REPUBLIC OF SOUTH AFRICA

18/8/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

15/8/17
DATE

SIGNATURE

CASE NO.: 83546/2016

Date heard: 14 August 2017

In the matter between:

SOUTH AFRICAN REVENUE SERVICES **Applicant**

and

HR & ASSOCIATES CC **Respondent**

In re:

HR & ASSOCIATES CC **Execution Creditor**

and

SOUTH AFRICAN REVENUE SERVICES **Execution Debtor**

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

1. This case has its origin during 2003, when Applicant commenced an investigation of the Value Added Tax (VAT) and Pay As You Earn (PAYE) affairs of Respondent, and of HR Computek (Pty) Ltd (HRC).

2. Pursuant to the investigation, and during November 2003 to May 2004, Applicant seized money from the bank accounts of Respondent, from HRC, as well as from Annexus CC. During the same period the sum of R 491 320.98 held by the Department of Local Government, presumably to the credit of one or more of the aforesaid entities, was also seized.

3. The investigation culminated in the prosecution of Respondent, HRC and three individuals, on 52 counts of theft, fraud, contravention of the Value Added Tax Act, 1991 and the Income Tax Act, 1962.

4. The prosecution occurred in the Regional Court for the Regional Division of Gauteng sitting at Johannesburg under case number 41/2602/09. At the conclusion of the trial the accused were acquitted on all charges.

5. On 21 July 2016 the learned magistrate made the following remarks in his judgment:

"SARS was of the view that the accused had evaded tax by either withholding tax

moneys and/or underpaying tax. As a result of their findings, SARS seized the amount of R 694 277.90 from HRA's bank account with ABSA and the amount of R 126 837.25 from HRC's account on 6 November 2003. From Annexus CC an amount of R 385 518.45 was seized during March to May 2004. In March 2004, SARS seized R 491 320.98 from the Department of Local Government."

"However SARS and more particularly Mr Lockhard at some point took a mind boggling and legally unjustifiable approach to the matter. When he did not get an acceptable response from the accused with regards to his queries, he decided to ignore the fact that accused 3 and 4 were different legal entities, each with its own tax liabilities. He combined the two tax liabilities as one. This is totally wrong. It cannot be done."

6. Respondent took the view that the aforesaid statement by the regional court magistrate was a final court order sounding in money, as defined by section 4 A of The State Liability Act, Act 20 of 1957 ("the Act"). On 23 August 2016 Respondent commenced the procedure for the enforcement of State liabilities as provided for in section 3 of the Act, by addressing a notice to the Office of the Minister of Finance, the Commissioner of the South African Revenue Service, the National Treasury, the Director of the National Treasury, and the State Attorney.

7. The notice alleged that on 21 July 2016 the Regional Court, Johannesburg in The State v Chakala and others had granted an order that could be enforced by the mechanism created in section 3 (4) of the Act. A transcript of the judgment was attached, and the notice made specific reference to the passage quoted above, in support of its contention that a final order had been granted against applicant. The notice specified the amounts seized, and the interest that had allegedly accrued

thereon, calculated as at 31 August 2016. The notice demanded that applicant (who was referred to in the notice as the execution debtor), pay the total sum of R 11 796 861.70.

8. On 6 September 2016 Applicant's attorneys wrote to Respondent's attorneys pointing out that the judgment "*cannot possibly meet the definitional requirements of a final court order sounding in money*". Applicant also made the point that the passage upon which Respondent relied was simply a recordal that Applicant had seized certain money. Applicant refused to pay any money to Respondent, and it advised that should Respondent issue a writ of execution, proceedings would be launched to set aside the writ, and that a punitive costs order would be sought against Respondent.

9. Respondent replied that in its view the judgment of the Regional Court was a judgment "sound in money" *(sic),* and that the writ of execution would be served in due course. In Respondent's view non-payment was not negotiable.

10. On 26 October 2016 Respondent applied to the Registrar, in accordance with section 3 (5) of the Act, for a writ of execution. In support of its application, respondent attached the section 3 (4) notice dated 23 August 2017. The Registrar accepted that the requirements for the issuing of a writ had been satisfied, and issued the writ that is the subject of this application.

11. The result of the aforesaid was that Applicant launched this application in which it seeks an order:

    11.1 That the writ of execution be set aside;

11.2 That Respondent be ordered to pay the costs on the attorney/client scale.

12. In a counter application, Respondent seeks an order for judgment against Applicant for payment of R 694 277.90 and R 385 518.45, together with interest on the said amounts at 15,5 % per annum, calculated from 12 March 2004 and 31 May 2004 respectively.

THE STATE LIABILITY ACT NO 20 OF 1957

13. Section 1 of the Act provides:

> *"Any claim against a the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant."*

14. Section 3 (1) provides:

> *"Subject to subsections (4) to (8), no execution, attachment or like process for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, but the amount, if any, which may be required to satisfy any final court order given or made against the nominal defendant or respondent in such action or proceedings must be paid as contemplated in this section."*

15. Section 4 A defines a "final court order" as being an order:

"(a) given or confirmed by a court of final instance; or,

(b) given by any other court where the time for noting an appeal against the judgment or order to a higher court has expired and no appeal has been lodged: Provided that where a court thereafter grants condonation for the late lodging of an appeal, an order given or confirmed by the court hearing such appeal."

16. The purpose of the Act is to provide a mechanism for enforcement of claims against the State, sounding in money, where a final court order had been given for payment by a competent court.

17. Respondent's counsel submitted that the regional magistrate's remarks quoted above are a "final court order sounding in money". There are numerous reasons why there is no merit to this submission.

