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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: 18103/2021

In the matter between:

CLAREMART AUCTIONEERS (PTY) LTD

Applicant

and

WILHELMUS ANTONIUM VAN BEUREN

First Respondent

PARAGON CPT (PTY) LTD

Second Respondent

NANDE INGRID MABONA

Third Respondent

TSM INC

Fourth Respondent

THE SHERIFF OF THE HIGH COURT, CAPE TOWN

Fifth Respondent

Heard: 3 July 2025

Delivered: Electronically on 30 July 2025

Summary: Application for stay of warrant of execution. The applicant sought an undertaking from the first and second respondents that they would not execute. The respondents refused to make such an undertaking. The applicant instituted an urgent application for a stay of execution. The respondents provided an undertaking after the application was instituted. Stay of execution granted. Respondents ordered to pay the costs of the application.

ORDER

1. The Warrant of Execution issued by the Registrar of this court on 04 June 2025 and executed on 09 June 2025, is hereby stayed pending the outcome of the applicant's application for leave to appeal or any subsequent appeal proceedings.
2. The first and the second respondents are ordered to pay the costs of this application jointly and severally including the costs of counsel on a party and party scale B.

JUDGMENT

LEKHULENI J:

Introduction

[1] This is an application in which the applicant seeks an order that the execution of a judgment handed down by Fortuin J on 19 February 2025 be stayed pending the determination of an application for leave to appeal in respect of that judgment and any appeal proceedings following thereafter. The applicant also seeks an order that all warrants of execution issued against the applicant pursuant to the impugned judgment be stayed pending the determination and outcome of the applicant's

application for leave to appeal or any subsequent appeal proceedings. In addition, the applicant seeks an order that the first and second respondents be ordered to pay the costs of this application. The third, fourth, and fifth respondents did not take part in these proceedings. Accordingly, references to the respondents in this judgment refer only to the first and second respondents.

Factual Background

[2] The main application giving rise to the judgment of Fortuin J against the applicant was pronounced in October 2021. In that application, the first and second respondents sought an order declaring the sale agreement concluded in January 2018 in respect of Erf 1[...], situated in Delft, between the first and third respondent to be invalid and not binding against the first and second respondents. The property in question was sold at an auction by the applicant, who is also an auctioneer. The first respondent attended the auction and submitted the highest bid, and the property was subsequently sold to him. After the auction, the first respondent entered into a nomination agreement with the second respondent. This agreement allowed the first respondent to replace himself with the second respondent as a purchaser of the property, which is a company of which the first respondent is the sole shareholder.

[3] The third respondent, Ms Mabona, was the seller of the property. She was, however, not the registered owner of the property. She purchased the property from the registered owner; however, at the time of the auction, it had not yet been transferred or registered in her name. The transaction was accordingly going to be a back-to-back registration, in that it first had to be registered from the registered owner to the third respondent, and then from the third respondent into the name of the second respondent. The fourth respondent was appointed as the transferring attorneys. However, before the property could be registered in the name of the second respondent, it was discovered that Ms Mabona had constructed structures on the property without obtaining any municipal planning consent or approved plans. The structures built by the third respondent on the property were unlawful and did not comply with fire regulations.

[4] Subsequent thereto, the respondents cancelled the contract and demanded refund of the sum of R180,000. This amount included the sum paid by the first respondent to the applicant, which comprised ten percent of the purchase price, as well as the auctioneer's commission and VAT. During October 2021, the first and second respondents instituted the main application to declare the sale invalid, alternatively cancel it, and sought repayment of the sum of R180,000. On 4 November 2024, the application was argued before Fortun J. After considering the matter, on 19 February 2025, Fortuin J handed down judgment and found on various grounds that the sale agreement entered into between the first and the third respondent was invalid. The court ordered the applicant to repay the amount of R180,000, together with interest thereon, to the respondents.

[5] Thereafter, the applicant filed its application for leave to appeal the judgment on 17 March 2025. The application for leave to appeal was delivered two days late. The applicant asserted that Fortuin J's judgment, delivered electronically to the parties, recorded an incorrect case number, and the confusion surrounding the case number, as reflected in the judgment, caused the application for leave to appeal to be filed out of time. According to the applicant, the reasons for the late filing of the application for leave to appeal were not only due to the incorrect case number on the judgment, but also because their counsel was involved in a trial and had to undergo a medical procedure during that time. To this end, a separate affidavit was filed together with the application for leave to appeal, in which the reasons for the late filing were explained.

[6] Notwithstanding the application for leave to appeal, the first respondent enforced the judgment of Fortuin J by issuing a warrant of execution against the applicant. The warrant was served and executed against the applicant on 9 June 2025. The Sheriff of Cape Town West, the fifth respondent, attached several movable assets of the applicant. On 11 June 2025, before launching this application, the applicant sent a letter to the respondents' attorneys seeking an undertaking that the respondents would not pursue execution and would stay the warrant pending the outcome of the application for leave to appeal. In the correspondence, the applicant's attorney also advised that if such an undertaking was not provided or was denied, the applicant would be compelled to bring an urgent application to seek the

same relief. On 12 June 2025, the respondents' attorneys replied and refused to provide such an undertaking. The attorneys for the respondent expressed the intention to proceed with the execution of the applicant's movable assets once the inventory from the sheriff was received.

