THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 417/08

In the matter between:

STRATGRO CAPITAL (SA) LIMITED	**APPELLANT**
and	
LOMBARD LODEWYK THEODORUS NO	**FIRST RESPONDENT**
LOMBARD LORRAINE SONJA NO	**SECOND RESPONDENT**
GELDENHUYS BARTHOLOMEUS NO	**THIRD RESPONDENT**
LOMBARD LODEWYK THEODORUS	**FOURTH RESPONDENT**

Neutral citation: *Stratgro Capital v Lombard* (417/2008) [2009] ZASCA 142 (23 November 2009)

CORAM: **Mpati P, Mthiyane, Snyders JJA *et* Leach, Bosielo AJJA**

HEARD: **17 August 2009**

DELIVERED: **23 November 2009**

SUMMARY: Uniform Rule of Court 45(8) – writ of execution and notice of attachment of incorporeal movable property – failure to give notice of attachment to execution debtor renders attachment incomplete – attachment and subsequent sale in execution null and void.

ORDER

On appeal from: High Court of South Africa, Witwatersrand Local Division, (Selvan AJ sitting as court of first instance).

1. The appeal is allowed.
2. The Theo Lombard Family Trust and the fourth respondent are ordered to pay the appellant's costs of appeal jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.
3. The order of the court below is set aside and replaced with the following:

   '(a) The attachment and subsequent sale in execution, on 24 January 2007, of the applicant's claim against the Theo Lombard Family Trust to the fourth respondent are set aside.

   (b) The Theo Lombard Family Trust and the fourth respondent are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.'

JUDGMENT

MPATI P (Mthiyane, Snyders JJA *et* Leach, Bosielo AJJA concurring)

[1] The issue in this appeal is whether the attachment of the appellant's claim against the first to third respondents, in their representative capacities as trustees of the Theo Lombard Family Trust ('the Trust'), and its subsequent sale in execution should be set aside on grounds of alleged defects in the attachment process and sale in execution, or alleged *mala fide* abuse of court

process. The successful bidder at the sale in execution was the fourth respondent, acting in his personal capacity.

[2] The Trust was the owner of certain fixed property known as erf 5710, Pietersburg ('the property'). On or about 18 June 2001 the appellant, duly represented by Mr Darryl Charles Ducasse ('Ducasse'), concluded a written agreement with the Trust, represented by Mr André Lombard (the fourth respondent's son), in terms of which the appellant purchased the property at a purchase price of R8 925 000. The agreement was conditional upon the appellant's ability to raise finance for the full purchase price. The condition was not fulfilled and the agreement ultimately lapsed.

[3] But when he could not raise the necessary finance, Ducasse, in collaboration with another entity, Blue Dot, introduced a third party who agreed to purchase the property for R10 500 000. In terms of an oral agreement between the Trust and Ducasse, on behalf of the appellant, the third party was introduced on the basis that the profit would be shared: the Trust, as seller, would receive R9 million and the appellant R1.5 million. Upon transfer of the property to the purchaser the latter's financiers, First National Bank, released an amount of R9 million. The balance was to be paid to the Trust upon conclusion of a long term lease agreement for the occupancy of part of the property. The Trust and Ducasse agreed, in the meantime, that the appellant would be paid R500 000 upon receipt by the Trust of the first tranche of R9 million and the rest (R1m) upon payment by First National Bank of the balance of the purchase price. But when the balance of the purchase price was paid the Trustees refused to pay the amount owing to the appellant in terms of the agreement. They contended that the appellant's claim constituted commission and that the appellant, not being a registered estate agent, was precluded from claiming payment of the sum still outstanding.

[4] The appellant then instituted motion proceedings (the main application) in the Johannesburg High Court against the Trust, seeking an order for payment of the sum of R1m, being the balance allegedly owing to it. The matter was referred to trial and set down for the hearing of oral evidence on 7

March 2007. In the interim, the Trust obtained an order, with costs, in terms of which the appellant was ordered to provide security for the Trust's costs in the main application. The costs of the application for the furnishing of security were taxed on 18 September 2006 in an amount of R27 431.24. The appellant was not represented at the taxation. A copy of the taxing master's *allocatur* was, however, sent to the appellant's attorneys under cover of a letter from the Trust's attorneys dated 17 October 2006, in which demand was made for payment of the taxed costs by 20 October 2006, failing which, the writer asserted: 'I have an instruction to proceed'.

