

IN THE HIGH COURT OF ESWATINI

CASE NO: 576/2020

HELD IN MBABANE

IN THE MATTER BETWEEN

MADVUBADLE INVESTMENTS (PTY) LTD

t/a DLAMINI TRANSPORT

APPLICANT

AND

HEAVY PLANT CENTRE (PTY) LTD

1ST RESPONDENT

MUSA N. MAVUSO N.O

2ND RESPONDENT

In re:

HEAVY PLANT CENTRE (PTY) LTD

PLAINTIFF

AND

MADVUBADLE INVESTMENTS (PTY) LTD

t/a DLAMINI TRANSPORT

DEFENDANT

NEUTRAL CITATION:

***MADVUBADLE INVESTMENTS (PTY) LTD VS
HEAVY PLANT CENTRE (PTY) LTD (576/2020)
[2024] SZHC – 260 [16/04/2024]***

CORAM:

BW MAGAGULA J

HEARD:

21/02/2024

DELIVERED:

16/04/2024

Summary:

Urgent Application to set aside as premature and invalid the attachment of the Deputy Sheriff and subsequent removal of goods subsequent to execution of a writ – Applicant seeking the attached goods to be released forthwith to the Applicant or his present attorneys – Rule 45 considered - what is just cause and unfair practice also considered. Held: There is no legal basis for the prayer sought, execution is a natural consequence of an enforcement of a civil order of this Court. The unfairness alleged is not supported by any evidence. The application is dismissed. Costs to follow the event.

JUDGMENT

BW MAGAGULA J

[1] On the 8th of February 2024, after hearing submissions from respective counsel and considering the urgency and interim nature of the matter, the court granted the following prayers:

1. Dispensing with the rules of this court and hearing the matter as one of urgency.
2. Ordering the Respondents, jointly and/or severally, to immediately release to the Applicant and/or its present attorney's possession and control of the motor vehicle, namely, the Mercedes Benz Truck, registered as USD 283AM.

3. The Applicant to arrange sufficient comprehensive insurance cover for the value of all attached goods before Order 2 is effected, to be filed with the Registrar.
4. Prohibiting the Applicant from disposing of or effecting changes in ownership of the attached goods pending the finalization of the matter.

[2] The matter was then postponed to the 21st February 2024. It thereafter proceeded with the Respondents filing their substantive answering affidavit, and the Applicant duly filed a replying affidavit.

[3] Eventually, the matter was argued on the 21st of February 2024, and this judgment follows those arguments.

[4] The history preceding the urgent application before the court indicates that the 1st Respondent was granted default judgment by this court for the payment of the principal judgment debt of E279,887.24 (Two Hundred and Seventy-Nine Thousand Eight Hundred and Eighty-Seven Emalangeneni Twenty-Four Cents), inclusive of interest and interest collection commission. Upon failure to settle the judgment debt, the 1st Respondent executed against the Applicant, who is the Defendant in the main matter. Ordinarily orders of this court are executed by a Deputy Sheriff. It is not in dispute that the 2nd Respondent is the duly appointed Deputy Sheriff in this matter, who is seized with the task of executing the civil judgment of this court.

[5] The 2nd Respondent proceeded to attach two vehicles, namely, a TLB and a Tipper Truck registered as USD 283AM, referred to as truck M03 in the

pleadings. Despite both items being attached, the Deputy Sheriff only removed truck M03, and left the TLB in the possession of the Applicant despite being under attachment as it was listed in the inventory.

[6] The Applicant being displeased by the attachment and subsequent removal of truck M03, brought the present application. An order is sought to set aside the attachment on the grounds of prematurity and invalidity.

[7] The Applicant's case, as pleaded in the founding affidavit, avers the following facts:

- 7.1. The Applicant's business involves sourcing and supplying mineral resources such as river sand, plaster sand, gravel soil, and crash stone to its customers. Integral to its operations, are machinery and motor vehicles used daily to transport these mineral resources.
- 7.2. In early 2019, one of the Applicant's directors who is now deceased took one of the Applicant's trucks to the 1st Respondent, for mechanical repairs. This truck, described as a MERCEDES BENZ TIPPER TRUCK, REGISTERED ASD 580 AM,(MT04) was still in the possession and control of the 1st Respondent at the time of the deceased's unfortunate demise.
- 7.3. After the deceased's death, the Applicant requested the 1st Respondent, through its Director Mr. Zweli Zulu, to release the truck, but was refused.
- 7.4. Despite engaging with Mr. Zulu, the Applicant was unsuccessful in securing the release of the truck.

