IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED

DATE: **7 December 2022**

SIGNATURE:.

Case No. 38929/2022

In the matter between:

SPARTAN SME FINANCE (PTY) LTD First Intervening Applicant

In re:

INSURANCE UNDERWRITING MANAGERS (PTY) LTD Applicant

and

ZULULAND BUS SERVICES CC **First Respondent**

MDUDUZI WILFRED SITHOLE **Second Respondent**

SHERIFF, PRETORIA SOUTH – WEST **Third Respondent**

KOBUS VAN DER WESTHUIZEN N.O **Fourth Respondent**

VUSUMZI LUKAS MATIKINCA N.O

(in their capacities as joint liquidators of AFRICA PEOPLE MOVERS (PTY) LTD (in liquidation))

NATIONAL EMPOWERMENT FUND **Fifth Respondent**

Coram: Millar J

Heard on: 28 November 2022

Judgment: 28 November 2022

Reasons: 7 December 2022 – These reasons were handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 7 December 2022.

Summary: Ex-parte application – *mandament van spolie* – return date – failure of applicant to make full disclosure or establish possession of property at the time of the bringing of the application – deliberate failure to serve on relevant parties – unreasonable opposition to application for intervention by true owners of property and discharge of order by *bona fide* possessor – applicant's improper use of writ of attachment to procure payment of debt due by company in liquidation from third parties to be deprecated - rule *nisi* discharged with punitive costs and return of the property to true owners ordered – conduct of applicant's attorney and sheriff in acting to circumvent the order granted *ex-parte* and to conceal the whereabouts of the property to be brought to the attention of the Legal Practice Council, Gauteng and Sheriff's Board.

ORDER

1. The order marked “X1” was made an order of court on 28 November 2022.

REASONS FOR JUDGMENT

MILLAR J

1. On 4 October 2022 and in the urgent court, the applicant (“IUM”) obtained an order for the repossession of 4 Volvo busses that were in the possession of the first and second respondents (“ZBS”). This order was an interim order, brought *ex parte* and authorized the immediate repossession of the busses. It also provided for a return day – 13 December 2022 when ZBS would be entitled to appear and to show cause why it should not be made final. After the granting of this order, 2 further parties, the first intervening party (“Spartan”) as well as the fifth respondent (“NEF”) sought leave to intervene and, together with ZBS to seek the discharge of the interim order.

2. The interim order was sought by IUM on the pretext that it was in possession of the busses and that ZBS had spoliated the busses from it. Spartan and NEF sought leave to intervene on the basis that IUM had in fact never been in possession of the busses and made common cause with ZBS that IUM in fact had no right upon which the order of 4 October 2022 had been granted.

3. The background to this matter is that IUM was a creditor of the fourth respondent ("APM") who had obtained a default judgment against APM for R2 million on 21 July 2021. Unbeknown to IUM, there had been an application for business rescue for APM which had been opposed and on 25 June 2021, an application for its liquidation.

4. After the granting of the default judgement and on 27 July 2021, a warrant of execution had been issued and on 28 July 2021, 11 busses were attached to satisfy the writ. Meanwhile on 11 August 2021 IUM was informed by the attorneys acting for the provisional liquidators of APM that the busses that had been attached were not the property of APM. Thereafter, on 28 September 2021, an order was granted for the provisional winding up of APM. This order was made final on 30 November 2021.

5. On 11 November 2021, NEF had sought the release of certain of the busses through the liquidators of APM. When the busses were not released, NEF brought an application and on 25 January 2022, judgment was handed down setting aside the attachment and inter alia declaring any possession of the busses by IUM to be unlawful. On 28 January 2022, an application for leave to appeal that judgment was filed. Thereafter, no steps were taken to prosecute the application.

6. What followed was an attempt by the parties to resolve the dispute regarding the possession of the busses. It was not seriously in dispute that APM was not the owner of the busses – instead IUM sought to persuade ZBS to enter into an agreement with it in terms of which it would pay APM's debt in full and in exchange obtain a cession of IUM's claims against APM in liquidation. Had this agreement come into existence[1], IUM would have then surrendered possession of the busses to ZBS.

