

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG**

CASE NO: UM 189/2022

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the matter between:-

**ITOKOLLE CLINIX PRIVATE HOSPITAL,
MAHIKENG**

1st Applicant

ASTER FRANS MOTHUPE

2nd Applicant

and

DINGAAN PETRUS MOFOKENG

1st Respondent

SETSOANA PAULINA MOFOKENG N.O

2nd Respondent

THE SHERIFF MAHIKENG

3rd Respondent

THE SHERIFF ZEERUST (*in their capacity as*

appointed ad hoc Sheriff)

4th Respondent

Summary: Civil law and procedure – urgent interdict – stay of warrant of execution – Magistrates’ Courts Rule 36.

This judgment was handed down electronically by circulation to the parties’ representatives *via* email. The date and time for hand-down is deemed to be **12 October 2023**.

ORDER

- (i) **The warrant of execution issued on 8 December 2022 is set aside.**
- (ii) **There shall be no order as to costs.**

JUDGMENT

MFENYANA J

Factual background

[1] This application has a long and convoluted history. Because of its relevance to the current proceedings it is necessary to set out that history as follows:

- 1.1 On **24 January 2019**, the first respondent, now deceased, instituted action proceedings against the applicants for damages arising from a

motor vehicle accident. On **9 April 2019** the first respondent obtained default judgment against the applicants in the amount of R247 463.43, as claimed in the summons, owing to the applicants' failure to enter appearance to defend the claim. On **23 April 2019** a warrant of execution was issued against the applicants for the judgement amount of R247 463.43. In giving effect to the warrant, on **7 May 2019**, the third respondent placed two vehicles belonging to the applicants under judicial attachment. Subsequent attempts to settle the matter came to naught. It is common cause that on **2 October 2019** the applicants launched an application for rescission of the default judgment which was dismissed on **12 February 2020**. Subsequent to the dismissal of the rescission application, the applicants issued an application in the Regional court, for the stay and setting aside of the warrant of execution issued on 23 April 2019. That application was also dismissed on **22 July 2020** with costs on attorney and client scale.

1.2 On **4 October 2022** the applicants issued an application in this Court, on an extremely urgent basis, seeking a stay of the warrant of execution pending:

- (i) the substitution of the first respondent as a party to the action,
- (ii) the finalisation of review / appeal proceedings against the judgment of Magistrate S du Toit dated 22 July 2020,

(iii) the issuing of reasons by Magistrate du Toit for the judgment aforestated.

1.3 Bar the review of taxation application which is pending before the Regional court, it turned out during the proceedings that none of these processes is pending before any court, including the Regional court.

1.4 The applicants also sought a stay of the sale in execution in the Regional court, which was scheduled to take place on **5 October 2022**. The application was subsequently removed from the roll after the third respondent confirmed that the sale had been cancelled. The matter was re-enrolled on the ordinary motion court roll for **10 November 2022**. On **26 October 2022** the respondents filed their notice of opposition. On **1 November 2022** the applicants removed the application from the roll on account of it being opposed. It was set down on the ordinary motion court roll for argument on **20 July 2023**.

1.5 Having not received an answering affidavit, on **14 December 2022** the applicants set the matter down for hearing on the unopposed roll on **9 February 2023**.

1.6 On **16 January 2023** the applicants brought an urgent application seeking the stay of all proceedings in the matter between the applicants and the first respondent, which was heard in the Regional court, under case number NW/MMB/RC24/2019, pending the

finalisation and outcome of applications brought under that case number, as well as in this Court, under case number UM189/2022.

The application launched in this Court is pending and has not been finalised.

- [2] The applicants further seek an order for the return of two (2) motor vehicles which were removed by the fourth respondent on **13 January 2023** in execution of the warrant of execution that was reissued on 8 December 2022.
- [3] The applicants also seek costs *de bonis propriis* against the first, second and fourth respondents.
- [4] Following engagements the filing of further papers, the Court directed the respondents to file their answering affidavit on **19 January 2023**, and the applicants to file the replying affidavit on **25 January 2023**. The respondents were further directed to restore possession of the applicants' motor vehicles which were removed on 13 January 2023, and not to dispose of the applicants' motor vehicles, or encumber them in any way. The matter was postponed to **27 January 2023** with the issue of costs held over for determination at the hearing of the application.

Applicants' case

- [5] In their founding affidavit the applicants aver that on **13 January 2023**, the Sheriff, armed with a new warrant of execution issued on 8 December 2022, attended at the offices of the first applicant and removed the two motor

vehicles of the applicants. The present application was launched for the purpose of staying the sale in execution.

[6] They further state that they have filed an application for the review of the taxed bill of costs obtained by the respondents in the amount of R420 034.10, which was set to be heard in the Regional court on 9 February 2023, the same day as the application for the stay of the warrant in this Court. Save it being for a taxed bill of costs, it does not appear *ex facie* the papers that this amount is in terms of an order of court.

