

EX PARTE KAEFER INSULATION (PTY) LTD: IN RE KAEFER INSULATION (PTY) LTD V SHARNECK
[1984] 4 All SA 125 (W)

Division: Witwatersrand Local Division
Judgment Date: 9 March 1984
Case No: Not Recorded
Before: Conradie J
Parallel Citation: 1984 (3) SA 533 (W)

• [Keywords](#) • [Cases referred to](#) • [Judgment](#) •

Keywords

Practice and Procedure - Attachment

Cases referred to:

Bloemfontein Town Council v Richter 1938 AD 195 - Applied

Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 - Applied

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Judgment

CONRADIE AJ: The applicant, which is a judgment creditor, seeks an order

"authorising the Sheriff or his deputy to break and forcibly enter premises situate at 34 Kamassie Street, Eldorado Park, Extension 3, Johannesburg, and there to remove and take into execution all the movable goods of Norman Charlot, previously attached in pursuance of a writ of execution dated 14 November 1983;"

There is also a prayer that the defendant pay the costs of the application.

In support of the relief sought an articulated clerk in the employ of the applicant's attorneys of record made a short affidavit relating that judgment was granted against the judgment debtor, that a writ of execution was issued and that pursuant thereto the deputy sheriff attached certain property at the judgment debtor's premises. It relates further that the deputy sheriff was on 24 December 1983 at 10h30 and on 3 January 1984 at 14h00 unable to remove the goods because he found that the premises were locked.

The deputy sheriff's return, which is one of the annexures to the affidavit, requests the applicant to,

"please supply this office with an order of Court authorising the deputy sheriff to make a forced entry or alternatively to obtain the services of a locksmith".

When the matter was called, I raised with the applicant's counsel the question of the competence of this Court to grant the desired relief. She was unable to refer me to any reported case in which this type of relief has been granted and I have not been able to find one. She maintained

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that Judges in this Division have granted relief similar to that which she sought, but did not refer me to any matter in which the propriety or desirability of such an order has been considered.

The issue is not only whether the Court is competent to make an order relieving the deputy sheriff of responsibility for what he proposes to do, but whether it is desirable, assuming that the Court has the power, that it should do so.

The deputy sheriff is by s 36 (1) of the Supreme Court Act 59 of 1959 ("the Act") charged with the duty of executing all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the Court directed at the sheriff. He is an officer of the Supreme Court (s 34 (1) (a) of the Supreme Court Act).

Where a statute imposes a duty on a public body or a public official, in the performance of which there must inevitably be interference with the private rights of others, one is entitled to infer that such interference was sanctioned by the Legislature. The exercise of the statutory power in such a case is limited by the consideration that it must be carried out with the least possible interference: *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163 at 173.

The Legislature must have intended that, in the

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execution of writs, certain private rights of the judgment debtor would inevitably be infringed. A writ could in most cases not be executed unless the deputy sheriff entered the property of the judgment debtor, an act which would, in the absence of statutory authority, be a trespass.

Other, more serious, infringements of private rights must, I think, depending upon the circumstances, also be taken to have been sanctioned. If a judgment debtor resists the execution of a warrant the deputy sheriff must, by necessary implication, have the power to overcome that resistance by such force as may strictly be appropriate. Rule 41 of the Rules framed under the Magistrates' Courts Act 32 of 1944 provides in subrule (2) that:

"So far as may be necessary to the execution of any such warrant (ie a warrant of execution against movable property), the messenger may open any door on any premises, or of any piece of furniture, if opening be refused or if there be no person there who represents the person against whom such warrant is to be executed and the messenger may, if necessary, use force to that end."

This provision, although in my view strictly unnecessary, is an indication of the power which the Legislature intended an officer charged with the execution of writs to have.

Insofar as certain duties of the deputy sheriff may be carried out in a way which might or might not interfere with private rights he is entitled to show that such duties could not, in the circumstances, be performed without such interference: *Johannesburg Municipality v African Realty Trust Ltd (supra at 172 et seq).*

The onus of doing this rests on the deputy sheriff. *Bloemfontein Town Council v Richter 1938 AD 195 at 228.*

I can see no difference in principle between the kind of necessary invasion of the defendant's rights which occurs when the deputy sheriff walks through the judgment debtor's garden gate and the invasion of rights which comes about as a result of the deputy sheriff forcibly gaining entry to the judgment debtor's premises. In each case the exercise of the power would have to be reasonable under the circumstances. A

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deputy sheriff would have as little right to remain in the debtor's garden if that were not necessary as he would have to break open a door if that were not necessary.

It goes without saying that a forcible entry would have to be accompanied by the least possible damage. If a lock could be opened with the assistance of a locksmith, the deputy sheriff could not lawfully break down the door. Of course, he would also have to ensure that there was no other reasonable time at which he could gain entry with the consent of the judgment debtor.

An order, supposing one to be competent, would not confer absolute protection on the deputy sheriff. If he were to unreasonably force an entry into the premises, he would not be protected by the order any more than he would be if he

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acted unreasonably without the order. I do not know whether, when the deputy sheriff again attempts to remove the goods, he would be acting reasonably or unreasonably in making a forcible entry.

What the applicant wants is an order protecting the deputy sheriff from possible unlawful conduct. A Court cannot, in my view, give him such an indemnity in advance. If the deputy sheriff wants an indemnity he must get one from the judgment creditor in the same way as he customarily gets an indemnity in case he should be held liable for removing goods not belonging to the judgment debtor. If he refuses to remove the goods despite an adequate indemnity, the applicant would be entitled to approach the Court for appropriate relief in terms of s 36 (4) of the Act. But then the deputy sheriff would normally be cited as the respondent. Relief would not be granted pursuant to an *ex parte* application such as the one now before me.

In the present case the deputy sheriff twice attempted to remove the attached goods. Both attempts were made during the Christmas holiday period and at a time of the day when it is not unusual for people to be absent from their homes. Even if I am wrong in thinking that the applicant has no right to approach the Court for an order that the deputy sheriff might forcibly enter the judgment debtor's premises, I would not be disposed to granting an order under these circumstances simply because the applicant has failed to satisfy me that the judgment debtor might not reasonably have been away on holiday during this time or might not have been at work, and that an attempt at gaining entry at a more propitious time would not have met with greater success.

There is nothing before me to indicate that the deputy sheriff made enquiries to ascertain when the judgment debtor might be expected to be at home.

For the above reasons I have come to the conclusion that the application ought not to succeed. It is accordingly dismissed.

Appearances

WA Cosijn - Advocate/s for the Applicant/s

Bowman, Gilfillan and Blacklock - Attorney/s for the Applicant/s