7. Subsequent to the failed attempt by IUM to enter into an agreement with ZBS, ZBS and NEF entered into an agreement in terms of which ZBS purchased the

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[1] The agreement was subject to a suspensive condition which was never fulfilled.

busses from NEF. The purchase was financed by Spartan and by 19 August 2022, the relationship between ZBS, NEF and Spartan had reached the point where all that was now required was for ZBS to obtain the possession of the busses that it did not already have and which it had purchased, before the sale and financing agreements could be concluded.

8. On 24 September 2022, ZBS being aware of where the busses were being kept and having been furnished with the permission of NEF, the owner, went and removed the busses. It is this removal that precipitated the urgent *ex parte* application that was brought and resulted in the order of 4 October 2022.

9. When the attachment of the busses had been made on 28 July 2021, these had been attached at APM's premises located at 365 Charlotte Maxeke Street Pretoria West. Thereafter and on 10 November 2021, the disputed busses were removed. They were not removed and taken to the premises of the sheriff to be stored but were instead taken to 766 Sterkfontein Avenue Doornkloof East. It is common cause that these premises are neither the premises of the Sheriff Pretoria South West or of any of the other parties.

10. The order granted on 4 October 2022 provides –

> *"2.1 The First and Second Respondents are directed to return forthwith a Volvo with registration number JJ 42 SS GP (Vin Number: YV3T2T422KA193190) and a Volvo with registration number DZ 73 JY GP (Vin Number: YV3T2T428GA175767) (hereinafter called "the busses") to the following premises, being 766 Sterkfontein Avenue, Doornkloof East, Pretoria, Gauteng and the Sheriff, the Third Respondent, is directed and authorized to seize forthwith the said busses and to return them to the premises described above"*

11. In bringing the *ex parte* application IUM predicated its right to claim the return of the busses on the assertion that *"The respondents were aware that the two busses were under judicial attachment and were kept at 766 Sterkfontein Avenue, Doornkloof East Pretoria."*

12. The purported urgency upon which the application was brought was that since ZBS is a bus company that conveys passengers, it would use the busses and that – *"The busses are not road worthy and as such pose a risk to passengers, road users and property."* It was also asserted that *"There is a reasonable apprehension that the First and Second Respondents will remove the busses elsewhere if they get wind or notice of this application and it is conceivable that the busses taken may be stripped down for parts for the First Respondents other busses or to make their identification impossible"* and that "Redress in the normal course will not prevent the First and Second Respondents from disposing of or hiding of or damaging of the busses and will not prevent harm to others if they are used to convey passengers."

13. Further allegations of impropriety on the part of ZBS were made and in particular that a whistle blower had shown IUM's attorney an alleged proof of payment on a cellular telephone ostensibly for a bribe to allow ZBS to remove the busses on 24 September 2022.

14. Despite a written judgment in the NEF application delivered on 25 January 2022, IUM failed to attach a copy of the judgment to the ex parte application – it was simply referred to in passing as follows:

> *". . . The Applicant applied for leave to appeal against that order and which is pending at this time. The application for leave to appeal I submit suspended that order and as such the busses remain under attachment."*

15. The allegations made in the *ex parte* application were made without any basis having been laid for them[2]. No affidavit was placed before the court by the alleged whistle blower and no copies of any screenshot were attached to the papers.

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[2] National Director of Public Prosecutions v Alexander and Others 2001 (2) SACR 1 (T) at 8G-H.

