



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

Case Number: 2023/102250

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
<u>23/10/2023</u>	
DATE	SIGNATURE

In the matter between:

**THE EXECUTIVE MAYOR:
MATJHABENG LOCAL MUNICIPALITY**

First Applicant

**THE MUNICIPAL MANAGER:
MATJHABENG LOCAL MUNICIPALITY**

Second Applicant

MATJHABENG LOCAL MUNICIPALITY

Third Applicant

and

ABSA BANK LIMITED

First Respondent

THE SHERIFF OF THE HIGH COURT: WELKOM

Second Respondent

KRUGER VENTER INCORPORATED ATTORNEYS

Third Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL (MEC)
FOR COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS (COGTA),
THE FREE STATE PROVINCIAL GOVERNMENT**

Fourth Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL (MEC)
FOR FINANCE, THE FREE STATE PROVINCIAL GOVERNMENT**

Fifth Respondent

THE MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS (COGTA)	Sixth Respondent
THE MINISTER OF FINANCE	Seventh Respondent
THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION (SALGA)	Eighth Respondent
THE SPECIAL INVESTIGATING UNIT	Ninth Respondent
ESKOM HOLDINGS SOC LTD	Tenth Respondent
SEDIBENG WATER BOARD	Eleventh Respondent
BAILE TRADING (PTY) LTD	Twelfth Respondent
BLATEW SECURITY (PTY) LTD	Thirteenth Respondent
CHOKMAH (PTY) LTD	Fourteenth Respondent
DOWN TOUCH INVESTMENTS (PTY) LTD	Fifteenth Respondent
FOLLEX GROUP (PTY) LTD	Sixteenth Respondent
LELE & TSHIDI CONSTRUCTION & PLANT HIRE	Seventeenth Respondent
MC SECURITY & INVESTIGATIONS CC	Eighteenth Respondent
MM MANAGEMENT CONSULTING	Nineteenth Respondent
MOON & EARTH TRADING & PROJECTS 78 (PTY) LTD	Twentieth Respondent
MOTSEWARONA CONSTRUCTION & MAINTENANCE (PTY) LTD	Twenty-First Respondent
PAKAMPHO ELECTRICAL (PTY) LTD	Twenty-Second Respondent
PULELETSO SECURITY AND PROJECTS (PTY) LTD	Twenty-Third Respondent
T-GAZZI CONSTRUCTION & PROJECTS CC	Twenty-Fourth Respondent
GABRIEL BARTLOMEUS J CONRADIE	Twenty-Fifth Respondent
TSEAL TSWEU CONSULTING ENGINEERS (PTY) LTD	Twenty-Sixth Respondent
TECHNOBITS TECH (PTY) LTD	Twenty-Seventh Respondent
MOSHARAF HOSSAIN & M.A HOSSAIN	Twenty-Eighth Respondent

JUDGMENT

STRYDOM, J

Introduction

- [1] This is an urgent application filed for interim relief to stay writs of execution by the three applicants, being the Executive Mayor of Matjhabeng Local Municipality (the first applicant), the Municipal Manager of the Matjhabeng Local Municipality (the second applicant), and the Matjhabeng Local Municipality itself (the municipality).
- [2] There are in total 29 respondents, of which the first respondent is Absa Bank Limited (Absa); the second respondent is the Sheriff of the High Court, Welkom (the Sheriff); Kruger Venter Incorporated, Attorneys (the respondent's attorney), the fourth to eighth respondents are local and national government officials, the tenth respondent is Eskom Holdings SOC Ltd (Eskom) and the eleventh respondent is Sedibeng Water Board (SWB) both judgment creditors. The further respondents are also judgment creditors of Matjhabeng. For purposes of this judgment, two of the judgment creditors should be mentioned specifically, the fourteenth respondent, Chokmah (Pty) Ltd (Chokmah), and the twenty-third respondent, Puleletso Security And Projects (Pty) Ltd (Puleletso). The interim order applied for would have an immediate impact on payment of their claims which are in the process of being paid to them directly from the Absa Bank account of the municipality, held at the Welkom branch, pursuant to writs of execution issued in terms of rule 45 (12)(a) (Garnishee orders).
- [3] This application was brought on an extremely urgent basis set down on Sunday 8 October 2023 at 17h00 for an interim order essentially staying the execution of judgments obtained in the High Court, Free State Division, Bloemfontein (the Free State High Court), against Matjhabeng, which is a municipal council within the Free State Province. This relief is sought pending the determination of an

application to be launched by Matjhabeng for the relief contemplated in section 152 of the Local Government: Municipal Finance Management Act¹, (the MFMA); and, in the interim, to restrain Absa from paying the Sheriff any funds standing to the credit of Matjhabeng with the bank.

