



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

REPORTABLE

Case no: 235/2021

In the matter between:

**MEC FOR THE DEPARTMENT OF PUBLIC
WORKS**

First Applicant

**MEC FOR THE DEPARTMENT OF HEALTH
MEC FOR FINANCE, EASTERN CAPE**

Second Applicant

Third Applicant

AND

IKAMVA ARCHITECTS

First Respondent

**THE SHERIFF OF THE HIGH COURT
KING WILLIAMS TOWN**

Second Respondent

**THE SHERIFF OF THE HIGH COURT
DISTRICT OF ZWELITSHA, MDANTSANE AND
STUTTERHEIM**

Third Respondent

JUDGMENT

VAN ZYL DJP, TOKOTA AND GOVINDJEE JJ

Background

[1] The first and second applicants ('the Departments') launched an application seeking urgent relief to set aside:

- (a) two notices of attachment dated 11 March 2016;
- (b) a writ of attachment dated 10 March 2021;
- (c) the attachment of the Department of Health's Standard Bank account number 273021567 (the bank account attachment) on 11 March 2021.

[2] In the alternative, the Departments sought to stay the further execution of the writs and uplift the attachment of the bank account pending the final determination of an application for leave to appeal in case number 2610/2019 ('the Beshe J application'), including any consequent appeals.

[3] The first respondent's attempted execution stems from a default judgment granted by Malusi AJ on 1 December 2015 in the sum of R41 031 279,58 ('the Malusi AJ judgment'). Acting on the basis of a writ of attachment for movable property issued on 11 March 2016 ('the first writ'), the third respondent attached 'all office furniture and related office equipment and vehicles' of the Departments on that date. Shortly after this, the Departments brought an urgent application to set aside the first writ. That application was postponed sine die, by agreement between the parties and by order of court, for the Departments to take steps to finalise an application for leave to appeal and / or an application for rescission.¹

¹ The order by agreement reads as follows:

'1. The present application be and is hereby postponed sine die in order to enable the applicants to take whatever steps they deem meet to finalise the application for leave to appeal and / or an application for rescission, and the status quo in respect of the issue of execution on the judgment of Malusi AJ shall remain in place.'

[4] When the Constitutional Court, on 29 July 2019, refused the Departments' application for leave to appeal the dismissal of an application to rescind the Malusi AJ judgment, the first respondent ('Ikamva') proceeded with steps in execution, resulting in an urgent self-review application by the Departments during September 2019. This culminated in an order by agreement before Rugunanan AJ on 17 September 2019, staying the execution of the writ pending the determination of the self-review application.²

[5] That application was dismissed by Beshe J on 16 February 2021. An application for leave to appeal was dismissed on 30 April 2021 and a petition for special leave has followed. When Ikamva again took steps to execute the writ, the Departments brought an urgent application to stay the execution on 5 March 2021. That application was struck from the roll by Lowe J for lack of urgency on 10 March 2021. Ikamva issued a further writ of attachment for the sum of the default judgment on the same date, this time specifically in respect of the second applicant's bank account ('the second writ'), prompting this urgent application.

[6] The first and second applicants filed a Rule 16A Notice on 9 June 2021, raising various matters in relation to the relief sought in the application. This followed the issue of directives by this court. The third applicant subsequently applied for leave to intervene and claimed that any writ of execution or attachment pursuant to the Malusi

2. In the event of the Respondent being successful in due course the applicants agree and undertake to pay interest on the sum owing to the Respondent in terms of the Order of Malusi AJ as from 19 May 2016 until date of payment, at the legal rate applicable to the judgment of Malusi AJ.

3. It is recorded that the foregoing is without prejudice to the entitlement of the respondent to argue any defence otherwise applicable to it, and without any concession of the entitlement of the applicants to take any steps to challenge, delay or avoid, the judgment debt reflected in the order of Malusi AJ.

4. The agreement is also entered into without prejudice to the rights of the applicants, who do not concede that they are entitled to the relief as requested in this interim application (sic).

5. Applicants are to pay the wasted costs consequent upon today's postponement and including the costs of two counsel and including their preparation, and all remaining costs are reserved for determination at a later stage.'

² The pertinent portion of the Order reads as follows: 'That pending the determination of the relief sought in Part B, no further execution will take place under the writ of execution dated 11th March 2016.' Reference to the 'Part B' relief relates to the self-review application. The Departments submit that the intention of the agreement was that execution should be suspended until the final determination of the self-review application, which must include all possible appeals.

AJ judgment should be declared invalid, unlawful and unconstitutional.³ It also filed a Rule 16A Notice to that effect. This intervention was opposed by Ikamva, who additionally filed applications in terms of Uniform Rule 30 to set aside the Departments' Rule 16A notice (dated 9 June 2021) and the application for intervention as irregular proceedings.

[7] There is no merit in this opposition and the third applicant must be permitted to intervene for the following reasons. The third applicant has a direct and substantial interest in the outcome of the litigation, namely a possible legal interest that may be prejudicially affected by the judgment of the court.⁴ Ikamva sought the enforcement of an order sounding in money. Section 3 of the State Liability Act, 1957 ('the Act')⁵ provides for service of an unsatisfied order for payment on the relevant treasury, which must ensure satisfaction within 14 days of service, or make satisfactory arrangements with the judgment creditor. Section 3(11) of the Act provides for a range of possible options to be pursued by the relevant treasury to comply with its obligations. The relevant treasury is therefore a necessary party to the process of enforcement of an order of court against the State sounding in money. The third applicant has a direct and substantial interest in whether or not the writs are to be executed, set aside or stayed, and must be permitted to participate in the proceedings. As will become evident, various issues raised, including whether the attachment of a state bank account is consistent with s 226 of the Constitution, have constitutional implications.

Issues for determination

[8] The following issues require determination:

- (a) The validity of the Malusi AJ judgment.
- (b) Whether the two notices of attachment dated 11 March 2016, the second writ and / or the bank account attachment on 11 March 2021 should be set aside.

³ In the alternative, the third applicant also claimed suspension of any writ of execution or attachment pending finalisation of the appeal in the Beshe J application.

⁴ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) para 9. Also see *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) para 9.

⁵ Act 20 of 1957.

- (c) If not, whether further execution should be stayed or otherwise suspended and the bank account attachment uplifted pending the finalisation of the application for leave to appeal in the Beshe J application, including any consequent appeals.
- (d) Whether any writ of execution or attachment pursuant to the Malusi AJ judgment should be declared invalid, unlawful and unconstitutional.
- (e) Whether the application was sufficiently urgent to warrant the way it was launched.

[9] Given the issues raised, it is convenient to first focus on the issue of nullity, before addressing satisfaction of final court orders in the context of the Act and whether incorporeal movable state assets may be attached. This includes consideration of whether the attachment of a state bank account is contrary to s 226 of the Constitution. The 2016 notices of attachment and the second writ will then be considered.

Was the default judgment a nullity?

[10] The court issued a directive on 18 May 2021 requiring supplementary written submissions on various issues pertaining to Majiki J's jurisdiction to strike out the Departments' defence, whether the framing of that order invalidated the subsequent judgment of Malusi AJ and whether the Act permits the attachment of state monies in the execution of a money judgment.⁶

[11] The root of this line of enquiry flows from the order of Majiki J, granted on 10 November 2011:

⁶ The Directive was framed as follows: '2.1 Did Majiki J have jurisdiction in terms of Rule 35(7) to make the order of 11 November 2011 striking out the defendant's defence, and if not, is the order not a nullity as envisaged in *Master of the High Court Northern Gauteng High Court, Pretoria v Motala* 2012 (3) SA 325 (SCA) ('*Motala*')?

2.2 To what extent, if at all, would the invalidity of the order of Majiki J (if found to be invalid), affect the validity of the order of Malusi J dated 1 December 2015?

2.3 Should it be found that the order of Malusi J is also invalid, must it be given effect to by execution against the property of the judgment debtor?

2.4 With reference to foreign jurisdictions, the Constitution, the Public Finance Management Act No. 1 of 1999 and the Regulations published in terms thereof, does the scheme of the State Liability Act at all permit the attachment of State monies in the execution of a money judgment?'

'The Defendants be granted a period of ten (10) days from date of service hereof to reply to the Plaintiff's Notice in terms of Rule 35(3) dated 22 July 2011, failing which the Defendant's defence will be struck out and the Plaintiff will apply for judgment against the Defendants based on the same papers, amplified if necessary.'

[12] Dukada J was subsequently required to consider whether the Majiki J order meant that the Departments' defence had automatically been struck out as soon as they had failed to comply within the period provided for, or whether Ikamva was still required to apply to strike out the defence. Dukada J preferred the latter interpretation and dismissed an application for default judgment.

[13] Plasket J, on behalf of a full bench, held that, on an interpretation thereof, the Majiki J order was clear, even though it had been crafted unusually.⁷ The full bench considered this to be a strong indicator that Majiki J had intended the order to have a different effect to the usual order, as follows:⁸

'Paragraph 1 of the order was, in my view, unambiguously intended to provide for the striking out of the defendants' defences automatically in the event of non-compliance after ten days of service of the order on them. It follows that Dukada J erred when he interpreted the order to mean that an application for the striking out of the defence was required before an application for default judgment could be considered. In other words, he ought to have heard the application for default judgment. That means that the appeal must succeed.'

[14] Ikamva was consequently required to set down the application for default judgment again, also so that evidence could be led on the quantification of damages.⁹ The learned judge concluded by suggesting a way forward for the Departments based on Uniform Rule 27: comply with the order, give a full explanation for the default and apply for the defence to be re-instated.¹⁰

⁷ Reported as *Ikamva Architects CC v MEC for the Department of Public Works and Another* [2014] ZAECHGHC 70 ('the Plasket judgment'). The typical order provides that in the event of non-compliance by the defendants the plaintiff may apply for their defence to be struck out on the same papers, amplified if necessary. An application for leave to appeal this judgment to the Supreme Court of Appeal failed for want of prospects of success.

