

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 57/2001

In the matter between:

PARSONS TRANSPORT (PTY) LTD

APPLICANT

And

FLORAH DUBE

1st RESPONDENT

DANIEL MANTIMAKHULU

2nd RESPONDENT

CORAM:

NKOSINATHI NKONYANE:

ACTING JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

FOR APPLICANT

:

MR. D. MAZIBUKO

FOR 1st RESPONDENT

:

NO APPEARANCE

FOR 2ND RESPONDENT

:

MR. N. MTHETHWA

JUDGEMENT 28.09.06

[1] The facts of this application reveal how a deputy sheriff executed a writ but never paid the proceeds to the judgement creditor or his attorneys.

[2] The deputy sheriff was paid a sum of E47,104.00 in the form of two cheques by the judgement debtor. One cheque was for the sum of E7,946:00 and the other was for the sum of E39,158:00.

[3] On seeing that the deputy sheriff was unable to account for the money, the judgement creditor sued out a second writ. The second writ of execution was issued to a different deputy sheriff, the 1st respondent, to execute.

[4] The 1st respondent proceeded to attach the goods of the applicant. The 1st respondent advertised for the sale of the attached goods. The sale was scheduled for the 16th August 2006 at 10:00 a.m.

[5] The applicant on the 15th August 2006 instituted the present proceedings with a view to stop the intended sale and to have the second writ of execution set aside.

(6) In the Notice of Motion which was brought on a certificate of urgency the applicant applied for order in the following terms: -

"(a) That the court dispense with the rules and time limits in the rules regarding service and hear the matter as urgent.

(b) That the sale of the applicant's goods scheduled for the 16th August 2006 at 10:00 a.m. advertised in the Times of Swaziland

dated 10th August 2006 be suspended pending hearing of prayer (c,d,e).

(c) That the writ of execution issued under Case No.57/2001 annexure A hereto be set aside.

(d) That the 1st Respondent be ordered to return to applicant at her cost the applicants goods attached under writ of execution dated 21st June 2005 under case no.57/2001 annexure "A" hereto.

(e) That the 1st and 2nd Respondents be ordered to pay costs of suit herein jointly and severally the one paying the other to be absolved.

(fj) That order (b) be granted as an interim relief and the matter be postponed to a date to be fixed by the Honourable court for determination of the remainder of the prayers hereto and for filing answering and subsequent affidavits. Should the respondents wish to oppose this application they shall file a notice to oppose and any other opposing papers not later than this 15th day of August 2006 at 2:45 p.m. failing which the matter will proceed as unopposed."

[7] An interim order was granted in terms of prayers (a) (b) and (fj). Today therefore is the return day of the rule *nisi* issued by the court on the 15th August 2006.

[8] The 1st respondent did not file any papers. The 2nd respondent filed its opposing affidavit deposed to by Mr. Mthethwa.

[9] Before court Mr. Mthethwa argued on behalf of the 2nd respondent that the 1st writ was never satisfied because they never received the money. It was further argued that there was no agency relationship that was created between the 2nd respondent and the deputy sheriff, and that therefore payment of the money to the deputy sheriff did not amount to payment to the 2nd respondent or his attorneys. Mr. Mthethwa argued that in terms of writ of execution, the applicant was supposed to pay the 2nd respondent or his attorneys.

[10] At this point the court will quickly point out that this latter part of the argument is not correct. In terms of paragraph 2 of the writ, it is the deputy sheriff that is instructed to pay the 2nd respondent or his attorneys, and not the applicant.

[U] Mr. Mazibuko on behalf of the applicant argued that after the applicant paid the deputy sheriff, Maswazi Sibandze the amount of the judgement debt, it fully discharged the legal duty it had to satisfy the judgement debt. He argued that in terms of the law, the first writ was satisfied on payment of the judgement debt and that the applicant was entitled to a withdrawal of the writ against it. The court was referred to **RULE 45 (13) (g) OF THE HIGH COURT RULES, which** deals with execution. The court was also referred to the work of **HERBSTEIN AND VAN WINSEN "THE**

**CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH
AFRICA" (1977) 4th EDITION PP. 755 - 787.**

In this application the deputy sheriff in question, Maswazi Sibandze was not cited. The 1st respondent did not file any papers. The court was told that the 1st respondent indicated that she would abide by any order that the court will make.

Mr. Mthethwa's argument in court was simply that the applicant was supposed to pay them the money, and it never did so. Mr. Mthethwa did not come out clearly whether it was wrong and/or unlawful for the applicant to pay the amount of the judgement debt to Maswazi Sibandze, the deputy sheriff.

[14] In terms of the writ of execution the deputy sheriff was directed "to attach and take into execution the movable goods" of the applicant. The second paragraph of the writ instructs the deputy sheriff to "pay to the applicant (the 2nd respondent herein) or his attorneys the sum or sums due to them".

[15] It is clear therefore that in terms of the court document in the hands of the deputy sheriff, to wit, the writ of execution, it is the deputy sheriff that must pay to the 2nd respondent or his attorneys the sum or sums of money that have been obtained by him from the judgement debtor either as a result of a sale in execution of the debtor's property or payment of the amount of money of the writ and costs. There is no legal duty imposed upon the judgement debtor to see to it that the money is in fact thereafter paid to the judgement creditor.

[16] There was no suggestion that it was wrong for the applicant to pay the amount of the writ to the deputy sheriff who was armed with the writ of execution. There was also no suggestion that the writ of execution was defective or invalid. There was further no suggestion that the applicant knew or ought to have known that Maswazi Sibandze was not going to pay the 2nd respondent or his attorneys the sums of money.

[17] The authorities cited by Mr. Mthethwa do not advance the 2nd respondent's case any further. These authorities merely restate a trite position of the law that a messenger or sheriff when performing his duties does not act as the agent of anybody but as an executive of the law.

(SEDIBE AND ANOTHER V. UNITED BUILDING SOCIETY AND ANOTHER 1993 (3) S.A. 671 (T)).

[18] In this matter it is not in dispute that the applicant paid the amount of the judgement debt to the deputy sheriff, Maswazi Sibandze. It is also not in dispute that Maswazi Sibandze never paid this money to the 2nd respondent or his attorneys.

[19] **RULE 45 (13) (g) OF THE HIGH COURT RULES STATES THAT:-**

"Payment of the amount due under and in respect of any writ, and all costs and like incidental thereto, shall entitle the person paying to a withdrawal thereof."

[20] The applicant therefore having paid the amount due under and in respect of the writ was entitled to the withdrawal of the writ.

[21] It follows that the second writ of execution sued out in terms of the same judgement is irregular and is liable to be set aside.

[22] The court having taken into account all the circumstances of the case will make the following order:-

a) **THAT THE WRIT OF EXECUTION ISSUED UNDER CASE NO. 57/2001 IN POSSESSION OF THE 1st RESPONDENT IS SET ASIDE.**

b) **THAT THE 1st RESPONDENT IS TO RETURN TO THE APPLICANT AT HER COST ALL THE APPLICANTS GOODS ATTACHED UNDER THE SAID WRIT.**

c) **THAT THE 2nd RESPONDENT IS TO PAY THE COSTS OF THIS APPLICATION.**

The members agree.

NKOSINATHI NKONYANE AJ.
INDUSTRIAL COURT