



IN THE HIGH COURT OF ESWATINI

CASE NO. 16/2023

In the matter between:

LUNGILE MAKHANYA (NEE MDLULI)

APPLICANT

And

MAGISTRATE S. LOKOTHWAYO N.O

1ST RESPONDENT

T.M BHEMBE ATTORNEYS

2ND RESPONDENT

STANDARD BANK SWAZILAND LIMITED

3RD RESPONDENT

THE ATTORNEY GENERAL

4TH RESPONDENT

NEUTRAL CITATION: LUNGILE MAKHANYA (NEE MDLULI) VS MAGISTRATE S. LOKOTHWAYO N.O & 3 OTHERS (16/2023) SZHC – 19 (07/02/2023)

CORUM

: BW MAGAGULA J

HEARD

: 02/02/2023

DELIVERED

: 08/02/2023

Summary – Urgent application for review – Grounds for review being that the Magistrate committed an error of law by failing to take into considerations the provisions of Section 47 (2) of the Magistrate Court Act of 1939 – Points of law for failure to make averments in support of a review application – Points of law dismissed for lack of merit – Source of funds being the Applicant’s cannot be ignored – Applicant justification for attaching the entire amount including the Applicant’s salary under the guise that it is a debt disengenuous - Bank has all the tools and material to determine which money comprises of salary on the Applicant’s money standing in her account – Application granted – 1st Respondent ordered to make a proper enquiry in-terms Section 47 (2) of the Magistrate Court Act of 1939 before arriving at a decision of how much should be attached from the Applicant.

HELD - Application granted with costs.

JUDGMENT

BACKGROUND

[1] This matter came before me as one of urgency on the 13th January 2023.

[2] The parties recorded a consent order, where 3rd Respondent (Standard Bank) was directed to retain the funds withheld from the Applicant in her account and not to remit same to either of the parties.

[3] The 1st and the 4th Respondents were to file a record of the proceedings of the court *a quo* by close of business on the 18th January 2023. The 1st and 4th Respondents were not in court on the date the order was granted neither did they enter the fray in terms of opposing the Application.

[4] The court has since been advised during the arguments, of that compliance with paragraph 2 of consent order was inconsequential, as there was no written judgment by the 1st Respondent. It was unopposed matter where the learned Magistrate issued the order that fully appears in Annexure 4 attached to the Applicant's founding affidavit.

[5] The nature of the order issued by the 1st Respondent is that the 3rd Respondent was permitted to withhold any funds not in excess of Twenty Thousand Two Hundred and Eighty Three Emalangeni – Fifty Six Cents (E20 283.56) including cost of suits from any funds held with it in favor of 2nd Respondent due to the Applicant under any single or several accounts from the date of the service of the application.

[6] One known account being account 9110004702967.

[7] Subsequent to the consent order issued by this court on the 13th January 2023, the parties have since filed a full set of papers. The 2nd Respondent raised preliminary points in the answering affidavit.

[8] The matter was argued holistically by the parties, both the points of law and the merits were addressed.

POINTS OF LAW

Failure to meet grounds for review

[9] The 2nd Respondent argues that the Applicant's application is bad in law for lack of the requisite averments necessary in an application review.

[10] The 2nd Respondent further argues that the Applicant's founding affidavit fails to substantiate and prove a single ground for review.

[11] The Applicant on the other hand argues that at paragraph 13 – 15.4 of her founding affidavit outlines the basis for review application. The grounds are articulated in the following manner:-

11.1 The Learned Magistrate failed to take into account the provisions of Section 47 (2) of the Magistrate Court Act of 1939 before granting the order in the manner in which he did.

11.2 The Learned Magistrate did not satisfy himself through sworn information that the Applicant will be left with sufficient means to

maintain herself and those dependent on her after the execution of the order.

[12] I deem it prudent to reproduce the provisions of Section 47 (2);

“No such order in respect of salary or wages shall be granted unless the court is satisfied upon sworn information that sufficient means will after satisfaction of the order be left to the judgment debtor to maintain himself and those dependent on him”.