⁸ Paras 24, 26 of the Plasket J judgment. The court went on to provide guidance for courts of first instance about the consequences of defences being struck automatically, in the form of an obiter dicta: paras 27 et seq. As part of this obiter dicta, Plasket J expressed his doubts that an order striking out a defence automatically was competent, deliberately refraining from expressing a firm view on the point.

⁹ Para 32.

¹⁰ Para 31.

[15] The Departments appear to have initially attempted to follow that route. On 30 January 2015 they applied for condonation, extension of time and reinstatement of their defences, but then withdrew this application before Lowe J. Ikamva proceeded to apply for default judgment. Malusi AJ ruled that the Departments should not be heard given that their defence had been struck out. Having heard Ikamva's evidence, he awarded default judgment in its favour. The Departments failed in their attempt to rescind that judgment. Hartle J held that the remedy of rescission was ill-conceived in the circumstances and the application for rescission was dismissed with costs. An application for leave to appeal that order was dismissed and subsequent petitions to the full bench, Supreme Court of Appeal and Constitutional Court failed.

[16] The Departments argued that the Majiki J and Malusi AJ orders ought to be treated as nullities. A judgment may not be capable of execution where the judgement falls within a narrow band of orders considered invalid by reason of having been made without jurisdiction. A court may, even without an order having been challenged and set aside, refuse to enforce and give effect to an order that was beyond the powers of the court which granted it.¹¹ It is recognised as an exception to the general rule that a court order remains binding and must be complied with until it is set aside.¹²

[17] Plasket J did not determine the validity and/or the correctness of the Majiki J order as it stood. He left that question open, raising concern about the competency of the order itself. That order provided the legal basis for Malusi AJ to subsequently grant default judgment. Put differently, default judgment arose directly from the striking out order and could not have been granted but for that order, which was the

¹¹ *Motala* op cit fn 6 paras 11-13; *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others* 2012 (6) SA 294 (SCA); *Moriatis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* 2017 (5) SA 508 (SCA) at fn 4; *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others, Mathibane and Others v Normandien Farms (Pty) Ltd and Others* 2019 (1) SA 154 (SCA) at para 53; and *Travelex Limiter v Maloney* [2015] ZASCA 128.

¹² An insightful discussion of the topic can be found in MN de Beer 'Invalid Court Orders' *Constitutional Court Review* (2019) vol 9 283-315.

foundation for everything that followed.¹³ Despite this, the parties did not address the validity of the Majiki J order in any of the subsequent proceedings until now.

[18] It must be accepted that the Majiki J order was erroneous on the basis that it followed a one- as opposed to two-stage procedure. Uniform Rule 35(7) does not contemplate the striking out of a defence automatically but rather on application on the same papers, amplified if necessary. As noted by Plasket J, it is only when a court has had the opportunity to decide that grounds exist for the striking out of a defence that an application for default judgment may be made.¹⁴ The dismissal of a claim or the striking of a defence is a drastic remedy, and the power to grant such a remedy is discretionary, a discretion that must be exercised judicially.¹⁵ The power to strike out a defence is derived from the Uniform Rules. The interpretation and application of a court rule often requires a consideration of the provisions of the Constitution.¹⁶ Section 34 is relevant in this respect, providing that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. The striking out of a plaintiff's claim or a defendant's defence has a far-reaching impact on this right. It has the potential to deprive a litigant of a fair trial, bringing an end to a claim or defence. In the case of a defendant, the usual effect of a striking out is to prevent the presentation of a defence so that judgment will be entered for the plaintiff, subject to any further order of court.

[19] By following a one-step process, the court did not have the opportunity to consider whether it had been proved that the party concerned had failed to comply with the rule in question. There was then no option to remedy the breach by giving the party the opportunity to comply. The consequence was that the court did not have the opportunity to exercise its discretion in determining what, if any, procedural consequence should follow because the party had failed to remedy the breach. This was a discretion to be exercised judicially on the facts before court and bearing in

¹³ See *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) para 18, holding that a second order arising in consequence of a first order would be legally untenable if the first order was wrong in law.

¹⁴ *Ikamva Architects v MEC for the Department of Public Works and Another* op cit fn 7 para 29.

¹⁵ *Leask v East Cape Forest Products CC t/a Highburg Treated Timbers* [2008] ZAECHC 171. See also the unreported judgment of Revelas J in *Sebata Municipal Solutions (Pty) Ltd v Nelson Mandela Bay Municipality* (566/2020) (delivered on 23 March 2021).

¹⁶ O' Regan J in *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 16.

mind that striking out should normally be a last resort, considering that it has the potential to deprive a litigant of an entrenched right to a fair trial.¹⁷ A virtue of the Uniform Rules is that it provides for flexible remedies for breaches of the Rules, giving the court the opportunity to make the sanction fit the breach.¹⁸ Importantly, the discretion should only be exercised after the defendant has been given an opportunity to be heard in compliance with the *audi alteram partem* rule.

[20] This did not happen in the present matter. The defence was struck out in the absence of the Departments and without:

- (a) The applicant requesting the striking out having placed any facts before the court justifying the granting of such a far-reaching order;
- (b) The Departments having first been placed in a position to either seek condonation for their failure to comply with the order to compel, or to convince the court not to strike out their defence and to make an alternative order that would ensure compliance with the order to compel discovery without the drastic step of striking out their defence.¹⁹
- (c) The court having been placed in a position to exercise its discretion judicially, as envisaged by Uniform Rule 35(7), and to make an informed decision.

[21] The order striking out the Departments' defence was therefore granted erroneously as envisaged in Uniform Rule 42(1)(a). Uniform Rule 42 provides for the rescission and variation of an order or judgment. In terms of this rule, the High Court has a discretion, in addition to any other powers it may have, to *mero motu* or upon application of any party affected, rescind or vary an order or judgment 'erroneously sought or erroneously granted in the absence of any party affected thereby'.

¹⁷ In the context of discovery, it will serve very little purpose to strike out a defence if the documents the plaintiff requires have no relevance to the issues raised, and if there is no real likelihood of trial prejudice to the plaintiff. To make such a determination, the court will require facts to be placed before it to justify such an order, with the other party given the opportunity to respond. Failing that process, it can hardly be said that the court had judicially exercised its discretion as mandated by the Rule.

¹⁸ Uniform Rule 27(3).

¹⁹ This opportunity would have been afforded if Ikamva had followed a two-stage process as envisaged by Uniform Rule 35(7).

[22] In *Promedia Drukkers & Uitgawers (Edms) Bpk v Kaimowitz and Others*,²⁰ Van Reenen J held that:

‘Relief will be granted under this rule if there was an irregularity in the proceedings, if the court lacked legal competence to have made the order, and if the court, at the time the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order. It is not necessary for an applicant to show “good cause” for the Rule to apply.’

[23] None of the parties requested any of the courts that subsequently presided over the matter to act in terms of Uniform Rule 42(1)(a), nor did any of the said courts *mero motu* consider setting aside the order of Majiki J and the consequential judgement of Malusi AJ as envisaged in the rule. The courts were asked to determine whether the Departments had satisfied the requirements for rescission of the judgement of Malusi AJ in terms of Uniform Rule 31(2)(b) or the common law. The courts were not called upon to consider the matter on the basis that the order of a Majiki J was an incompetent order and, as such, erroneously granted, nor did they do so.

[24] The question raised by this Court with the parties at the hearing of the matter was whether the order of Malusi AJ, which was granted in consequence of the wrongly granted striking out order, was a valid order capable of enforcement by way of execution. The answer to this question depends on whether the striking out order, and the order of Malusi AJ that followed thereon, are nullities that both fall within the narrow band of orders which this court may refuse to give effect to by way of execution, without first setting it aside.²¹ The Majiki J order is the foundation of the default judgment granted by Malusi AJ. From this it follows that had the Majiki J order amounted to a nullity, this would impact upon the executability of the Malusi AJ judgment.²²

²⁰ *Promedia Drukkers & Uitgawers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 417G-I (references omitted).

²¹ *Motala* op cit fn 6. Also see *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) fn 78.

²² See *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) para 18 and *Multichoice Support Services (Pty) Ltd v Calvin Electronics t/a/ Botaria Trading and Another* [2020] ZASCA 143 para 12.

[25] In our view, however, the order of Majiki J does not fall within the category of orders that may, on the face of it, be regarded as being invalid. An order is not invalid simply because it is erroneous as contemplated in Uniform Rule 42(1)(a). It remains binding until set aside. Majiki J cannot be said to have lacked jurisdiction to grant the order striking out the Departments' defence.²³ Uniform Rule 35(7) gives the court the authority or power to strike out a defendant's defence. Majiki J accordingly had that power. That it was incorrectly exercised does not, *per se*, render the order invalid. The order exists in fact and continues to have legal effect until it is set aside.

[26] Similarly, the question whether the default judgment can be disregarded as a nullity at this stage, on the strength of *Motala*, must be answered in the negative.²⁴ Unlike *Motala*, it cannot be said that Malusi AJ was not empowered to grant default judgment. It cannot be found that Malusi AJ acted outside of his powers in granting the application for default judgment. There can be no suggestion, as in *Motala*, that the learned judge was acting contrary to the law in proceeding as he did. At that moment, Malusi AJ had the authority to make the decision he made. On its face, that order is valid and competent and nullity '... does not – so to speak – jump out of the page ...', as was the case with the nullity of the orders in *Changing Tides* and *Motala*.²⁵

[27] In any event, the Constitutional Court has supported the following view it expressed in *Tsoga*:

'... *Motala* is only authority for the proposition that if a court "is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded". This is a far cry from the inference that any court order that is subsequently found to be based on an invalid exercise of public power can be ignored.'²⁶

²³ Jurisdiction in this context means the power, competence or authority vested in a court by law to take cognisance, adjudicate upon, determine and dispose of the issues raised before it, and to give effect to its judgment: *Steytler NO v Fitzgerald* 1911 AD 295 at 346-347 and *Yeneta Mineraria Spa v Carolina Colliers (Pty) Ltd* 1987 (4) SA 883 (A) at 893F.

²⁴ For criticism of the decision in *Motala* op cit fn 6, see the majority judgment in *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) ('*Tasima*').

