

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: Yes
_____	_____
DATE	E

Case No: 2018/28163

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

SHAIB SEIF MAHMOUD

First Respondent

THE SHERIFF OF PRETORIA EAST

Second Respondent

REASONS FOR ORDER ON 26 FEBRUARY 2024

Gilbert AJ:

1. This matter concerns an attempt by the Road Accident Fund to avoid payment of a judgment debt based upon a contention that the successful plaintiff was a foreigner and that until the Fund was satisfied as to whether the plaintiff was legally in the country when the accident occurred, the Fund would not satisfy the judgment debt and would be seeking the rescission of the judgment debt against it.
2. This was not be the first attempt by the Fund to do so.
3. Judgment was granted by consent against the Fund in favour of the first respondent on 26 October 2023 based upon a settlement agreement concluded on 18 April 2023 in the RAF trial action A warrant of execution was issued on 1 November 2023. The Fund's assets were attached on 6 November 2023. The Sheriff's auction to sell the Fund's assets was scheduled for 27 February 2024,
4. On Friday, 23 February 2024, the RAF launched urgent proceedings to suspend the operation and execution of the court order pending application to be launched by the Fund to rescind the court order. The asserted urgency was that the Sheriff's auction of the Fund's assets the following Tuesday, 27 February 2024.
5. The urgent application was served by email on Friday, 23 February 2024 and set down for hearing on Monday, 26 February 2024.
6. At the commencement of the hearing of the application in the urgent court on Monday, 26 February 2024, the Fund was represented by its attorney,

Ms Mhlanga of the State Attorney, Johannesburg. As there was no appearance on behalf of the first respondent, I stood the matter down for Ms Mhlanga to make enquiries as to the first respondent's position by way of her contacting the first respondent's attorneys.

7. When the matter re-commenced, Ms Molope-Madondo, who had been the first respondent's counsel in the trial, appeared and informed the court that the first respondent's attorneys had not been able to contact their client for instructions and that unfortunately as matters presently stood she did not hold any instructions on behalf of the first respondent and therefore could not participate further in the matter. Ms Molope-Madondo was accordingly excused.
8. I then proceeded to hear submissions on behalf of the Fund.
9. I dismissed the application on its merits, with no order as to costs as the first respondent had not opposed the application. I indicated that my reasons would follow.
10. The Fund's case is that after the attachment had been made "*[the Fund] then instructed the Department of Home Affairs to investigate whether the first respondent was legally in the country at the time when the accident occurred*".
11. The Fund explains that the outcome of that investigation was received by it on 21 February 2024, and on the Fund's reading of that report the first respondent was illegally in the country at the time of the accident.

12. The Fund states under oath that the first respondent failed to produce a valid passport with entry and exit stamps evidencing that he was legally present in South Africa at the time of the accident.
13. The Fund relies upon a 'management directive' issued by it on 21 June 2022. Although the actual directive is not attached to the papers, the wording thereof does appear in paragraph 73 of the founding affidavit.

"FOREIGN CLAIMANTS

The following applies to all lodgements received or pre-assessed from the date of [t]his directive; in instances where the claimant or injured is a foreigner, proof of identity must be accompanied by documentary proof that the claimant was legally in South Africa at the time of the accident. A copy of the foreign claimant's passport showing the entry stamp and/or exit stamp must be submitted. Where a passport does not have any stamp, the RAF will not be lodging such a claim. Where the passport document does not have an exit stamp, proof that the claimant is still in the country must be produced. In this instance, the passport copy indicating an approved visa must be submitted. Copies of the passport must be certified by SAPS".

14. The Fund's case for an interim interdict staying the execution of the order is that the directive precludes payment to the first respondent as the successful plaintiff in the action, and that until the directive is set aside on review, it is binding.

15. The Fund in its founding affidavit describes how various litigation is presently underway challenging the constitutionality of *inter alia* the directive and that the outcome of that litigation must be awaited.
16. The Fund in the notice of motion to its urgent application does not seek that the order execution be suspended pending the outcome of that litigation. Instead the Fund seeks that execution of the order be suspended pending an application by the Fund to rescind the order.
17. The founding affidavit does not make it clear what the basis would be for the order to be rescinded. I will return to this when considering the merits of the application.
18. As to whether the Fund had sufficiently made out a case that the court should entertain its application on an urgent basis, I had serious reservations. The writ was issued already on 1 November 2023 and the attachment made on 6 November 2023. The Fund does not disclose when it furnished instructions to the Department of Home Affairs to investigate the immigration status of the first respondent, contenting itself with a bland allegation that it was after the writ of execution had been issued. While it may be that the report from the Department of Home Affairs only materialised on 21 February 2024, that averment by itself is of little value in the absence of the Fund disclosing when it first sought the report from the Department of Home Affairs. The urgency was self-created.
19. This was exacerbated as this application was launched on a Friday and then set down for hearing on the following Monday, i.e. on the next court

day. This afforded little opportunity to the first respondent to consider his position. It is not surprising that the first respondent's attorneys were unable to obtain instructions from their client on such short notice, particularly if he is an immigrant.

