



LESOTHO

IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU

C of A
(CIV)11/2023
CIV/A/27/2019
CIV/APN/91/2013

In the matter between

MOOSA HOLDINGS (PTY) LTD
1ST APPELLANT

MOOSA GROUP OF COMPANIES (PTY) LTD
APPELLANT

2ND

AND

MESSENGER OF COURT -
ALEXIS MPHAHAMA
RESPONDENT

1ST

THE SHERIFF - MADAM LEKOATSA
RESPONDENT

2ND

LESOTHO REVENUE AUTHORITY
RESPONDENT

3RD

CORAM: MOSITO P
 MOKHESI AJA

BANYANE AJA

HEARD: 12 OCTOBER 2023

DELIVERED: 17 NOVEMBER 2023

SUMMARY

Execution of judgments and messengers' fees- the Lesotho Revenue Authority(now RSL) filing a statement of the appellant's tax liability with the Clerk of Court under section 144(2) of the Income Tax Act, 1993- statement amounting to a judgment- LRA issuing a warrant of execution but thereafter suspending the process pending determination of the appellant's request for review of assessment- messenger of court unilaterally proceeding to appoint the date of sale and publishing it during the period of suspension of the execution of judgment- doing so against the judgment's creditor's instructions--reassessment culminating in a reduction of the judgment debt- whether the messenger's fees calculable based on the original amount reflected on the writ or the revised amount- proper construction of rule 21 (under Table B (Tariff of fees of messengers)) of the Subordinate Courts Rules 1996(as amended)- authorization to sell is a precondition to a claim of 5 percent- appeal upheld.

JUDGMENT

BANYANE AJA

Introduction

[1] This appeal concerns the payment of the messenger's fees where the messenger unilaterally initiates the sale process during the suspension of the execution process. It hinges on

the proper interpretation of rule 21, under Table B of the Subordinate Courts (Amendment) Rules 2014¹. It provides that:

“When a messenger has been authorized to sell a property and the property is not sold by reason of the fact that the attachment is withdrawn or stayed, 5% of the amount reflected on the writ shall be paid by the judgment debtor”.

[2] Two questions arise from the dispute between the parties. The first is whether the messenger is entitled to 5 percent of the amount reflected on the writ in circumstances where the execution process is suspended by the judgment creditor. Secondly, does the variation of a judgment amount to a withdrawal of the attachment within the meaning of rule 21?

Background facts

[3] The pertinent facts underlying this appeal are that on 27 February 2013, the Lesotho Revenue Authority (LRA) filed a statement of the Appellants’ tax liability pursuant to section 144(2) of the Income Tax Act, 1993². The statement for an amount of M3 143 116.05 was filed with the clerk of Court in the Magistrate’s Court for the District of Maseru. In terms of this provision, the statement so filed is treated as a civil judgment.

¹Legal notice 30 of 2014

²Income Tax 1993

Under this judgment, a writ of execution was issued on the same date. Mr. Teboho Mphahama, a messenger of court (1st Respondent in this appeal) proceeded to attach both movable and immovable property of the Appellants, although it is not immediately clear from the record as to when this was done. For a period spanning five and half years, the judgment was not enforced. Again, the reasons for inaction are not immediately clear from the record. It is common cause, however, that the Appellants' property was not released from attachment until 19th June 2019 as will become clear later in the judgment.

[4] On 7th May 2019, the messenger penned a letter to LRA's Senior Manager (Litigation department), Mr. M. Lichaba, notifying him that he(the messenger) had appointed a date for the auction of the property under attachment. The letter is titled *move to execute sale - Moosa Holdings (pty) Ltd CIV/APN/91/2013*. It is necessary to reproduce its contents.

"Please find herein a move intended to bring this long outstanding matter to finality.

In terms of Subordinate Court Rule 43 (6) (a), as a messenger of the court in charge in this matter I appoint the date of sale of all movables and immovable property of Moosa Holdings (pty) Ltd under judicial attachment to be the 27th June 2019. This date is scheduled for the sale of immovable property. The movable property will be sold before that date.

In terms of the same Rule 43 (6) (c) I wish to indicate that for the publishing purposes you approach the Lesotho Times Newspaper and the Post Newspaper to publish such notice of sale.

