IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C362/2018

In the matter between

WAYNE HARRY LEVINE **Applicant**

and

ALBERT WIENAND **First Respondent**

THE SHERIFF FOR THE DISTRICT OF MALMESBURY **Second Respondent**

FIRSTRAND BANK LIMITED **Third Respondent**

Heard: 18 May 2018 and 22 June 2018

Delivered: 29 June 2018

JUDGMENT

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RABKIN-NAICKER J

[1] On May 2 2018, the Applicant approached this Court on an ex parte basis and obtained the following order from La-Grange J:

"1. A *rule nisi* is hereby issued returnable on 18th May 2018, calling upon the respondents to show cause why an order should not be granted in the following terms, pending the outcome of an action to be instituted by the applicant against the second respondent for the repayment of the amount of R183 233. 29:

1.1 that the second respondent be interdicted from paying any monies to the first respondent;

1.2 that the second respondent be ordered to pay the costs of this application on the attorney and client scale;

2. That the relief set out in paragraph 1.1 above operates as an interim interdict with immediate effect;

3. Directing the applicant to institute an action against the second respondent for the repayment of the amount of R183 233, 29 within twenty days from the date of confirmation of the rule nisi;

4. Postponing the question of costs to the return date of this application;…"

[2] On the 18th May 2018, I extended the rule until 22nd June 2018 and gave leave to the first respondent to file an answering affidavit on or before 25 May 2018 and the applicant a reply on or before 8 June 2018. Costs were to stand over. What this Court must decide is whether the rule nisi stands to be confirmed or discharged.

[3] The first respondent (Wienand) obtained an arbitration award dated 21 February 2018, in which it was ordered that Osmosis Group (Pty) Ltd pay him back pay and compensation in the amount of R181,620.99. The applicant acknowledges that this is a binding award in his papers.

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[4] In his founding affidavit the applicant set out the summary of the relief sought as follows:

"This is an urgent application to interdict the sheriff from paying the amount of R181 620, 99 plus interest at the prescribed legal rate from 16 March 2018 to Wienand, pending the outcome of an action to be instituted by me against the sheriff and Wienand, in which I seek an order that the payment I made in my personal capacity in the amount of 183 233,29 to the sheriff on 30 April 2018 be paid back to me on the grounds that I made the payment under duress from the sheriff.

This application is brought on an ex parte basis. If Wienand and the sheriff were to be given notice hereof, the sheriff could easily ensure that payment was made from his account to that of Wienand prior to the grant and service of an order prohibiting him from doing so. This will cause me irreparable loss as Wienand does not have the means to repay me the money."

[5] I note that the applicant founds the right to the relief he seeks on the grounds that he made the payment under duress. Mr Elliot for the applicant submitted that on the facts there are no reasons to have serious doubt as to the version of the applicant, and that the applicant had established a prima facie right although open to some doubt. He submitted that: "Having regard to the inherent probabilities, the applicant was forced to settle the debt of a third party in circumstances where he did not owe the debt himself. In other words, some external force, i.e. duress was brought to bear on the applicant's state of mind that compelled him to make the payment from his own bank account to that of the sheriff."

[6] The deputy sheriff (Stander) arrived at the private residence of the applicant on April 29, 2018 in the early morning, duly empowered to attach goods owned by Osmosis in respect of an arbitration award in favour of Wienand. He explained that, as is the norm, he needed to compile an inventory of sufficient goods to secure the judgment debt and that such goods, although attached, would not be removed from the premises at that stage. The founding papers do not allege that

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Stander informed the applicant that he was going to remove the assets. There is only a bald denial of Stander's averments in this regard in reply.

[7] According to the founding papers, applicant told Stander that he was at the wrong address as he was at applicant's private residence and he had caused Osmosis to change its registered address. This was not true. In his founding papers, he states that he accepts that the effective date of the change of address was 1 May 2018 but avers: "However, this does not detract from the fact that Osmosis has no assets capable of attachment at my home in Melbosstrand." Applicant told Stander he was not going to let him into the premises. Stander replied that he would then have to leave and return with the police.