²⁵ *Provincial Government: North West Province v Tsoga Developers* CC 2016 (5) BCLR 687 (CC) ('*Tsoga*').

²⁶ *Tasima* op cit fn 24 para 197.

[28] While it may have been open for Malusi AJ to refuse the application on the basis that the Majiki J order was erroneous,²⁷ the failure to do so does not of itself amount to a further nullity, even if the default judgment was wrongly issued.²⁸ That application was properly before Malusi AJ on the strength of an order striking out the Departments' defence. That order was valid until set aside in appropriate proceedings. Court orders must be appropriately challenged by means of a legally cognisable process, as envisaged in the Uniform Rules, to be set aside.²⁹ In addition, disregarding default judgments by treating them as nullities at the enforcement stage, years after they have been ordered and unsuccessfully challenged in the courts, will create legal uncertainty, with potentially chaotic consequences.³⁰

[29] The question whether the Malusi AJ judgment was a nullity, as raised by the court, focused on a narrow legal issue. In the absence of this court having been placed in a position to make an informed decision as to the exercise of a discretion as envisaged in Uniform Rule 42(1)(a), it would be inappropriate in these proceedings to make an order that would have the effect of setting aside the judgment of Malusi AJ. The present circumstances, where a litigant may have been entitled to assume that the party against whom the order was granted had accepted its finality, is another reason for this. As a result, the issues raised in these proceedings arising from the execution of the default judgment will be addressed on the basis that the judgment is capable of execution.

Satisfaction of final court orders and the State Liability Act

²⁷ See *Tasima* ibid para 190-191.

²⁸ *Tasima* ibid para 182.

²⁹ *Tasima* ibid para 192; *Tsoga* op cit fn 25 para 52.

³⁰ See *Tasima* op cit fn 24 para 183: "So, in the current case, the Mabuse J order...was enforceable immediately after it was issued. This finding vindicates the constitutionally prescribed authority of the courts. The obligation to obey court orders "has at its heart the very effectiveness and legitimacy of the judicial system". Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built." (references omitted). Also see *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 (2) SA 413 (SCA) para 8.

[30] The Act consolidates the law relating to the liability of the State in respect of acts of its employees.³¹ Section 3 is relevant in this matter and requires analysis.³²

[31] Section 3(1) confirms that:

‘Subject to subsections (4) to (8), no execution, attachment or like process for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, but the amount, if any, which may be required to satisfy any final court order given or made against the nominal defendant or respondent in any such action or proceedings must be paid as contemplated in this section.’

[32] As the heading of the section suggests, the purpose appears to be to ensure ‘satisfaction of final court orders sounding in money’, permitting execution, attachment and the like following compliance with a stipulated process and sequence. The reason for this is clear. Final orders of court must, if not successfully appealed or rescinded, be satisfied and stand to be executed. The integrity of the Constitution demands that governmental departments, which are organs of state, have a duty over and above that of the average litigant to comply with court orders.³³ To this end, the State Attorney or attorney appearing on behalf of the department concerned must, within seven days after a court order sounding in money against a department becomes final, inform the executive authority and accounting officer of that department and the relevant treasury of the final court order in writing.³⁴ A final court order against a department for the payment of money must be satisfied within 30 days of the date of the order becoming final, alternatively within a time period agreed upon by the judgment creditor and the accounting officer of the department concerned.³⁵

³¹ The history of this Act has been described in *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and another* [2008] ZACC 8 (‘*Nyathi*’) para 16 *et seq*.

³² The section was substituted, following the decisions of the Constitutional Court in *Nyathi* op cit fn 31 by s 2 of Act No. 14 of 2011.

³³ *Tasima* op cit fn 24 para 188.

³⁴ S 3(2).

³⁵ S 3(3)(a). It is the accounting officer of the department concerned that must make payment in terms of such order within the time period specified: s 3(3)(b)(i). Such payment must be charged against the appropriated budget of the department concerned: s 3(3)(b)(ii). ‘Appropriated budget’ is defined in s 4A of the Act to mean ‘the budget of a department which is appropriated in terms of appropriation legislation in the annual budget or an adjustments budget’.

[33] The Act anticipates that a final order against a department for the payment of money may nevertheless not be satisfied within this (30-day or agreed) time period.³⁶ In that case, ‘...the judgment creditor may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury.’³⁷ Within 14 days of such service, the relevant treasury ‘must’ ensure that either the judgment debt is satisfied, alternatively, and if there are inadequate funds available in the vote³⁸ of the department concerned, the relevant treasury must ensure that acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt.³⁹

[34] It is the failure of the relevant treasury to do so (within 14 days of service of the final court order) that triggers the possibility of the issue of a writ of execution or a warrant of execution.⁴⁰ The Registrar must then, upon the written request of the

³⁶ In terms of the definition of ‘final court order’ in section 4A of the Act, an order is final if given or confirmed by a court of final instance or otherwise becomes final after expiry of the period within which an appeal to a higher court may be lodged.

³⁷ S 3(4).

³⁸ The voted funds of the department consists of the total amount which is appropriated for a specific department in an appropriated act. See s 1 of the Public Finance Management Act, 1999 (Act 1 of 1999) (‘the PFMA’).

³⁹ S 3(5). S 3(11) adds the following:

‘In order to comply with its obligations in terms of subsection (5), and in general to ensure that final court orders are satisfied by departments without any delay, the relevant treasury may –

- (a) make or issue appropriate regulations, instructions, circulars, guidelines and reporting rules;
- (b) issue a direction to a department to make a payment in order to satisfy any outstanding final court order;
- (c) conduct an investigation, inspection or review into any failure by a department to pay any outstanding final court orders;
- (d) issue an instruction to take remedial action or to obtain specified support, where –
 - i. there has been non-compliance by a department with the provisions of this section, or regulations, instructions, circulars, guidelines or directions made or issued by the relevant treasury; or
 - ii. there is a need for intervention in view of the financial, governance or management situation, condition or failure of a department;
- (e) withhold from a department’s voted funds sufficient funds to provide for the satisfaction of any outstanding final court order against a department, which funds may only be released to the department upon the submission of proof acceptable to the relevant treasury that the court order in question has been satisfied;
- (f) satisfy any outstanding final court order on behalf of a department, which satisfaction must be recorded and debited against the appropriated budget of the department concerned; or
- (g) debit the costs associated with the satisfaction of a final court order provided for in paragraph (f), an administration charge and a penalty from the appropriated budget of the department concerned.

⁴⁰ S 3(6).

judgment creditor or his or her legal representative, 'issue a writ of execution or a warrant of execution in terms of the applicable Rules of Court against movable property owned by the State and used by the department concerned'.⁴¹ There is one proviso. Where a judgment by default was granted against a department, the writ or warrant of execution can only be issued by the registrar if he or she is satisfied that there has been compliance with the service requirements stipulated in s 3(4).⁴² Subsection (7)(b) provides that the sheriff and the accounting officer of the department concerned '... may, in writing, agree on the movable property owned by the State and used by the department concerned that may not be attached, removed and sold in execution of the judgment debt because it will severely disrupt service delivery, threaten life or put the security of the public at risk'.

[35] If no agreement is reached as envisaged in s 3(7)(b), the sheriff may attach 'any' movable property owned by the State and used by the department concerned (the proceeds of the sale of which will, in their opinion, be sufficient to satisfy the judgment debt) and remove and sell it after the expiry of 30 days from the date of attachment. The removal of the property is subject to there being no application to court as contemplated by s 3(10). Section 3(10)(a) provides that, 'A party having a direct and substantial interest' may, before the attached property is sold in execution, apply to a court for a stay 'on the grounds that the execution of the attached movable property –

- (i) would severely disrupt service delivery, threaten life or put the security of the public at risk; or
- (ii) it is not in the interests of justice.'

Section 3(10)(b) provides that if the application is brought by the department concerned, it must identify movable property that may instead be attached and sold in execution of the judgment debt, and the location of this property.

[36] To summarise, s 3:

- (a) regulates the manner of the enforcement or giving effect of a final money judgment or order granted by a court of law against the State;

⁴¹ Ibid.

⁴² Ibid.

- (b) serves to identify the functionaries whose duty it is to pay the judgment debt;
- (c) serves to authorise those functionaries to pay the judgment debt, and identifies the source of the monies from which payment must be made;
- (d) provides for specific time periods which are to expire, and the actions or the omission of the relevant functionaries to act as contemplated, before the judgment creditor may request the registrar to issue a writ of execution;
- (e) identifies and pertinently limits the property that may be attached and sold in execution to movable property owned by the State and used by the department concerned;
- (f) importantly, provides for mechanisms and procedures to prevent the attachment of, and the selling in execution of state property that will disrupt service delivery, threaten life, or put the security of the public at risk. This is consistent with, and complementary to, the inherent jurisdiction of the court to generally regulate its own process, and to stay the execution of a judgement on such terms as it may deem fit, if the interests of justice so require.⁴³

[37] By enacting s 3, the legislature aimed at finding a balance between the right of a creditor to get satisfaction of a judgment debt, against the wider public interest in the delivery of services by state departments in compliance with their constitutional mandates. The objective of the prescripts and the mechanisms created by s 3 is clearly to make the attachment of state property a last resort. It obliges the department concerned to pay the judgment debt. When the department fails to do so, it obliges the relevant treasury to pay the debt on behalf of the department, or to make acceptable arrangements for its payment. It is only after there has been a total failure to pay the judgement debt that the judgement creditor may seek to attach the property of the department. The attachment is, however, subject to any written agreement between the sheriff and the departments concerned on the movable property that may not be attached, removed and sold in execution. The purpose of this is to prevent the attachment of assets which may result in a disruption of the department's constitutional mandate to deliver services to the public.

⁴³ Execution is a process of the court and the court has the inherent power to regulate its own process, subject to the Uniform Rules of Court. This includes the discretion, derived from common law, to set aside or stay a writ of execution: *Stime v Stime* 1983 (4) SA 850 (C) at 852A.

