

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. AR 267/10

In the matter between:

VINCENT DELANI NDABA

APPELLANT

and

JOSEPH JAMELA MHLAMBI

RESPONDENT

APPEAL JUDGMENT Delivered on 04 April 2011

SWAIN J

[1] The issue which falls to be decided in the present appeal, is whether a warrant of execution issued by the respondent, out of the Orange Free State High Court, under Case No. 3138/2001, in respect of the taxed costs of an application, which was decided in favour of the respondent against the appellant, stands as a bar to the recovery by the respondent of such taxed costs, in terms of Section 65 M of the Magistrates' Court Act No. 32 of 1944 (the Act), before the Magistrates' Court for the district of Durban.

[2] A summary of the history of the matter is necessary to place this issue in context.

[2.1] The appellant was an articled clerk employed by the respondent's firm of attorneys and brought an application before the Orange Free State Provincial Division of the High Court under Case No. 173/97, to compel the respondent to cede his contract of Articles of Clerkship to another attorney. The application was opposed by the respondent and dismissed on 06 February 1997, with costs in favour of the respondent.

[2.2] The costs order was taxed by the respondent's attorneys on 28 October 1997 in an amount of R14,142.90, the bill of costs and the Registrar's Allocatur, forming part of the record before us.

[2.3] The respondent then instituted action for payment of the taxed costs under Case No. 17079/01 in the Durban Magistrates' Court, which case was withdrawn by the respondent, with a tender to pay the appellant's costs. This action is not relevant to the issue to be decided in the present appeal.

[2.4] The respondent on 05 July 2001 issued the said warrant of execution in respect of the taxed costs, which resulted in the appellant approaching the Orange Free State High Court, with the consequent issue on 15 November 2001, of a *rule nisi* calling upon the respondent to show cause *inter alia*, why the warrant of execution should not be declared null and void. The rule was subsequently adjourned *sine die*, and no further steps have subsequently been

taken by either of the parties, to advance the application.

[2.5] The respondent then again instituted action in the Durban Magistrates' Court for payment of the said taxed costs, which proceedings were again withdrawn by the respondent, with a tender to pay the appellant's costs. This action is also of no relevance to the issue to be decided in the present appeal.

[2.6] The respondent then acted in terms of the provisions of Section 65 M of the Act and filed with the Clerk of the Durban Magistrate's Court , a certified copy of the Judgment of the Orange Free State Provincial Division, dismissing the application of the appellant with costs. The respondent also filed a certificate by the respondent's attorney dated 09 October 2008 specifying the amount owing under the Judgment, being the sum of R14,142.90 plus interest at the rate of 15.5 per cent per annum from 28 October 1997 (being the date of taxation) to the date of payment. In the result and in terms of Section 65 M of the Act, the judgment "shall have all the effects of a judgment of such court and any proceedings may be taken thereon as if it were a judgment lawfully given in such court in favour of the judgment creditor, for the amount mentioned in the affidavit or affirmation or the certificate as still owing under such judgment , subject however to the right of the judgment debtor to dispute the correctness of the amount specified in the said affidavit or affirmation or certificate". Thereafter the respondent issued a notice in terms of Section 65 A (1) of the Act, dated 25 November 2008, calling upon the appellant to appear on 04 February 2009, to enable the Court to enquire into his financial position.

[2.7] The appellant filed a notice of intention to oppose on

03 February 2009, before he appeared at the Section 65 enquiry, setting out his grounds of opposition. Thereafter the appellant filed an opposing affidavit and the respondent filed a replying affidavit under Case No. 51382/2008.

[2.8] The appellant then instituted further proceedings under Case No. 23986/2009 in the Durban Magistrates' Court to dismiss the Section 65 proceedings. The respondent filed an answering affidavit and the appellant filed a replying affidavit.

[2.9] Thereafter cases 51382/2008 and 23986/2009 were by agreement consolidated for the purposes of the hearing.

