IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Case No: J4324/99

In the matter between:

JOCELYN ANN TAYLOR Applicant
And
LETTA VILANCULA First Respondent
JAN JACOBUS MEYER Second Respondent

THE SHERIFF JOHANNESBURG NORTH Third Respondent

MERVYN ISRAEL SWARTZ N.O. Fourth Respondent
SYFRETS BOARD OF TRUSTEES (PTY) LTD Fifth Respondent
In re:

LETTA VILANCULA Applicant

And
JOCELYN ANN TAYLOR Respondent

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JUDGMENT

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WAGLAY, J

1. On 9 September 1999 the CCMA handed down an award in favour of the first respondent and against applicant in terms whereof applicant was ordered to pay to the first respondent an amount of R8000.00 in compensation consequent upon first respondent's unfair dismissal by the applicant.

2. The applicant failed to make payment in terms of the award and on 7 December 1999 the arbitration award was made an order of this Court. On 22 February 2002 the Registrar of this Court issued a writ of execution against the applicant. The Sheriff was directed to execute the writ on the fourth respondent, who was cited in his capacity as a duly appointed Trustee in the insolvent estate of the applicant's husband, Adrian Moshe Taylor. The sheriff was directed in terms of the writ to take into execution the "incorporeal goods" of the applicant and to realize same by public auction to liquidate the judgment debt.

3. The Sheriff of this Court attached applicant's right title and interests in and to the claimed "incorporeal goods" held by the fourth respondent. The said "incorporeal goods" consisted of a claim applicant had proved against the insolvent estate and comprised mainly arrear maintenance (R24000) in respect of the applicant and (R74000) in respect of her minor children. It should be noted that the applicant and her husband are involved in an extremely acrimonius divorce with the husband being accused of salting away alternatively

hiding his assets. The husband has failed to make payments in *lieu* of maintenance to the applicant. Interesting also is the undisputed averment made by the applicant that the applicant's insolvent husband's attorneys funded the first respondent (judgment creditor) in instituting execution proceedings against the applicant.

4. Pursuant to the attachment a sale was held where the above "incorporeal goods' were sold to the second respondent (a business associate of the applicant's insolvent husband) for an amount of R5814.00.

5. The applicant now seeks to set aside the writ of execution; the sale that took place pursuant to the writ; and prays for an order of costs against the second respondent because he is opposing this application.
6. The grounds upon which applicant seeks the setting aside of the attachment of the writ and the subsequent sale of her claim in her husband's insolvent estate are the following:

    6.1 There was no compliance with section 45 of the Rules of the High Court (read with section 26 of the Labour Court Rules);

6.2 That the writ purports to attach property incapable of being attached and/or sold;

6.3 The attachment and sale is a manipulation and an abuse of the process of Court as it is no more than a conduit for the insolvent, to use the execution process through the first respondent's credit to frustrate and ultimately disentitle the applicant from receiving maintenance due to her and the minor children; and finally-

6.4 That the attached 'incorporeal goods" comprised maintenance payment.

7. Firstly with regard to non compliance with the relevant rules, rule 26 of the Labour Court Rules provides that the High Court Rules are applicable in respect of Labour Court matters in relation to execution. The relevant High Court Rule that is of relevance is section 45. In terms of this rule, a judgment creditor is in the first instance obliged to direct the Sheriff to first demand satisfaction of the writ before the Sheriff can proceed to make an attachment [s 45(3)]. What this presupposes is that no matter where the assets, belonging to the judgment debtor, may be held, before the Sheriff can make the attachment some form of notification to the judgment debtor is obligatory. Furthermore where incorporeal rights and property are attached the Sheriff is obliged to give notice of the attachment to all interested parties [145(8)(c)(i)(a)].

8 In **Reichenberg v Deputy Sheriff Johannesburg: In re Reichenberg v Joel Melamed & Horwitz** 1992 (2) SA 381 (WLD)

383 B-F the Court held that the requirement of demanding satisfaction of a writ must be strictly adhered to and where there is no demand there can be no valid attachment. In this matter applicant was unaware until the sale had been finalized that her "incorporeal goods" had been attached—she was not advised of this by the Sheriff or the Trustee (I acknowledge that the trustee had no obligation to do so). The Sheriff simply attended the offices of the insolvent's Trustee and attached applicant's asset. Assuming that the Sheriff could have made a demand for the satisfaction of the writ to the Trustee, there is no evidence that he did so –there is no return of service to this effect. Clearly when there is no demand there can be no valid attachment. Furthermore there has also been no compliance of Rule 45(8)(c)(i)(a) which required the Sheriff to give applicant notice of the attachment of her "incorporeal property".