[5] In response to the demand the appellant's attorneys advised that payment was being processed. But despite this assurance the Trust's attorneys still threatened 'to proceed'. On 23 October 2006 the appellant's attorneys dispatched a letter to them, the last three paragraphs of which read as follows:

> 'In the circumstances we reiterate our submission in our previous letter namely that the institution of further legal proceedings and/or execution aimed at recovery of the taxed Bill of Cost is unnecessary in the circumstances.
>
> However, should your client choose to execute on the Bill of Cost we request that you kindly notify us per telephone or telefax whereupon we will **furnish you with the current physical address of the Plaintiff.**
>
> We hope that "reason will prevail" and look forward to receipt of your favourable responses soonest.'

(The words in bold print in the penultimate paragraph appear as such in the text of the letter.)

[6] By 3 November 2006 payment had still not been made and in a letter of the same date addressed to the Trust's attorneys, the appellant's attorneys recorded that 'the payment of the costs was unfortunately delayed due to two digits (of your trust banking account details) having been inadvertently transposed, but this error has been corrected and the amount has been paid into your account'. The Trust's attorneys responded on 8 November 2006 advising that no payment had been received and that 'I am accordingly continuing with my client's instructions'. It appears, however, that during this

exchange of correspondence the Trust's attorneys caused to be issued a writ of execution directing the Sheriff 'to attach and take into execution the movable property of the [appellant]'.

[7] Prior to seeking the order compelling the appellant to furnish security for its costs the Trust instructed its attorneys to conduct a search, through the office of the Registrar of Companies, to ascertain the address of the appellant's registered office. The address yielded by the search was 1st Floor, Chloride House, 4 Boundary Road, Johannesburg, which is different from the address given by Ducasse when he deposed to the appellant's founding affidavit in the main application. There, Mr Ducasse alleged that the appellant 'carries on business as a property investment company and has its registered office at 43 Wessels Road, Rivonia, Gauteng'.

[8] The Trust had also established that the appellant had no physical assets available for attachment. In its answering affidavit, deposed to by the first respondent in his representative capacity, the Trust says the following:

'25. As set out above the Trust's investigations revealed that the appellant did not have any place of business or physical assets available for attachment. The only asset of the applicant of which the Trust was aware was the appellant's cause of action against the Trust in the main proceedings. The Trust accordingly instructed its attorney to cause the Sheriff to attach such right of action and have it sold in execution of the taxed Bill of Costs.

26. As also set out above, the registered office of the applicant at all material times was at 1st Floor Chloride House, 4 Boundary Road, Highlands North, Johannesburg, the name of which building had since been changed to Frameworks House. As the applicant was not carrying on business, this was the only address at which execution could be levied. . . .

27. As set out above, the applicant had been made aware in the application for security for costs that the address which the applicant had given in the main proceedings as its registered office was not in fact its registered office.'[1]

The Sheriff was thus instructed to execute at the appellant's registered address and on 30 October 2004 he recorded in his 'Return of Non Service'

[1] The Trust's attorneys apparently also established that the appellant did not occupy the premises at 43 Wessels Road, Rivonia, Gauteng, and was not known at those premises.

that the writ 'could not be executed' and ‘the [appellant] is unknown to Mrs van der Laan in charge at Frameworks present occupier'.

[9] But despite the Sheriff’s Return of Non-service and its own prior knowledge that the appellant was unknown at its registered address the Trust, through its attorneys, nevertheless instructed the Sheriff to 'attach the [appellant's] right of action by service of the warrant of execution at [its] registered office'. In line with these instructions the Deputy Sheriff, Mr Van Dijk, furnished a Return of Service recording that on 22 November 2006 the writ of execution 'was duly served by affixing a copy thereof to the principal door of SELBY & COMPANY which was found closed'.[2] The Return of Service further recorded the following:

'I HEREBY DO ATTACH THE [APPELLANT'S] CLAIM AGAINST THE LOMBARD FAMILY TRUST AND OTHERS UNDER CASE NUMBER 03/23807. YOUR FURTHER INSTRUCTIONS ARE HEREWITH AWAITED.

COPIES LEFT AT FRAMEWORKS ON 1ST FLOOR AT FRAMEWORKS HOUSE 4 BOUNDARY ROAD ROUXVILLE.'