- [8] Subsequently, the Applicant engaged Mr. Zweli Zulu to release the truck, but he refused.
- [9] Following the Applicant's unsuccessful plea for release, the 1st Respondent invoiced the Applicant for E279, 887.24 for alleged repair costs for the truck and demanded payment before releasing the truck.
- [10] In response, the Applicant requested a job card to verify the repairs' details but received no supporting documents. Instead, the 1st Respondent's Director claimed the charges were based on a gentlemen's agreement with the deceased.
- [11] The 1st Respondent then threatened not to release the truck unless the invoice was paid, asserting a right of retention over the truck.
- [12] Unbeknownst to the Applicant, the 1st Respondent obtained a default judgment based on the summons.
- [13] Subsequently, the Applicant filed a rescission application, partly granted by this court.
- [14] On or about the 24th January 2024, the 2nd Respondent, at the instruction and behest of the 1st Respondent, attended at the Applicant's business premises and caused to be served upon Applicant a Writ of Execution dated the 30th November 2022. Subsequent thereto, the 2nd Respondent attached from Applicant the following vehicles, namely; TLB Bell, Registered ESD 028 AM

(“TLB”) annexed hereto marked “DT3” is the Registration Certificate for Truck M03.

[15] Subsequent evaluations valued the truck at E245, 000.00. The Applicant contests the repair costs of E279, 887.24.

[16] The Applicant challenges the attachment, alleging that the 1st Respondent must retain another truck, MT04, as security for the unpaid invoice.

[17] The Applicant argues that attaching a different truck, M03, before selling MT04 constitutes unlawful double satisfaction.

[18] Furthermore, the Applicant contends that the attachment of M03 is meant to undermine its business, suggesting that selling MT04 at public auction could satisfy the debt in full.

The Respondents’ Case

[19] In addition to addressing the merits, the Respondents raise a legal point regarding the existence of foreseeable disputes of facts.

[20] The Respondents argue that the application is clouded with numerous disputed facts.

[21] The Respondents support this point by citing summonses issued by the 1st Respondent in 2020, for repair costs allegedly related to truck M03.

- [22] The Respondents dispute the claimed amount as solely for MT04's repairs, arguing it covers various mechanical works on different trucks owned by the Applicant.
- [23] On the merits, the Respondents deny that MT04 was ever attached by the Deputy Sheriff, refuting the need for its sale before the attachment of M03.
- [24] Additionally, the Respondents argue against the existence of a law compelling them to exercise a repair lien over MT04.
- [25] The Respondents further argue that repair liens are specific to the repaired vehicle and not applicable to multiple trucks, as suggested by the Applicant.
- [26] The Respondents further contend that the Applicant has failed to plead any agreement regarding MT04's retention as security for debts related to various trucks.
- [27] The Respondents further seek punitive costs against the Applicant, alleging the application aims at delaying and frustrating the 1st Respondent, causing further financial harm through prolonged litigation.

THE LAW

- [28] This court has been referred by the Applicant to the work of authors H.R Hahlo and Ellison Kahn in their Book; the South African legal system and its background at page 31 where the following caption has been cited;

“The law ought to be just and reasonable both in regard to the subject matter, directing what is honorable, forbidding what is base; and as to its form preserving equality and binding the citizens equally.” The authors proceed to state that the primary criterion is that “law must be reasonable...the individual must be ensured a fair process in disputes with other individuals and with the community itself.”

- [29] The principle of fairness in the execution of sale in execution was dealt with by the Supreme Court in the case of **Rodgers Bhoyane Du-Pont v Swaziland Building Society and 2 others (07/2015) [2016] SZSC 79 (5th August 2016)** where the apex court held as follows at paragraph 96;

“Our view is that Rule 46 (13) propagates an unfair practice. It should be revisited and amended to provide for the sale in execution of immovable property at market value”.(Underlined words my emphasis).

