SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 710/11

Reportable

In the matter between:

SOUTH AFRICAN CONGO OIL COMPANY (PTY) LTD Appellant

and

IDENTIGUARD INTERNATIONAL (PTY) LTD Respondent

Neutral citation: *South Africa Congo Oil Company (Pty) Ltd v Identiguard International (Pty) Ltd* (710/11) [2012] ZASCA 91 (31 May 2012)

Coram: MPATI P, CACHALIA, LEACH JJA and KROON AND BORUCHOWITZ AJJA

Heard: 15 MAY 2012

Delivered: 31 MAY 2012

Summary: Execution – garnishee proceedings – rule of court 45(12)(*a*) – whether attachment of debt in terms of rule 45(8) necessary to render garnishee proceedings effective.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Victor J sitting as a court of first instance):

The following order is made:

1 The appeal succeeds with costs including the costs of two counsel;

2 The order of the court below is set aside and the following order substituted for it:

'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

BORUCHOWITZ AJA (MPATI P, CACHALIA, LEACH JJA and KROON AJA concurring):

[1] This appeal is concerned with garnishee proceedings under the Uniform Rules of Court for the attachment of a debt owed to a judgment debtor by a third person (Rule 45(12)).

[2] On 28 February 2003, judgment by default was entered by the South Gauteng High Court against the Government of the Democratic Republic of the Congo ('the DRC') in favour of the respondent for

payment of US$576 000 and US$1 395 000, or the equivalent of these sums in South African Rand, together with interest thereon and costs of suit. Pursuant to a writ of execution issued on the strength of the judgment, the respondent sold in execution an aircraft owned by the DRC. The sale yielded an amount of R1 766 007.72. The respondent has only obtained partial satisfaction of the judgment and the balance of the judgment debt remains unpaid.

[3] The respondent invoked garnishee proceedings in terms of rule 45(12) against the appellant as a means of executing on the judgment against the DRC. It is common cause that a sum of US$2 million (the debt) was owed by the appellant to the DRC when the garnishee proceedings commenced. On 16 September 2010 the respondent issued two separate notices in terms of rule 45(12)(*a*). The first directed the sheriff to attach the debt and the second, (which I will henceforth refer to as 'the garnishee notice') called upon the appellant to pay the amount of the debt to the respondent. The garnishee notice was served on the respondent on 20 September 2010. The appellant refused to pay the sheriff the amount demanded of it. As a result, the respondent approached the South Gauteng High Court for an order in terms of rule 45(12)(*b*), that the appellant show cause why it should not pay the sheriff the amount of the debt in satisfaction of the respondent's writ of execution. The application was opposed. The appellant disputed that the respondent was entitled to invoke the provisions of rule 45(12)(*b*) in the prevailing circumstances and various grounds of defence were raised. The court below dismissed these contentions and granted an order authorising the garnishee notice. The appellant was also ordered to pay the costs of the application. The present appeal is with the leave of the court below.

[4] The respondent contended, in limine, that the appeal was moot and will have no practical effect or result as the appellant is, on its own admission, not able to comply with a court order to pay the debt. Moreover, the issues raised in the appeal are said not to be of any public interest as to warrant this court exercising its discretion and hearing the appeal.

[5] Section 21A(1) of the Supreme Court Act 59 of 1959 empowers the court to dismiss an appeal if it would not have any practical effect or result. It is well settled that mootness does not constitute an absolute bar to the justiciability of an issue and that the court has discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order the court makes will have any practical effect either on the parties or on others, and in the exercise of its discretion a court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty (*Van Wyk v Unitas Hospital & another* 2008 (2) SA 472 (CC) para 29. See, also, *Executive Officer, Financial Services Board v Dynamic Wealth Limited and others* 2012 (1) SA 453 (SCA) paras 43 and 44 and the reference therein to the decision in *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 2 *All ER* 42 (HL) at 47d-f). See, also, *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 9).

[6] In my view, it cannot be said that the appeal will have no practical effect or result. The respondent has indicated that it will in due course apply for the winding-up of the appellant. In addition, the appeal involves, a decision on an important question - the proper construction

and legal effect of garnishee proceedings brought under rule 45(12) and its inter-relationship with the provisions of rule 45(8). It will therefore be of benefit to the larger litigating public and it is necessary that legal certainty as to interpretation of the procedural machinery provided for in rule 45(12) be obtained. It is thus in the public interest that this court entertain the appeal.

