A .....IMbk

DATE: 19/4/05

NOT REPORTABLE CASE NO.; 14991/2004

In the matter between:

SARA VELEPHI NKABINDE APPLICANT

and

THE SHERIFF OF THE MAGISTRATE'S COURT KWA-MHLANGA 1ST RESPONDENT

TITUS MAILA 2ND RESPONDENT

JUDGMENT

POSWA J:

[1] This is a matter with a long history that was initially between the applicant, Ms Sarah Velaphi Nkabinde, and the second respondent, Mr. Titus Maila. The latter is brother to the applicant's late husband, Kamogelo Adam Maila. The applicant and the deceased were married to each other on 21 July, 2002 and remained as husband and wife until on 24 November, 1997, the deceased initiated divorce proceedings against the applicant in the North Eastern Divorce Court, under Case No. T 1888/97. He died before those proceedings were finalised.

[2] After her husband's death, a dispute arose between the applicant and the second respondent, pertaining to certain property which, according to her, were part of joint estate, her and the deceased's, viz;

(a) a Toyota Hi-Ace Siyaya motor vehicle. with registration numbers and letters PCY189GP;

(b) a Toyota Hi-Ace Siyaya motor vehicle, with registration numbers PPM972GP;

(c) a Toyota Hi-Ace Super 16 motor vehicle, with registration numbers and letters HHV487GP;

(d) a BMW motor vehicle, with registration numbers and letters DSK (no further details given), white in colour; and

(e) a house and stand at 306 Dark City, Enkangala, together with its furniture and other household items.

[3] Applicant issued summons, on 10 May, 2004, against the second respondent before the Magistrate Court in the district of Enkangala, under Case No. 214/04. Relevant aspects of the action before Magistrate Court can be summed up as follows;

(a) The applicant, as plaintiff, sought the return of the cars and the house listed above, which she claimed to have been dispossessed of by the second respondent after her husband's death;

(b) With that action still pending, the applicant brought an application and obtained an order before the Magistrate Court, on 10 May, 2004, for the return of the very items in respect whereof the action was pending;

(c) The order was to operate as a Rule *Nisi* returnable on 10 June, 2004;

(d) The second respondent anticipated the return day and had the interim order set aside on 28 May, 2004, on the basis that the Magistrate's Court had no jurisdiction to entertain the application, on account of the total value of the goods claimed;

(e) The first respondent, who had earlier attached the motor vehicles and the house and handed them over to the applicant, in terms of the initial order, removed the items from the applicant after the dismissal of the Rule *Nisi;*

(f) In removing the goods from the applicant, the first respondent purported to act in terms of the Court Order of 28 May, 2004;

(g) The first respondent handed the items over to the second respondent, thus restoring possession thereof to the second respondent.

[4] The applicant then brought the present application, before this Court, seeking the return of the goods that are the subject of this application, on the basis that the Court Order of 28 May, 2004, did not authorise the first respondent to remove the items from the applicant and that he should restore them to the second respondent or even just to retain them.

[5] Although the first respondent had earlier contended that he acted in accordance with the Court Order of 28 May, 2004, it became common cause, during argument, that the order of 28 May, 2004, did not authorise the first respondent in any of the above respects. Indeed, the first respondent merely contented himself with denying an allegation by the applicant that he "acted with stealth and untruth when removing the vehicles," as alleged by the applicant.

[6] On 15 June, 2004, Preller, J ordered that:

"... the respondents ..... forthwith restore into the applicant's possession: -

1.1 One Toyota Hi-Ace Siyaya motor vehicle bearing registration numbers and letters PCY 180 GP, white in colour;

1.2 One Toyota Hi-Ace Siyaya motor vehicle bearing registration numbers and letters PPM 972 GP, white in colour;

1.3 One Toyota Hi-Ace Super 16 motor vehicle with registration numbers and letters HHV 487 GP, cream/brown in colour;

2. That the sheriff of this Honourable Court forthwith seize the aforementioned vehicles, wherever they may be found and to forthwith restore same into the possession of the applicant;"

3. That the matter be and is hereby postponed to 27 July, 2004, to *show why costs should not be paid jointly/severally."* (Emphasis added.)

[6] It will be noticed that the BMW motor vehicle and the house are not part of Preller, J's order, as they were not part of the reliefs sought in the Notice of Motion. I have no recollection of an explanation being made in this regard during argument, not that it makes any difference to the issues for resolution in this application.

[7] The matter having been postponed, on 27 July, 2004, to 26 October, 2004, it appears that the Rule was extended again, on the latter date, to 29 October, 2004, to the Opposed Motion roll. On the latter date, the rule was extended to 23 February, 2005, with the applicant being ordered to pay wasted costs of the first and second respondent's.

[8] According to the parties, in their respective Heads of Argument, they understood the issues for argument before me to be, briefly, as follows:

8.1 The applicant's attitude was that, her possession of the motor vehicles having been confirmed by Preller, J's order of 15 June, 2004, the only outstanding issue was that which is highlighted in paragraph 3 of that order, viz. for the respondents "to show why

[the applicant's] costs should not be paid jointly/severally" by them;

8.2 The first respondent's attitude was that it was being dragged into court, against its will, by the applicant, who was insisting that a cost order be made against him notwithstanding an approach by the first respondent's attorneys that the first respondent be allowed to abide the Court's decision without her having to pay costs;

8.3 The second respondent's attitude was that the applicant has no *locus standi,* in that, upon the death of her husband, his estate vested upon the executor of his estate or, in the event of none having not yet been appointed, upon the Master. Alternatively, in the event of the attack of the complainant's standing being unsuccessful, the second respondent contested the applicant's claim of co-ownership.

[9] Extensive and well-researched Heads of Argument, for which I am indebted to all counsel (by which I mean, all legal representatives, regardless of whether they are advocates or attorneys), were submitted on behalf of each of the parties.