18. The regional court, as any lower court, is a creature of statute, and is limited in its functions to the exercise of those powers which are conferred upon it expressly or by necessary implication by the creating statute or by competent legislative authority.[1]

19. A regional court, sitting in criminal proceedings, is governed by the provisions of the Criminal Procedure Act, Act 51 of 1977. It has no jurisdiction to grant a civil order for payment of money. Therefore, even if the court wanted to make an order that

[1] Roodepoort – Maraisburg Town Council v Wendy 1960(3) SA 61 (T)

respondents should be repaid, it could not do so.

20. Applicant was not a party to the criminal proceedings, and no relief was sought against it. The contention that an order can be made against a person who is not party to the proceedings, against whom no relief was sought, without hearing that party, is contrary to the core principles of our law.

21. The word "judgment" comprises in its general sense the reasons for the decision, the decision itself, and the order made pursuant to the decision[2]. The Supreme Court of Appeal in **Zweni v Minister of Law and Order of the Republic of South Africa**[3] has suggested that the distinction between "judgment" and "order" is archaic and formalistic, and that the words have the same meaning. They are essentially interchangeable.

22. The remarks upon which respondent wishes to hang its hat were part of the reasons advanced by the magistrate for the eventual decision reached, which was the acquittal of the accused. They were not part of the "pronouncement of the disposition", the executive part of the judgment, to which is referred in the **Zweni** matter.

23. The regional court judgment should also be read properly, and in context. There is no possible way of interpreting the magistrate's words to mean that he intended to make an order that applicant should repay any money to respondent. He was expressing a view that the applicant's seizure of money from different entities, whilst ignoring the fact that they were in fact separate legal entities with separate tax liabilities, was legally unjustifiable. His remark was at best for respondent, the

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[2] Herbstein & Van Winsen – The Civil Practice of the High Courts 5th edition p911

[3] Zweni v Minister of Law and Order of the Republic of South African 1993(1) SA 523 (A) at 532 D-E

expression of an opinion. There is not, and never has been, a final court order sounding in money.

24. In my view therefore the writ of execution was unlawful and it should not have been issued.

THE COUNTER APPLICATION

25. Respondent's counter application alleges that:

25.1 On 21 July 2016 a judgment was granted in the regional court under case number 41/2602/09;

25.2 The judgment stated that four amounts of money were unlawfully seized, two from respondent and two from HRC;

25.3 The judgment is *res iudicata*.

26. Based upon the above contentions respondent seeks judgment against applicant for payment of R694 277.90 and R385 518.45, plus interest. Respondent also seeks a costs order.

27. In view of the conclusion that I have come to, rejecting the respondent's averment that a judgment was entered in its favour, the counter application must fail. This Court cannot grant a civil judgement based simply on the criminal proceedings, and the findings made therein. In application proceedings the affidavits constitute not only the evidence, but also the pleadings, and as a result the founding affidavit must contain all the averments that are required to make out a case for the relief sought.

The founding affidavit does not make out any case for the relief sought in the notice of motion.

28. In reply, respondent's counter application morphed into a delictual claim for damages. Respondent now alleges that the reference to the "judgment" in its founding affidavit was for "evidentiary value" only, in order to prove respondent's damages. I agree with applicant's contention that a respondent seeking relief in a counter application should make out a case in its founding affidavit. It cannot make its case in reply. Respondent now seeks to make the case that the evidence in the regional court matter proves that Applicant acted unlawfully, and that as a consequence Respondent has suffered damages.

29. This was not the case that Applicant had to meet in the Respondent's founding affidavit. I am of the view that there is no merit to Respondent's submission in this regard.

30. In the result the counter application cannot succeed.

COSTS

31. Applicant has sought costs on the attorney/client scale.

32. In the **Friedrich Kling** matter[4] the court followed the *dictum* in **Ward v Sulzer**[5]:

"In general, the basic relevant principles in regard to costs may be summarised as follows:

[4] Friederich Kling GmbH v Continental Jewellery Manufactures; Spreidel GmbH v Continental Jewellery Manufacturers 1995(4) SA 966 (C)
[5] Ward v Sulzer 1973(3) SA 701 (A)

1. *In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides. See Gelb v Hawkins 1960(3) SA 687 (AD) at 694 A and Graham v Odendaal 1972 (2) SA 611 (AD) at p. 616. Ethical considerations may also enter into the exercise of the discretion; see Mahomed v Nagdee 1952(1) SA 410 (AD) at 420 in fin.*
2. *The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs;..."*

33. As I have pointed out before, applicant specifically addressed the lawfulness of the writ with respondent's attorneys. Applicant warned respondent that this application would be launched, and that costs on the attorney/client scale would be sought.

34. Respondent's decision, firstly to apply for a writ based upon a non-existent "judgment", and then to oppose this application is so lacking in merit, that the only reasonable deduction is that respondent was trying to harass applicant, and that the application for a writ, and the opposition to the setting aside thereof, was vexatious and reckless. The counter application was equally ill-advised.

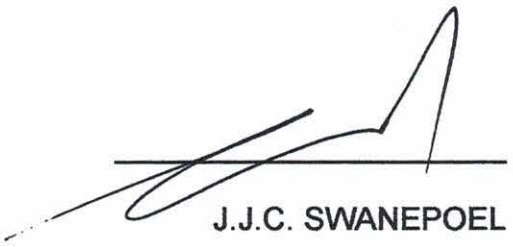
35. In the result I make the following order:

34.1 The writ of execution issued by the Registrar of this Court on 26 October 2016 under case number 83546/2016 is set aside;

34.2 Respondent shall pay the costs of the application on the attorney/client

scale;

34.3 The counter application is dismissed with costs on the attorney/client scale.



J.J.C. SWANEPOEL

Acting Judge of the High Court