**REPORTABLE**

***FORM A***
**FILING SHEET FOR TRANSKEI DIVISION**
**JUDGMENT**

PARTIES**:**

**KING SABATA DALINDYEBO MUNICIPALITY** **APPLICANT**

**and**

**NOBUHLE MAGAVU** **RESPONDENT**

(b) Case Number: 1662/07

(c) High Court: Transkei Division

(d) DATE HEARD: 7 August 2008

DATE DELIVERED: 21 August 2008

JUDGE(S): Dilizo AJ

LEGAL REPRESENTATIVES –

*Appearances:*

(d) for the Applicant(s): Adv. P.V. Msiwa
(e) for the Respondent(s): Adv. K.T. Mququ

*Instructing attorneys:*

2 Applicant(s): X.M. Petse Inc.
3. Respondent(s): S.V. Magazi Attorneys

CASE INFORMATION -

**Summary:**

- **Whether a Municipality is a department or administration within the national or provincial sphere of government to be protected against attachment of its assets in satisfaction of judgment against it in terms of Section 3 of State Liability Act, No.20 of 1957**

- **Whether a mere launching of an application for rescission of judgment automatically suspends the execution of that judgment**

- **Whether it is competent to allow execution against property to be carried out in the light of a pending**

**application for rescission of judgment upon which the warrant of execution is based.**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(TRANSKEI DIVISION)**

**CASE NO.: 1662/07**

In the matter between:

**KING SABATA DALINDYEBO MUNICIPALITY APPLICANT**

**and**

**NOBUHLE MAGAVU RESPONDENT**

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**JUDGMENT**

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**DILIZO AJ:**

[1] This is an application launched by Applicant wherein it sought the following relief:

2.1 That the attachment and removal of the applicant's goods set out in the Notice of Attachment be and is hereby declared unlawful, invalid and set aside.

2.2 That the Respondent be and is hereby interdicted and restrained from attaching and removing the applicant's goods referred to in the Notice of Attachment

4. That paragraph 2.2. above shall operate as an interim or mandamus pending the finalization of the rescission application under Case No.1613/2007.

4. That the respondent pays costs of this application".

[2] This application was preceded by an application for rescission of judgment by default granted against Applicant on 8 November 2007. On the strength of the said judgment by default, a Warrant of Execution against Applicant's assets was issued and executed on 20 November 2007.

[3] The issuance and execution of the above warrant prompted the immediate launch by Applicant of the application for rescission of judgment by default on 22 November 2007.

[4]Mr Msiwa, counsel for Applicant, advanced argument that Applicant, as a Municipality, is an organ of State and that it therefore follows that its assets are indemnified or protected from attachment as envisaged in terms of Section 3 of the State Liability Act No.20 of 1957. Mr Mququ, counsel for the Respondent, countered the above contention in that Section 3 of the State Liability excludes local authorities from protection accorded in terms thereof.

[5]Section 239 of the Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution") defines "an organ of State" to mean …

> **"(a) any department of state or administration, national, provincial or local sphere of government; or**

**(b) any other functionary or institution –**

**(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or**

**(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer".**

[6] State Liability Act No. 20 of 1957:

**"SECTION 1: Claims against the State cognizable in any competent court-**

Any claim against the State which would, if that claim has arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

**SECTION 2: Proceedings to be taken against Minister of department concerned.-**

(1) In any action or other proceedings instituted by virtue of the provisions of section *one*, the Minister of the department concerned may be cited as nominal defendant or respondent.

(2) For the purposes of subsection (1),"Minister" shall, where appropriate, be interpreted as referring to a member of the Executive Council of a Province.

**SECTION 3: Satisfaction of judgment.-**

"No execution, attachment or alike process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may

be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings, may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be."