16. Save for a reference to the fact that the judgment granted on 25 January 2022 had been taken on appeal, a copy of the judgment in that matter was not attached to the papers. That application was brought, and judgment granted in terms of a *rei vindicatio* on the part of NEF. While it is on appeal, the finding in paragraph 4 of that judgment, which reads:

> *"[4] The Third Respondent's attorneys (APM) Thompson Wilks Inc, addressed a letter, dated 5 August 2021 to the First Respondent (Sheriff Pretoria South West) informing him, inter alia, that the 15 busses attached by the Sheriff are owned by third parties and the ownership particulars of the owner are displayed on the windscreens of the said busses."*

is not contentious and is common cause in the present matter in that while IUM may dispute the ownership of the busses by NEF, it is not open to it to dispute that the busses were not owned by APM and could therefore not be sold in execution for the judgment against APM[3]. It was argued by Spartan and ZBS that in any event the default judgment and any subsequent action taken in consequence of it were *void ab initio* having regard to the provisions of section 359 of the Companies Act[4]

17. While I am of the view that the judgment obtained by IUM is *void ab initio* and any subsequent attachment similarly void, this finding is not dispositive of the present application.

18. There are two issues that arise for determination in this application:

18.1 Firstly, should Spartan and NEF be granted leave to intervene?

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[3] Weeks and Another v Amalgamated Agencies Ltd 1920 (AD) 218 at 236-7; referred to in Reynders v Rand Bank BPK 1978 (2) SA 630 (T) at 633H

[4] 71 of 1973 and in particular section 359(1)(b) which provides that: *"any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void."* Furthermore, the date on which a winding up is commenced is the date upon which the application is brought, in the present instance, almost a month before the default judgment was granted – see LL Mining Corporation Ltd v Namco (Pty) Ltd (in liquidation) 2004 (3) SA 407 (C) at 413F-H.

18.2 Secondly, whether IUM was in possession of the busses at the time they were removed by ZBS.

19. Both Spartan and NEF have established their rights *qua* owner in regard to the busses. IUM was not able to seriously dispute their ownership or the interest in the whereabouts and ultimate possessor and possession of the busses. This to my mind militates in favour of their being granted leave to intervene in the proceedings[5]. The ownership of the busses and the right of the owner to exercise possession is not in issue in this application. However, an owner does have an interest in his property and a right to participate in proceedings relating to that property even if in doing so, he is unable to claim the exercise of one of his rights in the property.

20. Was IUM in possession[6] of the busses at the time they were removed by ZBS on 24 September 2022? From the returns of service that were attached to the papers, it is apparent that the busses, having been initially attached on 28 July 2021 were left *in situ* on the premises where they were attached. The sheriff's return of service confirms this. On the eve of the launch of NEF's *rei vindicatio* application on 11 November 2021, IUM caused the execution of a second writ in terms of which the 4 busses in issue in this application were then removed.

21. The return of service relating to the removal is a preprinted form purportedly completed by the Sheriff which bears no stamp or other identifying mark which indicates that it emanates from the office of the sheriff. The original return of service relating to the attachment on 28 July 2021[7] records the attachment of various busses.

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5 De Villiers and Others v GJN Trust and Others 2019 (1) SA 120 (SCA) at paragraph 22

6 "Possession" – "The action or fact of possessing something; the holding or having something as one's own or in one's control; actual holding or occupancy as distinct from ownership; ***law*** visible power or control over a thing" The Shorter Oxford English Dictionary, Volume 2, 6th Ed, Oxford University Press, 2007

7 The typed return of service reflects that the warrant was executed on 28 June 2021, but this is presumably a typographical error.

22. No typed return of service was placed before the court relating to 10 November 2021. Notwithstanding that the first return of service records "*Attachment of Assets"* but no removal, the subsequent preprinted return reflects "*Assets – Attached and Removed".* Of course, there was no need for any further attachment of the assets on 10 November 2021 if the warrant that had been executed on 28 July 2021 was still in effect. Furthermore, there was nothing placed before the court to indicate how the busses that had been removed on 10 November 2021 had found their way to Doornkloof.

23. During argument, counsel for IUM was asked to clarify how it came about that the busses had been removed and taken to premises other than the sheriff's premises. The court was informed that this had been arranged between IUM's attorney and the sheriff orally.

