



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: (A) 32/2014

In the matter between:

1.1.1.1.

**PETHERBRIDGE LAW CHAMBERS
APPLICANT**

And

**THE ACTING DEPUTY SHERIFF FOR THE
DISTRICT OF WINDHOEK**

1st RESPONDENT

T. NIKANOR t/a NATUTUNGENI

2nd RESPONDENT

NATUTUNGENI PAMWE CONSTRUCTION

3rd RESPONDENT

HAW RETAILERS CC t/a ARK TRADING

4th RESPONDENT

AND

Case no: (A) 155/2012

In the matter between:

1.1.1.2.

**HAW RETAILERS CC t/a ARK TRADING
APPLICANT**

and

**T. NIKANOR t/a NATUTUNGENI PAMWE
CONSTRUCTION**

1st RESPONDENT

NATUTUNGENI PAMWE CONSTRUCTION CC**2nd RESPONDENT****PETHERBRIDGE LAW CHAMBERS****3rd RESPONDENT**

Neutral citation: Petherbridge Law Chambers v The Acting Deputy Sheriff of the District of Windhoek (A32/2013) [2014] NALCMD 232 (30 July 2014)

Coram: SMUTS, J
Heard: 7 July 2014
Delivered: 30 July 2014

Flynote: Interrelated applications arising from the taxation of a cost order granted in favour of Petherbridge Law Chambers. The court ordered set aside the refusal of the Deputy Sheriff to proceed with execution and to pay over funds held in trust and paid as security to him. The application to set aside the writ execution in respect of the court order found to be without a basis and dismissed.

ORDER

1. That the application for condonation by Petherbridge Law Chambers for the late filing of the notice to oppose and answering affidavit is granted.
2. That Petherbridge Law Chambers is directed to pay the costs of opposition to the condonation application.
3. That the application to set aside the writ of execution is dismissed with costs.
4. That Haw Retailers CC is to pay the costs of Petherbridge Law Chambers in opposing that application. These costs include the costs of one instructed and one instructing counsel.

JUDGMENT

SMUTS, J

(b) I have before me two applications which are interrelated and thus heard together.

(c)

(d) This is firstly an application (in case number A32/2014) to review the refusal by the deputy sheriff to proceed with the sale in execution and to pay the applicant an amount of N\$46, 694. held by him on trust pursuant to a writ of execution in favour of the applicant. The applicant also seeks an order declaring that this sum held on trust as security is due satisfaction and that the deputy sheriff should be compelled to pay that amount over to the applicant. The applicant also seeks costs of the application on a special scale.

(e) The applicant is a legal practitioner firm, Petherbridge Law Chambers (Petherbridge). This firm had been cited as a respondent in an urgent interlocutory application brought by the fourth respondent, Haw Retailer CC T/A Ark Trading. (Haw). It was struck from the roll and Haw was directed to pay Petherbridge's costs on 2 August 2012. A bill of costs was prepared. A date was obtained for taxation and due notice of the taxation and the date was given to Haw's legal practitioners. Haw elected not to contest any items in the bill of costs or attend the taxation. The bill was then taxed in the sum of N\$46,694. on 16 May 2013.

(f)

(g) On the strength of the Taxing Master's *allocator* Ms Petherbridge caused a warrant of execution to be issued by the Registrar of this court on 12 July 2013 addressed to the deputy sheriff in the usual terms, thus directing him to attach and take into execution movable property of Haw to satisfy that warrant.

(h) On 16 August 2013 the deputy sheriff gave notice of an attachment of a Mercedes Benz motor vehicle truck. In the meantime, Ms Petherbridge had on

21 May 2013 informed Haw's legal practitioner of the taxation and requested payment in the amount of the *allocator*. When no payment had been received, the applicant approached the deputy sheriff, cited as first respondent, to proceed with the execution.

(i) On 21 August 2013 Ms Petherbridge gave the deputy sheriff instructions to proceed with the advertising of the sale in execution of the truck. But he failed to carry out that instruction. Ms Petherbridge followed up the issue with him. Haw's legal practitioner however on 4 October 2013 addressed a letter to the deputy sheriff indicating that Haw was prepared to pay an amount into trust as security for the claim which would only be paid out in the event of Haw succeeding with an application to set aside the writ of execution. As a consequence of this letter, the deputy sheriff took no further steps in execution. Nor did he pay over the sum to Ms Petherbridge who then brought this application under section 32(4) of the High Court Act.¹

(j)

(k) Section 32 deals with the execution of process and the obligation and duty of the deputy sheriff to execute all judgments, writs, orders, warrants, commands and processes of this court. Sub-section (4) provides:

(l)

(m) 'A refusal by such sheriff or any deputy to perform any act which he or she is by law empowered to perform, shall be subject to review by the High Court on application *ex parte* or on notice, as the circumstances may require.

