

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 15196/2021

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

31 October 2024

Judge Dippenaar

In the matter between:

MALAS (PTY) LTD

APPLICANT

and

FUNDISWA ETHEL MOSSIE

FIRST RESPONDENT

THE SHERIFF OF PRETORIA SOUTH WEST

SECOND RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and being uploaded on the electronic platform. The date and time for hand-down is deemed to be 14h00 on the 31st of October 2024.

DIPPENAAR J:

[1] The applicant, Malas (Pty) Ltd launched an urgent application on 22 October 2024, seeking the stay of a default judgment order granted on 11 October 2022 and the execution of a warrant of execution issued by the first respondent, Ms Mossie on 18 October 2024, pending the determination of a rescission application launched by the applicant on 18 October 2024. In terms of the default judgment order ("the order"), it was declared that the applicant is liable for the proven or agreed damages suffered by Ms Mossie under the *actio de pauperie*, resulting from a dog bite incident which occurred on 6 January 2019. The respondent was directed to pay the costs. The writ of execution pertains to the taxed costs relating to the order.

[2] The application was opposed by the first respondent, the plaintiff in the action proceedings. The second respondent, the Sheriff Pretoria South West, did not participate in the proceedings. Where convenient, Ms Mossie will be referred to as 'the respondent'.

[3] In sum, the applicant's case is that it did not oppose the action proceedings as it was agreed that the security company which provided it with guarding services, NPC Guarding Services, the first defendant in the action proceedings, would defend the action on its behalf. The applicant became aware of the judgment on 3 October 2024 when it received a letter from the respondent's attorneys demanding payment of the taxed bill of costs, which was attached to the letter. It appointed an attorney who on 10 October 2024 sought the respondent's consent to rescission of the judgment. It was refused. The applicant launched a rescission application to set aside the default judgment on 18

October 2024. Later that day, a writ of execution was issued by the respondent for payment of the costs order. Various items of correspondence were exchanged between the attorneys of the respective parties in terms of which inter alia, the applicant tendered to pay the amount of the taxed bill of costs, into his trust account, pending the rescission. The tender was rejected. Thereafter, the applicant tendered to pay the amount in trust with the Sheriff. That tender was also rejected and the respondent demanded payment of the writ within 5 days. This triggered the launching of the present stay application under rule 45A.

[4] The respondent challenged the urgency of the application on the basis that it is self-created. Reliance was placed on the Sheriff's returns of service for the summons, application for default judgment, notice of taxation and the notice of set down of the taxation, served on 27 June 2024. It was not disputed that those documents were served on the applicant. The applicant's case was that the documents were not brought to the attention of the applicant's management. It was common cause that the applicant did not defend the action, resulting in a default judgment order being granted.

[5] I am not persuaded by the argument. The urgency of the application was triggered by the respondent's refusal to accept the security tendered by the applicant in paying the amount of the taxed bill of costs in trust pending the determination of the rescission application, which forced the applicant to take action. The preceding returns of service may well be relevant to the success of the rescission application, where the parties' respective versions will be considered. Given the conflicting versions on that issue, it is not supportive of the conclusion that any urgency in the matter was self-created. Significantly, the respondent did not contend that the default judgment order itself was served.

[6] Considering all the facts, I am persuaded that the applicant has set out sufficient facts to illustrate that it would not obtain substantial redress at a hearing in due course

and that it has established prejudice if relief is not granted¹. The applicants have set out their grounds of urgency with sufficient particularity to comply with r 612(b). I am further persuaded that the applicant has illustrated that it will not obtain sufficient redress at a hearing in due course², given the stance adopted by the respondent. The stance adopted by the respondent in insisting to proceed with the writ of execution on 21 October 2024 and demanding payment within five days, was the effective trigger and cause of the present application.

[7] I turn to consider the merits. The respondent's defence on the merits was that there is no prospects of success in the rescission application. It was further argued that the applicant could avert any prejudice by simply paying the valid bill of costs.

[8] The relevant principles applicable to a stay of execution are enunciated in *Gois*³ and reiterated in *Ikamva*⁴ with reference to the relevant authorities. It is not necessary to repeat all of them, save where relevant in the present factual context. As a starting point, execution must generally speaking be allowed. Courts however enjoy constitutionally supported inherent jurisdiction to control their own processes taking into account the interests of justice, affording a discretion which falls to be exercised judicially in light of the particular facts.

[9] A distinction must be drawn between cases where an applicant is asserting a right and cases where it seeks to avert injustice. As held in *Gois*⁵ and reiterated in *Ikamva*⁶, a court will be guided by considering the factors usually applicable to interim interdicts unless the applicant seeks to avert injustice. In the latter case, courts will generally grant a stay of execution if the applicant demonstrates that substantial justice requires it⁷ or

¹ East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd (11/33767) [2011] ZAGPJHC 196 (23 September 2011), [2011] JDR 1832 (GSJ)

² Ibid paras [6]-[7]

³ *Gois t/a Shakespeare Pub v Van Zyl* 2011 (1) SA 148 (LC)

⁴ MEC, Department of Public Works v *Ikamva Architects* 2022 (6) SA 275 (ECB) paras [81]-[90] and the authorities cited therein.

