

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2025-083622

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
23/6/2025	
DATE	SIGNATURE

In the matter between:

TEBOGO BENJAMIN MALEKA

Applicant

and

NEDBANK LIMITED

First Respondent

THE SHERIFF OF THE HIGH COURT, RANDBURG WEST

Second Respondent

DINEO PRECIOUS KUBHEKA SELETSWANE

Third Respondent

JUDGMENT

Smit, AJ

Introduction

- [1] The applicant issued this urgent application in the morning on Wednesday 4 June 2025¹ and set it down for hearing on Friday 6 June 2025.
- [2] The applicant sought, essentially, the following relief:
- a. To stay a writ of execution issued in prior proceedings against the third respondent, Ms Seletswane, pursuant to which certain motor vehicles and other movable property at the house where she lives were attached; and
 - b. To interdict the removal of the motor vehicles by the sheriff and to order the sheriff to return the other movable property.
- [3] Despite the extremely short timelines imposed by the applicant, the parties managed to file the normal sets of affidavits and brief heads of argument by the time I heard the application, during the afternoon of Friday 6 June. I am grateful for counsel's assistance in this regard.

Background facts

- [4] I relate certain background facts regarding the applicant, Dr Maleka and the third respondent, Ms Seletswane in some detail, because it is relevant to Dr Maleka's contentions as to why the furniture should be returned.
- [5] Dr Maleka is an ophthalmologist. He lives in a house in Dainfern, Johannesburg (House A) with his romantic partner, Ms Seletswane and four minor children. Ms Seletswane is a judgment debtor of the first respondent, Nedbank.
- [6] Dr Maleka purchased House A on auction on 4 July 2023 for R2.9 million. For reasons which are not pertinent to this judgment, the house has not been registered in his name. House A remains registered in the name of the DSM Trust, of which Ms Seletswane is a trustee. It should be noted that House

¹ The application was served on Nedbank on at 07:24 on Wednesday 4 June 2025, before issuance some hours later. Nedbank was given until 09:00 to enter opposition.

A was sold on auction to Dr Maleka pursuant to a judgment debt owed by the DSM Trust to a different bank (not Nedbank).

- [7] Prior to 2020, Nedbank took judgment against the DSM Trust in an amount of R7 million and obtained an order to declare another house in Dainfern (House B) to be specially executable. House B was sold at auction in January 2020 for an amount of R3.8 million, rendering Ms Seletswane liable for the remainder.²
- [8] Pursuant to the remaining judgment debt in a principal amount of R3.2 million, Nedbank caused a writ of execution to be issued in respect of the movable assets at House A, where Ms Seletswane resides and which remains registered in the name of the DSM Trust.
- [9] On 16 May 2025, the second respondent's representative – the deputy sheriff for Randburg West – attended at House A to attach five motor vehicles kept on the property as well as other movable assets – in the form of household furniture, excluding beds. Dr Maleka was present at the attachment. The vehicles include a Porsche 911, Lexus station wagon and three other cars. Dr Maleka says that even the forced sale value of the motor vehicles exceeds R1.5 million.
- [10] The deputy sheriff did not, at that stage, remove anything. The deputy sheriff returned, however, on 30 May 2025 and 2 June 2025 to remove the household furniture, including various lounge suites, a golf cart and five mountain bikes. Again, Dr Maleka was present.
- [11] The removal of the furniture acted as the catalyst for the urgent application.

Dr Maleka's contentions

- [12] Dr Maleka contends that the attached property belongs to him, not to the judgment debtor Ms Seletswane. In support of this contention, he attached invoices for some of the furniture, some of which bear his name as the purchaser and some of which bear the names of legal entities (the ownership of which is

² There is apparently ongoing litigation regarding both the sale of House A and House B. The applicant did not seek to make anything of this at the hearing, and it does not seem relevant to the relief he seeks.

not explained on affidavit). He also attached NATIS certificates for some of the vehicles and so-called “CSI reports” for others.

