IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-101788

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

25 September 2024
DATE

[redacted]
SIGNATURE

THE MUNICPALITY OF THABAZIMBI Applicant

and

HENDRIK JOHANNES BADENHORST First Respondent

ABSA BANK LIMITED Second Respondent

THE OFFICE OF THE SHERIFF, THABAZIMBI Third Respondent

JUDGMENT

NEUKIRCHER J:

1] On 8 September 2024 the applicant issued out an urgent application giving the respondent three days after service of the application within which to file its answering affidavit. The relief sought by the applicant is the following:

a) the application be heard as one of extreme urgency in terms of the provisions of rule 6 (12);

b) that the writ of execution under case number 66933/ 2011 is set aside;[1]

c) that the amount of R19 941 263.96, paid out to first respondent pursuant to the execution of the writ of execution – on 5 September 2024 – be repaid to the applicant within one hour of the grant of this order[2];

d) that the first respondent's attorney be ordered to pay the costs of the urgent application *de bonis propriis*.

2] It is worth noting that, despite the order sought in (d) above, the first respondent's attorney was not joined to the present proceedings.

3] The facts upon which the application rests are common cause and are the following:

a) on 18 December 2023 this court granted an order against the applicant and in favour of the first respondent for payment of the amount of R8 904 556.46, together with interest at the rate of 10% per annum from 12 December 2011 to date of full payment;

b) on 26 February 2024 the application for leave to appeal this order was dismissed with costs;

[1] My emphasis

[2] My emphasis. In my view this time limit is unrealistic

c) on 25 March 2024 the applicant then petitioned the Supreme Court of Appeal (SCA). This petition was dismissed with costs on 14 May 2024;

d) in the meantime, and subsequent to the dismissal of the petition, on 5 June 2024 the first respondent served a writ of execution on the applicant. The writ was re-issued on 19 August 2024;

e) the applicant however, had launched an application for reconsideration in terms of s17(2)(f) of the Superior Court's Act 10 of 2013 ("the Superior Court's Act") on 13 June 2024. On 22 August 2024 this application was dismissed by the President of the SCA. I emphasize that the writ was re-issued subsequent to the launch of the s17(2)(f) reconsideration and prior to the decision of the President of the SCA;

f) much correspondence flowed between the applicant and the first respondent's attorney of record between 26 August 2024[3] and 5 September 2024[4]. The gist of the correspondence was that the applicant informed the first respondent that it intended to apply for leave to appeal to the Constitutional Court by 6 September 2024, and the first respondent informed the applicant that it would not suspend the writ and that it required a court order before it would do so. The applicant also warned the first respondent not to execute the writ as it did not have a s18(3) of the Superior Courts Act court order;

g) on 5 September 2024, and despite the application for leave to appeal being served on the first respondent's attorney of record,[5] the first respondent

[3] The date on which the SCA informed the applicant of its unsuccessful s17(2)(f) application

[4] When the applicant served its latest application for leave to appeal to the constitutional Court on the first respondent

[5] The application was filed at the Constitutional Court on 6 September 2024

executed the writ.[6] As a result, ABSA Bank paid over the amount of R19 941 263. 96 to the sheriff[7] and, after deducting his costs and fees, the amount of R19 937 912.46 was paid over to the first respondent's attorney of record;

h) this application was prepared and issued on 8 September 2024.

4] The second respondent (ABSA Bank) has indicated that it does not intend to oppose the application and abides by the outcome thereof. The third respondent (the Sheriff, Thabazimbi) has also not opposed the application.

5] The first respondent opposes this urgent application. He raises several points in limine:

a) that the application is not urgent;

b) that the relief sought by the applicant is not competent given the circumstances of this case;

c) that no case is made out for the relief sought vis-à-vis the payment of the funds;

d) that as the applicant failed to join the first respondents attorney of record, the costs sought in respect of day bones propriis relief is not competent.

6] By the time the matter was argued before me on 17 September 2024, a further issue was raised by the first respondent: on 13 September 2024 the first respondent filed a rule 7 notice disputing the authority of the municipal manager, Mr Tloubatla, to

[6] It had warned the applicant of its intention to do so on 26 August 2024

[7] Who executed the writ

instruct Raphiri Inc Attorneys to persist with this application and to depose to an affidavit.[8] Given the terms in which the rule 7 notice is framed, no issue has been taken with the institution of these proceedings.

