IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER :3656 /2021

IN THE MATTER BETWEEN:

THE KUFAN TRUST (IT 326/2004) **FIRST APPLICANT**

Represented by

JACK STANLEY FRANK N.O

JACK STANLEY FRANK **SECOND APPLICANT**

LEONIE ANDRE FRANK **THIRD APPLICANT**

AND

ABSA BANK LIMITED **RESPONDENT**

JUDGMENT DELIVERED ELECTRONICALLY ON 01 FEBRUARY 2023

RALARALA, AJ

INTRODUCTION

[1] This is an application for an order setting aside a writ of attachment, flowing from a judgment granted pursuant to a settlement agreement. The writ of attachment was issued and signed by the Registrar of this court on 23 January 2020 under case number 13256/2013 on 23 January 2020, in favour of the respondent, Absa Bank Limited in respect of an immovable property owned by first applicant, the Kufan Trust. The Property is situated at 4[...] A[...], 2[...] B[...] Road, Strand, Western Cape.

[2] The applicants, the Kufan Trust, Jack Stanley Frank, and Leonie Andre Frank also seek that the attachment of the immovable property made pursuant to the aforesaid writ of attachment be set aside, and that the respondent be restrained from selling the said immovable property in execution.

[3] The applicants' reasoning for the relief sought is premised on the contention that, in the writ of attachment, the respondent was incorrectly cited as plaintiff and the other parties were incorrectly cited as first to sixth defendants, this despite the fact that the matter was not an action. The defendants referred to in this matter are the applicants.

[4] Also, that the order upon which the issuing of the writ of attachment was based, was in favour of two applicants namely, the respondent as the first applicant and Absa Home Loans Guarantee Company (Pty) Limited, as second applicant. The court order regarding payment of the sum of R2 027 647, with accrued interest was issued jointly in favour of two applicants and not solely in favour of Absa Bank Limited.

[5] Based on the aforementioned, the applicants aver that the respondent was precluded from causing a writ of attachment of the immovable property to be issued for payment, entirely in favour of the respondent and wrongly citing itself as plaintiff.

PRELIMINARY ISSUES

Representation of the third applicant by second applicant

[6] The first applicant, the Kufan Trust, is represented by the second applicant, in his capacity as a trustee of the first applicant. The resolution adopted on 21 January

2021 by the trustees of the Kufan Trust authorises his representative capacity in the litigation of this matter., is sanctioned by the resolution passed on 21 January 2021, by the trustees of the Kufan Trust. In terms of the resolution, Mr Jack Stanley Frank was to represent the third applicant in her personal capacity. Mr Jack Stanley Frank is a retired legal practitioner, and not enrolled to practice law. The respondent contends that the resolution does not constitute a valid resolution in that it bears only one signature and not that of all three trustees. The respondent further avers that no confirmatory affidavits were filed by any of the trustees both in their capacities as trustees and in their personal capacities. In their response applicants contend that the document in question was a certified extract of the minute of a meeting of the trustees of the Kufan Trust in terms whereof a resolution was made as set out therein. Applicants further submit that Bevan Frank and Jack Stanley Frank were not required to sign the resolution as the extract that was furnished as annexure 'A' to the founding affidavit, was sufficient to verify that a valid resolution was passed.

[7] I am of the view that although not all the trustees signed the resolution, they appear to be acting in concert as trustees, and the decision of the trust to litigate manifests in Mr Jack Stanley Frank's conduct in proceeding with the litigation of this matter unimpeded despite him and Bevan Frank not having signed the resolution. To insist on the second applicant's signature and Bevan Frank's to be attached on the resolution, would amount to putting form over substance. The trustees of the Kufan Trust appear to be acting jointly in this regard.

