

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 22264/2022

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

Date: 26 April 2022

E van der Schyff
E van der Schyff

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

AND

NTHOSA MADIBA INCORPORATED

FIRST RESPONDENT

MRS. L NEL

SECOND RESPONDENT

(In her capacity as Sheriff Pretoria East)

M E MASOLA

THIRD RESPONDENT

T NKUNA

FOURTH RESPONDENT

M R LELAKA

FIFTH RESPONDENT

S P KGOLE

SIXTH RESPONDENT

M D MAFOLOGELA

SEVENTH RESPONDENT

N T MOITSI

EIGHTH RESPONDENT

JUDGMENT

Van der Schyff J

- [1] The applicant approached the urgent court on the basis of extreme urgency seeking an order interdicting the Sheriff of Pretoria East from removing and/or selling the applicant's movable property as per the arranged sale of execution to be held on 26 April 2022 pertaining to cases 5509/19, 222/21, 6563/19, 5658/19, 795/16 and 5079/19 respectively, pending the finalisation of the application under case number 3525/22 and the applicant's Forensic Investigating Department's (FID) investigation on or before 26 July 2022. The applicant does not seek that the warrant of execution be set aside, but that the removal and sale of the property be stayed pending the occurrence of two future events, namely the finalisation of the application under case number 3525/22 and the applicant's FID investigation.

- [2] The unique context of this application is found therein that the cases in terms of which relief is sought, were dealt with in the Limpopo Division of the High Court, held at Polokwane and the writs of execution pursuant to which the sale in execution was arranged, were issued by the Registrar of the Limpopo Division of the High Court.

- [3] The applicant contends that the court has the necessary jurisdiction to hear this application because section 21(1) of the Superior Courts Act 10 of 2013 empowers this court with jurisdiction over respondents residing or being in and in relation to all causes arising within its area of jurisdiction. The applicant referred the court to *Zokufa v Compuscan Credit Bureau*¹ where Alkema J held:

‘I believe, with respect, that it follows from all of the above that on a proper interpretation of s 19(1) and on general principle a court will have jurisdiction to grant an interdict if the jurisdictional connecting facts supporting the requirements for the interdict are present within its area of jurisdiction’.

¹ 2011 (1) SA 272 (CMA paras [30] and [61-62].

- [4] The applicant also referred the court to *Mtshali v Mtambo and Another*² where the court held:

‘There is obvious ample justification for the rule that an interdict founds jurisdiction and that no exception to the Court’s jurisdiction can be taken in such proceedings. The interdict procedure is an extraordinary remedy devised for matters which do not admit of delay – *periculum in mora* – and in which the power of the Court should be summarily interposed to prevent and, if necessary, to discontinue, the perpetration of unlawful acts forthwith and for good or pending action. The administration of justice would be seriously hampered, if not frustrated, if a Court does [not] have such power within its own area of jurisdiction.

... therefore, ... lack of jurisdiction cannot be interposed as an objection in proceedings for an interdict in which the recognised requirements for an interdict are satisfied by the facts within the territorial jurisdiction of the Court.’

- [5] In the present matter, the writs of execution are sought to be enforced in this court’s area of jurisdiction. The Sheriff who holds instruction is the Sheriff of Pretoria East. The assets of the applicant are those in the Menlyn Office, which is in the jurisdiction of this court. The first respondent’s offices are within this court’s area of jurisdiction. This court can competently exercise jurisdiction in relation to the first and second respondents in this matter, and no relief is sought against the third to eighth respondents. The conduct sought to be interdicted is arranged to take place within this court’s area of jurisdiction.

- [6] The first, and third to eighth respondents (the respondents) submit that this court does not have the necessary jurisdiction to hear this application. Counsel correctly pointed out that the applicant failed to plead in the founding affidavit that this court has jurisdiction to hear the matter. Counsel for the applicant submitted that the court is entitled to consider the whole of the founding affidavit to determine whether a case

² [1962] 2 All SA 457 (GW).

is made out that the court has jurisdiction and the failure to specifically claim that a court has jurisdiction to hear a matter is not the end of the issue.