24. The existence of the agreement, so the argument went, meant that the attachment of 28 July 2021 and subsequent attachment and removal on 10 November 2021 were in their terms lawful and that IUM as the execution creditor of APM was a "co-possessor" of the property under judicial attachment. IUM sought to argue that there were 2 categories of possession – the first was *de facto* possession and the second, the right to possession. It was argued that the present application concerned *de facto* possession – unsurprisingly as this is a pre-requisite for the *mandament van spolie.* It was further argued that the right to possession is one of the rights that is part of the bundle of rights enjoyed by an owner but that the exercise of that right, *qua owner*, in the present matter was not an issue to be decided now.

25. In a similar vein to the allegations made against ZBS purportedly justifying urgency, nothing was placed before the court to indicate the existence of any such agreement. It was argued that such agreements are entered into and that the oath of the deponent to the founding affidavit and the confirmatory affidavit of IUM's attorney were sufficient to establish the existence of the agreement.

What was unexplained was why there was no confirmatory affidavit from the sheriff to confirm the existence of such an agreement and furthermore, why the ex-parte application in which the sheriff was ostensibly, at least on the version of IUM, a co-possessor, was not served on the sheriff. The application was not served on the sheriff prior to the hearing of the application on 4 October 2022. The application was also not served on the sheriff at any time thereafter.

26. The highwater mark of IUM's argument on this issue was that the sheriff had been invited to the case on the court's digital filing platform CaseLines and that this constituted sufficient notice to the sheriff of the proceedings. Not wanting to create the impression that IUM had this single arrow in its quiver, it was then argued that in any event, the sheriff had executed upon the order granted on 4 October 2022 and was thus now fully aware of the proceedings.

27. It was the case for IUM that: -

> *"46. The precise details of exactly how the First and Second respondents managed to remove the busses are not known fully to the Applicant but the person in charge of the premises was paid an amount of R75 000.00 on the day and he showed Engelbrecht* **(IUM's attorney)** *the proof of payment into his account by the Respondent on his cellular telephone."*

28. The identity of the person in "charge of the premises" is not disclosed in the papers but at the very least it was neither the sheriff nor an agent of IUM. No case was made out that either had physical possession or any control over the premises or the busses.

29. It is thus clear that neither IUM nor the sheriff were in charge of the premises at which the busses were kept. Furthermore, there is nothing on the papers to indicate how the busses were removed from the premises – whether they were driven or towed. It is was not canvassed on the papers whether or not the keys to the busses had been attached by the sheriff when the busses were originally attached on 28 July 2021 or subsequently on 10

November 2021 and whether or not those keys had been furnished to the person in charge of the premises at Doornkloof and whether or not those keys were ever used either by ZBS or subsequently by IUM to move the busses[8].

30. The sheriff's return for the execution of the order of 4 October 2022 records that on 5 October 2022:

> *"That on the 05 October 2022 at 05h30 at 365 CHARLOTTE MAXEKE STREET, PRETORIA WEST being the Respondant business the VOLVO, REG NO. JJ42 SSGP, VIN YV3T2T422KA193190 AND REG NO. DZ 73 JY GP VEN. YV3T2T428GA175767 as described in the order of court was judicially attached, by removing it from the possession of ZULULAND BUS SERVICES CC. MDUDUZI WILFRED SITHOL, and handed in full control of MR Gert – instructing attorney, whey were towed by Joewies Towing and documents were affixed to the main office as the employees of the respondent refused to accept the document. Time spent – 05h30 – 11h30"*

31. During the course of the argument, the court enquired from counsel for IUM as to where the busses were now located. I was initially informed that the applicant's attorney Engelbrecht did not want to disclose the whereabouts of the busses. I adjourned the court for a short while to enable him to consider his position on this. When the court reconvened, I was informed that the busses were now stored at the premises of Eco Car Hire at 34 Whittakers Way, Bedfordview Johannesburg. The wheels of the busses had been removed and they were now "on blocks" so they could now neither be towed nor driven away – this was explained from the bar as having been done because when vehicles stand on their tyres for any length of time, the tyres deteriorate.