- [4] By the time the application was heard at approximately 20h00 on Sunday evening, the application had not been served on the respondents. Through a virtual link, the court only heard counsel for the applicants and had to consider the nature and extent of the urgency alleged and why an order was required forthwith. The court expressed its concern to the applicants' counsel that this application should have been served on the affected parties. The court was informed that there was not sufficient time for this. The court then considered the facts.
- [5] It was alleged and argued that the applicants on the previous day, Saturday 7 October 2023, met with the purpose to review the capacity of the municipality to meet its fast-increasing financial obligations which were caused by various judgments taken against it in the Free State High Court. A decision was taken to convene an urgent council meeting of the municipality, within days, to decide to apply to court for relief in terms of section 152 of the MFMA. If granted it would cause a temporary stay of legal proceedings and executions. In the meantime, an urgent court order was required to prevent further payments from being made to the judgment creditors as this would leave the municipality financially strained to meet other payment commitments to provide essential services and to pay salaries.
- [6] It was further argued that two payments in the total amount of approximately R91 million, pertaining to judgments obtained by Chokmah and Puleletso, were going to be made to the sheriff by Absa at 00h00 on Monday 9 October 2023, unless a Court Order was obtained to prevent this. These amounts became payable pursuant to garnishee orders obtained in favour of the Sheriff as contemplated in Rule 45(12)(a) of the Rules of this Court. It should be noted that this

¹ 56 of 2003.

submission about exactly when the funds would have been withdrawn was made from the bar and does not appear in the founding affidavit.

[7] After the court considered these facts as presented by the applicants, the court decided that it would be in the interests of justice that the application should be served on the respondents, but that an interim order should be made, which could be reconsidered during this court's urgent court week.

[8] The court made the following order:

"1. Pending the determination of the urgency of this matter in terms of Rule 6(12)(a):

- 1.1 The hearing of this application stands down until 12h00 on Thursday 12 October 2023;
- 1.2 The applicants' founding papers must be served on all interested and affected parties on Monday, 09 October 2023;
- 1.3 Any party intending to oppose this application must file opposing affidavits by not later than 09h00 on Wednesday 11 October 2023;
- 1.4 The applicants to file their replying affidavit by close of business on Wednesday 11 October 2023; and
- 1.5 Absa Bank Limited ("the first respondent") is restrained from paying to the Sheriff of the Court for Welkom any funds standing to credit of the Municipality with the bank until the determination of this application."

[9] The purpose of this order was to provide interim relief based on the facts, including facts in relation to urgency, as presented by the applicants only but affording interested parties time to oppose the alleged urgent nature of the matter as well as the merits.

[10] The respondent's attorneys, representing many judgment creditors and other creditors then caused a notice of reconsideration in terms of Rule 6(12)(c) to be filed and set the matter down to be reconsidered on Thursday 12 September 2023 at 12h00, which date and time corresponded with the date and time which the court determined. An answering affidavit was deposed to oppose the relief sought by applicants and to support a condonation application for the late filing of this affidavit. The deponent of the affidavit, Casper De Mist Kruger (Kruger),

an attorney at the third respondent indicated that his firm acts on behalf of the 12th, 14th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, and 24th respondents. For ease of reference, the aforesaid respondents will collectively be referred to herein as “the respondents”. The other respondents were either not aware of the application or elected not to oppose same.

[11] The court must now reconsider its order made on 8 October 2023 (the urgent order).

[12] The respondents filed their answering affidavit a few hours after the time stipulated in the urgent order. Condonation is sought. This should be granted considering the truncated time periods provided to the respondents to file an answering affidavit. The grounds upon which the respondents seek the urgent order to be reconsidered and set aside with costs are that:

- a. The court lacks jurisdiction, given especially what the aim of the application is. The applicants want this court to stay writs of execution issued pursuant to judgments given in a different division of the High Court.
- b. The application is not urgent, and if found to be urgent, the urgency is self-created.
- c. The application is an abuse of process.
- d. The lack of authority of the three applicants to lodge the application on behalf of the municipality.
- e. No case for the relief sought is made out.
- f. The applicants have failed to satisfy the requirements of an interlocutory interdict.

