



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 004922/2024

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	21/01/2025
.....	
SIGNATURE	DATE

In the matter between:

MELANY JOANITA VILJOEN

First Applicant

PETRUS JACOBUS VILJOEN

Second Applicant

and

SHERIFF PRETORIA SOUTH EAST

First Respondent

TAMARA CHUMISA MDUZULWANA

Second Respondent

LINDA NKUNA ATTORNEYS

Third Respondent

JUDGMENT

LABUSCHAGNE J

[1] The applicants approached the urgent court on Friday, 17 January 2024 for an order in the following terms:

- “2. The warrant of execution issued under the abovementioned case number on 25 September 2024 be stayed pending the adjudication of the rescission application in respect of the order granted under the abovementioned case number in favour of the second respondent on 23 August 2024 and as already uploaded to CaseLines.*
- 3. That the respondents be interdicted from taking any further steps in the execution of the order granted under the abovementioned case number on 23 August 2024 pending the finalisation of the rescission application, including a sale in execution.*
- 4. That this order shall lapse upon final judgment being given in respect of the rescission application.*
- 5. The applicants are to obtain a hearing date on the unopposed roll in respect of the rescission application within four weeks from the date of this order, unless opposing papers are filed, in which case the applicants are to ensure that the Uniform Rules and the Directives of this court in respect of the opposed motions and enrolment thereof are complied with.*
- 6. No order as to costs except in the event of opposition.”*

[2] The warrant of execution referred in prayer 2 of the notice of motion flows from a judgment granted in favour of the second respondent.

[3] Under the case number of the present matter the second respondent, as the applicant, brought proceedings against Tammy Taylor Nails Franchising Number 45 (Pty) Ltd and the first and second applicants, who were second and third respondents in those proceedings. For purposes of clarity, I will refer to the applicants as Mr and Ms Viljoen and to the second respondent as Ms Mduzulwana.

[4] Ms Mduzulwana obtained an order in her favour before Nharmuravate AJ on 23 August 2024. The order reads:

- “1. The franchise agreement concluded between the applicant and the first respondent is declared void and unenforceable on the grounds that it does not comply with the provisions of the Consumer Protection Act 68 of 2008, read with regulations 2 and 3 of the Consumer Protection Act Regulations, 2011.*
- 2. The second and third respondents (the current applicants – my insertion) are declared to have carried on the business of the first respondent in a manner prohibited by section 22(1) of the Companies Act, 71 of 2008.*
- 3. The second and third respondents are declared liable jointly and severally with the first respondent in terms of section 218, read with sections 76(3) and 77 of the Companies Act, 71 of 2008 for the repayment of R215 000.00 to the applicant (Ms Mduzulwana).*
- 4. The first, second and third respondents must pay the amount of R2 145 000.00 to the applicant within seven days from date of this court’s*

order, inclusive of interest thereon a tempore morae calculated from the date of demand to date of payment, jointly and severally, the one paying the other to be absolved.

5. *The Registrar of this court is to forward a copy of this court's order and a copy of all papers filed in this application to the National Prosecuting Authority of South Africa for investigation and possible prosecution per sections 214 and 216 of the Companies Act, 71 of 2008.*
6. *The first, second and third respondents are to pay the costs of this application on a party and party scale, including the costs of counsel on scale C, jointly and severally."*

[5] On 29 October 2024 the Sheriff (the first respondent) executed a warrant of execution in respect of the aforesaid judgment. The applicants, Mr and Ms Viljoen contend that this was the first occasion on which they heard about the judgment that had been granted against them. They contend that they were never notified by their former attorney of the hearing date of this matter on 23 August 2024. After the attachment on 29 October 2024, the goods attached were removed on 12 November 2024.

[6] Ms Mduzulwana contends that the applicants were aware of the hearing date on 23 August 2024. They were served with a notice of set down on 8 April 2024 enrolling the matter for 23 August 2024. Their attorney then served a notice of withdrawal as attorney of record on 14 May 2024. The former attorneys were however reappointed and filed a notice of appointment of attorneys of record on 15 July 2024. Despite their attorneys being fully aware

of the date of the hearing, Mr and Ms Viljoen failed to file opposing papers and the matter proceeded to judgment on 23 August 2024 on an unopposed basis.

[7] Mr and Ms Viljoen launched a rescission application on 30 October 2024 under the same case number. They concede that this application is deficient and requires supplementing. So, for example, the founding affidavit does not address the substantive requirements for a rescission application. The only explanation provided relates to the reasons for their default . The explanation offered reads as follows:

“4.3 During or about 22 May 2024 the file held by my current attorney of record was transferred to AH Stander & Agenbag Attorneys as is evident from the collection confirmation of the file, which I attach hereto as annexure “C”.

4.4 The already prepared filed notice, annexure “A” hereto, accompanied the said file.

4.5 Then, after an impasse was resolved with my current attorneys, the files, which included the files on which this matter was returned to my current attorneys of record.