[7] I turn therefore to consider what is, essentially, the principal issue in the appeal: whether it is a requirement of rule 45(12)(*a*) that the sheriff should attach the debt in accordance with the procedure envisaged in rule 45(8). The garnishee machinery provided for in rule 45(12), as far as is relevant, reads:

'(12) *(a)* Whenever it is brought to the knowledge of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor, the sheriff may, if requested thereto by the judgment creditor, attach the same, and thereupon shall serve a notice on such third person, hereinafter called the garnishee, requiring payment by him to the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may, upon any such payment, give a receipt to the garnishee which shall be a discharge, *pro tanto*, of the debt attached.

(b) In the event of the garnishee refusing or neglecting to comply with any such notice, the sheriff shall forthwith notify the judgment creditor and the judgment creditor may call upon the garnishee to appear before the court to show cause why he should not pay to the sheriff the debt due, or so much thereof as may be sufficient to satisfy the writ, and if the garnishee does not dispute the debt due, or claimed to be due by him to the party against whom execution is issued, or he does not appear to answer to such notice, then the court may order execution to issue, and it may issue accordingly, without any previous writ or process, for the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the writ.' (emphasis added)

[8] Rule 45(8) prescribes the manner in which an attachment is to be made, and reads in material part as follows:

'(8) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided:

(a) ...

(b) ...

(c) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,

(i) The attachment shall only be complete when-

(a) Notice of the attachment has been given in writing by the sheriff to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose deeds registry the property or right is registered, and

(b) The sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;

(ii) The sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached.'

[9] Counsel were agreed that it is a requirement of rule 45(12)(*a*) that the debt owed by the garnishee to the judgment debtor be attached, but differed as to the manner in which this was to be achieved. The appellant contended that the attachment must be effected in accordance with the procedure outlined in rule 45(8)(*c*) whereas the respondent argued that mere service of the garnishee notice on the garnishee serves as an attachment. If the appellant's contention is correct there was no effective attachment as contemplated by the rule and this precluded the court below from granting the relief it did.

[10] The appellant maintained that on a literal interpretation of rule 45(12)(*a*) it is plain that an attachment of the debt is required. The rule expressly provides that the sheriff may, if requested by the judgment creditor, attach the debt and serve a notice on the third party. Accordingly, that wording does not permit the construction sought to be placed upon it by the respondent.

[11] The appellant also submitted that rules 45(8) and (12) should be read together and in the context of rule 45 which regulates the execution process. By reading rule 45(12)(*a*) in isolation, it was contended, the provision for the attachment of the debt would not only be inchoate but a departure from the long-standing practice in garnishee proceedings that there be an attachment. Whilst the service of a garnishee notice may have constituted an attachment of a debt under the common law, an attachment of that nature only followed upon an application to court on notice to the debtor and the creditor in respect of the debt and upon the court sanctioning the issue and service of the garnishee order. (see *Bergmann v Colonial Government* (1907) 24 (SC) 703 at 706; *Reinhardt v Ricker and David* 1905 TS 179 at 186-188). Accordingly, it was submitted that because notice was not given to the DRC, and no endeavour had been made to effect an attachment in terms of rule 45(8)(*c*) the garnishee proceedings were ineffective.

[12] On the other hand, the respondent invoked the case of *Reichenberg v Röntgen* 1983 (3) SA 745 (W) in support of its contention that mere service of the garnishee notice on the garnishee constitutes an attachment. Its reliance on that decision was, in my view, misplaced. In that matter the amount owing by the garnishee to the judgment debtor was attached pursuant to two writs of execution. The court concluded (at 747H) that by

reason of the attachment the defendant had become obliged to pay the debt to the judgment creditor. The judgment in *Reichenberg* is thus no authority for the proposition that mere service of the garnishee notice operates as an attachment of the debt. Nor is it authority for the proposition that the recognised procedure for the attachment of incorporeal property as set out in rule 45(8) is inapplicable.

[13] Respondent's counsel also relied on several foreign authorities[1] to buttress its aforesaid contention. Since garnishee proceedings are governed by the Uniform Rules, it is unhelpful, if not irrelevant, to rely on foreign authorities as an aid to interpretation of the rules. Whilst broadly similar procedures are followed in the jurisdictions referred to, none of the authorities relied upon deals with the essential question under consideration.

