REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-LAB-MOT-GEN-2021/00146

In the matter between:

LEWIS STORES NAMIBIA (PTY) LTD	**APPLICANT**

and

KEITH RICKERTS	**1ST RESPONDENT**
DEPUTY SHERIFF: DISTRICT OF WINDHOEK	**2ND RESPONDENT**
ASHLEY DRAGHOENDER	**3RD RESPONDENT**

Neutral Citation: *Lewis Stores Namibia (Pty) Ltd v Rickerts* (HC-MD-LAB-MOT-GEN-2021/00146) [2021] NALCMD 48 (09 November 2021)

CORAM: MASUKU J

Heard: 28 September 2021
Delivered: 09 November 2021

Flynote: Labour Law – Labour Court Act 11 of 2007 – Exclusive jurisdiction of the Labour Court - Propriety of the Deputy Sheriff to attach property at an address not specified in a writ of execution – Applicability of rules 104 and 105 of the High Court in the Labour Court – Rule 18 of Labour Court rules – The importance of the judgment

debtor to be called upon to satisfy judgment debt before attachment – Section 31 of the High Court Act – It is for the deputy sheriff to consider whether conduct complained of requires sanctions.

Summary: The applicant lodged an application to have a writ of execution set aside on the bases that the Deputy Sheriff in execution of that writ attached property that was at an address not specified on the writ of execution and that the deputy-sheriff did not make a demand on the applicant to pay the amount of the judgment before the attachment took place. This application is opposed by the respondents. The applicant contends that the deputy sheriff could only lawfully attach property at the address specified in the writ of attachment. The 3rd respondent holds the view that the deputy sheriff is required to attach movable goods of the judgment debtor wherever they may be found, even if in the hands of a third party.

The 3rd respondent further raised points *in limine* contending that the court does not have jurisdiction because there is no matter pending before an arbitrator and this is a requirement if the court is approached in terms of Section 117(1) of the Labour Court Act. It was argued that the dispute, which formed the subject matter of the writ of execution, had been finalised and resultantly, this court does not have jurisdiction to deal with the matter. In addition, the 3rd respondent contends that in the absence of an underlying prayer, seeking the declaration of the writ of attachment invalid, the court may not proceed to set aside the writ. The court found as follows:

Held: The legislature, generally intended the Labour Court to have jurisdiction to deal with any labour matter as per the provisions of section 117(1)(i) of the Labour Act.

Held that: The propriety or legality of the writ of attachment is not in question. It is therefor unnecessary for the applicant to first seek the declaration of the writ of attachment invalid before applying for the attachment effected by the deputy sheriff to be set aside.

Held further that: It is important for the judgment debtor to be called upon to pay the amount of the debt. If this is done satisfactorily, it will bring an end to the matter and further steps in execution need not be taken. If demand is absent there can be no proper attachment of any property belonging to the judgment debtor.

Held: that Form 22 does not set out the address where the property to be attached is to be found but rather the address required is that of the judgment debtor.

Held that: what is for the deputy sheriff to consider when executing a writ and make demand for payment is: whether the place of attachment is the dwelling-house, place of employment or business of the judgment debtor. If it is, then the deputy sheriff may proceed with the attachment process, in terms of rule 104(5).

Held further that: Where the judgment debtor has several places of business, there is nothing improper with the deputy-sheriff proceeding to any of the places of business of the judgment debtor and demand satisfaction of the judgment debt, failing which the movable property found thereon may be attached and removed.

Held: Complaints that require sanctions as provided for in Section 31 of the High Court Act should be considered by the sheriff.

The court dismissed the points *in limine* raised by the 3rd respondent and subsequently refused to set aside the notice of attachment and dismissed the application.

ORDER

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1. The Court has jurisdiction to hear and determine this matter, consequently, the Third Respondent's point of law *in limine* to the effect that this court has no jurisdiction to hear and determine this matter, is dismissed.
2. The application for the setting aside of a notice of attachment issued by the First Respondent under Case Number HC-MD-LAB-APP-AAA-2021/00130 and dated 19 July 2021, is refused.
3. There is no order as to costs.

4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The main issue for determination in this matter, relates to the propriety of the Deputy Sheriff, in the exertion of a writ of attachment, attaching and holding under attachment property of a judgment debtor found at a location other than that described in the writ of execution.

