



IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

CVHGB-000979-17

IN THE MATTER BETWEEN:

THE ATTORNEY GENERAL OF BOTSWANA 1ST APPLICANT

**MINISTRY OF MINERALS ENERGY
RESOURCES, GREEN TECHNOLOGY
AND ENERGY SECURITY** 2ND APPLICANT

AND

OLEASTER (PTY) LTD 1ST RESPONDENT
DEPUTY SHERIFF BRIAN TSHABANGU 2ND RESPONDENT

IN RE:

OLEASTER (PTY) LTD 1ST PLAINTIFF
BABCOCK TCM PLANT HIRE (PTY) LTD 2ND PLAINTIFF

AND

THE ATTORNEY GENERAL OF BOTSWANA 1ST DEFENDANT

**MINISTRY OF MINERAL RESOURCES,
GREEN TECHNOLOGY & ENERGY SECURITY** 2ND DEFENDANT

BOWMAG CONSTRUCTION (PTY) LTD 3RD DEFENDANT

**MR. ATTORNEY B.U. MANEWE FOR THE APPLICANT
MR. ATTORNEY P. NYAMAMBI FOR THE 1ST RESPONDENT**

JUDGMENT

MOTSWAGOLE JP:

1. On 23 February 2023, the Attorney General and the Ministry of Minerals Energy Resources, Green Technology & Energy Security, being 1st and 2nd respondents respectively, brought an application on urgency seeking a stay of a writ of execution issued on 6 January 2023 pending the final determination of review proceedings to be instituted within 44 days and the restoration of the attached and seized movable property by the Deputy Sheriff, the 2nd Respondent, who is joined together with the 1st Respondent and 1st Plaintiff in the main case. However, the co-Plaintiff is not involved in the instant proceedings.
2. The applicants, who in my view really are one person, are the 1st and 2nd defendants in the main case that is scheduled for case management on Monday 13 March 2023 and there is a 3rd

Defendant who is currently not involved in the instant proceedings.

3. The State Proceedings (Actions by or against Government or Public Officers) Act, CAP 10:01 of the Laws of Botswana has made it easier and simpler to institute a civil claim against the Government of Botswana or any Ministry thereof by providing in Section 3 that such be brought against the Attorney General in his or her representative capacity. I will therefore refer to the applicants collectively as the "Applicant" or "the Government" unless it is absolutely necessary to be specific for the purpose of clarity. The 1st Respondent shall be referred to interchangeably as the "1st Respondent" or "the Plaintiff" unless it is absolutely necessary to distinguish it from any other Plaintiff thereon, in which event, I will use "the 1st Plaintiff". The Deputy Sheriff has not taken any part in the instant proceedings and shall be referred to as "the Deputy Sheriff".
4. The Plaintiff has raised points in limine reproduced below:-

- “1. *The court has no jurisdiction to entertain this matter as it is res judicata, and stands to be dismissed with costs.*
2. *This matter is not urgent as the purported urgency herein is self-created.*”

5. The foundational facts are common cause.

5.1 The Plaintiff caused the Registrar to issue the writ of execution now being challenged on 6 January 2023 that purported to authorise a Deputy Sheriff to attach the movable goods of the Government to recover the sum of P2 710 999.96, interest at the rate of 10% per annum calculated from 28 May 2016 and costs of suit allegedly granted by an order of this court on 11 April 2022.

5.2 It has now been conceded that the order of 11 April 22, which is an initial case management order did not authorise the recovery of any sums of money.

5.3 That on 9 January 2023 the Plaintiff caused another Deputy Sheriff J. Moyo to execute the writ of execution in issue, who dutifully proceeded to attach several motor vehicles belonging to the Government.

5.4 The Government in defence of its interest sprung into action by filing an urgent application on 13 January 2023 during court vacation, and Leburu J, being the vacation Judge, issued the following rule nisi on 18 January 2023.

- “1. *That the normal rules of court relating to services of process and time limits be and are hereby dispensed with and that this matter be and is hereby treated as urgent application.*
2. *A Rule Nisi be and is hereby granted returnable on the 8th February 2023 at 0930 hours calling upon the*

respondent to show cause if any, why orders in the following terms should not be made final and absolute.

- (a) That writ of execution issued by registrar of this Honourable Court dated 6th January 2023 be stayed in execution pending the final determination of rescission application to be filed within 5 days after the date on which an order is made;*
- (b) That the 4th Respondent is hereby interdicted from attaching, advertising and/or selling the Applicant's property;*
- (c) Costs of this application are ordered against 1st Respondent.*
- (d) Order b(1) above should operate as an interim order pending the rendering of the rule nisi.*
- 3. That the 1st Respondent should file their opposing papers on or before 25th January 2023.*
- 4. That the Applicants file their replying affidavit on or before 31st January 2023."*

5.5 The foregoing rule was confirmed by consent on 8 February 2023 as evidenced by the order reproduced below.

- "1. The Applicant has made out a case for stay of execution of a writ of execution, pending rescission.*
- 2. The order nisi is therefore confirmed and made absolute.*
- 3. The matter is referred to the substantive Judge (Motswagole J) for further case management of the case."*

5.6 As it turned out the Government failed to lodge an application for the rescission of the writ of execution within 5 days of the order staying execution but did so belatedly and without leave of the court on 20 February 2023, and was thus late by 7 days.

