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

CASE NO: 3409/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

15 November 2022 .....
DATE SIGNATURE

In the matter between:

SERVICES SECTOR EDUCATION AND TRAINING AUTHORITY	Applicant
and	
AMANZ' ABANTU SERVICES (PTY) LTD (in business rescue)	First Respondent
THE SHERIFF: JOHANNESBURG-NORTH	Second Respondent

In re:

AMANZ' ABANTU SERVICES (PTY) LTD (in business rescue)	Execution Creditor
and	
SERVICES SECTOR EDUCATION AND TRAINING AUTHORITY	Execution Debtor

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, the Services Sector Education and Training Authority, a statutory body established in terms of section 9(1) of the Skills Development Act 97 of 1998, sought the stay of a writ of execution issued at the instance of the first respondent, pending the outcome of an appeal, by way of urgency.

[2] The first respondent, Amanz' Abantu Services (Pty) Ltd (in business rescue), opposed the application on the basis that there was no pending appeal and that the applicant failed to demonstrate or establish a right.

[3] The second respondent, the Sheriff Johannesburg-North, cited as an interested party, played no role in the proceedings.

[4] The applicant and the first respondent agreed to refer their dispute to arbitration. The dispute related to whether the construction contract concluded between them was re-measurable. The respondent contended that it was and claimed a final payment certificate.

[5] The arbitrator delivered his award on 4 November 2021 ('the award'). It was common cause between the parties that the award came to the parties' attention during January 2022.

[6] The award included a finding that the contract sum was re-measurable and directed the parties to agree to the appointment of a Quantity Surveyor ('QS'), an expert, in order to assess the first respondent's claim for a final payment certificate. In addition, the arbitrator directed that the applicant issue a final payment certificate for the amount determined by the QS, failing which that the QS issue the final payment certificate.

[7] The arbitrator directed the applicant to make payment to the first respondent of any amount assessed as being owing by the QS, within ten calendar days of the issue of the final payment certificate.

[8] Pursuant thereto, the parties mutually appointed the QS to assess the first respondent's claim for a final payment certificate. Accordingly, the applicant accepted the arbitrator's award and acted upon it.

[9] On 2 June 2022, the first respondent obtained an order of this Court in terms of which the arbitrator's award was made an order of court.

[10] The QS completed the re-measurement process and delivered his determination on 1 July 2022. The applicant, dissatisfied with the QS's decision, declined to issue the final payment certificate and the QS did so on 7 July 2022, in the amount of R9 395 851.54. The amount was payable in terms of the arbitrator's award within ten days, by 17 July 2022.

[11] Whilst the parties' agreement to determine their dispute by way of arbitration incorporated a provision that the arbitration be final and binding upon them, the applicant alleged that the parties concluded an addendum to the arbitration agreement, during March 2018. The addendum allegedly provided for the arbitration award to be

subject to an appeal in terms of the Rules of the Arbitration Foundation of South Africa ('AFSA').

[12] The applicant, on 6 July 2022, submitted an appeal in respect of the determination of the QS, not the award of the arbitrator itself. The first respondent objected to the appeal on the ground that the QS's determination was not appealable.

[13] The first respondent informed AFSA on 20 July 2022, of its view that the QS's determination was not appealable. On 31 August 2022, AFSA advised by way of correspondence that its participation in the matter was limited to the appointment of an arbitrator and that it had no jurisdiction to appoint an appeal tribunal.

[14] The first respondent caused the arbitrator's award and the Court order to be served on the applicant's attorneys of record on 24 August 2022, and, on National Treasury on 2 September 2022, Thereafter, on 28 September 2022, the first respondent informed the applicant that it intended procuring the issue of a writ based on the award that the applicant pay the amount determined by the QS.

[15] The writ was issued on 4 October 2022, in the amount of R9 395 851.54 plus interest thereon at the rate of 7.5% per annum from 18 July 2022 to date of payment, in terms of the payment certificate issued on 7 July 2022 read together with the Court order dated 2 June 2022.

[16] The first respondent's attorneys brought the writ to the attention of the applicant's attorneys by way of correspondence on 6 October 2022. As a result, the applicant launched this application by way of urgency for a stay of the writ, on 13 October 2022.

[17] The deponent to the affidavit in support of the application for the issue of the writ of execution, referred in that affidavit to:

17.1 Section 3(3)(a)(i) of the State Liability Act, 20 of 1957 ('the Act'), to the effect that a final court order against a department of state for the payment of money must be satisfied within 30 days of the date of the court order becoming final;

17.2 Section 3(4) of the Act to the effect that if the final court order for the payment of money is not satisfied within 30 days of the date of the order becoming final, the judgment creditor may serve the court order on the attorney of record and the relevant treasury;

17.3 In terms of s 3(5)(a) of the Act, the relevant treasury must, within 14 days of the service of the final court order, ensure that the judgment debt is satisfied;

17.4 In terms of s 3(6) of the Act, in the event that the relevant treasury fails to ensure that the judgment debt is satisfied within the time periods specified, the Registrar must upon the written request of the judgment creditor or his legal representative, issue a writ of execution or a warrant of execution in terms of the applicable Rules of Court against movable property owned by the State and used by the department concerned.

