

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 19982/2016

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

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Date: 26 July 2024

ROAD ACCIDENT FUND

Applicant

and

RUELE, LISBETH

First Respondent

THE SHERIFF PRETORIA EAST

Second Respondent

MALEPE ATTORNEYS

Third Respondent

THE ACTING SHERIFF JOHANNESBURG NORTH

Fourth Respondent

JUDGMENT

DE VOS AJ

- [1] The RAF seeks urgently to halt the sale in execution of its property. The relief is sought in terms of Rule 45A of the Uniform Rules of Court. This is the third time the RAF has had to approach the Court for the same relief. The RAF was successful on both previous occasions. On both previous occasions, the Court interdicted the first respondent, Ms Ruele, from further attempts at execution, pending a rescission application attacking the underlying default order. The rescission application has not been finalised. Despite two previous stay orders and interdicts, Ms Ruele's representatives have again instructed the Sheriff to attach the RAF's property. This has necessitated the RAF's urgent approach to this Court.
- [2] The Court was satisfied that the RAF had made out a claim in terms of Rule 45A and granted an order, with reasons to follow, on 9 July 2024. The order granted was:
- a) This application is enrolled as an urgent application in terms of rule 6(12) of the Uniform Rules of Court.
 - b) The counterclaim instituted on behalf of the first respondent is struck for want of urgency.
 - c) The points *in limine* raised by the First Respondent are dismissed.
 - d) It is declared order the order of this Court, handed down by Acting Judge Labuschagne on 21 July 2023, is an interlocutory order not having the effect of a final judgment, as per the provisions of Section 18(2) of the Superior Courts Act, 10 of 2013.
 - e) The order by Labuschagne AJ, has not been suspended by any application for leave to appeal, any appeal which may follow or any direct access application to the Constitutional Court.
 - f) The execution of the order of this Court dated 15 February 2021, as interdicted by Labuschagne AJ, remains interdicted until such time as the rescission application has been finalised including appeals.
 - g) The Second and Fourth Respondents are interdicted from executing against the Applicant's movable assets including its bank account.
 - h) The First Respondent's legal representatives are interdicted from instructing any sheriff of the court to execute on the order of 21 February 2021, pending finalisation of the rescission application appeal process.
 - i) In the event that the First Respondent's legal representatives instruct any sheriff of the court, countrywide, to execute the order of 21 February 2021 against the

Applicant's assets, the Applicant may approach this court on the same papers, duly supplemented, for an order for contempt of court.

j) The determination of costs is reserved and will be determined when the reasons of the Court for this order is provided.

[3] The Court reserved the issue of costs to be determined with these reasons. The RAF sought punitive costs *de bonis propriis* against Ms Ruele's legal representative, Mr S Malatji. The Court did not want to consider the issue of costs in the climate of urgent court, but rather wanted to do so after having re-read the papers and with careful thought. In what follows the Court provides reasons for the order referred to above as well as its determination of the issue of costs.

Facts

[4] The parties are involved in protracted litigation. Ms Ruele was injured in a motor vehicle accident. She claimed damages from the RAF and the RAF failed to appear at the hearing of the matter. This Court, on 15 February 2021, ordered the RAF to pay Ms Ruele an amount of R 5 368 308.00, by default.

[5] The RAF, with the order in hand, conducted calculations and concluded that Ms Ruele had overstated her loss of earnings. On the RAF's calculations a fair and reasonable compensation is half of what was ordered, being an amount of R 2 156 050. The RAF paid this amount, plus R 500 000 for general damages, to Ms Ruele and commenced rescission proceedings.

[6] However, the rescission proceedings were interrupted as Ms Ruele's previous representatives (the third respondents) issued a warrant for execution. The RAF launched a Rule 45A application to stay the execution of the warrant. On 6 October 2021 Davis J, granted the RAF a stay of the execution. Specifically, Davis J ordered that the execution of the default order is suspended, pending the finalisation of the rescission application. The terms are clear, until the rescission application is finalised, Ms Ruele cannot execute on the default order. This is the first stay order.

