Reportable:	**YES**/ NO
Circulate to Judges:	**YES**/ NO
Circulate to Magistrates:	**YES**/NO

INTHE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA &R 77/2015
Heard on: 02/05/2017
Delivered on: 26/05/2017

In the matter between:

BG BOJOSINYANE & ASSOCIATES Appellant/Defendant

And

SHERIFF: JH VAN STADEN Respondent/Plaintiff

Coram: Kgomo JP et Williams J et Mamosebo J

JUDGMENT

Order

1. **The appeal is upheld.**
2. **The Magistrate's judgment and order are set aside.**
3. **Each party is ordered to pay his own costs including the costs of the appeal.**

KGOMOJP

1. I have read the judgment of my sister Mamosebo J (the scribe) and the separate judgment by my sister Williams J and concur in both judgments. In my view these judgments complement each other and come to the same conclusion. Williams J also endorses the factual assessment and conclusions by Mamosebo J but deals with additional legal aspects. In the result the judgments underscore the extent to which the district Magistrate misdirected himself and why the appeal has to fail.

MAMOSEBOJ

[2] The appellant, Mr Boemo Granch Bojosinyane, is the defendant in an action which served before Acting Magistrate C Prinsloo in Hartswater, Northern Cape Province. He appeals against the judgment and order of the Magistrate who found the plaintiff to have succeeded in his claim and ordered him to pay an amount of R33 040.29 with costs.

[3] This appeal was initially argued before Williams J and myself but we were unable to agree on the outcome. The Judge President, Kgomo JP, has therefore constituted a full bench to hear the appeal in terms of s 14(3) of the Superior Court Act, 10 of 2013. The parties were in addition directed to file supplementary written submissions pertaining to the aspect whether an attorney can be held legally liable to a third party for the acts or omission of his client, with particular reference to the facts *in casu.*

[4] The appellant is an admitted attorney who practices under the name and style: BG Bojosinyane & Associates. It is common cause that he was the instructing attorney in another matter, MF Modisa v HP Motaung under Case No 453/2010, wherein his client, the judgment creditor, was the successful party. He consequently obtained a Warrant of Execution on the judgment debt in the amount of **R30 851.00** in his client's (Mr Modisa's) favour, as a result of which a Boer Bull Trailer with registration letters and numbers [E...] was to be sold in execution to satisfy that judgment debt.

[5] I am mindful of the fact that a plaintiff may choose a party against whom to institute action if either of them may be held liable. However, it remains inexplicable why Mr Modisa, for whom the appellant acted, was not cited as a party. Adv Jankowitz, appearing for the sheriff, submitted that the only reason for the appellant's sole citation was that he gave the sheriff instructions and the sheriff had to render the account to him.

[6] It is apposite to remark on the plaintiff's (sheriff's) amended particulars of claim. It is incumbent upon parties in any litigation to ensure that pleadings are drafted in clear and unambiguous terms. Rule 6 of the Magistrates' Court Rules stipulates:

(4) *"Every pleading shall contain* a *clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading,* as *the case may be, with sufficient particularity to enable the opposite party to reply thereto.*

(6) A party who in such party's pleading relies upon a contract shall state whether the contract is *in writing or oral, when, where and by whom it* was *concluded, and if the contract* is *in writing a copy thereof or the part relied on in the pleading shall be annexed to the pleading."*

[7] Para 3 of the Amended Pleadings reads:

"Op of ongeveer Junie 2012 het die eiser die verweerder in kennis gestel dat die verweerder se *klient 'n sekere sleepwa aan die eiser oorhandig het. Die verweerder het derhalwe die eiser opdrag verskaf vir die gepaargaande bes/aglegging op die sleepwa en oak* om *toe te sien tot die verkoping van die sleepwa."*

The terms of the oral agreement are not set out with sufficient particularity. Mr Jankowitz submitted that in the absence of any exception being taken to the pleadings and the fact that the appellant has pleaded comprehensively thereto a good cause of action was made out. This argument is fallacious because where a shortcoming in the pleadings is glaring a court cannot turn a blind eye just because no exception was taken.

