

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

CASE NO: 2013/12732

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO**

17/9/2021

In the matter between:

GEC

Applicant

And

TC

First Respondent

SHERIFF FOCHVILLE/ OBERHOLZER

Second Respondent

MATTHEE BADENHORST INC ATTORNEYS

Third Respondent

Date of hearing: 8 September 2021- In a 'virtual hearing' during a videoconference on Microsoft Teams digital platform.

Date of Judgment: 17 September 2021

JUDGMENT

GRAF AJ

INTRODUCTION

[1] This is an urgent application for the suspension of the operation of an order granted by this court on 31 May 2013 and the execution thereof, and for the setting aside of the attachment of the proceeds of sale of the applicant's immovable property.

[2] The application is opposed by the first respondent.

[3] The applicant informed the court that the relief sought is interim in nature, pending the outcome of the application for variation of the court order that was launched by the applicant on 6 August 2021.

BACKGROUND

[4] The applicant and first respondent were married, until this court dissolved the bonds of marriage between them on 31 May 2013 by decree of divorce. In terms of the court order the deed of settlement entered into between the parties was made an order of court. Clause 3 of the deed of settlement provided for maintenance payable by the applicant in respect of the two minor children born of the marriage.

[5] The applicant and first respondent reconciled shortly after the divorce order was granted and the applicant moved back into the marital home. The applicant, first respondent and their two minor children lived together as a family until March 2019. Due to the parties' living situation the applicant did not make maintenance payments as required in terms of the divorce order.

[6] In March 2019 and after having lived together for almost six years since their divorce, the applicant and first respondent separated and the applicant moved out of the marital home. The first respondent and the two children relocated to Bloemfontein.

[7] The applicant experienced financial difficulty after the break-up of his relationship with the first respondent. He sold his farm for R1 650 000-00 to one Janine Nortje. The purchase price was payable to the applicant in three annual

instalments of R550 000-00 each. The applicant received the first payment during September 2020 and the second payment was due on 1 September 2021.

[8] On 28 January 2021 the first respondent had the writ, which is the subject of this application, issued against the applicant, due to his failure to honour his maintenance obligations in accordance with the settlement agreement. On 2 February 2021 the sheriff, Sandton North, judicially attached the applicant's FNB bank account in an attempt to satisfy the first respondent's writ of execution. There was insufficient funds in the applicant's bank account and the attachment has since been uplifted. An attempt by the sheriff on 22 February 2021 to execute the writ at the applicant's new girlfriend's house also proved futile.

[9] Although the applicant was aware of the existence of the writ since February 2021, he only instructed his attorneys to launch an application for the retrospective variation of his maintenance obligations in terms of the divorce order towards the end of July 2021. The applicant attributes this delay to financial constraints and his inability to access the funds in his FNB bank account.

[9] The application for variation of the court order, which includes a prayer to set aside the warrant of execution, was served on the first respondent's attorneys of record on 6 August 2021.

[10] On 27 August 2021 the sheriff (second respondent) served a notice of attachment pursuant to the warrant of 28 January 2021 on the third respondent (conveyancing attorney), attaching the proceeds of the sale of the applicant's farm.

[11] It is against this background that the present application is launched.

RELIEF SOUGHT BY THE APPLICANT

[12] In the notice of motion the applicant prayed for an order in the following terms:

- Suspending the operation of the order made on 31 May 2013 and staying the execution thereof;

- Setting aside the writ issued 28 January 2021 pursuant to the court order made on 31 May 2013; and
- Setting aside the attachment on 20 August 2021 by the sheriff Fochville/ Oberholzer of the proceeds of sale of Portion [....] Farm E[....], registration division IQ pursuant to the writ of 28 January 2021.

[13] The first respondent took issue, amongst other things, with the wording of the order sought, on the following grounds:

- The entire divorce order cannot validly be suspended 7 years after it was granted.
- *Lis pendens*- The prayer for the setting aside of the writ of execution is also contained in the pending application for variation ('the main application').