4.6 It was during this period that, unbeknown to us, default judgment was obtained.”

- [8] As stated above, the set down had been duly served on Mr and Ms Viljoen's attorneys prior to the attorneys' withdrawal. The attorneys were in any event back on record when the matter proceeded on 23 August 2024.
- [9] The application for rescission does not deal with the merits of the defence which Mr and Ms Viljoen contend they would have advanced. It relates merely to an explanation for their non-attendance of the trial and the period that passed thereafter until the rescission application was launched.
- [10] After the first attachment referred to above, Mr and Ms Viljoen approached the urgent court on 13 November 2024 seeking an interdict suspending any further steps taken in execution by the respondents under case number 04922/2024. They also applied for the return of an inventory of listed items which had been attached and removed on 2 November 2024. The interdicts were sought to operate as interim interdicts pending finalisation of the application for rescission of judgment. It is during those proceedings that a Ms Millar filed an interpleader affidavit contending that all the attached assets were her property. Ms Millar contended that the goods belong to her and that Mr and Ms Viljoen were utilising the property with her consent.
- [11] The application was heard by Basson J on 15 November 2024 and the matter was struck from the roll for want of urgency. Mr and Ms Viljoen were directed to pay the costs jointly and severally on a punitive scale.
- [12] The application for rescission is admittedly deficient in a number of respects. It lacks valid reasons for the default of Mr and Ms Viljoen, taking into account that their attorney of record who had received the notice of set down was back

on record by the time the matter was being heard. The application for rescission does not contain a *prima facie* defence to the claim and does not purport to demonstrate prospects of success. These deficiencies are acknowledged in the founding papers of Mr and Ms Viljoen. During the hearing before Basson J in November 2024 the applicants indicated that they intended filing further affidavits to address the deficiencies in the application for rescission. The applicants have to date failed to supplement the rescission application.

- [13] In the proceedings before Basson J, Ms Millar states in her interpleader affidavit in the November 2024 proceedings that:

“Each and every asset irrespective of its value, currently referenced in the writ belongs to myself and to no other party whatsoever.”

- [14] After the matter was struck from the roll and on 6 December 2024 an advertisement was placed in a newspaper advertising the auction of the attached goods. The attached goods listed in the newspaper advert are the same assets which form the subject of the first urgent application and are the same assets which fall to be sold at an auction scheduled for 21 January 2025.

- [15] On 28 November 2024 the attorneys for Ms Mduzulwana wrote to the former attorneys of Mr and Ms Viljoen. In that letter the following is stated:

“Needless to mention that the so much touted rescission has no prospects of success, same as the application for stay, our client sees these too as a way by your clients to pass time in hope of a miracle of soughs. Our instructions

are to decline your clients' proposal. Any urgent application will be vigorously opposed.

The sale will be advertised soon."

- [16] The sale that was being referred to was also referenced in a letter of Mr and Ms Viljoen's attorneys dated 25 November 2024. In that letter the attorneys state in the opening paragraph:

"We refer to the above matter and were now informed by our clients that they were informed by yourselves that an auction is scheduled for 28 January 2025."

- [17] During November 2024 the then attorneys of Mr and Ms Viljoen tried to negotiate the posting of security in respect of the goods under attachment. They offered diamonds which were stated to have a value in excess of R2,7 million, being an amount in excess of the judgment debt granted against them. The second respondent contends that she did not accept the security posted and left it for the first respondent, the Sheriff, to consider.

- [18] The applicants contend that the fact that they had provided security in the form of the aforesaid diamonds resulted in them believing that the sale in execution would not proceed.

- [19] The applicants' attorney up to 12 December was Mr Muller. His mandate was terminated on 12 December 2024 and new attorneys were appointed to act on behalf of Mr and Ms Viljoen.

- [20] On 7 January 2025, while the Viljoens were in the United States, the Sheriff telephonically informed Mr Viljoen that the value of the jewellery when sold on auction only amounted to R1,3 million and therefore he would attend at their premises on 14 January 2025 to remove movable assets to satisfy the judgment debt. On 8 January 2025 the current attorneys for Mr and Ms Viljoen wrote a letter to the Sheriff, contending that the security provided had been to the Sheriff's satisfaction and that the sale in execution would not proceed until such time that the rescission application was finally adjudicated. The Sheriff did not agree that the security provided would be adequate and he indicated that if the rescission application was not brought by 14 December 2024, he would proceed with the sale in execution.
- [21] The Viljoens returned to South Africa on 9 January 2025, and they consulted with their legal representatives on 10 January 2025.
- [22] The first respondent indicated that he would remove their assets on 14 January 2025 in order to prepare for the sale in execution that was to occur on 21 January 2025. They contend that this was the first time they heard that the date of the sale was 21 January 2025.
- [23] Although being under the impression that the rescission application was set down for 15 January 2025, the applicants advised that it is not on CaseLines and the matter is not enrolled for that date.
- [24] Mr and Ms Viljoen blame their previous legal representatives for not supplementing the rescission application and contend that they were negligent in that regard.