- [30] In **Diesel Services Limited vs Zaphania Ntshalintshali and 7 Others**, the Learned Principal Judge S.B. Maphalala J (as he then was) opined as follows regarding the question of disputes of facts in para 15;

“It is trite law that an application may be dismissed with costs when the Applicant should have realized when launching his application that a serious dispute of facts was bound to develop (See: Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T).”

[31] Again, on the same question of disputes of facts, in the case of **Elmon Masilela vs Wrenning Investment (Pty) Ltd and another Civil Case 1768/02** at page 5, the court stated as follows;

“It is my view that this is a proper case for the dismissal of the application as from the previous relationship and dealings between the parties, as evidenced in part by previous litigation and disputed oral, written agreements of sale and lease, it was evident that any attempt to eject the Respondents would inevitably be opposed, raising serious disputes of fact and questions of law in the process. I note adversely to the Applicant that notwithstanding the realization that serious disputes would inevitably arise, he chose to launch these proceedings, not only on motion but under a certificate of urgency, in which case the time limits afforded Respondents to fully place their case before court are greatly curtailed.”

[32] In the case of **Vision Point Properties CC v Grace Kelly Makubire and 2 Others ZAHC Case No. 01670/2020 (GAUTENG DIVISION)** at para 12, the court cited with approval the case of **Singh v Singh Insurance Co Ltd** wherein dealing with the salvage lien, the court held that it was a remedy available to the possessor of another's property, operating as security for the

recovery of necessary expenditure incurred by them in the course of their possession of another's property.

- [33] At para 10, the court cited **First National Bank of South Africa Ltd v The Commissioner for the South African Revenue Services and Another**, wherein it was held;

“That there is no authority for the proposition that a person having a lien over the property of a third party thereby acquires an independent cause of action against a third-party owner. The Constitutional Court, in that case, citing Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd, confirmed that a lien did not exist in a vacuum but to secure or reinforce an underlying claim...”

- [34] In **Pheiffer v Van Wyk (267/13) [2014] ZASCA 87 (30th May 2014)**, at para 12, the court held as follows;

“A real lien (an enrichment lien) is afforded to a person who has expended money or labor on another’s property without any prior contractual relationship between the parties. The lien holder is entitled to retain possession until their enrichment claim has been met. It is an established principle of our law that the owner of the property subject to a right of retention may defeat the lien by furnishing adequate security for the payment of the debt.” (Accentuation my own).

- [35] At para 17, the court held that;

“It is apposite at this stage to consider the cases relevant to this issue. In Bombay Properties (Pty) Ltd v Ferrox Construction 1996 (2) SA 853 (W) Coetzee J had distinguished between a debtor/creditor lien, in

which the person relying on a jus retentionis had an enforceable claim in contract against the owner of the property, and an enrichment/improvement lien, where there was no such contractual claim available to the possessor, and where the court accordingly did not have a discretion to deprive the lien holder of its possession and to substitute for that a meaningless form of security.” (Accentuation my own).

- [36] A court has no discretion to deprive the lien holder of its possession as that would be tantamount to taking away its security over the underlying claim it has in respect of that property. A lien operates as against the retained property in respect of a claim arising from its retention. This right does not exist in a vacuum but it relates to an underlying claim in respect of that property.

ANALYSIS AND CONCLUSION

- [37] The court will commence with the legal point raised. The legal principle stated by the 1st Respondent regarding the dispute of fact is correct. However, its application to the facts of the matter that the court deems to be problematic. The Respondents have argued that the Applicant has premised its relief sought in court on wrong facts.

- [38] The cases of **Diesel Services Limited vs Zaphania Ntshalintshali and 7 Others** and **Elmon Masilela vs Wrenning Investment (Pty) Ltd** shed light on the dismissal of applications where a serious dispute of facts is foreseeable. These precedents underscore the importance of clarity and transparency in presenting facts before the court.