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[8] Whitman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)

32. The ex parte application brought by IUM was for a mandament van spolie. It was held in Anale Ngqukumba v The Minister of Safety and Security and Others[9] that:

> *'10. The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession of the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est (the despoiled person must be restored to possession before or else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy Is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due presses.'*

33. It is a pre-requisite, before a party is entitled to claim relief under the mandament van spolie that they be in possession. *"Possession involves detention and animus, and to the acquisition of possession, therefore, the physical and mental element are both necessary.[10]"*

34. IUM claims "co-possession" of the busses through the sheriff of the court. The manner in terms of which the sheriff of the court[11] in executing a warrant is required to act, is set out in Rule 45(3) – (6) of the Uniform Rules of Court[12] which provide:

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[9] 2014 (5) SA 112 (CC) at 117D – 118A, see also Sithole v Native Resettlement Board 1959(4) SA 115 WLD at 117; see also Stocks Housing (Cape Pty Ltd) vs Chief Executive Director, Department of Education and Cultural Services and Others 1996 (4) SA 231 (C) at 240B-C where the court said: 'The element of unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be because It was by force or by stealth or deceit or by theft . . .'

[10] Groenewald v Van Der Merwe 1917 AD 233

[11] Appointed in terms of section 2(1) of the Sheriffs Act 90 of 1986

[12] Uniform Rules of Court published in GN R48 of 1965 and amended in particular in respect of rules 45(3) and 45(4) by GN R2410 of 30 September 1991.

"(3) Whenever by any process of the court the sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself or by his assistant proceed to the dwelling-house or place of employment or business of such person (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached), and there –

(a) Demand satisfaction of the writ and, failing satisfaction,

(b) Demand that so much moveable and disposable property be pointed out as he may deem sufficient to satisfy the said writ, and failing such pointing out,

(c) Search for such property.

Any such property shall be immediately inventoried and, unless the execution creditor shall otherwise have directed, and subject to the provisions of sub rule (5) ***shall be taken into the custody of the sheriff****; Provided:*

(i) That if there is any claim made by any other person to any such property seized or about to be seized by the sheriff, then, if the plaintiff gives the sheriff an indemnity to his satisfaction to save him harmless from any loss or damage by reason of the seizure thereof, ***the sheriff shall retain or shall seize****, as the case may be, make an inventory of* ***and keep the said property****; and*

(ii) That if satisfaction of the writ was not demanded from the judgment debtor personally, the sheriff shall give the judgment debtor written notice of the attachment and a copy of the inventory made by him, unless his whereabouts are unknown.

(4) The sheriff shall file with the registrar any process with a return of what he has done thereon, and shall furnish a copy of such return and inventory to the party who caused such process to be issued"

> *(5) Where any movable property has been attached by the sheriff, the person whose property has been so attached may, together with some person of sufficient means as surety to the satisfaction of the sheriff, undertake in writing that such property shall be produced on the day appointed for the sale thereof, unless the said attachment shall sooner have been legally removed, whereupon the sheriff shall leave the said property attached and inventoried on the premises where it was found. The deed of suretyship shall be as near as may be in accordance with Form 19 of the First Schedule.*
>
> *(6) If the judgment debtor does not, together with a surety, give an undertaking as aforesaid, then, unless the execution creditor otherwise directs, the **sheriff shall remove** the said goods to some convenient place of security or **keep possession thereof** on the premises where they were seized, the expense whereof shall be recoverable from the judgment debtor and defrayed out of the levy." **[my emphasis]***

35. On a plain reading of Rule 45(3) to 45(6), it is the sheriff himself who must take the property into his "*custody*" and who must "*retain*" and "*keep*" the property that has been attached. There is no provision in either the Sheriffs Act or in the Uniform Rules of Court which either contemplates or provides for a situation in which the sheriff is permitted to share or delegate his functions to another party save as provided for in section 6[13] of the Sheriffs Act. Accordingly, it is the sheriff alone who must take into and maintain in his possession the property

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[13] ***6 Appointment of deputy sheriffs and employees***

(1) Any sheriff or acting sheriff may with the approval of the Board and on such conditions as the Board may determine appoint one or more deputy sheriffs, for whom he shall be responsible.