[2] The applicant cries foul and alleges that the Deputy Sheriff was wrong to attach its property at premises other than those mentioned in the writ of execution. It accordingly prays for an order setting aside the said writ. The 3rd respondent, on the other hand, who is the judgment creditor and a beneficiary of the writ, opposes the application and moved the court to find ultimately that the deputy sheriff's execution of the writ was not in any way, shape or form, unlawful and must be allowed to stand therefor.

The parties

[3] The applicant is Lewis Stores Namibia (Pty) Ltd, a company duly incorporated in terms of this Republic's company laws. Its place of business is situate at Cnr. Guthenberg and Farraday Street, Windhoek. The 1st respondent on the other hand, is Mr. Keith Rickerts, a male adult who serves as an assistant to the Deputy Sheriff of the District of Windhoek. The latter's offices are situate along Independence Avenue, Windhoek.

[4] The 3rd respondent is Mr. Ashley Draghoender, an adult male, residing in Rehoboth. He was cited in these proceedings for any interest he may have had although no particular relief was sought from him.

[5] It is important to mention that although the deputy sheriff and the 1st respondent were served with papers in this matter, they failed to file answering affidavits within the time stipulated or at all. As such, the allegations levelled against them by the applicant, which shall be considered in due course, remain uncontroverted.

Relief sought

[6] As intimated above, the main relief sought by the applicant is the setting aside of a notice of attachment in execution issued by the Deputy Sheriff of the District of Windhoek, as described above. The applicant further seeks an order calling upon the 1st and 2nd respondents to show cause why their conduct in this matter should not be referred for investigation in terms of s 31 of the High Court Act. It is clear that the latter relief stands unopposed for the reasons mentioned in paragraph [5] above.

Background

[7] The events giving rise to this application do not raise much controversy, if at all. They amount to the following: the applicant had the 3rd respondent in its employ. It would appear that the employment relationship went south, culminating in the 3rd respondent approaching the office of the Labour Commissioner, where he lodged a labour dispute.

[8] This dispute was determined in the 3rd respondent's favour by virtue of an arbitration award dated 18 June 2021. This award was subsequently made an order of this court. It ordered the applicant to pay the 3rd respondent an amount of N$ 207 648 on or before 15 July 2021.

[9] As the 3rd respondent was entitled to, he caused a notice of attachment to be issued by the Deputy Sheriff for the District of Windhoek. It is dated 16 July 2021. It is common cause that in pursuance of the writ, certain property belonging to the

applicant was attached by the deputy sheriff from the applicant's premises situate at No.81 Independence Avenue, Windhoek. It must be mentioned in this regard that the warrant of execution authorised the deputy sheriff to attach property at the applicant's premises mentioned in paragraph [3] above.

[10] After the attachment was effected, the applicant cried foul and wrote a letter to the deputy sheriff complaining that the attachment effected was unlawful for the reason that no demand for the satisfaction of the amount of the judgment debt was made and also for the reason that the attachment was not effected at the address specified in the writ of execution. Part of the applicant's lamentations in the letter, included the allegation that the value of the property attached far exceeded the amount of the judgment debt.

[11] The applicant demanded the return of the attached property, failing which it would approach this court on an urgent basis, seeking appropriate relief. A threat was breathed, to the effect that the court would be moved to grant costs on the punitive scale, including laying a formal complaint with the Sheriff, including the laying of criminal charges of theft for the reason that the property attached was located at a different address than that authorised.

[12] It is now history that the deputy sheriff did not bend to the applicant's demands. This resulted in an application brought by the applicant pursuant to the provisions of rule 73, namely an application brought on urgency. This application served before me on 26 July 2021.

[13] It is important to mention that the 3rd respondent opposed the application and to that effect, raised points of law *in limine,* including the proposition that this court does not have jurisdiction to hear and determine this matter. The 3rd respondent further urged the court to find that the relief sought by the applicant is incompetent as there is no underlying relief.

[14] I dismissed the 3rd respondent's points of law *in limine* and indicated that the reasons for the dismissal would be delivered together with the judgment on the merits.

It is important to note that in the meantime, the property in question was released back to the applicant as it had satisfied the judgment. It is, however, important, for clarity to be obtained regarding the legality of the attachment mentioned above in order to delineate the powers of the deputy sheriffs in effecting attachments pursuant to writs of execution.

[15] I now proceed to deal with the points of law, namely jurisdiction and the competence and propriety of the relief sought below.