[13] The other argument advanced by the Applicant in response to this point of law is that, it is also an acceptable ground for review which has been set out in her affidavit, that the order issued by the Learned Magistrate is unreasonable or arbitrary. He did not take into consideration the ability of the Applicant to maintain herself and those dependant on her once the order is affected. The rationale being that the money sought to be attached by the order of the learned Magistrate, included her entire monthly salary which is deposited by the Treasury monthly into her Standard Bank Account. The Applicant is a single mother of 3 children, who are all school going and entirely dependent on her for maintenance. The learned Magistrate erred considerably by not taking those facts into consideration before the order was issued.

[14] I have taken time to go through the Applicant's founding affidavit to ascertain if indeed the requirements of a review were not pleaded by the Applicant. I am satisfied that in paragraph 13 and 15 the Applicant addressed the averments in support of a review application. She states clearly that the decision of the Magistrate is in breach of a legislation being Section 47 (2) of The Magistrate Act of 1939. This is an acceptable ground for review. In the matter of **James Ncongwane Vs Swaziland Water Services Co-operation**¹ Her ladyship **Otta J** stated that an error of law can give rise to a good ground for review.

[15] It is also a good ground that the court a *quo* took into account irrelevant considerations and ignored the relevant ones. It will therefore suffice as a ground for review, if it is established that the Learned Magistrate should have taken into consideration, the provisions of Section 47 (2) of **The Magistrate Court Act of 1939**.

[16] I will dismiss this point of law, it has no merit.

Prayer 4 of the Applicant's Notice of motion having being overtaken by events.

[17] The 2nd Respondent also argued as a legal point that prayer 4 of the Applicant's application has been overtaken by events, in a sense that it seeks to direct the 2nd and 3rd Respondent to remit to the Applicant any amount of

¹ Unreported High Court Case No 52/2012 SZSC85

money that they have received or withheld belonging to the Applicant, pursuant to the order issued by the 1st Respondent on the 17th October 2022 and subsequently confirmed by the Learned Magistrate on the 1st December 2022 under **Magistrate Court Civil Case No. 2199/2022**.

- [18] The 2nd Respondent argues that this prayer or order sought is not capable of being effected against the 2nd Respondent, as it speaks of money received or withheld belonging to the Applicant.
- [19] The argument is that the 2nd Respondent as a firm of attorneys has no fiscal relationship with the Applicant. In a sworn affidavit Mr T. Bhembe an officer of this court, states that as a Director/Manager of the law firm he can categorically state that no funds were received belonging to the Applicant.
- [20] The firm nor himself have got no fiducial relationship with the Applicant.
- [21] It has been further submitted that the money that has been received from the 3rd Respondent (Standard Bank) belongs to 2nd Respondent, which is Mr Bhembe's law firm as per the court order which is sought to be reviewed. Which means the money now forms part of the assets of the law firm. Therefore the order sought is hamstrung by the impossibility of performance.
- [22] The argument by the law firm is further that even if the money did indeed belong to the Applicant, the firm has already under Mr T.M Bhembe's hand

disbursed it, in the course of the firms normal business operations, as it was it's right to do so at the time.

[23] The Applicant has argued *contra* to this point in that prayer 4 is very capable of enforcement in the event the order of the 1st Respondent is set aside. The resultant effect of the order would be that the remittance was void in the first place. As such neither party can be expected to benefit from it. The status quo would have to be restored, lest the 2nd Respondent be unjustly enriched.

[24] The Applicant further argues that the money attached belongs to her, having been deposited as such to her account held with Standard Bank as her salary by her employer. The money was in her bank account in her name being her salary.

[25] I will now take time to analyze the arguments by the parties. I comprehend the 2nd Respondent arguments to be that prayer 4 has been overtaken by events. In the month of December, Standard Bank, 2nd Respondent, proceeded to comply with the order and remitted the funds withheld from the Applicant's account to the 2nd Respondent.

