IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 3429/2018

In the matter between:

MATJHABENG LOCAL MUNICIPALITY Applicant

and

MAN IN ONE CC
(Registration No: CK2006/19445/23) 1st Respondent

PHAKAMA SECURITY SERVICES CC
(Registration No; 2005/183456/23) 2nd Respondent

MBV SECURITY (PTY) LTD
Registration No: 2013/024158/07) 3rd Respondent

HEARD ON: 12 JULY 2018

CORAM: PE MOLITSOANE, J

JUDGMENT BY: PE MOLITSOANE, J

DELIVERED ON: 30 JULY 2018

[1] This is an opposed application in terms of which applicant seeks the following on an urgent basis: The applicant seeks an order staying an execution of the judgment of this court of the 6th April 2018 in favour of the first respondent. Applicant further seeks orders staying any potential and/or actual sales in execution in pursuance of the court orders against the applicant in favour of the second and third respondents which might eventuate in the future. Lastly, applicant seeks an ancillary order requesting a Judge of this court to mediate the dispute regarding applicant's envisaged or intended payment terms in accordance with any court orders obtained by respondents. This application is opposed.

[2] The respondents obtained several judgments against the applicant as more fully set out hereunder below:

2.1 On the 6th August 2015 under Case No: 3116/2015 the second respondent obtained judgment against the applicant in the amount of R4 275 143.95 with interest and costs;

2.2 On the 8th June 2017 under Case No: 2448/2017 the second respondent obtained another judgment against the applicant in the amount of R9 955 505.91 with interest and costs. On the 14th July 2017,pursuant to this order, the applicant and second respondent concluded and signed a payment agreement in respect of the said judgment debt ;

2.3 On the 20th March 2018 under Case No: 3430/2018, the first respondent obtained a judgment in the amount of

R15 228 477.98 with interest and costs against the applicant;

2.4 On the 6th of April 2018 under Case No: 1239/2018, the first respondent obtained another judgment in the amount of R20 133 681.36 with interest and cost against the applicant.

[3] Pursuant to the granting of the judgment in 2.4 above, the first respondent caused a writ of execution to be issued and subsequent to that, the following vehicles were attached and removed by the sheriff, *to wit*, five Nissan bakkies of which three had canopies, 2 Nissan trucks, one FAW truck, three Jurgens trailers and two blow mowers. It is the attachment and removal of these assets of the applicant which triggered this application.

[4] On the 3rd May 2018 under Case No: 1430/2018 the first respondent again obtained judgment against the applicant for payment of R15 228 477.98 with interest and costs.

[5] Save for the writ of execution in case number 1239/2018, no other attachment has been made by any of the respondents to enforce their judgments.

[6] Adv. Lebala SC submitted in detail the constitutional obligations expected of the applicant, inter alia, in ensuring the provision of services to the communities in a sustainable manner. He submitted that the applicant did not dispute that it was indebted to the Respondents. The judgments and the orders against favour of the applicant were also not placed in dispute.

[7] He also alluded to the fact that the applicant had experienced challenges in making full payments to the respondents' indebtedness. He argued that the applicant took steps in an attempt to resolve the issue of payment of the relevant debts.by the applicant. He submitted that the applicant sought an undertaking that its property would not be sold in execution but to no avail.

[8] Adv. Lebala submitted that, in view of the fact that applicant acknowledged that it had defaulted on the settlement and payment plans it undertook with respondents, and had throughout undertaken to submit affidavits in line with the conditional undertaking ordered by this court, a court sanctioned mediation would serve the interests of all parties herein.

[9] Adv. Lebala further indicated that the requirements of the State Liability Act, 20 of 1957 as amended (the SLA) had not been complied with.

[10] On behalf of the respondents, Adv. Louw argued that no case was made for court sanctioned mediation. According to him the so called conditional payment orders given by this court in case numbers 3116/2018 and 1430/2018 as referred to by the applicant, referred to the invoices and not the judgment debts. He further argued that the applicant failed to show that it will suffer irreparable harm if the order is not granted.

