

Not reportable  
DELIVERED: 14 JUNE 2007

**IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)**

**CASE NO: 40331/2006**

IN THE MATTER BETWEEN:

MAIGRET (PTY)

APPLICANT

AND

JOHANNES HENDRICK BUYS N.O  
RESPONDENT

1<sup>ST</sup>

ATTORNEY MALAN MOHALE INCORPORATED .  
RESPONDENT

2<sup>ND</sup>

ADVOCATE JW LOUW SC  
RESPONDENT

3<sup>RD</sup>

ADVOCATE HJ FABRICIUS SC  
RESPONDENT

4<sup>TH</sup>

ADVOCATE JH DREYERS SC  
RESPONDENT

5<sup>TH</sup>

THE SHERIFF, JOHANESBURG  
RESPONDENT

6<sup>TH</sup>

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**JUDGMENT**

MAVUNDLA, J.,

1. The applicant has brought an urgent application for an order setting aside the warrant of execution dated the 14 March 2007 (issued on the 7 May 2007, alternatively for an order staying the execution of the warrant of execution pending either the finalisation of the appeal to the General Council of the Bar against the decision of Advocate Maritz S.C, alternatively the reviewing of the decision of Advocate Maritz S.C. which review is to be instituted by the applicant within 14 days of the order being granted and that the said order operate as an interim order pending the determination of either the appeal or review as set out herein above.
2. The first and second respondents oppose the application on various grounds, including on urgency. In regard to the latter point, I have been referred to *Syfrete Bank Ltd and Others v Sheriff of the Supreme Court*<sup>1</sup>.

Background Facts.

3. The first respondent was the plaintiff in this Court under case number 24223/2002. The matter was by agreement referred to arbitration before retired judge Mr. Justice van der Walt who dismissed the claim of with costs. The decision of Mr. Justice van der Walt, was then taken on appeal before three appeal arbiters, consisting of Advocates JW Louw SC, HJ Fabricius SC and JH Dreyer SC who on the 30 November 2006 found

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<sup>1</sup> 1997 (1) SA 764 at 776E-778C-D.

that the decision of Mr. Justice van der Walt was wrong and they awarded the claimant (first respondent in casu) an amount of R500,000.00 with cost.

4. The applicant in casu then brought on urgent basis under case number 40331/2006 an application for the stay of the award of the Arbitration Appellate Tribunal consisting of the aforesaid mentioned advocates, whom the applicant cited as the third to the fifth respondents respectively and interdicting the second respondent from paying the amount of R500,000.00 (together with the interest accrued thereon) which it held in trust to the third, fourth and fifth respondents pending the finalisation of review proceedings against the decision of the aforesaid Arbitration Appellate Tribunal.
5. On 5 December 2006 and by agreement the aforesaid application under case number 40331/2006 was settled, and the settlement was made an order of the Court by Mr. Justice Prinsloo, which order reads thus:

“1. That without admitting that the applicant was entitled to bring an urgent application in terms of prayer A of the applicant’s notice of motion, the first and second respondents undertake not to execute the award by the arbitration tribunal dated the 30<sup>th</sup> of November 2006, pending the finalization of the application set out in B of the applicant’s notice of motion.

2. That the applicant pay 50% of the arbitrators appeal costs, as agreed or as taxed by the Bar Counsel, as well as 50 % of the venue expenses, upon receipt of the said accounts, which payments are interim payments in terms of the arbitration

proceedings and their final destiny is reserved for decision at the finalization of the review applications and/ or further arbitration proceedings.

3. That the costs of the urgent application on 5 December 2006 are reserved.”

6. Subsequent thereto and in particular on the 16 March 2007 a warrant of execution was issued through the registrar of this Court to the Sheriff of Johannesburg North directing him to attach and take into execution the movable goods of the applicant herein and cause the same to be realized by public auction the sum “of R74 385.00 for 50% of the Arbitrator’s Costs which they recovered by judgment of this Court dated the 5 December 2006, in the above mentioned case and also all other costs and charges of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the said case to be hereafter duly taxed according to law, besides all your costs hereby included.”

#### AD URGENCY

7. In order to make a case for urgency, it has been stated on behalf of the applicant that it has suffered the attachment of assets which it utilises on a day-to-day basis. It is further stated that the applicant cannot lawfully remove these assets from its premises and is being frustrated in the conduct of its lawful business. An undertaking was sought (from the second respondent per letter dated the 18 May 2007), but was declined.<sup>2</sup>

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<sup>2</sup>Paginated page 16 para 27 of founding affidavit.

8. The effect of the attachment is to effect an arrest on the property of the applicant by a judicial order (*pignus iudiciale*), the consequences of which being that the control over such arrested property passes over from the hands of the applicant who is the judgment debtor to the hands of the sheriff while *dominium* over such attached property still vests with the applicant as the judgment debtor.<sup>3</sup>
  
9. In a letter dated 18 May 2007 the applicant's attorneys point out that a warrant of execution was served upon their client on 14 May 2007 and that the sheriff attached certain assets pursuant thereto. They further state that they understand that the sheriff has been instructed not to remove the items that are under attachment.<sup>4</sup>
  
10. Although the second respondent per letter dated 18 May 2007 respondent by saying that its instructions are to proceed to with the removal of the attached goods and invited the applicant to launch its threatened application to set aside the writ of execution, which letter was remitted per fax on the very same day<sup>5</sup>, such removal as on the date of the launch of this application had not been effected, nor is there any allegation on the part of the applicant that it

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3 Syfrets Bank Ltd and Others v Sheriff of the Supreme Court (supra) where Combrink J at 772D-E says: "An arrest effected on property in execution of a judgment creates a *pignus praetorium* or so to speak more correctly, a *pignus iudiciale*, 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, so that in the event of the debtor's insolvency the curator of the latter's estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent's estate.... But although the effect of a *pignus iudiciale* is that the control of the property arrested in execution passes from judgement debtor, and therefore on his insolvency supervening does not come under the administration of the curator of the insolvent estate, the *dominium* remains in the debtor, who can, up to the last moment before actual sale, redeem his attached property: that is to say, the property subject to the *pignus iudiciale*, for while the *pignus* lasts he remains the owner of the pledge (*dominus pignoris*, Dig 20.5.12: Cod 4.24.9.)

4 Annexure DDV11 at paginated page33.

5 Annexure DDV12

fears that such threat would be effected.

11. The respondents further state that there is no allegation that the applicant intends to dispose of the assets that have been attached. It is also significant to note that whereas the attachment was a done on the 14 May 2007, the applicant only came to Court 22 days after such attachment.
12. Taking the circumstances of this case I am of the view that the applicant has failed to persuade me that this matter is urgent.
13. In the premises the matter is struck off the urgent roll with cost.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE: 06 / 06/2007

DATE OF JUDGMENT: 14 /06/ 2007

APPLICANT`S ATT: Mr. STOLP

APPLICANT`S ADV: Mr.GR WYNNE.

RESPONDENT`S ATT: Mr L MALAN

RESPONDET`S ADV: Mr. T STRYDOM