[8] On 31 March 2012 the appellant addressed a fax to the respondent, as the sheriff in Hartswater, instructing him to attach the said trailer at the execution creditor's place at 24 Strydom Street, Hartswater. It later transpired that the given address was incorrect but the sheriff had already made two attempts at executing the process. He charged a fee for those attempts and was paid for his services. The appellant expressed his dissatisfaction with the sheriff in these terms in a letter dated 16 April 2012:

"We refer to the warrant of execution in the above matter and have to express our dissatisfaction in the manner in which you are handling it as *well* as *the frequent payments we have been making to you for your executions.*

While we accept responsibility for the incorrect address previously stated in the warrant, we confirm that the address was later corrected. We further advised you and your lady secretary by telephone that the Boer Bull Trailer registered [E...] which belonged to the debtor was in our client (creditor's) premises.

We further faxed to your office the letter, copy whereof is *enclosed, on the 12 November 2011 stating clearly that Mr and Mrs Modisa are seldom at home during the day as they are business people.*

As a result of your delay, our client decided to take the trailer to Pampierstad because of lack of storage space.

We shall therefore have to discuss *with you your fee for recent 2 [two] attempts (one attempt would have been reasonable and sufficient).*

As Taung is far from Vryburg where Taung sheriff will tow the trailer to for purposes of sale, ***we request you to arrange with us the date on which you will be proceeding to our client's place ([...] S. S.) to attach the trailer. We will arrange that it be taken back there.,,*** (Own emphasis)

[9] On 26 April 2012, ten days later, and in response to the appellant's aforementioned letter, the sheriff responded by letter:

"Met verwysing na u skrywe gedateer 16 April 2012.

Ben Segoni is *die tuinier by* ***hierdie adres*** *[I* presume this was referring to [...] S. S.] *en die man wat my telkens meegedeel het dat die wa nie by die adres* was *nie. Die wa word*

daagliks gebruik by die besigheid in Pampierstad. Hy het aan my gese dat die wa nie by hierdie huis gebere word nie, maar iewers in Pampierstad.

U moet my nie beskuldig van agterlosigheid nie; aangesien ek werklik nie elke dag na hierdie huis toe kan ry om te gaan kyk of die sogenaamde wa daar is nie. Inteendeel was ek meer as twee maal by hierdie huis om te kyk vir die wa, maar was die hekke ges/uit en kon ek niemand daar vind nie. Ek het u slegs vir 2 pogings laat betaal. ***Ek is bewus daarvan dat hierdie man en vrou besigheids persone is en selde by die huis is.***

U sat albei hierdie pogings betaal, aangesien ek dit nie sat afskryf nie. *U kan my telefoonnommer aan Taung Balju deurgee en* ***sodra hy die wa in my jurisdiksie het, sat ek voortgaan om daarop beslag te le.*** (Own emphasis)

[10] Had regard been had to the appellant's aforementioned letter in para 7 (above), the sheriff would not have visited this place unarranged and the response in para 8 above would have been avoided. The sheriff did not have to hear it from a gardener because the letter dated 16 April 2012 had already informed him of the situation and appellant's request to notify him of the day on which he needed to carry out the attachment.

[11] Despite the fact that the letter dated 16 April 2012 was, in my view, clear and unambiguous but contrived to be misunderstood or misinterpreted by the sheriff, the appellant wrote another letter (dated 30 April 2012) in which he not only withdrew part of what he said in his previous letter but also agreed that his client or his firm was liable to settle the sheriff's costs in full. It is common cause

that all accounts in respect of the non-service were settled. This last sentence of the appellant's letter is however significant:

"We are contacting our clients to arrange return of the trailer to his house at Hartswater and to advise you in that regard. The warrant of execution is being returned to you." (Own emphasis)

[12] It is also common cause that the appellant's client removed the said trailer from Pampierstad **and took it directly to the sheriff,** an action evidently not agreed upon with his attorney. It is unclear whether by doing so his client was on a frolic of his own or was an innocent act with the hope of expediting the process. Be that as it may, on 21 June 2016, 52 days later, the sheriff wrote to the appellant confirming that the trailer was in his possession and would charge a storage fee of R30.00 (thirty rand) per day with effect from 18 June 2012 until the trailer was removed. The sheriff concluded the letter by enquiring from the appellant after the whereabouts of the execution debtor to enable him to execute the Warrant of Execution. The appellant only responded on 12 July 2012. The address furnished by him was [...] T. S., Galeshewe, Kimberley.

