OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE NORTH WEST HIGH COURT
MAHIKENG

CASE NO.: M510/2015

In the matter between:

FRANS SETHUBI RAMOLOSO **Applicant**

and

KABELO MOKOTEDI
(In her capacity as Executrix of Estate
Late Gosalamang George Mokotedi) **1st Respondent**

RAMORWA KGORI **2ND Respondent**

SHERIFF, ZEERUST **3rd Respondent**

VAN DER MERWE & COETZER ATTORNEYS **4TH Respondent**

DATE OF HEARING	**:**	**10 NOVEMBER 2016**
DATE OF JUDGMENT	**:**	**10 NOVEMBER 2016**
DATE OF REQUEST OF REASONS	**:**	**23 NOVEMBER 2016**
DATE REASONS WERE HANDED	**:**	**24 FEBRUARY 2017**
FOR THE APPLICANT	**:**	**Mr C.E. Boden**
FOR THE RESPONDENT	**:**	**Adv. C. Zwiegelaar**

REASONS FOR JUDGMENT

KGOELE J:

[1] Pursuant to a warrant of execution issued against applicant in the Magistrate Court for the district of Marico held at Zeerust under Case No. 65/2007, applicant's right, title and interest in a High Court matter in this Division under Case No. 1659/2009 was attached and sold in execution at the offices of Attorneys Coulsen & Jacobs, Zeerust on the 4th September 2015.

[2] The applicant sought in the present application the rescission and setting aside of the aforesaid attachment and sale in execution of his right, title and interest in the civil action pending in this Court.

[3] The application was served upon the first to fourth respondents inclusive in January 2016. The first to fourth respondents delivered a notice of intention to oppose on 18th January 2016. Answering affidavits which were due on 8th February 2016 were filed by the respondents on 21st July 2016, some three days prior to the matter being heard on 28th July 2016.

[4] The matter was argued on the 10 November 2016 and the following order was issued:-

1. *"The attachment and sale in execution held at the office of the Sherif, Zeerust by the Third Respondent on the 4th day of SEPTEMBER 2015 under case number 65/2007 be and is hereby rescinded and set aside.*

2. *The applicant's rights in respect of the High Court litigation conducted in this Court under case no: 1659/2009 be and is hereby restored.*

3. *The First to Fourth Respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved, as between party and party scale."*

[5] The first, second and fourth respondents filed a notice in terms of Rule 49(1)(c) of the Uniform Rules of Court (**The Rules**) on the 23rd November 2016 and the reasons for the said order follows hereunder.

[6] The factual background to this matter is to the effect that during or about 2004, a Close Corporation, AST Africa Trading 607 CC in which the late Gosalamang George Mokotedi, the second respondent and the applicant were members, each holding an equal interest, purchased a farm namely Portion 12 (a portion of portion 8) of the farm Petrusdam 55, and the remaining extent of Portion 8 of the same farm (the farm) for an amount of R628 000.00 (Six hundred and twenty eight thousands). Such purchase was financed by the Land and Agricultural Development Bank of South Africa pursuant to a loan agreement with AST Africa Trading 607 CC. One of the terms of the written association agreement was that the applicant, the late Mokotedi and the second respondent as members of AST Africa Trading 607 CC had to make equal contributions to the said bank.

[7] AST Africa Trading 607 CC, the late Mokotedi and the second respondent instituted an action against the applicant based on the repudiation of the applicant of this written association agreement. The order sought against the applicant was firstly to direct him to sign his full membership in AST Africa Trading 607 CC off in favour of the late Mokotedi and the second respondent, alternatively, to pay an amount of R25 000.00 being the arrear amount payable to the Land Bank. It appears that a default judgment was then issued together with a Warrant of Execution by the Clerk of the Court Marico on the 23rd February 2007.

[8] The default judgment granted against the applicant in the civil action in the Magistrates' Court was for an amount of R37,702.36 which has been compounded as follows:

"Vonnisskuld:	**R25,000.00**
Koste:	**R 601.40**
Uitreiking van lasbrief:	**R 51.30**
Rente 14-01-2004 tot 22-02-2007 @ 15.50%	**R12,049.66"**

[8] The warrant of execution of property issued against the applicant on the strength of the default judgment in the civil action in the Magistrates' Court was served on the applicant personally at his place of business during the last week of February 2007. An application for the rescission of the default judgment granted against the applicant in the civil action in the Magistrates' Court was served on the fourth respondent, who was the attorney of

record of AST Africa Trading 607 CC, the late Mokotedi and the second respondent therein on 30 March 2007 after the third respondent had attached and removed the applicant's goods on 1 March 2007 and left a notice showing that the applicant's goods would be sold in execution on 13 April 2007.

