IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J2404/05

In the matter between:

GRIEKWALAND WES KORPORATIEF	APPLICANT
AND	
SHERIFF, HARTSWATER WARREN	
TON VIN	1ST RESPONDENT
MONANDA LANDBOU DIENSTE	
(IN LIQUIDATON)	2ND RESPONDENT
FAWU OBO LALMIDE & 219 OTHERS	3RD RESPONDENT
IN RE:	
SHERIFF, HARTSWATER WARREN	
TON VIN	1ST APPLICANT
FAWU OBO PALMIDE & 219 OTHERS	2ND APPLICANT
AND	
MONANDA LANDBOU DIENSTE	RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] T**1**his is an application to rescind the Order granted by this Court on 17th October 2006. In terms of that Order the Court dismissed the claim by the applicant over the attached property in execution of the arbitration award which had been issued by the commissioner of the Commissioner for Mediation, Conciliation and Arbitration (the CCMA). The Court further declared that the third to further respondents were entitled to proceed with the execution process in terms of the writ of execution issued on 20th February 2006.

[2] The Applicant, Griekwaland Wes Koporatief (GWK) now seeks to rescind and set aside that order in terms of Rule 16A(1)(a) of the Rules of this Court and the common law. In its application to have the above order rescinded the Applicant contends that the order was granted erroneously in its absence and that the Court was not competent to make such an order. The Applicant further contended that the Court would not have granted the order had it been aware of certain facts relating to the interpleader proceedings.

Background facts

[3] The history of this matter dates back to 25th October 2005, when an award was issued by the CCMA for compensation in the amount of R257 070.00 against the second respondent (Monanda) and in favour of the third to further respondents. The third to further respondents were represented by their union, Food and Allied Workers Union (FAWU).

[4] Because of failure to comply with the order by Monada, FAWAU sought to have the award certified in terms of section 143(3) of the Labour Relations Act 66 of 1995 (the LRA). Further to the certification, the writ of execution was issued by the Registrar of this Court on 20th February 2006, directing the Sheriff to attach the movables of the Monanda and cause the same to be realized by public auction.

[5] The GWK claims in its founding affidavit that it was not aware of the arbitration award including the issuing of the writ of execution. The GWK further claims that the Sheriff was not entitled to attach certain movable goods of Monanda because it had a special notarial bond over them. The notarial bond which GWK relied on in its claim was signed on 21st February 2006, a day after the issuance of the writ of execution.

[6] The GWK argued that the fact that the notarial bond was signed a day after the writ of execution was issued had no bearing on its right in the property because the notarial bond was prepared some time prior to the 21st February 2006. The notarial bond was for the capital amount of R750 000,00 and an additional R150 000,00 in respect of costs incurred in relation the bond itself. The bond was according to the GWK issued in terms of the Security by Means of Movable Property Act 57 of 1993 (the Movable Property Act). The property attached per the writ of execution entailed certain machinery of Monanda which would have provided security to the indebtedness of Monanda to the GWK.

[7] Consequent to the GWK's claim over the attached property, the Sheriff invoked the interpleader proceedings on 17th October 2006, in this Court. As indicated earlier the Court dismissed the GWK's claim and ordered the Sheriff to proceed with the execution of the writ.

Principles governing rescission

[8] In terms of section 165 of the LRA, this Court may acting on its own accord or on application by any of the parties vary or rescind an order or judgment erroneously sought or erroneously granted in the absence of the party affected by such an order or judgment. An application to rescind may be brought either in terms of rule 16A (1) (a), or rule 16A (1) (b) or the common law.

[9] The requirements for filing an application under any of these rules are different. In terms of rule 16A (1) (b) read with rule 16A (2) (b), an application to rescind or vary an order or a judgment must be brought within 15 (fifteen) days. The 15 (fifteen) days requirement does not apply to both rule 16A (1) (a) and the common law. See *Edgars Consolidated Stores Ltd v Dinat & others (2006) 27 ILJ 2356 (LC).* The other difference between the two rules is that whilst rule 16A (1) (b) requires an applicant to provide a reasonable explanation for his or her default, this requirement does not apply to an application in terms of rule 16A (1) (a).

