IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MAKHANDA)

CASE NO.: 3009/2021

Matter heard on: 20 September2022

Judgement delivered on: 27 September 2022

In the matter between: -

CHARLENE GOODMAN (PTY) LIMITED	**1st Applicant**
Y MKAZA CC	**2nd Applicant**

and

THE ACTING SHERIFF FOR THE DISTRICT OF EAST LONDON	**1st Respondent**
VENFOLO LINGANI INCOPORATED	**2nd Respondent**
THE STANDARD BANK OF SOUTH AFRICA LIMITED	**3rd Respondent**
MANAGER OF THE VINCENT PARK	

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

…… **……..**

Signature **Date**

JUDGMENT

SMITH J:

[1] The applicants seek an order setting aside a notice of attachment and a writ of execution issued in pursuance of a judgment granted by Lowe J on 20 August 2021, under case number 383/2021. Lowe J had ordered the second respondent and its sole member, Mr. Yongama Mkaza, to pay to the first applicant (Charlene Goodman PTY Ltd) the sum of R1 355 194.62, together with ancillary relief.

[2] In order to avoid confusion, it is necessary for me to explain the bases for the parties' involvement in this matter. The first applicant is a company with limited liability duly registered in terms of the laws of the country. It is represented in this application by its sole director, Ms Mfundiso Nana Ndwe. The second applicant is Y Mkaza CC, a duly registered Close Corporation, who is the judgment debtor in respect of the abovementioned order granted by Lowe J. The first respondent is the acting Sheriff for the district of East London, who is cited in his official capacity. No substantive relief or costs order is sought against him. The second respondent is Venfolo Lingani Incorporated, a firm of attorneys practicing in Cape Town. The third respondent is the Standard Bank of South Africa Limited. The applicants also do not seek substantive relief or a costs order against it.

[3] Although the applicants initially sought a rule nisi and interim relief, the matter has since become opposed and they now seek a final order setting aside the above-mentioned processes.

[4] Ms Ndwe has deposed to the founding affidavit on behalf of the first applicant. She avers that she is the sole director of the first applicant and has attached official documentation in support of this assertion. She furthermore says that the first applicant did not instruct the second respondent to act on its behalf in these proceedings or to pursue execution proceedings against the second applicant for the recovery of the judgment debt. She has not signed any resolution or power of attorney in her capacity as director in this regard. She contends that the proceedings

resulting in the notice of attachment and writ of execution were accordingly unlawful and of no force or effect.

[5] The first applicant also points out that the execution is in respect of the full amount of the judgment granted by Lowe J when the second applicant had in fact already paid a sum in excess of R730 000. The first applicant had negotiated terms for the repayment of the balance with the second applicant and it is not in the interest of the first applicant to attach monies required by the second applicant for its operations.

[6] The second respondent disputed the averment that it has no authority to act on behalf of the first applicant and stated that had been authorised by Mr Elvis Sello Matsoso in his capacity as director of the first applicant, and not by Ms Ndwe. In support of this assertion the second respondent has attached a resolution purporting to authorise it to act on behalf of the first applicant.

[7] Ms Ndwe has, however, correctly pointed out that the purported resolution is dated 1 August 2022, almost a month before the application to set aside the processes was commenced on 4 September 2022. Thus, there could not have been any mandate for the second respondent to proceed on 18 July 2022 by way of writ of execution since the purported resolution was not in existence at the time. In addition, she pointed out that although the resolution postdates the institution of the application proceedings, it nevertheless purports to authorise the second respondent to oppose the application. This, Ms Ndwe contends, is a clear indication that the purported resolution was an *ex post facto* attempt by the second respondent, in cahoots with Mr Matsoso, to regularise their unlawful conduct. The resolution is thus a fraudulent document and could not provide any basis for the second respondent to act on behalf of the first applicant.

[8] Mr. *Cole*, who appeared for the applicants, argued that this point was devastatingly destructive of the second respondent's opposition and that the applicants were entitled to final relief on this basis only.

[9] However, faced with this seemingly insurmountable hurdle, the second respondent appears to have changed tack and at the hearing of the matter on 20 September 2022, Mr Matsoso and Mr Ian Mvula brought an application for leave to intervene in the proceedings (the joinder application).

[10] Mr. Matsoso wants to intervene in order to challenge his contended unlawful removal as director of the company. He says that he intends to bring a counter-application for the setting aside of his removal as a director and for his reinstatement in that capacity. Mr. Mvula wants to intervene as a majority shareholder, claiming that he intends to oppose the application in the best interests of the company.

[11] Mr Matsoso says that he became aware of his unlawful removal as director of the first applicant during September 2021. He does, however, not explain why it took him almost a year before even contemplating the institution of proceedings to challenge his removal.

[12] Mr *Cole* has correctly submitted that the intervening applicants are effectively seeking to delay the proceedings so that they could be provided with an opportunity to regularise the internal affairs of the company. It is not disputed that at the time of instituting these proceedings Ms Ndwe was the sole director of the first applicant and thus properly authorised to act on its behalf. As things stood on the day that the application was argued, this was still the factual and legal position.

[13] There is nothing that stops Mr Matsoso from bringing proceedings to challenge the validity of his removal as director of the first applicant or Mr Mvula from taking steps to appointment another director. Those are, however, proceedings that are unrelated to the current application.

[14] In my view the intervening applicants have not made out a case for joinder in these proceedings and the application for intervention must fail with costs.

[15] I accordingly find that Ms Ndwe, in her capacity as sole director of the first applicant, has the requisite authority to act on its behalf and that the resolution on which the second respondent relies for its authority to oppose the application on

behalf of the first applicant, is invalid and of no force and effect. The applicants are accordingly entitled to an order setting aside the notice of attachment and writ of execution.

[17] Mr *Cole* has submitted that the conduct of the second respondent, in purporting to act on behalf of the first applicant on the basis of a fraudulent resolution, warrants a punitive costs order. I agree, the second respondent must have aware that the resolution was irregular. Costs must accordingly be on the attorney and client scale.

[16] In the result the following order issues:

(a) The intervention application is dismissed with costs.
(b) The writ of execution dated 18 July 2022 and the notice of attachment dated 17 August 2022 are set aside.
(c) The second respondent is ordered to pay the applicants' costs on the attorney and client scale.

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JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants	:	Adv.Cole S.C.
	:	Kawondera-Alex Attorneys
		City Chamber, 115 High Street
		MAKHANDA
Attorney for 2nd Respondent	:	Mr Njokweni
	:	Njokweni Attorneys
		6th Floor, 36 Long Street

CAPE TOWN