(n)

(o) Ms Petherbridge in this application correctly points out that the deputy sheriff does not have a discretion in the execution of process and is bound by the instruction in a writ. She submits that the deputy sheriff by deciding to set security pending the outcome of an application to set aside the writ amounts to conduct which is *ultra vires* his powers.

(p) Ms Petherbridge also refers to the Rules of this Court dealing with execution, which requires the deputy sheriff to sell by public auction property which has been attached within a time period referred to in the rules. The point

¹ Act 16 of 1990

is correctly made that the rule is peremptory and that the deputy sheriff does not have a discretion whether or not to proceed with the sale of attached goods or to accept security instead from an execution debtor in the absence of the consent of the execution creditor. Ms Petherbridge accordingly approached this court for the review of the deputy sheriff's refusal to proceed with execution or to pay over the amount held by him on trust.

(q) This application is opposed by the deputy sheriff and by Haw. On the eve of the hearing, the deputy sheriff however filed a very brief affidavit abiding the decision of this court. Haw did not file any answering affidavit. It, however, elected to file a notice in terms of Rule 30 seeking to set aside the notice of motion as an irregular step.

(r) In the Rule 30 notice, Haw takes the point that it had decided to bring an application to set aside the writ of execution and provided sufficient security for the amount so taxed, pending the finalization of that application. The application to set aside the writ was brought on 3 October 2013. (It is case no. 155/2012.) Haw thus contends that it is *sub judice*. It is contended that the application is irregular for that reason.

(s) In order to address the Rule 30 application, it is necessary to briefly refer to the other application serving before me, brought by Haw to set aside the writ of execution obtained by Petherbridge. In that application, no interim relief was sought to address the attachment in question. In the absence of any interim relief sought and granted, the point raised in the Rule 30 application (*sub judice*) cannot in my view avail. The launching of that application of itself does not serve to interrupt or stay any execution process in the absence of an order to that effect or an agreement between the parties. The Rule 30 notice must accordingly fail.

(t) It would further follow that the applicant in Case No A 32/2014, being Petherbridge Law Chambers, is entitled to the relief reviewing the refusal of the deputy sheriff to proceed with the execution and the ancillary relief flowing from that, as set out in the order below.

Application in case no. 155/2012

(u) I turn to the application brought by Haw Retailers CC t/a Ark Trading in Case No 155/2012. Petherbridge Law Chambers (Petherbridge) is cited as the third respondent. The application seeks to set aside the writ of execution issued in favour of Petherbridge on 12 July 2013 (in respect of the *allocatur* of the taxed bill of costs in favour of that firm).

(v)

(w) In that application, Haw refers to the original urgent interlocutory application which was struck from the roll. The point is sought to be made that the costs order was in favour of all three respondents cited in the matter. But that overlooks the order itself. Only the third respondent was represented in court. One of the points raised in that matter was that the other respondents had not been served. The striking of the matter with costs, including the costs of one instructing and one instructed counsel, was in respect of the respondent who had appeared and had opposed the application, namely Petherbridge.

(x)

(y) The fundamental premise upon which the application to set aside the writ of execution is based, namely that the cost order was in respect of all three respondents, is thus incorrect. It was clearly open to Petherbridge to tax its costs for its attendances in opposing that application. Once this is established, it follows that the reasoning based upon this flawed premises would likewise be fallacious.

(z)

(aa) It was also incorrect to state that the cost consultant had taxed the bill. The tax consultant had prepared the bill of costs under his letterhead. It referred to the bill being in respect of the 'respondents' which was subsequently charged in handwriting to reflect the third respondent.

(bb)

(cc) Mr Grobler, who appeared for Haw Retailers made much of this. It was on this basis that the writ was sought to be set aside. In the founding papers in that application it was contended that the handwritten change to the notice of taxation had been made with the purpose of avoiding a defence being raised

against a claim by the two other respondents. But this is clearly incorrect as those respondents did not obtain a costs order in their favour as they were not represented in court in those proceedings. The notice of taxation would appear to have been corrected by virtue of the fact that only the third respondent (Petherbridge Law Chambers) in those proceedings was represented in court and because that firm had obtained the cost order in its favour which included the costs of one instructing and one instructed counsel when the application was struck with costs.

