IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 82452/2015

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

…… 24/6/2021……..
SIGNATURE DATE

In the matter between:

JUMBO REBUILDS CC **Applicant**

v

JUDITH CHANTEL SWART **1st Respondent**

EUNANDA FOURIE INCORPORATED **2nd Respondent**

THE STANDARD BANK OF SA LIMITED **3rd Respondent**

THE SHERIFF OF THE HIGH COURT, MBOMBELA **4th Respondent**

JUDGEMENT

MOSOPA, J

1. This is an urgent application in terms of Rule 6(12) of the Uniform Rules of Court, wherein the applicant seeks relief to set aside and uplift the writ of execution issued on 28 April 2021, for the attachment and/or freezing of the applicant's Standard Bank cheque account with account number [….], and ancillary relief.

2. On 28 April 2021, the first respondent, who was cited as the Execution Creditor, issued a writ of execution against Mr Johannes Jakobus Swart, cited as the Execution Debtor. Mr Swart is not a party to the current proceedings under case number 82452/2015 in this court, for a judgment amount of R675 953.56. In terms of the writ of execution, the fourth respondent was directed to attach, remove and take into execution any monies held on behalf of or to the benefit of the Execution Debtor, in the trust bank account of Annemarie Swanepoel Attorneys, further alternatively, money held in trust for the benefit of the Execution Debtor in the trust account of any other attorney. The fourth respondent was further instructed to execute against several listed bank accounts, including the bank account belonging to the applicant in this matter.

3. It is common cause that the current applicant is not a party to the proceedings that involved the issuing of the writ of execution by the first respondent.

4. Two points-in-limine were raised by the first and second respondent *in casu*, in that;

    1. the matter is not urgent; and
    2. non-joinder of Mr JJ Swart as a party to the current proceedings.

5. In contention, Ms Vermaak-Hay, on behalf of the applicant, contended that the matter is urgent for two reasons;

    1. for the unlawfulness of the attachment; and
    2. prejudice to be suffered by the applicant and its employees.

6. For the sake of completeness, I find it prudent to refer to the provisions of Rule 6(12)(b) of the Uniform Rules, which governs the procedure in this type of application and provides;

    "12(b) – In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reason why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

7. In the matter of ***Luna Meubel Vervaardigers v Makin and Another 1977 (4) SA 135 (W)*** at para 137F, Coetzee J, when dealing with the provisions of Rule 6(12)(b), remarked;

    "Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter is set down."

8. Notshe AJ, in the matter of ***East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196***, when called upon to make a similar determination, observed;

    "The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The

question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress."

9. This application has its genesis in a warrant of execution which was issued on behalf of the first respondent against Mr JJ Swart after he failed to comply with a maintenance order which the first respondent obtained against him. The first respondent had a suspicion that Mr Swart was receiving large amounts of funds and that Mr Swart was dispersing joint estate assets, through various entities, including the applicant.

10. In terms of the writ of execution, the fourth respondent, who does not oppose this application, together with the third respondent (Standard Bank), was not authorized to freeze the applicant's bank account, but merely attach same. In that regard, the fourth respondent misunderstood its mandate. The first and second respondents indicated that they do not have any objection to the applicant's account being unfrozen.

11. Ms Vermaak-Hay contended that the Sheriff did not attach the account of Annemarie Swanepoel Attorneys and that the writ of attachment does not direct the fourth respondent to attach the account of the applicant and as such, it is unlawful. Further, that the continued freezing of the applicant's bank account prejudices the applicant in that it will result in the applicant closing shop, as it will be unable to meet its debt obligations. Furthermore, it will prejudice the employees of the applicant as the freezing of the account occurred at the end of May, which meant that they could not get their salaries and this forced the applicant to secure a loan in order to pay these salaries. Also, this will result in the applicant's employees again not being paid at the end of June.

12. Ms Ferreira correctly contended in my view, that the unlawful attachment of the applicant's bank account on its own does not render the matter urgent. After the freezing of the applicant's bank account, the applicant never ceased operations – it continued to operate and I take it that it is still operating, despite its bank account be frozen. The applicant failed to disclose the origin of its loan used to pay its employee's salaries at the end of May, and whether this loan was repaid or not.

13. The applicant knew about the freezing of the bank account on 13 May 2021. Several correspondences were exchanged between the applicant and the first and second respondents, up until 1 June 2021, when the application was issued on 9 June 2021. There is no explanation on the papers as to what the applicant did from 2 June 2021 up until the application was issued on 9 June 2021, to make it a point that the matter is enrolled on the court roll. However, that aspect on its own cannot be a ground for refusing to regard the matter as urgent. That aspect must be assessed in light of the circumstances of the case in totality and the explanation given.

14. The applicant was supposed to pay its employees on 25 May 2021, but could not do so as its bank account was frozen, resulting in its employees only being paid on 1 June 2021. Despite not being paid, as explained above, the applicant continued to exchanged correspondence with the first and second respondents, despite the fact that it was clear that the respondents were not willing to uplift the attachments until certain conditions are met. That, in my view, was an opportune time for the applicant to have brought the current application. This aspect, together with the unexplained period of delay in bringing the urgent application against the respondent, does not render the matter urgent. I am of the view that the matter can be dealt with in due course, where the applicant can get substantial redress in light of the concession made that the applicant's bank account can be unfrozen.

15. I now turn to deal with the second point-in-limine raised by the first and second respondents, relating to the non-joinder of Mr Swart to the current proceedings. The test is whether or not a party has a "*direct and substantial*

interest" in the subject matter of the action; that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.

16. Mr Swart is one of the trustees of JJ Swart Family Trust ("the Trust"), together with Mr Jacques Antonie Oelofse and Mr Neville Mathee, which is the sole owner of the applicant. Mr Swart is also the capital and income beneficiary of the Trust, together with his children. Mr Swart, in the warrant of execution proceedings, he is cited as the Execution Debtor, which its unlawfulness happens to be the subject matter of the current application.

17. In the document titled "Close Corporation Certificate" dated 14 August 2020, Mr Swart proclaims himself as a member of the applicant. Further, he deposed to an affidavit on the same date in which he stated that he is a member of the applicant.

18. There is nothing to gainsay that the Mr Swart did not sign the two documents referred to above and as such, I am convinced that Mr Swart was supposed to be joined as a party to the current proceedings. It must also be noted that the applicant is also joined as a party together with the Trust and its trustees in the pending divorce action between the first respondent and Mr Swart.

19. I have already dealt with the concession made by the first and second respondents that the applicant's bank account may be unfrozen. What is left for me is whether I am competent to make such an order in light of my findings pertaining to the two points-in-limine raised by the first and second respondents. There is no doubt that the fourth respondent acted outside his mandate as his actions were not what the first and second respondents intended to be a consequence. I am of the view that justice in this matter, despite my findings on the points-in-limine, will be better served if the account of the applicant is unfrozen.

20. In the consequence, I then make the following order;

1. The application is struck from the roll for lack of urgency and the failure to join Mr Johannes Jakobus Swart as a party to these proceedings;
2. That the third respondent is ordered to unfreeze the applicant's Standard Bank cheque account, with account number 10137615882;
3. The applicant is ordered to pay the costs occasioned by this application.

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MJ MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

Appearances:

For the applicant:	Adv I Vermaak-Hay
Instructed by:	Swanepoel and Partners Incorporated
For the respondent:	Adv R Ferreira
Instructed by:	Eunanda Fourie Incorporated
Date of hearing:	23 June 2021
Date of judgment:	24 June 2021