

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 10954/2023

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
.....	
.....	
DATE: 10.07.2024	SIGNATURE: [Redacted]

In the matter between:

PREMIER OF THE LIMPOPO PROVINCE

FIRST APPLICANT

THE MEC OF COGHSTA, LIMPOPO PROVINCE

SECOND APPLICANT

CHAIRPERSON OF LIMPOPO HOUSE OF
TRADITIONAL LEADERS

THIRD APPLICANT

-and-

HEADMAN ENOS MATOME KOBE

FIRST RESPONDENT

MAROKHU MATOME ALFRED

SECOND RESPONDENT

PHALA NOTME SIMON

THIRD RESPONDENT

KGATLA MASHILO PHILIP	FOURTH RESPONDENT
KUBU NGOAKA ABRAM	FIFTH RESPONDENT
LEBOGO MOLOKO COURTLY	SIXTH RESPONDENT
LEKWARA MATLOU ALBERT	SEVENTH RESPONDENT
MAILULA KOLOBE PATRICK	EIGHTH RESPONDENT
MANAKA NHLODI SAMUEL	NINTH RESPONDENT
MABOYA MKGODI WILSON	TENTH RESPONDENT
MALEKA NTOME DALTON	11 TH RESPONDENT
MONEYA MADJADJI	12 TH RESPONDENT
THELEDI MANTASE JACOB	13 TH RESPONDENT
KGOSHI NGOAKO ISAAC LEBOGO	14 TH RESPONDENT
BAHANANWA TRADITIONAL COUNCIL	15 TH RESPONDENT
SHERIFF – POLOKWANE	16 TH RESPONDENT

JUDGMENT

BRESLER AJ:

Introduction:

[1] The Applicants apply for the following relief:

1.1 That the execution of the Full Court's Order dated the 28th of June 2021 under case number: HCAA 14/2020, is stayed pending the finalisation of the appeal in the Supreme Court of Appeal by Kgoshi Isaac Lebogo and Bahananwa Traditional Council.

1.2 That the 1st and 2nd Respondents be interdicted from removing the Applicants' attached property.

1.3 That the Applicants' attached property is removed from attachment.

1.4 That the costs of the Application be paid by any of the Respondents opposing the application.

[2] The application is opposed by the 1st to 13th Respondents (hereinafter referred to as the 'Opposing Respondents').

[3] The common cause facts relevant to these proceedings are the following:

3.1 On the 11th of February 2019, the Opposing Respondents instituted a review application in the above Honourable Court in terms whereof they sought an order reviewing and setting aside the decision to remove them as headman / headwomen and ancillary relief.

3.2 The review application was dismissed with costs on the 6th of February 2020.

3.3 Thereafter the opposing respondents launched an appeal to the Full Court against the whole judgment and order. The Full Court upheld the appeal with costs on the 28th of June 2021 (the 'Full Court order').

3.4 The 14th and 15th Respondent then obtained special leave to appeal from the Supreme Court of Appeal.

3.5 The Applicants also applied for special leave to appeal to the Supreme Court of Appeal which application was dismissed on the 18th of September 2023.

[4] The question which this court is called upon to answer is whether the Appeal launched by the 14th and 15th Respondent suspends the operation of the Full Court order granted under case number HCAA 14/2020 having regard to the fact that the leave to appeal against the order was refused in respect of the Applicants.

[5] The matter initially came before court as an urgent application on the 7th of December 2023. On this day, this Court granted a provisional order to the effect *inter alia* that the execution of the order is suspended up to the 10th of April 2024. The *crux* of the query at that stage was the status of the 14th and 15th Respondents'

Appeal. The parties were directed to deliver supplementary affidavits addressing the validity of the alleged pending appeal.

- [6] Both parties submitted Supplementary affidavits setting out their respective communications with the attorneys for the 14th and 15th Respondent and the Registrar of the Supreme Court of Appeal.
- [7] It must be noted that neither the orders granted by the Supreme Court of Appeal, nor the correspondence received from the Registrar, explicitly notes that the Appeal has either lapsed, was dismissed or is deemed to have been dismissed because of the Applicants' Application for leave to appeal being refused. Adv N Gaisa, who represents the 14th and 15th Respondents in an ancillary matter, was present in court during the hearing of the matter. He confirmed that the 14th and 15th Respondents are in the process of applying for a hearing date for the Appeal.
- [8] This court must therefore assume that, although the Appeal is purportedly on the 'inactive' roll at the Supreme Court of Appeal, it is still pending for purposes of this application.
- [9] It stands to be noted that this matter was argued simultaneously with case number: 11377/2023, being a related matter between the same parties raising similar issues to be determined. Judgment in matter 11377/2023 will be delivered separately but simultaneously herewith.