- 5.7 The Government subsequently took the decision to withdraw the foregoing application and decided to lodge the current application. Perusing the notice of motion in question, one would notice that the Government sought to rescind the initial case management order issued on 4 April 2022 that was essentially an endorsement of the parties' case management report. It is not hard to see that such attempt would have been futile.
6. The Plaintiff now objects to the current application on the principle of *res judicata*. Comprehensive heads of argument have been filed by either side followed by oral submissions. The parties are in agreement on the requirements for the doctrine of *exceptio rei judicatae*, namely –
- a) the existence of a final judgment or order definitive of the rights of the parties and disposal of the dispute or a substantial part thereof;
 - b) involving the same parties;
 - c) concerning the same cause of action.
7. The Plaintiff's Counsel referred to ***Standard Chartered Bank Botswana (Pty) Ltd v Isaacs & Another*** [1999] BLR 453; ***Leifo v Ngwato Land Board & Another*** 2014 (3) BLR 468 (***Leifo***); ***Jet Air Plant Hire (Pty) Ltd v Zoe Electrical***

Installations (Pty) Ltd 2015 (1) BLR 410 (CA) (Jet Hire Plant); Tshekiso & Others v Estate of the Late Oshoma Mpuang [2018] 1 BLR 537 (CA).

8. For his part, the Applicant's Counsel in addition to ***Leifo and Jet Hire Plant*** above referred to ***Botipeng v Healthcare Holding (Pty) Ltd t/a Gaborone Private Hospital 2003 (1) BLR 297 (HC)*** and ***BCL Ltd v Trengove No. & Another 2002 (1) BLR 221 (HC); Mokone v Mokone 1989 BLR 323 (HC).***
9. The more recent and comprehensive treatment of the subject is found in ***Attorney General, Registrar of Deeds for Botswana v Kgosi Mosadi Seboko & Gamalete Development Trust Court of Appeal Civil Appeal No. CACGB-153-21***, delivered on 7 March 2023.
10. In applying the law to the facts, the learned counsels for the respective parties took separate ways. Whilst the Plaintiff's Counsel was of the view that the three requirements of res judicata are present, the Counsel for the Government differed,

saying the first order sought was not only interim but also dealt with the first attachment by Deputy Sheriff Moyo whereas the instant application is likewise interim but deals with a different attachment by Deputy Sheriff Tshabangu.

11. The objection to urgency is informed by the same facts stated above. The Plaintiff's Counsel stated that the option to seek review of the decision of the Registrar to issue a writ of execution on 6 January 2023 was known by the Government when the first application was lodged. It was given leave to do so by staying the execution but failed to take advantage of that indulgence. It also failed to seek the condonation of the late filing of the application for rescission. Consequently, it was contended, any urgency is self-created.

12. I am of the opinion that the two objections are totally unmeritorious. The Plaintiff's Counsel was at great pains to demonstrate to me what rights were definitely determined by the Order of Leburu J that was clearly an order to maintain the status quo, namely to hold in abeyance the execution of a writ

of execution pending the determination of an intended application for rescission. The Government was placed on terms to do so within 5 court days, if it was so minded and when it failed, the Plaintiff proceeded to cause another Deputy Sheriff to attach the Government's motor vehicles as apparently authorised by the writ of execution. This could technically be done as the order of Leburu J was an interim order that was conditional upon the filing of an application within 5 days.

13. I also agree with the Applicant's attorney that the parties are different and the subject matter of the two interlocutory applications are different. Likewise, the first application was triggered by the attachment of the Applicant's property by Deputy Sheriff Moyo who was a party to such proceedings and the instant application was triggered by the attachment and removal of the Applicant's motor vehicles effected by Deputy Sheriff Tshabangu on 22 January 2023, which application was filed on 23 February 2023 at 1751 hours, a few hours after the attachment. I see no basis for objecting to the urgency. It cannot be said the Applicant set on its rights even if one was to

assume the relief now sought should have been sought at the beginning. There is a clear demonstration of an intention to contest the authority of the writ of execution in issue from the time it was brought to the attention of the Applicant. The means adopted may have been inappropriate or misconceived or of doubtful efficacy but the intention to challenge what is perceived to be an unlawful process was clear.