- [7] The respondents' counsel submit that it is trite that a court that was seized with a matter when it was first instituted retains jurisdiction throughout the entire 'life of the matter'. In *casu*, where the actions for damages were instituted in the Limpopo High Court, the orders granted in the Limpopo High Court and the warrants sought to be stayed issued out of the Limpopo High Court, the Limpopo High Court retained jurisdiction over the execution of its orders.

Discussion

- [8] Rule 45A of the Uniform Rules of Court provides that the court may suspend the execution of any order for such period as it may deem fit. The question arises, however, whether this court has the necessary jurisdiction to stay or suspend the execution of an order granted by another court. Binns-Ward J recently confirmed the trite principle that the jurisdiction of one court to set aside or vary an order competently made by another court is not lightly to be presumed.³ In my view, the same applies to the question as to the court's jurisdiction to suspend the execution of an order granted by another court.
- [9] The Supreme Court of Appeal in *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others*,⁴ was called upon to deal with the question regarding the power of a high court, not sitting as a court of appeal, to suspend or nullify a final order granted in the same division. In dealing with this issue, the Supreme Court of Appeal stated the law in respect of the staying of execution of judgments as follows⁵

'[51] Apart from the provisions of Uniform Rule 45A, a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution

³ *F[...] v V[...] and Another* (10533/2014) [2021] ZAWCHC 90 (28 April 2021) para [2].

⁴ 2011 (4) SA 149 (SCA) at para [51] and [52].

⁵ Para [17]

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.'

[10] In *Stoffberg NO v Capital Harvest (Pty) Ltd*⁶ Binns-Ward J explained:

'The broad and unrestricting wording of rule 45A suggests that it was intended to be a restatement of the courts' common law discretionary power. The particular power is an instance of the courts' authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that execution will be suspended where real and substantial justice requires that. 'Real and substantial justice' is a concept that defies precise definition, rather like 'good cause' or 'substantial reason'. It is for the court to decide on the facts of each given case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment; and, if they are, on what terms any suspension it might be persuaded to allow should be granted.'

[11] Based on the parties' submissions I am of the view that a case is to be made out that this court has concurrent jurisdiction with the Limpopo Division to deal with this application. Van Loggerenberg in *Pollak The South African Law of Jurisdiction*,⁷

⁶ (2130/2021) [2021] ZAWCHC 37 (2 March 2021) para [26].

⁷ 3rd ed service 2, 2000, 44.

states that a division of the High Court having jurisdiction in respect of a cause, may, in certain circumstances, decline to exercise that jurisdiction in favour of some other court which also has jurisdiction to deal with it. I remain conscious of the fact that I am essentially required to intervene and suspend the execution of an order competently granted by a court from another division. The enforcement stage is the last stage of the judicial process after the claim has been determined on the merits in a judgment or order by the court which now remains to be enforced, and a court retains jurisdiction to ensure compliance with its order and to vindicate its authority.

- [12] The applicant proffered an explanation that the respondents chose the jurisdiction of this court when they launched the application under case number 3525/22 from this court. In the application under case number 3525/22 the applicants sought to obtain a contempt of court order based on a judgment handed down in this court on 9 April 2022. This application was however, struck from the roll for lack of urgency. I am not of the view that the respondents are bound to proceed with the application after it was struck and they are entitled to seek the enforcement of the judgments obtained in their favour in the Limpopo High Court by other means, as they are now doing.
- [13] Despite being of the view that this court has concurrent jurisdiction to deal with the application, I am of the view that a court must be very careful to suspend the execution of an order granted by another court, and that it should only be done in exceptional circumstances. The question is how to proceed from here. I am bound to consider that the applicant stated in its founding affidavit that it seeks a stay of execution pending the finalisation of an investigation by its FID in an effort to safeguard public funds. The respondents' counsel, with reference to the judgment of the Constitutional Court in *South African Association of Personal Injury Lawyers v Heath and Others*⁸ submitted that this court should not take cognisance of the applicant's submission that it is bound to safeguard public funds. As I read the Constitutional Court's judgment in *Heath*, however, the court opined that an investigation of any fraud on the RAF would fall within the scope of the Special

⁸ 2001 (1) SA 883 (CC).