Finally, I request you to apply your mind to the relevant sub-rules to play your role."

[5] Three days later on the 10th May 2019, Mr. Lichaba wrote to the 1st Appellant, apparently in response to its letter dated 8th May 2019. In this letter, the LRA unequivocally renounced any association with the messenger's move to sell the property under attachment. This letter was copied to the messenger.

The letter reads as follows:

"RE: letter received from Alexis Teboho Mphahama dated 07 May 2019.

Your letter dated the 08th May 2019 refers.

Mr. Mphahama has not been instructed by us to sell your movable and immovable assets ever since we had advised him to defer execution of the warrant entrusted on him. The process of execution was suspended on notice to him by us.

We again restate our instructions to him by a copy of this letter not to proceed with the execution of the warrant issued in CIV/APN/MSU/91/2013 until advised otherwise by us.

[6] This notwithstanding, the messenger proceeded to cause publication of a notice of sale in the Sunday Express newspaper, issue of the 9th of June 2019, purportedly acting pursuant to the writ of execution.

[7] On the 12th of June 2019, the judgment obtained on 27th February 2013 was varied from M3 143 116.05 to M294,

691.19. After such variation of the judgment, the LRA wrote to the messenger on the 19th June 2019. It is necessary to reproduce the contents of this correspondence in its entirety. It reads as follows:

“Reference is made to the above matter and in particular to the notice of sale prepared and published by you in the Sunday Express Newspaper issue of 09th June 2019 advising of the intended sale of the movable and immovable property of Moosa Holdings(Pty) Ltd(Moosa Holdings).”

We wish to repeat contents of our letter dated the 10th May 2019 addressed to Moosa Holdings and copied to you that you have not been instructed by the Lesotho Revenue Authority (LRA) as judgment Creditor to put up on sale the movable and immovable property of Moosa Holdings. In publishing as you did in the Sunday Express Newspaper the sale of the movable and immovable property of Moosa Holdings, you acted on your own accord and not on the instructions of the LRA.

We advise that judgment which was obtained against Moosa Holdings was varied from the amount of M3 143, 116.05 to M294, 691.19, the more reason why you may not proceed with the intended sale, which furthermore would have been arranged not in accordance the provisions of the Subordinate Court Rules. As of the date of this letter, Moosa Holdings has since paid the amount of M294 691.19 to the LRA and has agreed to pay you your fees on the amount of M294, 691.19 paid alternatively fees you are entitled to in terms of the Rules of the Subordinate Court and agreed upon in the Review Agreement the LRA entered into with Moosa Holdings.

Should you continue with the sale of the properties, when clearly would have been conducted not in accordance with the Subordinate Court Rules, you shall be liable for any loss or damages incurred as a result of thereof and you shall indemnify the Lesotho Revenue Authority against any such loss or damage”.

The application before the Magistrate Court

[8] Based on this chronology of events, the Appellants filed an urgent application in the Magistrate Court Maseru on 27th June 2019, seeking reliefs framed as follows;

1. *The non-compliance with the rules in respect of notice and service is condoned and the petition is regarded as urgent as contemplated in the rules.*
2. *The service of the application and any court orders granted herein, be served on the first and second respondents by the applicants via their legal representatives of record serving the petition and court orders.*
3. *The sale in execution of Plot 12274-010 Industrial Area, Maseru be and is hereby set aside.*
4. *The sale in execution of Plot 12284-036 Central Maseru and Plot 12594-073 Mohale's Hoek be and is hereby set aside.*
5. *The first respondent be and is hereby interdicted and restrained from advertising for sale, selling or any way alienating the immovable property described as **Plot 12274-010** Industrial Area, Maseru.*
6. *The first respondent be and is hereby interdicted and restrained from advertising for sale, selling or any way alienating the immovable property described as **Plot 12284-036** Central Maseru and **12594-073** Mohale's Hoek.*
7. *The sale in execution of the movable assets of the first applicant under writ CIV/APN/MSU/91/2013 is set aside.*
8. *The first respondent be and is hereby interdicted and restrained from advertising for sale, selling or in any way alienating the movable assets of the first applicant attached under writ CIV/APN/MSU/91/2013.*
9. *The sale in execution of the movable assets of the second applicant under writ CIV/APN/MSU/90/2013 is set aside.*
10. *The first respondent be and is hereby interdicted and restrained from advertising for sale, selling or in any way alienating the movable assets of the second applicant attached under writ CIV/APN/MSU/90/2013 is set aside.*
11. *That the writ of execution issued under case number CIV/APN/MSU/90/13 be set aside.*
12. *That the writ of execution issued under case number CIV/APN/MSU/91/13 be set aside.*
13. *That the first applicant is ordered to pay the first respondent his Messenger Fees of 5% on M294,691.19 amounting to M14,734.56 within thirty (30) days of the grant of this petition approximate amount of M8,500.00 for the attached furniture and computer storage.*