[10] The GWK contends that the order issued by the Court should be rescinded because its default in attending at Court on 17th October 2006, was due to the irregularity in the manner in which the interpleader proceedings were instituted

by the Sheriff. The second ground upon which GWK seeks to have the order rescinded is based on the averment that at the time of making the order the Court was not aware of certain facts, which had it been aware of it would not have made the order.

[11] It was argued on behalf of FAWU, that the GWK was in wilful default because itself and Monanda were aware of the interpleader summons but failed to file a statement of claim. It was further argued that both Monanda and the GWK were informed by he Sheriff that the matter would be heard on 17th October 2006. In the defence of the Court order FAWU relied on the letter from Monanda's attorneys dated 24th October 2006, wherein in response to the writ of execution it was stated that Monanda *"has no objection against the requested Order."*

[12] Another important factor to take into account in the consideration of whether or not to rescind an order or judgment of a Court concerns the prospects of success when the matter is considered on its merits once the order or judgment has been rescinded. In dealing with the same issue in *Edgars Consolidated Stores Ltd v Dinat & others (2006) 27 ILJ 2356 (LC),* Mokgoatleng AJ as he then was, quoted with approval the decision in *Chetty v Law Society of Transvaal 1985 (2) SA 756 (AD)*, where Miller JA stated, at 765A-C that:

> *"The term "sufficient cause" (or "good cause") defies precise or D comprehensive definition, for many and various factors require to be considered. (See Cairns' Executors v Gaarn 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in the long-standing*

practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that they party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which, prima facie , carries some prospect of success."

[13] The Learned Judge went further in *Dinat and Others* to say:

"It is not sufficient if only one of these requirements is met; for obvious reasons a party showing no prospects of on the merits will fail in an application for rescission of a default judgement against him [or her] no matter how reasonable and convincing the explanation of his [or her] explanation his [or her] explanation of his default. And (sic) orderly judicial process would process would be negated if, on the hand, a party who could offer no explanation of his [or her] default other than his disdain of the Rules was nevertheless permitted to have judgment against him [or her] rescinded on the ground that he [or she] had reasonable prospects of success on the merits."

Interpleader proceedings

[14] It is trite that there being no rule in the Labour Court rules dealing with interpleader proceedings, the applicable rule is rule 58 of the Rules of the High Court. Rule 58(1) of the Uniform Rules of the High Court reads as follows:

"Where any person, in this rule called 'the applicant', alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims, in this rule referred to as "the claimants", in respect thereto, the applicant may deliver a notice, in terms of this rule called an 'interpleader notice', to the claimants. In regard to conflicting claims with respect to property attached in execution, the sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant."

"Rule 58(2) provides that:

The interpleader notice shall

(a) state the nature of the liability, property or claim which is the subject matter of the dispute;

(b) call upon the claimants within the time stated in the notice, not being less than 15 days from the date of service thereof, to deliver particulars of their claims; and

(c) state that upon a further date, not being less than 15 days from the date specified in the notice for the delivery of claims, the applicant will apply to court for its decision as to his liability or the validity of the respective claims."

[15] The interpleader proceedings are initiated by the Sheriff as soon as there are conflicting claims to a property which is subject to an attachment process arising from a writ of execution. In terms of rule 58 of the High Court Rules, as soon as the Sheriff becomes aware of the conflicting claims in a property which

is subject of an attachment, he or she issues a notice stating therein, the nature of the property which is the subject matter of the dispute and call on the contending parties to deliver their respective particulars of claims within 15 (fifteen) days of date of delivery of the notice.

[16] The Sheriff is further required to attach to the interpleader notice an affidavit indicating that he or she does not have an interest in the subject matter in dispute other than the charges and cost and further that does not collude with any of the parties in dispute.