[13] The Respondents filed a Rule 7 notice challenging the authority of the applicants. This challenge was abandoned in court. Before the court can make any further findings in this matter, the court will have to consider its own jurisdiction.

[14] On behalf of the respondents, it was argued that given that the relief sought pertains to orders granted by the Free State High Court, this court is not vested

with the requisite jurisdiction to entertain this application. The notion that a court of competent jurisdiction, but in a different division, may suspend orders of a competent court in another geographical jurisdiction is untenable. Various warrants of execution have been issued by the Sheriff in execution of orders which were granted by the Free State High Court. In some instances, applications were brought in terms of Rule 45A for the stay of execution but these applications were unsuccessful.

[15] There is also a pending application which was set down for Friday, 13 October 2023 which pertains directly to court orders, writs, and the enforcement thereof. Despite this, the applicants approached this court for urgent relief without mentioning this for the courts attention. The respondents averred that this bolstered the inference of an abuse of process.

[16] The envisaged application will be the first application made by the municipality in terms of section 152(1) of the MFMA. Previous applications made in the Free State High Court for a stay of executions were made in terms of rule 45A of the rule of this court. There is further a pending constitutional challenge aimed at the constitutionality of rule 45(12)(a). All of this is pending proceedings in the Free State High Court. For reasons not provided to this court, the applicants elected to approach this court and not the Free State High Court for interim relief.

[17] Reference to section 152 of the MFMA should be made. It reads:

“152. Application for stay of legal proceedings –

(1) If a municipality is unable to meet its financial commitments, it may apply to the High Court for an order to stay, for a period not exceeding 90 days, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality or a municipal entity under the sole control of the municipality.

(2) The notice of an application in terms of subsection (1) must be given to –

- (a) The MEC for local government and the MEC for finance in the province;
- (b) The Minister;

- (c) The Cabinet member responsible for local government;
- (d) Organised local government; and
- (e) To the extent that they can reasonably be contacted, all persons to whom the municipality or the municipal entity owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100,000.

(3) An application in terms of subsection (1) may for the purposes of section 139(5) of the Constitution be regarded as an admission by the municipality that it is unable to meet its financial commitments.”

Jurisdiction

[18] As part of the respondents’ reconsideration application, they challenged the jurisdiction of this court to hear this matter. To establish jurisdiction Applicants argued that relief is, *inter alia*, sought against Absa. This being the case, so the argument went, will cloth this court with jurisdiction in this matter as Absa was residing within this court’s jurisdiction.

[19] On behalf of the applicants, it was argued that the court is obliged by law to hear any matter that falls within its jurisdiction and has no power to exercise discretion to decline to hear such a matter on the grounds that another court has concurrent jurisdiction². This is indeed the legal position.³ The question will remain whether it was proven by the applicants that this court has concurrent jurisdiction with the Free State High Court, which clearly has jurisdiction in this matter.

[20] To determine a court’s own jurisdiction, it should examine whether a recognised jurisdictional ground is present and if so, whether an effective judgment can be given by this court.⁴ It was argued that an essential part of the current interim relief sought is against Absa which has its registered office within the jurisdiction of this court and that this, standing alone, would provide this court with sufficient jurisdiction as it constitutes a jurisdictional connecting factor.

² The court was referred to *Standard Bank of South Africa Ltd and others v Thobeyane and others; Standard Bank of South Africa Ltd v Gqirana NO and Another* [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) (“*Thobeyane*”).

³ *Makhanya V University of Zululand* [2009] ZASCA69; 2010 (1) SA 62 (SCA); [2009] 4 All SA 146 (SAC) para 34

⁴ See *Bobroff and Another v National Director of Public Prosecutions* [2021] ZASCA 56 (SCA).

