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

CASE NO: 6577/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

26/08/2022

In the matter between:

**MEC: DEPARTMENT OF ROADS AND TRANSPORT,
GAUTENG PROVINCE**

First Applicant

**DEPARTMENT OF ROADS AND TRANSPORT,
GAUTENG PROVINCE**

Second Applicant

And

KWAGGA HOLDINGS (PTY) LTD

First Respondent

ROSSOUW LESIE INC ATTORNEYS

Second Respondent

SHERIFF JOHANNESBURG CENTRAL

Third Respondent

JUDGMENT

MAKUME, J:

[1] In this matter the Applicants seeks an order setting aside the Writ of Execution that was issued by the Registrar of this Honourable Court pursuant to an application by the Respondents on the 25th April 2022.

[2] The basis for seeking that order is set out in the Applicants Founding Affidavit as being the following:

- a) That the Writ was not based on any Court order granted in favour of the Respondents.
- b) There was non-compliance with the procedural obligation in terms of the Stale Liability Act 14 of 2011.
- c) The Writ was issued wrongly in the face of an Adjudication Award granted in favour of the Applicants.
- d) That the interest of justice favour the setting aside of the Writ.

BACKGROUND FACTS

[3] The dispute in this matter dates back to the year 2014 when the Adjudicator a Mr Mogotsi failed to make a ruling capable of being made an award in terms of the rules of Arbitration.

[4] Some year later during February 2019 the first Respondent and six other contractors brought an application before this Honourable Court under case number 6577/2019. Their claims were based on an alleged breach of contract by the Applicants.

[5] On the 7th November 2019 Yacoob J made the following order:

5.1 By no later than Friday 15th November 2019 the parties respective attorneys shall furnish to the other a list of three names, of persons to act as the adjudicator in the place and stead of the third Respondent in terms of

clause W1.1 of the NEC contract concluded between the parties (the NEC Contract).

5.2 By no later than Friday 22 November 2019 the parties shall agree to the identity of the nominated adjudicator failing such agreement by no later than Tuesday 26 November 2019 the chairman of the Johannesburg Society of Advocates shall appoint the adjudicator from one of the six names submitted.

5.3 The claims forming the subject matter of the application shall be referred to the Adjudicator who shall commence his/her adjudication by no later than 31 January 2020 and conclude same within the time periods provided for in the NEC contract.

5.4 The parties shall be entitled to raise all arguments in relation to the adjudication process before the adjudicator and all the parties' rights in relation to the NEC contract in general and the Adjudication in particular are strictly reserved.

[6] In compliance with the order referred to above Adv Badela was appointed Adjudicator and on the 17th August 2020 he made a determination dismissing the Respondents' claims. The first Respondent's claim in the Adjudication was for payment of the sum of R25 307 272.70 (Twenty-Five Million Three Hundred and Seven Thousand Two hundred and Seventy-Two Rand and Seventy Cents only).

[7] Contrary to the letter and spirit of the ruling and award by Adv Badela the first Respondent then decided on the 19th November 2021 almost a year after the award to address a letter of demand to the Applicants purportedly in terms of the State Liability Act in which for some unknown reason the first Respondent now referred to the April 2014 Award which was the Magotsi award which had already been superceded by the Badela Award.

[8] The Applicants responded to the email on 04 January 2022 and disputed the claim. On the 22nd March 2022 the First Respondent filed an affidavit in support of

the issuing of a Writ of Execution. In his affidavit Mr Nazer Cassim relies on the judgment granted in favour of other contractor. In particular, Cassim says the following at paragraph 27:

“According to all judgments, Magotsi completed the process on or during 14 April 2014 and handed down an adjudication award for each contractor who had referred the claim to him and who had paid for the adjudication service.”

[9] The above statement by Mr Cassim is incorrect and misleading. Mr Cassim knows very well that Adv Badela in paragraph 11 of his award noted as follows:

“What I am called to determine is the entitlement or otherwise of the claimants to the awards claimed against the Respondents as detailed in the claimants statement of claim.”

[10] It is common cause that on the 17th August 2020 Adv Badela after having considered all the necessary documents and evidence placed before him by Counsel on both sides dismissed the contractors claims. This fact was known to Mr Cassim at the time when he filed the affidavit in support of the application to authorise the issuing of the Writ of Execution.

THE LEGAL PRINCIPLE

[11] It is common cause and trite law that execution is a process which enables a judgment creditor to obtain satisfaction of a judgment granted in his favour. There is in this case a dispute about whether the Respondents are judgement creditors or not. I accordingly find myself in this urgent court not having sufficient time to resolve that dispute hence my order granted on the 7th July 2022.