[8] Regarding the representation of the third applicant in the personal capacity by the second respondent the court would not allow representation of a natural person by a layperson in a court of law. Accordingly, I find the remarks of Mangcu-Lockwood J (with Binns -Ward and Sher JJ concurring) in *Commissioner for the South African Revenue Service v Paoulter in re: Paoulter v Commissioner for the South African Revenue Service* (A74 /2021) [2022] ZAWCHC 206 (25 October 2022) , apposite in the circumstances and dispositive of the preliminary issue raised :

> *"… the recent Supreme Court of Appeal ("SCA") case of Commissioner for the South African Revenue Service v Candice –Jean van der Merwe disposes of that issue. There, the SCA, interpreting section 25 of the Legal Practice Act 28 of 2014 ("LPA") and applying the common law held that no lay person may*

represent a natural person in a court of law, and that a court has no discretion to allow a layperson to represent a natural person in a court of law …"

[9] In view of the delays that have already been occasioned in this matter, the matter has to be dealt with without any further delays. The application proceeded without legal representation in respect of the third applicant. This leads me to the third preliminary point.

Condonation of the late filing of the Applicant's heads of argument

[10] The applicants were out of time in filing their heads of argument. Hence, an application for condonation of the late filing thereof. Second applicant asserts that he could not adequately prepare for this matter, as he was involved in another matter. The respondent did not oppose the application for condonation. I am of the view that it is in the interest of justice to condone the late filing of the applicant's heads of argument. In the circumstances the application for condonation must succeed.

FACTUAL BACKGOUND

[11] A settlement agreement was made an order of court by the parties, and an order was granted on 29 January 2015, in favour of the respondent (who was the applicant in that application). The applicant was the respondent in this matter and the applicants in *casu* being the respondents together with their son Bevan Russel Frank. Bevan Russel Frank was cited both in his capacity as a trustee of the Kufan Trust, as well as in his personal capacity.

[12] Upon breach by the applicants of the terms of the settlement agreement's conditions, respondent brought an application in terms of rule 41(4) in which it sought judgment against applicants and Bevan Russel Frank. It can be gleaned from the judgment of Fortuin J, that three different matters were heard by her on the same day which she referred to as Claims A, B and C respectively. In claim A, judgment was given in favour of ABSA Bank Limited, the respondent in this application. In

respect of claim B and C, the respondent and ABSA Home Loans Company (Pty) Ltd were the applicants.

[13] The applicants and the respondent were thus informed of the terms embodied in the order of court as per the judgment of Fortuin J on 6 November 2015. On 15 December 2015 applicants and Bevan Russel Frank applied for rescission of the said judgment which the respondent opposed. The application was unsuccessful. An application for leave to appeal the judgment of the rescission application was launched by the applicant which was dismissed on 7 May 2019. A year later in June 2020 the applicants filed an application for leave to appeal the rescission of judgment in the SCA. However, the application for leave to appeal was dismissed with costs on 3 September 2020.

[14] Subsequent thereto, the respondent caused the immovable property to be declared executable pursuant to the rule 41(4) order by Fortuin J, to be sold in execution on 8 December 2020. Two weeks prior to the date of sale in execution of the property, the applicants and Bevan Russel Frank filed and served an application in terms of Section 17(2)(f) of the Superior Courts Act, 10 of 2013 for the reconsideration by the SCA of its decision, in dismissing the applicants' initial application for leave to appeal. This however, inevitably resulted in the cancelation of the sale in execution. Ultimately, the reconsideration application was unsuccessful in the SCA.

[16] The applicants approached this court seeking the relief set out in paragraphs 1 and 2 above. The respondent opposed the application, citing that the applicants rely on the patent errors as the basis of the application, and simultaneously filed a conditional counter application for the variation of the court order in terms of Rule 42 (1) (b), and that same be varied and rectified.

ISSUES FOR DETERMINATION

[17] This court is enjoined to determine the following issues:

Whether the writ of attachment flowing from the judgment of Fortuin J on 6 November 2015 is in accordance with the order on which it is premised. If not, the obvious and crisp question would be whether the writ of execution stands to be set aside and the execution of the immovable property declared invalid for that reason?