[10] The sale in execution was duly advertised in two newspapers and subsequently held on 24 January 2007. According to the Sheriff's ‘Return of Warrant of Execution Against Property’ (the return in respect of the sale in execution), the 'movable assets' sold in execution realised the sum of R1 500. As indicated, the successful 'bidder' was the fourth respondent.

[11] It is clear from these facts, and indeed common cause, that although the Trust’s attorneys had threatened to recover their client’s taxed costs by way of execution, the appellant was kept in the dark about the entire attachment process and ultimate sale in execution. Certain correspondence was exchanged between the parties' legal representatives relating to the further conduct of the main application, but no information on the attachment process was disclosed. Nor was it disclosed during a pre-trial conference held

[2] Selby & Company were the occupiers at 1st Floor, Chloride House, 4 Boundary Road, Johannesburg. 'Chloride House' had been changed to 'Framework House'.

on 1 December 2006. This was clearly on instructions from the Trust. The following appears in its answering affidavit:

'Mr Barling [the Trust's attorney] was instructed to comply strictly with the legal requirements. If Mr Barling had advised the applicant of the sale he would have been in breach of his duty to the Trust and would have acted contrary to the instructions given to him by his client.'

The withholding of information on the attachment process was thus deliberate. Not surprisingly, the Trust's attorney must have felt uncomfortable with his instructions to withhold information from the appellant on the attachment. He sought, and received, an assurance from the Law Society of the Northern Provinces that he was under no duty to notify the appellant of the attachment.

[12] The appellant's attorneys were advised of the sale in execution by letter dated 26 January 2006. They were also advised, in the letter, that they should withdraw as attorneys of record in the matter as the fourth respondent, who had purchased the appellant's right of action, wished to appoint his own attorneys in the further conduct of the matter. On 30 January 2007 payment in respect of the Trust's taxed costs was made by way of electronic transfer into the trust account of the Trust's attorneys. Following further correspondence between the parties' respective attorneys the appellant instituted motion proceedings seeking, against the trustees of the Trust and the fourth respondent, an order, inter alia, setting aside the attachment and sale in execution of its right, title and interest in its claim against the Trust. The court a quo (Selvan AJ) dismissed the application with costs. This appeal is with its leave.

[13] In this court the appellant's case was advanced on two fronts. The first was that the attachment and subsequent sale in execution of its right, title and interest in its claim against the Trust were invalid for want of compliance with the provisions of Rule 45(8) of the Uniform Rules of Court ('the Rules'). The second was that the execution process had not been invoked for the purpose for which it was intended, which is to obtain satisfaction of a judgment debt (in this case to recover taxed costs), but for the 'sinister purpose of quelling the

litigation'. This, so it was argued, constituted an abuse of the court process which should not be countenanced.

[14] Elaborating on the first of the two fronts (the alleged invalidity of the execution process for want of compliance with Rule 45(8)) counsel for the appellant submitted that the execution process was fatally flawed because (a) the attachment was fatally defective as, inter alia, nothing was attached, and (b) the advertisements were fatally defective because no information relating to the claim was published. It was accordingly contended that the sale was null and void because nothing had been sold or transferred. It was also argued, on behalf of the appellant, that the attachment and sale in execution fall to be set aside for failure, on the part of the sheriff, to give written notice of the attachment to all interested parties as required by Rule 45(8)(c)(i)(a).

[15] Rule 45(8) reads:

'(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) Where the property or right to be attached is a lease or a bill of exchange, promissory note, bond or other security for the payment of money, the attachment shall be complete only when –

(i) notice has been given by the sheriff to the lessor and lessee, mortgagor and mortgagee or person liable on the bill of exchange or promissory note or security as the case may be, and

(ii) the sheriff shall have taken possession of the writing (if any) evidencing the lease, or of the bill of exchange or promissory note, bond or other security as the case may be . . .

(b) Where movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under suspensive condition to or by a third person, the attachment shall be complete only when the sheriff has served on the execution debtor and on the third person notice of the attachment with a copy of the warrant of execution . . .

(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.'