⁵ *Gois t/a Shakespeare Pub v Van Zyl* 2011 (1) SA 148 (LC)

⁶ Par [84]

⁷ *Stoffberg NO and Another v Capital Harvest (Pty) Ltd* [2021] ZAWCHC 37 at para [26]

where an injustice⁸ will result in if execution proceeds⁹. As a general principle, absent any flaw in the judgment or the cause of action, a court has no authority under s 45A to suspend execution¹⁰. An important factor to consider is real and substantial prejudice. It is well established that courts will generally grant a stay of execution where the underlying causa of a judgment debt is being disputed.

[10] As held in *Gois*:

"(a) The court will be guided by considering the factors usually applicable to interim interdicts, except where an 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.

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

[11] It is thus not necessary for this court to effectively prejudge the rescission application or to consider the applicant's prospects of success in the main action. The issue is simply whether the causa is in dispute. From the papers it is clear that significant disputes exist between the parties pertaining thereto.

[12] The nub of the applicant's argument is that if it is successful in its rescission application and ultimately in the trial, the entire causa of the writ will have fallen away and it would suffer irreparable prejudice were it forced to pay the writ before the rescission application is determined.

⁸ *Strime v Strime* 1983 (4) SA 850 (C) 852A;

⁹ Para [82]

¹⁰ *Firm Mortgage Solutions (Pty) Ltd v Absa Bank Ltd and Another* 2014 (1) SA 168 (WCC)

[13] The respondent on the other hand argued that real injustice would arise from the granting of a stay as it would delay the determination of the respondent's claim and as the quantification of the claim had been enrolled for hearing during November 2024. It was argued that the applicant lacks rescission prospects given the sheriff's returns of service and that it has no bona fide defence to the respondent's claim. It was further argued that the applicant has an alternative remedy, being the remedy envisaged in r45(5).

[14] I am not persuaded that any of these arguments have merit. A delay of the respondent's claim is inevitable, given the pending rescission application and it must be clear that the proceedings enrolled for November 2024 cannot proceed. At the hearing, the respondent undertook to remove the matter from the roll. If the rescission application is successful, further delay is inevitable. The provisions of s 45(5) do not avail the respondent as it is not applicable where the cause of the writ is disputed, as is the case here.

[15] On a conspectus of the facts I am persuaded that real and substantial justice requires that a stay be granted pending the determination of the rescission application and that injustice would otherwise result if relief is not granted.

[16] For the reasons set out hereunder, I am further satisfied that the applicant has established that: (i) it has a prima facie right, although open to some doubt; (ii) there has been an injury actually committed or reasonably apprehended; (iii) the balance of convenience favours the applicant; and (iv) there is no other satisfactory remedy available to the applicant.

[17] Regarding a prima facie right, I am mindful that the issues between the parties will finally be determined by the court which hears the rescission the application. It is not appropriate to prejudge them in the present proceedings. I intend to adopt the approach

of Malan J in *Johannesburg Municipal Pension Fund* ¹¹ in considering whether the applicant has illustrated a prima facie right, although open to some doubt. It is only necessary for the applicant to illustrate a prospect of success to meet that threshold.

[18] Considering the facts and the issues raised on the papers, I am persuaded that the applicant has a prospect of success and a serious issue to be tried in the rescission application. It cannot be concluded that issues raised by the applicant are frivolous or vexatious or that it has no prospect of success in obtaining rescission.

[19] I am further persuaded that there is a risk of harm and that the balance of convenience¹² favors the applicant. The prejudice to the respondent caused by the delays is unfortunate, but inevitable. On the other hand, were rescission to be granted, the entire causa for the writ of execution would fall away and the prejudice to the applicant is self-evident. The argument advanced by the respondent that the applicant has an alternative remedy at its disposal lacks merit for the reasons already advanced.

[20] I conclude that the applicant has established the necessary requirements to stay the execution. I turn to the issue of costs. The applicant argues that costs should follow the result. The respondent argues that each party should be directed to pay its own costs, even if she is unsuccessful.

[21] In my view there are no circumstances which justify a deviation from the normal principle that costs follow the result. The stance adopted by the respondent was in the circumstances unreasonable, given the tenders made by the applicant. The respondent further elected to oppose the application even after costs were only sought if the application was opposed. I am not however persuaded that it is in the interests of justice to grant a punitive costs order, as sought by the applicant.

¹¹ *Johannesburg Municipal Pension Fund and Others v City of Johannesburg* 2005 (6) SA 273 (W) at 281-282

¹² *Olympic Passenger Services v Ramlagan* 1957 (2) SA 382 (D).

[22] I grant the following order:

[1] The application is heard on an urgent basis and the applicant's failure to comply with the ordinary time periods, service and enrolment is condoned under rule 6(12);

[2] The execution of the default judgment order granted by Justice Kumalo on 11 October 2022 under case number 15196/2021 and the warrant of execution dated 18 October 2024 are stayed pending the finalisation of the rescission application launched on 18 October 2024 under the above case number;

[3] The first respondent is directed to pay the costs of the application.


EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

HEARING

DATE OF HEARING : 29 October 2024

DATE OF JUDGMENT : 31 October 2024

APPEARANCES

APPLICANT'S COUNSEL : Adv. J Mouton

APPLICANT'S ATTORNEYS : Sharief & Associates

FIRST RESPONDENT'S COUNSEL : Adv. E Muller

FIRST RESPONDENT'S ATTORNEYS : T Matu Attorneys