7] The basis for the rule 7 notice is that on 10 September 2024 and in the regional division of Limpopo held at Thabazimbi, that court interdicted Mr Tloubatla from performing the duties of municipal manager of the Thabazimbi Local Municipality and interdicted him from entering the premises of the local municipality pending finalization of certain appeals and processes set out in that order. Accordingly, the first respondent argues that whilst it may be so that the application before me was initiated lawfully on 6th September 2024, no further instructions to proceed with the application were competent.

8] It would appear, that the first respondent has also attempted to add two further bows to its opposition of this application:

a) that the application for leave to appeal filed at the Constitutional Court is without merit;
b) that the money paid over by the sheriff of this court to the first respondent has been invested in an interest bearing trust account held by the attorney of record of the first respondent in order to safeguard it pending the outcome of the Constitutional Court application for leave to appeal. Given that the money is safeguarded, the first respondent argues that there is no urgency to this application and no prejudice to the applicant.

[8] My emphasis

9] I do not intend to deal with the rule 7 notice, failed so late in this application, in any great detail. The reason that I do not do so is twofold: firstly the instructions from the municipal manager to the applicants attorneys of record were given prior to the court order of 10 September 2024. Secondly, the mandate of the same attorneys of record to act in the Constitutional Court matter was also challenged and that authority has been, I am given to understand, satisfactorily resolved.

10] Furthermore, the basis for the objection is not that the municipal manager had no authority to institute these proceedings in the first place - rather the objection is that he had no authority to instruct the attorneys to finalise these proceedings on 17 September 2024. That is, in my view, nonsensical – it defies logic that where attorneys are given a mandate to institute proceedings, that this mandate would not include an instruction to finalise those proceedings as well, however that is done i.e. by way of a court order or a settlement. It is, at the very least, implicit in the initial instruction. The first respondent's argument is therefore, in my view, untenable.

11] The first respondent then objects to the authority of the municipal manager to depose to the affidavits in this application. But the municipal manager is no more than a witness in these proceedings and needs no authority to depose to affidavits, more especially when the facts fall within his personal knowledge, he having dealt with the issues all along.[9]

12] Thus, in my view, there is no merit in the rule 7 notice.

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[9] Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) para 19

13] Given that the applicant seeks an order that the writ be set aside, as opposed to the writ being stayed, the question is whether the first respondent was entitled to issue and execute the writ pending the finalisation of the appeal process. The applicant argues that it was not given the provisions of s18 of the Superior Courts Act.

14] Section 18 of the Superior Courts Act 10 of 2013 states:

> "(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
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> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
>
> (4) *(a)* If a court orders otherwise, as contemplated in subsection (1) —
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> (i) the court must immediately record its reasons for doing so;
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> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
>
> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(b) 'Next highest court', for purposes of paragraph *(a)*(ii), means —

(i) a full court of that Division, if the appeal is against a decision of a single judge of the Division; or

(ii) the Supreme Court of Appeal, if the appeal is against a decision of two judges or the full court of the Division.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

15] Section 18 suspends any order granted which is subject to a pending application for leave to appeal or an appeal. It is clear that the purpose of this is to prevent an injustice being done to the intended appellant. Prior to s18, the position was regulated by the common law, and then Rule 49(11)[10]. Iin *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[11] Corbett JA explains it thus:

"*Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see Ruby's Cash Store (Pty) Ltd. Estate Marks and Another, 1961 (2) SA 118 (T) at pp. 120 – 3), it is today the accepted common law rule of practice in Courts that generally the execution of a judgement is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgement cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted*

[10] Rule 49(11) of the Uniform Rules of Court was repealed with effect from 22 May 2015. Rule 49(11) stated:
"*Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs*."

