IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE No: 40585/2005

18153/2006

In the matter between:

THE MINISTER OF DEFENCE	**APPLICANT**
and	
BHEKUMNDENI QEDUSIZI PENUEL SIMELANE	**1ST RESPONDENT**
THE SHERIFF: PRETORIA SOUTH-EAST	**2ND RESPONDENT**

In re:

BHEKUMNDENI QEDUSIZI PENUEL SIMELANE	**APPLICANT**
and	
THE MINISTER OF DEFENCE	**1ST RESPONDENT**
THE SECRETARY FOR DEFENCE	**2ND RESPONDENT**
THE CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	**3RD RESPONDENT**

JUDGMENT

Brand AJ

Introduction

[1] The Applicant seeks the setting aside of a writ of execution on a judgment debt issued by the Registrar of this court in December of 2013 and the striking out of large portions of the 1st Respondent's affidavits.

[2] The 1st Respondent launched a counter application seeking the joinder of a firm of attorneys, and the declaration as invalid of the Applicant's delegation and of affidavits presented on behalf of the Minister. This counter application was abandoned during the course of the hearing of this matter, so it need not be dealt with.

Background

[3] This matter has a long, convoluted and acrimonious history, with numerous applications, counter applications, judgments and appeals, stretching over the course of 14 years and producing reams of documents, now already

comprising more than 10 lever-arch files. Fortunately very little of this complex history is relevant to this particular application, which now, post-hearing, deals only with a warrant of execution with respect to a judgment debt arising from three judgments of this court and an application for striking out. Despite the repeated invitation from the 1st Respondent, who represented himself to do other, I will confine myself only to that which is relevant to the validity or otherwise of the writ and to the striking out application.

[4] At issue are three orders of this court: an interim order pending finalisation of a review application issued by my brother Seriti on 27 January 2006 under case no. 40585/2005 ('the Seriti order'); an order of my brother Mynhardt in two review applications, of 7 May 2006 under case nos. 40585/2005 and 18153/2006 ('the Mynhardt order'); and an order of my brother Visser of 7 August 2006 under case no 34792/2007 dealing with the force and effect of the Mynhardt order pending an appeal against it ('the Visser order').

[5] The three orders all deal with a dispute regarding the termination of the 1st Respondent's employment with the South African National Defence Force (SANDF), which the 1st Respondent unsuccessfully challenged by way of two review applications.

[6] In December of 2013 the Registrar of this court issued a writ of execution for a judgment debt at the behest of the 1st Respondent, ostensibly for the amount

R6 569 124.30, for satisfaction of the judgment debt arising from the Seriti, Mynhardt and Visser orders.

[7] It is this writ that the Applicant now seeks to have set aside. Before I deal with the application proper, I dispose below of the Applicant's further application to strike portions of the 1st Respondent's affidavits.

Application to strike out

[8] In addition to its main application the Applicant brought an application to strike out significant portions of the 1st Respondent's affidavits both in answer to the main application for setting aside the writ and in support of his counter application.

[9] The application to strike out is voluminous and I don't intend to deal with it paragraph by paragraph. Suffice to say that it is brought under four main heads, being portions of the affidavits that are irrelevant to either the main or the counter application; portions of the affidavits that are scurrilous, scandalous and/or vexatious; portions of the affidavits that are argumentative; and portions of the affidavits that are repetitive.

[10] Although he was previously represented both by a firm of attorneys and, on occasion, counsel, the 1st Respondent has responded to this application representing himself. It cannot be gainsaid that, in doing so, he has buried

both this court and the Applicant in reams and reams of paper, most of which has proven to be either irrelevant, repetitive or argumentative. It also stands to reason that the 1st Respondent is personally invested in this matter and other related matters more than would have been a legal professional acting dispassionately on his behalf. He does therefore employ an accusatory, declamatory, highly pitched style that often spills over into the scurrilous, vexatious and/or scandalous.

[11] That said, it seems to me to serve little purpose to proceed to strike out all of those portions of his affidavits that fall into those two traps. This true in particular in light of what I find and hold below with respect to the Applicant's main application regarding the writ.