[38] The issuing of a writ takes place in terms of the Uniform Rules. The application of these rules is, however, subject to the provisions of the Act.⁴⁴ The Uniform Rules can accordingly only find application to the extent that they are not in conflict with the s 3 prescripts.

Which movable state assets may be executed against?

[39] The Departments argued that attachment of a state organ's bank account was impermissible for various reasons. These arguments are elaborated upon in the submissions of the third applicant. The question raised is whether 'movable property' in s 2 of the Act must be read so as to include both corporeal and incorporeal property.

[40] The Act does not mention the inclusion of incorporeal rights in its treatment of 'movable property' directly. It does refer to the issue of a writ, in terms of the applicable Rules, against movable property owned by the state and used by the department concerned.⁴⁵ Uniform Rule 45, by contrast, clearly contemplates the attachment of incorporeal movable property without the need for a prior application to court.⁴⁶

[41] The interpretation of language, including statutory language, is a unitary endeavour requiring the consideration of text, context and purpose.⁴⁷ Applying this approach to s 3, there is nothing that points to a conclusion that 'movable property'

⁴⁴ S 3(9) provides that 'Subject to this Act, the Rules of Court, where applicable, apply to the issuing of a writ of execution ... and the attachment, removal and sale of movable property in execution of a judgment debt against the State.'

⁴⁵ S 3(6).

⁴⁶ Uniform Rule 45(8)(c) provides that: 'If incorporeal property whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided:...

(c) in the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,
 (i) the attachment shall only be complete when –
 (a) notice of the attachment has been given in writing by the sheriff to all interested parties...and
 (b) the sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document.'

Also see *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D) at 673.

⁴⁷ *National Joint Municipal Pension Fund v Enduweni Municipality* 2012 (4) SA 593 (SCA) para 19.

in the section must be limited to corporeal movables. Such an interpretation would effectively differentiate between judgment creditors executing judgments obtained against private litigants, on the one hand, and against the state, on the other.⁴⁸ Debts owing to a judgment debtor are, like any other incorporeal property, executable and capable of being attached and sold.⁴⁹ The State would be placed in an advantageous position vis-à-vis other judgment debtors if the Act is interpreted to exclude this possibility. This would constitute an unjustifiable differentiation between a judgment creditor who obtains judgment against the state and a judgment creditor who obtains a judgment against a private litigant. In *Nyathi*, the Constitutional Court explained the difficulties with such an approach, bearing in mind the provisions of the Bill of Rights and section 165(5) of the Constitution.⁵⁰

[42] It is also relevant that s 3 of the Act previously prevented execution, attachment or the like against the State for the satisfaction of a final court order sounding in money. The problem with that approach was described in *Mjeni v Minister of Health and Welfare, Eastern Cape* (with reference to the Act prior to its amendment):⁵¹

‘A deliberate non-compliance or disobedience of a court order by the state through its officials amounts to a breach of [a] constitutional duty [imposed by s 165 of the Constitution]. Such conduct impacts negatively upon the dignity and effectiveness of the Courts...The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and the resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order. To a great extent s 3 of Act 20 of 1957 encroaches upon that enforcement of rights against the state by judgment creditors.’

⁴⁸ See *Nyathi* op cit fn 31 para 40.

⁴⁹ *Ex parte Master of the Supreme Court* 1906 T.S. 563 at 566. See *Ormerod* op cit fn 46 at 674C-F.

⁵⁰ *Nyathi* op cit fn 31 para 39 et seq. Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. The right to equality before the law and the right to equal protection and benefit of the law is guaranteed by section 9. Section 34 guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. Section 165(5) provides that ‘an order or decision issued by a court binds all persons to whom and organs of state to which it applies’.

⁵¹ *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 452G-H and 453C-D, quoted with approval in *Nyathi* op cit fn 31 para 43.

[43] Such an approach was held to be unconstitutional in *Nyathi*, resulting in the amendment to the section that followed. The purpose of that amendment was to eradicate the blanket restriction that prevented a judgment creditor being able to execute against the State in the manner provided for in the Uniform Rules. The legislature, in enacting changes to s 3 by reason of the judgment of the Constitutional Court, must be taken to have been aware that the execution of a money judgment takes place in terms of the Uniform Rules, and that those Rules authorise the attachment of both corporeal and incorporeal movables in satisfaction of a money judgment. If the legislature intended to limit the notion of ‘movable property’ in the Act to corporeal movables, one would have expected it to say so expressly. There is nothing in the language used in the section to suggest such a limitation. On the contrary, s 3(7)(c) pertinently refers to the attachment of ‘any movable property owned by the State and used by the department concerned’ (own emphasis).

[44] Legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude an unconstitutional construction.⁵² The core argument advanced in giving a restrictive interpretation to s 3 of the Act to provide only for attachment of corporeal movables is to address the potential disruption of the functioning of state departments through the attachment of bank accounts. Interpreting the Act and its references to ‘movable property’ in a way that permits judgment creditors to execute against state bank accounts will not threaten service delivery any more than the attachment of corporeal movables.⁵³ In any event, the sheriff and a department official may agree in writing on movable property that may not be attached, removed and sold in execution because it will disrupt service delivery, threaten life or put the security of the public at risk. The legislature has specifically enacted safeguards to prevent disruption of service delivery as a result of the attachment of state assets in execution of a judgment. To this extent, the sheriff

⁵² See *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2001] ZACC 8.

⁵³ See the remarks of Madlanga J in *Tsoga* op cit fn 25 para 25: ‘...as section 3(6) of the State Liability Act undoubtedly sanctions the attachment of movables like motor vehicles, machinery, office furniture, computers and other office equipment and fittings, the effect might well be the same if an international creditor owed vast sums of money were to attach virtually all these categories of the State’s movable assets. The question then is: is there much in seeking to draw a distinction between sanctioning the attachment of State monies, on the one hand, and movables other than money, on the other?’

is given the authority to reach an agreement with the department concerned to prevent this outcome.

[45] In addition, a party having a direct and material interest may, before the attached movable property is sold in execution of the judgment debt, apply to the court which granted the order, for a stay. This provides the opportunity for judicial oversight when executing against the property of the state.⁵⁴ This is consistent with the common law power of the court to regulate its own process, also in relation to the execution of its judgments. Grounds for granting a stay include the severe disruption of service delivery, threat to life or the interests of justice.⁵⁵ In other words, while essential corporeal movables (such as ambulances and dialysis machines) and state bank accounts may be attached, a stay may be granted in appropriate circumstances.⁵⁶ There is, in addition, in-built protection in s 3(8) of the Act: in the absence of an application for a stay, the sheriff may only remove and sell the attached movable property after the expiration of 30 days from the date of attachment.

[46] The process of attachment of incorporeal movables is also not inconsistent with the prescripts of, and the framework created by s 3 for execution against the movable property owned by the state. The attachment of a judgement debtor's right to monies in a banking account is authorised by Uniform Rule 45(8). It provides that an attachment of an incorporeal right is only complete when the sheriff has given notice of the attachment to all interested parties, and has taken possession of the writing or document that evidences the judgement debtor's ownership of the right. The requirements for a complete and effective attachment of the right in a banking account are not inconsistent with the process of execution prescribed by section 3 of the Act in that they:

- (a) allow the sheriff not to remove the attached property immediately;
- (b) enable the sheriff and the relevant state or provincial department to instead agree on the property to be attached, removed and sold in execution;

⁵⁴ See *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) para 86.

⁵⁵ S 3(10)(a) of the Act.

⁵⁶ See *Minister of Justice and Constitutional Development v Nyathi* 2010 (4) SA 567 (CC) ('Nyathi 2').

- (c) do not immediately deprive the relevant department of its use of the property, avoiding the potential for the disruption of service delivery obligations; and
- (d) provide for the sale of the right of the judgement debtor at a sale in execution to the highest bidder as envisaged in section 3 of the Act.

Provided that the monies standing to the credit of a state or provincial department are capable of being identified as monies which are being 'used' by the department concerned, in that it had been appropriated to the vote of that department, an attachment as envisaged in Uniform Rule 45(8) accordingly does not appear to conflict with the framework provided by s 3 of the Act.

Is the attachment of a state bank account inconsistent with section 226 of the Constitution?

[47] The Departments also argued that the attachment of state bank accounts is inconsistent with s 226 of the Constitution and unconstitutional. Section 226 establishes Provincial Revenue Funds and provides that money may be withdrawn from these funds only:⁵⁷

- (a) in terms of an appropriation by a provincial Act; or
- (b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

[48] At the outset, it must be noted that the applicants' reliance on *Minister of Finance v Golden Arrow Bus Services (Pty) Ltd*⁵⁸ appears to be misplaced. In that matter, an amount of over R90 million was due to the respondent in terms of an agreement. The respondent instituted motion proceedings seeking, inter alia, the following order:⁵⁹

'That the amount ... be paid to the applicant ... from the National Revenue Fund, in accordance with the provisions of section 3 of the State Liability Act ...'

⁵⁷ S 226(2) of the Constitution.

⁵⁸ *Minister of Finance v Golden Arrow Bus Services (Pty) Ltd* [2010] 2 All SA 237 (SCA).

⁵⁹ Ibid para 4.

[49] It is in that context that the Supreme Court of Appeal remarked that orders or decisions of courts were unlikely to constitute 'direct charges' against the National Revenue Fund or Provincial Revenue Fund.⁶⁰

[50] It may be accepted that the Provincial Revenue Fund is paid its share of the revenue raised nationally,⁶¹ and that these funds are then allocated amongst the various provincial departments by way of an appropriation by a provincial Act.⁶² There is nothing untoward in this. As the Constitutional Court noted in *Tsoga*, an annual Appropriation Act is passed by the relevant legislature at both national and provincial levels, the purpose being to provide for the appropriation of money from the relevant revenue fund for the financial requirements of the State or Province. The typical preamble to an Appropriation Act⁶³ specifically references the provisions of s 226 of the Constitution and s 26 of the PFMA as justification for the appropriation of money for the financial year to satisfy the requirements of the Province. Appropriation Acts further reference budgetary votes and contain schedules detailing estimates of provincial revenue and spending and the amounts allocated to the various provincial departments for the year in question. The provisions of the PFMA are satisfied in that all money received by the provincial government is paid into the Provincial Revenue Fund, and the money which makes its way to departmental sub-accounts follows appropriation by a provincial Act in this manner.⁶⁴

⁶⁰ Ibid para 15.