20. Notwithstanding the Fund's self-created urgency, I was prepared to and did consider the application on its merits. I had read the papers and the attorney for the Fund had argued the application, persisted in seeking the relief.
21. Much of the founding affidavit appears to be generic in nature. It therefore appeared to me upon the reading of the affidavit that this may not be the first time that the Fund had approached the court seeking such, or similar, relief based upon the June 2022 directive. I raised with the Fund's attorney if she was aware of any previous judgments in this regard. The response was that she was only aware of a decision where the court had declined to entertain similar relief on the basis that it was not urgent.
22. I was able to readily locate on the publicly accessible *SAFLII* website the decision of this Division by Twala J in *Road Accident Fund v Sheriff of the High Court, Pretoria and Another & Macamo* [0114226:2023] [2023] ZAGPJHC1336 (20 November 2023) ('*Macamo*') in which interim interdictory relief suspending execution, based upon the June 2022 directive, was sought. The court declined to grant the relief, dismissing the application on its merits.

23. Ms Mhlanga informed me that she was unaware of this judgment and was unable to state whether her client, the Fund, had had regard *Macamo* when instructing her. In *Macamo* the Road Accident Fund was not represented by the State Attorney.
24. In *Macamo*, the Fund stated that it would seek to rescind the order that had been granted against it on the basis that its employee who had agreed to the settlement agreement that had been made an order of court had no authority to do so as there had not been compliance at the time with the directive. The Fund accordingly advanced the argument in that matter that the judgment based on the settlement agreement was erroneously granted and therefore stood to be set aside. And so execution upon order should be stayed
25. The directive in its terms applies to '*all lodgements received or pre-assessed from the date of the directive*'. Twala J accordingly found in paragraph 20 of *Macamo* that the directive is directed at dealing with new claims that were lodged with the Fund and which were still to be processed from the date of the management directive. The directive was no assistance in relation to an action that had already been instituted in 2019.
26. The same situation arises in the present instance. The action in the present instance was instituted in 2018 and so, as found in *Macamo*, the directive cannot apply. Unless I find that *Macamo* is clearly wrong, I am bound to follow the judgment. I am not persuaded that *Macamo* is wrong;

to the contrary, the judgment is persuasive. On this basis, the present application cannot succeed.

27. But there is a further reason.
28. The settlement in the present matter was concluded on 18 April 2023 and resulted in the consent order of 26 October 2023. The court order stands until rescinded.
29. The Fund states in its founding affidavit that the issue as to the constitutionality of the directive must be decided in pending court proceedings and that execution should be held over at least until then. Although this is not relief that is sought in the notice of motion, the fundamental difficulty for the Fund is that even if it is found in due course that that the directive is constitutional, it would not avail the Fund in the present instance where judgment has already been granted.
30. The Fund was clearly aware of its own directive, which had existed since June 2022, when it agreed to the settlement in April 2023. The Fund cannot now seek to raise an issue that it should have been raised before it settled, and the subsequent consent order.
31. There is no disclosure by the Fund in the present matter when it first became alive to potentially relying upon the directive as a basis to resist the first respondent's claim. I invited the Fund's attorney on several occasions to point out where in the founding affidavit this was addressed. While the founding affidavit does state that the first respondent failed to

provide the Fund with a valid passport indicating entry and exit stamps and so evidencing that he was legally present in South Africa at the time of his accident, there is no averment as to when this issue first arose.

32. Should this awareness have arisen before the settlement was reached in April 2023 and subsequently resulted in the consent order in October 2023, the Fund cannot now rely upon the directive as a basis to avoid the judgment debt. And in any event the Fund must be assumed to have been alive at that time to its own management directive of June 2022.
33. On the other hand, should the Fund's realisation that the directive may come into play only have arisen after the order was granted, it would still not avail the Fund. A judgment to which a plaintiff is procedurally entitled taken in the absence of a defendant cannot be erroneously granted in light of a subsequently disclosed defence: 'The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.'¹ More so where the order was consented to pursuant to a settlement.
34. It appears that it may have only been when the Fund was faced with the sale in execution by the Sheriff of its attached assets that it then belatedly sought to rely upon the directive as a basis for avoiding payment of the

¹ See, for example, *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at para 27.

judgment debt through seeking a suspension of the execution proceedings.

35. Twala J concluded in *Macamo* in paragraph 24:

“In my respectful view therefore that there is no merit in the application to stay the operation of the order of 18 April 2023 and to interdict the Sheriff from executing that order. The applicant has failed to demonstrate that the order was erroneously granted. The only purpose to be served by this application is to delay the respondent from receiving his compensation for the loss and/or damages he suffered as a result of the driving of a motor vehicle as provided for by the [Road Accident Fund Act, 1996]. I hold the view therefore that the applicant has failed to demonstrate that it has any prospect of success in its application for rescission of the order and therefore the application stands to be dismissed”.

36. This applies equally in the present instance.

37. As the first respondent did not oppose the application, I decided that there be no order as to costs.

38. In the circumstances, the order that I made on 26 February 2024 was:

38.1. the application is dismissed;

38.2. there is no order as to costs.



Gilbert AJ

Date of hearing: 26 February 2024

Date of judgment: 3 March 2024

Appearance for the applicant: Ms Mhlanga (attorney)
The State Attorney, Johannesburg

No appearance for the respondents.