[26] The date on which the funds were remitted is the 11th January 2023. The consent order to which Mr TM Bhembe consented to was granted on the 13th January 2023. This means by the time Mr Bhembe consented to the order, the funds had already been remitted to his law firm 2 days earlier, on the 11th January 2023.

[27] It is concerning why Mr Bhembe did not disclose to the court that on the day he appeared before court and consented to the order the money which he agreed that should be retained by the bank was already in his account. Clearly the court issued an order that was inconsequential. By the 13th January 2023, according to what Mr Bhembe has stated in his answering affidavit, Standard Bank had already remitted the funds to him. He did not explain in the papers he filed before court, why he omitted to disclose to the court such pertinent facts when he appeared before court on the 13th January 2023. He had all the opportunity to do so, because the answering affidavit was filed way after the consent order had been granted. I find this to be disingenuous if not plainly insincere.

[28] The conduct of Mr T. Bhembe is worrisome. Especially because he is an officer of this court. He has a duty of outmost honesty to the court, not only to make submissions truthfully but also to disclose all pertinent facts including those that may adversely affect the lawyers own client's case².

[29] It is therefore inconceivable that the 2nd Respondent can use the very same argument being that money has already been deposited to the law firm's account and as such the order is now incapable of being enforced. He consented to the very same order which was clearly in futility. The law firm cannot be allowed to benefit from its own mischief.

² See an Article published by the Horizon Institute of Ethics for lawyers at page 4.

- [30] I also find the argument that the order is incapable of being effected against the 2nd Respondent as there is no fiscal relationship between the firm and the Applicant mendacious. These are the same funds that were in the Applicant's account, paid by her employer through the Treasury as her salary.
- [31] It is common cause that the Applicant's salary is being deposited to her account at Standard Bank every month. It is the very salary that was attached and remitted to the 2nd Respondent without adherence to the procedure as set out in Section 47 (2) of the Magistrate Court Act of 1939. Practically, for all intents and purposes the 2nd Respondent attached the Applicant's entire salary for a debt owing to the 2nd Respondent, being legal fees, without taking into consideration the other legal obligations that the Applicant has which she caters for through her salary.
- [32] The technical argument that once money is deposited to the bank cannot be separated as a salary is deceitful in the circumstances of this case. The bank keeps records being an account comprising of a narration of the monies that are deposited in the account. There is a clear record that the money originates from the Treasury. It can be identifiable, it is deposited every month. I will also dismiss this point of law, it has no merit.

MERITS

[33] On the merits the 2nd Respondent main ground for opposition can be summarized as follows;

33.1 The Applicant is indebted to the 2nd Respondent for legal services subsequent to which the legal bills were taxed, summons were issued and civil judgment was obtained against her.

33.2 Previously instructed a number of attorneys to defend the summons and the attorneys have withdrawn their legal services due to her failure to pay their legal fees.

33.3 The Applicant appears to be a person of means as she used to come to court driving different cars, being Toyota, Mercedes Benz class 2 different BMW's once his vehicles.

33.4 As such the Applicant since he is capable of changing 4 vehicles in a space of 2 years, can hardly be said to be one of financial challenges and if she does have those challenges they are caused by her poor fiscal disciplined which cannot be ground for her to be excused from paying her debts.

33.5 The 3rd Respondent which is the Bank is not the Applicant's employer and has no duty to pay any salary to her and therefore the bank cannot be compelled even through a court order to attach the Applicant's salary.

[34] The 2nd Respondent further argues that the order from the court *aqou* did not seek to attach the Applicant's salary, but sought to attach funds which were in her account due to her from the 3rd Respondent.

[35] The 2nd Respondent has also not denied that subsequent to the order issued by the 1st Respondent served on the 3rd Respondent the Applicant's bank account where she receives her monthly salary was subsequently frozen by the bank. The order as I read it, does not direct that the Applicant's account must be frozen.

The legal principles applicable

[36] The Applicant's application is premised on the violation of **Section 47 (2) of the Magistrate Court Act of 1939**. I have reproduced the provisions of this Section earlier on in this judgment. The impact of this legislation is that no attachment order in respect of a salary or wages should be granted unless the court is satisfied upon sworn information that sufficient means will after

satisfaction of the order be left to the judgment debtor to maintain himself and those dependent on him.