[14] As a consequence of the concerns raised by the first respondent the applicant revised the order sought in the following terms:

- Suspending the operation of the order given on 31 May 2013 insofar as the maintenance obligations of the applicant is concerned, pending the outcome of the variation application brought by the applicant on 6 August 2021.
- Staying the execution of the order given on 31 May 2013 in respect of the maintenance obligations of the applicant pending the outcome of the variation application.
- Setting aside the attachment by the second respondent of the proceeds of sale of Portion [....] Farm E[....], registration division IQ pursuant to the writ of 28 January 2021.

APPLICANT'S SUBMISSIONS

[15] According to the applicant the application is brought in terms of Rule 45A of the Uniform Rules of Court, alternatively on the basis of the court's inherent and wide

discretion to control its own process and the requirements of real and substantial justice.

[16] In the founding affidavit the applicant explains that he is in urgent need of the attached funds, due to his dire financial situation. The proceeds of the sale of the farm is the applicant's only source of income, save for a small income derived from handyman work. His FNB credit card has a negative balance of R154 335.96. He exchanged his motor vehicle for a cheaper model and has to settle the outstanding balance of R20 000-00 in September 2021. He borrowed money from his girlfriend to pay the deposit on the motor vehicle. He will lose his only mode of transport and will accordingly be unable to accept work as a handyman, should he be unable to pay the outstanding balance on the vehicle. He depends on his girlfriend for his day-to-day living expenses and accommodation and has agreed to compensate her by paying part of the transfer costs of her new house. She entered into an agreement of sale based on the applicant's undertaking and will be liable to pay damages, should the sale be cancelled as a result of her inability to pay the transfer costs. In addition to that, the applicant will be in default of an order of the High Court, North West Division, Mahikeng by 30 September if the proceeds of the farm's sale remains under attachment. The applicant, due to his financial constraints, will be unable to visit his children in Bloemfontein if the attachment is not uplifted.

[17] The applicant contends that his prospect of success in the variation application is excellent and that real and substantial justice requires a stay of execution of the order, pending the outcome of the variation application.

FIRST RESPONDENT'S SUBMISSIONS

[18] The first respondent disputes that the applicant is entitled to the relief sought. According to the first respondent the cash portion of the maintenance claim, which amounts to R192 188.21, is calculated based on the applications failure to pay maintenance for the period April 2019 to November 2020. The amount claimed does not include missed maintenance payments dating back to the date of divorce. An amount of R169 222.00 is claimed in respect of premiums due to the medical aid scheme in respect of the children's membership for the period June 2013 to November 2020. A further R59 559.79 is claimed in respect of medical expenses not

covered by the medical aid for the period May 2019 to November 2020 and the sum of R121 310.00 is claimed in respect of the children's school fees for 2019 and 2020.

[19] The first respondent opines that the applicant is more concerned about payment to his alleged creditors and the transfer costs relating to his girlfriend's property than to contribute towards the maintenance needs of the children.

[20] Although the first respondent is not prepared to agree to the upliftment of the attachment, she tenders that the attached funds be retained in an interest-bearing account pending finalisation of the main application.

THE LEGAL POSITION

[21] Rule 45A of the Uniform Rules of Court provides that:

‘The court may suspend the execution of any order for such period as it may deem fit’.

[22] In *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others*¹ Navsa JA, in considering the principles applicable to the staying of execution of judgments, stated that:

‘Apart from the provisions of Uniform Rule 45A, a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.

A court will grant a stay of execution in terms of Uniform Rule 45A where the underlying causa or judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial injustice compels such action’.

¹ 2011 (4) SA 149 (SCA) at para 51-52

[23] In *Stoffberg N.O and Another v Capital Harvest (Pty) Ltd*² Binns-Ward J explained that:

‘The broad and unrestricted wording of rule 45A suggests that it was intended to be a restatement of the courts’ common discretionary power. The particular power is an instance of the courts’ authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that execution will be suspended where real and substantial justice requires that. ‘Real and substantial justice’ is a concept that defies precise definition, rather like ‘good cause’ or ‘substantial reason’. It is for the court to decide on the facts of each case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment ; and, if they are, on what terms any suspension it might be persuaded to allow should be granted’.

