



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 575/2024

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

26 February 2024
DATE

SIGNATURE

In the matter between:

MANDLA MACBETH NCONGWANE

1ST APPLICANT/APPELLANT

MACBETH INCORPORATED

2ND APPLICANT/ APPELLANT

and

BODY CORPORATE DRYSDALE 24

1ST RESPONDENT

CHRISTO SMITH ATTORNEYS

2ND RESPONDENT

SHERIFF OF THE MAGISTRATE
COURT: MBOMBELA

3RD RESPONDENT

OFFICE OF THE MAGISTRATE
COURT: MBOMBELA

4TH RESPONDENT

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 08H00 on 26 February 2024.

Introduction

[1] This matter came before this court by way of urgent application wherein the Applicant seeks an order in the following terms:

- 1.1 That this application be treated as an urgent application in that the degree of urgency is so great that it justifies deviation from the requirements for forms, services, notifications and time periods provided for in the Rules of the above Honourable Court.
- 1.2 The Writ of Execution issued in favour of the First Respondent against the First Applicant in the action proceedings under case number 2326/2018, is set aside, alternatively stayed pending finalisation of the appeal.
- 1.3 That the Third Respondent is hereby interdicted and restrained from executing the Writ of execution issued in favour of the First Respondent against the Applicant in the action proceedings under the case number

2326/2018, pending finalisation of the appeal under case number A10/2024.

1.4 That insofar as the Third Respondent may have nonetheless executed the Writ and removed the Applicants' assets or property, he or she be ordered to forthwith return same to the Applicants, and immediately so.

1.5 The relief in prayer 2, 3 and 4 above shall operate as an interim interdict with immediate effect pending finalisation of

- i. the appeal process under case number A70/2022;
- ii. the appeal process under case number A10/2024; and
- iii. the rescission application due to be heard on 22 February 2024

1.6 That any of the Respondents who opposes the application, pay the costs thereof.

The application is opposed by the First Respondent.

Background.

[2] As it can be gleaned from the case numbers, this application is rooted in an action instituted in 2018 by the First Respondent against the First Applicant at Mbombela Magistrate Court over alleged outstanding levies. The First Respondent is a body corporate of which the First Applicant is a member. The action was defended by the First Applicant represented by the Second Applicant. Given a number of years that have lapsed without finality in this matter, it is necessary to unpack the chronological developments leading to this application.

[3] Following a notice to defend, filed by the First Applicant, the First Respondent applied for summary judgement. An external magistrate was outsourced from Bushbuckridge to hear the application for summary judgment. The outsourcing of judicial officers from another jurisdiction, to Mbombela Magisterial district, was done in respect of all the applications preceding the trial and the trial itself.

Summary judgment was dismissed on 23 May 2019. Pleadings were exchanged and the matter was certified trial ready on 22 January 2020. It was thereafter set down for trial which did not proceed on five different occasions for unspecified reasons.

- [4] The First Applicant thereafter brought an application to amend the plea and to file a counter claim. This was after the First Respondent objected to the notice he had filed to that effect. That application was heard and dismissed on 01 March 2022. On 04 March 2022, the First Applicant asked for the reasons for the order dismissing his application. The Magistrate furnished the reasons on 08 September 2022.
- [5] There is dispute between the Applicants and the First Respondent as to whether the First Applicant appealed against the order dismissing the application heard on 01 March 2022. It suffices for present purpose that the First Applicant attached to the founding affidavit in this application, a document titled “NOTICE OF APPEAL” reflecting case number A70/2022, apparently issued from the High Court Division of Mpumalanga, Mbombela (main seat). The Registrar’s date stamp on it reflects that it was issued on 28 October 2022. The dispute is around the procedure in noting a notice of appeal which the First Respondent argues that it was not in compliance with Rule 51(4) of the Magistrate Court Rules, as it was not noted at the Magistrate Court in question.
- [6] On 17 July 2023, the First Respondent approached the Senior Magistrate, Mbombela for trial date allocation and for the magistrate to hear the trial to be secured in advance. The date allocated for trial was 14 November 2023. Notice of set down was served on the Second Applicant on 30 August 2023. On 14 November 2023, the First Applicant was not in court attendance and so was his legal representative. Judgment was as such granted in favour of the First Respondent by default in the amount of R39 690.55 plus interests and costs.