[7] Section 151(1) of the Constitution reads:

> **"The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic".**

[8] Section 154(1) of the Constitution reads:

> **"The National government and provincial governments, by legislative and other means, must support and strengthen the capacity of the municipalities to manage their own affairs, to exercise their powers and perform their functions".**

[9] In **Mateis v Ngwathe Plaaslike Municipaliteit en andere 2003(4) SA 361 (SCA)** the Supreme Court of Appeal held that it was clear that Sections 2 and 3 of the State Liability Act No. 20 of 1957 are concerned with the liability of the central or provincial government. The liability of the municipalities, which were indeed also a form of government, was not mentioned, nor neither with regard to cause of action, nor as possible Defendant, nor as possible paying party, and was therefore excluded by the necessary implication. Neither did the Act provide for a source from which liability of the judgment could be satisfied, in contrast to the central or provincial government.

[10] The Court proceeded to state that it was, as unquestionably indicated by material provisions of the Act, never the intention of the Legislature to provide for liability of municipalities to third parties as a form of state liability nor include the municipality in the word "State" for the purposes of the Act. It was therefore held that sale in execution of assets of a municipality in satisfaction of a judgment against it is competent.

[11] In the light of the above legal expositions, I am unable to come to the conclusion that a municipality, though it is admittedly an organ of state in terms of Section 239 of the Constitution, is a "STATE" as envisaged in terms of the State Liability Act. This Act prohibits execution against the State or provincial government because of the massive disruptions which execution against the state assets might cause. In terms of Section 2 of the State Liability Act a Minister of a department should be cited as nominal defendant or respondent in order to bring the defendant or respondent within the ambit of the protection as provided by Section 3 of the Act (**Jayiya v MEC for Welfare, EC, 2004(2) SA 611 (SCA).**

[12] In the case of **Cape Metropolitan Council v Metro Inspection Services CC 2001(3) SA 1013(SCA),** the Court stated that this country's government is constituted as a national, provincial and local spheres of government and this is in line with the provisions of Section 40 (1) of the Constitution. The national sphere of the government comprises, at least, the parliament, the president and the cabinet and these entities were held not to be the "Section 239 organs of state" in that they are neither department nor administrations within the national sphere of government as envisaged under Section 239 of the Constitution.

[13] Though the municipality is an organ of State in terms of Section 239 of the Constitution, in my view, it is not part of the government in that, as an organ of state, it does not fall within the national or provincial spheres of government as contemplated under chapter 3 of the Constitution (**Independent Electoral Commission vs Langenberg Municipality 2001(1) 3 SA 925 (CC) at 937E-I**). Both national and provincial spheres of government have concurrent powers in relation to those functional areas as described in Schedule 4 of the Constitution.

[14] A municipality cannot be said, in my view, to be a department or administration within the national or provincial spheres of government in respect of which national or provincial executive has a duty of coordinating the functions of the state departments and administrations as envisaged in terms of Section 85 (2) of the Constitution. The local sphere of local government consists of municipalities as defined in Section 151(1) of the Constitution. Municipalities, such as Applicant, are established by members of the executive council in provinces in terms of Section 12 of Local Government: Municipal Structures Act No. 117 of 1998.

[15] In my view, based upon the above legal exposition and interpretation of the relevant legislations, Section 3 of the State Liability Act was intended to deal with cases of actual claims against the state and where such claims can only be satisfied out of national revenue fund or provincial revenue fund, as the case may be. A municipality has no control over or entitled to payment out of such funds; be it national nor provincial. To me these are distinguishable words that municipalities were

intended to be excluded from being accorded any protection against attachment of municipal assets. (**Maharaj Bros v Pieterse Bros Construction and Another 1961 (2) SA 232 (NPD).**

[16] It brooks of no argument to me that parliament, when enacting the Constitution as well as relevant legislations, intended that there should not be execution against the government in respect of matters in which a judgment is given against the state itself. I am therefore not persuaded that a municipality, such as Applicant, is a state though it is admittedly an organ of the State as envisaged in terms of Section 239 of the Constitution.