[3] The basis upon which the appellant sought an order dismissing the Section 65 proceedings, initiated by the respondent, was that the Magistrates' Court in Durban did not have jurisdiction to adjudicate on the Section 65 A (1) application because

[3.1] The Section 65 (A) (1) proceedings constituted a cause of action and/or a dispute between the parties, which was based on the same cause of action or dispute, which formed the basis of the warrant of execution, which was challenged in the Orange Free State Provincial Division, on the basis that the warrant of execution had become superannuated.

[3.2] The *rule nisi* which was adjourned *sine die* on 15 November 2001, was still pending before that Court.

[3.3] The result sought to be achieved in the Section 65 proceedings, is the same result which would have been achieved by the challenged warrant of execution.

[3.4] The defence raised was that of *lis pendens*, in that the respondent was precluded from bringing the same action (or an action aimed at achieving the same result) before another court, while the action was still pending before the original court, and for this reason the respondent was precluded from bringing Section 65 A (1) proceedings before the Magistrates' Court.

[4] The Magistrate after hearing argument granted an order in terms of which

[4.1] The application brought by the appellant opposing the Section 65 A (1) proceedings under Case No. 23986/09 was dismissed with costs.

[4.2] It was declared that the Durban Magistrates' Court possessed the necessary jurisdiction to deal with the Section 65 A (1) proceedings arising out of the Judgment granted by the Orange Free State Provincial Division in Case No. 173/1997, as the provisions of Section 65 M were duly complied with.

[4.3] It was declared that the application brought by the appellant before the Orange Free State Provincial Division, was

ancillary to the Section 65 A (1) proceedings before the Durban Magistrates' Court and had no effect on that Court's jurisdiction, in so far as the Section 65 A (1) proceedings were concerned.

[5] The appellant alleges that the Magistrate erred in granting the order that he did, because the warrant of execution and the Section 65 proceedings are based on the same cause of action, because in both the respondent seeks to recover the legal costs awarded to the respondent against the appellant under Case No. 173/1997. The validity of the warrant of execution which was challenged before the Orange Free State Provincial Division, it is alleged, has a direct bearing on the Section 65 proceedings. Despite the fact that the appellant, in his heads of argument, based his attack upon the decision of the Magistrate on the ground that the Magistrate had erred in failing to uphold the plea of *lis alibi pendens*, in argument before us, the appellant who is an Advocate and appeared in person, disavowed any reliance upon such a plea in arguing the appeal. In my view however, it is nevertheless necessary to deal with the validity of such a plea on appeal, not only because this was the basis upon which the Magistrate dismissed the appellant's application, but for the further reason that during the appellant's argument before us, he made submissions which I understood to be of relevance to such a plea. I will therefore initially deal with the validity of such a plea and thereafter I will deal with the further argument advanced by the appellant for the first time on appeal, which is based upon the provisions of Section 65 E (4) of the Act. It should be noted that the appellant also disavowed reliance upon a challenge that was raised

before the Magistrate and in his heads of argument, concerning the authority of the attorney to represent the respondent and depose to an affidavit on behalf of the respondent.

[6] The basic flaw in the appellant's argument based upon a plea of *lis alibi pendens* is that it confuses the recovery of the costs of the original application between the parties, under Case No. 173/1997, with the determination of the *lis* between the parties in that application, being the dispute as to whether the Articles of Clerkship of the appellant should be ceded. The recovery of the costs has nothing to do with the cause of action which was decided in that application. The procedures which the respondent may then pursue to enforce the costs order, or to collect the amount owed in terms of the costs order, form no part of the original cause of action, which was decided by the Orange Free State Provincial Division.

R S A Faktors v Bloemfontein Township Developers
1981 (2) SA 141 (O) at 145 B – C

[7] A procedure to enforce a costs order, where the costs have been taxed, whether by way of a writ of execution, or by way of a Section 65 procedure in terms of the Act constitute the enforcement of an order of court and not the prosecution of a cause of action. The object of Section 65 A of the Act is to conduct an enquiry into the financial position of the judgment debtor so that the Court can make an order which has as its aim, the settlement of the judgment debt.