- [7] A copy of the judgment was served on the Applicants by the First Respondent's attorneys on 15 November 2023. On 27 November 2023, the First Applicant served the First Respondent with a notice of application for rescission of judgment. This notice filed in court on 28 November 2023. According to the notice, the application for rescission of judgment would be heard on 27 November 2023. This date had already passed at the time of filing of the notice. This gave rise to the First Respondent arguing that there was no valid notice of rescission of judgment. Nevertheless, the First Respondent filed the notice of intention to oppose the rescission application on 30 November 2023.
- [8] The aspect of a wrong or past date became a bone of contention in the answering affidavit in this application. It also appears to have played a major role in the urgent application heard by the Magistrate which I shall deal with hereunder. In a replying affidavit, the First Applicant attached a document showing that the notice of application for rescission has since been amended to reflect a date of 22 February 2024 as the date on which the application will be heard. The notice to amend the motion was served on the First Respondent on 30 January 2024.
- [9] On 19 January 2024, the First Applicant was served with a warrant of execution by the Third Respondent. Attempts to get the First Respondent's attorneys to undertake that they will not execute this, pending the hearing of the rescission application, did not yield fruits. On 29 January 2024, the First Applicant brought an urgent application premised on section 78 of the Magistrates Courts Act¹ to interdict or stay the execution of the writ (section 78 application / order). This application was dismissed by the Magistrate on the same date. On 30 January 2024, the First Applicant filed an appeal against the Magistrate's section 78 order. The appeal is recorded as case no. A10/2024. The existence of this appeal does

¹ See paragraph 13 below for details.

not appear to be in dispute. Even if it was disputed, the First Respondent conceded that where an appeal is not in compliance with the required procedures for launching an appeal, it is in the discretion of the appeal court to condone such non-compliance and hear the appeal.

[10] Following the Magistrate's section 78 order, and on 06 February 2024, the Third Respondent and/or its employees proceeded to attach and remove the First Applicant's property for execution. The First Respondent attempted to stop them by informing them that there was an appeal against the section 78 order. The Third Respondent and/or its employees informed him that they had a legal opinion to the effect that they should ignore the alleged appeal. They however refused to share the said opinion with him. It is against this background that this court was approached on 19 February 2024, on urgent basis seeking the relief as per paragraph 1 above.

[11] At the time this application was heard on 19 February 2024, counsel for the Applicant had not filed heads of argument. He was afforded the opportunity to do so which he managed to do on 21 February 2024. The First Respondent's legal representative filed his supplementary heads of argument in response thereto on 22 February 2024. For these reasons, the date scheduled for the application for rescission of judgment, 22 February 2024 would have passed by the time this judgment is handed down. Depending on whether the application was heard and the outcome thereof, this judgment could be academic. It remains important that all the issues raised here be dealt with not only because the application is still pending, but also for precedence purposes.

Issues for determination.

[12] This judgment boils down to answering whether this court has jurisdiction to hear this application. The flip side of this question is the determination of a proper

remedy available for the Applicants pending the appeal launched against the Magistrate's section 78 order.

The law

[13] Section 78 of the Magistrates Courts Act² was quoted extensively in this hearing by both the First Applicant and the First Respondent. It provides,

“Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application.”

[14] Jones and Buckle³ remark that “court” means a magistrate's court for any district or regional division as defined in section 1 of the Magistrates Courts Act and that only the court (albeit not the same magistrate) granting the order appealed against has the power to make an order under this section. Interestingly, the legislation did not make a provision for the appeal in respect of the discretion exercised by the Magistrate in terms of this provision.