[11] Adv. Louw submitted, further, on behalf of the respondents that the SLA was not applicable to municipalities.

[12] Mr Louw argued that the applicants had another remedy as set out in Chapter 13 of the Local Government: Municipal Finance Management Act 56 of 2003(the Act). He thus submitted that on this point alone the instant application fell to be dismissed.

[13] The main issue for determination is whether the applicant has made up a case for an interdict to stay the sales or potential sales, in circumstances where the applicant cannot meet its financial obligations with a view to request a Judge to mediate a payment plan between the parties.

[14] The requirements for the granting of an interdict are settled. The applicant will have to show the following: a clear right, a well-grounded apprehension of irreparable harm if an interdict is not granted, the balance of convenience favouring the grant of the relief sought and the absence of any other ordinary remedy. See **Setlogelo v Setlogelo 1914 AD 221**.

[15] At the onset it has to be borne in mind that applicant does not dispute that the issue of the writ of execution is a lawful procedural step available to the respondents in order to enforce satisfaction of their judgments.

[16] The applicant avers that it has both statutory and constitutional duties to discharge its functions. Applicant further avers that it achieves these functions by providing basic services to all the people within its jurisdiction specifically the poor and the disadvantaged. It is submitted on behalf of the applicant that the removal of these assets prejudices such obligations.

[17] Although on the face of it, it appears convincing that the applicant may fail to meet its statutory and constitutional obligations, the applicant has not indicated what its entire fleet of vehicles is, in order to execute its statutory and constitutional mandate. It has further not provided any evidence as to the impact or likely impact the attachment and removal of the vehicles and machinery is likely to be. Such evidence is necessary for this court to asses if the applicant will not be in a position to meet its statutory and constitutional obligations. It is thus difficult to satisfy myself on the available evidence that the applicant will suffer irreparable harm. Bald and unsubstantiated averments will fall short of satisfying this court that the attachment and removal will hamper service delivery. See **Provincial Government: North West Province and Another v Tsoga Developers CC and others** [2016] ZACC 9 at par [37] and [38].

[18] The applicant has mandatory and statutory steps to be taken in cases of challenges and serious crisis in its finances. Both the Constitution and the Act provide for mandatory intervention by the provincial government. Section 139(5) of the Constitution requires that:

"(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations of financial commitments, the relevant provincial executive must:

(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which

(i) is to be prepared in accordance with national legislation;

and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crises in its financial affairs […]"

[19] Section 139 of the Act also provides as follows;

"**Mandatory provincial interventions arising from financial crises**

(1) If a municipality , as a result of a crisis in its financial affairs, is in a serious crisis or persistent material breach of its obligations to provide basic services or to meet its financial commitments , or admits that it is unable to meet its obligations or financial commitments, the provincial executive must promptly-

(a) request the Municipal Financial Recovery Service-

(i) to determine the reasons for the crisis in its financial affairs;

(ii) to assess the municipality's financial state;

(iii) to prepare an appropriate recovery plan for the municipality;

(iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan: and

(v) to submit to the MEC for finance of the province –

(aa) the determination and assessment referred to in subparagraphs(i) and (ii) as a matter of urgency; and

(bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period ,not exceeding 90 days, determined by the MEC for finance; and

(b) consult the mayor of the Municipality to obtain the municipality's cooperation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.

(2) The MEC for finance in the province must submit a copy of any request in terms of subsection(1)(a) and of any determination and assessment received in terms of subsection (1)(a)(v)(aa) to-

(a) the municipality;

(b) the Cabinet member responsible for local government; and

(c) the Minister.

> (3) An intervention referred to in subsection (1) supersedes any discretionary provincial intervention referred to in section 137, provided that any financial recovery plan prepared for the discretionary interventions must continue until replaced by recovery plan for the mandatory intervention."