[17] In the present instance the Sheriff issued the interpleader notice on 11th September 2006, in terms of Rule 58(1) of the High Court Rules. In my view the first notice issued by the Sheriff failed, in more than one respect to comply with the provisions of rule 58 of the Rules of the High Court. In the first instance the notice incorrectly refers to the Sheriff as the first applicant and to Monanda as the second applicant. And more importantly there is no reference to the GWK in this notice. The notice ought to have referred to FAWU and its members as one claimant on the one hand and to the GWK as the other claimant on the other hand.

[18] In addition to failure to identify the different claimants in respect of the property in issue, the notice fails to call upon each of the claimants to deliver their particulars of their claims. The notice calls upon one claimant, "die Aanspraakmaker" to deliver particulars of his claim, but "die Aanspraakmaker" is not identified in the notice. In my view the reference to the document

constituting the notarial bond as a claim by the "die Aanspraakmaker" is insufficient to identify the GWK as one of the claimants and FAWU as the other claimant. The notice falls short of the requirement of calling on GWK to file the particulars of its claim to the movable property attached by the Sheriff. The other difficulty with the first notice is that it was not signed nor did it indicate the date when the hearing would be held to determine the dispute as contained in the notice.

[19] The second interpleader notice which was signed and also recorded the date on which Sheriff would apply to Court for its decision as to his liability or the validity of the respective claims was faxed to the GWK on 3rd October 2006. The hearing was in terms of this notice scheduled to take place 17th October 2006, which is a period of less than 15 (fifteen) Court days required by rule 58 of the High Court Rules. In this regard the notice was thus also irregular.

[20] FAWU in its particulars of claim in response to the interpleader notice state:

> *"19.1 The third to further respondents were the first claimant and the GWK was the second claimant in the interpleader proceedings.*
>
> *19.2 Subsequent to this Honourable Court having issued a writ of execution against the second respondent, so contends the third to further respondents, the second respondent colluded with the GWK and unlawfully registered a notarial bond in favour of the GWK on 20 March 2006.*

19.3 The purpose of the notarial bond is to defeat the due process of law (and in particular the execution process embarked upon the third to further respondents), so says the third to further respondents. Since the notarial bond was only lodged with the Deeds Office on 20 February 2006 and the execution order was dated 20 February 2006, it is invalid and unenforceable."

[21] The GWK on the other hand contended that FAWU's particulars of claim were flawed because:

"20.1 It fails to identify, whether by way of annexure or otherwise, who each of the individuals are on whose behalf the third respondent is filing the particulars of claim (i.e. who are the further respondents).

20.2 The particulars of claim fails to indicate that the notarial bond registered by the GWK was a special notarial bond- The significance of this is, as explained above, that it ought to comply with the Security by Means of Movable Property Act, 57 of 1993. If it does, the goods are deemed to pledge to the GWK and cannot be attached.

20.3 It suggests that the second respondent and the GWK colluded in concluding the notarial bond. This is not so. The bond was anticipated and was prepared some time prior to the writ of

execution being issued by this Honourable Court. In this regard the following is pertinent:

20.3.1 The notarial bond was anticipated in advance of the date on which it was signed by the parties (which happens to be one day after the writ of execution was issued). This is evident from the face of the notarial bond. It records that a special power of attorney was already granted to the second respondent's representative to sign the special notarial bond on 16 February 2006. The authority would not have granted were the execution of the notarial bond not anticipated.

20.3.2 The GWK instructed its attorneys of record to prepare the notarial bond on the 9 December 2005.1 annex hereto as "FA1 1" proof of the instruction to the GWK's attorneys of record.

20.4 It is incorrect that the notarial bond is unlawful, or that it is invalid and unenforceable. In any event, the third to further respondents did not make such allegations in their particulars of claim such as would render the notarial bond unlawful and invalid. In particular:

20.4.1 At the time of concluding the special notarial bond (and at all times since) there has been a valid principal obligation

on the part of the second respondent vis-à-vis the GWK. The third to further respondents have not alleged otherwise.