[10] The first respondent added the following in its Heads of Argument dated 15 February, 2005;

> "IN LIMINE:
>
> It appears from *paragraph* 2 of the second respondent's answering affidavit that the applicant and her deceased husband, although having been involved in divorce proceedings, had, as at the time of the applicant's late husband's demise, not as yet been divorced and that the applicant had not yet, as at the time of the initial involvement of the first respondent in these events, inherited or otherwise acquired her late husband's assets. It is, therefor (sic), humbly submitted that the executor in the deceased's estate should have been joined as a necessary party in this application."

I should mention that in his Heads of Argument dated 20 October, 2004, this point *in limine* was not taken.

[11] When the matter was argued before me, on 23 February, 2005, it became common cause that the Magistrate's Court Order of 28 May, 2004, did not, in so many words, authorise seizure of the motor vehicles from the applicant and the placing thereof with the second respondent. I did not, therefore, have to decide whether the discharge of the Rule *Nisi* of 25 May, 2004, automatically, without express words to that effect, authorised the first respondent to attach the items as he did. Although I am inclined to think that the first respondent was not so authorised, I make no decision in that regard. Suffice to say that the parties agreed that he was not so authorised.

[12] In the course of the argument Mr. L. S. De Klerk, on behalf of the first respondent, and Mr. I. P. Ngobese, on behalf of the second respondent, conceded that Preller, J's order left room only for argument on the question of costs. It then followed that the *point in limine* taken by the second respondent and adopted by the first respondent was inappropriate, in that the stage when it should have been argued, i.e. before Preller, J, had passed.

[13] In the circumstances, it having been agreed that the first respondent was not authorised to remove the items from the applicant after and by the Order of the Magistrate Court made on 28 May, 2004, the only issue was whether or not the first and second respondents were to pay costs for their opposing, respectively, the application before me, on 23 May, 2005. There was no doubt that the second respondent incurred costs, in that his opposition to the application was legally and factually without foundation.

[14] Mr. De Klerk argued, however, that the first respondent literally stated that it was not opposing the application and referred me to correspondence annexed to the first respondent's opposing affidavit,

which is in support of that argument. Against that argument Mr. Omar submitted, on behalf of the applicant, that an application for costs against the first respondent was justified, in that the first respondent had ignored the applicant's resistance to the removal of the items. The first respondent actually ignored her plea that the cars not be removed. When, in her desperation, the applicant had telephoned her attorney and caused the first respondent to speak to her, the latter had assured the attorney that he was actually armed with a court order for the removal of the items, whereupon the attorney had advised her not to resist the attachment. The first respondent had undertaken to furnish the applicant with a copy of the court order. That court order never surfaced, not even after the applicant's attorney specifically asked for it, subsequently, from the first respondent.

[15] In fact, the first respondent conceded that he had erroneously interpreted the discharge of the Rule Nisi as being tantamount to an order to him to fetch the items that he had removed from the second respondent. There is no doubt that the first respondent could only have acted as he did if mandated by the court order.

[16] The gravamen of Mr Omar's submission is, however, that the first respondent initially falsely alleged that he was actually in possession of a court order authorising the attachment and removal of the items and restoration thereof to the second respondent. That the first respondent did purport to be in possession of such an order is common cause. That that was untrue is not disputed. I am of the view that the first respondent's conduct was reprehensible and that the applicant is, consequently, entitled to an order of costs against the first respondent.

[17] I would, in any event, have ordered the first respondent to pay costs, because I agree with Mr Omar's submission that, by adopting the second respondent's point *in limine,* the first respondent went beyond coming to court merely because the applicant insisted on a costs order

against him, even though the first respondent was not resisting the application. He was actually attacking the merits of the application, running the risk of an order of costs being awarded against him if his attack failed. In any event, an aspect I did not raise with Mr. De Klerk, the first respondent raised, in paragraph 13 of the earlier Heads of Argument, repeated in paragraph 11 of the later Heads, the applicant's failure to the first respondents opposing affidavit "or for that matter" the absence "any reaction to the affidavit of the second respondent.. .. " He "humbly submitted that prayer 2 of the applicant's notice of motion (part B) be dismissed with costs, such costs to be taxed on the scale as between attorney and client, as it grossly unfair that the first respondent, in his official capacity, be penalized with a costs order."

If the first respondent had confirmed its argument to the applicant's failure to reply to its opposing affidavit, without alluding to the second respondent's affidavit, he would have been acting within the parametres of the basis on which he claimed to have resisted the application viz. to oppose the costs order against him. He certainly went beyond that purpose.

[18] As I have pointed out, in the manner in which Preller, J's order is framed, the question of costs was the only issue to be dealt with today. The applicant was aware of the nature of the issue left for decision. There is no justification for the respondents not to have been equally aware of that situation.

[19] If Mr De Klerk's repeated assurance to me that it was not the first applicant's intention to do more than to come and oppose a costs order against it is taken to its logical conclusion, I should order Mr De Klerk to pay costs *de bonis propriis.* That would be inappropriate in the in the circumstances. I am in no doubt that in no doubt, in incorporating the second respondent's point *in limine,* Mr. De Klerk was trying to do his utmost best for his client. There is nothing reprehensible in his conduct. Although I do not need to decide on the issue, it does appear

that the question of the applicant's *locus standi* could appropriately have been raised on the merits.

[20] The respondents were unable, to use Preller, J's phraseology in paragraph 3 of his order, "to show why costs should not be paid [by them] jointly/severally." Consequently, I order that the first and the second should, jointly/severally, the one paying the other to be absolved, pay wasted costs occasioned by their opposing the application.

J. N. M .POSWA
JUDGE OF THE HIGH COURT