14. *That the first respondent be ordered to release the movable assets in the same condition as we were, upon being paid the storage costs.*

[9] The LRA did not participate in the proceedings. The messenger filed his opposing papers. He however confined his opposition to Prayer 13 relating to payment of his fees. After the close of the arguments, the learned magistrate issued the following order in terms of prayer 13 of the notice of motion:

“The applicant is hereby ordered to pay the 1st respondent 5 % of the messengers’ fees in respect of the varied judgment of 12/06/2019 within thirty days from today.”

[10] It is this order that was the subject of the appeal before the High Court. In the judgment, the learned magistrate dealt with prayer 13 only. No ruling was made in respect of the other reliefs sought. The magistrate reasoned that although the messenger was authorized in terms of the writ to attach and remove the Appellants’ property, before he could auction the property, he was advised by the judgment creditor to halt the process due to ongoing negotiations between them.

[11] The learned Magistrate noted that the variation of the judgment sought on 12th June 2019 was granted by consent.

This variation application, according to the judgment of the learned Magistrate, was based on section 199 (2) of the Income Tax Act, 1993 which provides that:

“The Commissioner General may remit in whole or part the additional tax payable.”

[12] He further considered the fact that the basis of the variation application was the appellants’ successful application for review of the assessment under provisions of **Additional Tax and Penalties Voluntarily Disclosure Regulations, 2018**.³ In his view, the appellant’s right to seek review of the assessment is permissible under the relevant tax legislation. For this reason, the messenger was not entitled to ignore the process of negotiations by proceeding with the intended sale in execution.

Appeal before the High Court

[13] Dissatisfied with the decision, the messenger of the Court appealed the decision to the High Court. He challenged the decision on several grounds. Amongst them are that the learned magistrate erred and misdirected himself in law;

³Legal notice 7 of 2018

- a) by granting prayer 13 of the notice of application without justification;
- b) in failing to uphold that the conduct, circumstances, and approach adopted by LRA against the writ of execution dated 28th February 2013 amounted to withdrawal of the writ;
- c) in denying the messenger his fees of 5% of the original writ amount to which he is entitled in terms of rule 21.

The judgment of the court a quo

[14] The learned Judge a quo (Monaphathi J) reversed the decision of the Magistrate hence the appeal to this Court. The nub of the learned judge's reasoning appears in paragraphs 16 and 17 of the judgment. He said:

"[16] My reading of Rule 21 is that when the messenger has been authorized to attach the property and he has done so, but before the sale, the attachment is withdrawn or stayed, the messenger is entitled to 5% of the amount reflected on the writ. It is not in dispute that the messenger was authorized by the 3rd respondent (LRA) being the execution creditor to attach the property of the 1st respondent in the amount of M3 143 1116.05 and the appellant had accordingly attached the property. Another issue which is not disputed is that after the appellant had proceeded to advertise for sale of the attached property, the respondent on ex parte basis filed an urgent application for an interdict of the intended sale of the attached property. The intended sale never took place.

[17] Now the salient question is whether in the circumstances the learned magistrate was correct in deciding that the appellant should be paid 5% of the revised amount of M294 694 691.01 instead of M3 143 116.05. The answer is in the negative. It is clear from the reading of Rule 21 that once the attachment has been effected and before sale, the attachment is withdrawn or stayed, 5% of the amount reflected on the writ shall be paid by the judgment debtor, so the Court agrees. The Magistrate did not effectively analyse rule 21 and its effect".

