to Mercedes in the amount of R431 923.71 being the capital, interest and legal fees pertaining to the vehicle. (iii) The applicant agreed and undertook to repay Mercedes the full outstanding balance referred to above in respect of the vehicle, in monthly instalments of R12 475.28 per month commencing on 1 December 2019, and then monthly thereafter on the first day of every month and the last instalment being on 1 May 2021 in the amount of R302 551.56 being the balloon payment as per the initial agreement.

[7] The terms of the agreement (in terms of which the applicant could retain temporary possession of the vehicle) was on condition that all due payments were timeously met. Mercedes in turn undertook to temporarily stay execution steps for as long as the applicant honored the terms of this subsequent agreement. The agreement confirmed that Mercedes is still and remains the owner of the vehicle as per the reservation of ownership in the installment sale agreement and in terms of the court order.

[8] The agreement further provided that the indulgence by Mercedes shall not be construed as a novation or abandonment of the judgment.

[9] Importantly, the applicant specifically acknowledged the right of Mercedes to immediately issue and execute a warrant of delivery in respect of the vehicle in the event of breach by the applicant without being obliged to give any further notice to the applicant. Thereafter Mercedes will be allowed to take delivery of the vehicle and proceed to sell same by public auction to the highest bidder and to utilize any and all payments made in terms of the agreement and set it off against the indebtedness of the applicant. The late payment by the applicant shall not give rise to any right to reinstatement of the agreement. Lastly, the agreement constituted the whole of the agreement between the parties relating to the subject matter thereof and no amendment, alteration, addition, variation or consensual cancellation will be of any force or effect unless reduced to writing and signed by the parties.

[10] On a plain reading of the agreement, it is clear that effect of the agreement between the parties was to merely temporarily suspended the writ of attachment on condition that the applicant complied with his payment obligations in terms of the agreement.

[11] It is common cause that the applicant subsequently failed to adhere to the payment terms and that he had failed to make payment of the final instalment amount.

[12] It is also common cause that the applicant did not launch an application for the rescission of judgment granted against him in terms whereof the warrant of attachment was issued. Importantly therefore, the court order granted by this court thus remains extant.

Is the applicant entitled to an order to stay the execution of the writ of attachment granted in favour of Mercedes?

[13] To recap the common cause facts: This court granted an order against the applicant for the return of the motor vehicle. The applicant also elected not to oppose the action which resulted in the default judgment nor did the applicant apply for a rescission of the default judgment. It is in terms of that judgment that the writ of attachment was issued. Furthermore, and by agreement (in terms of the subsequent agreement), Mercedes issued a further writ of attachment once the applicant defaulted on his payment obligations.

[14] The applicant approached this court for an order to stay the writ of attachment

dated 11 September 2019 and, in the alternative for an order in terms of the *mandament of spolie*. In brief: The applicant contended that the Mercedes used an invalid writ of attachment to seize the vehicle and as a result violated the applicant's rights to human dignity, privacy, freedom of movement and the right to trade and practice his profession. He further submitted that this matter is of "*great public importance as it ultimately underlines the rule of law*". It was further submitted that the "*unlawful seizure*" of the vehicle violated human rights.

[15] These submissions on behalf of the applicant has no merit and completely ignores the well-established principles in terms of which a court may suspend a writ of execution.

[16] Rule 45A of the Uniform Rules states that a court may on application suspend the operation and execution of any order for such period as it may deem fit. (In the case of an appeal a suspension must be in compliance with section 18 of the Act.) As a general rule the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done. The court in *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and another and a similar matter*¹ summarized the legal position as follows:

"[15] Rule 45A reads:

'The court may suspend the execution of any order for such period as it may deem fit.'

[16] *Van Loggerenberg & Bertelsmann Erasmus Superior Court Practice vol 2 at PD1 – 603 summarise the law as follows (footnotes omitted):*

*'As a general rule the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done. Thus, the court will grant a stay of execution where the underlying causa of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution.'*²

It has been held that, in particular circumstances, the court could, in the

¹ 2022 (1) SA 162 (GJ).

² My emphasis.

determination of the factors to be taken into account in the exercise of its discretion under this rule, borrow from the requirements for the granting of an interlocutory interdict, namely that the applicant must show (a) that the right which is the subject of the main action and which he seeks to protect by reason of the interim relief is clear or, if not clear, is prima facie established though open to some doubt; (b) that if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in the establishing of his right; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy.”