[7] On 17 June 2025, the applicant launched this application on an urgent basis and had it served upon the respondents. The application was set down for hearing on 3 July 2025. On 25 June 2025, the attorney for the respondents sent a letter to the applicant, stating that, in the interest of reaching a cost-effective resolution and without admitting to any part of the applicant's application, the first and second respondents were willing to provide an irrevocable guarantee that no further execution steps would be taken while awaiting the outcome of the applicant's application for condonation and leave to appeal.

[8] On 27 June 2025, the respondents' attorney further sent an email to the applicant's attorneys in which it was asserted that, for the avoidance of doubt, the tender made on 25 June 2025 was made on record. It was further stated in that correspondence that the applicant had approached the court on an urgent basis, and that the urgency had already fallen away in light of the respondents' irrevocable undertaking.

[9] On 27 June 2025, the applicant's attorney requested reasons from the respondents' attorneys for their initial refusal of the undertaking, thereby forcing the applicant to approach the court on an urgent basis. Furthermore, the applicant's attorney inquired as to why the first and second respondents should not make a tender for the wasted costs. On 30 June 2025, a further letter was addressed to the respondents' attorneys, noting that it was because of the respondents' unreasonable conduct and refusal of the initial undertaking that necessitated the application. To this end, Ms Theron, counsel for the applicant in the present matter, implored the court to grant the order postulated in paragraph 1 of this judgment.

[10] The respondents, on the other hand, contend that the application is entirely of the applicant's own making. Mr Van Reenen, counsel for the respondents, submitted that the applicant launched its application for leave to appeal late and did not appear

to appreciate that, as a matter of law, a late application for leave to appeal does not stay the execution of the judgment sought to be appealed. The respondents also asserted that they did not agree to stop execution of the judgment they obtained and were under no obligation whatsoever to agree not to execute the judgment. Furthermore, no formal application for condonation was filed for the late filing of the application for leave to appeal.

[11] According to the respondents, the affidavit explaining the delay in filing the application for leave to appeal was inadequate. The respondents believed that the applicant's dilatory conduct was the cause of this entire application. The first and second respondents asserted that it is unreasonable for the applicant to seek costs from them, especially since they have made an undertaking not to execute. The respondents opined that on 25 June 2025; after considering the applicant's application for the suspension of the warrant of execution, they made an irrevocable undertaking not to execute upon the judgment pending the hearing of the application for leave to appeal.

[12] The respondents contended that, notwithstanding their irrevocable tender, the applicant insisted on its application and sought a cost order against them. The respondents averred that the application was not urgent, considering the undertaking, and proposed that the issue of costs stand over for later determination.

Issues to be decided

[13] This court is tasked to determine two issues. *First*, whether the judgment granted on 19 February 2025, and the subsequent warrant of execution, should be suspended while the applicant seeks leave to appeal. *Secondly*, whether the respondents should be ordered to pay the costs of this application.

Discussion

[14] For clarity, I will address the disputed issues sequentially. I turn to consider whether the judgment and the subsequent warrant of execution should be suspended or not.

Should the Warrant of Execution be suspended?

[15] Section 18(1) and 18(3) of the Superior Courts Act 10 of 2013 and Rule 45A of the Uniform Rules of Court address the issues surrounding the suspension of an order. Section 18(1) and 18(3) of the Superior Courts Act provides:

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) ...

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.'

[16] Rule 45A of the Uniform Rules of Court grants this court a wide discretion to suspend an order for execution, which is limited only by the consideration that it must be exercised judicially. A court is empowered to, on good cause shown, stay any warrant of execution. Execution is a court process, and the court has inherent power to control its own process, subject to the Rules of Court. (*Cohen v Cohen* 1979 (3) SA 420 (R) at 423D-C). Execution should generally be allowed unless the applicant for a stay shows that real and substantial justice requires that such a stay should be granted. (*Rood v Wallach* 1904 TS 257 at 259; *Graham v Graham* 1950 SA 655 (T) at 657 and 658).

[17] Circumstances can arise where a stay of execution as sought here should be granted on the basis of real and substantial justice. Thus, where injustice would otherwise be caused, the court has the power and would, generally speaking, grant relief. (*Strime v Strime* 1983 (4) SA 850 (C) at 423B). The authorities discussed

hereinabove are clear: the court will grant a stay of execution where a real and substantial injustice would otherwise eventuate.

[18] In the present matter, it is not in dispute that the applicant seeks to appeal the court's judgment. It is also common cause that the application for leave to appeal has been filed, though 2 days after the cut-off date. It is now trite that if an application for leave to appeal had not been served within the prescribed time in terms of the Rules of Court and if no condonation for the non-compliance had been granted, then the judgment against which leave to appeal is sought is not suspended despite the filing of such an application for leave to appeal. (*Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ)). However, in my view, the inquiry does not end there.