⁶¹ As the third applicant's founding affidavit in the intervention application ('the Majeke affidavit') clarifies (para 51), this is the 'corporation for public deposits account' referred to in terms of section 4(3) of the 2021 Division of Revenue Act, which accommodates deposits only and permits no withdrawals. The Eastern Cape appropriates their equitable share amongst its ten provincial departments.'

⁶² This is confirmed by paras 61 and 62 of the Majeke affidavit. Contrary to the suggestion that 'the Second Applicant's appropriation situated in this [PMG] account has been attached by the third writ (para 60 of the Majeke affidavit), the correct position appears to be that 'The money attached by the third writ was appropriated to the Second Applicant by the EC Provincial Legislature to enable it to carry out its constitutional mandate': para 62 of the Majeke affidavit.

⁶³ See, for example, Eastern Cape Appropriation Act 3 of 2020.

⁶⁴ S21(3) of the PFMA provides: 'A provincial treasury must establish appropriate and effective cash management and banking arrangements for its Provincial Revenue Fund in accordance with the framework that must be prescribed in terms of section 7.' 'Prescribe' is defined to mean 'prescribe by regulation': s 1 of the PFMA. Regulation 15(2) provides that each Provincial Revenue Fund must have a bank account configuration that consists of at least an Exchequer bank account and a Paymaster-General bank account. If a department requires a separate bank account, the relevant treasury may approve one sub-account within the Paymaster-General account of the relevant revenue fund. The sub-account remains an integral part of the bank account configuration of the relevant revenue fund: see *Tsoga* op cit fn 25 para 17.

[51] The court was informed that the bank account in question had been closed despite the attachment.⁶⁵ Leaving aside that reality, it appears as if Ikamva issued a writ for the attachment of funds already appropriated to a bank account held by the second applicant. Those funds formed part of the voted funds for the department, as defined by the PFMA. Permitting a departmental bank account to be attached in this way is dissimilar to a direct charge or attachment against the Provincial Revenue Fund itself, and is not constitutionally impermissible.

[52] Section 3(11)(f) of the Act supports this interpretation. It confirms that provincial treasury may satisfy any outstanding final order on behalf of a department, record this and debit the amount against the appropriated budget of the department concerned. The third applicant's argument that this was 'practically impossible' cannot be accepted.⁶⁶ In *Tsoga* the lawfulness of a writ of execution flowing from an order granted pursuant to a settlement agreement was in issue. An amount of over R30 million, held in a bank account in the name of the Department of Public Works, was attached in terms of the writ.⁶⁷ That amount was paid to Tsoga Developers CC once an urgent application seeking interim relief to halt the execution process failed. The applicants sought an order for repayment of those funds.

[53] The Constitutional Court left open the question whether the attachment of a government bank account and the resultant transfer of funds from it constitute a withdrawal from the Provincial Revenue Fund, or a direct charge against that Fund, which is proscribed by s 226 of the Constitution.⁶⁸ This despite the attached amount being in an account held by the Department of Public Works. It raised, without deciding, the question whether once monies are placed in an account held by a

⁶⁵ The reason advanced for this is that Provincial Treasury awarded a contract to hold all Provincial bank accounts to ABSA Bank with effect from 1 May 2021: index at p 549.

⁶⁶ Majeke affidavit: para 69.

⁶⁷ *Tsoga* op cit fn 25 para 1.

⁶⁸ Section 226 of the Constitution provides:

- “(1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.
- (2) Money may be withdrawn from a Provincial Revenue Fund only –
 - (a) in terms of an appropriation by a provincial Act; or
 - (b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.”

government department they have not, in fact, already been appropriated to that department as envisaged in s 226(2)(a).

[54] As indicated above, s 3(3)(b)(ii) of the Act provides that payment of a judgment debt by an accounting officer of a department ‘must be charged against the *appropriated budget* of the department concerned’.⁶⁹ It is unclear how funds held in a departmental bank account, which must be accepted to constitute an ‘appropriated budget’, as detailed above, are unavailable for attachment on the basis of the s 226 argument.⁷⁰ This is precisely what prompted Madlanga J in *Tsoga* to remark: ‘If payment is expected to be from an “appropriated” budget, how is it that funds held under the same budget are somehow no longer “appropriated” and thus no longer available for attachment, as the applicants appear to contend?’ In all these circumstances, the s 226 argument is untenable.

The 2016 notices of attachment

[55] Ikamva issued a writ of attachment in respect of movable property on 11 March 2016, directing the Sheriff to ‘attach and take into execution the movable goods of the MEC for Department of Public Works, and the MEC for Department of Health’ to realise the sum of the default judgment. While there is no application to set aside this writ,⁷¹ the sheriff’s notices of attachment in response thereto are challenged.

[56] The Sheriff issued notices of attachment, including inventories, in respect of both departments on 11 March 2016. The inventories list ‘All office furniture and related office equipment and vehicles of (each) Department ...’ linked to specific buildings in Bhisho. The returns of service are couched in identical terms.

⁶⁹ Own emphasis.

⁷⁰ This is precisely the question posed in *Tsoga* op cit fn 25, prior to the Constitutional Court deciding that it was not in the interests of justice to grant leave in respect of the s 226 argument: para 24, fn 22. The Constitutional Court also left open the question whether it serves to draw any distinction between sanctioning the attachment of State monies, on the one hand, and movables other than money, on the other: para 25.

⁷¹ As indicated above, an application to set aside the writ was launched on 17 March 2016. It was subsequently postponed sine die by agreement before Hartle J on 19 May 2016 and has seemingly not been resuscitated.

[57] At first blush, it may appear as if the Sheriff's response to the writ contravenes Uniform Rule 45(3). That rule provides, in part, that property that is pointed out or found during the execution process '... shall be immediately inventoried and, unless the execution creditor shall otherwise have directed ... shall be taken into the custody of the sheriff ...' The inventories in question clearly fail to provide specificity as to the property attached. This is the nub of the Departments' complaint, as formulated in its notice of motion. It is also clear that the property was never taken into the sheriff's custody.

[58] The reason for the sheriff's approach is explained in his affidavit. He explains the existence of an agreement with the departments in Bhisho. A long-standing practice exists that the assets are attached 'in broad terms'. This implies that there is a blanket attachment of all office furniture and related office equipment and vehicles of the department concerned, without the need to identify any specific items or to list each and every item attached. This obviates the need to locate departmental vehicles, which could be anywhere within the province at any given time. Should payment still not be made, a further instruction is required before the attached property will be removed and sold. The department will, in that instance, be contacted so that individual motor vehicles may be identified (by the department) for removal. Those vehicles will then be placed in a large governmental parking lot in Bhisho, to be removed by the sheriff. At that stage, the vehicles will be fully identified and a notice of removal will be prepared and supplied to the department and the plaintiff, recording the identity of each of the removed vehicles. A date for sale, as well as the necessary advertisements, will be arranged thereafter.

[59] The Departments do not seriously contest the existence of this practice, stating only that they have no knowledge as to the practice's origin and with whom agreement was reached, and that insufficient particularity has been provided. It must be accepted that the process described by the sheriff has been in existence for several years and stands as the general practice. The approach is sensible, and apparently designed to lower the costs of execution, provide departments with additional time to make payment and include the departments in the process of determining which movables may be sold.

[60] The Departments seemingly accepted the technical manner of the sheriff's attachments for five years, while proceeding with various attempts to stay further execution. To now raise the issue of non-compliance with the strict formalities of Uniform Rule 45(3), in circumstances where a functional procedural deviation has developed in conjunction with governmental departments, is dilatory and opportunistic. This finding is fortified by those authorities that explain that a long delay in applying to set aside a writ, may be a bar to relief, as is acquiescence.⁷² This effectively also disposes of the Departments' submission that an excessive amount of movable property had been attached by the Sheriff in 2016. It is, furthermore, notable that Uniform Rules 45(3) and 45(6) contemplate an execution creditor permitting inventoried goods to remain where they are and directing the sheriff not to remove the goods.

[61] In any event, if a writ is issued for too large an amount, the whole writ will not be set aside in the absence of substantial prejudice to the debtor.⁷³ The attached movables, including the vehicles, were never removed in terms of the arrangement that had developed. No such instruction was ever received from the judgment creditor until 2021, by which time the amount due, including interest, appears to have been at least double the default judgment amount. No substantial prejudice to the Departments has been demonstrated. The proper course would, in any event, be to amend the writ to the correct amount.⁷⁴

The second writ

[62] At the time the urgent application for the stay of the first writ was argued before Lowe J (on 9 March 2021), the vehicles and movables which had been attached in 2016 had not been removed, a date for the sale had not been arranged and there was no suggestion that the removal of the vehicles was imminent. Ikamva issued the second writ on 10 March 2021, after that application was struck from the roll. The sheriff was directed 'to attach and take into execution sufficient funds in the Department of Health's Standard Bank Account ... to cause to be realised the sum

⁷² D Van Loggerenberg *Erasmus Superior Court Practice* RS 16 (2021) D1-606.

⁷³ *Dunlop Rubber Co v Stander* 1924 CPD 431.

⁷⁴ *Ibid.* Also see *Mbhele NO v Smith* [2009] ZAFSHC 86 para 62.

of R41 031 279,58 ... plus interest thereon at the rate of 15,5% per annum from 18 August 2008, limited in terms of the in duplum rule to a further sum of R41 031 279,58 ... in accordance with the judgment ... plus interest on the sum of R41 031 279,58 ... at the then prevailing legal rate of interest of 15,5% per annum calculated with effect from the 19th May 2016 ...⁷⁵

[63] The next day, five years to the day after the first writ had been issued, matters came to a head. The sheriff / deputy sheriff issued a 'notice of attachment in execution in incorporeal property or incorporeal rights in property (Rule 45(12)(a) read with Rule 45(8)(c))', including an inventory. The inventory portion of this notice provided as follows:

'The amount attached ... is to remain in the account until payment thereof is demanded from you by the Sheriff ... You are under no circumstances allowed to release the said amount interdicted by this attachment or to effect payment thereof to any party without the prior written instructions from this office. The attachment will only be complete as soon as payment of the amounts specified in the Writ of Execution have been demanded from the Defendant or his / her representative and a copy of the Writ of Execution and the Notice of Attachment have been served on the Defendant.'