[13] Of further importance is the aspect of the delay by the sheriff to finalise his legal obligations. It is common cause that the trailer was kept by the sheriff in storage for a period of two years. **A sheriff should only attach property (the said trailer) after demanding payment from a judgment debtor.** See Rule 41 (1)(a) of the Magistrates' Courts Rules. This was not done. The appellant, as legal representative, did not explain the reasons why

he did not request the Kimberley sheriff, Mr Seema, to serve the Warrant of Execution instead of persisting with the Hartswater sheriff who lacked the required jurisdiction to execute in Kimberley. Despite the jurisdictional impediment the appellant undertook to provide the respondent sheriff with the Notice of Sale and Security after the service.

[14] We already know that the sheriff did not demand payment of the R30 851.00 from the judgment debtor, the late Mr Motaung. Hence the trailer was delivered to him by Mr Modisa. Despite that the sheriff failed to draw up an inventory and make a valuation of the trailer as required by Rule 41(1)(a) and (b). Although the trailer was never lawfully attached by the sheriff it remained in his custody. Rule 41(f)(i) further stipulates:

"Unless an order of court is produced to the sheriff requiring him or her to detain any movable property under attachment for such further period as may be stipulated in such order, the sheriff shall, if a sale in respect of such property is not pending, release from attachment any such property which has been detained for a period exceeding four months."

[15] The question that also falls for determination is whether the period of two years during which the sheriff kept the trailer was reasonable or not. Mr Jankowitz argued that taking into account what transpired during this period and the fact that the sheriff was rendering monthly accounts to the appellant, the delay was reasonable. I cannot agree. Leaving the delay open-ended i.e without a limitation or timeframe is a sure recipe for abuse. Had

the sheriff complied with the Magistrates Court Rules this situation could have been avoided.

[16] From the provisions of Rule 41(7), quoted in full hereunder, it is disconcerting that the sheriff having received the trailer directly from the judgment creditor and, as already stated, without having effected an attachment, also did not observe the following provisions:

"(7)(a) The execution creditor or his or her attorney shall, where movable property, other than specie or documents, has *been attached, after such notification of such attachment,* ***instruct the sheriff in writing, whether the property shall be removed to a place of security*** *or left upon the premises in the charge and custody of the execution debtor or in the charge and custody of* some *other person acting on behalf of the sheriff: Provided that the execution creditor or his or her attorney may,* ***upon satisfying the registrar or clerk of the court, who shall endorse his or her approval on the document containing the instructions, of the desirability of immediate removal*** *upon issue of the warrant of execution, instruct the sheriff in writing, to remove immediately from the* possession *of the execution debtor all or any of the articles reasonably believed by the execution creditor to be in the* possession *of the execution debtor.*

(b) In the absence of any instruction under paragraph (a), the sheriff shall leave the movable property, other than specie or documents, on the premises and in the possession *of the person in whose* possession *the said movable property* is *attached."*

In my view there was neither urgency nor any need for the sheriff to keep the said trailer in his storage especially when there was an

option for Mr Modisa to keep it in his possession until the sale in execution was arranged after having followed the required procedural steps. (Own emphasis)

[17] In an undated handwritten fax, which according to the appellant may have been written on the 04 December 2012, an enquiry was directed to the sheriff for him to indicate whether the trailer had been sold and to contact him urgently on his cellphone on the numbers reflected on that facsimile. The sheriff responded the following day, 05 December 2012, interestingly as follows:

"Met verwysing na u faks sonder datum ontvang op 04.12.2012.

Ek kan ongelukkig geen veiling hou as ek nie 'n Kennisgewing van Verkoping ontvang het nie. *Ek het u wel destyds in kennis gestel datdie Balju vir Kimberley die kennisgewing van beslaglegging moes beteken op die verweerder. Die balju het my persoonlik verwittig dat hy nie 'n diens aan u kan lewer alvorens u sy rekening betaal nie. U het onderneem om dit met die balju vir Kimberley uit te sorteer nadat u met mnr Van Staden in gesprek* was.

My rekening ten opsigte van stoorkoste beloop R5814.00 tot en met vandag en moet hierdie bedrag plus verdere kostes ten opsigte van administratiewe werk ten volle vereffen word alvorens ek 'n veiling hierin sal hou.

U het meegedeel dat u dit met horn sou uitsorteer waarna ek nog nooit enige instruksies verder ontvang het nie...."