[15] The Superior Courts Act⁴ has a similar and broader provision in respect of execution of orders granted by the High Courts. Unlike the provision in the Magistrates Courts Act, the Superior Courts Act provides a remedy for the aggrieved party by granting such party an automatic right to appeal against the execution or enforcement orders (or the refusal thereof) by the High Courts.⁵ This lacuna in the Magistrates Courts Act led to conflicting decisions on

² Act 32 of 1944

³ See Jones and Buckle: Civil Practice of the Magistrates' Courts in South Africa: Act and Commentary under sec 78.

⁴ See section 18 of the Superior Court Act no. 10 of 2013.

⁵ See section 18(4) of the Superior Court Act *supra*.

whether enforcement orders are appealable.⁶ This question was finally settled by the Constitutional Court in *Mathale v Linda and Another*⁷ when it unanimously held that section 78 orders were appealable.

[16] The general principles applicable in granting or refusing a stay in execution were summarised by Waglay J in *Gois t/a Shakespeare's Pub v Van Zyl and Others*.⁸ The appeal court would have to consider if these principles were properly applied without any misdirection. This is however not an appeal court. The fact that the Applicants were cited as “Applicants/Appellants” does not change the status or nature of the case before court today. This matter was initiated as an application and was allocated to a single judge, which would not have been the case if it was an appeal. In as far as this court was expected to review the findings of the Magistrate in respect of section 78 application, this is a wrong forum.

Discussion

[17] The First Applicant’s predicament is that after an appeal against section 78 order, the Third Respondent came some six days later to attach the property. Of what value would the appeal be if at the time of its hearing, the subject forming part of the appeal would be moot as the property would have been attached and sold? The First Respondent does not question the right of the First Applicant to challenge the section 78 order on appeal. Its attitude however is that the Applicants should have used the appeal process as opposed to bringing the urgent application before the High Court.

⁶ In *Mathale v Linda and Another* (A507/2013) [2014] ZAGPPHC 779 (2 October 2014), this question was raised but the court left it open. In paragraph 7 of the judgment, Msimeki J referred to the following cases where it was held that High Court orders for enforcement or execution pending an appeal were not appealable: *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 16; 2002 (5) SA 703 (CC); *Tuckers Land Development Corporation (Pty) Ltd v Soja (Pty) Ltd* 1980 (1) SA 691 (W) at 699; *Livanos v Absa Bank Ltd* [1999] 3 All SA 221 (W) at 225B-C and *South African Druggists Ltd v Beecham Group pic* 1987 (4) SA 876 (T) at 800A-B

⁷ 2016 (2) SA 461 (CC).

⁸ 2011 (1) SA 148 (LC) at 155I-156B.

[18] I am not certain if the route proposed by the First Respondent would result in anything different to what the Applicants wish to achieve here. The appeal process, even when undertaken on urgent basis, involves the transcription of records which may take weeks, depending on the volume of material to be transcribed. What guarantee does the First Applicant have from the First Respondent that while the records are being transcribed or the process of appeal is unfolding, his property would not be attached? The First Applicant did launch an appeal, but this was not enough to safeguard his property, pending the outcome.

[19] The First and the Second Respondents were asked to give an undertaking in writing to the effect that they will not seek to execute the writ, and they failed to do so. It was already brought to their attention that there was an appeal launched when they sent the Third Respondent to go and attach the First Applicant's property. It does not look like there would be any recourse for the First Applicant in the route proposed by the First Respondent, even if it was undertaken on urgent basis. If the pending appeal could not stop them from attaching the property, what in the urgency would achieve that? The reality is that the hearing of the appeal would be inconsequential if the writ intended to be stayed would have been executed. This would be tantamount to denying the First Applicant the right to appeal in my view.