[64] The Deputy Sheriff also demanded the release of 800 vehicles from the Departments' officials on 11 March 2021. Following correspondence, the sheriff provided the Departments with a copy of the first writ, the corresponding notices of attachment and returns of service. The Departments' legal representative raised section 3(7) of the Act in response and the prospect of service delivery disruption and the like.

[65] Correspondence from the sheriff's office on 12 March 2021 clarifies that Ikamva had demanded removal of ten vehicles of the first applicant on the afternoon of 10 March 2021. In so far as the second writ and corresponding notice of attachment, this had been served on 12 March 2021 and 'the Sheriff's Office will have to wait 30 days before removing'.

⁷⁵ Standard Bank, was served with the second writ and notice of attachment on 11 March 2021. It received correspondence from the sheriff on 15 March 2021 indicating the total due as R123 102 142,57. A recalculation was provided by the sheriff on 17 March 2021, reflecting the amount due as R113 504 195,49.

[66] The Departments initially challenged the second writ on the basis that it amounted to a 'freezing' of the bank account concerned. This submission was jettisoned before argument. The bank account was not frozen but the second writ would not be satisfied until that account was placed in a positive balance.

[67] The Departments also challenged the second writ because of the existence of the first writ. That writ already provided for two attachments for R42 million each. The Departments' argument was that Ikamva had effectively caused the sheriff to attach an excessive amount of movable property (corporeal and incorporeal) by issuing the second writ.

[68] The issue relating to the bank account attachment had morphed by time the matter was argued. An affidavit submitted by Mr Msulwa Daka, the Chief Financial Officer of the Department of Health, Eastern Cape Province, explained that all provincial departments run their bank accounts as subsidiary accounts to the main Provincial Treasury bank account.⁷⁶ An open tender process determines which bank will hold the accounts for a period of five years. When the five-year contract with Standard Bank ended, Provincial Treasury awarded the contract to ABSA Bank, with effect from 1 May 2021. All Provincial departments were forced to take steps to close their respective Standard Bank accounts and move these to ABSA Bank. The Department of Health's Standard Bank account was effectively closed around July 2021. The result of this development is that, for all practical purposes, the writ of execution dated 10 March 2021, and the subsequent attachment of the account, was no longer effective. As Mr Daka noted, 'the anticipated outcome of this, is that all creditors with unsatisfied judgments against the Department of Health, who wish to pursue execution against the Department, will now have to issue writs of attachment against the ABSA bank account'.

[69] These developments suggest that the issue of the attachment made in terms of the second writ has been rendered moot. It would certainly serve no purpose to set aside the writ or to order the release of the bank account attachment when that

⁷⁶ P 547-553 of the index.

account has already been closed and the funds seemingly removed notwithstanding the attachment. In these circumstances, it is unnecessary for us to grant any specific relief in relation to this matter. Given that Ikamva might well proceed to attach the Departments' new bank account in a similar manner, however, the issue of the validity of the writ in the form in which it was issued, and the consequent manner in which the attachment was made, requires comment.

[70] This judgment has found that incorporeal movable assets belonging to the Departments may be executed against, and that the attachment of a state bank account is not inconsistent with s 226 of the Constitution. As indicated above, a judgment debtor is not always entitled to have an issued writ set aside on the basis that it reflects an inflated or excessive amount which is owed. Proof of actual prejudice suffered because of the issue of the exorbitant writ is required.⁷⁷ In *Mbhele NO v Smith*,⁷⁸ the Court found that it was probable that the warrant reflected an amount which was more than that due by the applicant. It found, however, that the applicant had failed to show substantial prejudice on the papers:

'61. An averment in appellant's affidavit to the effect that the furniture attached is her exclusive property and that she needs the same is, in my view, a self-evident prejudice which is not contemplated by the law as constituting substantial prejudice for the purpose of setting aside the warrant. (See *Dunlop Rubber Co v Stander (supra)* where the court found that the fact that the judgment debtor had to pay the full amount of the writ, although he owed less, in order to escape arrest, did not constitute substantial or the element of prejudice required.)

62. In circumstances where the writ includes an amount which is not due and payable, the law is that the proper course of action is to have the warrant amended to the extent of reducing or adjusting the sum reflected to the correct one...

63. In the present matter there was no application for the amendment of the warrant before the magistrate, as the appellant's case was that she was not indebted to the respondent in any amount whatsoever. Had she tendered payment of the amount which was legally owing to the respondent the position could, most probably, have been different.'

[71] As in *Mbhele NO v Smith*, there is no application for amendment and the court does not have sufficient material before it to engage in the mathematical exercise of

⁷⁷ *Dunlop Rubber Co v Stander* op cit fn 73 as cited in *Mbhele NO v Smith* op cit fn 74 para 58.

⁷⁸ *Mbhele v Smith* *ibid*.

identifying the correct amount due.⁷⁹ There is also no actual tender to pay the amount the Departments claim is due to Ikamva. Substantial prejudice has not been demonstrated and the application cannot succeed on this basis.

[72] But there is another more obvious reason why the writ and the attachment made pursuant thereto cannot stand. A writ for the attachment of movable property belonging to the judgement debtor is issued in terms of Uniform Rule 45(1). The rule provides that a party in whose favour any judgement of the court has been pronounced may, at its own risk, sue out of the office of the registrar one or more writs against the movable property of the judgement debtor corresponding substantially with Form 18 of the First Schedule. Form 18 directs the Sheriff to 'attach and take into execution the movable goods of the judgment debtor' to be realised by public auction for the sum of the judgment debt. The second writ was over-specific in terms of the movable property to be attached, directing the sheriff to attach only the department bank account. As such it does not correspond substantially with Form 18 of the First Schedule to the Uniform Rules and contravenes Uniform Rule 45(1).

[73] Put differently, the purpose of Uniform Rule 45(8) is simply to authorise attachment of a particular class of property (incorporeal rights) where the judgment creditor previously first had to obtain the leave of the court to execute against such property,⁸⁰ and to regulate the way incorporeal rights are attached. What it does not do, is to give the judgement creditor the right to choose which of the judgement debtor's movable property must be attached by the sheriff. The rule, in other words, does not serve as authority for the judgement creditor to choose to only attach a particular incorporeal right belonging to the judgement debtor, and to authorise the registrar to issue a writ that limits the authority of the sheriff to the attachment of specific movable incorporeal property. Subrule (8) cannot derogate from the issuing of a writ as envisaged in subrule (1), in substantial compliance with Form 18.

⁷⁹ *Mbhele NO v Smith* ibid paras 64, 67. Also see *H v H and Another* [2014] ZAWCHC 100 para 24.

⁸⁰ *Suliman and Another v Volkskas Bpk* 1956 (2) SA 474 (T) and *Lutuli v Hirsch* 1956 (2) SA 586 (W).

[74] In addition, Uniform Rule 45 requires several consecutive steps for the valid attachment in execution of the movable property of a judgement debtor. The most important being:

- (a) The issue of a valid writ of execution;⁸¹
- (b) A demand that the writ be satisfied;
- (c) If not satisfied, a demand that the judgement debtor point out sufficient movable and disposable property, failing which the sheriff is authorised to search for such property;⁸²
- (d) The making of an inventory⁸³ of the goods;
- (e) Subject to Uniform Rules 45(3) and (5), the sheriff shall take the movables into custody;⁸⁴
- (f) The making of a return of the manner of execution;⁸⁵
- (g) If the judgment debtor does not give an undertaking, and unless the execution creditor directs otherwise, the sheriff shall remove the goods to a convenient place of security or keep possession thereof on the premises where they were seized;
- (h) Notice of sale to be forwarded at least 15 days before the date of sale; and
- (i) The sale of the property attached at a sale in execution.

[75] The writ is the source of the sheriff's authority for all actions taken pursuant to the writ.⁸⁶ The sheriff derives authority to act from the writ itself and enjoys no residual authority. The manner in which the writ was framed in this instance undoubtedly contributed to the sheriff failing to comply with the proper process during execution. As indicated, the sheriff in this case was '*Directed* to attach and take into execution sufficient funds in the Department of Health's Standard Bank account' (own emphasis) and proceeded accordingly. There is no suggestion that the department was afforded the opportunity, in terms of Uniform Rule 45(3), to point out sufficient movable property, other than the bank account, to satisfy the writ. A judgement

⁸¹ *Nedbank Ltd v Norton* 1987 (3) SA 619 (N) at 621G.

⁸² *Nedbank Ltd v Norton* ibid at 621J-622K.

⁸³ Rule 45(3).

⁸⁴ In terms of Uniform Rule 45(8)(c)(i)(b), it is not obligatory for the sheriff to make an inventory of a right attached in terms of the subrule.

⁸⁵ Uniform Rule 45(4).

⁸⁶ *Weeks and Another v Amalgamated Agencies Ltd* 1920 AD 218 at 225.

debtor should not be deprived of this opportunity before the sheriff searches for property and proceeds to attach so much of the judgment debtor's movables as is sufficient to satisfy the writ.

[76] This interpretation is supported by s 3(7)(b) of the Act. The sheriff should operate in a way that is cognisant of the option of agreeing in writing with a department official on movable property owned by the State and used by the department concerned that may not be attached, removed and sold in execution because of the effect this will have on service delivery, public security or life. Couching a writ in an over-specific fashion to refer to particular movable property is likely to contribute to the sheriff ignoring this option in communications with the judgment debtor, in possible contravention of s 3(7)(b) of the Act. As already indicated, the purpose of s 3(7), and s 3(10) of the Act, is to avoid the attachment of property that may inter alia disrupt the statutory and constitutional obligations of the department in question to provide services to the public. Issuing a writ in a prescriptive way has the potential to obstruct that objective.