[7] The parties agreed to re-try the matter rather than to finalise the rescission application. The RAF requested a Rule 42 abandonment of the judgment and based on this agreement, the RAF did not proceed with the rescission application. Consequently, there was peace between the parties from November 2021 to June 2023. Ms Ruele's attorneys, during this period, failed to set down the re-trial.

[8] In June 2023, Ms Ruele’s attorneys, in conflict with the agreement, again instructed the Sheriff to execute on the default order. The sale in execution was scheduled for 25 July 2023. This necessitated the RAF having to approach the Court again, for a second time, to stay the execution of the default order. At this stage Ms Ruele’s current representative, Mr S Malatji (to be distinguished from the RAF’s attorneys Malatji Inc), had taken over the matter.

[9] On 21 July 2023 this Court per Labuschagne AJ granted an order staying the executing, pending the finalisation of the rescission application. The terms of this order is central. The Court ordered that the -

“operation and execution of the order dated 15 February 2021 and all writs of execution issued pursuant thereto are suspended pending finalisation of the application brought by the applicant to rescind the court order dated 15 February 2021”.

[10] This is the second stay order.

[11] Ms Ruele sought leave to appeal against the second stay order. Leave was refused with costs. In the judgment refusing leave to appeal, Labuschagne AJ specifically held that the second stay order was an interim order, not final in effect and therefore not appealable. The Court held in paragraph 7 of the judgment on leave to appeal that “appealability is central to the current application. I will deal with this issue primarily, as the order I granted is, as is explained below, not appealable”. The Court’s entire basis for refusing the leave to appeal is that the second stay order was interim in nature and therefore not appealable.

[12] Ms Ruele sought special leave to appeal against the second stay order from the Supreme Court of Appeal. The Supreme Court of Appeal, similarly, refused leave to appeal against the second stay order, and again with costs.

Interim nature of the two orders staying the execution of the default order

[13] At present, the order of Davis J and Labuschagne AJ which interdict the execution of the default order, stand. The clear language of both these orders are that they are to apply on an interim basis.

[14] If there was any doubt, in the application for leave to appeal, Labuschagne AJ set out the basis on which the relief granted was interim in nature. The Court considered the test as set out in *Zweni v Minister of Law and Order* and its endorsement by the

Constitutional Court in *UDM v Lebashe Investment Group* CCT39/21 [2022] ZACC 34. The reasoning of the Court on the appealability of the second stay order is central to the present dispute.

[15] I quote from the judgment on leave to appeal –

“[11] The suspension order that I granted in terms of Rule 45A was aimed at providing breathing space to the RAF while the application for rescission runs its course. If the rescission application fails, the suspension would fall away. If the rescission application is successful, then the suspension would have prevented execution pending the retrial, ie it would, in the interim, be an injustice. As the only practical effect of the suspension of the order is to suspend execution, which execution may proceed if the rescission fails or the trial delivers the same result, the order has interim effect only.

[12] As the suspension order does not finally decide the rights of parties, or even part of the issues, the order granted is interlocutory and not final in effect. It is the type of decision, even if leave to appeal were competent, where its interim operation would not be suspended in terms of section 18(2) of the Superior Courts Act, 10 of 2013.

[13] The suspension order granted has none of the qualities which would render it a judgment or order that is appealable in terms of the test in *Zweni*.

[14] Even applying the test in the *UDM* matter as set out in par [42] thereof, the suspension order that I have granted does not have final effect. Further, it does not dispose of any issue or portion of the issues in the rescission application or, if the rescission were to succeed, the retrial of the main action. The suspension order does not irreparably anticipate or preclude some of the relief which might be given at the hearing. The prompt resolution of the rights of the parties in this instance would be to bring the rescission application to finality. An appeal would not lead to a “*just and reasonably prompt resolution of the real issues between the parties*”. An appeal in this instance would merely decide whether the court order would be suspended or not. The issues remain, in my assessment, truly interlocutory, without being final in effect.

[15] As none of the tests for appealability are met, the order that I granted is not a decision that is appealable in the context of section 17 of the Superior Courts Act.”