[39] While the Respondent correctly raises the legal principle regarding disputed facts, its application to the specific facts of the present case poses challenges.

[40] The issue then is whether the nature of the alleged dispute of facts is capable of ascertainment or renders the court hamstrung to see through them and decide the matter on the papers. The fact that the Applicant has premised its argument on the basis that the judgment debt of E279, 887.24 arises from the repairs alleged to have been effected on truck M04 should not hamstrung the court from hearing the matter. Especially where the parties have filed a full set of affidavits where the issue is debated at length. The court will be capable of sifting through the evidence presented and adjudicating on the matter using available tools of evidence, especially the ones set out in the Plascon Evans Rule.

[41] In the circumstances, the court rules that inasmuch as there are discrepancies in the versions of the two parties, but the discrepancies are not such that the court cannot see through them for purposes of determining the matter on the papers. The court will, therefore, dismiss the point of law.

[42] The Court will now discern to evaluate the evidence in a bid to ascertain whether the Applicant has made out a case for the relief sought in the notice of motion. In effect, the Applicant seeks an order releasing goods that have been attached by a Deputy Sheriff of this Court.

[43] The basis thereof appears to vacillate between contesting the value of the repair costs and what the Applicant calls an unlawful and unjustified attachment.

[44] It appears that the challenge hinges on the act of the Deputy Sheriff to proceed and attach further goods of the Applicant, while the 1st Respondent holds in its possession a truck referred to as M04. The Applicant, in its replying affidavit, has not controverted certain pertinent facts that point to the direction that the judgment debt, which is being executed, does not arise from repairs of truck M04. There is quotation '**HDC1**' which was sent to the Applicant long after the demise of Mr. Alfred Dlamini, the proprietor of the Applicant. Also, the issue of the storage charges emanating from M04 has not been controverted. The holding of the truck as a lien has not been challenged over the period it has been held. So, the argument, therefore, is that the Deputy Sheriff should not have attached further goods while the Respondent held as a lien for repair costs in a specific amount of E279, 887.24 truck MT04.

[45] In assessing the lawfulness of the execution, the Court will have recourse to the Rules of Court which regulate the execution of writs against movable property.

[46] The Court has focused on this Rule because it is the relevant instrument that empowers a Deputy Sheriff to effect an attachment of movable goods. Also, it is the basis on which the Court will benchmark the conduct of the Deputy Sheriff on whether it propagates an unfair practice, as it has been argued by the Applicant.

[47] Once a civil judgment has been granted for a specified amount and the Defendant has not paid, the judgment creditor is entitled to execute against the debtor's property in satisfaction of the judgment. The process of execution

is initiated when a writ of execution is issued, which authorizes the Deputy Sheriff to attach and sell property of the Defendant. In keeping with Rule 45 (1), the writ will at first be confined to movables and only once it is shown that they are insufficient, will a writ be issued for execution against immovable property. Execution is made against the movable property belonging to the judgment debtor. In the matter at hand, it has not been contested that the judgment debt is not due nor that the attached goods do not belong to the Applicant who is the Defendant in the main matter. What is being challenged is that the Deputy Sheriff has chosen to attach. The Applicant points at other goods that it argues must be attached first. The justification is that the 1st Respondent is already in possession of these goods, being truck MT04. This argument triggers the following questions. Is the Deputy Sheriff obligated to attach goods that are held by the 1st Respondent? If so, does it make a difference if such goods are held as a lien by the 1st Respondent?

- [48] The precedents cited by both parties offer valuable insights into the legal principles underlying the present dispute. Firstly, the court acknowledges the principle highlighted in **Rodgers Bhoyane Du-Pont v Swaziland Building Society** regarding fairness in the execution of sale in execution. While this case concerns immovable property, the underlying principle of fairness in the enforcement of court orders is equally applicable to movable properties. Importantly, the Supreme Court in that decision criticized a specific Rule of the high court which sanctioned a sale of immovable property below the evaluation price. Hence, the court came to the conclusion that the sale, not the attachment, was unreasonable. Additionally, in the matter at hand, the attachment pertains to movable property. The unreasonableness alleged by the

Applicant does not hold water as the Deputy Sheriff is empowered to give effect to orders of this court. This being a civil judgment, an order of court is given to the Deputy Sheriff to attach the property of the Defendant to be sold in execution. It cannot be open to the defaulter, to dictate to the Deputy Sheriff which property should be attached. Also, the unreasonableness is premised on the assumption that the Truck MT04 was not held as a lien. The revelation of these pertinent facts throws the Applicant's arguments off track. The 2nd Respondent cannot be said to be unreasonable for not attaching a truck that has already been subjected to a lien for another debt.