[10] The applicant's application for the rescission of the default judgment granted against him in the civil action in the Magistrates' Court was on 4 May 2007 dismissed with costs and it was directed that the costs thereof was immediately taxable and payable. A sale in execution of certain of the property of the applicant attached by the third respondent on 1 March 2007 was held on 8 June 2007 and the third respondent paid an amount of R2,181.29 in respect thereof to the fourth respondent on 5 July 2007.

[11] In the mean time during the year 2007 according to the applicant the farm was sold by the Close Corporation AST Africa and he was precluded from sharing in the proceeds. The applicant issued summons against AST Africa, the late Mokotedi and the second respondent to claim his share of the net proceeds. The applicant's claim against AST Africa Trading 607 CC, the late Mokotedi and the second respondent in the civil action in this Court was for payment of the sum of R631,063.57 which the applicant alleged is his *pro rata* share as member of AST Africa Trading 607 CC of the proceeds of the farm which was held in an interest bearing trust account by the fourth respondent.

[12] The civil action in this Court was on 14 October 2013 removed from the roll by Hendricks J after the then attorney of record of the applicant withdrew as attorney of record of the applicant to enable the applicant to obtain the services of another attorney and the applicant was directed to pay the wasted costs occasioned by the removal of the matter from the roll.

[13] On 24 April 2014 a warrant of execution of property was issued against the applicant by the Registrar of this Court for the taxed costs and charges as per the taxed bill of costs in respect of the costs order made by Hendricks J against the applicant on 14 October 2014 and in which the third respondent was directed to attach and take into execution the movable goods of the applicant and cause same to be realised by public auction the sum of R136,075.22 plus costs.

[14] On 20 May 2014 the third respondent executed the warrant of execution of property referred to above at the place of business of the applicant and attached the movable goods that were pointed out by the applicant to him and served copies of the warrant of execution of property and the notices of attachment on the applicant by handing it to the applicant personally.

[15] Pursuant thereto an interpleader notice pertaining to adverse claims in respect of the property attached in execution by the third respondent on 20 May 2014 has been received. AST Africa

Trading 607 CC, the late Mokotedi and the second respondent decided to accept the adverse claims in respect of the property attached in execution by the third respondent on 20 May 2014 and the fourth respondent informed the third respondent accordingly.

[16] Another warrant of execution was issued against the applicant in the magistrate Court for the district of Marico held at Zeerust under the Case No. 65/2007 wherein the applicant's right, title and interest in the High Court matter he instituted in this Division under Case No. 1659/2009 was attached and sold in execution at the offices of Attorney Coulsen & Jacobs, Zeerust on the 4th September 2015. It is this warrant of execution which is the subject matter of the current proceedings.

[17] At the time of the sale in execution of the right, title and interest of the applicant in the civil action in this Court on 4 September 2015 the applicant had not made any payment to AST Africa Trading 607 CC and the first and second respondent in respect of the costs order made against him by Hendricks J on 14 October 2014.

[18] Although the applicant raised a myriad of alleged procedural irregularities in support of this application which the respondent also responded to, the parties agreed that they should only argue a crisp issue which the respondents conceded to wit" *"that the aforesaid right, title and interest of a litigant in an action does not fall within the ambit of* "***property executable***" *as envisaged in Section 68 of the Magistrate's Court Act Number 32 of 1944 (the Magistrates Court*

Act) or **"*debts*"** as envisages *in Section 73 thereof and further that it is thus not pursuant to the provisions of those sections liable to attachment and to be sold in execution to satisfy the judgment creditor's claim".*

[19] The aforesaid also appears to be trite by now.