[16] This Court has expressly and clearly indicated that the second stay order is not appealable, as it is interim in nature.

[17] In addition, the finding of Labuschagne AJ that the second stay order is interim in effect bears the stamp of approval of the Supreme Court of Appeal, which dismissed Ms Ruele’s application for leave to appeal against it with costs.

[18] Ms Ruele has, through her current representatives filed an application for leave to appeal against the second stay order in the Constitutional Court (case number CCT 328-2023). In addition, in January 2024 the RAF’s rescission application was

dismissed, as well as its application for leave to appeal. The RAF indicated it would file an application for special leave to the Supreme Court of Appeal before 5 July 2024 – in line with the time periods of the Supreme Court of Appeal.

- [19] After the rescission application was dismissed, Mr S Malatji instructed the Sheriff to execute on the default order. Mr S Malatji's position is that the application for leave to appeal to the Constitutional Court suspends the operation of the two stay orders. It is in response to this latest attempt by Mr S Malatji to execute on the default order, that the RAF has had to launch its third application to stay the execution of the default order.

Rule 45A

- [20] The RAF relies on Rule 45A of the Uniform Rules of Court. The Court has a broad discretion in this regard and is empowered to grant a stay where real and substantial justice requires such a stay. The Court notes that Rule 45A's purpose is to stay proceedings pending an attack on the underlying causa. The rescission application is such an attack and it has not been finalised.
- [21] This Court has twice before held that the RAF will suffer real and substantial injustice and stayed the execution. This position is unaltered.
- [22] The Court notes that Ms Ruele is not without relief, as the RAF has paid out R 3 million. Ms Ruele has not pleaded any facts which shows a prejudice to her if the stay is granted.
- [23] The RAF has however indicated that it will suffer serious prejudice. The RAF contends that its assets to be sold in execution, will not meet the judgment debt. The true aim of Mr S Malatji's instruction to the Sheriff is to bend the RAF to concede the payment. This, the RAF submits, renders the ability to obtain any substantial relief if it is successful on review, unlikely. Its prejudice, cannot be remedied later down the line.
- [24] In these circumstances, this Court, echoing the findings of Davis J and Labuschagne AJ, finds that it is in the interest of justice to stay the execution of the default order.
- [25] The RAF has however sought further relief from the Court, being a declarator that the second stay order is interim in nature.

Declaratory relief

- [26] The RAF explains its motivation for seeking this relief. It pleads that to obtain an order of contempt of court against Ms Ruele for continuing to execute despite the Labuschagne AJ order will not be useful to the RAF. The RAF contends that Ms Ruele is most probably “in the dark about the strategy followed by her representatives”. The RAF pleads that “it is not conceivable that Ms Ruelle would instruct her representatives to ignore a court order. Ms Ruele is dependent on the advice of her legal representatives, who, are the authors of this vexatious strategy”.
- [27] The RAF is therefore “limited in its options to enforce the order by Labuschagne AJ”. Therefore the RAF seeks relief that confirms that the Labuschagne AJ order will remain in force until the proceedings have been finalised, which includes the RAF’s right to appeal. This contends the RAF will be a “clear order that will provide the sheriffs with the necessary guidance to withstand the onslaught of Ms Ruele’s legal representatives”.
- [28] The Court notes that the reasons of Labuschagne AJ on the interim nature of the order is clear. In fact, the text of the order itself indicates that Ms Ruele is interdicted from executing until the rescission application has been finalised. The purpose of the order is clear: to allow the RAF to exhaust its remedies regarding the default order before the execution takes place. The purpose of the order is undermined if Ms Ruele can execute the order in the interim.
- [29] Lastly, the Court notes the purpose of section 18(2) of the Superior Courts Act. Section 18(2) provides that unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal. The import of the section is clear and finds application in this matter.
- [30] The need for a declarator arises in the specific context of this case. Absent such relief, the RAF is locked in a constant struggle to bring urgent stay applications. The Court is empowered, amongst others, by section 172 of the Constitution to grant appropriate relief. Such relief, in these circumstances requires clarity and certainty and prevent a fourth repeat of the present proceedings.