Investigating Units and Special Tribunals Act 74 of 1996, but that the allegations in question in that case, did not relate to the Road Accident Fund but to dealings between particular attorneys and their clients.⁹ In *Heath*, there is no suggestion that payments made by the Road Accident Fund to attorneys, on behalf of their clients, were in any way unlawful or improper. The same cannot be said in relation to the applicant's request to stay the execution of the orders granted in relation to the third, and fifth to eighth respondents' cases. The applicant contends that the FID has *prima facie* grounds to suspect that the first respondent is guilty of serious misconduct that underpins and preceded the granting of the orders, and as a result, public funds cannot be paid into its trust account. Basson J held in *Road Accident Fund v All Firms of Attorneys Listed in Annexure "A1" and Others*¹⁰ that one cannot lose sight of the fact that the Road Accident Fund has a constitutional obligation to safeguard the Road Accident Fund Fuel Levy. I am of the view that in these circumstances the court that granted the orders pursuant to which the writs of execution under discussion was issued, should decide an application for stay of execution of its orders in this context.

- [14] The question as to whether this court should come to the aid of the applicant and dispense with the time periods prescribed in the Uniform Rules of Court by hearing this application as one of urgency in terms of Rule 6(12) of The Uniform Rules of Court, remains to be answered.
- [15] I engaged applicant's counsel on the question of urgency. The writs of execution were served on the applicant between 11 and 15 March 2022. The applicant however, without explaining as to how it occurred, aver that it only became aware that the Sheriff has been instructed to execute the writs by selling the applicant's assets, on 19 April 2022. The applicant's lackadaisical approach renders the urgency to a great extent self-created. However, as in condonation applications, an applicant's tardiness to approach a court is but one of the aspects considered when a court exercises its discretion to condone non-compliance with prescribed time periods or come to the assistance of an applicant even where urgency is self-

⁹ *Heath*, supra, para [55].

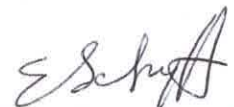
¹⁰ (21560)2021) [2021] ZAGPPHC 416 (9 June 2021) para [39]

created. I have to consider the public interest in the proper and orderly functioning of the Road Accident Fund, and the need to allow proper investigate allegations of fraud and improper conduct. The public interest in ensuring that judgments in favour of the third, and fifth to eighth respondents were not obtained in an irregular manner justifies dealing with this application, despite it being issued at a very late stage. I am of the view that an appropriate costs order is sufficient as a mark of this court's disapproval with the applicant's tardiness in approaching the court at the last minute.

ORDER

In the result the following order is granted:

1. The application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court any non-compliance with form, service and time periods in terms of the Uniform Rules of Court is condoned;
2. The sale of execution to be held on 26 April 2022 is suspended and the second respondent is interdicted from removing and or selling the applicant's movable property as per the arranged sale in execution pertaining to case numbers 5509/19, 222/21, 6563/19, 5658/19, 795/16 and 5079/19 respectively, subject the following condition:
 - 2.1. The applicant is to issue an application for the stay of execution of warrants of execution issued in case numbers 5509/19, 222/21, 6563/19, 5658/19, 795/16 and 5079/19 respectively, in the High Court of South Africa, Limpopo Division, within 15 days of the date of this order.
3. The applicant is to pay the costs of this application, inclusive of the costs of two counsel and the costs associated with the arrangement of the sale in execution on an attorney and client scale.



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Adv. R T Tshetlo
Instructed by:	Malatji & Co Attorneys
For the second respondent:	Adv. M E Manala
With	Adv. L J S Madiba
Instructed by:	Ntshosa Madiba Incorporated
Date of the hearing:	25 Aril 2022
Date of judgment:	26 April 2022