14. It became apparent during the hearing on 8 March 2023 that the main relief sought by the Applicant, namely the stay of execution of the writ of execution issued on 6 January 2023, pending the determination of the intended review application would not be an effective remedy in the interim. The difficulty that the Applicant faced is that about 9 motor vehicles of the Applicant including those used by the most senior officials had been seized and removed and the Applicant sought as a subsiding relief the restoration of possession thereof. I put it to the Counsel for the Applicant that to grant that relief in the instant proceedings would be tantamount to undoing what the

writ of execution being impugned authorised, a matter that must properly await the review proceedings.

15. The Applicant had a choice to stick to its guns or to amend its papers and seek alternative relief. Wisely, the Applicant opted to move an application for amendment orally. The essence of the proposed amendment of the notice of motion is to substitute an order setting aside the writ of execution issued on 6 January 2023 for an order for stay of the same and further supplementary orders seeking the setting aside of the attachment of the Applicant's property and the restoration of the property to the Applicants.

16. The Plaintiff's Counsel indicated that he needed time to appreciate the nature of the amendment and to take further instructions thereon. He also requested for a written amendment. I thought the request was noble and I granted an adjournment directing him to file the response by Monday 9 March 2023 and for the Applicant to respond thereto by Midday on 10 March 2023. The Applicant was further to file a written

notice of amendment which was done on 8 March 2023 at 1347 hours.

17. Amendment of pleadings is regulated in terms of Order 32. I reproduce rules 1,3, 7 and 8.

- "1. Failing consent by all parties the judge may, at any stage of the proceedings, on application allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.*
- 3. Pleadings may be amended by minor written alterations in all copies, unless the amendments are so numerous or of such a nature that the making of them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by retyping and delivering a copy of the document as amended.*
- 7. The judge may at any time, and on such terms as to costs or otherwise, as the judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the pleadings.*
- 8. The costs of and occasioned by any amendment made pursuant to this Order shall be borne by the party making the same, unless the judge otherwise orders."*

18. Order 32, rule 1 of the Rules is clear that amendment may be allowed at "any stage of the proceedings", and the qualifying factor is the achievement of the just determination of the real dispute between the parties. Of course, there are many

variables that will influence what is a just and fair determination, including the lateness and scope of the proposed amendment, the opportunity for the opposite party to deal therewith and the potential prejudice arising therefrom. The prejudice may be partially ameliorated by an order for costs, the granting of a postponement or adjournment and the narrowing of the issues that may be introduced by the amendment. The Court of Appeal has determined that the just determination of a real dispute between the parties is paramount and that our law in this regard departs from the South African practice: ***Dwinchi Woodtech Botswana (Pty) Ltd & Another v Botswana Building Society*** 2011 (2) BLR 874 (CA) at 884; ***Motor Holdings (Botswana) (Pty) Ltd t/a Gaborone Autoworld v Auto World (Pty) Ltd t/a Auto World*** 2010 (1) BLR 153 (CA) at 157-158; ***Seletlo v The Attorney General*** 2005 (1) BLR 96 (CA) at 123-124; ***Chicole v Chatsana & Another*** 1995 BLR 485 (CA) at 491-49.

19. See, Also ***Tsaanang & Another v Zurich Insurance Company Botswana Ltd*** [2016] 3 BLR 475 (HC) at 480-481; ***Tapela &***

Others v Attorney General & Others [2014] 2 BLR 353 (HC)
at 356-357, *Botswana Postal Services & Others v Bosekeng*
[2013] 1 BLR 402 (HC) at 404-405.

20. The learned Counsel for the Applicant submitted that the proposed amendment is sufficiently supported in the founding affidavit at paragraphs 21.1 to 21.3 and that the Plaintiff had the opportunity to deal with the averments and therefore no prejudice could possibly be suffered by it. I reproduce 21.1 to 21.3 of the founding affidavit.

“21.1 The writ was not based on any judgment/order granted in favour of the 1st respondent for payment of a specified sum.

21.2 There was no compliance with the writ procedural obligations in terms of section 7 of the State Proceedings (Civil Actions by or against the Government or Public Offices) Act, which requires that the Government be given 3 months to comply failing which only then was the Writ be used.

21.3 The writ of execution appears to have been issued based on the initial case management order which is not an order for payment of a specified sum.”

21. In response, the Plaintiff averred that the writ of execution was based on a consent judgment granted on 4 April 2022. I reproduce paragraph 19 of the Plaintiff’s answering affidavit.

“19. AD PARAGRAPH 21

19.1 I deny that the writ was not based on any judgment as there is a court order which state that the contested amounts are due and payable. This court order was made with the consent of the applicant.