[49] Furthermore, the court notes the significance of liens in law, as elucidated in **Vision Point Properties CC v Grace Kelly Makubire and 2 Others**. This case emphasizes the nature of liens as security for necessary expenditures incurred by the possessor of another's property. However, the court must also consider the limitations of liens, as highlighted in **First National Bank of South Africa Ltd v The Commissioner for the South African Revenue Services and Another**, which clarifies that a lien does not confer an independent cause of action against a third-party owner.

[50] Applying these precedents to the present case, it is evident that fairness and clarity are paramount in resolving disputes such as the one at hand. While the Applicant asserts that the 1st Respondent already has in its possession truck MT04, which could have been attached in satisfaction of the judgment debt, the Respondent disputes this claim and asserts that vehicle MT04 is held as a lien for a specific debt not included in the judgment debt. The 2nd Respondent cannot be said to have been unreasonable and unfair by not attaching goods that are a subject of a lien. It appears that truck MT04, which the Applicant

prefers the Deputy Sheriff to attach first, has incurred storage charges, and there is correspondence to that effect which has not been disputed. It appears, in the circumstances, the 1st Respondent is a lien holder in these circumstances.

[51] Consequently, the court finds that the Applicant has not sufficiently established the unlawfulness of the attachment of truck M03. The 2nd Respondent is the one that is tasked to attach goods belonging to a judgment debtor. He cannot be dictated to as to which specific goods he must attach and leave others.

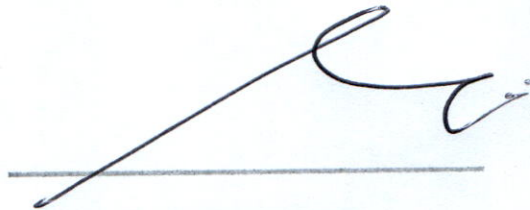
[52] On the issue of punitive costs, the authorities in this court in the subject matter notable is the case of **Stanlib Swaziland and Others vs Abel Sibandze Appeal Case No. 65/2009**, which stated as follows;

"In awarding costs, the court has a judicial discretion to be exercised judicially upon a consideration of facts and as between the parties, in essence, it is a matter of fairness to both sides....the same principle applies to costs on the attorney-own-client scale. For example, vexatious, unscrupulous, dilatory, or mendacious conduct (the list is not exhaustive) ...it is not an award that the court lightly makes. There must be something that is reprehensible or morally indefensible on the conduct of the party before the court will make such an order; it is made to mark its disapproval of the conduct of the litigant." In as much as the Respondents have argued that the Application should be dismissed with costs at a punitive scale, the court is not persuaded that the Applicant's conduct is dilatory. At most, the Applicant may have labored under the misconception that the invoice for effecting repairs

on truck MT04 were included in the judgment debt. The court will, therefore, rule that costs should be at the ordinary scale.

[53] The Applicant's contention cannot hold in the face of the revelation of the existence of a lien over truck MT04; hence, it was reasonable for the 2nd Respondent not to attach it. Especially because there were other goods of the Applicant to attach.

[54] After the survey of the arguments by both parties and due to the foregoing reasons, the Applicant's application ought to be dismissed. Therefore, the Respondent's arguments prevail, and the application is dismissed with costs awarded to the Respondent.

A handwritten signature in black ink, consisting of a long diagonal stroke followed by a loop and a small flourish.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the 1st and 2nd Applicants:

Mr L. Manyatsi (Manyatsi & Associates)

For the Respondent:

Mr L. Nkambule

(Dlamini Nkambule Mahlangu Attorneys)