

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 13089/16

In the matter between:

D J S

APPLICANT

and

B L S (nee R)

FIRST RESPONDENT

THE SHERIFF, NEW HANOVER

SECOND RESPONDENT

ORDER

1. The attachment for the applicants' members interest in DJ S Farming CC in terms of the writ for Execution issued by the Registrar of this court on 6 April 2022 is declared invalid and is set aside.

2. The first respondent is ordered to pay costs of the application.

JUDGMENT

Delivered on:

Mngadi J

[1] The applicant seeks an order setting aside a writ of execution and the attachment carried out pursuant therof, alternatively, an order suspending execution of the writ pending the finalisation of a divorce action. The first respondent opposes the application.

[2] The applicant is D J S an adult male businessman. The first respondent is B L S an adult female person. The second respondent is the Sheriff, New Hanover. The second respondent has not taken part in these proceedings.

[3] The applicant and the first respondent are married to each other by civil marriages out of community of property. There are two children born out of the marriage aged twenty (20) years and sixteen (16) years respectively. The applicant and the first respondent have a pending divorce action instituted in August 2013. On 23 April 2014 an order for maintenance *pende lite* was made againstt the applicant. The first respondent claims that the applicant fell into arrear maintenance totalling R594 235.00 which resulted in her deposing to an arrear maintenance affidavit in support of an application for the writ of execution against the movable assets of the applicant. The writ of execution was issued on April 2022.

[4] The applicant states that the Sheriff handed to him the writ of execution. He communicated with the first respondent but they could not agree on the arrear maintenance. The applicant in his founding affidavit has set out in detail the basis of his contention that the amount of arrear maintenance stated in the writ is incorrect. The first respondent in detail sets out the basis of her claim that the amount in the writ is the correct amount of arrear maintenance. In my view, it remains an unresolved issue on the papers the issue of the correct amount of arrear maintenance. It is, therefore, not an issue for me to take into account to decide whether to set aside or suspend the execution of the writ. However, the applicant challenges the execution of the writ on other grounds.

[5] The applicant states that the first respondent has caused his member's interest in DJ Scheur Farming CC to be attached pursuant to the writ of execution in question. He is the sole member of the close corporation which is used to conduct a business. He states that the writ of execution was not served on the close corporation which is a peremptory requirement. The writ issued on 6 April 2022 directed the Sheriff to attach and take into execution the movable goods of the abovenamed plaintiff and to cause to be realised by public auction the sum of R594 234.00 in satisfaction of the judgment obtained .

[6] The first respondent states that the service of the writ was effected on the applicant. The applicant as the judgment debtor was the correct person to be served with the writ, she contends. She , further, states that the applicant is the sole member of the close corporation and he has knowledge of the writ of execution and notice of attachment. She states that she is waiting for the sheriff to report on a sale in execution of the applicant's members interest. She admits that the applicant's members interest has been attached pursuant to the issuing of the writ of execution and she disputes that the writ is invalid.

[7] It is common cause that pursuant to the issuing of the writ, the applicant's membership interest in DJ S Farming CC a close corporation was purportedly attached. The applicant states, which is not denied, that farming operations are conducted through the vehicle of the close corporation. The close corporation owns the immovable property, livestock, vehicles and other equipment. He states that as

a sole member of the close corporation a sale in execution of his member's interest in the close corporation shall effectively divest him of the control of the entity, his use and occupation of the farm and the residence thereon which is his personal residence.

[8] The first respondent admits that the writ was served on the applicant. The sheriff has not filed an answering affidavit and there is no return of service. The contention that the writ was served on the applicant as the judgment debtor stands undisputed. A member's interest in a close corporation is an incorporeal movable asset. It may not be attached in terms of an ordinary warrant authorising attachment of movable assets. In addition, it may not be attached not following the prescribed procedure for the attachment of incorporeal property. The writ in question authorised attachment of only movable assets. It did not authorise attachment of incorporeal movable assets. In *Badenhorst v Pretoria Sentraalen Andere* 1998(4) SA 132 (T) the court stated that a writ issued to attach incorporeal movable asset is not an ordinary writ in terms of Rule 45(3). The Sheriff, in my view, in attaching incorporeal movable asset acted contrary to the terms of the warrant.

[9] The attachment of incorporeal movable assets is regulated by Rule 45(8). The sheriff did not serve the writ on the close corporation. In addition, the sheriff failed to take possession of the document serving as proof of the ownership of the incorporeal movable asset or to report that after diligent search and enquiries he could not find the document. In addition, the Sheriff did not serve the writ or give notice of the attachment to the Registrar of close corporation. In *Badenhorst* 139J it is pointed out that failure to comply with the prescribed requirements in effecting the attachment, the attachment is invalid.

[10] It follows that there are grounds for the setting aside of the attachment of the applicant's members' interest in the close corporation.

[11] It is ordered as follows:

1. The attachment of the applicants' members interest in DJ S Farming CC in terms of the writ of Execution issued by the Registrar of this court on 6 April 2022 is declared invalid and is set aside.
2. The first respondent is ordered to pay costs of the application.

Mngadi J

APPEARANCES

Case Number :
13089/2016P

For the applicant : S Franke

Instructed by : Grant & Swanepoel Inc.
PIETERMARITZBURG

For First Respondent : S Moola

Instructed by : Prinsloo Wright Inc

c/o Lister & Lister
PIETERMARITZBURG

Date of Hearing : 17 July 2023

Date of Judgment : 10 August 2023