[7] At the hearing of the matter on 27 January 2023, the applicants contended that it was necessary to bring the urgent application to stop the execution, in view of the fact that the two applications were set to be heard on 9 February 2023. This date was, according to the applicants, “around the corner”, and would dispose of the matter. Were the respondents to be allowed to proceed with the execution, the applicants would have no substantial redress at a later hearing of the matter, so argued the applicants.

Respondents’ case

[8] In opposing the application, the respondents raised four points in *limine*. They contend that the matter is not urgent, as the cause of action relied upon by the applicants arose over three years ago in 2020, when their application for rescission was dismissed by the regional court. They further contend that the application amounts to an abuse of the process of court. They set out the

chronology of events from the onset of the dispute in 2019, to 8 December 2022 when the warrant was re-issued and executed in January 2023.

[9] The respondents further contend that for as long as the applicants have not filed an appeal, or review, the default judgment is enforceable, and there can be no case for a stay of the warrant. They dismiss out of hand the applicants' contention that they are not able to file an appeal in the absence of reasons for the order of the court *a quo*, and argue that an appeal lies not against the reasons for judgment, but against the substantive order made by the court.

[10] However, it is common cause that there are no outstanding reasons as the reasons were provided by the presiding magistrate on **6 November 2020**. The upshot of this is that there exists no impediment for the applicants to file an appeal. That has however not happened as the applicants have not lodged any appeal, on the false contention that the reasons have not been provided.

[11] The respondents further aver that this Court has no jurisdiction over the taxation as the applicants failed to apply for rescission and have not joined the Taxing Master to these proceedings. The review of the taxation is not before this Court. There can thus not be any talk of this Court jurisdiction, or lack thereof in respect of the taxation. Nothing more need be said on this point of law.

[12] On merits, the respondents aver that the issues raised by the applicants relate to a warrant that was issued in 2020, which the applicants were all along

aware of, as the 2022 warrant is simply a re-issue of the 2019 warrant. They further contend that despite three years having passed, no appeal had been forthcoming from the applicants in respect of the decision of the Regional court.

[13] Subsequent to the filing of the answering affidavit, the respondents sought leave of court to file a supplementary answering affidavit, which was granted. In it the deponent states that at the time of deposing to the answering affidavit, he had no access to the court file. Upon gaining access thereto on 23 January 2023, it became clear that the presiding magistrate had provided reasons for the order, on 6 November 2020. He argued that the applicants' assertions in the founding affidavit, that the reasons were still outstanding, are therefore misleading and untrue. This prompted the applicants to file a supplementary replying affidavit.

[14] In the supplementary replying affidavit the applicants state that the deponent to the founding affidavit, Morne' Senekal, is no longer in the employ of the applicants' firm of attorneys. Thus the applicants cannot confirm whether or not the reasons for judgment were received by Senekal. This is despite the applicants receiving confirmation from their correspondent attorneys that the reasons were received by them, and provided to the applicants' attorneys of record on 6 November 2020. They do not, and cannot gainsay that the reasons for the order of 22 July 2020 were provided, a mere two weeks after they were requested. The applicants stated that they will "*abandon prayer 3 of the application to be heard on 9 February 2023*", but would consider their

options now that they are in possession of the reasons from the presiding magistrate. The difficulty with this submission is that this Court is not seized with that application. It cannot avail the applicants to, in these proceedings to premise the present application on what they would or would not do in another application, before another court.

[15] After it was brought to the attention of the Court that the reasons had already been provided to the applicants, the applicants tune and stated that they are still unable to proceed with review / appeal proceedings until the first respondent has been “properly substituted by the second respondent.”

Discussion

[16] If one cuts to the bone of the present application, the issue is very distinct. It is whether the applicants are entitled to a stay of the warrant issued on 8 December 2023 and executed on 13 January 2023.

[17] The issuing and reissuing of warrants in execution in the Magistrates’ court is governed by the provisions of Rule 36 of the Magistrates’ Courts Rules. A warrant may be sued out by any person in whose favour a judgment has been given, if such judgment is not then satisfied, stayed or suspended.¹ A warrant issued may at any time, on payment of the fees incurred, be withdrawn or suspended by notice to the sheriff by the party who has sued out such process.²

¹ Rule 36(2)
² Rule 36(3)

[18] The bone of contention in the present application is not the warrant that was originally issued by the respondents on 23 April 2019, but rather the warrant reissued by the respondents on 8 December 2023, which is sought to be stayed by the applicants. It is the removal of the two motor vehicles by the fourth respondent that has instigated the launching of this application. The cardinal question that comes to mind is whether in reissuing the warrant, and so to speak, in removing the two motor vehicles, the respondents acted lawfully or not. The secondary question is whether the applicants were justified in launching the current application and have made out a proper case for an order to stay the warrant sought to be stayed. This speaks to whether this application has any merit.

[19] In answering the above questions, the Court must have recourse to the respective contentions of the parties as well as the submissions made in court, during the hearing of this matter. In bolstering their case, the applicants contend that the application was necessitated by the reissued warrant which resulted in the removal of the applicants' motor vehicles on 13 January 2023. This, in the applicant's view, has nothing to do with the original warrant of 23 April 2019.