[8] What then transpired, according to the applicant, were calls to his attorney and after the latter had telephoned the sheriff, an agreement was reached that if applicant and his wife travelled immediately to the police station to depose to an affidavit confirming that the assets on the property were their personal assets and did not belong to Osmosis, then the sheriff would accept that as a fact, and the deputy sheriff would be recalled. Applicant avers that he went inside and told his wife to get dressed immediately and then went outside to tell Stander they were going to go the police station but was shocked when Stander informed him that he had been contacted by the Sheriff, who had told him that an affidavit would not suffice and that he must attach the assets.

[9] I note that on applicant's version Stander had not entered his property and that his wife was inside the property. Stander avers that he never saw applicant's wife, daughter, his housekeeper, or any of the neighbours that morning. This is relevant because the legal basis for applicant's case is supported in his founding affidavit as follows:

"The payment was made by me under protest

28. More than an hour had passed since the deputy sheriff had arrived at my home. My family were all in a state of shock. They were horrified that someone could arrive so early in the morning and demand to attach all the assets in our

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home. I reiterate that my wife and I were humiliated by the experience in front of our child, our domestic worker and our neighbours. The deputy, on the instructions of the sheriff, insisted that he required access to my home to prepare an inventory and to attach all the assets. I realised that the only option open to me was to make the payment to the sheriff from my personal bank account to the sheriff's account as Osmosis does not have the funds to pay Wienand at present. I made it clear to the deputy that I denied that I was obliged to pay the debt of Osmosis personally but that I was only doing so to avoid the continuing trauma and humiliation to my family. My attitude towards the unlawful conduct of the sheriff and his deputy, coupled with my unequivocal statement to the deputy that I was not liable for the debts of Osmosis, constitutes a clear communication to the deputy that I was asking the payment under protest, although I did not use these express words.

29. I have been advised by my legal representatives that the insistence of the sheriff and his deputy that my and my wife's assets be attached in our home constitutes an unlawful threat for the unlawful detention of goods made to pay a sum of money not due to me."

[10] Hyperbole aside, the above paragraph founds applicant's case in the notion of "payment under protest" and what is termed 'duress of goods'. The law on 'duress of goods' was dealt with in the matter of **Shuttleworth v Reserve Bank and Others** [1]when the SCA made reference to early case law as follows:

"[33] It is now necessary to consider whether the 10% levy unlawfully imposed by the Reserve Bank has to be repaid to Shuttleworth. It is common cause that the levy was paid by Shuttleworth under protest to the Corporation of Public Accounts as the representative of the Treasury. He therefore pursues the repayment claim against the minister. Almost a century ago in Union Government (Minister of Finance) v Gowar 1915 AD 426 at 433 – 444, Innes CJ observed:

[1] 2015 (1) SA 586 (SCA)

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'It would be in the highest degree inequitable that the Treasury should be permitted to retain what it had no right to claim; and the question is whether the law will allow it to take up such a position. . . . It seems to me that money wrongly exacted by the possessor of goods from the true owner as a condition precedent to their delivery, and paid by the latter not as a gift, but in order to obtain possession of his own property and with a reservation of his rights would be recoverable by a condictio. . . . Where goods have been wrongly detained and where the owner has been driven to pay money in order to obtain possession, and where he has done so not voluntarily, as by way of gift or compromise, but with an expressed reservation of his legal rights, payments so made can be recovered back, as having been exacted under duress of goods. The onus of showing that the payment had been made involuntarily and that there had been no abandonment of rights would, of course, be upon the person seeking to recover.'

Wessels AJA in a concurring judgment stated (at 453):

'I think we may well take the further step and hold that a payment is involuntary and, therefore, recoverable, even though it was not made metus causa in the Roman law sense, but was made under pressure at the demand of one in authority who had it in his power to withhold the property or to suspend the rights of the person making the payment.'