[77] There is a more technical reason for the invalidity of the actual attachment made by the sheriff on the writ. The return of service indicates that the sheriff executed the writ in terms of 'Rule 45(8)(c) read with Rule 45(12)(a)'. The difficulty with this attachment is that the two subrules are mutually exclusive. The former provides for the attachment of 'other' incorporeal rights, which in the present context would have been the Department of Health's right to the monies standing to its credit in its banking account. Importantly, this subrule does not envisage the attachment of actual monies but rather the right to the money in the bank account. Like any movable property that is attached, the right must be realised by its sale at a sale in execution. This subrule does not place any obligation on the bank in question to pay actual monies to either the sheriff or the judgment creditor. As Caney J explained in *Ormerod v Deputy Sheriff, Durban*:⁸⁷

'The legal relationship between a banking institution and its customer whose account with it is in credit is that of debtor and creditor; although the customer "deposits" money to the credit

⁸⁷ *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D) at 673C-H, quoted with approval in *Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd* 2004 (1) SA 284 (SCA) para 6.

of his account with the bank, the transaction is not one of depositum, but of loan without interest...The customer is a creditor who has a claim against the bank in the sense that he has a right to have it make payments to him, or to his order, on cheques drawn by him up to the amount by which his account is in credit...The question for determination is by what process a judgment creditor may resort to execution upon any such claim or right on the part of his judgment debtor.

It follows that in the present instance there is no question of attaching money; what the applicant wishes is to attach and sell the claims, that is to say the rights of action, which the judgment debtors have against the banks. These are movable incorporeal property.'

[78] Instead, payment of actual monies is exactly what is contemplated by Uniform Rule 45(12). The procedure created by this subrule is not that of an attachment followed by the sale of the attached property at a sale in execution. It creates a garnishee procedure, dealing with execution against debts which are accruing to the judgment debtor.

[79] The legal relationship between a bank and a customer whose account is in credit, is that of a debtor and a creditor.⁸⁸ The credit balance of the customer's account may accordingly be the subject of a garnishee order, and capable of an attachment as contemplated in subrule (12). The subrule obliges the debtor of the judgment debtor, referred to as 'the garnishee' to pay the amount it owes to the judgment debtor directly to the judgment creditor. Payment by the garnishee operates as a discharge *pro tanto* of the garnishee's obligation to the judgment debtor. Should the garnishee refuse or fail to comply with a notice delivered to it by the sheriff requiring payment by the garnishee to the sheriff, the sheriff must notify the judgment creditor, who may then call the garnishee to appear before court to show cause why he should not be ordered to make payment to the sheriff. An attachment in terms of subrule (12) does not envisage the sale of the right that underlies the debt owing or accruing by way of a sale in execution.

⁸⁸ The legal relationship between a banking institution and its customer whose account with it is in credit is that of a debtor and creditor; although the customer 'deposits' money to the credit of its account with the bank, the transaction is not one of *depositum*, but of loan without interest. See *White v Standard Bank* (1983) 4 N.L.R 88 pp 91-92. The customer is a creditor who has a claim against the bank in the sense that she has a right to have it make payments to her, or to her order, on cheques drawn by her up to the amount by which her account is in credit. See *Estate Ismail v Barclays Bank* 1957 (4) SA 17 (T) at 26.

[80] Attachments in terms of subrules (8) and (12) are, therefore, clearly distinct. The sheriff's return and the notice delivered to the bank in this matter indicate execution of the writ in terms of the latter subrule, despite the reference to the former. The sheriff refers to monies held to the credit of the Department of Health by the 'garnishee'. A subsequent letter demanded payment of the amount attached by a specified date into his bank account. This is completely inconsistent with an attachment made under subrule (8) which envisage a sale in execution of the attached right. Such an attachment would only be complete once the sheriff has taken possession of the writing or document that evidences ownership of the property or the right, and requires notice to all interested parties.⁸⁹

Should execution be stayed?

[81] Courts enjoy an inherent discretion to set aside or order a stay of a sale in execution, at least prior to the completion of the execution procedure:⁹⁰

'Execution is a process of the Court, and I think the Court must have an inherent power to control its own process subject to such rules as they are...the discretion must, I think, still be in the Court to stay the use of its process where "real and substantial justice" requires such stay, where injustice would otherwise be caused.'⁹¹

[82] Courts enjoy constitutionally-supported inherent jurisdiction to control their own processes, taking into account the interests of justice.⁹² It appears as if this inherent discretion operates independently of the provisions of Uniform Rule 45A.⁹³ Execution must generally be allowed.⁹⁴ This is so even in cases where a stay is sought pending

⁸⁹ Uniform Rule 45(8)(c)(i).

⁹⁰ *Whitfield v Van Aarde* 1993 (1) SA 332 (E) at 337E-F.

⁹¹ *Graham v Graham* 1950 (1) SA 655 (T) at 658.

⁹² S 173 of the Constitution.

⁹³ *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) para 51-52. It has also been suggested that the wording of Uniform Rule 45A, albeit prior to the 2020 substitution, was intended to be a restatement of the courts' common law discretionary power, which is an instance of the courts' authority to regulate its own process: *Stoffberg NO and Another v Capital Harvest (Pty) Ltd* [2021] ZAWCHC 37 para 26. In *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and another and a similar matter* 2022 (1) SA 162 (GJ), De Villiers AJ noted that an application for a stay in terms of Uniform Rule 45A and a cause of action based on an interim interdict would often overlap, but that the former had wider application to prevent injustices: para 8.

⁹⁴ *Strime v Strime* 1983 (4) SA 850 (C) at 852A-B.

the determination of proceedings still to be instituted.⁹⁵ Courts will generally grant a stay of execution if the applicant demonstrates that real and substantial justice requires this or where an injustice will result if execution proceeds.⁹⁶ The court's discretion must be exercised judicially, but cannot otherwise be limited.⁹⁷

[83] Waglay J considered the requirements for a stay, and the relevant authorities, in some detail in *Gois t/a Shakespeare's Pub v Van Zyl*.⁹⁸ That judgment noted that some cases consider the requirements for an interim interdict as part of the test to determine an application for a stay. Framing the test in that way was not entirely appropriate, especially where an applicant was not asserting a right, but seeking an indulgence on the grounds that execution might result in an injustice.⁹⁹ This view is consistent with the approach in *Road Accident Fund v Strydom*,¹⁰⁰ and supported in *BP Southern Africa (Pty) Ltd*.¹⁰¹

[84] The learned judge proceeded to summarise the general principles for the granting of a stay in execution as follows:

- (a) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice;
- (b) The court must be satisfied that:
 - i. The applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent; and
 - ii. Irreparable harm will result if the execution is not stayed and the applicant ultimately succeeds in establishing a clear right.
- (c) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed because it is the subject-matter of an ongoing dispute between the parties.

⁹⁵ *Tsoga* op cit fn 25 para 54.

⁹⁶ *Strime v Strime* op cit fn 94.

⁹⁷ *Whitfield v Van Aarde* op cit fn 90 at 337F-G.

⁹⁸ *Gois t/a Shakespeare's Pub v Van Zyl* (2011) 1 SA 148 (LC).

⁹⁹ *Gois t/a Shakespeare's Pub v Van Zyl* ibid para 33.

¹⁰⁰ *Road Accident Fund v Strydom* 2001 (1) SA 292 (C).

¹⁰¹ *BP Southern Africa (Pty) Ltd v v Mega Burst Oils and Fuels (Pty) Ltd and another and a similar matter* op cit fn 93 para 21.

- (d) The court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the causa is in dispute.

[85] Hard and fast rules circumscribing a court's discretion to order a stay are to be avoided. There are, nonetheless, lessons to be gleaned from previous cases. The judgment of Nestadt J in *Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd and Another*,¹⁰² for example, has been hailed as 'a classic case of how a judicial discretion is exercised judicially':

'This brings me to the issue of whether I should exercise my discretion in applicant's favour. It is in the interest of justice that applicant retain the opportunity of showing that the judgment appealed against is incorrect. The prejudice to the applicant if the sale proceeds and its right to appeal frustrated, is manifest. The appeal is due to be heard in about three weeks. The first respondent will suffer no substantial prejudice if the sale be stayed, particularly when it is borne in mind that it has done without this particular form of execution for some 16 months.'

[86] In *Whitfield*, Nepgen J placed particular emphasis on the prejudice to the respondent, or lack thereof, if the sale in execution was stayed:¹⁰³

'Further considerations supporting the exercise of my discretion in favour of the applicant are that the matter has now been re-enrolled for hearing on 26 November 1992 and that the respondent will suffer no substantial prejudice if the sale in execution is stayed, bearing in mind particularly the lengthy period that elapsed before the respondent did anything in connection with the costs order granted in his favour, while the prejudice to the applicant would be very substantial indeed if I do not come to his assistance...'

[87] Courts will generally grant a stay of execution where the underlying causa of the judgment debt is being disputed.¹⁰⁴ *Strime* involved a stay of execution of a writ pending an application for a reduction or cancellation of an obligation to pay maintenance. While there was no suggestion that the causa of the respondent's judgment claim was in dispute, and no mention of 'irreparable harm', there was a

¹⁰² *Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd and Another* 1981 (2) SA 407 (W) at 411B as cited in *Whitfield v Van Aarde* op cit fn 90 at 339B.

¹⁰³ *Whitfield v Van Aarde* op cit fn 90 at 340A-B.