[12] Accordingly, the application to strike out is denied. To the extent that the 1st Respondent's conduct of these proceedings prompted and required the Applicant to bring the application to strike out, that is addressed in my conclusions regarding costs below, despite the fact that the application to strike out is denied.

The validity or otherwise of the writ

[13] The applicant challenges the validity of the writ altogether on five separate but related grounds. These are that a) the judgment has become superannuated before the writ was issued; b) the writ is on its face defective as no evidence

was placed before the Registrar to substantiate the computation of the amount alleged to be owing; c) the three orders have in fact been settled in full; d) there is no causa in any of the orders for the portion of the amount alleged owing that is interest; and e) in causing a second writ on the same orders to issue on 18 January 2017 (this writ is the subject of a separate challenge) the 1st Respondent accepted that the 2013 writ is defective and should be set aside. I deal with each of these grounds in turn.

Superannuation

[14] The writ that is the subject matter of this application was issued in December 2013. At that time Rule 66 of the Uniform Rules of Court (which was repealed, but only in May 2014) still applied. It at the time determined that a) no writ may be issued on any judgment after expiration of three years from date of judgment; unless b) the debtor consents to the writ; or c) the judgment is revived by a court on notice to the debtor; d) any writ issued before the three year period has lapsed remains in force and may at any time be executed without being renewed, until full satisfaction of the debt.

[15] The Applicant points out that –

15.1. The writ was issued almost six years after the final judgment in the triad of judgments in August of 2007 was handed down;

15.2. the Applicant has not consented to the issuance of the writ, nor has there been any application from the 1st Respondent to court to have it revived; and

15.3. no writ was issued on any of the judgments before the expiry of the three year period.

[16] On this basis the executability of the judgments had long lapsed by the time the writ issued, so that the writ is for that reason in breach of Rule 66 and invalid.

[17] The 1st Respondent could offer no retort to these submissions, so that they must stand. The writ is on this ground alone invalid and stands to be set aside.

Writ defective for lack of substantiation of amount owing

[18] The exact amount that the Applicant was indebted for in terms of the three court orders does not appear *ex facie* any of the judgments.

[19] In such a case the writ could only competently issue if the 1st Respondent had proven to the Registrar the quantum of what is owed on the orders, preferably by way of affidavit or some other comparable form of proof.[1]

[1] See eg *De Crespigny v De Crespigny* 1959 (1) SA 149 (NPD).

[20] The Applicant submits that no such proof was furnished to the registrar and that the writ is for that reason defective and invalid.

[21] In this also the Applicant is correct. The 1st Respondent did furnish a table of figures to the Registrar via letter at the time of requesting the writ. This table, according to the 1st Respondent is a table showing mora interest calculated on the sum owing, according to him. Apart from the fact that the table seems incomplete (pagers are missing) and parts of it are illegible it does not amount to an explanation of the quantum owed, related to the court orders. In short, from the table the Registrar would not be able to see how the amount that the Respondent says is owing arises from the court orders.

[22] This defect also renders the writ invalid.

The three orders have been settled in full

[23] The Applicant points out that a sum total of R350 569.06 has been paid to the 1st Respondent in full settlement of the debt arising from the three orders. The 1st Respondents says that he is still owed R6 569 124.30.

[24] This discrepancy is explained by the different ways in which they interpret the scope and substance of the orders.

[25] The Applicant reads the effect of the orders to be the creation of an interim order, in effect requiring the reinstatement of the 1st Respondent in the position and at the salary at which he was employed on 30 November 2005 when he was forced to retire, pending resolution of the review of the decision to force him to retire. From date of his retirement taking effect (1 December 2005) until resolution of the review, he had to receive the same salary as that which he received directly before his retirement, until it was determined whether or not his forced retirement should stand. On 7 May 2007, his review applications failed, so that the validity of his forced retirement was confirmed. In terms of the three orders, he was entitled to receive a monthly salary from 1 December 2005 to 7 May 2007 at the same level he received before his forced retirement.

[26] The 1st Respondent in turn reads the orders to be aimed at addressing what he perceives to be an underpayment stretching over the entire period of his employment with the Applicant, from 27 April 1994 to 7 May 2007. For this entire period, so he alleges, he received a salary for post level 12 only, whereas he had in fact been appointed at post level 12 'top notch' (which apparently attracted a higher salary); and the three court orders entitle him to be paid that which he was underpaid.

