



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: B39194/2022**

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHERS JUDGES: YES/NO  
(3) REVISED

.....  
**SIGNATURE**

.....  
**DATE**

In the matter between:

**UBOMI-TECH SECURITIES (PTY) LTD**

Applicant

and

**RICHARDS PARK BODY CORPORATE**

1<sup>st</sup> Respondent

**MOKGOATJANA ATTORNEYS**

2<sup>nd</sup> Respondent

**OTTO KRAUSE INC**

3<sup>rd</sup> Respondent

**THE SHERIFF HALFWAY HOUSE**

4<sup>th</sup> Respondent

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**JUDGMENT- URGENT APPLICATION**

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**COWEN J**

**INTRODUCTION**

1. This is an urgent application in which the applicant, Ubomi-Tech Securities Pty (Ltd) seeks to protect attached property from an execution process. The

property comprises attached movables to be sold at auction. The applicant seeks, centrally, an interdict staying this process and related relief.<sup>1</sup>

2. The first respondent is Richards Park Body Corporate (RPBC). The second respondent is RPBC's former attorneys of record, representing the applicant in proceedings in this Court, through which an adverse costs order was granted against the applicant (in an exception process). The third respondent is Mokgoatjana Attorneys, the attorneys representing RPBC in the process of recovery of the fees.
3. The costs order was granted on 15 October 2020. There is a dispute about whether both parties were represented at the taxation on 6 May 2022. However, what is material is that the applicant states that it learnt only on 28 September 2022 that the taxing master had taxed and allocated the bill in the amount of R52 680.30. It did so after the applicant received a call from an employee of the fourth respondent, who advised the applicant that he is in possession of instructions from the third respondent directing his offices to attach and remove the applicant's property. The applicant contacted his attorneys who then advised that they had no knowledge of the third respondent or who it is representing and that there had been no notice of withdrawal filed in respect of the second respondent's representation. Communication then ensued between the applicant's attorneys and the third respondent in this regard.
4. The applicant contends, further, that there was no deed of cession pursuant to which the second respondent had ceded its entitlement to the debt to the third respondent. The fees, the applicant says, are due and payable in respect of the second respondent's fees and disbursements and it cannot be placed in a

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<sup>1</sup> The relief sought is more elaborate. In the notice of motion, the applicant seeks the following relief:

1. Condoning non-compliance with the Rules and hearing the matter urgently.
2. An interdict preventing the respondents from removing the applicant's property.
3. The stay of the execution of the warrant of attachment pending the conclusion of a signed agreement between the first and third respondent regarding which respondent should receive payment of the taxed bill alternatively the institution and conclusion of an interpleader application.
4. Granting the applicant leave to pay the taxed bill in an amount of R3000 per month over a period of 17 months.
5. Directing any party which opposes the application to pay the costs.
6. Further / alternative relief.

position where a process ensues whereby its debt is satisfied in favour of the third respondent.

5. On 28 September 2022, the applicant's attorneys wrote to the third respondent to inform them, effectively, that they had not received the taxing master's allocation and they are not properly on record and requested that they withdraw the warrant of attachment. They refused to do so and the fourth respondent proceeded with the attachment on the following day, 29 September 2022.
6. There are three primary bases upon which the applicant seeks impugn or stay the execution process.
7. The first is to enable it to reach agreement with the respondents alternatively institute urgent interpleader proceedings to ascertain which party it must pay (the first issue).
8. The second basis is that the warrant of execution was unlawfully obtained due to the failure formally and in terms of Rule 16 of the Rules of Court, to substitute the third respondent with the second respondent, as the attorneys on record, before the warrant of execution was obtained. Underpinning this issue are complaints that the first time that the applicant received notice of the taxing master's allocation was when contacted by the fourth respondent acting on instruction of the third respondent on 28 September 2022. It was, it says, at no stage requested to make payment to the first respondent either directly or by its still extant attorneys of record and afforded no opportunity to make arrangements to pay, which, it says, it needs to do. I refer to this as the second issue.
9. The third basis is to enable the applicant to make payment of the debt over a period of seventeen months, paying some R3000 per month. This is sought to be justified on the basis that the applicant only generates a pre-tax monthly profit of between R20 000 and R50 000 per month. The applicant says it will prejudice its 60 employees that may be rendered unemployed if the company fails to meet its obligations. The applicant says it requires the attached goods to generate an income. The attached goods are itemised in paragraph 13 of the founding

affidavit and I do not recite it save to point out that they include, amongst other items, the office furniture, computers and a range of goods used to perform office work. I refer to this as the third issue.

