



**THE LABOUR COURT OF SOUTH AFRICA  
JOHANNESBURG**

Reportable

Case no: J 1259 /2016

In the matter between:

**DIMAKATSO MASHEGO**

**Applicant**

and

**MPUMALANGA PROVINCIAL LEGISLATURE**

**First Respondent**

**SHERIFF: MBOMBELA**

**Second Respondent**

**FIRSTRAND BANK LIMITED**

**Third Respondent**

**Heard: 30 June 2016**

**Delivered: 30 June 2016**

**Date of Reasons: 30 August 2016**

**Summary: Urgent application for the setting aside of a writ of execution. Principles applicable for setting aside a writ of execution. The application was ill-conceived and an abuse of process. Applicant alleges attachment of his bank account is contravention of section 34 of the BCEA. No merit in such allegation. Application dismissed with costs.**

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**REASONS FOR ORDER**

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PRINSLOO J.

Introduction

- [1] On 30 June 2016 this matter served before Court as an urgent application for the setting aside of a writ of execution. The application was opposed.
- [2] The application was dismissed and on 20 July 2016 the Applicant's attorneys of record requested reasons for the judgment. The reasons for the order issued by this Court on 30 June 2016 are set out below.

The background facts

- [3] The Applicant is employed by the First Respondent (the Legislature) as a senior manager: Risk Management.
- [4] The Applicant was involved in litigation with his employer and on 22 July 2014 and under case number JR 2499/10 this Court awarded a punitive cost order against the Applicant. The bill of costs in respect of case number JR 2499/10 was taxed in the sum of R 123 889,93. This debt arose on 22 July 2014 was quantified on 25 February 2015.
- [5] On 7 May 2015 and under case number J 1222/12 this Court awarded costs against the Applicant on an attorney and own client scale and the bill of costs was taxed in the sum of R 121 130,55. This debt which arose on 7 May 2015 was quantified on 17 November 2015.
- [6] The Applicant averred that he was sent a notice of a debt in terms of the 'Debt Management Policy' in May or June 2015. His version is that he requested to meet with Mr Silinda, the acting secretary of the Legislature, to discuss a possible manner of payment. However, Mr Silinda refused, neglected or ignored his meeting requests.
- [7] On 7 July 2015 the Legislature appointed Mr Mwale as secretary and on 19 October 2015 the Applicant met with him and handed him a couple of documents relating to the matters between the parties. The Applicant requested Mr Mwale to acquaint himself with the matters, to obtain an independent opinion and for them to have another meeting once Mr Mwale had sufficient knowledge of the matters. Mr Mwale never reverted to him on

the issues.

- [8] On 16 February 2016 the Legislature's Service Board had a meeting and resolved *inter alia* that all debts should be recovered in full and that staff members should be informed in writing and that arrangements should be made with them to pay the amount due. On 4 April 2016 the secretariat meeting endorsed the aforesaid resolution.
- [9] On 7 April 2016 the Legislature obtained a warrant of execution in respect of case number JR 2499/2010 and J 1222/2012 wherein the Second Respondent (the Sheriff) was directed to attach and take into execution the Applicant's bank account held with First National Bank.
- [10] The Applicant's case is that all he wanted was an opportunity to make an arrangement for the payment of his debt within the realm of the Legislature's 'Debt Management Policy' and all his efforts were not taken seriously by Mr Silinda and or Mr Mwale.
- [11] When the Applicant's bank account was attached, he approached this Court on an urgent basis for relief.
- [12] The Legislature filed an opposing affidavit that paints quite a different picture.
- [13] The Legislature's case is that after the bill of costs in respect of case number JR 2499/10 was taxed, a letter of demand was sent to the Applicant's attorneys of record on 24 March 2015, demanding payment of the taxed sum and placing on record that if payment was not made, the Legislature would proceed to issue a warrant of execution.
- [14] The same was done on 20 November 2015 in respect of case number J 1222/2012. The demand for payment and the letters sent by the Legislature's attorney of record, Mr Lebea, remained ignored. The Applicant did not respond to Mr Lebea's letter, he did not pay the taxed sum and did not make any acceptable arrangement for the payment of the taxed sum, hence the attorneys proceeded to obtain warrants of execution, which were served on the Applicant on 5 and 9 May 2016.
- [15] The Legislature denied that Mr Silinda sent the Applicant a notice of a debt

in terms of the 'Debt Management Policy' in May or June 2015. In fact, Mr Silinda sent a letter to the Applicant on 16 April 2015 referring to the debt in respect of the cost orders and informed the Applicant to communicate directly with the Legislature's attorneys, Lebea Attorneys, regarding any matter relating to the payment of the said amount.