[17] Mr Msiwa further referred me to a judgment, in the matter between **Freeborn Maxhobandile Ndzamela v Eastern Cape Development Corporation, Case No.830/01** (unreported), of which I am its author, wherein the court came to the following conclusion:

> **"That the Respondent be and is hereby declared an organ of State as envisaged in terms of Section 239 of the Constitution of the Republic of South African Act No. 108 of 1996.**
>
> **The property of the Respondent is protected from attachment and/or execution as in terms of section 3 of the State Liabilities Act No. 20 of 1957".**

[18] Mr Msiwa, argued that the municipality, applicant *in casu* and respondent in the above case, is on the same footing and that this Court is bound by that judgment. I am not inclined to agree with the conclusion reached by Mr Msiwa as contended for herein. In reaching the conclusion arrived at in **Ndzamela's** case, the court was bound by the approach

adopted in terms of the control test issue by the government over the development corporation which is not obtaining in municipalities, such as Applicant herein.

[19] The Court, in **Ndzamela's** case, had to consider whether the development corporation'a property should, by virtue of the provincial government being its sole shareholder, together with other considerations of its degree of control over its policies, operations and business activities, be treated as being the property of the provincial government for the purposes of according indemnity against attachment or execution or as provided for in section 3 of he State Liability Act.

[20] Arising out of the above legal exposition, the Court eventually came to the conclusion arrived at **Ndzamela's** case. The Court essentially considered the statutory control of the development corporation by the provincial government and its funding and transfers of monies from provincial revenue fund, that on the strength thereof the corporation assets were essentially purchased by provincial government for the corporation. It concluded that such properties were to be accorded protection against attachment or execution as though they are the state assets as envisaged in terms of section 3 of the State Liability Act.

[21] **Ndzamela's** case is distinguishable from the case under consideration in that:

> "(a) Municipalities are subject to very much limited ministerial directions and control and they operate as a form of local

sphere of government and yet a development corporation is heavily funded by the provincial government.

(b) Municipalities have wide executive and legislative powers vested in their municipal councils and they have a right to govern, on their own initiative, their local government affairs subject, of course, to national and provincial legislations as provided for in the Constitution and yet the development corporation is substantially dependent upon provincial government for the proper exercise of its mandate and for its continued existence.

(c) Municipality may make and administer by-laws for the effective administration of the matters which it has a right to administer and to also administer the local government matters listed under Part B of Schedule 4 and Part B of Schedule 5. These are indeed extensive powers to administer without intervention of the provincial sphere of government of the province of the Eastern Cape yet, such is wanting with regard to Development Corporations.

(d) In terms of Section 4(2)(c) of the Eastern Cape Development Corporation Act 2 of 1997, the Corporation is bound to open a banking account as may be approved by the Auditor-General and the operations of corporations are managed and controlled by the Board of Directors and the above do not apply to municipalities such as the Applicant.

[22] It is upon the heavy reliance by corporation upon provincial treasury for its continued existence and upon transfer payments to it by the provincial government as well as the effective control exercised upon it in terms of the Public Finance Management Act No.1 of 1994 that the Court concluded that the corporation, which is another hand of the government of the province of the Eastern Cape, should be accorded indemnity against the attachment or execution as if its assets are those of the state as envisaged in terms of Section 3 of the State Liability Act.

[23] In *casu* the Sate does not exercise such powers and control over the Applicant, as a municipality as to, for instance, when and in what manner it should carry out its businesses, nor does the state maintain control of when and how its powers are to be exercised. A municipality, such as Applicant, conducts largely its affairs through municipal councils over which the state has no control. Applicant is not the nominal defendant nor respondent cited as envisaged in terms of Section 2 of the State Liability Act, further, nor is Applicant the political head of a department sued in a representative capacity. **(Jayiya v MEC for Welfare EC** *supra* **at 612B).**

[24] It is trite law that the onus of establishing the actual applicability of Section 3 of the State Liability rests upon the party relying upon it (**Shoba v OC Temporary Police Camp, Wagendrift Dam 1995(4)SA 1 AD at 20D).** In *casu* I am not persuaded that Applicant has succeeded in discharging the onus upon it on a balance of probabilities that, indeed, the provisions of Section 3 of the said Act are of application in this matter. In any event I am bound by judgment of the Supreme Court of Appeal in this

regard which has not been demonstrated to me to be distinguishable from the facts of this case. (**Mateis v Ngwathe Plaeslike Municipaliteit en andere** supra). In conclusion I find that Applicant is excluded from protection accorded by Section 3 of the Act.