ARGUMENTS BY THE PARTIES

[18] Mr Frank in his capacity as a trustee of the first applicant and cited as the second applicant in his personal capacity, contended that there is merit in the setting aside, cancelling or, declaring invalid the issued writ of attachment in question. He claims to support his contention on a multitude of assertions including that the addresses of the defendants have not been set out therein, nor does the writ of execution reflect where service thereof should be effected on the defendants. It was argued that although the writ of attachment refers to a date of judgment which is the 13 February 2018, the judgment in question has not been identified therein. This he argued renders the writ of attachment vague and meaningless. It ought not to have been issued. It was further contended that the citation of the parties in the writ of attachment was wrong which conflicted and was inconsistent with the parties as cited in the order of court. The applicants in their founding affidavit averred that the order of court and the writ of attachment are in conflict and at odds with one another.

[19] It was contended that in view of the fact that the matter was not an action, the parties should not have been cited as plaintiff and defendants in the writ of execution, but as applicant and respondents. Mr Frank added that the writ of attachment ought to have corresponded with the court order, which was in favour of two applicants, not merely in favour of Absa Bank. According to him, this would have affected the amount on the writ of attachment which reflects R2 027 646, 11 as owing to plaintiff. The applicant further pointed out that there ought to have been personal service of the writ of attachment on all defendants, and as there was no addresses of the parties reflected on the writ of attachment, therefore there was no effective and adequate service.

[20] Respondent claims there was proper service of the writ of attachment in that it was served on the trustees of the Trust at the Trust's designated *domicillium citandi et executandi*. The Respondent further asserts in the answering affidavit that the rule in any event does not require personal service of the writ of attachment, but merely requires that it be served on the owner of the immovable property which has been done in *casu.* The respondent's Counsel advanced an argument that the order of Fortuin J should prevail as it is the only order that was granted in the main application. The respondent further argued that any order typed out by a Registrar which does not correspond with the order granted by Fortuin J, cannot in any way alter or modify the Fortuin order as the Registrar does not possess such powers. The alteration of the order made by the Registrar would accordingly constitute an act that is *ultra vires*, and amount to a nullity in law. It was submitted on behalf of the respondent, that the only inference that can be drawn from the failure on the part of the applicant, to annex the judgment of Fortuin J to the founding affidavit is that they were aware that it would lay bare or expose the errors committed by the Registrar in drafting of the order.

[21] In their heads of argument the respondents assert that the order that was issued by the Registrar pursuant to the Fortuin judgment in so far as it sets out two applicants in the heading thereof is patently incorrect. It is abundantly clear from the Fortuin judgment that the only applicant in Claim A is ABSA Bank Limited. The order issued by the Registrar is rendered incorrect in this regard, as there was no second applicant in the main application. Despite this clear and evident fact, the applicants refuse to accept that the Registrar's order was patently and incorrectly typed out by the typist. It is further argued that the applicant's insistence that the writ of execution should follow the order issued by the Registrar and not that of Fortuin J, means that respondent would be forced to make the same mistake in their warrant of execution that the Registrar made in the order that was issued by her or him.

[22] The respondent contend that in essence, the writ of execution would be incorrect and falls to be set aside, as it is in conflict with the only order the respondent and the applicants are bound by, which is the order made by Fortuin J in

her judgment. As a matter of fact, this court denied both a request for an application for the rescission of the same order which was dismissed by this court, as well as the application for leave to appeal against such dismissal. Having been dismissed by both this court as well as the Supreme Court of Appeal including a reconsideration application of such dismissal by the Supreme Court of Appeal, the applicants are intent not to accept that the only order binding the parties is the order embodied in the Fortuin judgment.