[16] The Legislature explained that the collection of legal costs from the Applicant was handled by Lebea Attorneys and the Applicant was advised as far back as April 2015 to communicate directly with Lebea Attorneys regarding the payment. The Applicant never contacted Lebea Attorneys, no further discussion was held with him regarding the payment of the debt and he never made any offer to pay.

[17] The Applicant filed a replying affidavit on 20 July 2016. It is astonishing that the Applicant could be of the view that it was possible to file papers after the case was already decided and dismissed. This is more so since he is represented by an attorney.

#### The relief sought

[18] The Applicant's notice of motion contains ten prayers in which he seeks relief. In my view the relief sought relates to two main aspects. The first relates to the writs of execution issued on 7 April 2016 and the second main aspect seeks to compel the Legislature to comply with the provisions of the Basic Conditions of Employment Act<sup>1</sup> (BCEA), the 'Debt Management Policy' and resolutions of the Service Board and Secretariat.

#### Setting aside the writ of execution

[19] The Applicant seeks the setting aside of the writs of execution issued on 7 April 2016 under case numbers JR 2499/2010 and J 1222/2012 (the writs).

[20] The remainder of the relief sought is an order directing the Respondents to refund the money deducted from the Applicant's bank account and to allow him to transact from his account. This relief would follow if the writs are set aside and cannot be granted if the writs remain in place.

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<sup>1</sup> Act 75 of 1997.

- [21] In his founding affidavit the Applicant stated specifically that at no stage did he deny that he owes the debt to the Legislature and the decision of the Service Board to recover all debts in full is reasonable, lawful and binding. The Applicant takes issue with the fact that he was not approached by the Legislature to consult or to make arrangements for the repayment of the debt in accordance with the resolutions of the Service Board, despite the fact that he was willing to be consulted to make arrangements for the repayment of the debt.
- [22] The Applicant further takes issue with the fact that his bank account has been attached by the Sheriff and on 15 June 2016 his whole salary was deducted from his bank account. The Applicant views this as a contravention of the provisions of section 34(1)(b) of the BCEA.
- [23] It is also the Applicant's case that the attachment of his bank account is drastic and has far reaching consequences. He is deprived of and denied the use and benefit of his salary, which he averred is arbitrary and against public policy. He alleges that the 'Debt Management Policy' could be utilized as an alternative method to recover the debt.
- [24] The Legislature raised a point *in limine* that the writs were issued pursuant to Court orders and cannot be set aside unless the Court orders on which the writs were based, have been set aside or the amount in respect of which the writs were issued, had been satisfied, liquidated or extinguished.
- [25] A writ of execution could be set aside in one of the following circumstances: if the judgment was not definite and certain and the amount payable under the judgment can be ascertained only after deciding a further legal problem, when the debt in respect of which the judgment was obtained has been extinguished prior to the judgment, when the judgment had been extinguished by compensation or novation, when the judgment on which the writ is based is rescinded, when the writ erroneously refers to a certain person as a party or when the writ of execution is no longer justified by the *causa* or debt<sup>2</sup>.
- [26] The facts of this matter shows that the amount payable under the judgments for which the writs were issued, is certain and definite as it was taxed, the

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<sup>2</sup> Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, Fifth edition, volume 2 page 1091 – 1092.

judgments on which the writs are based have not been rescinded nor has the debt been extinguished or satisfied.

- [27] *In casu* the Applicant acknowledges that he owes the money to the Legislature but he takes issue with the fact that he was not consulted about the payment thereof and that there are other methods to recover the debt. The Applicant is no doubt greatly inconvenienced by the fact that his bank account has been attached.
- [28] However, the fact that the Applicant was not consulted about the payment of the debt, the fact that it could be recovered differently or that the attachment of his bank account causes inconvenience and difficulties, cannot be grounds to set aside a validly obtained writ of execution.
- [29] In my view the Applicant dismally failed to make out a case for the setting aside of the writs and the basis of his application is not sustainable in law.
- [30] The remainder of the relief sought is an order to compel the Legislature to comply with the provisions of the BCEA, the 'Debt Management Policy' and resolutions of the Service Board and Secretariat.