Application of law to the facts:

- [10] At common law the general rule is that the execution of a judgment is automatically suspended pending the noting of an appeal with the consequence that until the finalisation of the appeal, the judgment cannot be carried into effect.¹ The reasoning behind this, is to prevent irreparable damage to a losing party pending the outcome of the appeal if the judgment is put into motion under a warrant or by execution of the judgment.²
- [11] During the course of argument, I invited both the Applicants as well as the Respondents to present me with authority to the effect that the appeal has lapsed due to the fact that it was removed from the roll and not re-enrolled again.
- [12] Van Loggerenberg³ clearly states that a decision becomes the subject of an appeal as contemplated in Section 18(1), as soon as an application for leave to appeal or a notice of appeal is lodge with the registrar in terms of the applicable rules of court. It is furthermore apposite to note that Section 18(1) specifically suspends the operation and execution of the decision 'pending the decision of the application or appeal'.

¹ *Sabena Belgian World Airlines v Ver Elst* 1981 (1) SA 1235 (W) at 1236H; *Rentecor (Pty) Ltd v Rheeder and Berman NNO* 1988 (4) SA 469 (T) at 503E–504C; *Schoeman v Nedbank Ltd* 1989 (4) SA 812 (W) at 815D–816C.

² *Reid v Godart* 1938 AD 511 at 513; *Kalahari Salt Works (Pty) Ltd v Bonne Fortune Beleggings Bpk* 1973 (4) SA 471 (NC) at 477A.

³ Van Loggerenberg, *Erasmus: Superior Court Practice*, Volume 1 on page D - 133

- [13] In my view, the Appeal of the 14th and 15th Respondents is still pending as no decision has been made on the appeal as of yet. Although the Applicants' application for leave to appeal was refused, a determination must still be made on the 14th and 15th Respondents' Appeal. In effect, the Applicants therefore has no pending appeal. But, having regard to the nature and effect of the 14th and 15th Respondents' appeal, a successful prosecution thereof will result in the setting aside of the Full Court order.
- [14] I am fortified in my view in as far as the Full Court in the matter of **Turner and Another v Ntintelo and Another**⁴ states the following at [62]:

'Considerably, the respondents' application was instituted on February 2020 when the interim order was granted. The matter was struck off the roll on 08 April 2020 when the respondents were in default. The submission that the respondents' application was concluded on 08 April 2020 when the matter was removed from the roll is not correct. It must be stressed that the application was not dismissed but was removed from the roll. The difference between striking a matter off the roll and dismissal is that in the case of dismissal, the matter is disposed of and can no longer be set down on the roll again. If the applicant wishes to proceed with the matter, he would have to start the matter de novo. While on the other hand, striking of a matter off the roll has nothing to do with the merits of the case. It is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for re-

⁴ (A248/22) [2023] ZAWCHC 51 (8 March 2023)

instatement. Skhosana and Others v Roos t/a Roos se Oord and Others 2000 (4) SA 561 (LCC) at para 19.'

- [15] The striking, postponement or removal of a matter does not have a decisive and final effect. The matter must be re-enrolled for hearing to bring about a final result.
- [16] Even if I am wrong in my contention that the Appeal is still alive, I am guided by the principles pertaining to the suspension of execution in general. Rule 45A of the **Uniform Rules of Court** provides that, the court may on application, suspend the operation and execution of any order for such period as it may deem fit, provided that in the case of appeal, such suspension is in compliance with section 18 of the Superior Court Act, Act 10 of 2013.
- [17] In the judgment of De Villiers AJ in **BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another; BP Southern Africa (Pty) Ltd v ZA Petroleum and Another**⁵ at paragraph 25 it was held:

'A litigant with an enforceable judgment is entitled to payment, and only in rare cases would be delayed in that process. In my view there may be exceptional cases where a court would still exercise a discretion to prevent an injustice in staying execution.'