[16] A litigant's right, title and interest in a claim constitutes incorporeal property which may be attached at the instance of a judgment creditor and sold in execution.[3] Consequently, in attaching the appellant's claim against the Trust the respondent was obliged to comply with the provisions of rule 45(8). By reason of rule 45(8)(c)(i)(*a*), an attachment of the right, title and interest of a litigant in an action will only be complete once the sheriff has given notice of the attachment in writing 'to all interested parties'. This rule is couched in wide terms and there seems to be no reason to regard the appellant, whose claim in the main proceedings was attached, as not being an 'interested party' as contemplated therein. Both sub-rules 45(8)(a)(i) and (b), which relate to the attachment of certain specific incorporeals, require notice to be given to the execution debtor whose incorporeal property or right is the

[3] See eg *Marais v Aldridge* 1976 (1) SA 746 (T) at 750A-C; *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA).

subject of an attachment in order for such attachment to be complete. The framer of the rules could have had no good reason to distinguish between the incorporeal property specified in those two sub-rules and any other incorporeal property in providing for notice of an attachment to be given to a judgment debtor. After all, it would be absurd to require a judgment debtor to be given notice should its lease with a third party be attached (rule 45(8)(a)(i)), but not if its claim for payment of rentals due under the lease was the subject of the attachment. Had the drafter of the rules not intended to refer to all interested third parties in sub-rule 45(8)(c)(i)(*a*) but intended to exclude from its operation the judgment debtor whose incorporeal was being attached, it would have been a simple matter to have said so. It did not.

[17] I therefore conclude that the appellant was clearly an interested party as envisaged by rule 45(8)(c)(i)(*a*) in regard to its claim against the Trust which was purportedly attached, and the failure to give it notice resulted in the attachment being incomplete. It follows that the subsequent sale in execution was null and void.

[18] It may be mentioned that it is clear from a perusal of the judgment of the court a quo that in that forum counsel for the appellant did not argue that the appellant was an interested party as contemplated in rule 45(8)(c)(i)(a). I draw this conclusion from the following passage in the judgment:

'Another objection is put forward by the applicants' counsel to the actions of the sheriff. Reliance is placed upon the provision embodied in Rule rule 45(8)(c)(i)(a), that the sheriff should give notice of the attachment of incorporeal property to . . . 'all interested parties . . . without which, in the words of the Rule, "The attachment shall not be complete". Counsel goes on to submit that there were a number of interested parties who were entitled to receive notice, those being Blue Dot to whom the applicant was allegedly contractually obliged to pay half of the claim against the Trust, one Sohn who holds an undertaking from the applicant to make payment of monies owed to them out of the proceeds of the claim, and "Martins, who has a lien over the documentation relative to the litigation". Martins is the applicant's attorney.'

The court a quo rejected these submissions and held that the phrase 'interested parties' in the Rule 'connotes someone who has an interest in the

right, which is the subject matter of the attachment, not someone who has an indirect pecuniary interest.'

[19] The conclusion I have reached, ie that the failure to give notice to the appellant resulted in the attachment being incomplete, renders a consideration of all the other contentions advanced on behalf of the appellant unnecessary. It suffices merely to state that the actual attachment process is in itself suspect. It is doubtful whether there was compliance with the requirements of rule 45(8)(c)(i)(b).[4] However, I express no firm view on this issue.

[20] The question of costs remains. Counsel for the appellant submitted that this court should show its displeasure at the objectionable conduct of the Trust by awarding costs, in both courts, on the scale as between attorney and client. I agree. Counsel also argued that liability for the appellant's costs should be joint and several as against the Trust and the trustees as its representatives. I am not inclined to accede to this request. Although the Trust's instructions to its attorneys would have emanated from the trustees, they did so in a representative capacity. There is no evidence that they would have enjoyed personal gain had the Trust's actions not been found to have been reprehensible. There is no reason, however, why the fourth respondent, who purchased the appellant's claim in his personal capacity and who has participated in these proceedings in his personal capacity, should not be held jointly liable, with the Trust, for the appellant's costs.

[21] In the result, the following order is made:

1. The appeal is allowed.
2. The Theo Lombard Family Trust and the fourth respondent are ordered to pay the appellant's costs of appeal jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

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[4] Compare *Badenhorst v Balju, Pretoria Sentraal* 1998 (4) SA 132 (T).

3. The order of the court below is set aside and replaced with the following:

‘(a) The attachment and subsequent sale in execution, on 24 January 2007, of the applicant’s claim against the Theo Lombard Family Trust to the fourth respondent are set aside.

(b) The Theo Lombard Family Trust and the fourth respondent are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.’

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JUDGE OF APPEAL

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