[15] The learned judge further rejected, as immaterial, the Appellant's argument that the messenger had been instructed to refrain from proceeding with the sale. What is of paramount importance according to him, is that the messenger was instructed to attach the property of the value of M3 143 116.05 as reflected in the original writ and he accordingly effected the attachment. The fact that the execution creditor and execution debtor decided to settle the debt after the attachment had been made amounts to the withdrawal of the original writ contemplated by Rule 21.

The appeal before this Court

[16] The appellants raised several grounds on which they assert the appeal ought to have succeeded in the Court *a quo*. At the hearing of this appeal, a substantial number of them were abandoned, leaving only two grounds for consideration. The appellants' main complaint before this Court is that the High Court erred and misdirected itself:

- a) *In holding that the messenger is entitled to 5 percent of the original amount despite variation of the judgment debt.*
- b) *And holding that the original writ was withdrawn within the meaning of rule 21.*

The Law

[17] The proceedings that culminated in this appeal commenced through the tax debt collection procedure allowable under the Income Tax Act, 1993(ITA). Section 144(1) provides that income tax which is due and payable is a debt owed by the taxpayer to the Lesotho Government and is payable to the Commissioner. Where income tax is not paid on the due date, subsection (2) provides that:

“...the Commissioner may file a certified statement setting out the amount of tax owing with the clerk of any court of competent jurisdiction and that statement is treated as a civil judgment of that court in favour of the Commissioner for the amount of debt set out in the judgment”.

[18] Another method of income tax collection available to the Commissioner of LRA is distress proceedings under section 147 of ITA. In terms of this provision, the commissioner issues a distress order executable in the manner prescribed therein. In terms of section 147 (3), the property upon which distress is levied must be kept for 10 days either at the premises where distress was levied or at such other place as the Commissioner may consider appropriate, at the cost of the taxpayer whose tax liability is involved.

[19] If the taxpayer does not pay the tax due, together with costs of the distress, within 10 days after the distress is levied, subsection 4 provides that in such circumstances, then the property distrained upon may be sold by public auction, or in such a manner as the Commissioner may direct; the proceeds of the sale being applied first towards the cost of taking, keeping, and selling the property distrained upon; then towards the income tax due and payable; and the remainder of the proceeds, if any, shall be restored to the owner of the property.

[20] Section 147(5) provides that the Commissioner may proceed under section 144 for any balance owed if the proceeds of the distress are not sufficient to meet the costs thereof and the income tax due.

[21] A proper reading of both sections is that procedures under sections 144(2) and 147 are designed for tax collection. Distress proceedings are an alternative method of recovery of unpaid tax provided for in section 144 (2). Both are summary remedies by which the Commissioner seeks an instant redress to take into his/her possession the movables or immovables of the debtor, to be held in order to compel the satisfaction of the tax debt. This is because they both start *ex parte* on a mere

statement of the Commissioner. In other words, both procedures are not suits filed in terms of the Rules of Court.

[22] Based on this understanding of the relevant legislation, it becomes clear that the judgment, whose execution is under scrutiny was obtained *ex parte* as correctly observed by the learned Magistrate. I discuss next the steps and process of execution of judgment debts outlined in the subordinate Court Rules, 1996 because as earlier indicated in this judgment, the Commissioner adopted section 144(2) procedure to collect the amount of tax due and payable by the appellants.

Execution of judgments

[23] The convenient starting point is Rule 36 of the Subordinate Court Rules, 1996. This rule shows, in relevant parts, that a creditor who has been granted a judgment sounding in money and has not obtained satisfaction for it, is entitled to have a writ of execution issued, which serves as a warrant to the Messenger of Court to attach the debtor's property. It reads as follows:

"36 (1) The process of the execution of any judgment for the payment of money, for the delivery of property, whether movable or immovable or for ejectment shall be by warrant issued and signed by the Clerk of the Court and addressed to the Messenger.

(2) Such process maybe sued out by any person in whose favour any such judgment shall have been given, if such judgment is not then satisfied, stayed or suspended.

(3) Such process may at any time, on payment of the fees incurred, be withdrawn or suspended by notice to the messenger by the party who has sued out such process. A request in writing made from time to time by such party to defer execution of such process for a definite period not being longer than one month shall not be deemed to be a suspension.