[12] It has been decided in a number of cases that a court has a discretion to stay a Writ in Execution. In **Graham v Graham 1950 (1) SA 655 (T)** the following was said by Clayden J at 658:

“Execution is the process of the Court and I think the Court must have an inherent power to control its own process subject to such rules as there are (See: **Mahomed v Ebrahim 1911 CPD 29** and **Cohen v Cohen 1979 (3) SA 420 (R) at 423 C-D**) The Court will generally speaking grant a stay of execution where real and substantial justice require such a stay or put otherwise where injustice would otherwise be done.”

[13] In **Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd and Another 1981 (2) SA 407 (W) at 411A** Nestadt J said the following:

“Even however if the above approach be wrong, I consider that I have a discretion to grant a stay in execution.

And at 411E-F Nestadt said: It is in the interest of justice that Applicant retain the opportunity of showing that the judgment appealed against is incorrect. The prejudice to the Applicant if the sale proceeds and its right to appeal frustrated is manifest.”

[14] In **Whitfield v Van Aarde 1993 (1) SA 332 (ECD) at page 337 (F-G)** Neppen J held as follows: “The effect of holding that a Court is unable to control its own process would be to deprive a Court of what has always been considered to be an inherent power of such Court. Of course the discretion which a Court has must be exercised judicially.”

[15] Finally in **Van Rensburg NNO v Naidoo NNO 2011 (4) SA 149 (SCA) at paragraph 52** NAVSA JA said the following:

“A court will grant a stay in execution in terms of Rule 45A where the underlying causa of a judgment is being disputed or no longer exists, or when an attempt is being 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 justice compel such action.”

[16] The second ground relied upon by the Applicants to set aside the Writ of Execution is based on the fact that the Respondents did not follow the procedure set out in the State Liability Act. The process for execution of Writs in terms of that Act have been outlined by the Constitutional Court in the matter of **Provincial Government of North West and Another vs Tsoga Developments CC and Other [2016] [5] BCLR 687 (CC)**.

[17] It is common cause that the Respondents did not follow that procedure accordingly the jurisdictional fact entitling the Registrar of this Honourable Court to issue the Writ were lacking.

INTEREST OF JUSTICE

[18] As it was set out in the various decision referred to above a Court in dealing with the issue of discretion must also take into account what is in the best interest of justice.

[19] I am persuaded that an injustice has been done and continues to be done to the Applicants by the continued hold on its bank account. The Applicant is a Government Department employing thousands of people, it has obligations to service providers and needs to access its bank account. The Respondents are not without remedy in the future. All they had to do was either review the Badela finding or proceed by way of action against the Applicants.

URGENCY

[20] The Respondents have said very little or nothing about the merits of this application. They have instead relied heavily on the issue of urgency. It is contended by the Respondents that urgency is self-created since the Writ was granted on the 25th April 2022 and the Applicants only decided to approach Court some two (2) months later.

[21] The freezing of the Applicants bank account remains urgent even after two months. It has never stopped being urgent since the Applicants are unable to carry out their statutory government obligations.

[22] I am persuaded that urgency is not self-created and to have refused to hear this matter on an urgent basis would have continued to restrict and hamstring the operation of government.

[23] In the final analysis I am persuaded that the Applicants have made out a case not only of urgency but on the merits also. I am of the view that the Writ of Execution should be suspended and the hold on the Applicants account be uplifted.

[24] In the result I make the following order:

ORDER

1. The Applicants non-compliance with the Rules of this honourable Court relating to forms and services of this application on the Respondents and allowing this matter to be heard as one of urgency in terms of Uniform Rules 6 (12) of the Rules of above Honourable Court, is hereby condoned.

2. The first, second and third Respondents ("the Respondents") are hereby interdicted and restrained from:

2.1 attaching and executing the Applicant's bank account to the value of R73 895 054.18 together with interest thereon;

2.2 attaching and executing the second Applicant's rights, title and interest in the Bank Account with Account number [....] held with First National Bank Limited;

2.3 attaching and executing the second Applicant's rights, title and interest in the Bank Account with Account Number [....] held with Standard Bank of South Africa.

3. The Writ of Execution which was issued by the Registrar of this Honourable Court on 25 April 2022 is hereby stayed pending an application to have same set aside as irregular, which application shall be instituted within 30 days from date of this order.

4. The Sheriff of Johannesburg Central is hereby ordered to restore to the second Applicant the bank accounts mentioned in paragraphs 2.2 and 2.3 above.

5. The costs of this application shall be decided simultaneously with the costs of the application to set aside the Writ of Execution.

Dated at Johannesburg on this 26th day of AUGUST 2022.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 06 JULY 2022

DATE OF JUDGMENT : 26 AUGUST 2022

FOR APPLICANT : ADV BOKABA SC
ADV LECOGE

INSTRUCTED BY THE STATE ATTORNEY

FOR RESPONDENT : ADV MOTHIBE-SHADRY

INSTRUCTED BY MESSRS MOHAMED ASHRAF ESSOP