20.4.2 The notarial bond complies with the provisions of the Security by Means of Movable Property Act, 57 of 1993 and was correctly registered in accordance with the Deeds Registries Act, 47 of 1937. The third to further respondents have not pointed to any provisions in this legislation not being complied with."

[22] Before dealing with the issues concerning the interpleader I need to pause and deal very briefly with the legal principles governing notarial bonds. The general principles governing notarial bonds are no different to those governing all mortgages bonds.

[23] Similar to a mortgage bond a notarial bond is an instrument through which a debtor may hypothecate movable property without delivering it to the creditor in whose favour the bond is passed. See *Badenhorst et al in Silberberg and Schoeman's Law of Property, 4th Edition p385*. According to Badenhorst the Security by Means of Movable Property Act 57 of 1993, was promulgated to address the whole issue of notarial bonds, as well as to provide for specific matters relating to movable property as the object of real security. In this respect the main objectives of the Movable Property Act is to regulate the legal consequences of registration of a notarial bond over specified movable property. Once registered in accordance with the provisions of the Deeds Registries Act

47 of 1937, a corporeal movable property which is specified and described in the notarial bond in such a way that it is readily recognizable in terms of section 1 of the Movable Property Act, is deemed to have been pledged as if it had expressly been delivered to the mortgagee.

[24] Turning to the facts in the present matter, there can be no dispute that the first notice can not be regarded as a proper interpleader notice because it was not signed. The second notice was also defective because it did not give the GWK sufficient time as required by rule 58 of the Rules of the High Court to file its particulars of claim before the matter could be heard by the Court.

[25] The next issue upon which this matter, in my view, turns on concerns the prospects of success if the order granted earlier by the Court was to be rescinded and the interpleader was to be considered on its merits.

[26] In support of its prospects of success the GWK argued that rule 45(8) (b) of the Rules of the High Court provides that an attachment is incomplete until the Sheriff has served on the execution debtor in the property pledged which would include the notarial bond. It argued on the facts that the execution was incomplete until it was served on the GWK. In terms of rule 45(8)(b). Rule 45(8) (b) provides as follows:

> *"(8) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided:*
>
> *(a) ...*

(b) Where movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person, the attachment shall be complete only when the sheriff has served on the execution debtor and on the third person notice of the attachment with a copy of the warrant of execution. The sheriff may upon exhibiting the original of such warrant of execution to the pledgee, lessor, lessee, purchaser or sellers enter upon the premises where such property is and make an inventory and valuation of the said interest."

[27] In as far as the substantive aspect of an interpleader is concerned, it is only a claim in *ius in re* in the property which will found success in the interpleader and therefore a claim to a *jus ad rem* or personal claim is insufficient to sustain an interpleader claim. See *Mayet v Mall 1959 (3) SA 811 (NPD).* In terms of mortgage bonds the *ius in re* which is a real right in a property is conferred on the mortgagee in the mortgagor's property on registration of the bond. Thus the date of registration of the bond is key to determining whether or not an interpleader claim is sustainable and not the date on which the debt secured by the bond was incurred. See Badenhorst et al (supra) page 369.

[28] In *Lief NO v Dettmann [1964] 2 All SA 448 (A)* in dealing with the consequences of a mortgage bond held that:

"The bond is registered in the Deeds Office so that the world should have knowledge of the fact that there is a charge against the mortgagor's property; the object is not to notify the world that the mortgagor owes the mortgagee specific a sum of money. Creditors of the mortgagee cannot rely on the acknowledgment of indebtedness in the mortgage bond as correctly reflecting the debt owed to the mortgagee by the mortgagor at any particular time subsequent to registration. The only real rights in favour of the mortgagee created by the registration of the bond are rights in respect of the mortgaged property, e.g. the right to restrain its alienation and the right to claim a preference in respect of its proceeds on insolvency of the mortgagor. These real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them. On the other hand such a debt can exist without being secured, and there seems to be no reason why a mortgagee should not be able to cede the debt without also ceding the security. It may be that where no cession of the bond is contemplated the mortgagor is entitled to claim a cancellation of the bond, but that is another matter. The real rights under a bond are immovable, but the debt is a movable. Cession of real rights in land require registration, but cession of a debt under a bond, being an incorporeal movable, requires no more than an agreement to cede. I agree that inasmuch as no cessions of any of the bonds in this case were

registered, the plaintiff's claims to "real rights" in the bonds, or "secured claims" in respect of the proceeds thereof cannot succeed."

[29] The Court went further and stated that:

"In Union Government v. Chatwin, 1931 T.P.D. 317, reference is made to the fact that the object of the mortgage bond is not merely hypothecation but the settlement of the terms of the loan as well. The obligation of the mortgagee to lend the money to the mortgagor and the latter's obligation to furnish the security stipulated for and to comply with the conditions as to repayment of the amount of the loan flow from their common consent to undertake the transaction. By their common consent alone, however, they only create personal rights and obligations, notwithstanding the fact that in part their consent aims at the constitution of the real right in immovable property which is to inhere in the lender. Consensual right to claim hypothecation of the immovable property is prior to the personal right available only against the debtor. When the debtor gives effect to the reciprocal obligation in this respect by causing the mortgage to be registered in the Deeds Registry then, and only then, is the real right properly constituted in favour of the mortgagee (Registrar Deeds (Tvl) v Ferreira Deep Ltd, 1930 A.D. 169 at p. 180) does not affect the nature of the principal obligation, which throughout retains its character as of personal right of action available to the mortgagee against the mortgagor for the payment of the interest and capital due in terms of the mortgage bond."

[30] Turning to the facts of this case, it is common cause that the notarial bond was registered after the Sheriff attached the property which is the subject of the interpleader. On face value interpretation of these facts it means that at the time of the attachment, the GWK had personal and not real right on the movable property and therefore the conclusion which ordinarily should be drawn is that the GWK has no reasonable prospects of success when the merit of interpleader is considered once the rescission was granted. However the prospects of success are fairly high if one accepts the interpretation that the GWK had placed in its argument on the provisions of rule 45(8) (b), of the Rules of the High Court, which provides that the attachment would only come into effect once the third party, which in this case would be the GWK, has been served with the notice of attachment. The second interpleader notice whilst signed by the Sheriff unlike the first one, only Monanda, FAWU and its members are cited therein. There is also no reference to the GWK in the interpleader except that in the same way as the first notice there is reference to the *"die Aanspraakmaker."* Thus this notice did not properly identify the Applicant such that it could be said that "*die Aanspraakmaker"* refers to it and therefore failure to file a claim and appear in Court when the order was made was not wilful conduct on the part of the Applicant.

[31] In the light of the above I am of the view that the Applicant has made out a case for the rescission of the order of the Court made on the 17 October 2006. I am also of the view that in the circumstances of this matter, there is no reason in both the law and fairness why the costs should not follow the results.

[32] In the premises the following order is made:

(i) The Order granted by the Court on the 17th October 2006, is rescinded.

(ii) The Applicant is granted leave, within 15 (fifteen) days of date of this Order, to serve and file its particulars of claim in relation to the property identified in the interpleader notice in this matter.

(iii) Any party to the interpleader proceedings may, on proper notice to the other party to the interpleader proceedings, set down the interpleader dispute for a hearing on a date not less 30 days of date of this Order.

(iv) The Third to Further Respondents are to pay the costs of the Applicant.

Molahlehi J

Date of Hearing : 7th August 2008

Date of Judgment : 29th April 2009

Appearances

For the Applicant : Adv G Fourie

Instructed by : Duncan & Rothman Attorneys

For the Respondent: Mr M J Ponoane of Ponoane Attorneys