[24] Execution of a judgment is a process as stated in this rule. Other rules of Court outline the procedure to be followed in the execution of movables, incorporeal property, and immovables. Rule 39 is concerned with execution in general. Rule 41 covers execution against movable property while rule 43 deals with execution granted against immovable property. For purposes of the present matter, I propose to confine the discussion to Rule 43 because the messenger purported to have acted under Rule 43(6) when he appointed the date of sale.

[25] Rule 43 explains the mode of execution against immovable property. It shows that once an attachment has taken place, a sale in execution will follow. The rule also prescribes the period within which the steps are to be taken after attachment. After the messenger has set a date and place of sale for the execution of the immovable property, the conditions of sale must be prepared and submitted to the messenger by the

execution creditor. For purposes of this case, I quote from relevant portions of the rule applicable after the attachment.

Sub-rule 6 provides as follows:

43(6) (a) The messenger shall appoint a day and place for the sale of such property which day shall, except by special leave of the court, be not less than one month after service of the notice of attachment.

[26] The notice of attachment referred to under this sub-rule is issued under sub-rule 2 which provides that:

"46(2) The mode of attachment of immovable property shall be by notice by the messenger served in the manner as a summons together with the copy of the warrant of execution upon the execution debtor as the owner thereof and upon the Registrar of Deeds or other officer charged with the registration of such immovable property, upon all registered holders of bonds (other than the execution creditor) registered against the property attached and, if the property is in the occupation of some person other than the execution debtor, also upon that occupier"

[27] Rule 43(6) (b) in turn provides that:

"The execution creditor shall, after consultation with the messenger, prepare a notice of sale containing a short description of the property and its situate, the date, time, and place for the holding of the sale, and the material conditions thereof and furnish the messenger with as many copies of the said notice as he may require.

43(6)(c) The messenger shall indicate two local or other newspapers circulating in the district in which the property is situate and require the execution creditor to publish the said notice once in the said newspaper not later than seven days before the date appointed for the sale and to furnish him not later than the day prior to the date of the sale with one copy each of the said newspapers in which the notice appeared.

43(7) (a) The conditions of sale shall be prepared by the execution creditor and shall, inter alia, provide for payment by the purchasers of any interest due to the preferent creditor from the date of sale of the property to date of transfer. The execution creditor shall not less than twenty-one days prior to the appointed date of sale, deliver two copies of the conditions of the sale to the messenger and one

copy thereof to each person who may be entitled to notice of the sale.”

[28] With these rules in mind, I turn to consider the nub of this appeal, the messenger’s fees where sale in execution did not take place. The tariff of messengers’ fees is laid down in Table B of the Subordinate Court Rules, 1996. The tariffs were amended by Legal Notice No. 30 of 2014. The contentious Rule 21 provides as follows:

“When a messenger has been authorized to sell a property and the property is not sold by reason of the fact that the attachment is withdrawn or stayed, 5% of the amount reflected on the writ shall be paid by the judgment debtor”.

[29] The basis of the messenger’s claim is that the variation of the judgment on 12 June 2019 amounted to the withdrawal of the writ. According to him, the writ of execution authorized not only the attachment of the appellants’ property but also, the sale of such property. Mr. Potsane on behalf of the messenger has tried to impress upon us that his client is entitled to 5 percent of the amount of the writ before its variation. In support of that, he forcefully argued that his claim stems from the withdrawal of the writ through variation of the judgment.

[30] The correctness of this argument must be viewed in the light of rule 43. It seems to me that this rule creates and defines the authority of the messenger concerning the sale in execution of immovable property.

[31] The facts of this matter reveal that the LRA suspended the execution process by notice to the messenger as is allowable in terms of rule 36(3). This suspension was made to allow a review of the assessment sought by the 1st appellant. The facts of the matter also reveal that these negotiations between the LRA as judgment creditor and the 1st appellant as judgment debtor culminated in the downward variation of the judgment debt. The pleadings do not, however, reveal whether the suspension was made before or after the amendment of the rules. The messenger's answering affidavit does not disclose why he did not appoint the auction date in 2013 when the judgment was issued.

