IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

Reportable

CASE NO **D406/06**

DATE 2006/07/13

In the matter between

MTHIYANE AND ANOTHER Applicants

and

BANARIS INVESTMENT CC
t/a ESSENWOOD SPAR First Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 13 JULY 2006

ON BEHALF OF APPLICANTS: MR I DUTTON
(Instructed by Christine Wade & Co)

ON BEHALF OF RESPONDENT: MR S ALBERTS
(Instructed by Riaan Kruger Attorneys)

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JUDGMENT 13 JULY 2006

PILLAY D, J

[1] The first respondent employer had obtained a costs order in its favour following an unlawful strike by members of the United Food, Beverage and Allied Workers Union of South Africa ("UFBAWUSA").

[2] The applicants, who were shop stewards of UFBAWUSA at the time, were dismissed. They referred a dispute concerning their alleged unfair dismissal to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for arbitration. The arbitration was scheduled for 30 May 2006. On 23 May 2006, the third respondent sheriff attached the applicant's "right, title and interest in the dispute" between the applicants and the first respondent in the CCMA under case No KNRB1488/05.

[3] Mr *Dutton* for the applicants submitted, firstly, that the first respondent could not on the one hand contend that the applicants had no valid dispute because their dismissal was not unfair and, on the other hand, assert that their dispute was an attachable asset. Relying on the decision in *Thermo-Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) AD 295, he submitted that the first respondent could not reprobate

and approbate. Secondly, the dispute was not a thing capable of attachment. Furthermore, whether the attachment should be allowed was a policy issue.

[4] Mr *Alberts*, for the first respondent, submitted that the thing attached was the arbitration. The attachment was not of the outcome of the arbitration. The arbitration was saleable by public auction. Anyone who thought that the applicants had a good case at arbitration would bid for "the arbitration". Therefore the first respondent was not the only person who would bid at the sale and execution. The motive of the first respondent in effecting the attachment was, he continued, not relevant to its validity. He referred to the following cases: *Whitfield v van Aarde* 1993 (1) SA 332 (ECD); *Van Dyk v Du Toit en 'n Ander* 1993 (2) SA 781 (OPD); *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1997 (2) SA 411 (TPA); *Santam Ltd v Norman and Another* 1996 (3) SA 502 (CPD); and *Strime v Strime* 1983 (4) SA 850 (CPD).

[5] It was common cause that there is no case directly on the point as to whether such an attachment is permissible under law.

[6] At the outset I disagree with the first respondent's

interpretation of what is attached. The third respondent's inventory identifies the attachment as the "right, title and interest in the dispute". The attachment is not of the arbitration. A literal interpretation of the inventory does not support the first respondent's construction.

[7] Neither party made any submissions about who owns the "arbitration" and whether, as a statutory process, it is capable of ownership. Nor did they present any submissions or authorities on whether under the common law the dispute or the arbitration is *in commercium* or mercantible.

[8] The arbitration is not a thing of value to anyone but the parties to the arbitration. The outcome of the arbitration could be valuable to third parties and therefore executable if a third party has an interest in the parties or the outcome of the dispute and might participate in the sale in execution. No prudent investor is likely to participate in the sale in execution of either the right, title and interest in the dispute or the arbitration purely for the purpose of investment.

[9] The first respondent is likely to outbid anyone whose bid is less than the amount owing to it.

[10] In *Whitfield*, above, the respondent in a damages claim secured a costs order against the applicants, who had been compelled to seek a postponement. The respondent attached the applicants' right, title and interest in and to the damages claim. NEPGEN J cited the following extracts of NESTADT J from *Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd and Another* 1986 (2) SA 407 (W), which was also quoted by COETZEE DJP in *Bestbier v Jackson and Another* 1986 (3) SA 482 (W):

> "This brings me to the issue of whether I should exercise my discretion in applicant's favour. It is in the interest of justice that applicant retain the opportunity of showing that the judgment appealed against is incorrect. The prejudice to the applicant if the sale proceeds, and its right to appeal frustrated, is manifest. The appeal is due to be heard in about three weeks. The first respondent will suffer no substantial prejudice if the sale be stayed particularly when it is borne in mind that it has done without this particular form of execution for some 16 months."