Jurisdiction

[16] Mr. Namandje, who appeared on the 3rd respondent's behalf, argued that this court does not have jurisdiction to deal with the application. He contended that for this court to have jurisdiction in any matter, the applicant must fall within the province of s 89 of the Labour Act, 2007, '(the Act'). It was his contention that a party who approaches this court in terms of s 117(1) of the Act can only do so if there is a matter that is pending before the arbitrator.

[17] It was Mr. Namandje contention that in the present matter, the dispute had been resolved and finalised by the arbitrator and as such, there was no matter pending before the arbitrator. As a result, this court does not have jurisdiction to entertain the matter and grant interdictory relief.[1]

[18] Mr. Haraseb, for the applicant, argued contrariwise and submitted that the court has jurisdiction to deal with this matter. He placed reliance on a judgment by Mr. Justice Parker in *Fisheries Observer Agency v Evenson and Others*.[2]

[19] I do not agree with the submission and interpretation given to the Act by Mr. Namandje, namely, that an employer may only approach the court in terms of s 89 of the Act for urgent relief, failing which any approach to the court in terms of s 117 of the

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[1] *Meatco v NAFAU* 2013 (3) NR 777.

[2] *Fisheries Observer Agency v Evenson and Others* (HC-MD-CIV-MOT-GEN-2021/00179) [2021] NAHCMD 301 (23 June 2021).

Act, renders this court bereft of jurisdiction if the matter is, all said and done, one that falls within the purview of s 117(1)(i) of the Act. .

[20] In my view, it would work hardship for parties to be required to shuttle between this court and the High Court on what are clearly matters necessary or incidental to the functions of the Labour Court and which concern labour matters. It would be disconcerting and probably unfair that for some purposes, the Labour Court has jurisdiction in labour matters and in other instances, the High Court has jurisdiction, even though it is a labour matter.

[21] It is in my view plain that the legislature, had intended that this court should generally speaking, have jurisdiction to deal with any labour matter. This appears plain when one has regard to the provisions of s 117, which spell out the jurisdiction of this court, particularly s 117(1)(i) of the Act. Furthermore, the provisions of s 115 of the Act state that the Labour Court is a division of the High Court and this should not be an idle or inconsequential consideration in dealing with the issue of this court's jurisdiction.

[22] Furthermore, one should consider the policy set by the legislature for creating the Labour Court, was to come to the assistance of the parties, particularly the employees, when it comes to the question of costs. In this regard, s 118 does not allow the Labour Court to lightly order costs, unless there is frivolous or vexatious conduct accompanying the institution, defence or continuance of the matter.

[23] Where labour matters are eventually determined in the High Court, it may have the unintended consequence of opening the parties to paying costs, which the legislature sought to specifically avoid. When one has regard to financial power, it is more often the case that employers are liberally endowed therewith. Mulcting parties with costs, which the High Court has to do as a matter of course, may result in employees, in particular, being unable to afford legal costs and thus be deprived of justice, even their cases may have good prospects of success.

[24] This point is thus doomed to fail in my considered view. It is for that reason that I consider the court to be clothed with the jurisdiction to proceed to deal with the matter

on the merits. I accordingly move on to deal with the rest of the argument. I immediately proceed to deal with the argument regarding the alleged incompetence of the relief sought, namely, the setting aside of the writ of attachment.

Competency of the relief sought

[25] Mr. Namandje was not done with punching holes in the applicant's matter. It was his further argument that the application should be dismissed for the reason that it is incompetent for the court to grant the order setting the attachment aside in the absence of an underlining prayer, seeking the declaration of the writ of attachment invalid. It is only where a *declarator* has been issued, pronouncing the underlying order as illegal and thus invalid that the court may properly proceed to issue an order setting aside the writ in this case.

[26] In support of this legal proposition, Mr. Namandje placed store on the judgment of *Mushwena v Government of the Republic of Namibia*.[3] I am of the considered view that *Mushwena* is correct in its statement of the law but must be considered in the light of the facts thereto anent. It is not proposition for the argument that there are no cases where one may properly move the court to set aside an action or other procedural step without previously seeking an order declaring the said action unconstitutional or illegal.

[27] In the instant case, the applicant is not questioning the propriety nor the legality of the writ of attachment. It is perfectly valid as it followed upon an award of the arbitrator and it subsequently metamorphosed into an order of this court. The applicant's complaint in this matter is thus targeted at the execution of the writ by the deputy sheriff, as opposed to the legality of the issue of the writ by the sheriff.