[17] Important to note from this quotation is that a court will grant a stay of execution where the underlying *causa* of the judgment debt is being disputed or no longer exists,³ or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution.⁴

[18] It is common cause that the judgment granted against the applicant is not disputed and has never been disputed: The applicant never brought an application to rescind that order and the order, as already pointed out, remains valid and in force. The underlying *causa* of the order therefore remains extant. Moreover, it is further clear from the subsequent agreement that the terms of the judgment were not amended in any way: The agreement merely temporarily suspended the attachment on condition that the applicant complies with his payment obligations which he did not do. Moreover, Mercedes caused a further warrant of attachment to be issued which in terms of the (subsequent) agreement as

³ *Erasmus v Sentraalwes Koöperasie Bpk* 1997 JDR 0614 (O): “In *Le Roux v Yskor Landgoed (Edms) Bpk en Andere* 1984 (4) SA 252 (T) te 257B-I, word die volgende vermeld:

“Die algemene reël is dat 'n eksekusielasbrief tersyde gestel sal word as die lasbrief nie ondersteun of nie verder ondersteun word deur sy *causa* nie. Die *causa* is die skuld en die vonnis wat daarop verleen is”

⁴ *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) at 300A-C. “This may be summarised as follows:

(1) Relief under Rule 45(A) by way of suspension of execution is granted when the foundation on which the suspension sought affects or assails the very *causa* which is the basis of the writ of execution (see *Erasmus v Sentraalwes Koöperasie Bpk* [1997] 4 B All SA 303 (O) at 360a - 307d) or where the writ is sought to be executed for an improper purpose (*Whitfield v Van Aarde* 1993 (1) SA 332 (E) and *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) at 418E - G). However, so the argument goes, this application neither attacks the *causa* for the envisaged writ, nor does applicant allege that respondent entertained an improper motive or any motive other than to obtain payment.”

it was entitled to do.

[19] There is therefore, in light of the fact that the underlying cause is not disputed, the fact that the agreement merely temporarily suspended the attachment, and the fact that the agreement itself entitled (by agreement) Mercedes to issue a further warrant of attachment, no reason why this court should suspend the writ of attachment. It certainly is not in the interest of justice to do so: The applicant has defaulted on his payment obligations and should therefore return the vehicle. Despite arguing that the writ of attachment is invalid, I can find no basis on which this court can decide that the writ is invalid. The application must therefore fail.

Spoliation

[20] The applicant also relied on the mandament of spolie. There is no merit in this contention. The requirements for spoliation is settled law. Briefly, an applicant needs to prove that: (i) he was in peaceful and undisturbed possession of the property; and (ii) that he was deprived unlawfully of possession.

[21] On the applicant's own version, he is still in possession of the motor vehicle. But, more importantly, the applicant was not unlawfully deprived of the motor vehicle: Not only is he still in possession of the vehicle, Mercedes' attempts to repossess the vehicle was done in accordance with a writ of attachment which was lawfully obtained in terms of a court order. Also, the applicant consented to an attachment in the subsequent agreement in the event that he fails to comply with his payment obligations in terms of the agreement.

[22] There was therefore no spoliation and the application falls to fail on this basis.

New Credit Agreement

[23] A further claim made by the applicant was that the subsequent agreement entered into between the parties constitutes a new credit agreement, and is therefore subject to the National Credit Act.⁵

[24] There is no merit in this claim. No credit was advanced in terms of the subsequent

⁵ Act 34 of 2005.

agreement. The agreement specifically refers to the instalment sale agreement in terms of which the vehicle was purchased by the applicant. The subsequent agreement was concluded in circumstances where “*the Debtor is desirous to retain possession of the said vehicle*” and to provide for the “*Debtor to temporarily retain possession of the asset against payment of certain sums*”. No further or new credit agreement as contemplated by the National Credit Act was concluded.

[25] There is therefore no merit in this claim.

Requirements for an interdict

[26] The applicant has not established any basis for an interdict to be granted and therefore has no right in law or otherwise to remain in possession of the vehicle.

Order

[27] In the premises the application is dismissed with costs on the scale as between attorney and client.

A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 February 2022.

Appearances

For the applicant

Adv M Molemeng

Instructed by Molatsi Seleke Attorneys

For the second respondent

Adv AP Ellis

Instructed by Strauss Daly Inc