(2) A deputy sheriff may, subject to the directions of the sheriff or acting sheriff appointing him, perform the functions of any such sheriff or acting sheriff.

(3) *Any sheriff or acting sheriff may appoint such other persons in his employ as he may consider necessary.*

that has been attached.[14] It was held in Liquidators Union and Rhodesia Wholesale Ltd v Brown & Company[15] that:

> *"While an ordinary arrest of property under the Roman-Dutch Law gives no preference, an arrest effected on property in execution of a judgment creates a pignus praetorium or to speak more correctly, a pignus judiciale, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court"*

36. Even if the sheriff was, as a matter of law, entitled to co-possess the property that had been attached with the judgment creditor, before any such co-possession could be shared, the sheriff would have to have ensured that the attachment was itself valid and legal in all respects.

37. The failure on the part of IUM to place any evidence before the court in its founding papers as to the circumstances under which the busses were attached on 10 November 2021 and then removed to Doornkloof casts doubt on whether or not the attachment and the removal was valid. Furthermore, the failure to provide any documentary proof of either the instructions, indemnity or subsequent carrying out of those instructions by the sheriff and reliance on a purported oral agreement is a matter of grave concern. In its heads of argument, IUM sought to justify the dearth of an explanation or supporting documents in substantiation of its claim to co-possession by stating[16]:

> *"48. IUM submits that just as there is a duty to disclose all material facts, there is a duty not to mulch a Court with irrelevant facts.*

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[14] Reynolds Grofts (SA) Ltd v Wessels 1977 (1) SA 583 (C) at 585G – 586E; see also Rule 45(5) which provides that in circumstances where the judgment debtor is able to furnish a surety to the satisfaction of the sheriff together with an undertaking that the property attached will be produced on the day of the sale, the property will not be removed by the sheriff and in terms of Rule 45(6), in the absence of such a surety or undertaking ". . . the sheriff shall remove the said goods to some convenient place of security or keep possession thereof on the premises where they were seized." See also Deputy-Sheriff v Curtis 1910 TS 18; Adjunk-Balju, Vanderbijlpark v Sentraal Westelike Ko-op Maatskappy BPK 1970 (2) SA 124 (T) at 127D

[15] 1922 AD 549 at 558

[16] Applicant's heads of argument filed for the return date.

49. The liquidation of APM and its ramifications were overtaken by the NEF order and the application for leave to appeal and as such are entirely irrelevant in respect of spoliation and de facto possession.

50. The facts that the challengers claim ought to have been placed before the Court in the ex parte application are in the submission of IUM irrelevant in spoliation proceedings because they are all aimed at or about entitlement to possession and the lawfulness thereof."

38. It is trite that in *ex parte* proceedings, an applicant and its representatives are required to disclose all material facts.

39. The failure of the part of IUM to produce any proper return of service to reflect that this was done according to law together with the failure of the sheriff to file with the registrar[17] his return of service reflecting what he had done also, to my mind, calls into question the validity of the attachment. If the attachment and removal of the busses was not validly executed and the sheriff did not maintain possession of the busses, then the sheriff was at no stage a possessor and in the circumstances IUM could not be a co-possessor.

40. It is trite a judgment creditor acquires no rights to any property under attachment other than to the proceeds of any sale in execution. In the present circumstances, IUM was aware, at least a year before the present ex parte application was brought, that the busses in question were not the property of APM and therefore could therefore never, notwithstanding the prior liquidation proceedings which invalidated both the default judgment and any warrants issued pursuant thereto, have been sold in execution of a judgment against APM.