[18] There was a lull from 05 December 2012 to 13 March 2013 between the parties. On 14 March 2013, three months and ten days later, the appellant wrote to the sheriff requesting him to

return the Boer Bull trailer to his client. The sheriff responded a month and fifteen days later, on 29 April 2013, focusing on the aspect of storage costs, and stated:

"Hierdie sleepwa* sal *aan niemand oorhandig word alvorens hierdie stoorkostes finaal vereffen word nie. Op 02 April 2013 het die eiser my kantoor besoek. Ek het aan hom meegedeel dat hierdie kostes eers betaalbaar is. *Tot op hede het ek geen betalling ontvang nie en gee ek hiermee drie (3) dae tyd om hierdie aangeleentheid te finaliseer en my rekening te betaal. Tot en met vandag is die stoorkoste R11 628.00* ***en* sal *dit vanaf 03 May 2013 verhoog na R100.00 per dag tot en met verwydering."*** (Emphasis added)

[19] The appellant has by letter dated 03 June 2013 attempted to clarify that the Kimberley sheriff, Mr Seema, never received the Warrant of Execution. Mr Seema and his secretary, Ms Bianca, are said to have confirmed to the appellant that had their office received the Warrant it would have been registered on their system. The appellant provided the sheriff with Mr Seema's cellular phone numbers. Still appearing in person before us, the appellant submitted that the sheriff was not instructed to attach the trailer from Pampierstad or to have it delivered directly to him. He also canvassed the issue of financial prejudice to his client more so in that the judgment debtor, Mr Motaung, had passed away in April 2013.

[20] Notably, neither the said sheriff of Kimberley, nor his secretary or even the deputy sheriff, Mr Kika, were called as witnesses at the trial by either party to confirm or deny what

related to them. The sheriff maintained in a letter dated 06 June 2013 that he sent the Warrant of Execution to the Kimberley sheriff whose deputy had intimated that they refused to serve it because of an outstanding account that the appellant had with them. In the midst of this impasse the sheriff in pursuance to his storage fees went ahead with the advertisement of the trailer ostensibly acting in terms of s 71A of the Magistrates Court Act, 32 of 1944, to recover his storage costs. The advertisement was carried in the Noordwes Koerante *T/A* Stellalander but does not form part of the papers, only the Tax invoice is indicative thereof. However, the statement and proof of payment to Noorwes Koerante *T/A* Stellalander by the sheriff were furnished.

[21] It is evident from the record of proceedings that the appellant informed the presiding Magistrate that he was unaware of pages 1 to 23 in the bundle of documents handed in as Exhibit A. He only became aware thereof on 03 March 2015 when they were discovered, a point conceded by the sheriffs attorney, Mr De Bruyn. It follows that the appellant was unaware of the process that had allegedly been followed by the sheriff in terms of s 71A.

[22] Section 71A stipulates:

"71A Movable property which messenger cannot dispose of in terms of this Act, shall be sold by public auction. -

(1)Any movable property in the custody of the messenger or any other person acting on his behalf ***in respect of which attachment has been withdrawn*** *or which is released from attachment and in respect of which the owner or person from whose possession the property has been removed,* ***cannot be***

traced, *and which cannot be disposed of in terms of this Act, shall be sold by the messenger by public auction, and the proceeds of the sale shall, after deduction of the messenger's costs, be paid into the consolidated Revenue Fund:* ***Provided that such sale shall not take place unless such property has remained unclaimed for a period of fourteen days after the messenger has published, in one English and one Afrikaans newspaper circulating in the district where the last known address of the judgment debtor is situate, a notice containing the name of the judgment debtor, a description of the property and stating the intention to sell such property if it is not claimed within the period specified therein.***

(2) ***After*** *the public auction referred to in subsection (1), the messenger shall draw up a vendue roll as if the sale was a sale in execution of property and shall attach the roll to his return in respect of the relevant process of the court in the case together with proof that the proceeds of the sale have been paid into the Consolidated Revenue Fund.*

(3) The proceeds of a sale paid into the Consolidated Revenue Fund in terms of this section, shall be refunded out of accruing revenue to any person who satisfies a judicial officer of the district in which the sale took place that he would have been entitled to receive the property referred to in this section after the attachment thereof had been withdrawn or the property had been released from attachment."

[23] It is unquestionable that the trailer was never attached and the appellant did not receive the return of non-service either. This is how the record reads at page 33:

"Magistrate: Mnr Van Staden, voor ek na die volgende bladsy toe oorgaan, is *daar toe ooit 'n veiling gehou van daardie sleepwa?*

Mr Van Staden: Edelagbare nee, ek kon geen veiling hou of reel omdat daar geen betekening van die lasbrief was *nie."*

It is incomprehensible how Mr Jankowitz could argue that because the appellant erroneously spoke of "the attached trailer" when enquiring from the sheriff whether it has been sold, that it meant that the trailer was indeed attached. Contextually the appellant meant to refer to the trailer in the possession of the sheriff. Mr Jankowitz conceded that there was nothing in the papers that served as proof that the trailer was indeed attached.