- [21] In the founding papers the first respondent (Absa) is referred to as “*ABSA BANK LIMITED, Welkom, a branch of Absa Bank Limited, registered as a bank in terms of the Banks Act, Number 94 of 1990, section 11; the bank in which the Municipality’s bank account is held against which warrants and notices of attachment were issued, as further deposed to in this affidavit.*”
- [22] According to the second applicant he was in communication with the bank, which could only have been a reference to someone at the Welkom branch of Absa pertaining to these writs of execution. When the matter was heard by the court on the 8th of October 2023 the court enquired how this order would be made effective and executed on a Sunday evening. The court was assured that the applicants had contact with Absa branch personnel.
- [23] In paragraph 62 of the founding affidavit, it was averred that Absa is domiciled within the jurisdiction of this court. Further, as this application is incidental to the main application (the intended s152 application) to be launched by the municipality before 13 October 2023, this court has jurisdiction. It was averred as follows:
- “I am advised that the Court having jurisdiction in the section 152 application will also have the competence to determine this incidental application.”
- [24] It was also baldly averred that several of the defendants in the section 152 application are based within the jurisdiction of this court. On this premise, it was submitted that this court has jurisdiction over the subject matter of this *incidental* and main application.
- [25] To establish the jurisdiction of this court, the applicants referred the court to the matter of *Road Accident Fund v Legal Practice Council and others*.⁵ In this matter, the Road Accident Fund applied for a stay of execution in relation to many claims emanating from provinces right across the country. The court considered the jurisdiction of the Gauteng Provincial Division and with reference to section 21(2) of the Superior Courts Act⁶ concluded that it could decide the matters

⁵ 2021 (6) SA 230 (GP) (“*RAF matter*”).

⁶ Section 21(2) provides that: “A division also has jurisdiction over any person residing or being outside its area of jurisdiction which is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.”

relating to judgments and writs emanating from all provinces of this country as the court had jurisdiction in relation to a number of judgment creditors emanating from judgments issued in Gauteng.

[26] The question in this matter would thus be whether this court has jurisdiction over certain of the respondents which would then permit this court to hear the matter, albeit, that many of the respondents might reside or are domiciled outside the area of jurisdiction of this court.

[27] The applicants made bald allegations in the founding papers, as referred to hereinbefore, which were repeated in the replying affidavit that the registered address of Absa is in Johannesburg and the registered addresses of a number of other respondents are also within the jurisdiction of this court. No addresses were provided to substantiate these allegations. The allegations pertaining to this court's jurisdiction made in the founding papers were denied by the respondents.

[28] In my view, this matter is distinguishable from the *RAF* matter where Meyer J (as he then was) found as follows:

"[17] The same holds true in the present matter. It is not necessary for us to consider whether the *causae continentia* rule should or should not be applied in this case since s 21(2) of the Superior Courts Act finds application. This court has jurisdiction to entertain this application in respect of the respondents and thousands of interested parties residing in its area of jurisdiction, which is not at issue, but also in respect of the second, and eighth to twelfth respondents and the thousands of other interested parties residing within the area of jurisdiction of other divisions. Also, regarding the question of convenience, this application avoids a multiplicity of applications, along with the additional costs of the risk of discordant findings."

[29] In the *RAF* matter, it was found that "*thousands of other interested parties*" resided within the area of jurisdiction of the Gauteng Court. In this matter, there is simply no such evidence and section 21(2) does not assist applicants.

[30] There is also no evidence that links Chokmah and Puleletso to the jurisdiction of this court. These are the parties that obtained judgments against the municipality

which were going to be executed by the sheriff through writs for garnishee orders. The applicants did not give any plausible explanation as to why they decided to bring this application in this court and not in the Free State High Court.

[31] The *causae continentia* rule allows a court to assume jurisdiction in respect of a defendant who is otherwise not amenable to that jurisdiction on any of the recognised grounds of jurisdiction and this may be done to avoid inconvenience. In *Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd*,⁷ it was held, applying the common law *causae continentia* rule that, where one court has jurisdiction over a part of a cause, considerations of convenience, justice, and good sense justify its exercising jurisdiction over the whole cause.

[32] In the matter before this court, the writs of execution which the applicants want to stay were issued by the Free State High Court. The monies and bank account to which the application pertains are held by Absa Bank at its Welkom branch. This is the branch where the municipality holds its bank account and the branch which the applicants were in communication with. The sheriff against which relief is sought is the sheriff for Welkom.