Costs

- [31] The RAF has requested the Court to grant costs *de bonis propriis* against Mr S Malatji. The RAF presents the Court with case law in support of its request for costs *de bonis propriis*. Specifically, it relies on *SA Liquours Traders Association v Chairperson, Gauteng Liquor Board*¹ where it was held that an order for costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. The RAF submits that an officer of court and owes a court an appropriate level of professionalism and courtesy.
- [32] The Court notes that it is only in exceptional circumstances that such an order should be granted. It also weighs with the court that Mr S Malatji appeared before Court as counsel, presumably with a trust account. Costs *de bonis propriis* is not an order that should be lightly granted and one which the Court did not want to consider in the climate of urgent court and its inherent pressures. It not only deprives the representative of their fees, but also requires the representative to foot the opponent's bill. It has, and must, weigh heavily on a Court, before it is granted.
- [33] The Court considers the RAF's request for these costs with care. it is trite that costs *de bonis propriis* should only be ordered in exceptional circumstances.² There must have been conduct which is egregious on the part of the particular attorney or counsel to attract such an order of costs. The assessment of the gravity of the conduct is objective and lies at the discretion of the court.³
- [34] The Constitutional Court in *SA Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others*,⁴ held that an order for costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. The RAF relies on specific acts to ground the request for costs *de bonis propriis*.

¹ *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* (CCT57/05) [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) (2 June 2006)

² *Grobbelaar v Grobbelaar* [1959 \(4\) SA 719](#) (A) at 725

³ *Public Protector v South African Reserve Bank* [\[2019\] ZACC 29](#); [2019 \(9\) BCLR 1113](#) (CC); [2019 \(6\) SA 253](#) (CC)

⁴ [\[2006\] ZACC 7](#); [2009 \(1\) SA 565](#) (CC); [2006 \(8\) BCLR 901](#) (CC) para 54

- [35] First, the RAF submits that Mr S Malatji's has repeatedly attempted to execute on the default order, in clear breach of the orders of Davis J and Labuschagne AJ. The RAF submits that Mr S Malatji's intentional disregard for the order of Labuschagne AJ and refusing to stop when informed that the RAF intends applying to the SCA, amounts to reason to grant a cost order on a *de bonis propriis* scale.
- [36] Second, Mr S Malatji is abusing the court process. The RAF refers to correspondence it received from Mr S Malatji after argument before Labuschagne AJ but before judgment was handed down. Mr S Malatji wrote that the sale in execution will take place on 25 July 2023, regardless of whether or not the Court granted the order. Mr S Malatji further stated that he will "just take appeal steps and execute". Later the same day, after judgment was handed down, Malatji S wrote that the judgment of Labuschagne AJ will be appealed and the Sheriff will continue with the sale on 25 July 2023". Mr S Malatji has indicated, expressly, that he will, regardless of what the court orders seek to execute on the default order. Mr S Malatji has been true to his word in this regard.
- [37] The RAF contends that from this it is clear that Mr S Malatji had no intention of advising his client to abide by the order if it was to be in favour of the RAF. Mr S Malatji was going to instruct the Sheriff to proceed with the execution despite any order to stay the execution, and he would do so under the guise of filing the one after the other appeals – which is indeed what he has done. The RAF pleads that Mr S Malatji "simply ignores the order interdicting the execution and relentlessly instructs" the Sheriffs to execute.
- [38] Third, the RAF contends that a contempt of court order against Ms Ruele or a further costs order against her would not be appropriate. As set out above, the RAF contends that Ms Ruele is acting on the advice of her legal representative. The Court notes that Labuschagne AJ granted costs against Ms Ruele and her representatives in the Rule 45A application. Similarly, costs were granted against Ms Ruele by Labuschagne AJ in the application for leave to appeal. The Supreme Court of Appeal has also dismissed Ms Ruele's appeal with costs. The granting of costs have not deterred Ms Ruele's representatives.
- [39] Fourth, the RAF also points to the manner in which Mr S Malatji has engaged with the Sheriff in this matter. The Court has been provided with email after email to various

different Sheriffs seeking to execute on the order. If a Sheriff in one area fails to execute, Mr S Malatji instructs the Sheriff of another area to execute. The RAF points to Mr S Malatji's attempts to convince, and pressure, one after the other Sheriff, to execute on the default order.