(dd)

(ee) A further important issue, for which no proper explanation is however provided in this application, is the failure by the part of Haw to oppose the taxation itself. If there were items in the taxation which it contested, then it was open to Haw to contest those items at the taxation. That is the right and forum created for parties to contest items in a taxation. Furthermore, the rules provide a specific remedy in the erstwhile Rule 47 to a party dissatisfied with any ruling of a taxing master to take the taxation on review. That is the remedy created by the rules for a party when being dissatisfied with the outcome of a taxation. Haw cannot in my view seek to set aside the writ of execution on the basis of the taxation when it did not exercise the remedies contained in the rules for contesting a taxation. This is quite apart from flawed reasoning raised to attack the taxation and the writ. This constitutes a further reason why this application should be dismissed. In short, no proper reasons have been advanced why the cost order which had been duly obtained in court by Petherbridge, and thereafter taxed, should not be paid.

(ff) It follows that the application to set aside the writ of execution is to be dismissed with costs.

Costs

(gg) In Case No. A 32/2014 a special costs order was sought against the deputy sheriff for refusing to proceed on the writ. Although the deputy sheriff initially filed a notice to oppose, he subsequently filed an affidavit abiding the decision of the court.

(hh)

(ii) Whilst his refusal to proceed with the execution process was not justified in law, as I have pointed out, I do not consider that his conduct was at all unreasonable. A legal practitioner had after all approached him and had provided security for the amount set out in the writ so that the sale should not proceed. He had been informed that there was an application pending to set aside that writ and that the sum in question should be held in trust, pending that application. His decision not to pay it over to Petherbridge was also not correct in law. But it was also not in my view unreasonable in the circumstances. I do not consider that a special costs order is warranted in the circumstances. Indeed, given the fact that he abides the decision of this court, I do not consider that order as to costs should be granted against him in the exercise of my discretion. The costs of opposition in that matter are to be paid by Haw which had opposed that application.

(jj) In application A 155/2012, Petherbridge Law Chambers filed a notice of opposition out of time and an answering affidavit some 20 days late and shortly before the matter was placed on the unopposed motion roll. This point was raised in the replying affidavit. Only then was an application for condonation forthcoming from Petherbridge. It was opposed. In the exercise of my discretion, I have resolved to grant condonation for the late filing of notice to oppose and the answering affidavit in that application given the lack of prejudice, except for costs, which resulted from that late filing. Whilst Petherbridge has succeeded in opposing the application A 155/2012, the costs of the opposition to the condonation application, which opposition was not unreasonable, should in my view be borne by that firm in the exercise of my discretion. For the purposes of taxation, I point out that no more than 5 minutes was spent in oral argument addressing the issue of condonation.

(kk) The following order is made in Case No. A 32/2014:

- (ll) 1. The first respondent's refusal to proceed with the sale in execution of the Mercedes Benz truck and to pay over the amount provided in security in respect of that sale being N\$46,694. is set

aside.

2. The first respondent is directed to pay the sum of N\$46,694, together, with such interest which has accrued upon it to the applicant, Petherbridge Law Chambers in satisfaction of the writ in Case No. A 155/2012 forthwith.
3. The fourth respondent, Haw Retailers CC t/a Ark Trading is directed to pay the applicant's costs in Case No. A 32/2014.
4. The fourth respondent's notice in terms of Rule 30 is dismissed with costs.
5. The costs set out in this order include the costs of one instructed and one instructing counsel.

(mm) The following order is made in Case No. A 155/2012:

- (nn) 1. That the application for condonation by Petherbridge Law Chambers for the late filing of the notice to oppose and answering affidavit is granted.
2. That Petherbridge Law Chambers is directed to pay the costs of opposition to the condonation application.
3. That the application to set aside the writ of execution is dismissed with costs.
4. That Haw Retailers CC is to pay the costs of Petherbridge Law Chambers in opposing that application. These costs include the costs of one instructed and one instructing counsel.

D SMUTS

Judge

APPEARANCES

APPLICANT: Adv JPR Jones
Instructed by Petherbridge Law Chambers

FIRST RESPONDENT: Mr Erasmus
Instructed by Erasmus, Erasmus Associates

FOURTH RESPONDENT: Mr Grobler
Instructed by Grobler & Co.