[25] I now proceed to consider whether the mere launching of an application for rescission of a judgment by default automatically suspends the said judgment or not.

[26] In the case of **Nel v Le Roux NO & Others 2006(30 SA 56 (SE)**the court held that an application for rescission, correction or variation the judgment does not have the effect of automatically suspending the judgment and, in order to have such an effect, Applicant for rescission of judgment requires an application to court in order for it to be suspended. The court went further to state that, where a warrant of execution has already been issued, the Applicant ought, simultaneously with his or her application to suspend the judgment, to apply for an order staying the warrant of execution. In the absence of an order staying the warrant, any subsequent sale in execution remains valid and cannot be set aside (at 95FG and 59J-60A).

[27] I am in full agreement with the above legal exposition. When Applicant lodged the application for rescission on 22 November 2007, it knew already that a Warrant of Execution was issued and was brought to its attention with a view to executing it on 20 November 2007 and should have, simultaneously with its application for rescission of judgment, apply

for an order staying the Warrant of Execution and not to wait until 4 December 2007 when the current application was actually instituted.

[28] Applicant should have known, when application for rescission of judgment was launched on 22 November 2007, that there is no substantive rule of law that the mere filing of an application to rescind a judgment automatically suspends execution of that judgment. It is only a substantive rule of law that the noting of an appeal automatically suspends the operation of the order in question.

[29] In the case of **United Reflective Converters (Pty) Ltd v Levine 1988(4) SA 460 (WLD)** the court stated that "there is no substantive rule of law that an application to vary or rescind an order or judgment automatically suspends its operation (463J-464B). However, it was also said, a Court is empowered to assist a litigant by ordering the suspension of an order or judgment pending finalization of an application to vary or rescind it to avoid apparent injustice. The court further explained provisions of Rule 49(11) to mean, save where it deals with appeals, that it is a substantive rule of law that the words "or to rescind, correct, review or vary" as they appear in the Rule, are of no force or effect (at p.464B). I am in full agreement with the above legal exposition.

[30] On whether to grant relief sought in the Notice of Motion or not, I am of the view that the dismissal of this application will lead to the revival of the warrant of execution which may be executed against Applicant's assets and thereby render the pending application for rescission of judgment to be of no force or effect. In my view that would be too harsh

and would effectively deprive Applicant of its opportunity to proceed with the Application for rescission and, if successful, of defending the main case. That would clearly not be in accordance with a right or access to justice or court. It is only in most deserving cases where such drastic steps may be taken. In my view, therefore, this is a proper case where such consequences should be averted at all costs.

[31] I feel I would also be usurping the court, of its powers, that may be seized with the application for rescission of judgment if I were to exercise my discretion against the Applicant in that, by discharging the rule, I would directly or indirectly be rendering the application for rescission worthless, which I am not empowered to do in these proceedings. Further more there would be no practical effect, result or advantage in pursuit by Applicant of the application for rescission. The court dealing with the application for rescission would be merely called upon to pronounce upon abstract or academic issues as there will no longer be any issues between the parties (**Coin Security Group (Pty) Ltd v SA National Union for Security Officers 2001(2) SA 872 (SCA) at 875A-D; Port Elizabeth Municipality v Smith 2002 (4) SA 241 (SCA) at 246I-247A)**.

[32] Considering whether to stay the warrant of execution or not, in **Van Dyk v Du Toit en andere 1993(2) SA 781(O),** the court held that a warrant of execution can be set aside if it is no longer supported by its *causa*. A judgment which is dependant, for its enforceability and further existence, on a decision of a further legal issue, whether to rescind it or not, was held to be uncertain to such an extent that it cannot serve as a basis for a warrant of execution. Whether the warrant of execution is still

supported by its *causa*, can only be answered after the decision of a legal issue, of whether the judgment sought to be rescinded is in fact actually rescinded when the application for rescission is finally dealt with.