[32] Execution of judgments is a process as stated earlier. The rules highlighted above prescribe many consecutive steps in the execution of a judgment debt. The first is the issuance of a writ of execution, followed by attachment of the debtor's property unless he pays the amount of the writ and costs, then

the sale by public auction by the messenger or Deputy Sheriff of the property attached, and lastly payment of the net proceeds of sale to the judgment creditor to cover the amount due under the writ including costs.⁴

[33] In taking any step or proceeding to the next stage in the process of execution, the messenger must remain within the parameters of the law from which his authority stems. This is because when the deputy sheriff attaches and sells the property in execution he does not act as the agent of the judgment creditor but does so as the executive of the law.⁵

[34] It is therefore in the context of rules 36, 39, and 43 that the opening words “authorized to sell” in rule 21 must be understood. It will be recalled that when the messenger issued the notice of sale, he was not authorized to sell the 1st appellant’s property by the LRA as the execution creditor because the latter had suspended the process per rule 36(3).

[35] On the proper reading of these rules, I am inclined to take the view that the messenger has no authority to sell the property under attachment where the execution process is

⁴Mattoida Constructions v E. Carbonari Construction 1973(3) SA at 327 at 332

⁵Syfrets Bank Ltd and others v Sheriff of the Supreme Court Durban: SchoerieN.O v Syfrets Bank Ltd and others 1997(1) 764(D)

suspended. This follows from the wording of the opening phrase of the rule '*where the messenger has been authorized to sell*'. The phrase is descriptive of circumstances under which 5 percent is claimable. Authorization to sell is a precondition to 5 percent entitlement of the writ amount.

[36] Execution in its widest sense means carrying out or giving effect to a judgment or order of court. Suspension of execution of a judgment means the judgment cannot be carried out and no effect can be given thereto.⁶

[37] All these considerations point to no other conclusion but that where the execution process is suspended, there is no authorization to sell. In circumstances analogous to the present matter, this Court in **Abubaker and another v Magistrate Quthing**⁷ held that during the suspension, the operation of the order is suspended. The Court further held that any purported execution of the order which has been suspended by the noting of an appeal is a nullity.

Does variation of a judgment amount to withdrawal of attachment?

⁶South Cape Corporation Vereeniging Management Services (Pty)Ltd 1977(3) SA 534 at 544H, Maharaj Brothers v Pieterse Bros. construction(pty)Ltd and another 1961(2)SA 232(N) at 238B

⁷LAC(2015-2016 at 356

[38] I turn to answer the question of whether the variation of the judgment amounts to a withdrawal of the writ. The answer must be deduced from the rules read as a whole. The rule under scrutiny deals with fees. It must therefore not be interpreted in isolation but in harmony with the other rules on execution of judgments. Withdrawal and suspension of execution is provided for in rule 36 (3) read with rule 39. These rules prescribe how both are to be effected. Rule 36(3) reads as follows:

“(3) such process may at any time, on payment of the fees incurred, be withdrawn or suspended by notice to the messenger by the party who sued out such process.”(my emphasis)

[39] Rule 39 embodies the general rules of execution of judgments. Rule 39 (3) provides that:

“39(3) withdrawal of attachment shall be effected by note made and signed by the messenger on the warrant of execution that the attachment is withdrawn stating the time, and date of the making of such note. The messenger shall give notice in writing of the withdrawal and of the time and date thereof to the execution creditor and the judgment debtor and to any person by whom a claim to the property attached has been lodged with him: provided that the property shall not be released from the attachment so long as an unsatisfied warrant of execution lodged under sub-rule (2) remains in the hands of the messenger.

[40] Judicial attachment of property in execution of a judgment debt affords the judgment creditor a security right, namely a

judicial pledge or mortgage (*pignus judiciale* or *pignus praetorium*) depending on the nature of the property.⁸ The purpose of a Judicial pledge is to serve as security for the satisfaction of the judgment debt.⁹ At attachment, the property passes out of the hands of the judgment debtor and is placed in the custody and control of the officer who executed the warrant. The position is explained as follows by Kortzee AJ(as he then was) in **Liquidators Union and Rhodesia Wholesale Ltd v Brown's Co**¹⁰

“An arrest effected on property in execution of a judgment creates a pignus praetorium or to speak more correctly, a pignus judiciale, over such property. The effect of such a Judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the court. They pass out of the estate of the judgment debtor.”¹¹

[41] Because the debtor remains the owner despite attachment, the property will be released, and the Judicial pledge redeemed if the debtor pays the judgment debt and all the costs and expenses of execution.¹²