⁵ 2022 (1) SA 162 (GJ)

[18] Without embarking on an extensive discourse of the law, the legal position today is that a Court will grant a stay of execution where real and substantial justice is required, or an injustice will otherwise be occasioned.⁶

[19] A court faced with an application for the suspension of execution, must consider the factors that underlies the granting of interim interdicts, with due regard to the fact that an applicant is not asserting a *prima facie* right but is seeking to avoid an injustice. The Court must therefore be satisfied that:

19.1 The applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent; and

19.2 Irreparable harm will result if execution is not stayed, and the applicant ultimately succeeds in establishing a clear right.

[20] It follows that irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed or where the underlying *causa* is the subject matter of an ongoing dispute between the parties. *In casu*, the underlying *causa* is the subject matter of an ongoing dispute between the Opposing Respondents and the 14th and 15th Respondent. It however materially effects the position of the Applicants although they were not successful in their appeal.

⁶ *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (LC) at para 37; *Road Accident Fund v Legal Practice Council* 2021 (6) SA 230 (GP) (a decision of the full court) at paragraphs 30 to 33.

- [21] The Court is not concerned with the merits of the underlying dispute. The Court's enquiry is limited to the existence of the dispute in respect of the *causa*.⁷ The Court therefore need not determine at this stage whether the 14th and 15th Respondents are going to be successful with their Appeal. The Court must simply consider that the underlying *causa* may be negated if the 14th and 15th Respondents are successful.
- [22] In my view, should a stay of execution not be granted at this stage, it would lead to substantial prejudice for the Applicants as they could be without any satisfactory remedy. The execution of the Full Court order also holds infinite consequences for the community as a whole and has severe financial consequences for the Applicants. A suspension of the execution of the Full Court order will therefore serve the interest of justice.
- [23] Regarding the balance of convenience, it is indeed correct that the Opposing Respondents have a right to finalisation of this matter. It is however my view that, the Applicants may be seriously prejudiced should a stay of execution of the Full Court order not be granted. Thus, if the 14th and 15th Respondents succeed in having the Full Court order expunged, the prejudice would be far worse than the inconvenience the Opposing Respondents are experiencing pending the hearing of Appeal.

⁷ *Gois t/a Shakespeare's Pub v Van Zyl and Others supra*

- [24] Nothing prohibits the Opposing Respondents from ensuring that the Appeal is expedited and enrolled. It did not appear from the records before court that the Opposing Respondents took any steps in this regard to date hereof.
- [25] In the result, I am of the view that, justice would be best served if the operation and execution of the Full Court order, inclusive of the issue of costs, be stayed pending the outcome of the 14th of 15th Respondents' Appeal.
- [26] There is no reason to consider the setting aside of the writ or the consequential attachment at this stage. It follows that the suspension of the Full Court's order will result in a suspension of the writ as well. The writ was, after all, not erroneously issued as the underlying *causa* has not been extinguished but is merely disputed.

Costs:

- [27] The Applicants are substantially successful in the relief prayed for. The Opposing Respondents in this matter was entitled to oppose the application on the premise that the Applicants' application for leave to appeal was refused. The Opposing Respondents was warranted in their frustration as it is evident that the 14th and 15th Respondents did not proffer a reasonable explanation for the delay in finalising their appeal.
- [28] The Court retains a discretion to award costs that is fair to all parties concerned. Despite the fact, therefore, that the Applicants has succeeded in obtaining a stay in execution, I am of the view that the normal rule that costs should follow the result,

will not bring about a fair result. Under the circumstances, each party is ordered to pay its own costs.

Order:

[29] In the result the following order is made:

- 26.1 The execution of the Full Court's Order dated the 28th of June 2021 under Case number HCAA 14/2020, is stayed pending the finalisation of the appeal in the Supreme Court of Appeal by Kgoshi Isaac Lebogo and Bahananwa Traditional Council.**
- 26.2 The execution of the Writ of Attachment issued under case number: 854/2019 (HCAA 14/2020) is suspended pending the finalisation of the appeal in the Supreme Court of Appeal by Kgoshi Isaac Lebogo and Bahananwa Traditional Council.**
- 56.5 Each party is ordered to pay its own costs.**



M BRESLER

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES:

FOR THE APPLICANTS

: Adv Tshikororo

INSTRUCTED BY

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FOR THE 1ST – 13TH

RESPONDENTS

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INSTRUCTED BY

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DATE OF HEARING

: 10 April 2024

DATE OF JUDGMENT

: 10 July 2024