See: **Poffley v Goldblatt 1933 TPD 222 to 223 and 227;** and **PMB Hardware Wholesalers CC v Yusuf 2003 (2) SA 73 (NPD)** at **74 H to I.**

[20] In **PMB Hardware Wholesalers CC v Yusuf (***supra***)** the applicant obtained a judgment against the respondent in the Mount Frere Magistrate's Court, Trankei. No property which was executable under the provisions of section 68 of the Magistrates' Court was found by the various Sheriffs of the Magistrate's Court to whom writs of execution were issued pursuant to the said judgment. After having established that the respondent had an action pending in the Durban and Coast Local Division of the High Court against an insurance company in which he claimed payment of an amount of money, the applicant instructed the sheriff of the Magistrate's Court, Durban to attach the respondent's right, title and interest in that claim in execution of the judgment in the Magistrate's Court. The sheriff, however, took the view that the respondent's claim against the insurance company was not "executable property" as envisaged in section 68 of the Magistrates' Court Act. The applicant then applied to the Durban and Coast Local Division of the High Court for an order authorising the sheriff of the Magistrate's Court, Durban, to attach the

respondent's right, title and interest in his claim against the insurance company in execution of the Magistrates' Court judgment and to sell such right, title and interest by public auction and apply the proceeds towards satisfaction of the unsatisfied judgment in the magistrate's court. It has been stated in 74 I of the judgment in respect of the aforesaid application that:

> **"I should perhaps say that, in my view, the view expressed by the sheriff in this regard** (*viz* that the respondent's claim against the insurance company was not executable property as envisaged in section 68 of the Magistrates' Court Act) (insertion added) **is a correct one."**

[21] It is of importance to note that the right, title and interest which the applicant in the matter of **PMB Hardware Wholesalers CC v Yusuf (***supra***)** sought to attach and sell in execution had like in the present matter also related to a High Court action and that the applicant intended to do the attachment and sale in execution thereof similarly to the present matter pursuant to a Magistrates' Court judgment.

[22] It is further trite that a judgment creditor who proposes to execute upon movable incorporeal property other than those referred to in section 68 and 72 of the Magistrates' Court Act must invoke the authority of the High Court: See:-

Grunter v Motlasi 1963 (3) SA 203 at 203 to 204; and

Patel v Manika And Others 1969 (3) SA 509 (D) at 510 to 511.

[23] Our case law suggest that the proper procedure to invoke the authority of the High Court is by means of an application to the High Court for an order authorising the attachment of the movable incorporeal property and for it to be sold by public auction and that the proceeds thereof be applied towards the satisfaction of the unsatisfied judgment.

[24] It has been held in **Suliman and Another v Volkskas Beperk and Another 1956 (2) 474 (TPD) at 475:**

> "The proper way to attach an incorporeal is to apply for an order of Court authorising the attachment of the incorporeal right. Where such an incorporeal is to be the subject of an attachment, there will in nearly all cases be other parties whose rights and interests may be affected. Notice should be given to all interested parties unless the matter is one of urgency when the Court may overcome the lack of notice by issuing a *rule nisi*".

[25] It is thus clear from the aforesaid that the first and second respondents should have prior to the attachment and sale in execution of the right, title and interest of the applicant in the civil action in this Court applied to this Court with notice to the applicant for an order authorising the attachment thereof and for it to be sold by public auction and that the proceeds thereof be applied towards the satisfaction of the judgment debt of the civil action in the Magistrates' Court.

[26] It is common cause between the parties that such an application has not been lodged by or on behalf of the first and second respondents. Consequently no authorisation for the attachment and sale in execution of the right, title and interest of the applicant in the civil action in this Court has been obtained. As such the third respondent was not empowered to attach and sell in execution the applicant's right, title and interest in the civil action in this Court.

[27] It was thus not competent for the third respondent to attach and sell in execution the right, title and interest of the applicant in the civil action in this Court merely by means of the re-issuing of the warrant of execution of movable property issued against the applicant on the strength of the judgment granted by default against him in the civil action in the Magistrates' Court. The attachment and sale in execution of the right, title and interest of the applicant in the civil action in this Court were thus for the aforesaid reason invalid.

[28] However the respondents' Counsel Advocate Zwiegelaar argued further that it is, however, not the end of the matter as section 70 of the Magistrates' Court Act gives a person who has purchased goods on a sale in execution in certain circumstances an impeachable title in such goods.

[29] Section 70 of the Magistrates' Court Act provides:

> "70. **Sale in execution gives good title**.
>
> A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect".