[37] It is common cause that the Applicant receives her monthly salary from her employer through the Treasury as she is a member of the army. She receives her emoluments through her account held with Standard Bank, Account No 9110004702967. The 1st Respondent issued an order that the 2nd Respondent (the firm of attorneys) who are owed legal fees must withhold any funds not in excess of E20 283.56 including costs of suit from any funds held by the bank in favor of Lungile Makhanya, the Applicant in this matter. It is common cause that the costs of suit to be included were not quantified. It is a mystery how much the 3rd Respondent was going to withhold as costs of suit.

[38] The “any funds” that are referred to in the order sought to be reviewed include the Applicant’s monthly salary. The withholding of the funds inclusive of the salary occurred without the 1st Respondent satisfying himself upon sworn information, that after the retentions, sufficient funds would be left for the Applicant to maintain herself and those dependant on her.

[39] As it turned out to be, the Applicant has 3 minor children which she caters for, using the very funds which were withheld by the 2nd Respondent, without subjecting her to the requisite enquiry as outline in Section 47 (2) of the Act.

ANALYSIS AND CONCLUSION

[40] The effect of the order obtained by the 2nd Respondent caused the entire salary of the Applicant to be attached directly from her account at Standard Bank. The further consequences of the order granted by the learned Magistrate was that the Applicant's account was frozen and she could not operate it.

[41] Indeed, this case is a prime example of why Parliament when enacting **Section 47 (2) of the Magistrate Court Act of 1939** deemed it key, that judicial oversight should prevail over the execution process pertaining to emoluments. A salary attachment order may deal with the enforcement of a judgment debt, which is the case in the matter at hand. However, it is a substantive decision in it's self. When granting an order that a debtor should pay the debt through the attachment of the entire amount standing in her bank account, the court in such circumstances, should decide how the debt will be paid. A decision on the means of paying a debt can often be as important as the debt it's self. The parties may argue and debate the means of payment even when they do not dispute that the debt it's self must be paid. A large debt payable through lenient means may be less burdensome than a small debt payable in one go.

[42] In the matter of **The University of Stellenbosch Legal Aid Clinic and Others Vs Minister of Justice and Correctional Services and Others**³ His lordship **Cameroon J** penning the judgment for the majority stated the following;

³ [2016/ZACC 32; 2016 (6) SA 596

“131 Emoluments attachment order is clearly burdensome. It’s severely constricts the autonomy of the debtor to decide how should pay off a debt. It is also inflexible as it does not adapt to the debtor’s changing circumstances from week to week. It goes directly off a debtor’s wages; and these wages will often form the means for the debtor’s day to day survival. These are all important considerations to be born in mind when deciding whether an emoluments order should be granted. What is more, a debtor’s personal circumstances may well have changed in the interim between when a judgment debt is entered and ordered to be paid in installments an emoluments attachment order is sought. It is therefore crucial that these considerations are taken into account at the time the emoluments attachment order is sought”.

- [43] In my view, the provisions of the Section 47 (2) of The Magistrate Court Act encompasses the sentiments as stated in this South African Constitutional Court decision. It is part of the reasons why I am of the view that the learned Magistrate should have paid more attention to the fact that the money standing in the Applicant’s account, which he authorized that the 2nd Respondent must attach, could comprise of her salary to which Section 47 (2) of The Magistrate Court Act of 1939 was applicable. The learned Magistrate should have taken a full account of the harsh effects, in the absence of judicial oversight the attachment of this amount of money from the Applicant’s bank account may have on her. The order definitely threatens the livelihood and dignity of the Applicant.

[44] The 2nd Respondent argued during the hearing of the matter that in the event the Applicant was aggrieved by the order, she was supposed to approach the very same court for a variation of the order as per the requirements of the Section 47 (3) of the Magistrate Court Act of 1939.