[11] 1977 (3) SA 534 (A) at 544H – 545A

the judgement. To obtain such leave the party in whose favour the judgement was given must make special application. (See generally Oliphants Tin "B" Syndicate v De Jager, 1912 AD 477 at p. 481; Reid and Another v Godart and Another, 1938 AD 511 at p 513; Gentiruco A.G v Firestone SA (Pty) Ltd., 1972 (1) SA 589 (AD) at p. 667; Standard Bank of SA Ltd v Stama (Pty) Ltd., 1975 (1) SA 730 (AD) at p. 746) The purpose of this rule as to the suspension of a judgement on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgement in any other matter appropriate to the nature of the judgement appealed from (Reid's case, supra, at p 513). The Court to which application for leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby's Cash Store (Pty) Ltd. Estate Marks and Another, supra at p 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgement (cf Fismer v Thornton, 1927 Ad 17 at p 19). In exercising this discretion, the Court should in my view, determine what is just and equitable in all circumstances…"

16] It is therefore clear that the entire purpose behind the erstwhile Rule 49(11), and the present Section 18(1), is to prevent irreparable damage from being done to the applicant/appellant whilst the appeal process runs its course.[12] In *Business Connexion*, a Writ of Execution was issued after a s17(2)(c) Superior Courts Act reconsideration was filed, but before that application was finalised. That is exactly what occurred here, save that the writ was executed upon after that reconsideration

[12] Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd and Others (2024/005180) [2024] ZAGPJHC 1664 (16 April 2024) (Business Connexion)

application was refused. But, in my view, the first respondent was well aware that the applicant intended to petition the Constitutional Court for leave to appeal and should have therefore waited for the appeal period to have lapsed before proceeding to execute the writ. This much is confirmed in the *Business Connexion* judgment:

> "[23] A decision, in terms of section 18(5) of the Superior Court's Act, becomes the subject of an appeal for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the applicable rules of court. This applies to an application for leave to appeal or an appeal to the full court, the Supreme Court of Appeal and the Constitutional Court. Put differently, an applicant for leave to appeal is protected against execution throughout the appeal process up and until all appeal processes have been exhausted unless a court under exceptional circumstances orders otherwise. "

17] I agree with the view expressed in *Business Connexion.* In my view, given that the writ was issued prior to the exhaustion of the appeal processes, it must be set aside. Once this is done the funds paid over to the first respondent must be repaid to the applicant. In my view, it matters not that these funds are safeguarded by the first respondent's attorney in an interest-bearing trust account – the first respondent was not entitled to them in the first place.

18] There is one issue that requires further comment: ABSA Bank paid over to the Sheriff the amount of R19 941 263. 96 on 5 September 2024. The Sheriff then paid the first respondent's attorney of record the amount of R19 937 912.46 after they deducted their costs and charges. This is the amount that stands to the credit of the first respondent (excluding the interest the amount has accumulated to date).

19] As to costs: the applicant asks that the first respondent's attorney be ordered to pay the costs *de bonis propriis*. He is not joined to these proceedings and I therefore decline to make such an order. However, although it is understandable that the first respondent feels frustrated that he is still unable to execute the order he obtained against the applicant as far back as 18 December 2023, the process must be allowed to be completed. The writ should not have been issued in the first place in the circumstances that it was, and it should most certainly not have been executed. This being so, the first respondent must pay the costs.

ORDER

20] The order I issue is the following:

1. The Writ of Execution issued under case number 66933/2011 is set aside.
2. The first respondent is ordered to refund to the applicant the amount of R19 937 912.46, together with such interest accumulated on that amount since 9 September 2024, within 5 business days of the date upon which the applicant nominates a bank account into which the funds should be paid, as set out in paragraph 3 below.
3. The amount, together with interest, is to be paid into an account nominated by the applicant for that purpose. The applicant shall serve this order on the first respondent's attorneys and, at the same time, notify the first respondent's attorney of record of the full details of the nominated account. Should the applicant fail to so nominate a bank account, the funds will be only be repayable within 5 business days of the account details being provided by the applicant to the first

respondent's attorneys of record.

4. The first respondent is ordered to pay the costs of this application.

NEUKIRCHER J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 September 2024.

For the applicant	:	Adv Kwinda
Instructed by	:	JL Raphiri Attorneys
For 1st respondent	:	Adv Ward
Instructed by	:	H W Theron Inc
Date of hearing	:	17 September 2024
Date of judgment	:	25 September 2024