[28] The argument advanced by Mr. Namandje, if taken to its logical conclusion, would result in absurdity and would compel parties to seek relief that they are not entitled to and which they in any event, have no right to seek, either because that is not their case, or because the relief is legally untenable as having no foundation in law.

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[3] Mushwena v Government of the Republic of Namibia 2004 NR 94.

[29] I accordingly come to the considered conclusion that in the specific context of this case, it was unnecessary for the applicant to first seek the declaration of the writ of attachment invalid before applying for it to be set aside. There are no legal grounds for a declaration that the said warrant was wrongly issued or that it was issued illegally or in violation of the Constitution of Namibia, in any respect. This argument must accordingly fall on its face, paving the way for the court to deal with the matter on the merits. I proceed to do so below.

The merits

[30] The applicant's complaint, as previously stated, is that there is a disparity between the place where the deputy sheriff was authorised to attach by the warrant and the place where he purportedly attached the applicant's goods. The warrant authorised the deputy sheriff to attach goods to be found at 13 Guthenberg Street, Windhoek, Namibia. The address of the applicant's shop was also described as Shop 48, Second Floor, Old Power Station Complex, Armstrong Street, Windhoek.

[31] The notice of attachment, it is common cause, reflects that the property attached was so attached at applicant's shop known as Branch 0188, which is located on No. 81, Independence Avenue in Windhoek. The applicant contends that this was wrong and that the deputy sheriff could only lawfully attach property at the address given in the writ of attachment.

[32] On the date of argument of the matter on the merits, Mr. Van Vuuren appeared for the applicant and Mr. Nina appeared for the 3rd respondent. There was no appearance for the 1st and 2nd respondents and Mr. Ntinda's attempt to secure a postponement in order to be able to represent them was tossed out of the window without much ceremony. He seems to have been at peace with that decision in the face of unexplained non-compliance by the said respondents with a number of court orders, when they were legally represented by Mr. Erasmus of Erasmus & Associates.

The parties' arguments

[33] The applicant submitted that the application ought to be granted because the matters implicated have a material bearing on the protection and integrity of the court's processes and the administration of justice. It was the applicant's further argument that the processes to be followed in the matter, are designed to protect the applicant's business operations and rights accorded by the rules of court.

[34] It was the applicant's contention that the procedure followed by the deputy sheriff was at odds with the provisions of rule 104 and 105 of the High Court. The applicant argued in this connection that the applicant was not afforded an opportunity to satisfy the judgment as provided by the rules of court. As such, it was contended, the deputy sheriff failed to act impartially and as expected of an officer of the court. Allegations of frivolousness and dishonesty are thus levelled at the deputy sheriff.

[35] As intimated above, the mainstay of the applicant's case, is the attachment of property at an address other than provided in the warrant of attachment issued. The applicant further argued that the attachment was in any event not necessary, considering that by the time the attachment took place, the applicant had already provided a bond of security, to the extent required by the 3rd respondent and this was done on by 21 July 2021.

[36] It was accordingly the applicant's case that the application ought to be granted and that given the untoward behaviour of the deputy sheriff, the court ought to mark its disapproval of the respondents' behaviour by not only granting the relief sought but by accompanying the order by mulcting the said respondents with an adverse order as to costs.

[37] Mr. Ntinda, for the 3rd respondent on the other hand, argued that there is no merit at all in the submissions of the applicant. Mr. Ntinda argued that the applicant was not interested in complying with the writ of attachment. This he submitted was because the deputy sheriff attempted to execute the writ on 16 July 2021, but failed because the applicant then engaged its legal practitioners of record and did not comply with their duties in terms of rule 104 and 105 of the applicable rules.

[38] It is the 3rd respondent's case that the issue of a bond of security that the applicant purported to provide was not a procedure known to the rules of court. The 3rd respondent further submitted that a deputy sheriff is required to attach movable goods of a judgment debtor wherever they may be found, even if they are in the hands of a third party.[4]

[39] It was accordingly the 3rd respondent's contention that there is no requirement that the property of the judgment debtor to be attached must be at the address given in the writ of attachment. In this regard, further contended Mr. Ntinda, as long as the property in question belongs to the judgment debtor, that should suffice. In the instant case, there is no argument that the property in question, although located at an address other than that specified in the warrant, it belonged to the applicant and not some other person.