[18] The deponent stated further that the judgment debtor, the applicant, failed to satisfy the judgment debt within 30 days of the date for payment and the court order was served on the judgment debtor's attorney of record and upon the National Treasury.

[19] The issues to be determined by me were:

19.1 Whether the applicant established urgency sufficient to bring the application on the truncated time periods utilised by it regarding notice and service of the application; and

19.2 Whether real and substantial justice required the stay of the writ or whether an injustice would result if the writ was not stayed.

[20] The applicant submitted that in the alternative to a determination of whether real and substantial justice required a stay, the applicant was entitled to a stay if:

20.1 The applicant established a *prima facie* right to the relief sought by it;

20.2 There was a reasonable apprehension of irreparable harm; and

20.3 The balance of convenience favoured the applicant.

[21] Given that the application involved the stay or otherwise of a writ in excess of R9 million, I determined that the application was sufficiently urgent to justify it being determined on the basis on which it was brought before me by the applicant, and that the matter should be enrolled and determined as a matter of urgency.

[22] The applicant relied on the potential injustice that it alleged would follow in the event that the writ was not stayed, and the applicant ultimately found success in its appeal against the determination of the QS. Furthermore, the applicant contended that this Court was not required to consider the merits of the underlying dispute as the sole enquiry was whether the underlying *causa* remained in dispute between the parties.

The applicant argued that it was not asserting a right but rather seeking to prevent an injustice and that the granting of real and substantial justice compelled the ordering of the stay. Accordingly, the applicant argued further that the first respondent's contentions that the applicant did not have a *prima facie* or a clear right, was not relevant to the issues under consideration.

[23] Whilst I am not seized with the merits of the underlying dispute, they are relevant insofar as I am obliged to assess whether the alleged dispute regarding the underlying *causa* relied upon by the applicant, constitutes a triable issue.[1]

[24] The parties, pursuant to the award, agreed to refer the assessment of the payment certificate to an expert, the QS, who reached a determination. Neither party alleged that the QS did not act honestly and in good faith in rendering his determination. Thus, I accept that the QS performed the assessment honestly and in good faith.

[25] The QS, thereafter, became *functus officio* and his decision final and binding on the parties. The only method of disturbing the expert's determination was by way of review proceedings.[2] It was common cause between the parties that the applicant did not institute review proceedings in respect of the QS's determination.

[26] In order for this Court to suspend the decision constituting the underlying *causa*, the applicant had to demonstrate that the underlying *causa* was disputed between the parties.[3]

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1 *BP SA v Mega Burst Oils* 2022 (1) SA 162 (GJ) ('*BP*') para 21.
2 *Transnet National Ports Authority v Reit Investments (Pty)Ltd* [2020] ZASCA 129 (2020 JDR 2104) paras 32-34 ('*Transnet*'); *Tahilram v Trustees, Lukamber Trust* 2022 (2) SA 436 (SCA) para 27; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* 2008 (2) SA 448 (SCA) para 22 ('*Lufuno*').
3 *Gois t/a Shakespeare's Pub v Van Zyl & Others* 2011 (1) SA 148 (LC) para 37.

[27] As stated afore, the applicant accepted and acted upon the award in terms of which the arbitrator directed the appointment and assessment of a QS. The arbitrator's award remains undisputed by the applicant. The latter did not bring appeal or review proceedings against the award.

[28] Rule 22.2 of AFSA's Arbitration Rules provides that "A notice of appeal shall be delivered by the appellant, within 7 calendar days of publication of the award, failing which the interim award or final award shall not be appealable. ...". Accordingly, given the absence of a notice of appeal by the applicant in respect of the arbitrator's award within the stated time period, the award became final.

[29] As regards the applicant's alleged appeal against the determination of the QS, the respondent objected to the appeal in that the QS was appointed, by agreement between the parties, as an expert and thus did not perform a quasi-judicial function. As a result, the QS's determination is not capable of sustaining an appeal.[4]

[30] On 15 August 2022, the applicant adopted the view that the QS's determination was reviewable. Notwithstanding, the applicant did not persist therewith, took no action in that regard and did not furnish any basis upon which the QS allegedly did not act honestly or in good faith. Moreover, as submitted by the applicant's counsel in argument before me, the Arbitration Act does not permit of a general entitlement of a party to an arbitration to bring review proceedings. In any event, the applicant's grounded its application firmly upon the alleged purported appeal of the QS's determination

[31] Reference to the requirements of an interim interdict in the context of Rule 45A, is not entirely appropriate in circumstances where "an applicant is not asserting a right

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4 *Transnet* note 2 above; *Lufuno* note 2 above.

in the strict sense but a discretionary indulgence based on the apprehension of injustice,"[5] as occurred in this matter.

