



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 2026/061039

In the matter between:

JONGIKHAYA LUVULWENI

Applicant

and

NOLUPHELO XHEGWANA & OTHERS

Respondent

**REASONS FOR THE ORDER
GRANTED ON 05 MAY 2026**

MHAMBI AJ

Introduction

[1] This matter appeared before me during the unopposed motion court on 05 May 2026. On this day, both parties were legally represented. I issued an order without giving reasons. On 10 May 2026, the applicant's legal practitioners

sought for the written reasons for the order issued. I now furnish the reasons for the grant of the order.

[2] Background of this matter is as follows: it was enrolled on an urgent basis on 24 March 2026, my sister Cengani - Mbokazi AJ, as she then was, issued an order as follows: -

“1. The applicant’s non-compliance with the rules relating to forms and time limits is hereby condoned.

1.1 The applicant is hereby granted leave to move this application on an urgent basis in terms Rule 6(12) of the Uniform Rules of this Court.

2. Rule nisi hereby issue calling upon respondent to show cause if any, on Tuesday, the 05 May 2026, at 10h00 or so soon thereafter as the matter may be heard, why an order in the following terms should not be made final.

2.1 The second and third respondents are hereby directed to pay an amount of R700 000.00 as interim payment in the money withheld by them not later than 27 March 2026, ending finalization of Case No.: 3852/2002.

2.2 Directing the second and third respondents to pay legal rate of interest to the applicant commencing from the 25 March 2026. Should it fail to make payment within the period stated in the preceding paragraph.

2.3 Directing the outstanding aspects of the remaining amounts should stand over for a later finalization of the pending interdict application which was bought by the first respondent under Case No.: 3852/2002.

2.4 The applicant further seeks an interdict and restrained the first respondent from interfering into his money in which she features no whereas there is no nexus between the applicant and the first respondent.

3. That paragraph 2.1, 2.2, 2.3 and 2.4 above shall operate as interim orders pending the finalization of the matter.

4. The second and third respondents ordered and directed to pay costs of this application.”

[3] The nature of this order was an interim order with a rule *nisi*.

Rule Nisi: -

[4] A rule *nisi* is generally issued on an *ex parte* application in which an application sets out fully the circumstances of the cause of complaint. It is an order which is issued by a court at the instance of a party calling upon another party to show cause on a stipulated date before that court why the relief claimed should not be granted. The rule *nisi* procedure is premised on the acceptance that the interest of justice requires the balancing of the rights of the applicant and the respondent. This ensures that what is worthy of immediate protection is not prejudiced by the time it takes to hear the interested parties. The essential

character and purpose of the rule *nisi* procedure remains to ensure (a) that notice is given to an affected party, (b) that a *prima facie* case is made out for the relief sought, and (c) such relief may be granted unless cause is shown why it should not be granted.

[5] In *National Director of Public Prosecutions v Mohamed NO and Others*¹ held as follows in respect of a rule *nisi*-

‘[28] Our common law has recognized both the great importance of the audi rule as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the very rights sought to be enforced or protected. In such circumstances, the court issues a rule nisi calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule nisi should not be made final, and at the same time orders that the rule nisi should act immediately as a temporary order, pending the return day. This practice has been recognized by the South African courts for over a century:

The term ‘rule nisi’ is derived from English Law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. Our common law knew the temporary interdict and, as Van Zyl points out, a ‘curious mixture of our practice with the practice of England’ took place and the practice arose of asking the court for a rule returnable on a certain day, but in the meantime to operate as a temporary interdict.’

¹ 2003 (4) SA 1 (CC)

[6] The SCA in *Member of the Executive Council for the Department of Health v BM*², the rule nisi procedure is explained thus:-

“[12] A rule nisi is an order issued by a court, at the instance of a party, calling upon another party or parties to show cause on a stipulated date before that court why relief, as claimed, should not be granted. The procedure, which derives from English law, has been employed by our courts for well over a century.^[3] Its use and development is underpinned by the principle that a court will not grant relief which impacts or constrains the rights and interests of a party without affording that party an opportunity to be heard (*audi alteram partem*). It is also premised on the acceptance that the interests of justice require the balancing of rights and interests to ensure that what is worthy of immediate protection is not prejudiced by the time it takes to hear all interested parties.

