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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **2023/070007**

(1) REPORTABLE:	
(2) OF INTEREST TO OTHER JUDGES:	
(3) REVISED:	
.....	
SIGNATURE	DATE

In the matter between:

M[...] P[...] R[...]

Applicant

And

**L[...] O[...]
(ID number: [...])**

First Respondent

YAMMIN HAMMOND INCORPORATED

Second Respondent

**THE SHERRIF FOR THE DISTRICT OF
JOHANNESBURG NORTH**

Third Respondent

Judgment

GREEN, AJ

1. The parties in this matter were previously married to each other. When an order of divorce was granted, it incorporated an agreement of settlement. The agreement of settlement provided for the payment of maintenance for the children born of the marriage.

2. The respondent¹ alleges that maintenance due in terms of the settlement agreement was not paid. To recover the unpaid maintenance the respondent issued a writ of execution out of the High Court, Johannesburg. The writ was executed and money held in trust by the second respondent was attached. The trust money was part of the proceeds from the sale of the erstwhile matrimonial home. The applicant's movable property was also attached.

3. The attachment prompted the applicant to bring an urgent application in which he sought an order setting aside the writ, alternatively suspending the execution of the writ. No indication was given of whether the suspension was intended to be temporary or permanent.

4. The urgent application was resolved by agreement and a consent order was granted. The consent order provided that the attachment of the money in the second respondents trust account was suspended pending the finalisation of the main application, the attachment of the movable property was lifted, and the parties were granted leave to file further affidavits within the time periods provided by the Rules.

5. In the founding papers the basis upon which the applicant sought an order setting aside or suspending the writ was that the writ had been issued out of the High Court when it ought to have been issued out of the Maintenance Court. The applicant's heads of argument were also prepared on this basis. At the hearing of the matter the applicant's counsel accepted, correctly in my view, that the respondent had an election whether to issue the writ out of the High Court or the Maintenance Court. The existence of that election is dealt with in *MFI*² and the *Greenhill*³ cases.

6. Having accepted that the respondent had an election to issue the writ out of either the High Court or the Maintenance Court the applicant nonetheless argued that in making that election the respondent ought to have elected to issue the writ out of the Maintenance Court. As I understood the argument it was that there is some residual check on the election that is afforded to a party when electing from which

¹ I refer to the respondent as that was the nomenclature employed during the hearing. Correctly stated this is a reference to the first respondent.

² *MFI v NI* [2018] ZAWCHC 65

³ *Greenhill v Discovery Preservation Fund administered by: Discovery Life Investments Services Ltd and another* 2022(3) SA 236 (GJ).

court to issue the writ. This was not the case that was made out in the founding papers.

7. In my view, once it is accepted that a party has an election there cannot logically be circumstances where that election must be exercised in a particular way. If that were so the party would not have an election but would instead be required to go to one or the other court without a choice.

8. When I enquired into why the respondent ought to have elected to proceed in the Maintenance court the applicant's answer was somewhat opaque. Reference was made to the children, who are now majors, the non-joinder of the now major children, and the fact that there is no indication that the children had sought maintenance from the applicant. There was also reference to the respondent apparently not being impecunious and that she was seeking to use the writ in an oppressive way. None of these arguments are, in my view, reasons that may dictate that the writ had to be issued out of the Maintenance court. The reference to the children and to the respondent's lack of impecuniosity might be relevant to a variation of the amount of maintenance in future, but are not relevant to maintenance that is due under the settle agreement and is historical in character.

9. Further, the issues raised relating to the children seem to overlook that the settlement agreement requires maintenance to be paid until the children are self-supporting, and that maintenance must be paid to the respondent. There is nothing in the papers to indicate that the children are self-supporting and so the applicant's obligation to pay maintenance persists.

10. I accordingly find that even if the applicant is correct, which I doubt, that there is some residual check on a party's election on which court to issue a writ out of, in this matter it has not been shown that the respondent ought, in the exercise of her election ought to have proceeded out of the Maintenance Court.

11. Having accepted that the respondent had an election to issue the writ out of either the High Court or the Maintenance Court, and absent any reason compelling the respondent to exercise her election to proceed out of the Maintenance Court it must follow that the applicant's relief for setting the writ must fail.

12. That brings into focus the alternative relief which the applicant is sought, namely that the execution of the writ should be suspended. I have already made the point that the applicant has not in his notice of motion indicated whether the suspension is to be temporary or permanent. In argument I was told by the applicant's counsel that there is a myriad of disputes between the parties, this being but one of them. In those circumstances it was argued that I should postpone the execution of the writ to allow the parties to ventilate their disputes.

13. Courts undoubtedly have the power to regulate their process which includes the suspension of a writ if that would be just. This was expressed thus by Navsa JA in *Van Rensburg*:⁴

"[51] Apart from the provisions of Uniform Rule 45A, a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.

[52] A court will grant a stay of execution in terms of Uniform Rule 45A where the underlying causa of a judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial justice compels such action."

14. To decide whether I should accede to the applicant's request for the suspension of the execution of writ I must enquire into whether a basis has been laid for that. Stated differently – has the applicant shown that he has a basis on which to challenge the writ.