[32] The alternate interdictory relief sought by the applicant must fail given that the applicant did not rely upon a right in the strict sense.[6] That however does not necessarily mean that the applicant's application must fail. The interests of justice in terms of Rule 45A and this Court's inherent jurisdiction remain relevant to the relief sought by the applicant herein.[7]

[33] The applicant relied upon an injustice in the event that the writ was not stayed and the applicant succeeded in its appeal. Stated differently, the applicant contended that irreparable harm would invariably result if there was a possibility that the underlying *causa* was the subject-matter of an ongoing dispute between the parties.

[34] However, there is no ongoing dispute between the parties. The arbitrator's award is final and binding given that the applicant did not lodge a review or an appeal against the award in terms of Rule 22.2 of AFSA's Rules.

[35] As regards the alleged appeal against the QS's determination, AFSA advised the applicant on 31 August 2022, that AFSA does not have jurisdiction to appoint an appeal tribunal. Accordingly, there is no pending appeal of the QS's determination.

[36] In the circumstances, the applicant did not establish that the underlying *causa* is in dispute between the parties and that irreparable harm will result if the writ is not stayed.

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5 *BP* note 1 above; *MEC, Department of Public Works v Ikamva Architects* [2022] 3 All SA 760 (ECB) para 83; *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) 304E;
6 *BP* note 1 above para 15.
7 Id.

[37] Insofar as I am obliged to exercise this Court's discretion under Rule 45A judicially, that requires that I not close my eyes to the fact that there is no pending appeal by the applicant.

[38] Given the absence of a pending appeal, the 'question arises as to whether Rule 45A provides a residual, equitable discretion to a Court …'.[8] In short, uniform rule 45A does not envisage 'the exercise of an equitable jurisdiction unhinged from any legal *causa*, … simply predicated on the equities of a case.'[9]

[39] Accordingly, the first respondent's argument that absent a protectable right this Court does not have a residual equitable discretion to order a stay of execution in terms of uniform rule 45A,[10] was correctly made.

[40] Insofar as the applicant argued that neither the arbitrator's award or the determination of the QS provided for payment by the applicant of interest, s 29 of the Arbitration Act 42 of 1965, provides for interest on the amount awarded in terms of an award for payment of a sum of money. Such amount shall, unless the award provides otherwise, carry interest at the same rate as a judgment debt. Accordingly, the Prescribed Rate of Interest Act 55 of 1975 applies in respect of the payment of interest. Additionally, the capital amount claimed under the writ is correct.[11]

[41] Accordingly, the first respondent is entitled to *mora* interest at the prevailing rate on the amount ordered by the arbitrator, being the amount determined by the QS, from the date of the award subject to the relevant provisions of the State Liability Act aforementioned.

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8 *BP* id para 24.
9 *Firm Mortgage Solutions (Pty) Ltd & Another v Absa Bank Limited & Another* 2014 (1) SA 168 (WCC) para 33 ('*Firm Mortgage*') as quoted in *BP* id.
10 *Firm Mortgage* id paras 3, 7, 9 and 13.
11 *Dunlop Rubber Co v Stander* 1924 CPD 431.

[42] There is nothing irregular in the first respondent's procedure in having the award made an order of Court prior to the completion by the QS of his determination. The issue of a writ of execution arising from a court order that provides for payment of an amount determined by an expert, (or for payment of a list of expenses[12]), and the inclusion of the amount so determined in the writ, is valid and regular. The amount so determined is capable of sustaining a writ if it is easily ascertainable and has been ascertained in an affidavit filed on behalf of the judgment creditor, which duly transpired in this matter.

[43] The applicant argued that the issue in dispute between the parties was whether or not the determination of the QS constituted an award capable of appeal. The applicant alleged that it did sustain an appeal and the first respondent the opposite. It is not for me to determine the merits or otherwise of that dispute. It suffices for purposes hereof that the underlying *causa of* the writ is not in dispute as alleged by the applicant as there is no pending appeal, as stated afore.

[44] In so far as Rule 45A does not provide for a residual equitable jurisdiction based on the equities of a case and in the absence of legal *causa,* there is no ground available to me to grant the application sought by the applicant and stay the execution of the writ.

[45] In addition, the first respondent holds an enforceable judgment. It is entitled to payment.[13]

[46] In the circumstances, there is no basis upon which I may grant the application and order the stay of the writ, even on an interim basis, and the appropriate order will

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12 *Butchart v Butchart* 1997 (4) SA 108 (W) 111 C-J.
13 *BP* note 1 above para 27.2; *Perelson v Druain* 1910 TS 458.

follow hereunder. There is no reason to order otherwise than that the order on the costs follow the order on the merits of the application.

[47] By reason of the aforementioned, I grant the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the application such costs to include the costs of two counsel including senior counsel, where two counsel including senior counsel, were utilised.

I hand down the judgment.

A A CRUTCHFIELD
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 15 November 2022.

COUNSEL FOR THE APPLICANT: Ms L Segeels-Ncube

INSTRUCTED BY:	Edward Nathan Sonnenbergs Inc
COUNSEL FOR THE FIRST RESPONDENT:	Mr H B Marais SC Mr J G Botha
INSTRUCTED BY:	Peter le Mottée Attorneys
DATE OF THE HEARING:	17 October 2022
DATE OF JUDGMENT:	15 November 2022