10. The notice of motion and founding affidavit are both dated 11 October 2022 but the notice of motion carries a court stamp of 18 October 2022. The first respondent delivered a notice of intention to oppose on 19 October 2022 under cover of an email that reflects that the application was only served that day. The delay between finalisation of the papers and service is not explained. There are technical difficulties with the notice of motion: for example, in explaining when and how any opposition should ensue and it fails to indicate when the application is to be heard. The application was, according to the applicant's counsel, erroneously enrolled on 25 October 2022 but thereafter removed from the roll in circumstances where the first respondent had briefed counsel. Answering papers were requested only by that date. The first respondent delivered an answering affidavit on 24 October 2022. The third respondent only delivered an answering affidavit on 14 November 2022. There is a replying affidavit dated 17 November 2022 but it replies only to the first respondent's affidavit. The application was set down for 22 November 2022.

11. On that day I requested counsel to address me on urgency in circumstances where the participating respondents contended that any urgency was self-created. There was, however, no dispute that there was urgency in the matter that arose on 28 September 2022. On the evidence before me, it is correct that urgency arose on that date. The manner in which the applicant conducted itself thereafter raises a number of concerns. However, the matter was ultimately only enrolled for 22 November 2022, in circumstances where papers had been filed, and, ultimately, I formed the view that the matter should be heard and that the concerns about the conduct of the matter alluded to in paragraph 10 above should be addressed through an appropriate costs order. The parties delivered supplementary submissions: the last were received on 30 November 2022. I deal in this judgment with the main considerations leading to my decision.

12. In my view, the first issue (see paragraph 6) has become academic as these proceedings have unfolded. Specifically, the second respondent withdrew as attorneys of record on 24 October 2022, after the proceedings were instituted but before these proceedings were heard. Moreover, it is now quite clear that the third respondent is and, when the warrant was secured, was acting on behalf of the first respondent in the recovery process and that there is no cession in place either in favour of the second or third respondent. In this regard, the first respondent explains that it has paid the second respondent its fees and the applicant is, as per the court order, obliged to reimburse it the taxed amount. It has terminated the mandate of the second respondent and appointed the third respondent to recover the fees payable.

13. In my view, the applicant has failed to make out a case on the third issue (see paragraph 9). The information supplied is, simply, too scant to enable this court to exercise any discretion it may have in the applicant's favour.<sup>2</sup>

14. However, the second issue (paragraph 8) warrants separate consideration. There was, sensibly, no dispute between the parties that notice to the applicant of the allocation was necessary before any attachment could lawfully proceed.<sup>3</sup> The first respondent, however, explained that it had given notice. This was apparently done on 8 September 2022, when first respondent's attorneys – by then the third respondent – had sent a letter to the applicant's attorneys informing the applicant that it was representing the first respondent, providing the taxed and allocated bill and demanding payment within 14 days to a named account. There was no response and the third respondent followed up on 13 September 2022 to no avail. Notably, the substance of the communication is contained in an attachment to the e-mail of 8 September 2022, and not in the e-mail itself. According to the applicant, there was no attachment to the e-mail and, it continues, there was no reason to respond as the attorneys writing to them were not known to them as attorneys in the matter. The respondent has, however,

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<sup>2</sup> Whether this Court has any discretion was debated before me but it is not necessary for me to make that determination. See however, Davis J's interpretation of Rule 45A in *Frim Mortgage Solutions v Absa Bank* 2014(1) SA 168 (WCC) and see *Lavelikhwezi Investments (Pty) Ltd and Others v Mzontsundu Trading (Pty) Ltd and Others* (1043/2022) [2022] ZAECMHC 6 (12 April 2022).

<sup>3</sup> Any different interpretation of Rule 45(2) would, in my view, undermine the rule of law.

supplied proof that when the e-mail of 8 September 2022 was sent, there was an attachment. I accept the respondent's version.<sup>4</sup> Moreover, it is difficult to understand why an attorney would not at least follow up on an e-mail in the above circumstances.

15. Nevertheless, what then becomes material are the events of 28 and 29 September 2022. On 28 September 2022, the applicant's attorneys contacted the third respondent telephonically and addressed correspondence, which highlights both that the emails of 8 and 13 September 2022 had no attachments and referred to the concern that the third respondent was not on record as the first respondent's attorneys. The attachments were again forwarded by third respondent to the applicant's attorney on 28 September 2022, presumably after the telephone call and were thus to hand before 29 September 2022 when the third respondent secured a warrant of attachment from the registrar.

16. On the information to hand, I am unable to conclude that the warrant of attachment was unlawfully obtained. As a matter of fact, by the time that the warrant was secured, the first respondent had given the applicant notice of the allocation, through the third respondent, and the third respondent was mandated to act on behalf of the first respondent. That this is so is confirmed through the answering affidavit and its attachments.

17. However, it does not follow that the applicant is not entitled to any stay in the circumstances.<sup>5</sup> In this regard, it is difficult to understand why, upon receipt of the letter of 29 September 2022 from the applicant's attorney, the first respondent commenced immediately with the execution process. The first respondent had, on 8 September 2022 considered a 14-day period for payment reasonable. Even accepting, as I do, that the third respondent sent the attachments on 8 September 2022, it is quite plausible that they were not received. If so, the process would have ensued after only 24 hours' notice to pay, in circumstances where the taxing process had been drawn out and apparently dealt with as far

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<sup>4</sup> *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634H-635C and *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) at para 13.