[30] She relied heavily on the cases of **Sookdeyi v Sahadeo 1952(4) SA 568 (A)** and **Gibson N.O. v Iscor Housing Utility Co Ltd and Others 1963 (3) SA 783 (T)** to support her proposition that it is clear from the aforesaid that if some error has occurred and a sale in execution has taken place and registration or delivery pursuant thereto has been effected, the delivery or registration cannot be impugned in the absence of *bad faith* or knowledge on the part of the purchaser.

[31] On this note Advocate Zwiegelaar submitted that the question thus arises as to whether the purchaser, in this case the first and second respondent, acted in *good faith* and without notice of any defect; that is without any knowledge of the fact that the attachment and sale in execution of the right, title and interest of the applicant in the civil action in this Court was invalid due thereto that the authorisation of the High Court has not been invoked as well as of the other defects as alleged by the applicant.

[32] To expand on this contention Advocate Zwiegelaar submitted that Mr Van der Merwe who is the attorney of record of the respondents and who has acted on their behalf in all the litigation

including the High Court one, might have been negligent by not knowing the correct procedure / law in this regard, but that does not mean he was a *mala fide* purchaser. He had played open cards all along and had also conceded to the fact that there is no such procedure in the lower Court showing honesty. The onus is therefore on the applicant to show that Mr Van der Merwe is not a *bona fide* purchaser.

[33] I fully agree with the submission by Mr Boden on behalf of the applicant that there are reasons to accept the fact that the respondents were not *bona fide* purchasers. The conduct of Mr Van der Merwe in particular who is an officer of the Court, and an attorney of record who not only dealt with the warrant but apparently represented the respondents during the sale is highly questionable. There are letters attached to the papers before Court where the applicant wrote to his firm with an effort to find out what happened and what transpired of the matter that the execution went through. He was not co-operative with the applicant at all. His letter dated 29 September is couched as follows:-

> *"We have been instructed not to assist you with any further information."*

This came after the last letter which followed the initial one and in this letter applicant's attorney were raising an issue that the legality of the steps taken to purchase their client's claim need to be investigated.

[34] The behaviour of Mr Van der Merwe persisted if one has regard to a further letter relied by the applicant despite the fact that the papers purport to indicate that the sale took place at their offices.

[35] It also appears that the Sheriff, the third respondent, was not co-operative either. This is evident from Annexure "T", a letter written by Mr Boden to him which has been couched as follows:-

> *"1. We record that you telephoned writer on Tuesday, 20th October 2015 and acknowledged receipt of our letter dated 16th October 2015 in which we requested details of the sale conducted by your offices.*
>
> *2. You advised writer that the documents would be available for collection at your offices the following day (Wednesday, 21st October 2015) at 15h00 and that we should send our client to collect same from you.*
>
> *3. We record that our client duly attended at your offices, at the appointed time and date and none of the documentation was handed to him.*
>
> *4. He returned yesterday (22nd October 2015) and again, the documents were not made available to him.*
>
> *5. Would you advise us:-*
>
> *5.1 Why you breeched your undertaking to hand the documents to our client or Tuesday, 20th October at 15h00 and*

5.2 when we can expect the documents and a full response to the question set out in our letter dated 15th October 2015

6. We are not developing grave suspicions as to whether any of the procedural requirements as set out in the Rules of Court were complied with and whether there was a proper sale in execution of our client's right, title and interest in and to his claims against the two defendants.

7. We record further, that you became extremely aggressive in the telephone conversation with our Mr Boden and amongst other things advised that it would take you five or six hours to answer all our queries.

8. With the utmost respect, your office conducted the sale and should be in possession of all the information requested in our letter.

9. We cannot understand your recalcitrance in supplying the information requested."

[36] Mr Boden's letter dated 26 October 2015 to the third respondent also depicts that the purported sale never came to their attention notwithstanding that they had filed a notice of appointment as attorney of record and has conducted correspondence with the execution creditor's attorneys in matters unrelated to the sale in execution.

[37] The following paragraph in the letter Mr Boden wrote on the 26 October 2015 to the Sheriff also depicts that from long time in

memorial before the institution of these proceedings, the issue of the illegality / proper procedure whether it was followed or not was in the pipeline, including the questionable conduct of Mr Van der Merwe.