- [25] The opposition to the application by the Viljoens focuses on three core contentions. First, that urgency has not been established. Second, lis pendens- as the merits of the November urgent application are still pending in this division. Third, that Ms Millar is an essential party to these proceedings and should have been joined.
- [26] Ms Mduzulwana contends that the proverbial clock started ticking on the issue of urgency in November. In particular, reference is made to the aforesaid letter of 28 November 2024 in which the attorneys for Ms Mduzulwana advised the applicants' attorneys to bring their urgent application, and to advise that it would be opposed.
- [27] It is apparent from the timeline that the applicants and more particularly their legal representatives were aware in November of an auction scheduled for 28 January 2025. As they were advised on 28 November 2024 that they needed to bring an urgent application to avert the auction, the issue of urgency looms large.
- [28] In addition to the aforesaid considerations, it bears noting that the notice of motion in the current application envisages a hearing on 14 January 2025. However, the matter was not enrolled on the urgent roll on that date, and it was set down for hearing unilaterally on Friday, 17 January 2025. This is a deviation from the normal set down provisions in the directives of this division. A specific case needs to be made out in the founding papers if the "Thursday for Tuesday" rule is not complied with and particularly where a matter is heard

at a time selected by the applicants during the course of an urgent week, i.e. a time not allocated by the Judge administering the urgent roll.

[29] The lack of urgency is self-evident. The applicants have therefore been dilatory in pursuing their remedy and urgency is self-created. Further, no case has been made out for condonation for non-compliance with the practice directives regarding the time and set down of an application other than at times determined by the Judge administering the urgent court roll. The matter could be struck on this ground alone.

[30] However, the second defence raised by the respondents, namely *lis pendens* also gains traction. The goods to be sold at auction on 21 January 2025 are the same goods which were the subject matter of the first urgent court hearing in November 2024 and the list of assets published on 6 December 2024. In respect of those assets, Ms Millar claimed to be the owner. However, she has not been cited in these proceedings, despite her very clear and direct interest in the relief being sought.

[31] Counsel for the applicants contended that the goods that were attached in October and November 2024 were released back to the applicants and it is contended that the facts have therefore changed since November 2024. It is contended that the current application does not relate to any assets in which Ms Millar asserts any rights. This proposition cannot be accepted. When goods are attached by the Sheriff and are removed, a judicial pledge is established over such assets. It falls within the powers of the Sheriff to determine whether goods that have been attached and removed may be

returned to the applicants. For this he sought and obtained security. If he decides that such goods may be returned, they remain under attachment. For matters of practicality, they are however returned to the applicants who then holds possession of those assets on behalf of the Sheriff. A return of goods under attachment in such circumstances does not constitute a relinquishing of the writ. The writ remains in force. The facts of the current matter demonstrate that the same goods that were attached in November 2024 fall to be sold on auction in January 2025. The merits of the first urgent application are still pending and the defence of *lis pendens* is established.

[32] So too the defence of non-joinder. Ms Millar asserted a right to all the assets under attachment in November 2024 and clearly has an interest in the proceedings before this court. Her non-joinder is fatal.

[33] The applicants contend that the right to the stay that it seeks in the current application is based on an agreed stay. However, it is apparent that the second respondent did not agree to any stay. She merely referred the issue of the jewellery being offered as security to the Sheriff without accepting the proposal. Either way, the security offered does not affect the list of assets under attachment. Counsel for Ms Mduzulwana contended that the diamonds are not up for sale on 21 January 2025. Unless specifically attached, this proposition is accepted.

[34] Further, the letter of 28 November 2024 challenging the applicants to bring its urgent application, and advising that it would be opposed, is the clearest indicator thereof that there was no agreement not to proceed with the sale in

execution in January 2025. The basis upon which the applicants therefore approach the court for the stay of execution is fatally defective.

[35] Rule 45A envisages the suspension of the execution of a judgment or writ in circumstances where the failure to do so may result in manifest injustice. Such injustice would become manifest where a rescission application has been launched in which the merits that gave rise to the judgment are being challenged. However, in the present matter the rescission application does not rise to the level where the merits of the judgment have been assailed in such rescission proceedings. The threats of supplementing the rescission application have come to naught, despite being raised in November 2024 during the urgent court proceedings that served before Basson J.

[36] I am therefore satisfied that the rescission application does not rise to the level where it in itself represents the clearest indicator of a manifest injustice if the stay were not to be granted. In the premises I am satisfied that the application falls to be dismissed for this reason as well.

[37] In the premises this application fails on a number of grounds:

37.1 The applicants have been dilatory in bringing the application and urgency is self-created. In addition no case was established warranting condonation for non-compliance with the directives of this division relating to for the set down of an urgent application on a Friday.

37.2 The merits of the November 2024 urgent application overlap with the current application and that application has not been withdrawn. The defence of *lis pendens* is established.

37.3 The non-joinder of Ms Millar is fatal. Ms Millar is a party with a material interest in the subject matter of the relief sought but has not been joined;

37.4 The applicants have not made out a case for a stay based on either an agreed stay or on the basis of rule 45A.

[38] In the premises I make the following order:

1.The application is dismissed with costs on Scale B.

- [REDACTED]

LABUSCHAGNE J
JUDGE OF THE HIGH COURT