[34] In Commissioner for Inland Revenue v First National Industrial Bank Ltd 1990 (3) SA 641 (A) at 647C – D, Nienaber AJA, after referring with approval to the aforesaid dicta from Gowar, stated:

'(T)he condictio indebiti is not, of course, confined to the recovery of an indebitum solutum which was involuntary because it was paid by mistake; it is now also available when the payment (or indeed any performance), although deliberate, perhaps even advised, was nevertheless involuntary because it was effected under pressure and protest.'"

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[11] The issue of whether payment has been made 'involuntarily' or not must be decided on the facts of each case as held in **Goldroad (Pty) Ltd v Fidelity Bank (Pty)Ltd[2].** In that matter, the plaintiff had instituted action in a Provincial Division for the recovery of an amount it had paid under protest in settlement of an amount due under a loan agreement. The plaintiff based its case on the contention that the amount had been paid under duress. From the evidence it appeared that the plaintiff wished to settle the amount of the loan as it had acquired financing from another financial institution at more favourable terms. The duress exerted upon the plaintiff had been (i) a threat by the defendant to foreclose on plaintiff (the plaintiff was already in arrears); (ii) a threat by defendant to take steps against the plaintiff in respect of another different and unrelated agreement between the parties; and (iii) that time was of the essence with regard to the offer by the other financial institution. It was held, relying on the **Gower** judgment, that in such a claim the money had to have been paid involuntarily: the payer, for example, having been driven to pay in order to facilitate the enjoyment of a right wrongly withheld. Because the threats alleged to have been made to the plaintiff had not been shown to be illegitimate, the payment could not be considered illegitimate as required by law.

[12] Further and important for the matter before me, the Court in **Goldroad** found that the plaintiff, far from having paid involuntarily, in fact had had a few options open to it, namely to accept and pay the settlement amount as determined by the defendant and be released from the debt; or to refuse to pay the determined amount and try to continue the monthly instalments as originally agreed; or not to pay anything at all and face the consequences…"

[13] In my view, the applicant has failed to discharge his onus to show that he paid the money under threat. At the time the attachment was sought, his residential address was also the registered address of Osmosis. The sheriff thus was not acting unlawfully or illegitimately in seeking to attach the goods. Furthermore, the applicant had a number of options. He could have let the deputy make an

[2] 1996(4)SA 1151(T)

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inventory and proceed to ensure that Osmosis claimed ownership of the goods and the sheriff issued an interpleader, given that Osmosis, of which he is a director, owes the monies in question. He could have approached this court on an urgent basis (and not ex parte) to stay the execution before any goods were removed from his premises. I find that on a balance of probabilities and on the papers before me, that for whatever reason, applicant did not want the sheriff to enter his private residence and took a voluntary decision to pay the monies from his private account. In addition, given that the Stander never entered the house nor saw applicant's wife, daughter or housekeeper, applicant's version of humiliation and threat is placed under serious doubt.

[14] Much was made in submission by Mr Elliot about the alleged breach of the agreement made between the sheriff and applicant's attorney. This is not material to a decision in this matter. Having found that the payment was not made under duress or under protest on the facts, the applicant has not established 'a prima facie right though open to some doubt' to the interdictory relief he seeks i.e. that this court should confirm an order that such monies should be repaid to him pending an action to be brought in this court.

[15] This brings me to the question of costs. The justification for rushing to Court on an ex parte basis is given as follows in the founding papers:

"This application is brought on an ex parte basis without notice to the respondents. In the case of Wienand, were he to get notice hereof, he could quite easily contact the sheriff and request him to pay over the funds prior to the hearing of the matter and thereby frustrate me in obtaining any relief in this matter. Likewise in the case of the sheriff, were he to obtain notice of this application and given his attitude towards me, there is every probability that the sheriff will pay the funds to Wienand which will leave me without remedy."