¹⁰⁴ *Tyres 2000 (Jetpark) (SA) (Pty) Ltd v Central African Road Services (Pty) Ltd* [2017] ZAGPJHC 325 para 8. Also see *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* op cit fn 93 para 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.'

possibility that the judgment debt might be expunged pursuant to a retrospective cancellation of the maintenance order by the Maintenance Court.¹⁰⁵ The court granted the stay notwithstanding that it was not in a position, and in fact considered it inappropriate, to assess the applicant's prospects of success in the pending maintenance application.¹⁰⁶

[88] This is different to the approach in *Cooper v Feinstein*.¹⁰⁷ In that matter it was considered appropriate to borrow from the factors for the granting of an interim interdict in determining whether to suspend a writ of execution. The court noted that this was not a general rule, and correctly indicated that circumstances would dictate whether a stay was appropriate.¹⁰⁸ The judgment therefore accords with the statement in *Gois* that the factors for an interim interdict would be inapposite where the applicant was not seeking to exercise a right but 'attempting to avert injustice', as in the present application.

[89] In *BP Southern Africa (Pty) Ltd*, an attempt to interdict the execution of a judgment, pending the outcome of a petition for leave to appeal, failed on the basis that no protectable interest had been established. The court nevertheless considered whether execution should be suspended in the interests of justice, either in terms of Uniform Rule 45A or based on the inherent jurisdiction of the court.

[90] The Constitutional Court in *Tsoga* dealt with stay of execution in a single paragraph and expressed support for *Cooper*, framing the need to establish a prima facie right as an absolute requirement:¹⁰⁹

'It goes without saying that the applicant for the stay of execution must demonstrate that the proposed claim has prospects of success. Otherwise, what would the point of the stay be? In *Cooper* the Court held that the applicant must show a prima facie right...'

¹⁰⁵ *Stoffberg NO and another v Capital Harvest (Pty) Ltd* op cit fn 93 para 23. This possibility was considered to be a significant factor in the exercise of a discretion to grant the stay in *Strime v Strime* op cit fn 94: see *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T).

¹⁰⁶ Also see *Erasmus v Sentraalwes Koöperasie Bpk* [1997] 4 All SA 303 (O) at 307-308.

¹⁰⁷ *Cooper v Feinstein* [2005] ZAWCHC 28 para 18.

¹⁰⁸ *Cooper v Feinstein* ibid at paras 18, 19.

¹⁰⁹ *Tsoga* op cit fn 25 para 54 (references omitted).

[91] Does this statement overtake the developments that resulted in a distinction in cases where an applicant seeks to avert injustice? In our view, the present matter is distinguishable, and reliance on the approach in *Gois* remains appropriate. It is significant that the limited remarks regarding a stay of execution in *Tsoga* appear in the context of considering whether leave to appeal should be granted against an interim order of execution. As indicated, that matter considered the setting aside of a settlement agreement in circumstances where an order of court had been granted pursuant to the agreement and remained unchallenged. The issue of a stay arose only tangentially in *Tsoga*: the applicants raised a potential future claim in the sum of R8,8 million as the basis for staying the execution of the order based on the settlement agreement.¹¹⁰ There was a paucity of detail about the possible future claim.¹¹¹ At best for Ikamva, *Tsoga* stands as authority for the following: an applicant who seeks a stay of execution pending finalisation of a future claim, yet to be instituted, must demonstrate that the proposed claim has prospects of success.¹¹² The present matter, in which a stay is sought pending final consideration of a petition for leave to appeal, and any consequent appeals to the self-review proceedings already launched, is very different.

[92] We were informed on 16 February 2022 that the Departments' application for leave to appeal to the SCA against the Beshe J judgment has lapsed. In response to a directive, the Departments' explained that its instructing attorney had regrettably not complied with an order of the SCA by failing to file additional copies of the application for leave to appeal with that court. An application for condonation has since been filed, together with the requisite copies. While the appeal has lapsed, the condonation and re-instatement application form part of the appeal proceedings and are matters to be considered by the SCA and, if further appeal is pursued, the Constitutional Court. As a result, the lapsed appeal does not affect the position regarding the alternative relief sought.

[93] Ultimately, the circumstances favour a stay of execution of the 2016 attachments pending finalisation of the self-review process. The Departments are

¹¹⁰ *Tsoga* op cit fn 25 para 12.

¹¹¹ *Tsoga* op cit fn 25 para 54.

¹¹² *Ibid.*

not, in the present matter, asserting a right, but attempting to prevent an injustice. As such, this court need not consider factors that are applicable for purposes of interim interdicts.¹¹³ This means that there is no need for the court to comment on whether the self-review application has any prospects of success.¹¹⁴ Ikamva is clearly desperate to execute. Irreparable harm will result if execution is not stayed, if some of the money paid to Ikamva is dissipated and the Departments ultimately succeed in the self-review. Ikamva may, for example, become insolvent or funds could be moved to third parties and become difficult to trace. The amount in question is significant and there is at least a possibility that the underlying causa may ultimately be removed. These factors also justify the urgency with which the matter was launched. Arriving at this conclusion does not require the Rugunanan AJ order to be interpreted along these lines. That Ikamva has agreed on previous occasions to stay the execution of the writ is peripheral, as is the interest that accrues in its favour and the guarantee furnished by the Departments in terms of the PFMA. It is clear in any event that Ikamva's claim is adequately secured and there is little danger that it will not be paid in full once the Departments' appeal processes are exhausted.¹¹⁵

Costs

[94] The applicants have been successful in respect of the alternative relief sought in this application and are entitled to their costs, including the costs of two counsel where employed. Ikamva is responsible for these costs, including its attempts to oppose the intervention by the third applicant, the filing of a notice of irregular proceedings and the costs of the hearing of 5 August 2021. The applicants should not, however, benefit from the presentation to the court of 'the Majiki J bundle' and 'the SCA bundle' of documents, which were of limited assistance.

[95] It is unfortunately also necessary to comment on Ikamva's conduct in addressing issues raised in directives of this court. A supplementary affidavit filed by Ikamva's managing member suggesting that this court had unjustifiably descended into the arena. In addition, an answering affidavit filed by Ikamva's attorney of record,

¹¹³ *Gois t/a Shakespeare's Pub v Van Zyl* op cit fn 98 at para 40.

¹¹⁴ *Ibid.*

¹¹⁵ *Stoffberg NO and Another v Capital Harvest (Pty) Ltd* op cit fn 93 para 27.

in an application for leave to appeal before the SCA, took umbrage at the 'questionable propriety' of the issues raised *mero motu* by this court and suggested that the 'intervention' of the Judge President of the Division should be 'subject to scrutiny'. This court was even threatened with an application for recusal unless the legal points raised were withdrawn.

[96] In fact, this court raised issues foreshadowed in the papers. The Departments' main prayer related to the invalidity of notices of attachment and a writ of attachment of a bank account. That must include consideration of whether a valid, competent order of court underpinned the execution process. Far from the court improperly broadening the issues to be determined, these matters were important in the context of a multimillion rand claim against the Departments and required full ventilation. In *CUSA v Tao Ying Metal Industries*,¹¹⁶ the court state:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.'

[97] The Judge President did nothing other than constitute a full bench for a matter, upon the request of Tokota J, in circumstances where the dispute was clearly of sufficient complexity to warrant this. This was triggered by consideration of the implications of attachment of a state department bank account, and because the Constitutional Court had left the issue open in *Tsoga*. In doing so, the Judge President acted in terms of Rule 19(d) of the Joint Rules of Practice for the Division, and because of the nature of the issues at hand. No objection was raised at the time by Ikamva, who were seemingly aware that the Judge President had appeared as counsel in the matter some years previously.

[98] The conduct and tone of Ikamva's objections to these routine matters borders on contempt and undermines respect for the judiciary. The suggestion that this court conducted itself in a way that was somehow part and parcel of an attempt to apply

¹¹⁶ *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 68.

pressure in order to influence Ikamva to accept payment of a lesser sum in damages borders on paranoia and is manifestly unfounded and scandalous.

[99] It is most unfortunate that Ikamva's legal representatives permitted the threat of recusal to be recorded in an affidavit based on incorrect facts and assumptions.¹¹⁷ It goes without saying that no recusal application was ever brought. It must be expected that legal practitioners, as officers of the court, will act proactively in protecting the dignity of the court, even if this proves to be unpopular with their clients. That expectation is heightened when the court has the benefit of being addressed by senior counsel. The proper administration of justice depends on the preservation of the court's dignity and the suppression of wild sentiments and woolly criticism by all role-players. The judiciary is not above scrutiny or reproach but should not be the victim of unwarranted attacks. Legal practitioners, *au fait* with the ethical standards of the Bench, the Code of Judicial Conduct and the Norms and Standards for the Performance of Judicial Functions, should be the first to ensure that the judiciary remains respected and protected. This is irrespective of whether there is a sense that the court has adopted an unfavourable *prima facie* view on the matter.

[100] In the circumstances, it is appropriate for Ikamva to pay costs on an attorney and client scale in respect of the filing of its supplementary and confirmatory affidavits dated 21 July 2021 and addendums, as well as the applicants' affidavit in answer to this supplementary affidavit, dated 28 July 2021, and addendums.

Order

[101] The following order will issue:

- (a) The intervening party is given leave to intervene in the matter as the third applicant.
- (b) The further execution of the writs of attachment dated 11 March 2016, including the removal of the attached movables, is stayed pending the final determination of the application for leave to appeal the order of Beshe J

¹¹⁷ Para 63 of the First Respondent's supplementary affidavit, dated 21 July 2021, at p 583 of the index.

dated 16 February 2021 (case number 2610/2019), including any consequent appeals.

- (c) The first respondent is to pay the costs of the application, including the costs of the application for intervention, the costs occasioned by the Rule 30 applications dated 22 June 2021 and 30 July 2021 and the reserved costs of the hearing of the application on 5 August 2021, such costs to include the costs of two counsel where so employed, but excluding any costs associated with the presentation of the 'Majiki J bundle' and 'the SCA bundle' to the court.
- (d) The costs of the first respondent's supplementary and confirmatory affidavits dated 21 July 2021 and the applicants' answering affidavit dated 28 July 2021 are to be paid by the first respondent on the attorney and client scale.

D. VAN ZYL
DEPUTY JUDGE PRESIDENT OF
THE HIGH COURT

B. TOKOTA
JUDGE OF THE HIGH COURT

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 5 August 2021 and 18 October 2021

Delivered: 17 March 2022

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