#### The Basic Conditions of Employment Act

- [31] Section 34 of the BCEA provides that an employer may not make any deduction from an employee's remuneration unless the employee either agrees in writing to the deduction of a debt specified in the agreement or the deduction is required or permitted in terms of the law, a collective agreement, court order or arbitration award.
- [32] It is the Applicant's case that his salary is paid into the bank account that has now been attached in terms of the writ of execution and that a deduction of his salary was made from his bank account. The Legislature is circumventing the law as this action does not amount to a deduction as contemplated in section 34(1)(b) of the BCEA. This is disputed by the Legislature.
- [33] Section 34 of the BCEA prohibits an employer to make any deduction from an employee's remuneration unless certain conditions are met.

- [34] On the Applicant's own version, the Legislature paid his salary into his bank account on 15 June 2016. The Applicant attached a copy of his payslip from which it is evident that no deductions other than tax, pension fund and UIF were made from his salary. I am not convinced that the employer made a deduction from the Applicant's remuneration in contravention with the provisions of section 34 of the BCEA.
- [35] The question is whether the attachment of funds in his bank account is in contravention with the provisions of section 34 of the BCEA.
- [36] It is trite that whenever the sheriff is commanded by any process of the Court to levy and raise a sum of money upon the goods of any person, the sheriff must proceed to the dwelling or place of business or employment of such person and demand satisfaction of the writ and failing satisfaction, demand that so much moveable and disposable property be pointed out as the sheriff may deem sufficient to satisfy the writ, failing which the sheriff may search for such property. Such property means property to satisfy the writ. Money in the hands of the debtor may be attached in the ordinary way other moveable are attached<sup>3</sup>.
- [37] *In casu* the Legislature obtained a writ of execution on 7 April 2016, the sheriff visited the Applicant's address on 9 May 2016 and attached some moveable property and the Applicant's bank account was attached in June 2016 in the process of satisfying a writ of execution after the sheriff already attached some moveable property.
- [38] In my view the provisions of section 34 of the BCEA do not find application where attachment is done by way of a writ of execution and a bank account is attached in the process. The mere fact that the Applicant's salary is paid into the attached bank account, does not render the attachment a deduction from remuneration as contemplated in section 34 of the BCEA.

### The Debt Management Policy

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<sup>3</sup> Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, Fifth edition, volume 2 page 1054 – 1060.

- [39] The Applicant seeks that the Legislature be compelled to comply with the provisions of the 'Debt Management Policy' as it could be utilized as an alternative method to recover the debt.
- [40] In my view the Applicant faces a major difficulty here.
- [41] In item 3 of the 'Debt Management Policy' the scope is defined as follows: "The policy applies to the employees of the Legislature, suppliers and individuals who have been overpaid or paid in error."
- [42] *In casu* the debt does not arise from an overpayment or a payment in error, but arises from cost orders made by this Court. The 'Debt Management Policy' finds no application and the Applicant is opportunistic to seek an order to compel the Legislature to comply with a policy that does not apply to his situation.

#### Resolutions of the Service Board and the Secretariat

- [43] The Applicant seeks an order to compel the Legislature to comply with the resolutions as contained in paragraph 5.3 of the minutes of the Service Board meeting held on 16 February 2016 and the resolution as contained in paragraph 4.2 of the Secretariat meeting held on 4 April 2016.
- [44] The resolutions in paragraph 5.3 of the minutes of the Service Board meeting held on 16 February 2016 resolved *inter alia* that all debt must be recovered in full, employees should be informed in writing and arrangements should be made with them to pay the amount due and the trade union should be informed of the decision. This was endorsed by the Secretariat on 4 April 2016.
- [45] The Applicant's case is that the issuing of the warrant of execution on 7 April 2016 is a failure to comply with the said resolutions as he was never approached or consulted to make arrangements for the repayment of the debt.
- [46] The Legislature responded that it is apparent that the Service Board and the Secretariat treated debts arising from a taxed bill of costs differently from other debts and that Lebea Attorneys were specifically instructed to continue with the writs of execution to recover taxed costs. It is thus disputed that there was a failure to comply with the relevant resolutions.