[24] What is puzzling is that the sheriff sold this trailer purportedly in terms of s 71A for R4500.00 to a Mr JNL Van Staden whose relationship to the sheriff, also a Van Staden, has not been disclosed. The s 71A notice in the Magistrates Court dated 17 July 2013 stated that **the sheriff is in possession of an unclaimed trailer** which will be sold on a public auction if no claim was received within 14 days from the date of the advertisement. What I find peculiar about this assertion, that the trailer was unclaimed, is that the appellant had already written to the sheriff and requested him to return the trailer to the judgment creditor (Mr Modisa) who himself had visited the respondent on **02 April 2013.** Th is is what the sheriff wrote:

"Op 02 April 2013 het die eiser my kantore besoek rakende hierdie situasie. ***Ek het aan hom verduidelik wat aangaan rondom die***

stoorkostes en dat die sleepwa in my besit sal bly tot ek my geld ontvang het. *Hoe op aarde kan u verwag dat ek maar net die sleepwa sou teruggee aan die eiser?" (Own emphasis)*

[25] It is clear to me that the issue was not that the trailer was unclaimed. The sheriff knew that the judgment creditor (Mr Modisa) needed to recover his debt from the proceeds of the sale of that trailer. He was the successful party. This is what appears on the return of service of 23 May 2013:

"Mr MF Modisa *Execution Creditor*

And

Mr Henry Pogisho Motaung *Execution Debtor*

Return in accordance with the provisions of the Magistrate's Court Act 32 of 1944, as *amended*

The storage fees are calculated from 18.06.2012 till 02.05.2013 for R30.00 p/day. From the 3rd of May [2013] it is *calculated at R100.00 p/day.* ***The trailer will remain in my possession till full and final payment is received. All extra administration costs will be debited against your account.***

With reference to several correspondence herein and my letter dated 29.04.2013.

PS: The original return together with the original abovementioned process is *dispatched to the man."*

A sum total of R13 366.95 was claimed, the storage fees whereof amounted to R9540.00.

[26] On 19 June 2014 the sheriff issued a "complementary return":

"Herewith the outstanding costs *regarding the storage and further*

administration costs with reference to my return dated 23 May 2013.

PS: The original return together with the original abovementioned process is dispatched to the man."

Here a revised amount of R24 173.34 was reflected for storage and administration.

[27] The compound storage costs consequently escalated to an astronomical figure of R37 897.89. This figure is even higher than the judgment debt of R30 851.00 which was claimed by Mr MF Modisa, the Execution Creditor. The sheriff stated that there are no guidelines regulating how much he could charge for storage. So he asked around and was advised that he was undercharging. He increased his fees for what is colloquially referred to as an "overnight" charge with no adequate warning. The storage costs were calculated as follows: 18 June 2012 to 02 May 2013 at R30.00 per day amounted to R9540.00 and for the period 03 May 2013 to 06 December 2013 at R100.00 per day amounted to R21 700.00. The total figure for storage alone amounted to R31 240.00. The difference from the total amount of R37 897.89 comprises the alleged sheriff's expenses for newspaper advertisements, bank charges, correspondence, selling expenses and telephone costs.

[28] I find fault with the sheriff for receiving the trailer directly from the judgment creditor (Mr Modisa) when he was instructed that he had to attach it at [...] S. S.. Had the sheriff notified Mr MF Modisa that there were storage fees involved, Modisa's decision

whether to leave the trailer with the sheriff or take it to his residence to secure an attachment would have been significant.