41. On consideration of this matter as a whole, IUM improperly sought to use the execution process in order to garner for itself an advantage to which it was not entitled.

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[17] No returns of any nature have been filed by the Sheriff on the CaseLines system notwithstanding its operation for more than a year before either of the attachments on 28 July 2021 or 10 November 2021.

42. Despite being aware of the fact that the busses were not the property of APM, IUM persisted with the attachment of the busses after 11 August 2021. It went further and sought to subvert the rights of NEF by instructing the sheriff to then remove the busses to the premises of a third party. This all occurred in circumstances where there was no compliance with the rules of court by either IUM or the sheriff.

43. The conduct did not end there. After judgment was delivered on 28 January 2022 in which it was recorded that there was no dispute about the ownership of the busses, an application for leave to appeal was filed and then left dormant. This application was brought for no other purpose than to ensure that NEF would be unable to exercise its rights qua owner of the busses in the hope that IUM could lever payment of what was due to it by APM. When it became apparent that NEF would not be levered, IUM then sought to do so with ZBS[18] who had entered into an agreement with NEF for the acquisition of the busses.

44. All the while the busses were located at the Doornkloof premises – in circumstances where it is unclear whether the sheriff even knew that the busses were kept there. There is certainly nothing before the court to indicate that the sheriff knew that the busses were there or that he exercised any possession over the busses. To my mind, once the busses were delivered to the Doornkloof premises, they were now in the possession of the person in charge of those premises and neither the sheriff nor for that matter IUM. It follows then that the *mandament van spolie* was not available to IUM when it sought and was granted the order of 4 October 2022.

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[18] See Van Eck NO And Van Rensburg NO v Etna Stores 1947 (2) SA 984 (A) - headnote:
"The principle that powers given for a particular purpose cannot be used for attaining other objects applies, not only to powers conferred on public bodies, but also to powers conferred on officials or even on private persons or corporations. To pretend to use a power for the purpose for which alone it was given, yet in fact to use it for another is to act in fraudem legis and is an abuse of that power amounting to mala fides."

45. In opposing the application for intervention by Spartan, IUM raised a number of points *in limine*. Some of the points raised have been dealt with elsewhere in this judgment and I intend dealing now with the remainder of these briefly:

45.1 The first of these was that Spartan was not properly before the court. This was raised on the basis that there was no resolution authorizing the institution of the application to intervene. This was subsequently rectified but, in any event, IUM failed to utilize the provisions of Rule 7(1) of the Uniform Rules of Court which was the appropriate way in which to challenge authority. I was referred to Unlawful Occupiers, School Site v City of Johannesburg[19] as authority for this proposition with which I agree. This point is without any merit.

45.2 The second of these, was that it was not permitted to anticipate the return date. There is no merit to this point. A party cannot seek an order *ex parte*, without notice to those affected by it and then argue that an affected party has no right to approach the court to be heard.

45.3 The third of these was that there was an existence of an alleged factual dispute. This purported dispute is alleged to relate to the ownership of the busses. This is irrelevant for purposes of the present application. There is no factual dispute in this matter relating to the *mandament van spolie* that cannot be resolved on the papers. The entirety of IUM's case is predicated on co-possession of the busses and the case made out in the founding papers when it brought the *ex-parte* application.

45.4 The final point *in limine* is that IUM was obliged because of the NEF order is on appeal to keep possession and maintain the *status quo.* This point is contrived and self-serving as IUM is well aware of the fact that the highwater mark of any right that it has is *qua creditor* of APM. It has no right to the assets of APM which would vest in its liquidators but in

[19] 2005 (4) SA 199 (SCA) at paragraph 16.

any event, the liquidators indicated clearly and unequivocally that the busses were not assets or property of APM.

46. If IUM made a full and proper disclosure of all the facts relating to the circumstances under which the busses had been removed from APM's premises and taken to Doornkloof, I am in no doubt that absent service on either the sheriff, ZBS or for that matter any other party, the court on 4 October 2022 would have not have granted the order that it did.