19.2 *The order admitting liability by the Applicant to the 1st Respondent was made on the 4th April 2022. I am advised by my attorneys and I verily believe it to be true that there has been substantial compliance with section 7 of the State Proceedings (Civil Action by or Against Government or Public Officers) Act."*

22. The order in question is attached to the founding affidavit as Annexure "EM2". This, as stated before, was made during the initial case management conference and merely endorsed the facts set out by the parties as not being in dispute. It is will be useful to reproduce the relevant parts here.

- "xi. The Plaintiff and the 3rd Defendant admit that the 1st and 2nd Defendants agreed to made payment of P2 710 999.96 on behalf of the 3rd Defendant. This amount is not being disputed by all the Defendants as due and payable to the Plaintiffs by the 2nd Defendant.*
- xii. The Plaintiff and the 3rd Defendant admit that on 6 December 2019 the parties agreed in writing that, should the 1st and 2nd Defendant pay the 3rd Defendant any money in respect of contract number MTC/MMEWR/DOE/3/3/14.15, they shall first pay to the Plaintiff an amount of P2 710 999.96.*
- xiii. The Plaintiff and 3rd Defendant admit that the Plaintiffs were appointed in terms of clause 4.4(b) of FIDIC.*
- xiv. On 22 June 2016 the 2nd Defendant wrote to the Plaintiffs stating that it refused to make a written commitment on assisting the subcontractor to pay the Plaintiff directly as per the Plaintiffs request because, the 3rd Defendant had subcontracted more than 25% of the net contact amount to non-citizens; the Plaintiffs and the 3rd Defendant had to revise the subcontract in line with the PPADB Act; the 3rd Defendant had agreed to work with the engineer*

when drafting the service level agreement between the Plaintiffs and the 3rd Defendant.”

23. In the foregoing order, the 3rd Defendant is **Bowmag Construction (Pty) Ltd** and there are two plaintiffs including the 1st Respondent herein. Besides the purpose intended by the foregoing admissions of facts, namely that at the trial the same need not be established by evidence, what is really being agreed is that any money found due to the 3rd Defendant would first be applied towards the payment of the sum of P2 710 999.96 due from the 3rd Defendant to the Plaintiff. In other words, the Applicant must be found to be liable to pay the 3rd Defendant and only then will the former pay the money to the Plaintiff.

24. Any lingering doubt should really be dispelled by the parties proposed pre-trial draft order filed on 7 October 2022. The same paragraphs XI to XII reproduced at paragraph 21 above form paragraphs 1.10 to 1.13 of the Proposed Final Pre-trial Draft Order filed by the parties on 7 October 2022.

25. The bottom line however is that the order relied upon does not oblige the Applicant to pay the sum of P2 710 999.96 to the Plaintiff. The writ of execution issued on 6 January 2023 purports to derive its authority from the same case management order. The Registrar by appending her signature to the document was not conferring authority and legitimacy thereto as the authority can only be derived from a court order. See, ***Molepo & Others v Moshoeshoe & Another* 2011 (2) BLR 262 (HC); *Bolex Group (Pty) Ltd v Chirima & Another* 2012 (2) BLR 735; *JP Print Productions (Pty) Ltd v Botswana Building Society & Another. In Re: Botswana Building Society v JP Print Productions (Pty) Ltd* [2016] 2 BLR 249 (HC); *Kul Investments (Pty) Ltd v Kasane & Another. In Re: Kasane v Kul Investments (Pty) Ltd* [2018] 1 BLR 455 (HC).**
26. In the circumstances of the instant case, I have come to the conclusion that the purported writ of execution lacked authority in the absence of a court and cannot be used to recover or levy any money. Consequently, any purported attachment arising therefrom would be null and void. It is clear that insistence by

the Plaintiff to maintain the attachment in the face of all known facts was and remains an abuse of the court process. I have no doubt that such abuse must be visited with an appropriate order of costs on the higher side of the scale.

26. In conclusion, I make an order as follows:-

- (a) The Plaintiff's preliminary objections are dismissed with costs on ordinary scale.
- (b) The application for amendment is allowed with costs to the Respondent.
- (c) This matter is urgent and I do hereby dispense with the normal rules of Court as to procedure, time limits and forms of service.
- (d) The writ of execution issued by the Registrar of this court on 6 January 2023 be and is hereby set aside because it was issued without a judgment/order directing the defendants/applicants to pay a specified sum of money to the 1st respondent.
- (e) The attachment of the applicants' movable property made pursuant to the foregoing writ of execution is hereto set aside.
- (f) The 2nd respondent is hereby directed to restore possession of the applicant's attached and removed movable property to the applicants.

- (g) The 1st Respondent shall pay costs on an attorney and own client scale.

**DELIVERED IN OPEN COURT AT GABORONE ON THIS 13TH
DAY OF MARCH 2023.**



.....
M.T. MOTSWAGOLE
(JUDGE PRESIDENT)

Bogopa, Manewe, Tobedza & Co representing the applicant
Nyamambi Attorneys representing the 1st respondent