[29] Despite the fact that the sheriff knew that the appellant was the judgment creditor's attorney, who had already written to him and asked for the trailer to be returned to the judgment creditor on 17 July 2013 the sheriff nevertheless wrote:

"In terms of the Magistrate Court - Section 71A I, sheriff for Hartswater, give hereby notice that I am currently ***in possession of an unclaimed trailer.*** *This trailer will be [sold] on* a *public auction if no claim is received within 14 days from date of this advertisement."*

[30] On 31 October 2013 the sheriff issued a Notice of Public Sale wherein he intimated that in terms of the provisions of Article 71A of the Magistrate's Court Act an unclaimed trailer would be sold to the highest bidder on 06 December 2013 at the sheriff's offices at 10h00 . It turns out, as already stated, that the trailer was only sold for R4500.00 to a Mr JNL Van Staden. The sheriff claimed to have kept the trailer as a lien to recover his outstanding storage fees. A lien is defined in The Law of South Africa (LAWSA) 2nd Ed Vol 15 Part 2 Para 49 as:

"(T)he right to retain physical control of another's property, whether movable or immovable, as a *means of securing payment of* a *claim relating to the expenditure of money or something of monetary value by the possessor (termed 'retentor' or 'lien holder', while exercising his or her lien) on that property, until the claim has been satisfied."*

[31] In ***Oceana Leasing Services (Pty) Ltd v BG Motors (Pty) Ltd*** 1980 (3) SA 267 (WLD) at 273C Melamet J remarked:

"A pledge of property, without the consent of the owner, is not binding on the owner thereof: Wille The Law of Mortgage and Pledge in South Africa 2nd ed at 27; Roos v Ross & Co *1917 CPD 303 at 306 - 307."*

Van Zyl J in ***Trust Bank van Afrika BPK v Van der Walt N.O*** 1972 (3) SA 166 (KPA) at 170F - H enunciated the following as translated in the unreported judgment by Ndlovu J in ***Absa Bank Limited v Robin's Mobile & Fleet Maintenance CC*** Case No 11956/2011 delivered on 05 April 2011:

"There is no agreement to pay storage. Storage can, therefore, not be claimed ex contractu. If it is claimable it must be on the ground of enrichment. The applicant is not enriched by the storage of the lorry. Respondent had a *claim against the applicant for the repair of the lorry and he held the lorry as security for the payment of those repairs. After completion of the repairs the respondent could immediately have claimed the amount due from applicant and if applicant failed to pay, the respondent could have sued him for the amount due. The debtor is not enriched by* costs *incurred by the creditor* as a *result of his omission to claim, just* as *interest on an outstanding amount of money cannot be claimed. Storage cannot be claimed in these circumstances. If respondent foresaw storage* as a *result of late payment he should have stipulated for that."*

[32] Sonnekus and Neels Sakereg Vonnisbundel at 768 classify a lien as a form of self- help that has been sanctioned by law with the effect that it encroaches on the entitlement of owners. Thus this

form of "self-help" should only be allowed in certain well-defined instances. Van Reenen J also pointed out in ***Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre*** 1997 (1) SA 646 (CPD) at 652C - D:

"On my understanding of the authorities the essential content of a *ius retentionis in South African law* is *the right on the part of* a *retentor to retain physical control of another's property* as a *means of securing payment by the owner thereof- to the extent that he* has *been enriched - of money or labour expended thereon by the retentor. Brooklyn House Furnishers (Pty) Ltd v Knoetze and* Sons *1970 (3) SA 264 (A) at 270E."*

[33] It is common cause that the sheriff, Mr Van Staden, though placed in possession of the Warrant of Execution, did not attach the trailer. Procedurally, it is a requirement that the sheriff ought to demand payment of the judgment debt from the Execution Debtor before attaching the property. Since the Execution Debtor was in a different area of jurisdiction, Kimberley, the legal process had to be carried out by the Kimberley sheriff, which did not happen.

[34] The following can be abstracted from the Magistrate's judgment:

34.1 The Magistrate found that the sheriff had attached the trailer and was entitled to claim the costs from the appellant as the instructing attorney. This finding is incorrect. It was conceded by the sheriff during the trial that he could not attach the trailer as it was beyond his jurisdiction. It was therefore a misdirection by the

Magistrate to nevertheless still have found that the sheriff had attached the trailer.

34.2 The Magistrate focused on the question: *"what* was *the mandate given to the sheriff and who gave him that mandate?"* and *"whether the plaintiff acted within the borders of his mandate or for that matter outside his instructions."* According to the Magistrate he looked at the Warrant of Execution which reads:

"To the Messenger of the Court:

Whereas in this action the said Execution Creditor [Mr M F Modisa] on the 09 March 2011 obtained judgment in the abovementioned court against the said Execution Debtor [the late Mr Henry Pogisho Motaung] of [...] S. S., Hartswater, for the several sums set out in the margin hereof amounting in all to the sum of R30 851.00 (excluding interest still to be added to the Capital Amount) of which RNil has since been paid. This is therefore to authorize and require you to raise on the property of the said Execution Debtor the sum of R30 851.00 + interest + messenger's Fee together with your costs of this execution and pay the said Execution Creditor's Attorney the aforesaid sum of R30 851,00 + interest and return to this court what you have done by virtue hereof "

The sheriff has clearly not carried out the mandate as reflected on the Warrant of Execution.