[27] Whence this interpretation of the 1st Respondent's is difficult to see. There is simply nothing in any one of the orders individually or the three read together that pertains to anything outside of the time-span of 1 December 2005 to 7

May 2007. The Seriti order is an interim order protecting the 1st Respondent until the review application has been determined; the Mynhardt order signals the end of the operation of this interim order; and the Visser order deals with the question whether the interim order was revived by the lodging of an appeal. The Applicant's understanding of the orders is clearly correct and the Applicant has shown that it has indeed fully settled the debt, as calculated on the Applicant's understanding of the orders.

[28] In this light there is no *causa* for the writ so that it is invalid.

Interest

[29] In the same manner as above, there is also nothing in any of the three orders that entitles the 1st Respondent to payment of the interest he seeks with the writ.

Second writ

[30] On 18 January 2017 the Registrar issued a second writ on the same judgments as the 2013 writ, now for the sum of R9 903 865.96.

[31] The 1st Respondent provides no explanation of why it was necessary for him to issue also this writ. In the absence of any such explanation, the Applicant's submission that the issuing of the second writ amounts to an acknowledgement that the first writ was fatally defective.

Does the noting of an appeal against the Mynhardt order extend the operation of the interim order?

[32] The 1st Respondent's final attempt at saving the writ was to submit that his lodging of an appeal against the Mynhardt judgment and order had the effect that the interim order of Seriti J was extended, pending finalisation of the appeal.

[33] Here also he is mistaken. Ms Hassim SC for the Applicant referred me to copious authority for the proposition that an interim order granted pending finalisation of a main application simply expires upon resolution of the main application. This is most clearly stated by the Supreme Court of Appeal, in ***MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA)** at page 752:

"Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side."

[34] Also this attempted justification of the writ must therefore fail.

Costs

[35] The Applicant has been substantially successful in these proceedings, apart from the application to strike out. Ordinarily costs would simply follow result. However Ms Hassim motivated strongly for the Applicant that a punitive cost order should be imposed on the 1st Respondent.

[36] I must agree. This is not so much because of the manner in which the 1st Respondent has litigated – his status as a lay person representing himself means that he will inevitably be unaware of both the exact processes and rules, as well as the appropriate decorum and manner of conduct during litigation; and will also not be as well able as a legal professional to avoid irrelevance, repetition and subjectively motivated argument. It is principally because there does seem to be an element of bad faith in the 1st Respondents conduct in these proceedings.

[37] The interpretation of the three orders proffered by the 1st Respondent is so far-fetched that the conclusion is unavoidable that he knew that it was at the very least, very strained and simply took a chance in having the writ issued to see how it would work out. The challenges to the Applicant's notice of motion and affidavits and the joinder application that formed the 1st Respondent's counter application are likewise based on such flimsy facts and argument that it is difficult to avoid the impression of some vexatiousness on the part of the 1st Respondent. This is bolstered by the fact that the counter application was

then simply abandoned at the hearing. Again, it seems as if the 1st Respondent was simply chancing his arm.

[38] Accordingly, the 1st Respondent shall pay the costs for the main application to set aside the writ and for his counter application as between attorney and client. These costs shall include the cost of two counsel where they were so employed.

[39] With respect to the application to strike out, where the Applicant was not successful, I further take the unusual step of holding not that the Applicant should pay the costs of that application, but instead that each party will carry its own costs, such as they are.

[40] Accordingly, I order as follows:

ORDER:-

1. The warrant of execution with respect to cases number 40585/2005 and 18153/2006 issued by the Registrar of this court on 6 December 2013 is declared invalid and set aside.

2. The 1st Respondent shall pay the costs of the application to have the warrant of execution set aside and of his counter application as between attorney and client. These costs shall include the cost of two counsel where so employed.

3. Each party shall pay its own costs attendant upon the application to strike out.

JFD Brand

Acting Judge of the High Court

Appearances:

For the Applicant: SK Hassim SC

L Pillay

Instructed by the State Attorney

For the 1st Respondent: Appearance in person

Date Heard : 01 NOVEMBER 2018

Date Delivered: 14 December 2018