The object of a notice in terms of Section 65 A (1) of the Act, is to enforce the already existing judgment debt.

Lombard v Minister van Verdediging
2002 (3) SA 242 (T) at 245 F – G

Equally, the issue of a writ of execution in terms of Rule 45 of the Rules of Court has, as a necessary pre-requisite, a judgment of the Court pronounced in favour of a party. As stated by Didcott J in

Lurlev v Unifreight General Services & Others
1978 (A) SA 74 (DCLD) at 79 A – C

“The ordinary sort of judgment or judicial order has at least two functional components. First of all, it is a command to the party at whom it is aimed, coupled in an appropriate case with a warrant to the sheriff to enforce the command. Secondly, it regulates the legal relationship between the parties and settles their mutual rights and obligations, to the extent necessary for its grant. That, after all, is what makes its effect *res judicata*. Even the simplest judgments generally contain this second element. A default judgment for the price of goods sold and delivered is, in addition to all else, a judicial declaration that the plaintiff has sold and delivered the goods to the defendant and that the defendant is liable to pay their price to the plaintiff. In essence, most judgments and orders are thus declaratory orders supplemented by positive directions, and this is no less so because declaratory orders in a pure form are sometimes claimable on their own”.

It is this inherent duality in the function of a judgment, or order, which is highlighted in the present case. The Judgment of the Orange Free State Provincial Division, settled the mutual rights and obligations of

the parties, in respect of any cession of the appellants Articles of Clerkship, as well as the appellant's liability for the legal costs of the application. The judgment also constituted a command to the appellant to pay the legal costs. The issue of a writ of execution by the respondent, to enforce the command which was directed at the appellant, and the challenge raised by the appellant to the validity of the writ, cannot be regarded as a "pending action" which arises from "the same cause of action" within the meaning of those terms, as is required to support a plea of *lis pendens*.

[8] I am therefore satisfied that the Magistrate was correct in dismissing the plea of *lis pendens*.

[9] Turning to the argument advanced based upon Section 65 E (4) of the Act. The Section reads as follows:

"(4) If the judgment creditor issues or causes to be issued a warrant of execution against movable property belonging to any judgment debtor before the hearing of proceedings in terms of a notice under section 65A(1) and a *nulla bona* return is made, the judgment creditor shall not be entitled to costs in connection with the issue and execution of such warrant unless the court on good cause shown orders otherwise at the hearing of the proceedings".

[10] As I understood the argument, the meaning of this section is that a judgment creditor is precluded from bringing an application in terms of Section 65 A (1) of the Act, where a writ has previously been

issued by the judgment creditor.

[11] This is quite plainly not the meaning of this section, the object of which “is undoubtedly to avoid the issuing of warrants of execution against movable property which may prove abortive”.

Jones & Buckle: The Civil Practice of the Magistrates’ Courts in South Africa Vol 1 pg 273

The Section has no bearing upon the right of the judgment creditor to institute Section 65 proceedings, after a warrant of execution has been issued. All that it makes provision for is the deprivation of the judgment creditor’s costs, in connection with the issue and execution of the warrant, where a *nulla bona* return is made.

[12] There is accordingly no substance to the argument.

I make the following order

a) The appeal is dismissed.

b) The appellant is ordered
to pay the respondent’s
costs.

K. SWAIN J

J. PLOOS VAN AMSTEL A J

Appearances /

Appearances:

For the Appellant : In person

Instructed by : Ponoane Attorneys
Durban
C/o Memka & Associates
Pietermaritzburg

For the Respondent : Mr. L. M. Poldbielski

Instructed by : Louis M Podbielski
Durban
C/o Austen Smith
Pietermaritzburg

Date of Hearing : 28 March 2011

Date of Filing of Judgment : 04 April 2011