[33] The court is fully aware of the fact that the interim relief sought is not to stay the execution in terms of rule 45A of the Rules of this Court. In such a case there would have been no argument that the applicants would have had to approach the court in the Free State which granted the orders. It is, consequently, irrelevant that in some instances staying applications were refused and in others still pending. Section 152 of the MFMA caters for a much wider order which, if granted, would stay all legal proceedings, including the execution of legal process, by persons claiming money from the municipality or a municipal entity under the sole control of the municipality.

[34] In my view, the applicants also failed to establish why it would be convenient for this court to hear this application for interim relief. In my view justice and good sense would rather point to the Free State High Court as the court in which this application should have been brought. The Free State High Court dealt with and is still seized with applications to stay executions.

⁷ *Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd* 1962 (4) SA 326 (A).

[35] The respondents averred that the applicants opted to approach a court in a different jurisdiction which action they state to be “*undoubtedly forum shopping...*”. The applicants, apart from alleging that they were entitled to and lawfully approached this court for relief, failed to provide any explanation whatsoever as to why the Free State High Court was circumvented. I agree with this conclusion and find that the approach adopted by the applicants amounts to an abuse of process. Certainly, section 21(2) would have come to their assistance in relation to the parties residing outside the jurisdiction of that division if this application was launched in that High Court.

[36] Accordingly, the court is of the view that this court does not have the required jurisdiction to deal with this matter. It should be mentioned that at the hearing of the matter on 8 October 2023, the court raised the issue of jurisdiction but was informed by counsel on behalf of the applicants that this court has in fact the requisite jurisdiction.

[37] After reconsidering the matter, the court is of the view that it should not have granted the interim relief and accordingly, the order made by this court should be set aside. This application should have been brought in the Free State High Court and amounted to an abuse of process. I punitive cost order is warranted.

[38] Pertaining to cost there is one issue this court should address. It was raised in the applicant’s replying affidavit that after the court made its interim order and after service of this order, Mr Casper Kruger from Kruger Venter Inc., the attorney acting for the respondents, including acting for his own firm, the third respondent, directed a letter to ABSA Bank Ltd, the Sheriff: Welkom and BMH Attorneys, applicants’ attorneys. In this letter, the following was stated:

“We also note that an urgent application was filed on 8 instant in the Johannesburg High Court, for very obvious reasons this order is absolutely non-existent, has no legal effect and should not be adhered to, our clients are opposing this application and order, we will seek a punitive cost order against the attorneys involved in the matter.

Pertaining to the Bloemfontein matter there is absolutely no order suspending any execution at this stage and as such we insist that any funds held by the Sheriff be paid to our offices immediately.”

[39] The contents of this letter and that it was emailed to the mentioned parties were not disputed during arguments before this court. Mr Kruger treated the court order with disdain which may constitute contempt of court. The court does not intend to make such a finding at this stage but will consider it when the court makes an order as to costs.

[40] An order of this court, in fact any court order, could simply not be ignored. In *Department of Transport v Tasima (Pty) Ltd*⁸ the majority in the Constitutional Court held that under s 165(5) of the Constitution, a court order is binding until set aside, irrespective of whether it was valid; judicial orders wrongly issued were not nullities but existed in fact and might have legal consequences; and whether an order was enforceable dependant on whether the judge had the authority to make the decision at the time the order was made. Consequently, it was held that a party bound by an invalid order must comply with the order until set aside.⁹

[41] Regardless of this court's finding that it lacks jurisdiction to deal with this matter the interim order had a legal effect and remained enforceable until this court sets it aside. The letter written treated the order as if it had no effect whatsoever. For this reason, the court intends not to make any costs in favour of the third respondent.

[42] The following order is made:

Order

- a. The interim order made by this court is reconsidered and set aside;
- b. The interim application is dismissed on the ground that this court has no jurisdiction to deal with this matter;
- c. The applicants are ordered to pay the costs of this reconsideration application, excluding the costs of the third respondent, jointly and severally, the one paying the other to be absolved on an attorney and client scale, including the cost of senior counsel.

⁸ *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

⁹ *Id* at 670 E-F.

R. STRYDOM, J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

For the Applicants:

Mr. S.O. Ogunronbi

with Ms. N.M.A. Ndaba

Instructed by:

Botes Mahlobogoane Van Heerden

Inc Attorneys

For the Respondents:

Mr. S. Grobler SC

Instructed by:

Kruger Venter Attorneys

Date of Hearing:

12 October 2023

Date of Judgment:

23 October 2023