15. When the respondent issued the writ, she deposed to an affidavit supporting the amount claimed. During argument I was shown the papers that were filed by the respondent in support of the writ. The papers were contained in an arch lever file and by my estimate consisted of 300 or more pages. This affidavit was available to the applicant.

⁴ Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others 2011(4) SA 149 (SCA)

16. When dealing with the writ in his reply the applicant said:

“It is not necessary for me to deal with the content of the First Respondent's supporting affidavit (attached to the writ of execution in these proceedings) on the basis that, had the First Respondent launched a bona fide application for the attachment of my debts, in the appropriate forum, she may have acquired the necessary court order, permitting her to attach the funds held by the Second Respondent and I would have been given the opportunity to challenge this order, in accordance with the provisions as set out in the Maintenance Act, Act No.99 of 1998, as amended (“the Act”). Given that there are still disputes between the parties which can only be determined after the full set of papers is delivered and uploaded herein, I need not deal therewith, herein.”⁵

and

“There is no obligation on me to present my defence in respect of the First Respondent's maintenance claim in circumstances where the writ of execution was improperly procured as no Court had granted a prior order permitting the First Respondent to attach the funds held in trust with the Second Respondent in accordance with the Act. The procedural errors and jurisdictional problems cannot be remedied by the First Respondent, in retrospect in these current proceedings.”⁶

17. To be sure that the applicant had not somewhere, perhaps obliquely dealt with the merits of his complaint about the writ the applicant's counsel was asked to point out where the merits of the applicant's complaint about the writ had been dealt with. No facts could be pointed out and I am satisfied that the applicant did not set out any facts. This is consistent with his election not to disclose his defence to the writ.

18. There was nothing to prevent the applicant from setting out facts which would indicate that he has some basis upon which to challenge that which is claimed in the writ. He could for instance have pointed to the settlement agreement and provided documents to indicate that he had paid a particular amount; or he could have pointed to an amount claimed in the writ, contrasted it with the settlement agreement and made the argument that the amount claimed was not covered by the settlement

⁵ Replying affidavit para 9.

⁶ Replying Affidavit para 13.

agreement. None of this was done. It is relevant that the applicant was not required to engage in a game of shadow boxing because he had the respondent's affidavit in support of the writ which he could answer to.

19. Absent the applicant having laid a basis upon which he could challenge that which is claimed in the writ it is my view that it would not be just for me to stay the execution of the writ. It follows that the execution of the writ ought not to be stayed.

20. When the respondent delivered her answering affidavit that prompted the applicant to launch an application to strike out parts of the answer. Those parts of the answer that were sought to be struck out dealt for the most part with historical events that provided background, and context, to the respondent's position. At the hearing of the matter the application to strike out was pressed. This was in my view correct. The non-pressing of the application to strike out may have in part been the result of the direction which the debate in court took, or it may have been the result of the applicant's acceptance that the respondent had an election. The striking out application has generated its own set of not insubstantial papers. Time and effort must have been devoted to those papers and raises the question of costs.

21. In assessing the costs of the striking out application I have considered what order I might have made if the application had been persisted with. I would have dismissed the application to strike out. The allegations are not of the sort that can be said to be scandalous or vexatious, nor are they allegations that might prejudice the applicant if they are to remain. In the event the determination of the setting aside or staying the execution of the writ is determined on a basis that does have regard to the paragraphs that were sought to be struck out.

22. I am mindful that in family law and divorce matters generally cost orders ought to be sparingly given to prevent one of the parties trying to "out litigate" the other party, and as part of that using cost orders to oppress a party. That said costs remain a matter of discretion.

23. In this matter, and in the exercise of my discretion it would be just to award the costs of the application in favour of the respondent. This would be consistent with the usual cost order which follows the result. Furthermore, the applicant's conscious

decision not to engage with the amounts claimed in the writ, but instead to limit his attack on the writ to the forum in which it was issued, and to then accept that the respondent had an election are factors which in the exercise of my discretion warrant a cost order.

24. Further, in the exercise of my discretion it would be just to order that the applicant pay the costs of the striking out application. If the application had been persisted with it would probably have been dismissed, and the paragraphs that were sought to be struck out do not feature in the final determination of the matter.

25. In argument it was brought to my attention that the rules relating to costs have been changed with effect from 12 April 2024 and that I am required to indicate the scale on which Counsels fees are to be taxed. When this point was dealt with in argument both parties agreed that Scale B was appropriate. I agree with that.

26. I accordingly make the following order:

1. The application is dismissed.
2. The applicant is to pay the costs of the application, and the application to strike, out on the party and party scale, with the costs of counsel to be on scale B.

I. GREEN

Acting Judge of the High Court

Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 16 April 2024 and is handed down electronically by circulation to the parties/their legal representatives by e mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 April 2024.

Date of hearing: 15 April 2024

Date of delivery of judgment: 16 April 2024

Appearances:

For the plaintiff: Adv Clint Ascar

Instructed by: Soldatos Cooper Inc

For the defendant: Adv Sarita Liebenberg

Instructed by: Lee Attorneys