9 Having regard to the nature of the incorporeal property I am satisfied that the attachment and sale of applicant's proved claim in the husband's insolvent estate should be set aside because of the sheriff's non-compliance of rule 45 of the High Court Rules. I arrive at this

decision knowing full well that I have a discretion to allow the attachment and the sale to stand notwithstanding first and third respondent's failure to comply with the rules and the "innocence" of the second respondent in the matter.

10 The other grounds raised by the applicant on the basis of which she seeks to set aside the writ and also set aside the attachment and sale of her claim in her husband's insolvent estate are all interlinked. What the first respondent sought to attach was in the main money that the insolvent was liable to pay the applicant in lieu of maintenance both for herself and the minor children. The applicant in this respect argued that what first respondent sought to attach was an asset which was so personal to the applicant that she could not be deprived of it. Applicant referred to the matter **of McPhee v McPhee and others** 1989 (2) SA 765 (NPD) where the Court held that:

> "Some rights are so personal that they can never be transferred to anyone else" at 768C

and further said:

> " Consider the (perhaps fanciful) case of a husband suing his

> wife for divorce. In the course of the proceedings the wife obtains an order for maintenance; in some interlocutory step the husband obtains an order for costs. Clearly…he could nor set – off his claim for costs against her right to maintenance. Nor can she cede her right to maintenance to a third party…The reality is that the right is so personal to her husband that he cannot be deprived of it and no one else could exercise it" at 768 E-G.

11.Relying on the judgment of **McPhee** (supra) applicant argued that since the "incorporeal property" related to maintenance for the applicant and her children it was personal and therefore could not be sold or ceded and the writ seeking to attach that should be set aside.

12. The second respondent argued that the attachment was an attachment of a claim of maintenance that was already due and payable and had therefore already accrued to the applicant. Since the maintenance had already accrued, so second respondent continued, the claim was no longer a personal claim whilst maintenance payable in future was.

13. According to the first respondent once maintenance payment is due but not paid then that money is no longer incapable of being attached. The effect of this argument is that a mother who may beg and borrow money to feed

her children in the hope that she will collect maintenance from the father of the child, may have little hope of doing so if she is one who has judgment creditors following her. Because according to the first respondent's arguments no sooner do maintenance payments accrue a judgment creditor could go ahead and attach that claim. To allow this would be to play in the hands of those who deliberately seek to avoid payment of maintenance often on malicious grounds and to ensure further hardship upon, particularly women, so that they suffer maximum inconvenience frustration and anger. This matter borders on being one where there appears to be a determination on the part of the applicant's husband to cause maximum hardship both to the applicant and his own offspring. The applicant's husband got himself declared insolvent; his attorney funds the first respondent in pursuing her claim. No doubt he and/or his lawyer provided the information about the claim proved by the applicant in the insolvent estate, the insolvent's *alter ego* purchases the claim. The claim is purchased for six percent of its value.

14. In view of the above I am not satisfied that payment of maintenance even where the maintenance was past due, can be attached, sold or ceded and as such the warrant of execution seeking to attach the "incorporeal property" which was essentially payment of maintenance, is liable to be set aside.

15. With regard to costs, notwithstanding the fact that the second respondent

may be an innocent purchaser of the claim, the fact that he opposed the application lays him open to be liable for the costs of this application. I am satisfied having regard both to law and equity that costs should follow the result.

In the result I make the following order:

1. The warrant of execution dated 21/22 February 2002 is hereby set aside.

2. The attachment and sale that took place pursuant to the said warrant is also set aside.

3. Second respondent is ordered to pay the costs of this application.

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WAGLAY J
DATE OF JUDGEMENT: 19 JANUARY 2005.
FOR THE APPLICANT: ADV AJ DANIELS instructed by Wertheim Becker Inc.
FOR THE SECOND RESPONDENT: ADV IP GREEN instructed by Kim Meikle Attorneys