[13] The rule nisi is generally used in *ex parte* applications. Van Zyl explains that, ‘This rule, or order, for after all it is really an order, is granted only on an *ex parte* application. This application should be by *petition setting forth fully all of the circumstances of the applicant’s cause of complaint, so as to induce the Court to grant his prayer*. He must [show] a good *prima facie* cause to entitle him to this rule, and a good reason must be assigned, or [shown] for the urgency of the application, and why it should be *ex parte* instead of serving the respondent with the notice of motion.’

² MEC for Department of Health, Eastern Cape v BM (213/2021) [2022] ZASCA 140 (24 October 2022) para [12] to [15].

[14] Since those observations were made, the practice relating to rules nisi has been used in various contexts. The essential character and purpose of the procedure, however, remains to ensure that (a) notice is given to an affected party; (b) a *prima facie* case is made out for the relief sought; and (c) such relief may be granted unless cause is shown why it should not be granted.

[15] The authorities demonstrate that the use of the rule nisi procedure and its adaptation to new circumstances has occurred in a manner consistent with the principles of procedural law. In each instance, it has occurred in the context of application proceedings, requiring the granting of a rule nisi to be supported by evidence which warrants the granting of the rule.” Footnotes omitted.

[7] Before Cengani-Mbokazi AJ, the matter was not opposed; the interim order with a rule nisi was granted in default of the respondents. On 5 May 2026, the matter was opposed by the first respondent. Mr Dyantyi from the office of Legal Aid South Africa appeared for the first respondent. The opposing respondent had not filed her answering affidavit at that time; Mr Dyantyi indicated to have instructions to file the answering affidavit.

[8] I was approached in chambers by Mr Talapile, Counsel for the applicant, and Mr Dyantyi, Counsel for the first respondent. They both advised me that they will, in court, seek for the matter to be postponed with a rule extended. I enquired whether the interim order has been executed or not. Mr Talapile advised, but the instructing attorney has intentions to execute as soon as 05 May 2026.

[9] I advised both counsels to address me in court with the following issues: first, whether the matter falls within rule 34A for an interim payment to have been sought; second, the effect of the grant and subsequent execution of the interim order on the pending rescission application.

[10] In court, Mr Talapile asked for the matter to be postponed to a future date to enable the opposing papers to be filed; he asked the rule *nisi* to be extended to that date. He did not make a submission in respect of the issues I raised in chambers; he argues that the court's duty is simple to extend the rule as asked and not concern itself with other issues.

[11] Mr Dyantyi did not oppose the postponement with the rule extended. He, too, did not make submissions relating to the issues I raised, save to say that he submitted on bar that his instructions to oppose the application are based on the same issues. He goes further to say that the execution of para 2.1 of the order will affect the pending litigation between the parties.

[12] I was not persuaded to not vary the interim order by Cengani-Mbokazi AJ, and simple grant the postponement and the extension of the rule as sought, I then granted the order that: -

- “1. The matter is hereby postponed to 26 May 2026.
2. The rule nisi is hereby extended accordingly.
3. The applicant shall file its heads of argument on or before 19 May 2026.

4. The first respondent is directed to file its heads of argument on or before 21 May 2026.
5. The applicant is directed not to execute the interim order of 24 March 2026.”

[13] The following issues from the applicant’s application required more scrutiny or consideration: -

[14] The applicant and the 1st respondent divorced through a decree of divorce issued by the Regional Court, Bloemfontein, on 10 September 2003.

[15] Subsequent thereto, the 1st respondent initiated a rescission or variation application before the Regional Court, Bloemfontein.

[16] In the rescission application, the 1st respondent sought to interdict the 3rd respondent from releasing the pension fund of the applicant, pending the determination of the rescission application. In the rescission application, the 1st respondent seeks the half share from the pension funds of the applicant. She does so by virtue of marriage to the applicant.

[17] The rescission application has not yet been adjudicated as at the grant of the interim order.

[18] The pension funds of the applicant held by the 3rd respondent remain withheld pending the final determination of the rescission application.

[19] In this application, the applicant seeks an interim payment. The question is whether the applicant is entitled to an interim order in circumstances where its claim is not a personal injury claim or a damages claim. I asked the Counsel for the applicant to have regard to the provisions of rule 34A of the uniform rules of this court and address me whether the interim order relating to interim payment ought to have been granted in the circumstances of this case.