[20] Further submissions by the First Respondent reveal what could be the real underlying issues. It was submitted that the First Applicant was playing the Stalingrad or delaying tactics hence this action has not seen the end since 2018. This concern is amplified in the supplementary heads of argument wherein it is suggested that allowing a stay in execution could result in the whole process being stagnant as a result of the First Applicant not prosecuting the appeal.

[21] Given the year in which the action was initiated, the concerns of the First Respondent are not without merit. It should however be noted that none of the parties apportion the blame for the delay in finalising the trial on each other – particularly on why the trial could not proceed on any of the five days it was set to be heard. The court's concern though is, presuming that the First Applicant is indeed playing delaying tactics; should it then ignore the irreparable harm or substantial injustice he could suffer as a result of the denying him the right to appeal?

[22] Perhaps facts giving rise to the argument that the First Applicant was delaying the proceedings deliberately were laid before the Magistrate in the section 78 application. Such facts were however not placed before this court and as such, I am unable to make a finding thereto. Presuming that there is merit in this argument, I remain unconvinced that such a conduct can result in the court lawfully depriving a litigant of what is rightfully within their rights.

[23] The court can however put measures in place to avoid the eventuality of what is feared, from materialising. Such measures can include giving the timeframes within which an appeal should have been prosecuted and finalised and specifying the particular appeal for which an interdict is applicable, where there are several appeals. I am of a view that unless this court intervenes by way of granting the sought interdict, the First Applicant stands to suffer irreparable harm or substantial prejudice.

[24] As for costs, I am of the view that each party was exercising its rights that are also protected in the Constitution. The First Respondent was a successful candidate in the Magistrates Court both in respect of the action and the section 78 order. With the litigation spanning over five years, the First Respondent, being a body corporate that still has to be functional and of service to its members, seeking execution once the judgment is obtained in its favour seems to be the

natural thing to do, for which it cannot be faulted. The same can be said in respect of its opposition to this application.

[25] For the aforesaid reasons, I make the following order:

25.1 The Applicants' failure to comply with the forms and service provided for in the Uniform Rules of the Court is condoned. This matter is dealt with on an urgent basis as envisaged in Rule 6(12) of the Uniform Rules;

25.2 Subject to paragraphs 25.5 and 25.6 below, the Writ of Execution issued in favour of the First Respondent against the First Applicant in the action proceedings under case number 2326/2018, is stayed pending finalisation of the appeal under case no. A10/2024;

25.3 The Third Respondent is hereby interdicted and restrained from executing the Writ of execution issued in favour of the First Respondent against the Applicant in the action proceedings under the case number 2326/2018;

25.4 Insofar as the Third Respondent and/or the employees may have nonetheless executed the Writ and removed the Applicants' assets or property, they are ordered to forthwith return same to the Applicants;

25.5 The orders in paragraphs 25.2, 25.3 and 25.4 above shall operate as interim interdict with immediate effect pending the finalisation of the appeal under appeal case no. A10/2024; which should be prosecuted and finalised within 6 (six) months from the date of this order.

25.6 This interdict shall lapse after the expiry of 6 (six) months from the date of this order, unless this court or the appeal court hearing the appeal under

case no. A10/2024, has, upon good cause shown, extended it further for a period it deems fit;

25.7 The First Applicant and the First Respondent are ordered to complete Form F, within 30 days from the date of this order, with a view to have the appeal in appeal case no. A10/2024 finalised within 6 (six) months from the date of this order. In case of disagreement, the party/parties should approach the Registrar of this court who shall place the matter before a judge for case management of the appeal and completion of Form F;

25.8 There is no order as to costs.



TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

FOR THE APPLICANTS:

ADV G SHAKOANE SC

INSTRUCTED BY:

MACBETH ATTORNEYS INC

MBOMBELA

FOR THE FIRST RESPONDENT:

MR. C SMITH

INTRUSCTED BY:

CHRISTO SMITH ATTORNEYS INC

MBOMBELA

DATE HEARD: 19 FEBRUARY 2024

JUDGMENT DELIVERED: 26 FEBRUARY 2024