[16] The above is based on an assumption that the sheriff had "an attitude" towards the applicant personally and would have thus gone ahead and paid out the money on notice of an urgent application to this court. There is no factual basis for this belief over and above that, on applicant's own version, the sheriff

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changed his mind that an affidavit averring that none of the possessions in the property were owned by Osmosis would suffice. Stander avers in answering papers that when the applicant went into the house to contact the sheriff and presumably spoke to his lawyer, he was waiting in his vehicle and:

"I read the CIPRO notice of change of registered address and noticed that the change in address would only become effective the next day, being 1 May 2018. Upon discovering this I telephoned Mr Basson to inform him of this and obtain his further instructions.

Mr Basson instructed me to continue with the attachment process in execution of the writ. I advised the Applicant of the instructions when he returned."

[17] In his confirmatory affidavit, the second respondent, Basson, specifically denies the applicant's version of Bagg's conversation with him on 30 April 2018 as follows:

"I deny the applicant's averment contained in paragraph 24 and 25 of the founding affidavit wherein it is alleged that I came to an agreement with Bagg that the attachment procedure would be stayed on provision of affidavits from the Applicant and his wife to the effect that there are no assets of the judgment debtor on the premises.

I advised Bagg that, if the Applicant was able to furnish me with such affidavits already prepared, that and only in that case I would have been prepared to accept such as sufficient reason to stay the attachment.

Since this was not the case and since the writ had to be issued on an urgent basis, I advised my deputy to proceed with the attachment after he confirmed with me that the address he attended was still the current registered address for the judgment debtor."

[18] The applicant denies this version in reply and calls the sheriff "disingenuous" at best and avers inter alia that: "Had Mr Bagg been informed by the sheriff that, only in the event that such affidavits had been prepared and were available, he

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would have stayed the attachment, Mr Bagg would have insisted that I be afforded sufficient time (an hour or so) to obtain the affidavits in order to protect the interests of my family and myself;" There is no confirmatory affidavit to the replying papers by applicant's attorney, Mr Bagg.

[19] In view of the above, I do not accept that applicant can properly rely on the allegation that Basson had 'an attitude against him' and would have paid out the money to Wienand had an urgent application been made on notice.

[20] The applicant's stance is that "the formalistic and technical approach of the sheriff and his deputy in contending that the effect of the change of address would only take place the following day, 1 May 2018, demonstrates their bad faith in this matter and constitutes a further justification for a costs order to be awarded against them." As far as the Court is concerned the second respondent and his deputy were lawfully and legitimately doing their duty. The fact that the applicant merely had to let Stander in to allow him to make an inventory that day should not be overlooked.

[21] I have found that the applicant has not made out a case for the confirmation of the rule nisi and the rule therefore must be discharged. All parties have sought punitive costs orders. In law and fairness, the applicant must pay the costs of first and second respondent. First Respondent (Wienand) was brought to Court on the return day and wished to place his response to the application before Court which he was entitled to do. The second respondent was faced with an ex parte order and the threat of punitive costs against his office. As was submitted on behalf of second respondent, nothing prevented the applicant approaching the Court on notice requesting the same relief with a prayer for costs only in the event of opposition. I also take into account that applicant did not tell the truth to Stander, i.e. when he said that his private residence was not the residential address of Osmosis. Stander only discovered that it was, when he looked at his documents while waiting in his car for the applicant to come out of his house. He

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also freely impugned the integrity of the sheriff's office. The Court needs to show its disapproval in this regard.

[22] In the circumstances, it is my view that attorney-own client costs are apposite in relation to second respondent. Given that Wienand was not present at the premises on the day in question and therefore had no evidence to give as to the issue of payment under duress, and further that the founding papers did not threaten costs against him personally, a special costs order in his favour is not appropriate. The exercise of my discretion in respect of costs is reflected in the order below.

[23] Order

1. The rule issued on 2 May 2018 is discharged;

2. Applicant is to pay first respondent's costs;

3. Applicant is to pay second respondent's costs on an attorney- own client scale.

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H. Rabkin-Naicker

Judge of the Labour Court

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Appearances

Applicant: G. Elliot instructed by Andrew Bagg Attorneys

First Respondent: Herold Gie Attorneys

Second Respondent: GM Viljoen instructed by E. Basson Attorneys.

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