- [13] Dr Maleka deposed on 30 May 2025 to what he calls an “*interpleader affidavit*”. The affidavit affirms his ownership of the attached assets and seeks “*to place on record reasons as to why this interpleader in terms of Rule 58 should be issued*”.
- [14] D Maleka states that he informed the deputy sheriff, at the attachment of the goods, of his ownership. He also says that he forwarded the “*interpleader affidavit*” to Nedbank’s attorneys. He does not state exactly when he did so; or when exactly he gave the “*interpleader affidavit*” to the deputy sheriff.³
- [15] In an affidavit deposed on the day of the hearing, the deputy sheriff stated that Ms Seletswane handed the “*interpleader affidavit*” to him on 2 June 2025 and asked him to take it to the sheriff’s office, which he did. The deputy sheriff further explained that Dr Maleka did not furnish him with any proof of ownership before he removed the furniture.
- [16] By the time of the hearing, it became common cause that the motor vehicles would remain attached, but would not be removed by the sheriff. Insofar as it may be relevant to the issue of costs, it is Nedbank’s case that the deputy sheriff informed Dr Maleka by 2 June 2025 that the vehicles would not be removed (and, indeed, there was no attempt to do so). Nedbank in any event informed Dr Maleka on 4 June 2025 that it would not ask the sheriff to remove the vehicles. No more needs to be said about their status.
- [17] Dr Maleka’s cause of action for the stay of the writ of execution and the return of the furniture is unclear. He does not allege that the issuance of the writ was irregular in any way. Thus, this Court may assume that the writ was lawfully issued and – insofar as the attachment of the movable assets and the removal of the furniture go – lawfully executed.

³ There are passages in the founding affidavit that suggest that he did so on 30 May 2025, but in light of the deputy sheriff’s affidavit – together with the application of the *Plascon-Evans* rule – that cannot be unequivocally accepted. In light of my conclusions, the exact date and time are irrelevant.

[18] Dr Maleka did not rely on a *rei vindicatio*, but accepted that ownership of the furniture would need to be determined in due course in interpleader proceedings.⁴

[19] Rather, Dr Maleka's argument as advanced at the hearing proceeded along two lines:

- a. First, he contended that Rule 45(5) as read with Rule 58(1) supported the return of the furniture, given that he deposed to the "*interpleader affidavit*". (I dealt with the effect of both Rules below.)
- b. Second, he contended that the best interests of his and the judgment debtor's four minor children – as enshrined in section 28(2) of the Constitution, 1996⁵ – requires the return of the furniture, given that they were now living in an "*empty shell*" and were currently writing exams.

[20] In my view, neither of these arguments sustain a cause of action for a stay of the writ, or for the return of the furniture. Put differently, Dr Maleka was required to show a "*clear right*" to the interdict sought, or at least a *prima facie* right although open to some doubt. He failed to make out a case for such a right.

Discussion

[21] Pursuant to section 43(1) of the Superior Courts Act, 10 of 2013, the sheriff has no discretion to execute upon writs.⁶

[22] In Rule 45 as read with Rule 58, the Uniform Rules of Court explicitly recognise that the sheriff – in lawfully executing a writ – may attach and remove goods to which a person who is not the judgment debtor claims ownership. The reason for that is clear: ownership of movable assets may be acquired and transferred in

⁴ In this regard, the replying affidavit states: "*I am not asking this court to determine any ownership, I am asking this court to restore possession, the prayers are specifically phrased in a manner to ensure the court need not concern itself with ownership as all the relief is only 'pending the interpleader proceedings'.*"

⁵ "*A child's best interests are of paramount importance in every matter concerning the child.*"

⁶ Section 43(1) states: "*The sheriff must, subject to the applicable rules, execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff and must make return of the manner of execution thereof to the court and to the party at whose instance they were issued.*"

an informal manner. Thus, their ownership (and proof thereof) will frequently be contested.

[23] In this regard, Rule 45(3) states – insofar relevant to this matter – that, upon the issuance of a writ of execution against a judgment debtor (such as Ms Seletswane) *“the sheriff shall forthwith or by such sheriff’s assistant proceed to the dwelling-house ... of such person”* and *“demand that so much movable and disposable property be pointed out as the sheriff may deem sufficient to satisfy the said writ”*. The sheriff must then inventory the movable property and must – subject to subrule (5) and a further proviso in subrule (3) – take such property into his custody.