[40] Fifth, the RAF refers the Court to its clear and repeated engagements with Mr S Malatji. The RAF's attorneys repeated attempts to engage Mr S Malatji is provided to the Court. The communication is clear, consistent and repeated. An example of this is an email from the RAF's attorneys: "The order by Labuschagne AJ is not appealable, it is in interim order, not a final order and thus not appealable. The plaintiff cannot simply issue irregular proceedings which is bad in law and expect the RAF to abide by irregular proceedings". Despite this, Mr S Malatji persists in seeking to execute in conflict with an interdict.

[41] Sixth, the RAF referred to the absence of professionalism and courtesy in Mr S Malatji's handling of Ms Ruele's matter. The RAF has placed letters and emails from Mr S Malatji before the Court. The Court notes the language employed by Mr S Malatji in his engagements with the RAF's attorneys. Mr S Malatji repeatedly accused attorneys for the RAF for having faked court orders and calling them "delinquent". The content of this has to be tested against a standard of professionalism.

[42] Seventh, the RAF points to the ongoing litigation in this matter. This is the third time the RAF has had to approach the Court for urgent relief to stay the execution. The Court considers that Mr S Malatji has instituted the following additional proceedings: a rule 35(12) notice in the Constitutional Court and an application to compel under Rule 39 of the Constitutional Court Rules. In addition, two further applications have been launched before the Constitutional Court, one under case number CCT 76/2024 and another filed on 10 June 2024 with no case number allocated.

[43] Eighth, the RAF submitted that Mr S Malatji has shown negligence in the manner he has represented Ms Ruele. The RAF said, pointedly, Mr S Malatji should be advising his client differently. They refer to the clear provisions of section 18 which indicate that an interim order is not appealable. They refer to the clear wording of the Labuschagne order which interdicted the execution of the default order until the rescission application is finalised.

[44] In relation to notice, the RAF submits that the Notice of Motion and the prayer for costs *de bonis propriis* was served on Malatji S Legal Practitioners and it is submitted that same is sufficient notice to request such an order.⁵

[45] The Court has considered the issue of notice. In the case of *Chithi and others In Re Luhlwini Mchunu Community v Hancock and Others*⁶ the Supreme Court of Appeal ruled that an order costs *de bonis propriis*, can only be made against a person once such a person at least has had the opportunity to address the court regarding such a possible costs order. The Court also must be satisfied that Mr Malatji had an opportunity to state his case. The Supreme Court of Appeal has overturned an order granting costs *de bonis propriis* as the representative was not afforded such an opportunity. The finding of the Court is:

“Such an order may not be made against a party or person that had not been afforded a proper opportunity to respond to the allegations in question and to state his or her case in respect of the envisaged costs order. ... The court a quo did not call upon Smit Sewgoolam to explain itself. In the circumstances, it was denied an opportunity to state its case. In the result, its appeal must succeed with costs.”

[46] The Court considers Mr S Malatji’s response to the RAF’s notice that it intends to seek personal costs against him. In response to this notice of a possible costs *de bonis propriis* being sought, Mr S Malatji filed a counter-claim in this matter. The counter-claim was uploaded at 09:15 the morning of the hearing. The relief sought was for the joinder of the Judicial Service Commission, two directors of Malatji Inc (the RAF’s attorneys) and the Regional Manager of the RAF.