[20] I advised both Counsel that, in my *prima facie* view, the interim order granting interim payment ought not to have been granted in the circumstances of this court.

[21] Granting such an order was a mistake common to Counsel for the applicant and the court during the hearing of the matter.

[22] Rule 42 grants this court the discretion to *mero motu* vary such an order. On the basis of rule 42, I deemed it appropriate to vary the order by Cengani-Mbakaza AJ, to the extent I directed the applicant not to execute the interim order.

[23] The basis for that was, first, that the execution of paragraph 2.1 of the interim order would render mute the pending litigation proceedings before the Bloemfontein Regional Court. In which the payment of the pensions of the applicant is the subject of that litigation.

[24] It is my view that had the court been aware of the legal fact or point of law that it is impossible to grant an interim payment as prayed by the applicant in circumstances not based on rule 34A, a claim not being damages claim where liability has been determined. This case does not fall in the Rule 34A category at all, to the extent it was erroneously sought and subsequently granted.

[25] I am mindful of the *functus officio* principle. It is a fundamental principle of the common law that once a court has duly pronounced a final judgment and order, it has no authority to alter or supplement it.³

[26] However, in *Firestone SA (Pty) Ltd v Genticino*⁴, the court provided a common law exception to the *functus officio* rule.

[27] Further to that, I relied on rule 42 to vary the interim order to the extent I deem it appropriate. This, albeit, to state that the *functus officio* rule does not apply to the interim order as it is not final, it is subject to the discretion of a judge on a return day.

[28] In addition, this court is empowered by Section 172 (1) (b) to make an order that is just and equitable. In circumstances of this case, an order just and equitable is the one that suspends execution of the interim order granted. The execution of that order would have drastic consequences, as I have explained in the pending Regional Court case and the point of law I have explained above.

³ Estate Garlick v Commissioner for Inland Revenue 1934 AD 499 at 502.

⁴ 1977 (4) SA 298 (A) at (306 H)

[29] A similar approach was followed in *Re v GM Holdings*⁵, the court had made an order requiring the respondent to pay a sum of money to the applicant but ordered a stay of execution pending an appeal.

[30] In granting such an order, I need to state that:-

[31] An interim interdict is a temporary order that aims to protect the rights of an applicant, pending the outcome of a main application or action. It attempts to preserve or restore the status quo until a final decision relating to the rights of the parties can be made by the review court in the rights of the parties. It bears stressing that the grant of an interim interdict does not, and should not, affect the review court's decision when making its final decision and should not have an effect on the determination of the rights in the main application. The purpose of an interdict is to provide an applicant with adequate and effective temporary relief.

[32] It was, in my view, in the interests of justice to have the interim order execution stayed. Accordingly, in determining what the interests of justice demand, a court must have regard to, and carefully weigh, all relevant circumstances and factors. Undoubtedly, the relevant factors will differ in each case. These non-exhaustive factors include:

⁵ 1941 3 ALL ER 417.

- (a) The kind and importance of the relief granted in the interim order stayed.
- (b) The potential for irreparable harm if the interim order is executed.
- (c) Whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending litigation between the parties.
- (d) Whether there are prospects of success in the pending action between the parties.
- (e) Whether interim relief would unduly trespass on the exclusive terrain of the other before the final determination of the proceedings in courts.
- (f) Whether allowing the execution of an interim would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources and legal costs.

Order

[33] In the result, the following order is issued:

1. The matter is hereby postponed to 26 May 2026.
2. The rule nisi is hereby extended accordingly.

3. The applicant shall file its heads of argument on or before 19 May 2026.
4. The first respondent is directed to file its heads of argument on or before 21 May 2026.
5. The applicant is directed not to execute the interim order of 24 March 2026.

M MHAMBI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : *Mr. Talapile*

Instructed by : Mmqayana Inc
Mthatha

Counsel for the Respondent : *Mr. Dyantyi*

Instructed by : Legal Aid South Africa
Mthatha

Heard on : 05 May 2026

Date of reasons : 05 June 2026

This judgment is delivered by circulation to the parties' email addresses; the date of delivery is deemed to be 05 June 2026 at 16hrs.