[23] Regarding the citation of the parties, counsel for the respondent conceded that it is indeed so that the respondent was the applicant and not the plaintiff in the main application. The applicants were the respondents and not the defendants. The respondent further acknowledges that in the heading of the writ of execution ABSA Bank Limited is set out as the plaintiff and the applicants as the defendants. Nevertheless, counsel for the respondent asserts that no adverse or material outcome out turn should result, as it does not affect the functions and operation of the writ of execution. Furthermore, no prejudice has been alleged to have been endured by the applicants.

ANALYSIS AND LEGAL PRINCIPLES.

[24] The basic test is to determine whether a writ is in accordance with the court order on which it was issued or the facts show that the debt has been satisfied or the order on which it is premised is itself set aside. See *Rand West City Local Municipality v Quill Associates (Pty) Ltd and another* [2021] Jol 51360 (SCA); *Le Roux v Yskor Langoed (EDMS) BPK en andere* 1984(4) SA 252 (T) at 257 B-I.

[25] In this matter, it is common ground that both the order directing the registrar to issue the writ of execution as well as the writ of execution itself contained some errors. It is abundantly clear that the order was issued correctly in terms of the judgment. The respondent asserts in the answering affidavit that the fact that the respondent in *casu* was described as Plaintiff in the writ of execution instead of applicant and applicants in *casu* were described as defendants instead of

respondents does not invalidate the writ in its entirety and cannot constitute a basis and ground upon which the entire writ falls to be set aside. Counsel for the respondents further argued that the errors on the order were patent inaccuracies by the registrar. That is so because when the court order and the writ of execution are looked at in conjunction with the Judgment of Judge Fortuin, and not in isolation, it is clear that the errors in the order were created in the issuing process by the registrar. Most significantly, the parties signed a settlement agreement on 18 December 2014 which underpins the 6 November 2015 judgment by Fortuin J. Therefore, at all material times the applicants must have been aware that the judgment in Claim A was in favour of ABSA Bank Limited only. In my mind, clearly the reason as to why the writ of execution does not accord with the order and with the judgment it is premised on should be considered. I concur with the respondent's counsel, that the mistakes of the registrar should not be permitted to supersede a properly considered and legally binding judgment of the court. To me that would be unjust to say the least.

[26] The applicants contended that the respondent took no steps to rectify the errors in the order and ought to have known that the writ conflicted with the order. It must be noted that the applicants are not asserting that the errors referred to in the court order and writ of execution would prejudice applicants in any manner or render the writ incapable of being given effect to. See *Sachs v Katz 1955(1) SA 67 (T) at 72 -E*; *Graphic Laminates CC v Albar Distributors* CC *and Another* 2005 (5) SA 409 at 413 E.

[27] On the other hand, the applicants had been properly served after the decision was rendered, therefore they were aware of the inaccuracies on the writ of execution for seven years. It was only subsequent to the failed attempts to rescind the judgment and thereafter a protracted appeal process, that applicants' focus was redirected at the errors on the order and writ of execution. This application in my view, is another stratagem to frustrate the respondent in giving effect to the court order. Evidently, the intended outcome of the application for rescission of the judgment and the appeal process that followed was the automatic cancellation of the

sale in execution in December 2018. Setting aside or cancelling a writ of execution in this instance purely because the Registrar made insignificant and immaterial errors when issuing an order and a writ of execution, in my view, would not be justified in this case. Any decision by the court with the effect of cessation in the process of carrying out a judgment, which is what execution in this sense means, in my view should be based on substantial reasons. To my mind, the errors on the order and the writ of execution were bona fide mistakes by the Registrar and I find that the applicant's application to be opportunistic and vexatious. I am therefore of the view that the application has no merit and must fail.

[28] In the result the following order is made:

[28.1] The applicant's application to set aside the writ of execution is hereby dismissed.

[28.2] The costs of the application are to be borne by the applicants including costs for counsel.

RALARALA, AJ

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT: IN PERSON (MR JACK FRANK)

COUNSEL FOR RESPONDENT: ADV DANIEL RABIE

INSTRUCTED BY: MARAIS MULLER HENDRICKS ATTORNEYS