⁸ R Brits, Judicial Pledge (2016) Juta 478

⁹Ibid p.478

¹⁰ 1922 AD 549 at 558-559

¹¹See also, Liquidators, Mr. Spares(pty)Ltd v Goldies Motor Suppliers(pty)Ltd 1982(4) SA 607 at 609, Syfrets Bank Ltd and others v Sheriff of the Supreme Court, Durban Central, and another; Schoerie NO v Syfrets Bank Ltd and others 1997(1) SA 764(D) 722

¹²Syfrets Bank Ltd and others v Sheriff of the Supreme Court. (supra n11)

[42] In the present matter, the appellants' property remained under attachment until the LRA, as judgment creditor, issued instructions on 19 June 2019 for its release upon the judgment debt being satisfied. Tellingly, when the order was varied on 12 June 2019, the attachment was not withdrawn. It follows that variation of the judgment under scrutiny did not amount to withdrawal of the attachment, mindful of the fact that the operation of the initial order was still suspended at the time variation was sought and obtained.

[43] If, after variation of the judgment, the appellants did not pay the revised amount within the period agreed upon during settlement, the judgment creditor would have been at liberty to amend the writ accordingly for the messenger to proceed with the sale of the attached property. If, before the dateline for payment, the 1st appellant satisfied the judgment debt thereby extinguishing it, it follows that in such circumstances the writ of execution would inevitably be withdrawn. As a result, the messenger would be entitled to 5 percent of the writ amount (as amended).

[44] To put it differently, where the execution process is suspended as is the case here, the messenger must await

instructions from the judgment creditor showing that the suspension has been uplifted. In *casu*, when the messenger moved to appoint the date for sale, the judgment creditor had not uplifted the suspension. The messenger acted unilaterally. This appears clearly from the correspondence exchanged between the parties after the messenger appointed the date of sale and published the notice of sale.

[45] I revert to the judgment *a quo*. The learned judge's construction of rule 21 seems to be that when the messenger has been authorized to attach the property and he has done so, he is entitled to 5 percent of the amount reflected on the writ. With due respect, the learned judge erred in concluding that authorization to attach gives rise to the 5 percent entitlement. The fee contemplated in rule 21 is not for authorization to attach, but to take the next step in the execution process, to sell. It especially arises and is only available where the messenger is authorized to sell the judgment debtor's property.

Conclusion

[46] Because a statement filed in terms of section 144(2) of the Income Tax Act, 1993 is a judgment debt, the execution by the messenger is subject to the rules on execution. The facts of the

matter show that all the steps were taken by the messenger in violation of rules 36, 39, and 43 of the Subordinate Court Rules. This is so because in May 2019 when he sought to resuscitate the process by appointing the auction date, the execution process had been suspended for years. His opposing affidavit in the Magistrate Court is silent on what triggered this sudden enthusiasm to *'put the long outstanding matter to finality'*. I am satisfied that he had no right to act on the strength of a suspended writ. He cannot, in the circumstances allege that he was authorized to sell the appellants' property.

[47] The 5 percent claim could only arise from an amended warrant reflecting the revised amount when the attachment was withdrawn upon payment of the tax debt, but before the sale of the attached property, as stated earlier.

[48] I am not persuaded that there is anything in Rule 21 that can properly justify payment of 5 percent of the original writ amount. For these reasons, the Magistrate's order ought to have been confirmed and the appeal ought to have failed.

[49] Notwithstanding the conclusion reached above, the following must not be lost sight of. The appellants are the ones who approached the Magistrates Court to ask for an order that they pay 5 percent of the revised amount, and even in this appeal, they urged upon us to find that that order was the correct one. That is the basis upon which I find that the order of the Magistrate Court should not be disturbed.

Order

[49] In the result, the following order is made:

- i) The appeal succeeds with costs
- ii) The order of the court *a quo* is set aside and replaced with an order:

“The appeal is dismissed with costs”.



P. BANYANE
ACTING JUSTICE OF APPEAL

I agree



MOSITO P
PRESIDENT OF THE COURT OF APPEAL

I agree



M. MOKHESI
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT : ADV N. HLALELE

FOR THE RESPONDENT: ADV T. POTSANE