[20] It is contended on behalf of the applicant that the fact that the applicant is unable to pay one creditor does not ignite an intervention as envisaged in s139 of the Act. It is argued that the applicant wants to pay and is not in such a crisis as would require an intervention. This argument is, however, not supported by the evidence before the court. It is not in dispute that the applicant is indebted to the respondents in the total amount of R64 821 287.38 plus interest and costs in various cases referred to above. It is not in dispute that the applicant entered in at least two settlement/ payment plans with the first respondent. It is also not in dispute that the applicant failed to make payments as agreed in terms of the payment plans and also failed to satisfy the orders granted. By its own admission, applicant prioritised the debts of Eskom and Sedibeng Water over any of its debts and thus failed to make good the judgments in favour of the respondents.

[21] The applicant wants to down play the seriousness of its financial crisis. While there is no sufficient evidence to conclude that the applicant is in a serious financial crisis, there are clear pointers that the respondent is unable to meet its financial obligations. Applicant even entered in settlement/ payment plans it was unable to meet. Clearly on the little evidence before me it is apparent that applicant is unable to meet its financial obligations. Clearly because of the challenges it has in settling its debts, the applicant is obliged as of law to seek intervention of the provincial government as set out in

Chapter 13 of the Act. It is not so that applicant has a hiccup in paying one creditor as it has been argued. It is clear that the applicant has an ordinary remedy in terms of the Act as opposed to seeking the stay of the execution in this application.

[22] The applicant implores me to order a judge of this court to mediate 'a dispute' pertaining to payment. This argument is premised, firstly, on the contention that this court has inherent powers to protect and regulate its own process taking into account the interest of justice as set out in s173 of the Constitution. Secondly, on the need to exercise judicial activism as envisaged in **Nyathi v MEC for Department of Health, Gauteng and Another** [2008] ZACC 8. This second contention is also based on conditional payment orders granted by this court in case numbers 3116/2015 and 1430/2018.

[23] The court in the case of **Nyathi *(supra)*** was seized with the certification of declaration of invalidity of s3 of the State Liability Act 20 of 1957.It is in my view unnecessary to go in depth in the said case save to refer to the following paragraph of the said judgment;

"[85] **It is indeed unfortunate that judicial officers are placed in the invidious position of having to oversee state action. However, oversight is essential in the circumstances. In the interest of justice and in an effort to uphold the rights and principles that are espoused in our Constitution, there can be no other effective manner to ensure that the state complies with the order**."

[24] This paragraph must be understood in the context in which it was said. The court in the case of **Nyathi** was grappling with the challenges in the enforcement of court orders against the state in

light of s3 of the State Liability Act which, inter alia, infringed on the right to equality enshrined in s(9) of the Constitution as it unjustifiably differentiated between a judgment creditor who had an order against a private citizen and a creditor who had a judgment against the state. The former creditor could usually enforce the order by levying execution on the property of a debtor while the latter could not.

[25] Unlike in the **Nyathi** case, where a creditor could not levy execution against the state in view of the provisions of s3 of the SLA, *in casu*, the applicant already has certain statutory and constitutional remedies available to it as alluded to above. The case of **Nyathi** cannot thus be invoked to request a judge to mediate a payment plan between the parties in circumstances where there is already another remedy in place. In addition s157 of the Act provides a machinery to stay any legal proceedings, including execution against the applicant where the legal proceedings, including execution have already been initiated. Section 157 of the Act provides as follows:

> “**If a municipality is unable to meet its financial obligations, it may apply to the High Court for an order to stay, for a period not exceeding ninety days, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality or a municipal entity under the sole control of the municipality”**

[26] I was further implored to consider the conditional orders granted in case numbers 1430/2018 and 3116/2015 by this court. Reference to these orders was made with the request that the court should

exercise inherent jurisdiction and order judicial mediation between the parties. The specific orders referred to are as follows:

"Should respondent fail to effect payment of the full amount of any such invoice, it shall report to the above Honourable Court in writing within 48 hours of the due date, by way of an affidavit sworn to under oath by its municipal manager stating full reasons for non-payment, the steps it intends to take to rectify non- payment and when compliance is anticipated."