Determination

[40] It is important, in trying to untie the Gordian Knot, as it were, in this case, to have regard to the relevant provisions of the applicable rules. The parties appear *ad idem* that the applicable rules are rules 104 and 105 of the High Court rules. One may immediately pose a question, why should High Court rules apply in the execution of orders issued by the Labour Court?

[41] The answer is to be found in the provisions of rule 18 of the Labour Court Rules, entitled, 'Execution of judgments and awards'. It provides as follows:

> 'Without derogating from section 90 of the Act, any judgment or order of the court and any award of an arbitration tribunal sounding in money may be enforced in accordance with the rules applicable in civil proceedings in the High Court, as if such judgment or order or award in a civil action in the High Court.'

[42] It is plain that the instant arbitral award is one sounding in money as stated earlier. For that reason, it is one that is fit to be dealt with in terms of the provisions of

[4] *Marais v Aldridge and Others* 1976 (1) SA 746 (TPD). At 750F

rule 18 quoted above. The rules that deal with execution in the High Court Rules, are rules 104 and 105. I deal with them immediately below.

[43] Rule 104(1) and (5), read as follows:

'(1) The party in whose favour judgment of the court has been given may, subject to rule 107(1), sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 22, except that no writ may be issued in respect of the salary, earnings or emolument or any part thereof due to the judgment debtor.

…

(5) If by any process of the court the deputy-sheriff is directed to levy and raise a sum of money on the goods of a person the deputy-sheriff himself or herself or his or her assistant must, unless the judgment creditor gives in writing different instructions regarding the situation and or location of the assets to be attached, without delay proceed to the dwelling-house or place of employment or business of that person and at that house or place -

(a) demand satisfaction of the writ and failing satisfaction; (b) demand that so much movable and disposable property be pointed out as he or she may consider sufficient to satisfy the writ; and (c) failing such pointing out, search for that property.'

[44] It is important, however, before proceeding to deal with the above provisions, to have immediate regard to Form 22, mentioned in rule 104. It is a Form made in pursuance of rule 104(1). It authorises the deputy-sheriff to attach and take into execution movable property a named person 'the abovementioned defendant of …….. (address), and of the same cause to be realised by public auction the sum of ……..'

[45] Read together, the rules permit a judgment debtor to issue a writ or writs out of the office of the registrar of the High Court as near as can be to Form 22. Upon arriving at the premises of the judgment debtor, the identity of which I will deal with below, the deputy-sheriff must demand satisfaction of the writ, failing which, he or she must demand movable and disposable property to be pointed out by the debtor and which property the deputy-sheriff must consider sufficient to satisfy the writ issued. If the property liable to attachment is not pointed out, the deputy-sheriff must then search for that property.

[46] The first complaint lodged by the applicant is that the attachment in this matter was irregular for the reason that the deputy-sheriff never made a demand for the satisfaction of the amount of the writ. In this regard, the 3rd respondent is, in my considered view, ill-placed to deal with those allegations, as he was not present. The deputy-sheriff, as stated, did not file an affidavit to deal with that particular issue.

[47] For that reason, the position is that there is no evidence placed on record to gainsay the applicant's version as the person who was present when the attachment was effected, stated on oath that there was no demand made. In the premises, I am of the considered view that had the property still been in the deputy-sheriff's possession, this would have been a proper ground to set the attachment aside.

[48] I say this for the reason that the applicant states that had a demand for the payment of the amount been made, it would have settled that amount. The taking of the further step of attaching property without first having made a demand for payment of the amount of the judgment, is in my view wrong and improper. Furthermore, it is inconsistent with the provision of the rules.

[49] It is important that a judgment debtor is called upon to pay the amount of the debt. If that is done and in a manner that is satisfactory to the deputy sheriff, that should mark the end of the matter, without a need to follow the subsequent steps mentioned in the subrule in question. The object of the deputy sheriff, must first be to get immediate or a suitable payment arrangement in place. It does not befit the office for the deputy-sheriff to skip the first step in order to play macho by attaching property of the judgment debtor.

[50] A deputy-sheriff, who sidesteps the demand for payment and proceeds to attachment, may be accused, and properly so, of acting in bad faith. The demand is a foundational step upon which the whole process of eventual attachment of the property is predicated. Absent a demand, then there can be no proper attachment of any property belonging to the judgment debtor.