34.3 It is further unclear how the Magistrate could then have found that the sheriff was justified in using the Warrant of Execution as authorising him to recover the storage costs because the Warrant of Execution was meant to compensate the Execution Creditor who in this instance was left in the cold.

34.4 It remains inexplicable how the sheriff could have resorted to self-help by selling the trailer following the s 71A route when the judgment creditor was known to him. In my view it was unprocedural and unjustified for the sheriff to have done so.

34.5 Even if my conclusions were to be wrong I nevertheless find that the escalation from a modest but reasonable storage charge of R30.00 per day to an astronomical R100.00 per day was arbitrary, unilateral, irregular and unjustified.

[35] In any event the law exonerates the appellant from liability in the circumstances of this case. In THE LAW OF SOUTH AFRICA (LAWSA) Second Edition Volume 14 Part 2 page 267 para 306 the following is stated:

"An attorney is not responsible for any wrongful act committed by him or her qua attorney within the scope of his or her authority: qui tacit alium tacit per se." See ***Smit v Meyerton Outfitters*** 1971 (1) SA 137 (T).

[36] Even if the claim of the plaintiff/respondent (the sheriff) claim succeeded he would only have been entitled to storage costs at the rate of R30.00 per day for a period not exceeding four (4) months. Rule 41 aforementioned is a good indicator that a period of 4 months would have been reasonable. This would have meant that the sheriff would have been entitled to R30.00 X 319 days as calculated from 18 June 2012 to 02 May 2013: an amount of R9570.00.

[37] In as far as the costs are concerned fairness and equity dictates that each party should bear his own costs notwithstanding the

appellant's success. I am mindful that the appellant throughout the proceedings handled his own case. This is not prohibited. He is an admitted attorney and lost income when he prosecuted his case. However, he and his client (Mr Modisa) contributed in large measure to the confusion and delay in this matter. In the result, the following order is made:

Order

1. **The appeal is upheld.**
2. **The Magistrate's judgment and order are set aside.**
3. **Each party is ordered to pay his own costs including the costs of the appeal.**

M C MAMOSEBO
JUDGE
NORTHERN CAPE DIVISION

I concur

s

F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

WILLIAMS J

38. I have read the judgment of Mamosebo J in this matter. I agree with the proposed order but for different reasons. The facts of this appeal are set forth in the judgment of Mamosebo J and I therefore deal with it only as far as is necessary to give completeness to my reasoning.

39. After the initial difficulties experienced by the sheriff in attaching the trailer at the residence of the judgment creditor, Mr Modise, he returned the warrant of execution to the appellant, Mr Bojosinyane. The date on which the warrant was returned is not apparent from the evidence or the correspondence between the parties. From the evidence of the sheriff however (and the particulars of claim I may add) it is clear that on the date that Modise delivered the trailer at the sheriff's place of business (18 June 2012) the sheriff was not in possession of the warrant of execution anymore.

40. What is important about this fact is that he did not at the relevant time have an instruction from the appellant to attach the trailer. That instruction was only given again on 12 July 2012 when the appellant forwarded 2 copies of the warrant of execution to the sheriff together with the address of the judgment debtor for service thereof. The sheriff confirms in his evidence-in-chief that his instructions received on 12 July 2012 were to attend to the service

of the warrant of execution on the judgment debtor and the attachment of the trailer.

41. In the amended particulars of claim the sheriff's cause of action is set out as follows:

"3. Op of ongeveer Junie 2012 het die Eiser die verweerder in kennis gestel dat die Verweerder se klient 'n sekere sleepwa aan die Eiser oorhandig het. Die Verweerder het derhalwe die Eiser opdrag verskaf vir die gepaardgaande beslag/egging op die sleepwa en ook om toe te sien tot die verkoping van die sleepwa.

4. Hierby aangeheg rekeningstaat soos opgestel deur die Eiser aan die Verweerder wat aantoon die onderskeie fooie, uitgawes en koste waarop die baljuldie eiser geregtig is om te verhaal in terme van die Landdroshof wetgewing."