[45] In my view, this argument is misplaced. Especially in light of the specific circumstances of this matter. This court is the upper guardian of all minors in the country. The error by the learned Magistrate to take into considerations the far reaching implications of the order that he granted, without subjecting her to the rigours of Section 47 (2) of the Magistrate Court Act is reviewable. The consequences of such an erroneous order has far reaching implications on the Applicant and the minor children. This court seized with this matter. It may not accord with the good dictates of justice, to refer the matter again to the court *aqou* to allow for a variation order application to be launched, whilst the prejudice on the Applicant and the children persists.

[46] I agree with the Applicant's argument that Section 47 (3) is applicable when the presiding officer has properly applied his mind to the matter when reaching that decision. That cannot be said to the case in the matter at hand. The 1st Respondent erred in not taking into consideration the provisions of Section 47 (2). In as much as one may not put the blame solely on the learned Magistrate, especially because the Applicant in the court *aquo* (now 2nd Respondent) failed to disclose to the Magistrate that part of the money which they conveniently called a debt, which was sought to be attached from

the bank account, also comprised Applicant's salary. Therefore, the judgment creditor in the court *aquo*, was equally stealthful and contributed to the error that was committed by the learned Magistrate.

[47] In conclusion, I am satisfied that the Applicant has been able to satisfy the requirements for a review. As such, 1st Respondent's order ought to be corrected and set aside.

[48] This court is not pronouncing on the validity of the debt that is due, but the court is setting aside the decision of the 1st Respondent pertaining to the irregular procedure that was followed resulting in the attachment of the entire Applicant's salary in her bank account. The issue is further exacerbated by the fact that, the 2nd Respondent had already elected to execute it's judgment through garnishee proceedings. The 2nd Respondent currently benefits an amount of One Thousand Emalangeni (E1 000-00) being a garnishee order placed on the Treasury in settlement of the very same debt. The conduct of the 2nd Respondent is concerning, especially of an officer of this court. In other words, the 2nd Respondent executed it's judgment in respect of the same debt twice, using two different court processes. A garnishee order where the law firm attached E1 000-00 directly from the Treasury was used. Now, a drastic procedure of attaching the entire Applicant's salary and also freezing her account has been resorted to. The Applicant has been seriously prejudiced by the 2nd Respondent's conduct. She cannot operate her bank account because it has been frozen. The bank account is now a one way stream, that can only receive money including her salary, but she cannot withdraw from it or transact for any other purpose. The entire salary is then remitted to the 2nd

Respondent. This is drastic, draconian and unjust. This court cannot countenance and allow this state of affairs to persist. There are minor children that are involved which are currently being prejudiced. I will accordingly grant the Applicant's application as sought in the notice of motion.

ORDER

- 1) The normal forms in terms of time limits and manner of service are hereby dispensed with and that the matter is heard as one of urgency.
- 2) That order issued by the 1st Respondent on the 17th October 2022 and subsequently confirmed on the 1st December 2022 under Manzini Magistrate Court Civil Case No 2199/2022 is hereby reviewed, corrected and set aside.
- 3) The 2nd and 3rd Respondents are directed to remit to the Applicant any amount of money they have received or withheld belonging to the Applicant pursuant to the order issued by the 1st Respondent on the 17th October 2022 and subsequently confirmed on the 1st December 2022 under Manzini Magistrate Court Civil Case No 2199/2022.
- 4) In the event the 3rd Respondent has already remitted the money to the 2nd Applicant. The 2nd Applicant is ordered to reimburse the amount so unlawfully deducted from her salary bank into her Standard Bank Account.

- 5) The 1st Respondent is directed to comply with Section 47 (2) of the Magistrate Court Act, before considering an order of attachment of the Applicant's salary.
- 6) The 2nd Respondent to pay costs of suit.

B.W. MAGAGULA
JUDGE OF THE HIGH COURT

FOR APPLICANT: Mr S. SHABANGU
(DLAMINI KUNENE ASSOCIATED)

FOR RESPONDENTS: Mr T.M BHEMBE
(TM. BHEMBE ATTORNEYS)