<sup>5</sup> A court may stay an execution process where real and substantial justice requires it or where injustice would otherwise result. See eg *Gois v Van Zyl* 2011(1) SA 148 CLC.

back as May 2022, the costs order is dated 2020 and the first respondent had considered it reasonable to afford 14 days to pay. In any event, the first respondent, through its attorneys ought to have ensured that they were placed on record through Rule 16 of the Rules of Court before either expecting payment or proceeding to execute. The warrant is signed by a person claiming to be the excipient's attorney and contemplates that the sheriff will pay it the monies obtained through the execution process. That the relevant party's attorney sign the warrant is, moreover, contemplated by Form 18 of the First Schedule to the Rules, which is, according to Rule 45, to be used.

18. I am mindful that the applicant, in any event, is not in a position to make immediate payment of the amounts owed. Rather it sought an opportunity to make payment arrangements and has now approached the Court to secure an order to that effect. While the first respondent disputed the applicant's entitlement to such an order, and I do not grant it, the first respondent does not say that it would not entertain such a request had it been duly made.

19. In my view, on a consideration of the conspectus of circumstances in this case, it was wholly unjust for the first respondent to proceed with the execution process before ensuring that its representation was regularised and duly engaging the applicant's attorney in that regard. It is a recipe for injustice and uncertainty for an attorney not on record to demand payment of amounts owing to a party under a costs order and proceed with execution. That is so even if duly mandated. Conversely, it was reasonable for the applicant's attorney to insist that the third respondent's representation be in order at that stage. This could easily have been done expeditiously albeit that it would invariably have resulted in a delay. It was in any event, as indicated above, unreasonable in this case to assume that the attachments, even if sent, had been received on 8 September 2022 and act on that assumption. In all of the circumstances, I am of the view that the applicant is entitled to alternative relief being a stay of the execution process for a period of 10 days.<sup>6</sup> The relief will serve to redress the injustice that was caused when the execution process ensued.

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<sup>6</sup> This relief is lesser relief than what was prayed for yet addresses the substance of the complaint. The related factual matter is fully canvassed.

20. The second respondent did not oppose the proceedings. It responded by effecting its notice of withdrawal albeit only on 24 October 2022. As the applicant only seeks costs against a party opposing the proceedings, nothing further need be said of the second respondent's conduct. The third respondent did oppose the application and raises two points in its defence. First, it contends that it ought not have been joined as its sole role is as the legal representative of the first respondent. No rights have been ceded to it, it says. Second, it contends that as a matter of fact, the applicant was notified of the taxed bill and called upon to pay it on 8 September 2022. It was only after it failed to pay within 14 days, as required, that the warrant of attachment was obtained. Counsel, moreover, addressed certain arguments opposing the application aligned with those of the first respondent. I agree with the third respondent that it is not a necessary party to these proceedings.<sup>7</sup> However, on the information the applicant had to hand when it instituted proceedings, it could not have known that with any certainty, and it was only through the answering papers that the third respondent's mandate to act and the extent of its rights became clear. Costs were only sought against a party opposing the proceedings. It is unfortunate that the relations between attorneys were not such that enabled matters of this sort to be resolved before litigation was initiated, but on the facts of this case, third respondent must carry a material degree of responsibility for this. Moreover, it is difficult to understand why the third respondent opposed the application instead of abiding it and explaining its position in an explanatory affidavit.

21. This leads me to the remaining issue, costs. The applicant has been only partly successful but it has obtained some relief. However, its conduct in prosecuting the urgent application raises concerns, alluded to above. In my view it is entitled to 50% of its costs from the first respondent. The third respondent should carry its own costs.

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<sup>7</sup> Applying the test in *SA Riding for the Disabled Association v Regional Land Claims Commissioner and others* 2017(5) SA (CC).



22. The following order is made:

- 22.1. The execution process pursuant to the writ of execution is stayed for 10 days from the date of this judgment.
- 22.2. The first respondent shall pay the applicant 50% of its costs on a party and party scale.
- 22.3. The third respondent shall carry its own costs.

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SJ Cowen  
Judge, Gauteng Division, Pretoria  
High Court.

*Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 06 November 2022.*

**Date of hearing: 22 November 2022**

**Supplementary submissions: 28, 29 & 30 November 2022**

**Date of judgment: 06 December 2022**

**Appearances:**

Applicant: Mr Boshomane instructed by Qhali attorneys

First respondent: Mr Sefahamela instructed by Mokgoatjana Attorneys

Third respondent: Mr Ngwana instructed by Mokgoatjana Attorneys