[19] I must emphasise that, from the factual background discussed above, the respondents' conduct leading up to the launch of this application is relevant to the consideration of the disputed issues in this matter. As previously mentioned, the application for leave to appeal was filed on 17 March 2025. Condonation for the late filing of the application for leave to appeal was sought, and a separate affidavit was filed in support of that application. The applicant has given reasons for the late filing of its application for leave to appeal. I pause to mention that it is not for this court to adjudicate that application. It is expected that the merits of that application, as well as the application for leave to appeal, will be dealt with in the appropriate forum in due course.

[20] However, from the documents filed, it is abundantly clear that the first and the second respondents knew that the applicant intended to exercise its right to apply for leave to appeal the impugned judgment. The respondents were aware that the applicant filed its application for leave to appeal, as well as an affidavit explaining the delay in applying for leave to appeal. Despite the delivery of the application for leave to appeal and the affidavit in support of the condonation application, the respondent proceeded to issue a warrant of execution against the applicant. Whilst I accept that an application for leave to appeal filed out of time does not suspend the execution of the judgment, in my view, the conduct of the respondent in this case was improper and unacceptable. The respondents' surreptitious issuing of the warrant of execution

without any prior warning, notwithstanding the application for leave to appeal, in my view, was not justified. The respondents proceeded to execute against the movables of the applicant, notwithstanding their knowledge that the applicant was appealing the judgment, which is the substratum of the warrant.

[21] What I find very concerning is that, prior to the launch of this application, the applicant's attorney addressed a written request to the attorneys of the first and second respondents, asking for an undertaking that the execution of the warrant would be stayed pending the outcome of the application for leave to appeal. The first and second respondents' attorney refused to provide the undertaking, indicating that they intended to proceed with the execution against the applicant's movable assets. This led the applicant to institute an urgent application for a stay of execution. The respondents only provided the applicant with the necessary undertaking that they will not proceed to execute after the applicant launched the present application. The applicant would not have launched this application if the respondents had given an undertaking promptly or timeously.

[22] At the time the undertaking was provided, costs had already been incurred, as the applicant had already launched this application in this court. In addition, the respondents' undertaking was not unconditional. The applicant was compelled to come to court to seek a stay of execution. This court bears the duty to ensure that both procedural and substantive justice are served. To this end, I share the views expressed by the court in *Infusion Social Club Camps Bay (Pty) Ltd v Camps Bay Investment Trust (Pty) Ltd and Another* (20608/2024)[2024] ZAWCHC 288 (30 September 2024) para 44, where the court noted that even in adversarial litigation such as the present matter, litigant must conduct themselves with due regard to the procedural rights of their adversaries, and when, by design, they fail to do so, it may be acting unlawfully, which the court is entitled, indeed enjoined, to redress.

[23] As discussed above, the applicant displayed its intention to appeal the impugned judgment. From the documents filed, the sheriff of the court has attached several movable assets of the applicant. If those assets are sold in execution, and the applicant succeeds in its appeal proceedings, the applicant would suffer substantial prejudice. In *Knoop NO v Gupta (Execution)* 2021 SA 135 (SCA) at

139D, the Supreme Court of Appeal held that ‘the immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful’. In my opinion, the failure to suspend the warrant of execution will result in irreparable loss to the applicant.

[24] I am also mindful that the respondents have tendered an irrevocable undertaking that no further execution will take place pending the outcome of the leave to appeal and, if leave to appeal is granted, the final determination of the appeal. On a conspectus of all the facts placed before this court, I am of the view that the applicant’s application to stay the execution of the warrant must succeed.

[25] I am cognisant that the applicant is also applying for the suspension of the judgment of the court that authorised execution against the applicant. In my view, the suspension of the warrant would serve the same purpose.

Should the respondents be ordered to pay the costs of this application?

[26] As previously mentioned, the applicant sought an undertaking from the respondents that they will not proceed with execution before approaching this court on an urgent basis, and that undertaking was refused. The applicant was compelled to institute this application to suspend the warrant pending the outcome of the application for leave to appeal. The respondent made an irrevocable undertaking not to execute long after the applicant launched the application. The respondents’ undertaking was conditional, and they did not tender the costs incurred in bringing the application.

[27] The respondents were warned that if a tender was not made, the applicant would bring an application to court. In my view, the costs incurred by the applicant in bringing this application must be borne by the respondents. This also includes the costs incurred for the hearing of this matter. If the respondents tendered the costs of the application, it would have been unnecessary for the applicant to proceed with application on 3 July 2025. Bereft of such tender, the applicant was compelled to appear and argue the matter.

Order

[28] Given all these considerations, the following order is granted.

28.1 The Warrant of Execution issued by the Registrar of this court on 04 June 2025 and executed on 09 June 2025, is hereby stayed pending the outcome of the applicant's application for leave to appeal or any subsequent appeal proceedings.

28.2 The first and the second respondents are ordered to pay the costs of this application jointly and severally, including the costs of counsel on a party and party scale-B.

LEKHULENI J
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Adv Theron

Instructed by: Cluver Markotter Attorneys

For the Respondents: Adv Van Reenen

Instructed by: Lionel Murray Schwormstedt & Louw