NEPGEN J concluded at 339:

> "I have no hesitation whatsoever in coming to the conclusion that I should exercise my discretion in the applicant's favour. The contentions to the contrary, insofar as they relate to the actual

payment of the costs, advanced on behalf of the respondent are of no significance, once it is realised that the respondent's motive is not to recover such costs but to put an end to the litigation. This is not a case of a judgment debtor having to pay the price of forfeiting his claim in order to put the judgment creditor in possession of funds which will go towards satisfying his claim, for the judgment creditor is not in this case seeking to obtain such funds. Therefore the reliance that the respondent seeks to place on the *dicta* referred to in *Madden's* case *supra* and *Marais v Aldridge and Others* (*supra),* is unfounded. The true position is that the respondent is attempting to make use of a process of the Court, which is designed to enable him to obtain satisfaction of the judgment for costs granted in his favour, for the purpose of putting an end to the litigation against him and for that purpose only. His purpose is therefore an ulterior one. In this regard it is in my view appropriate to refer to what was stated by De Villiers JA in *Hudson v Hudson and Another* 1927 AD 259 at 268:

> 'When therefore, the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse. But it is a power which has to be exercised with great caution, and only in a

clear case.'

A clearer case of the abuse of the process of Court than the present one is difficult to imagine."

[11] *Brummer v Gorfil* was also a case where the object of the attachment of the right, title and interest in the pending action against the defendant was to put an end to the litigation. SPOELSTRA J dismissed the application to set aside the sale in execution. That case is distinguishable, firstly because it presented as a review before the Court and, secondly, the sale had already taken place and the interests of third parties were affected. *(Brummer* at 413G-J.)

[12] In *Thermo-Radiant Oven Sales (Pty) Ltd* the applicant/defendant claimed the balance of the purchase price in an action for damages arising from a breach of contract. The respondent/plaintiff sought to attach the applicant's claim to found jurisdiction. OGILVIE THOMPSON J held at 302:

"Where, as in the present case, it is implicit in the prospective incola plaintiff's action that the prospective peregrine defendant's claim is sought to be attached does not exist at all, the Court should, as is done under similar though not identical circumstances in *Ferguson's* case *supra*, in my opinion decline

> to permit the plaintiff incola thus to approbate and reprobate and should, in my judgment, decline to authorise the attachment."

[13] I agree with Mr *Dutton* that, in denying that the dismissal was unfair but in effecting the attachment, the first respondent is reprobating and approbating.

[14] Irrespective of whether the thing attached is the right, title and interest in the dispute or the arbitration, and assuming that they are mercantible, the first respondent as the execution purchaser could prevent the arbitration from taking place altogether. The applicants will be barred not only from pursuing and exercising their constitutional right to access to an independent forum but also from their potential right to reinstatement in their employment with the first respondent.

[15] The sale in execution is an unreasonable and disproportionate limitation on the applicant's rights. By barring their potential reinstatement, the first respondent will extract more than its claim for R50 265,92 in taxed costs. It will deprive the applicants of a livelihood without any hearing as to whether their dismissal was fair.

[16] The Court has an inherent discretion exercised judicially to stay a sale in execution which it must do if it is in the interests of justice. (*Whitfield* at 338C-340B; *Strime v Strime* at 852A-B; *Santam Limited* at 505E-F.)

[17] In this case justice demands that the sale in execution should not only be stayed but that the writ should be set aside because it is unlawful. The first respondent bears the *onus* of proving that the attachment is mercantible and it has failed to prove that the right, title and interest in the dispute is mercantible.

[18] The first respondent is not deprived of its costs altogether. Its right to claim it is simply suspended until the outcome of the arbitration. In that way the rights of the applicant and the first respondent are balanced, without the one annihilating the other.

[19] Finally, the reaction of the CCMA to the attachment calls for a response from the Court. Mr van Zuydam, presumably acting as the senior convening commissioner, interpreted the writ to mean "that the employer is now the owner of the case, and the union and its members have no say over the dispute". He directed that the arbitration be removed from the roll.

[20] The first respondent could never have been the owner before the sale in execution had taken place. The matter should not have been removed from the roll. Accordingly, in addition to the order granted on 10 July, the second respondent is directed to give the dispute preference on its roll.

[21] These are the reasons for the order I granted on 10 July 2006.

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Judge D Pillay

Date: 4 August 2006