[51] This is, in my considered view, so because the judgment debtor would have been deprived of an opportunity to make payment, thus obviating the inconvenience and embarrassment occasioned by the attachment and removal of his or her property. I would have thus been compelled by the failure to make a demand, to set aside the attachment.

[52] I now move on to decide the sustainability of the applicant's point that the attachment was liable to be set aside because of the attachment of the property at an address other than that stated in the writ of execution. I am of the considered view that Mr. Ntinda is eminently correct in his submission. When one reads Form 22, it is not intended to provide an address at which the attachment should take place.

[53] On a proper construction, and this is apparent from the portion of Form 22 quoted verbatim above, the address required is that of the judgment debtor and not necessarily the address where the property to be attached is to be found. The provisions of rule 104(5), in my view make this plain. They authorise the deputy-sheriff to proceed to the 'situation or location of the assets to be attached, without delay proceed to the dwelling-house or place of employment or business of that person and at that house or place –'

[54] It would appear to me in this regard that the question that the deputy-sheriff must ask himself or herself is this – is the place where I am going to make a demand for payment, and subsequently attach, if necessary, the dwelling house, place of employment or place of business of the judgment debtor? It is clear that the subrule conceives of the attachment of different classes of judgment debtors.

[55] From the locations, it is clear that there may be attachment at a dwelling house of a natural person, or at his or her place of employment. If the judgment debtor is a legal person, the demand must be made at that legal person's place of business. As a result, the question to ask in this particular case is this – was the place where the attachment was done, the place of business of the applicant? If it was, then, *cadit quaestio*.

[56] I make bold and say that if the judgment debtor has several places of business, there is nothing wrong or improper with the deputy-sheriff proceeding to any of the places of business of the judgment debtor and to demand satisfaction of the judgment, failing which, the attachment of the movable and disposable property to be found thereat. It may of course be a different kettle of fish altogether, if the property where demand is made and attachment is effected, is not the premises of the judgment debtor.

[57] I am of the considered view that the work of a deputy-sheriff is not easy, namely that of locating the premises of judgment debtors for the purpose of demanding payment and possibly attaching movable goods. If they have located property belonging to the judgment debtor, there is no reason why they should be sent from pillar to post, for a ‘perfect’ place of attachment according to the judgment debtor.

[58] I am of the considered view that writs of execution must not be treated in the same vein as warrants of search and seizure, or warrants of arrest, for that matter. Those warrants are normally issued with the effect of affecting fundamental rights of those mentioned in the warrants. More often than not, the information relied on for the issuance of the warrant is *ex parte,* without the subject being afforded an opportunity to make representations before the issuance of the warrant.

[59] It is for that reason that the approach of the courts to such documents, is to interpret and construe them narrowly because of their potential to violate certain fundamental rights. A warrant of execution, on the other hand, is a document designed to give effect to a court order and after the judgment debtor has been heard and his or her defence has failed, or his claim is dismissed. In this regard, it would be contrary to the interests of justice and the rule of law, to adopt a pedantic approach to warrants of execution.

[60] I am accordingly of the considered view that the complaint by the applicant regarding the attachment at the address where attachment was effected, is totally misplaced. The deputy-sheriff was within his rights to attach the property at the said premises, provided there had been a prior demand, as required by rule 104(5)(a) of the rules of court.

[61] The sentiments expressed in *Marais v Aldridge*[5] Melamet J ring ever so true even to this day. The learned Judge said:

'It is only necessary that in doing so, the Deputy-Sheriff complied with the provisions of Rule 45 (8) of the Rules of Court. It is this Rule which authorises the attachment of incorporeal asset. Before considering this aspect I should indicate that I am of the opinion that there is no substance in the contention of applicant that he was overseas and that his attorneys were not authorised to accept service of the writ of execution. A writ of execution cannot be equated with a summons and the Deputy-Sheriff is directed and authorised by the execution creditor to seize and attach assets wherever they may be found. If such assets are in the possession of a third party, the Deputy-Sheriff will seize and attach them subject to his being given the necessary authority and indemnity by the judgment creditor. (Emphasis added).

[62] I am accordingly of the considered view that the contentions by the applicant that the attachment was irregular because of the address where attachment took place was at odds with that inserted in the warrant of execution, is with respect, untenable. As long as the property belonged to the judgment creditor, the attachment cannot, subject to the other provisions of rule 104, be impeached, in my respectful view.