47. In regard to costs, ZBS, Spartan and NEF all sought a punitive order for costs against IUM which costs were to include the costs consequent upon the employment of two counsel. It was argued that the conduct of IUM and its legal representatives had been improper and in disregard of the law.

48. Besides the fact that the institution of the liquidation proceedings against APM on 25 June 2021 had to all intents and purposes rendered the default judgment and every other step taken pursuant thereto by IUM *void ab initio*, they had persisted in attempting to gain an advantage by virtue of the unlawful attachment of busses which they were aware, at least from 11 August 2021, were the property of third parties and not APM. The identity of the true owners is of no moment to IUM and at no stage was it ever suggested that they either obtained or retained possession of the busses as *negotiorium gestors*.

49. Rather on consideration of what has been set out above, I am of the view that IUM and its representatives have engaged in conduct which is an abuse of the law and improper. There is no evidence before this court as to what dividend if any, would be paid by the liquidators of APM to the creditors or whether there was a danger of a contribution – what is clear, is that IUM rather than content itself with lawful process in the winding up of APM, sought to use the unlawful attachment of the busses as a lever to procure payment of its judgment debt from an innocent third party.

50. The conduct of the proceedings by IUM, as set out above, is hardly salutary and on its own would to my mind have justified the granting of a punitive costs order. There is however a further and concerning aspect.

51. Notwithstanding the clear and unequivocal terms of the order granted on 4 October 2022, that the busses be returned to the Doornkloof premises, IUM's attorney, Engelbrecht, arranged for the busses to be towed to another address – in another jurisdiction and beyond the reach of the sheriff whose attachment purported to found the right upon which the application was brought.

52. The conduct of IUM and its representatives in opposing the discharge and setting aside of the order granted on 4 October 2022 in circumstances where they well knew that they were in contempt of that order is to my mind demonstrative of a lack of appreciation of the wrongfulness of the course of conduct which they have embarked upon since at least 11 August 2021. Their misuse and abuse of the legal process to try and procure a favourable commercial outcome, irrespective of the law, is to be deprecated.

53. When legal representatives conduct themselves in this fashion, they bring not only themselves but also the legal profession as a whole into disrepute. IUM through Engelbrecht has acted in breach of the order of 4 October 2022 and it would seem based on the return of service of 5 October 2022 that this was done deliberately and with the co-operation of the sheriff.

54. It is for the reasons set out above that I made the order that I did, set out in annexure "X1" hereto.

55. On consideration of what is set out in this judgment and in particular paragraphs 49 to 53 above, I direct that a copy of this judgment be furnished by Spartan and/or ZBS and/or NEF to the Legal Practice Council, Gauteng and the Board for Sheriffs for their consideration of the conduct of IUM's attorney and the sheriff respectively.

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A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	28 NOVEMBER 2022
JUDGMENT:	28 NOVEMBER 2022
REASONS:	7 DECEMBER 2022
COUNSEL FOR THE 1ST INTERVENING APPLICANT:	ADV. FH TERBLANCE SC ADV. AJ WESSELS
INSTRUCTED BY:	TIM DU TOIT & COMPANY INC
REFERENCE:	MR W DU RANDT
COUNSEL FOR THE APPLICANT:	MR A MYBURGH
INSTRUCTED BY:	ENGELBRECHT ATTORNEYS INC
REFERENCE:	MR G ENGELBRECHT
COUNSEL FOR THE 1ST & 2ND RESPONDENTS:	ADV. D RAMDHANI SC
INSTRUCTED BY:	GIYAPERSAD INC
REFERENCE:	MS T NAICKER
COUNSEL FOR THE 5TH RESPONDENT	ADV. N MAHLANGU
INSTRUCTED BY:	DM 5 INC
REFERENCE:	MR M MAPIYEYE

NO APPEARANCE FOR THE 3RD & 4TH RESPONDENTS (THE SHERIFF AND JOINT LIQUIDATORS RESPECTIVELY)