[47] The counter-claim then also seeks to declare the Directors and the Regional Manager as “vexatious litigants as defined in the Vexatious Proceedings Act 3 of 1956 since all Respondents are interdicted in the Constitutional Court not to institute any legal proceedings against the 1st Respondent any High Court, Supreme Court of Appeal and/or lower court in the Republic of South Africa” and that they be guilty of contempt of court “for 24 months direct imprisonment in jail”. The rest of the relief sought includes:

⁵ Hlumisa Technologies (Pty) Ltd and another v Voight NO and others [2020] JOL 49141 (ECG) 8 2009 (1) SA 565 (CC) at para 54

⁶ [2021] JOL 51092 (SCA)

“8. The directors and regional manager be deemed to have intentionally and unlawfully insulted and undermined the judicial processes of the Constitutional Court by instituting the invalid legal proceedings before Pretoria High Court;

9. The respondents – inclusive of the JSC - be declared delinquent prescribed officer of Road Accident Fund and others be declared delinquent prescribed officers of the court

10. That the legal proceedings instituted by the Road Accident Fund and Malatji & Co Attorneys be declared unlawful, invalid and be referred to the Constitutional Court.”

[48] In essence, in response to the RAF giving Mr S Malatji notice of the possibility of a personal cost order being sought against him, on the morning of the hearing of the Rule 45A application, Mr S Malatji filed a counterclaim seeking to join the attorneys of the RAF in their personal capacity, as well as the RAF’s regional manager, have them declared vexatious litigants and have them imprisoned for contempt of court for two years. The Court struck the counter-claim from the roll. However, it is Mr Malatji’s response to the notice which weighs with the Court.

[49] In this case, the RAF gave notice of its intention to seek personal costs against Mr S Malatji in the Notice of Motion, heads of argument and two practice notes. Mr S Malatji was given notice and did not respond to any of these opportunities to indicate why no costs should be granted.

[50] The Court also engaged with Mr S Malatji, at the hearing, on whether he had any submissions to be made in relation to the issue of notice and whether such costs were appropriate. Despite repeated invitations from the Court, Mr S Malatji claimed no prejudice and did not object to the issue of notice. Mr S Malatji also did not object to the notice he received of RAF’s intention to seek costs *de bonis propriis*.

[51] The RAF has had to approach this Court for a third time. The RAF is being forced to re-litigate the same issue as a result of Ms Ruele’s refusal to adhere to the existing order of Labuschagne AJ and Davis J. Despite the clarity of the orders of Labuschagne AJ and Davis J, and the reasons provided in the application for leave to appeal, Ms Ruele’s legal representatives persist in their endeavours to execute on the order. The RAF is entitled to its costs. It does not appear fair to place these costs at Ms Ruele’s feet. The basis for the costs is the repeatedly abusive and negligent manner in which Ms Ruele’s case has been dealt with.

[52] In these circumstances the Court finds that the Mr S Malatji is liable to pay costs *de bonis propriis*. The costs can only be charged from the moment Mr S Malatji received notice of the order being sought against him, which was contained in the notice of motion. Mr S Malatji is liable for the costs incurred by the RAF subsequent to the filing of the Notice of Motion in this matter on Scale A.

Urgency

[53] The RAF submitted that should this above Honourable Court not grant the relief sought then the removal and sale of the RAF assets will threaten the RAF's operations and ability to make payment to other claimants and to fulfil its duty as a social security provider. The Court notes that both Davis J and Labuschagne AJ have already determined that the application in exactly the same facts is urgent, that there is a reasonable apprehension of harm if the order is not granted and that the balance of convenience favours stopping execution.

[54] The RAF submitted that once execution is completed, the process cannot be undone, and it would mean the possibility of an illegitimate payment in circumstances where there is *prima facie* evidence of overcompensation and an unreasonable award considering the injuries sustained. There was an auction scheduled for the 21st of June 2024 which would have resulted in the sale of the Applicant's moveable assets. The Sheriff in question held off from proceeding as a result of the launching of this urgent application.

[55] In this context, the Court accepted that the matter was urgent.

Conclusion

[56] The Court replaces paragraph (j) of its order of 9 July 2024 which reserved the consideration of costs with an order that grants costs *de bonis propriis* against Mr S Malatji on scale A from the date after Mr S Malatji received the notice of motion.



I de Vos
Acting Judge of the High Court

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

Counsel for the applicant: C Rip
Instructed by: Malatji Inc

Representative for the respondent: S Malatji (Counsel with trust account)

Date of the hearing: 25 June 2024
Date of the order: 9 July 2024
Date of judgment: 26 July 2024