[14] A further argument advanced on behalf of the respondent was that the attachment procedure in rule 45(12) applies to the exclusion of the

[1] Reference was made to *Rekstin v Severo Sibirsko & Co and the Bank for Russian Trade Limited* [1933] 1 KB 47 where the Court of Appeal held, (at 70), that –
'[T]he effect of the service of garnishee order *nisi* is, according to Lord Watson in *Rogers v Whiteley* (4), to make the garnishee 'custodier' for the court of the whole funds attached.'
In *Rekstin* (at 71) the court applied the finding of Atkin LJ in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 131, that –
'[T]he service of the order *nisi* binds the debt in the hands of the garnishee – that is, creates a charge in favour of the judgment creditor.'
The dictum of Atkin LJ was followed in *Choice Investments Limited v Jeromnimon (Midland Bank Limited, garnishee)* [1981] 1 All ER 225 at 227 where Lord Denning stated that:
'[A]s soon as the garnishee order *nisi* is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor **…** the 'attachment' is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged.'
Reference was also made to American jurisprudence and in particular to the case of *Harbor Bank of Maryland v Hanlon Park Condominium* 153 Md. A pp 554, 834A 2d 993, 51.U.C.C. Rep. Serv. 2d 903 (2003) in which it was held that –
'[A] writ of garnishment "preserves the assets of the judgment debtor by creating an 'inchoate lien' that is binding and prevents the garnishee from disposing of those of the assets in his possession until such time as a judgment is entered in the garnishment proceedings" . . . The general rule is that "once the writ of garnishment is issued and laid in the hands of the garnishee, he is bound to safely keep the assets of the debtor in his possession".'

procedure contained in rule 45(8). The latter, it was submitted, deals with a different subject matter, namely, execution against the judgment debtor's own property. This contention is clearly without substance. There is no principled reason why the attachment of a debt in the hands of a third party should be treated differently to the attachment of a judgment debtor's incorporeal property. The following remarks of Howie J in *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311(*C*) are apposite:

'One must bear in mind that a "right" and a "debt" are, after all, merely opposite poles of one and the same obligation…. Essentially, therefore, claiming payment of the debt is no different in principle from enforcing the right to payment of the debt.'

[15] Finally, it was suggested that support for the respondents contention is to be found in the following phrase which appears in rule 45(12)*(b)*:

'the court may order execution to issue…without any previous writ or process, for the amount due from such a garnishee… as may be sufficient to satisfy the writ.'

It was argued that the fact that rule 45(12)(*b)* provides that the court may order execution 'without any previous writ or process' was an indication that a separate or prior attachment of the debt was not required in order to invoke garnishee proceedings under rule 45(12). It was also submitted that in the light thereof the words 'attach the same…' which appear in rule 45(12)(*a*) were tautologous. This contention is incorrect. As is evident from the history of the rule as outlined below, the 'previous writ or process …' was a reference to the proceedings, which under the common law, had to be instituted against the garnishee before an attachment of the debt could be made.

[16] Rule 45(12) must be viewed against the backdrop of the common law and the procedural position that obtained immediately before its

introduction. Under the common law a special application to court was always required in order to attach the debt owing by a third person to the judgment debtor. (See the *Bergmann and Reinhardt* cases supra; *Van Zyl's Judicial Practice* 4th ed at 254 and Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5th ed at 1039.) The requirement that an attachment of the debt be effected in garnishee proceedings has consistently been followed by our courts, save that under the present rules the attachment may be effected without the necessity of a prior application to court.

[17] Rule 45(12) was inserted into the rules by GN R235 of 18 February 1966, and is based on the wording of the old Cape rule 39. Before the introduction of the rule a creditor was obliged, except in the Cape and Natal, after effecting an attachment of the debt, to approach the court by way of application for an order calling upon the garnishee to show cause why the debt should not be paid to the sheriff in satisfaction of the writ in execution. The reason for the introduction of the rule was to provide a uniform mechanism based on the old Cape rule obliging the garnishee to pay the attached debt to the creditor and not the judgment debtor.

[18] The case of *Simpson v Standard Bank of South Africa Limited* 1966 (1) SA 590 (W) is illustrative of the position that obtained before the introduction of rule 45(12). There, a divorced wife applied for an order that a bank pay to her moneys due by her ex-husband. The moneys standing to the credit of the bank account constituted a right of action which her ex-husband (the judgment debtor) had against the bank. She launched the application without first issuing a writ of execution and effecting an attachment of her ex-husband's claim against the bank. Galgut J said the following in regard to the procedure followed:

'… [I]t seems to me that the procedure which the applicant should have followed is, firstly, to have issued a writ of execution as provided for in Rule 45(8)*(c)*. In terms of that writ the Deputy Sheriff will in the meantime attach the claim against the bank so that the money in the bank account cannot be paid over to the ex-husband (*cf.* the order made in *Ex parte Crous*, 1913 Transvaal Provincial Division 648 at pages 649 to 650). Thereafter or at the same time she could have approached the court by way of application for an order calling upon her ex-husband to show cause why the bank (*ie* the so-called garnishee) should not be directed to pay over to the Deputy Sheriff on a fixed day so much of the moneys in their hands, to which her ex-husband is entitled, towards satisfaction of the writ of execution issued out of this court, and in the event of the bank having any reason for refusing to make such payment, directing the bank to appear and show cause why it should not make the required payment to the Deputy Sheriff **…**'.