Applicability of section 31 of the High Court Act

[63] The above-quoted provision reads as follows:

'31. (1) A deputy-sheriff who is alleged to have been negligent or dilatory in the service or execution of process or wilfully to have demanded payment of more than the prescribed fees or expenses or to have made a false return or in any other manner to have misconducted himself or herself in connection with his or her duties, may pending investigation, be suspended from office and profit by the sheriff who may appoint any person to act in his or her place during the period of suspension.

(2) The sheriff shall forthwith report to the Permanent Secretary for Justice for the information of the Minister any action which he or she has taken under this section, and the Minister may, after investigation set aside the suspension or may confirm it and may if he or she deems fit dismiss from his or her office the deputy-sheriff who has been so suspended.'

[5] *Marais v Aldridge* 1976 (1) SA 746 at 750 E-G.

[64] It must be recalled that the applicant, in prayer 4 of the notice of motion sought an order '. . . in terms whereof the first respondent, on a date to be determined by this Court, is called upon to show cause why, this Court should not refer the first respondent's conduct for investigation as contemplated in section 31 of the High Court Act, 16 of 1990.'

[65] It is to be noted that when one reads the provision closely, it does not create any role for the court to perform in cases where a deputy-sheriff has misconducted himself or herself. There may be cases of course, where the court takes the view, on the evidence before it, that there may be some misconduct by the deputy-sheriff. In that case, the court may, in my view, *mero motu,* invoke the above provisions.

[66] In my reading of the section in question, there is nothing that prevents a person in the position of the applicant, who or which has a complaint that is viewed as amounting to misconduct, from reporting that particular conduct in terms of the provision. The applicant may, if so advised, explore the avenues provided by the provision, without seeking the concurrence, support or participation of the court. It may be for the sheriff to consider whether any of the conduct complained of, requires any sanction stipulated in section 31 of the High Court Act.

[67] I must mention that the applicant filed two supplementary affidavits regarding the conduct of the deputy-sheriff. These affidavits were filed without leave having been sought and granted by the court. For that reason, no reliance may be placed on them for any relief that is sought in this matter. That does not, as I have pointed out above, preclude the applicant from placing any material that it considered to be misconduct by the deputy-sheriff, or his assistant, to the attention of the sheriff for action that the latter may consider to be appropriate.

[68] I am accordingly of the considered view that this is not a proper case for the court to grant prayer 4 of the notice of motion, as described above. This does not constitute an impediment in the applicant's way from independently employing the provision of s 31 of the High Court Act.

Costs

[69] It must be recalled that this is a labour matter. Section 118 of the Labour Act, 2007, decrees that no costs shall be ordered unless the court is satisfied that the relevant party in the institution, defence or proceeding with proceedings in that matter, has acted frivolously and vexatiously. I am not satisfied that there is any evidence of either of the qualifying conduct, to enable the court to grant an order for costs.

[70] In any event, even if any costs were payable, it is plain that the applicant has been successful to some extent, but unsuccessful in other respects. The same can be said of the 3rd respondent, as well. The main worry of course, is the deputy-sheriff not having filed any papers, apparently because his lawyers appear to have let him down. I will say no more of this matter.

Conclusion

[71] In the premises, understanding as we must, that the matter had been overtaken by events after the papers had been filed, the main question for determination ultimately, was whether a deputy-sheriff is confined to attach and execute upon a writ at the address appearing on the writ of execution. The answer returned is in the negative. A deputy-sheriff may execute a writ and attach the movable property of the judgment debtor wherever that property may be found within the jurisdictional area of the deputy-sheriff concerned.

[72] The court is also of the view that the applicant is at liberty, without the imprimatur of the court, to refer the conduct of the deputy-sheriff complained of, to the sheriff in terms of s 31 of the High Court Act, 1990.

Order

[73] In view of the above analysis and conclusions, I am of the considered opinion that the following order would meet the justice of the case, namely:

1. The Court has jurisdiction to hear and determine this matter, consequently, the Third Respondent's point of law *in limine* to the effect that this court has no jurisdiction to hear and determine this matter, is dismissed.

2. The application for the setting aside of a notice of attachment issued by the First Respondent under Case Number HC-MD-LAB-APP-AAA-2021/00130 and dated 19 July 2021, is refused.

3. There is no order as to costs.

4. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge

Appearances:

APPLICANT	A. S. Van Vuuren
Instructed by:	ENS Africa
RESPONDENT	M. Ntinda
	Of Sisa Namandje Inc.