"Die Eiser het die sleepwa wat gestoor is by die Eiser in terme van Artikel 71A van die Landroshowe Wet verkoop op 'n publieke veiling waarvan die opbrengs die bedrag van R4500. 00 beloop het

42. The bulk of the charges in the statement of account relate to the storage costs of the trailer - some R31 240, 00 of a total account which inclusive of VAT amounted to R37 540, 29. After deduction of the selling price of the trailer the sheriff's claim against the appellant totalled R33 040, 29.

43. From what transpired after the warrant of execution was received by the sheriff on 12 July 2012, and which is dealt with in the judgment of Mamosebo J, it is obvious that judicial attachment of the trailer never took place. The court a *qua* was wrong in finding

that it had. It follows also that the sheriff's reliance on s71 A of the Magistrates Court Act for the sale of the trailer is misplaced. This is not a case where attachment had been withdrawn or where the trailer had been released from attachment and the owner or person it had been removed from cannot be traced, as envisaged in the section. There is therefore no basis upon which the appellant can be held liable for the charges relating to notices, advertisements and other expenditure in connection with the sale of the trailer.

44. I return to the issue of the storage costs. It is common cause that the appellant did not personally instruct the sheriff to store the trailer. The evidence of the sheriff in this regard is:

> "... *ek verstaan dat Mnr Bojosinyane se dat hy nie die opdrag gegee het vir die verwydering nie, maar ek wil ook aan die Hof weereens verduidelik dat sy kliient het die wa na my toe gebring en uit hoofde van vorige kere wat die lasbrief by my was, het ek geweet dat dit vir hulle belangrik is dat daar op die wa beslaggele moes word. En toe hulle die wa na my toe bring was dit my eerste optrede om vir mnr Bojosinyane in kennis te stel dat die item wet in my besit is."*

45. Having established that (i) there had been no express agreement between the appellant and the sheriff that the trailer be stored at the premises of the sheriff and that (ii) the storage of the trailer did not take place pursuant to the execution process as prescribed in Rule 41, the question is on what basis the appellant could be held liable for the storage costs.

46. In this respect Mr Jankowitz who appeared for the sheriff argued that at the very least it was an implied term of the agreement between the parties that the appellant would be liable for the

storage costs. I cannot agree with this contention. An implied term usually arises by operation of law. In *Bertelsmann v Per* 1996(2) SA 375 TPD at 382-383, where the issue was whether the liability of an attorney for counsel's fees was implied as a matter of law, it was held that it would depend on the existence of a professional practice or trade usage which would have to be established by evidence. *In casu* no evidence was led to the existence of such professional practice or trade usage between an attorney and the sheriff and in addition no such implied term was pleaded. In any event such implied term would be contrary to the general principle as enunciated in *Diplock v Webb 1910 CPD* 198 at 202 as follows:

"Now, under ordinary circumstances, unless some special liability is incurred by the attorney in his transactions with the Messenger, the attorney renders himself in no respect liable for the costs which his client is condemned to pay. That is laid down in the case of Maybery v Mansfield (9c.B.754), and the principle of that judgment may be accepted by this Court. It amounts to this: that, under ordinary circumstances a messenger acts as an officer of the Court, and not as a servant of the attorney who issues the writ; that as an officer of the Court he is entitled to certain costs, and those are costs which must be paid by the client for whom the attorney acted. That is the general principle, and I can find nothing in this particular case which would take the case from under that principle. The attorney entered into no contractual relation with the Messenger, and he did no more that is usually done by parties to a suit i.e., to assist the Messenger in discovering the whereabouts of property belonging to a judgment debtor."

(own emphasis)

47. Had Mr Jankowits meant to argue that it was a tacit term of the agreement that the appellant be liable for the storage costs, the

first obstacle once again is that such a term has not been pleaded. Furthermore in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974(3) SA 506(A) at 532 H, it is stated that:

"The Court does not readily import a tacit term. In cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration m a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term."

48. In light of the fact that there was no instruction from the appellant that the sheriff store the trailer and no subsequent attachment, there are no grounds upon which to import a tacit term conferring liability for storage costs on the appellant.

CC WILLIAMS

JUDGE

NORTHERN CAPE DIVISION

I concur

F DIALE KGOMO

JUDGE PRESIDENT

NORTHERN CAPE DIVISION

For the appellant:	**Mr BG Bojosinyane (in person)**
For the respondent:	**Adv DC Jankowitz**
Instructed by:	Haarhoffs Attorneys