[24] Further, insofar as is relevant to this matter:

a. The proviso to Rule 45(3) states in essence that, if a judgment creditor indemnifies the sheriff against damage or loss caused by seizing the property of a third party, the sheriff shall seize property to which a third party claims ownership.

b. Rule 45(5) states as follows:

“Where any movable property has been attached by the sheriff, the person whose property has been so attached may, together with some person of sufficient means as surety to the satisfaction of the sheriff, undertake in writing that such property shall be produced on the day appointed for the sale thereof, unless the said attachment shall sooner have been legally removed, whereupon the sheriff shall leave the said property attached and inventoried on the premises where it was found. The deed of suretyship shall be as near as may be in accordance with Form 19 of the First Schedule.”

c. Rule 45(6) states as follows:

“If the judgment debtor does not, together with a surety, give an undertaking as aforesaid, then, unless the execution creditor otherwise directs, the sheriff shall remove the said goods to some

convenient place of security or keep possession thereof on the premises where they were seized, the expense whereof shall be recoverable from the judgment debtor and defrayed out of the levy.”

[25] Rule 58(1), in turn, provides for interpleader proceedings generally. It states:

“Where any person, in this rule called ‘the applicant’, alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims, in this rule referred to as ‘the claimants’, in respect thereto, the applicant may deliver a notice, in terms of this rule called an ‘interpleader notice’, to the claimants. In regard to conflicting claims with respect to property attached in execution, the sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.” (Emphasis added.)

[26] Thus, Rule 58(1) provides *inter alia* for circumstances such as this application. It envisages a situation where the sheriff took into custody goods to which both the judgment creditor and a third party (such as Dr Maleka) assert conflicting claims of ownership.⁷ It then describes a procedure (interpleader proceedings) through which competing claims of ownership may be resolved.

[27] Dr Maleka’s contentions in this matter are based on compliance with Rule 45(5). He says that his “*interpleader affidavit*” fulfilled the function of a suretyship and undertaking referred to in that Rule.

[28] On closer scrutiny, however, the “*interpleader affidavit*” does not comport at all with Rule 45(5). It merely asserts that Dr Maleka is the owner of the attached goods. In doing so, it was meant to activate the issuance of interpleader proceedings by the sheriff in terms of Rule 58(1), to establish the ownership of the goods through judicial means.

[29] The “*interpleader affidavit*” does not fulfil the two crucial functions of the suretyship and undertaking envisaged by Rule 45(5):

⁷ Typically, the judgment creditor would claim that the judgment debtor is the owner, while the third party would claim that he or she, and not the judgment debtor, is the owner.

- a. It does not bind Dr Maleka as surety to the judgment creditor (Nedbank) that the goods would be “*produced on the day appointed for the sale thereof, unless the said attachment shall sooner have been legally removed*”.
- b. It does not undertake in writing so to produce the goods.

[30] Thus, the “*interpleader affidavit*” did not have the legal effect implied by Dr Maleka, that would have provided sufficient cause for the sheriff not to take the attached goods into custody.

[31] Dr Maleka also relied heavily on the constitutional principle that the best interests of his (and the judgment debtor’s) minor children are paramount in every matter concerning the child.

[32] It is trite, however, that where subsidiary law (i.e. law other than the Constitution) permits or prescribes acting in a particular way, and a litigant asserts that acting in that way is constitutionally suspect or impermissible, that litigant may not rely directly on the Constitution. The litigant’s remedy is to declare the subsidiary law to be unconstitutional insofar as it lawfully permits actions which are alleged to be unconstitutional. That is the effect of the constitutional principle of subsidiarity.⁸

[33] In accordance with the principle of subsidiarity, Dr Maleka was not entitled to challenge the lawful actions of the sheriff through reliance upon section 28(2) of the Constitution without challenging the constitutionality of, at least, Rule 45.