[27] The above directive should be understood in the context of all the paragraphs of these orders. Firstly, the principal orders related to the declaration of indebtedness of the applicant to the respondents. Secondly, the ancillary orders dealt with future monthly invoices to be rendered by the respondents in respect of security and guarding services by the respondents. These are the so called conditional orders according to the applicant. The above-mentioned conditional orders related to the invoices to be rendered in the future and did not relate to any existing judgment debts. It is incorrect to rely on the conditional orders which did not relate to existing debts as a basis for requesting judicial mediation.

[28] Even if it could be said that I am wrong in rejecting the argument that the above-mentioned conditional orders cannot be used as the laying basis for the process of mediation by a judge, the conduct of the applicant must be scrutinised post the said orders.

[29] It is not the applicant's case that it complied with the conditional orders in question by submitting affidavits when it failed to pay the invoices. The applicant makes no effort even in these proceedings to submit such affidavits. What the applicant avers is that, it has

always been its intention throughout to submit an affidavit to the court. The applicant wants this court to believe that it is the recalcitrant behaviour of the respondent's' attorneys that no such affidavits were filed with the court. It seems to have escaped the applicant that the obligation was on it to **"…*report to this court in writing within 48 hours of the due date*** (my emphasis) **..."** upon failure to make payments. What purpose would it serve to request a Judge to mediate when already the applicant appears not to heed the order to file an affidavit within 48 hours of failure to make good the invoices rendered? This argument stands to be rejected.

[30] I hasten to add that mediation is a noble consensus-seeking process for settling disputes. It allows warring parties to find each other to the benefit of all concerned resulting in them owning the outcome. Mediation, noble as it is, is a voluntary process. The success of a mediation process is also dependant on the bona fides of the parties. It cannot be forced down the throats of the litigants. If it were to be forced on the parties, the process would lose credibility and would be difficult to implement. Upon perusal of the correspondence between the parties and the submissions made it is clear that the parties could not find each other, hence this application was brought. *In casu,* respondents do not seek mediation. It will thus be incorrect to authorise judicial mediation between the parties in circumstances where any of the parties is not amenable to the process.

[31] The other argument by the applicant is that the writ of execution issued did not comply with the legal prescripts as there was non-compliance with the SLA. It is apposite to mention that no

evidence or submissions were made to indicate in what respects the said process was issued in contravention of the SLA .

[32] Be that as it may, I wish to highlight the following with regard to the applicability or otherwise of the SLA to municipalities. Section 3 of the SLA was amended by the State Liability Amendment Act, 2011 following the decision in **Nyathi** (*supra*)..Section 3 of the SLA (as amended) provides as follows:

"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 action (section)."

[33] Section 239 of the Constitution defines an organ of state to mean;

"(a) any department of state or administration, national, provincial or local sphere of government; or

(b)….."

[34] Section 151(1) of the Constitution provides as follows:

"The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic."

[35] A municipality is, therefore, an organ of state in the sense that it is a department or administration in the local sphere of government. It is now settled that the SLA is not applicable to municipalities. In **Mateis v Ngwathe Plaaslike Munisipaliteit en andere 2003(4) SA 361 (SCA)** the court held that ss2 and 3 of the SLA are

concerned with the liability of the central or provincial government. The court further held that the liability of the municipalities, which were indeed also a form of government, was not mentioned neither with regard to cause of action, nor as possible defendant. It was also not mentioned as a possible paying party.

[36] Any argument of non- compliance with the SLA must, therefore, be rejected as the said Act is, in law, not applicable to Municipalities and consequently to the Applicant.

[37] It is my considered view that the applicant has failed to show that it will suffer irreparable harm if the relief sought is not granted. Further the applicant has a constitutional and statutory remedy by way of a provincial intervention available to it, thus the relief sought is not the only remedy available to the applicant.

[38] This application should therefore fail. I cannot find any reason to depart from the general practice that the costs should follow the cause and I accordingly make the following order:

ORDER

1. The application is dismissed with costs.

P.E. MOLITSOANE, J

On behalf of Applicant:	Adv. S.M Lebala SC with him
	Adv. N. Khooe
Instructed by:	Bokwa Attorneys
	BLOEMFONTEIN
On behalf of Respondents:	Adv. M. C Louw
Instructed by:	Hill McHardy and Herbst
	BLOEMFONTEIN