[24] Counsel for the applicant placed a lot of emphasis on the matter of *Strime v Strime*³ where a divorced husband successfully applied for a stay of execution of a writ issued out at the instance of his ex-wife in respect of unpaid maintenance. The court granted the stay until after the determination of a pending application brought by the applicant to have his maintenance obligations reduced or cancelled.

[25] The first respondent’s counsel, on the other hand, highlighted the differences between *Strime* and the present matter and the necessity of considering the best interests of the minor children to be of paramount importance in the determination of this application. Spousal maintenance was at issue in *Strime*, whereas the present matter entails unpaid maintenance in respect of two minor children. She referred me to *SS v VV-S*⁴ where the Constitutional Court emphasised the significance of maintenance obligations and the duty of the courts to ensure compliance therewith. It was said that the ‘court’s integrity would be jeopardised if it failed to uphold its

² (2130/2021)[2021] ZAWCHC 37 (2 March 2021) at para 26

³ 1983 (4) SA 850 (C)

⁴ [2018] ZACC 5 (Judgment delivered on 1 March 2018)

solemn constitutional obligation under section 28, to protect the best interest of the children’.

BALANCING OF INTERESTS

[26] It is clear that the decision I am called upon to make requires me to strike a balance between the applicant’s interests on the one hand and the interests of the first respondent and two minor children on the other hand.

[27] There is nothing to gainsay the applicant’s averment that he will be financially ruined if the attachment of the funds is not uplifted. He might lose his only mode of transport, which will in turn make it impossible for him to earn an income through handyman work. He will be in default of another High Court order, should he fail to make payment on or before 30 September 2021.

[28] However, it is not in dispute that the applicant has failed to comply with his maintenance obligations towards his children, at least from 2019 when he left the marital home. From the first respondent’s calculations the cash component of the arrear maintenance, excluding school fees and medical expenses, amounts to R192 188-21.

[29] Having regard to the applicant’s dire financial situation it seems unlikely that he will be able to retain some funds to provide for the arrear maintenance of the children, in the event that the variation application does not absolve him from such obligations. The first respondent’s reluctance to agree to the setting aside of the attachment is understandable under the circumstances.

[30] In the analyses of all the evidence I am of the view that real and substantial injustice may result if the execution of the maintenance portion of the deed of settlement is not temporarily stayed and the attachment of the funds pursuant to the writ not partially uplifted. However, to safeguard the interest of the minor children, I am not willing to authorise a complete upliftment of the attachment. Some funds are to be retained by the third respondent in an interest-bearing account, pending the finalisation of the main application.

ORDER

[31] The following order is made:

- The matter is enrolled as urgent, and the forms and service provided for in the rules of court are dispensed with.
- The operation of the order of this court under case number 2013/12732, given on 31 May 2013, is suspended insofar as the maintenance obligations of the applicant is concerned, pending the outcome of the variation application brought by the applicant on 06 August 2021 under the above case number.
- The execution of the order of this court under case number 2013/12732, given on 31 May 2013 in respect of the maintenance obligations of the applicant is stayed, pending the outcome of the variation application brought by the applicant on 06 August 2021 under the above case number.
- The attachment by the second respondent of the proceeds of the sale of Portion 48 (a portion of portion 5) of the Farm E[...] 561, registration division IQ, Gauteng Province pursuant to the writ issued on 28 January 2021, is set aside in part, the third respondent being ordered to pay R275,000.00 (Two Hundred and Seventy Five Thousand Rand) of the proceeds of the sale of said farm to the applicant, while retaining the remainder of such proceeds in an interest bearing trust banking account, pending the outcome of the variation application brought by the applicant on 06 August 2021 under the above case number.
- Costs of this application is reserved for the court hearing the variation application.

A. GRAF

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 8 September 2021

Date of judgment: 17 September 2021

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