[19] *Simpson* was delivered on 25 December 1965, shortly before the introduction of rule 45(12). What emerges from that case is that rule 45(8) must be employed when effecting an attachment of incorporeal property including the attachment of a debt owing by a third person to the judgment debtor. Rule 45(12) did not, as was suggested by the respondent, dispense with the attachment requirement, or create a discreet attachment procedure. What it in fact did was to establish the machinery necessary to oblige the garnishee to pay the attached debt to the judgment creditor.

[20] The need to attach the debt is self evident. An attachment in execution creates a *pignus judiciale* the effect of which is that control of the property attached passes from the judgment debtor to the officer entrusted with the execution of the writ, the dominium of the debt remaining with the judgment debtor (see *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at 558-9). The necessity for

an attachment of incorporeal property such as a debt was described by Innes CJ in *Reinhardt* supra at 187.

'(T)he essential to be observed in all cases of the attachment of debts is that the debtor should receive due notice, so that he may be warned not to discharge his obligation to his original creditor, and so that he may have an opportunity of coming to the Court for relief in case he wishes to raise the question of the validity of the debt, or any lien, discharge or other matter which would operate in his favour.'

[21] Were the respondents contentions correct, only the garnishee, to the exclusion of all other interested parties, including the judgment debtor, would have notice of the attachment. This would redound to their prejudice. By reason of rule 45(8)(*c*)(*i*)(*a)* an attachment is only complete once the sheriff has given notice in writing 'to all interested parties'. See *Stratgro Capital (SA) Ltd v Lombard NO and others* 2010 (2) SA 530 (SCA) paras 15-17. Compare *Schmidt v Weaving* 2009 (1) SA 170 (SCA) paras 15-21.

[22] The argument of the respondent fails to take account of the plain language employed in rule 45(12)(*a*) and in particular the words

'[a]ttach the same, and thereupon shall serve a notice on such third person…'

The adverb 'thereupon' 'is of particular significance.' The Shorter Oxford English Dictionary 6 ed Vol 2 p 3234 ascribes the following meanings to it:

(1) 'Upon that or it; Upon that (in time or order)';

(2) 'On that being done or said; (Directly) after that';

(3) 'On that subject or matter with reference to that.'

Given the context in which the adverb appears in rule 45(12)(a) the first two meanings ascribed thereto are appropriate.

Properly interpreted the phrase '[a]ttach the same, and thereupon shall serve a notice on such third person…' envisages two separate jural acts (a) an

attachment of the debt and (b) service upon the garnishee of the prescribed notice.

[23] For these reasons I conclude that it is indeed a necessary requirement of rule 45(12)(*a*) that the sheriff attach the debt in accordance of rule 45(8)(*c*). Such attachment coupled with service of the garnishee notice has the effect, as in English law and other foreign jurisdictions, of prohibiting the person upon whom the garnishee notice is served from parting or dealing with the debt pending the outcome of the garnishee proceedings. It is by virtue of the attachment that the garnishee becomes obliged to pay not the judgment debtor but the judgment creditor (see *Reichenberg* (*supra*) at 747H *in fin*; as also the cases there cited, namely *Paramount Furnishers v Lezar's Shoe Store & Outfitters* 1970 (3) SA 361 (T) at 364-365 and *African Distillers Limited and others v Honiball and another* 1972 (3) SA 135 (R) at 136H.

[24] In the present instance it is common cause that no notice was given to the DRC and that no endeavour was made by the sheriff to effect an attachment in accordance with rule 45(8)(*c*). Accordingly, the garnishee proceedings were rendered ineffective and the court below had erred in granting the order that it did. For these reasons the appeal should succeed. This conclusion renders it unnecessary to decide the other issues raised in the appeal.

[25] The following order is made:

1 The appeal succeeds with costs including the costs of two counsel;

2 The order of the court below is set aside and the following order substituted for it:

‘The application is dismissed with costs, including the costs of two counsel.’

_____

P BORUCHOWITZ
ACTING JUDGE OF APPEAL

Appearances:

Appellant:	A. O Cook SC (with him G M Ameer)
	Instructed by
	Norton Rose South Africa, Sandton
	Webbers, Bloemfontein
Respondent:	L.J. Morrison SC (with him N Dayand-Ingroop)
	Instructed by
	Webber Wentzel, Johannesburg
	Lovius-Block, Bloemfontein