[34] I am in any event not convinced that, in the circumstances of this case, Dr Maleka could convincingly rely upon the principle of the best interests of the child to reverse the attachment or removal of the movable assets in question.

[35] Dr Maleka is a medical specialist. He lives in a house worth several million Rands. He claims to own five motor vehicles worth at least R1.5 million. His obvious legal remedy to avoid the disruption to his household on which he relies

⁸ See e.g. *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para 46; *CSARS v Richards Bay Coal Terminal (Pty) Ltd* 2025 (6) BCLR 639 (CC) paras 124-130.

was to stand as surety pursuant to Rule 45(5) until such time as the ownership of the attached goods could be judicially scrutinised.⁹ Failing that – a matter which is unexplained on affidavit or otherwise – his practical remedy is to purchase the necessities required for his household and to pursue a damages claim, if any is available. There was no allegation on affidavit that he was not in a position to purchase such goods.

- [36] I therefore conclude that Dr Maleka has failed to plead and prove any cause of action that would entitle him to the relief sought. As such, his application falls to be dismissed.

Urgency

- [37] If I did not conclude that this application should be dismissed on the basis set out above, I would in any event have concluded that it should be struck from the roll for a lack of urgency.
- [38] The urgency on which Dr Maleka relied was entirely self-created. After the attachment of the goods on 16 May 2025, at which Dr Maleka was present, he took no action – in terms of Rule 45(5) or otherwise – to prevent the removal of the goods, which is an inevitable consequence of attachment. Instead, he waited until the goods were actually removed, two weeks later, to depose to the “*interpleader affidavit*” on 30 May 2025 and, four days later, to launch an urgent application.
- [39] He also had the legal and practical remedies set out above, which illustrates that the urgency was either self-created or notional.
- [40] Further, the set-down of this matter on a day (other than a Tuesday), only two clear court days after the application was served and one clear day after it was issued, does not comport in any way with the well-known principles set out in *Luna Meubel Vervaardigers*.¹⁰ These were recently reiterated in a “*Notice to the*

⁹ Nedbank confirmed on 4 June 2025 that no sale of attached property would occur until interpleader proceedings are finalised.

¹⁰ *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).

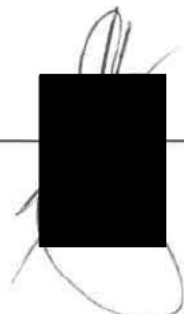
Profession” issued by the Deputy Judge President of this Court on 4 October 2021.

Costs

- [41] Nedbank initially sought a costs order *de bonis propriis* against Dr Maleka's attorneys on the basis that the application was abusive and conflicted with the principles governing urgent applications, set out above. As a result, Dr Maleka's attorneys briefed counsel to represent it at the hearing. In the event, Nedbank abandoned this prayer shortly before the hearing.
- [42] In light of my conclusions, set out above, I make no order as to the costs occasioned by Nedbank's prayer for costs *de bonis propriis*. I do not think that Nedbank acted unreasonably in initially seeking costs *de bonis propriis*, given the extent of Dr Maleka's unmotivated non-compliance with the principles governing urgent applications.
- [43] Nedbank persisted in seeking costs on a punitive scale against Dr Maleka, given this non-compliance. In light of my conclusions above, I consider such a costs order to be justified. Dr Maleka gave Nedbank less than a day to oppose this application and only slightly more time to file an answering affidavit. The matter was then set down on two days' notice, at the considerable inconvenience of everyone involved and at the risk to the administration of justice caused by further clogging up an already congested urgent roll.
- [44] Given his obvious other remedies, Dr Maleka's actions were unreasonable and, as such, deserving of a punitive costs order.

Order

- [45] The application is dismissed.
- [46] The applicant shall pay the first respondent's costs taxed at Scale B, as between attorney and client.



DJ SMIT

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Date of hearing: 6 June 2025

Date of judgment: 23 June 2025

For the applicant:

X van Niekerk instructed by Naude
Dawson

For the first respondent:

L Peter instructed by Lowndes Dlamini

For Naude Dawson:

J Marais instructed by Naude Dawson