[47] It is further the Legislature's case that the Applicant was notified in writing when letters of demand for the payment of the taxed costs were sent to his attorneys of record and when he was advised to contact Lebea Attorneys in relation to the payment of the taxed costs. The Applicant did not make payment and did not make an arrangement with Lebea Attorneys.

[48] In my view the Applicant is now crying at the proverbial wrong funeral. He now seeks an order to effectively compel the Legislature to inform him in writing of his debt and for arrangements to be made to pay the amount. The reality is that the Applicant was informed about the debt as far back as March 2015 when a letter of demand was sent to his attorneys of record. Mr Silinda also sent him a personal letter in April 2015 wherein he informed the Applicant of the taxed bill of costs and the fact that Lebea Attorneys were instructed to recover the amount. The Applicant was also informed to contact Lebea Attorneys regarding payment of the amount. Lebea Attorneys sent another letter of demand to the Applicant's attorneys in November 2015. The Applicant disregarded these demands, made no payment or arrangements with Lebea Attorneys and the execution process followed. The Applicant is no doubt the creator of his own misfortune.

[49] In view of the fact that the Applicant was notified about the debt in March, April and November 2015, was informed that Lebea Attorneys were instructed to recover the debt and that he should contact Lebea Attorneys regarding payment, I find it not only shocking but opportunistic in the extreme that the Applicant seeks an order to compel the Legislature to inform him in writing of his debt and for arrangements to be made to pay the amount.

[50] The Applicant has not made out a case for the relief he seeks and this application is nothing but a desperate abuse of process.

[51] It was for these reasons that the application was dismissed.

### Costs

[52] Costs should be considered against the provisions of section 162 of the Act and according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result.

[53] In considering fairness, this Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[54] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In considering whether costs should be awarded, the requirements of law and fairness become applicable.

[55] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*<sup>4</sup> it was emphasized that:

“.....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.”

[56] In *Wallis v Thorpe and another*<sup>5</sup> the Court held:

“In relation to costs, this court has a discretion in terms of s 162 to make an order for costs according to the requirements of the law and fairness. The ordinary rule, ie that costs follow the result, is a factor to be taken into account, but it is not a determinative factor.

..... Ultimately, the applicant is the author of his own misfortune. This court encounters many indigent and illiterate litigants who seek to enforce what they perceive to be their rights. The court is often wary of the effect of a costs order on persons such as these, who more often than not sincerely but misguidedly institute ill-conceived proceedings. The applicant in these proceedings is neither indigent, nor is he illiterate. On the contrary, he is an articulate, experienced business person, who was quite capable of considering the consequences of his decision...”

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<sup>4</sup> 2012 33 ILJ 2117 (LC).

<sup>5</sup> [2010] 31 ILJ 1254 (LC)

[57] *In casu* it is evident that the application is not only without any merit, but is opportunistic, vexatious and *mala fide*. The Applicant seeks to set aside a writ of execution without providing any basis in law for the relief he seeks. He admits that he owes the money and it is evident from the papers before me that he was notified in 2015 that he should pay, as the Legislature has appointed attorneys to recover the debt. The Applicant took no steps to pay or to make an arrangement for payment and when he is inconvenienced by the fact that his bank account is attached, he runs to Court on an urgent basis, whilst ignoring the demands to pay and failing to make any alternative arrangement for the payment of the taxed costs.

[58] The Applicant approaching this Court is nothing but a gross abuse of process. The Applicant was legally represented and was to be advised of the consequences of litigation in a court of law and the risk of losing and paying costs. In fact, this application is the remote result of two previous costs orders awarded against the Applicant.

[59] This Court has to discourage ill-conceived litigation.

[60] In my view, the Applicant's conduct warrants an order for costs. I can see no reason to deviate from the ordinary rule that costs should follow the result. The Legislature is entitled to costs. I can also not see a reason why tax payers should be burdened to pay the costs to defend an application that should not have seen the light of day in the first place.

[61] Litigants should be warned that abuses of the right to urgent relief that this Court affords in appropriate circumstances, will be met with orders for costs, including punitive costs orders and orders to the effect that the legal representatives concerned should forfeit their fees in respect of such applications.

[62] It was for these reasons that the following order was made:

Order

1. The application is dismissed with costs.
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Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant: Mr M Ndhlovu of Mac Ndhlovu Attorneys

For the Respondent: Advocate M H Marcus

Instructed by: Lebea and Associates Attorneys

LABOUR COURT