[20] In an attempt to dislodge the applicants, the respondents aver that the 8 December 2023 warrant is a reissue of the warrant initially issued on 23 April 2019, hence their contention that the applicants had known about the existence of the warrant as far back as 2019. -Whether or not the second

warrant can be considered to be a reissue of the first, lies on the warrants themselves which require further scrutiny.

[21] On close scrutiny, the two warrants are markedly different from each other. The 2019 warrant which was sanctioned by the court order is for an amount of R247 463.43 whereas the 2022 warrant is for R780 995.47. In the interim, the respondents' bill of costs was taxed and allowed in the amount of R420 034.10.

[22] Another distinguishing feature is that the respondents issued the second warrant without withdrawing the previous warrant as contemplated in Rule 36(3), and is not, *stricto sensu*, issued in execution of any judgement, as contemplated in Rule 36(1). This, then, brings the legality of the second warrant into question.

[23] *It is trite that reissuing pertains only to a process which has been withdrawn. 'The subrule does not authorize a judgment creditor to issue a succession of different warrants on the same judgment.'*³ Over and above, recovery of costs by execution separately from recovery of the capital sum due, does 'not constitute an improper splitting of a single judgment debt'.⁴ The registrar is entitled to issue separate warrants of execution for the capital sum and for costs.

³ *Jones and Buckle, The Civil Practice of the Magistrates' Courts in South Africa Vol II; Van Loggerenberg, DE; 10th Edition*

⁴ *Jones & Buckle, op sit*

[24] It was thus not open to the respondents to issue a second completely different warrant, under the guise that it was for the same judgment debt. Further, the issuing of second and further warrants is reserved for cases where a warrant has been lost or misplaced. In *casu*, it appears that the issuing of the second warrant on 8 December 2022 was presumably for purposes of catering for the respondents' costs. What is not clear is how the amount of R780 995. 47 was arrived at. The respondent's taxed costs is an amount of R420 034.10

[25] The question that, then, arises is whether the warrant in question is susceptible to being stayed or suspended. In **Minister of Police v Magwebu and Others**⁵ the court said:

"[12] The discretion to suspend the operation of writs vested in courts in terms of Uniform Court Rule 45A has always been exercised only if there is a material error in the writ, by way of example: where it has not been issued in accordance with the judgment, the incorrect persons have been cited, or the judgment debt had been extinguished. (Erasmus: Superior Courts Practice, Second Edition, D1 -604)"

[26] The next question that begs asking is whether the applicant has made out a case for the granting of the urgent interdict. It is trite that a court will grant a stay of execution where real and substantial justice requires it, or where an injustice would otherwise result. The court will be guided by factors usually applicable to interim interdicts, except where the applicant is not asserting a

⁵ (2160/2022) [2023] ZAECMKHC 26 (14 February 2023)

right, but attempting to avert an injustice. The court must be satisfied that the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondents, and irreparable harm would result if execution is not stayed and the applicant alternatively succeeds in establishing a clear right. The court is not concerned with the merits of the underlying dispute.⁶

[27] Having considered each of the requirements for the interdict set out above, I am of the view that the applicants have made out a case for the relief in question. The respondents were not justified in issuing the warrant of 8 December 2022. On this basis, the second warrant cannot stand.

[28] With that in mind, the question that immediately follows is whether the respondents' conduct is sufficient to exonerate the applicants from the shortcomings in their application. The application is beset with inaccuracies. These relate to the applicants' assertions that the warrant should be stayed subject to finalisation of matters pending in the Regional court, when it is only the review of taxation that is pending. The other issue is the applicants' false statement that the reasons for the order were not provided by the Regional court, when in fact, this was not the case.

[29] The above challenges notwithstanding, this Court cannot close its eyes to the manifest illegalities committed by the respondents in the reissuing of the

⁶ *Ndevu and Another v Westonaria South Property Holding (Pty) Ltd t/a Westonaria South and Others* [2022] JOL 53978 (GP)

warrant of 8 December 2022. In my view it would be a travesty of justice if this Court were to allow the execution of a warrant that is manifestly unlawful.

Costs

[30] Whilst it is a general rule that costs follow the result, I am inclined to depart from the general rule purely because of the applicants' conduct in the handling of this matter, as demonstrated above.

Order

[31] In the result, I make the following order:

- (i) The warrant of execution issued on 8 December 2022 is set aside.**

- (ii) There shall be no order as to costs.**

S MFENYANA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

APPEARANCES:

On behalf of the Applicants : **Adv. T Masike**
Instructed by : **Palm Hollander Inc.**

c/o : **Maree & Maree Attorneys**

Email : legal9@phattorneys.co.za

On behalf of the respondents : **Adv. M Mashele**

Instructed by : **Mahlangu & Associates Inc**

Email : info@mahlanguattorneys.co.za

Reserved : 27 January 2023

Handed down : 12 October 2023