[33] The issuance of the warrant of execution on 20 November 2007 was clearly dependant upon the judgment by default granted against Applicant on 8 November 2007. Without existence of the judgment by default sought to be rescinded on the application launched on 22 November 2007 upon whose *causa* the warrant of execution is clearly based, the warrant of execution under consideration will no longer be supported by its *causa*, judgment by default.

[34] If the *causa* for the warrant of execution has fallen away or is likely bound to fall away, simultaneously with the setting aside of judgment upon which it is based, I feel that the power to execute the warrant should be temporarily stayed pending finality in the application for rescission of judgment granted 8 November 2007(**Ras an andere v Sand River Cytrust Estates (Pty) Ltd 1972(4) SA 404 (TPD)**.

[35] In the case of **Le Roux v Yskor Landgoed 1984(4) SA 252(T) at 257B-C,** the court held that stay of execution could be granted where the underlying cause of the judgment debt is being disputed or no longer exists. In the pending application of rescission of judgment, the claim against Applicant is being disputed which, in my view, indicates that the *causa* of the judgment in question is being assailed and in *casu* the execution of the judgment is now being sought to be stayed.

[36] In **Road Accident Fund v Straydom 2001(1) SA 705 (CPD)**, it was held that the court will, generally speaking, grant the stay of the execution where justice requires such a stay wherein injustice would otherwise be done. In *casu* I am satisfied that Applicant has shown a well grounded apprehension of the order being executed to finality long before the application for rescission is brought to an end if the execution of the warrant is not stayed. Applicant has further sufficiently demonstrated that the stay of execution is justified as the foundation upon which its apprehensions are based will affect or assail the very *causa* which is the basis of the warrant of execution. I therefore conclude that substantial injustice on the part of the Applicant will be enormous if the execution and sale of Applicant's assets were to be allowed before finality of the application for rescission of judgment which, is still pending before this court, is reached.

[37] Should the Application for rescission of judgment be successful, I am satisfied that the underlying *causa* upon which the warrant of execution was issued will also fall away and there would accordingly be no basis for the warrant of execution being executed. The judgment sought to be rescinded is clearly dependent, for its enforcement, on the outcome of the pending application for rescission of judgment where the execution will be dependant upon legal issues to be raised therein. As the judgment under consideration cannot, in view of the above approach, serve as a basis for the warrant of execution, I am of the view that it is proper and more appropriate for this court to grant a stay of execution pending finalization of the application for rescission of judgment granted against Applicant on 8 November 2007.

[37] However, though I am inclined to confirm the Rule subject to the extent of amendment I intend effecting, I nonetheless feel that, had Applicant conducted itself in accordance with the law as expounded above, there would have been no need for it to now launch this application, separately from one of rescission of judgment. Because of Applicant's conduct as a afore-stated, costs of this application were unnecessarily incurred by the Respondent who acted lawfully when proceeding with a Warrant of Execution as nothing in law that disapproves of its conduct in the circumstances. This therefore bears relevance with regard to the issue of costs order which I intend giving hereunder.

[39] In the result I make the following order:-

1. Pending finalisation of the application for rescission of judgment by default granted against Applicant on 8 November 2007, it is hereby order that:-

    1.1 the execution of the judgment by default referred to under paragraph 1 above be and is hereby suspended.

    1.2 the Warrant of Execution against property of Applicant issued on 20 November 2007 be and is hereby stayed.

    1.3 Applicant to pay 50% of Respondent's costs occasioned by this application

**ACTING JUDGE OF THE HIGH COURT**

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|---|---|---|
| **COUNSEL FOR THE APPLICANT** | **:** | **P.V. MSIWA** |
| **Instructed by** | **:** | **X.M. Petse Inc.** |
| **ATTORNEY FOR THE RESPONDENT:** | | **K.T. MQUQU** |
| **Instructed by** | **:** | **S.V. Magazi Attorneys** |

**Heard on 7 August 2008.**

**Delivered on 21 August 2008.**