> *"Given that your response will in due course form part of the record in an application to the High Court, Mmabatho, you may be well advised to avail yourself of the opportunity presented to give a detailed response. The execution creditors' attorney has adopted a stonewalling attitude which we will, in due course, bring to the attention of the relevant authorities, including the Local Law Society, in the event that proper procedures were not followed".*

[38] Advocate Zwiegelaar seems to suggest that Mr Van der Merwe did this *bona fide* when he was not aware of the law. Besides the fact that ignorance of the law is not an excuse, his conduct when asked for information reveals the contrary.

[39] There are further questionable issues regarding the said sale. The Verdurol attached on paginated page 133 indicates that the purchaser is Mr Van der Merwe when a letter from the Sheriff Annexure "W2" on paginated page 128 indicates *"Your clients' rights were duly sold to the Execution Creditors as per Vendu roll attached".* As if it was not enough, the Vendurol indicates that the commission of the Sheriff is R20 000-00 which amount is also highly questionable whether it is within the prescripts of the law. The identity of the purchaser is also at odds with what Mr Van der Merwe said in Annexure "L" where he said "the purchasers were

plaintiffs in case 65/2007 who were the defendants in the case 1659/2009.

[40] Any submission of *bona fides* clearly files against all that I had mentioned above and suggest a conduct which is against professional collegiality. It is only in their affidavit wherein Mr Van der Merwe explains the discrepancy that he was bidding on behalf of the defendants, a fact which both him and the Sheriff could have disclosed earlier when prompted to reply to the letters. Sight must not be lost of the fact that defendants had the onus to proof their *bona fides*.

[41] A careful reading of Section 70 of the Magistrate Court's Act depicts that the section is specific. It deals with property executable in the Magistrates Court which are movables and immovable. In my view, it is not a catch-up all umbrella section that affects other property which are outside those that are not governed by the Magistrate Court's Act.

[42] In addition, the failure to apply for authorisation from the High Court as required by our law is a major defect or a gross irregularity as it goes to the root of the attachment and the sale, and vitiates the two. In simpler terms, the Magistrate Court / Clerk did not have in *casu* authority to re-issue the warrant of execution. A careful analysis of the cases that dealt with this authority indicates that the authority is necessary because the High Court has jurisdiction over Magistrate Courts and can be able to supervise the process of attachment of the claim which is the subject of the application.

[43] In the case of **Joosub v J I CASE SA (Pty) Ltd (known as Construction and Special Equipment Co (Pty) Ltd and Others 1992 (1) All SA 55 (N)** the following was said:-

> "…If a sale in execution is invalid to the extent of being a nullity, there is no sale to which Section 70 can apply".

Once the respondent concede to the fact that they messed up as they did, it is the end of the matter because it is an important procedural issue.

[44] The submission also by Advocate Zwiegelaar that applicant did not rely on this issue of authorisation in their papers because they did not indicate to them that they (defendants) failed to obtain the necessary authority from the High Court cannot assist the respondent as it is ill-conceived. In paragraph 58 of the founding affidavit found on page 21, the applicant raised as a *Point in Limine* the fact that:- *"there is no procedure laid down in the Magistrate Court to attain my right, title and interest under case no. 1659/2009 being a pending High Court matter, and for this reason alone, it is submitted the sale should be set aside"*. The applicant did not have to put it in any clearer terms than this. The applicant also did not have to plead evidence and no obligation existed that he should have pointed to the defendants what they should have done. The failure to get authorisation is fatal to the respondents' case.

[45] All the cases that Advocate Zwiegelaar referred to this Court cannot also salvage the case of the respondents. All of them are distinguishable to our matter because their subject matter dealt

with was not similar to our matter which is *"attaching a claim to the title, interest of a judgment debtor"*. They dealt with property that is executable in terms of the Magistrate Court Act. In addition to this, all of these cases dealt with the mistakes or errors which had occurred in the process of attaching the executable property and/or not having complied with the requirements in general terms of the Magistrate Court Act and not the failure to apply for authorisation in the High Court. This failure to apply for the High Court authorisation is fatal to the respondent's case to such an extent that for this reason alone, the application by the applicant should succeed and the need to deal with other irregularities falls away.

[46] The above sums up the full reasons why the above mentioned order was issued.

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A M KGOELE
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPLICANT	:	Smit Stanton Inc. 29 Warren Street MAFIKENG 2745
FOR THE RESPONDENT	:	W.J. Coetzer Attorneys 23 Victoria Street MAFIKENG 2745