

No Execution against Organ of State Assets without proper Procedure followed by Legal Practitioners, Clerks of Court, Registrars and Sherriffs

Generally, in civil proceedings, a judgment creditor issues a summons against a defaulting party (“judgment debtor”), and judgment is obtained either summarily, by default or at the end of a trial. Certain steps need to be taken to ensure that the judgment amount is recovered by attaching assets of the judgment debtor by way of a warrant of execution and the sheriff selling them off on auction or transferring funds attached to a judgment debtor.

However, attaching assets of an organ of state by a judgment creditor requires special steps as opposed to normal procedures other parties. Failure to take these steps has certain consequences.

In this article, we focus on the judgment of ***Department of Agriculture, Forestry and Fisheries and Another v B Xulu and Partners Incorporated and Others*** (6189/2019) [2020] ZAWCHC 3 (30 January 2020) (“B Xulu Judgment or B Xulu”). This article focuses only on the warrant of execution against the Department of Agriculture, Forestry and Fisheries (“the Department”) and the State Liability Amendment Act, 14 of 2011 (“the Amendment Act”).

As for the facts, B Xulu entered into a settlement agreement with the Department which was made an order of court. In terms of the settlement agreement, the Department was to pay B Xulu sums of money. The Department failed to pay such monies, where after B Xulu proceeded to issue a warrant of execution against the various banking accounts of the Department amounting to more than R30m. Some banking institutions had already released some monies in terms of the various warrants of execution.

Having known of the above act, the Department approached a High Court on an urgent basis seeking the warrants of execution and attachment of the monies

suspended pending the challenges by the Department relating to the (i) legality of the settlement agreement; (ii) legality of the service level agreement between B Xulu and the Department; and the (iii) procurement flaws relating to the appointment of B Xulu.

The Court was called upon to decide whether the settlement agreement, which was the underlying *causa* for the warrant of execution, was legal. The Department further raised concerns regarding the warrants of execution for not having followed the proper procedure laid down by the Amendment Act.

The Court observed that B Xulu, to a large extent, failed to follow the procedure and compliance required by the Amendment Act, and as a result of the above, set aside the warrants of execution obtained by B Xulu and ordered them to pay back all monies obtained by it through such warrants of executions. The Court also noted that the Registrar in its division was not aware of the requirements which are set out in the Amendment Act before issuing a warrant of execution.

Furthermore, the Amendment Act regulates how final court orders sounding in money may be satisfied and further new requirements which ought to be adhered to when instituting action against an organ of state. First, the relevant Minister must be cited as a defendant/respondent. Second, after issuing of the summons or application, the state attorney must be served with such papers within seven days.

As a form of guidance to legal practitioners, clerks of court and registrars as well as organs of state and sheriffs, there should be compliance before obtaining a warrant of execution:

1. First, the organ of state must ensure that the order sounding in money is paid within 30 days, or alternatively within a period which may be agreed between the judgment creditor and the organ of state.
1. Second, if there is no payment within 30 days or as agreed, the judgment creditor may serve the order on; (i) the executive authority; (ii) the accounting officer of the relevant department – municipal manager for example; (iii) the state attorney or attorney of record for the organ of state; and (iv) the relevant treasury.
1. Finally, if there is no payment made within 14 days or as agreed, the

judgment creditor should proceed with obtaining a warrant of execution and provide the registrar, the clerk of the court and the sheriff, who will be attaching, proof of the above compliance.

1. When attaching the sheriff also has a duty to engage with an organ of state whose items are to be attached as the attachment might cause a disruption a critical service delivery. In the absence of any agreement, the sheriff may attach and in his or her return report the engagement and the non-compliance.
1. If 30 days expire and the organ of state has not satisfied the order sounding in money, the sheriff may be directed to remove the attached goods.

An organ of state, against whom a final order sounding in money has been obtained, may approach a relevant court to challenge the legal validity of the writ of execution or the warrant of execution. The organ of state has this right because the attachment may disrupt the execution of its constitutional mandate. Hence the Amendment Act was enacted. Furthermore, if an organ of state fails to challenge the attachment and the removal of the goods, a party having direct interest in the matter may also approach a court for special relief to stop such actions.

Please note that by the time this article was written, the B Xulu Judgment was subject to an appeal, which was dismissed on 10 September 2020: <http://www.saflii.org/za/cases/ZAWCHC/2020/98.html> .

Regomoditswe Marakalla, Van Velden-Duffey Inc