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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 031536/2021

REPORTABLE

OF INTEREST TO OTHER JUDGES

NOT REVISED

21/11/23

In the matter between:

MBIZA: PONANI RUSSELL First Applicant

(ID NO: [...])

MBIZA: NXALATI SIPHIWE Second Applicant

(ID NO: [...])

and

PHOLA COACHES LIMITED First Respondent

MBITA CONSULTING SERVICES CC **(In Business Rescue)**	Second Respondent
SUMAIYA KHAMMISSA N.O.	Third Respondent
SHERIFF OF THE HIGH COURT **PALM RIDGE**	Fourth Respondent

in re:

PHOLA COACHES LIMITED	Plaintiff

and

MBIZA: PONANI RUSSELL (ID NO: [...])	First Defendant
MBIZA: NXALATI SIPHIWE (ID NO: [...])	Second Defendant

JUDGMENT

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 for hand-down is deemed to be on 21 November 2023.

CAJEE AJ:

1. This is an urgent application in terms of Part A of a Notice of Motion wherein the Applicants seek an order staying and suspending the operation of a

warrant of execution pending the outcome of a rescission application in Part B thereof.[1]

2. It is common cause that on or about the 7th of May 2019 the Applicants signed a suretyship agreement in favour of the first Respondent for the indebtedness to it of the second Respondent in terms of credit facilities granted to it by the first Respondent on or about the 30th of January 2019. The physical address of the Applicants is cited as 1242/2 Camwood Close, Ormonde in the suretyship. No separate domicilium address for the Applicants is cited.

3. On or about the 11th of February 2021 the Applicants and the second Respondent entered into a settlement agreement with the first Respondent in terms of which the they conceded indebtedness to it for the sum R4 479 133-87 and agreed on certain payment terms towards settlement of this debt. The domicilium addresses of the Applicant's was cited as[…], Office 219 [...], Kempton Park.

4. Around the same time on the 10th of February 2021[2] the first Respondent and the second Respondent represented by the first Applicant entered into a written master rental agreement in terms of which the first Respondent leased a further eight buses to the second Respondent. The physical address of the second Respondent is stated as Mido House Building, 25 Uys Krige Street,

[1] In Part B the Applicants seeks the same relief they seek in an already pending rescission application dated 31 August 2023.
[2] There is some dispute about the exact dates.

Randhart, Alberton. The applicants contend that this is their address as well, and that this is the address at which all applications and processes should have been served on them.

5. On or about the 26th of September 2022 the first Respondent instituted an application against the Applicants for the sum of R7 271 222-64 along with mora interest and costs. The cause of action, which the first Respondent claims extends to the settlement agreement above, was the suretyship the applicants signed in favour of the second Respondent during May 2019 for its indebtedness to the first Respondent.

6. The application was allegedly served by the Sheriff of Kempton Park at two addresses. The first address at which the Sheriff allegedly served the application was a domicilium address at Office 219, [...], [...], Kempton Park on the 15th of November 2022. Personal service was not possible and the application (what the Sheriff's return describes as the Summons) was affixed to the principle door.

7. The second address at which the Sheriff of Kempton Park allegedly served the application was what is described in the return of service as "1242/2 Camwood Close, Ormonde C/O [...], Office 219 [...], Kempton Park being the chosen domicilium citandi et executandi" on the 18th of April 2023. The application (once again described by the Sheriff as the summons) was allegedly affixed to the principal door.

8. While none of the parties have raised the issue, it is uncertain from the return of service dated the 18th of April 2023 whether it was effected in Ormonde or Kempton Park. If it was at the Ormonde address, it is not explained why the service was effected by the Sheriff of Kempton Park and not by the Sheriff under whose jurisdiction the address in Ormonde falls. If it was at the Kempton Park address, it is not explained why this second service at that address was necessary.

9. On the 9th of May 2023 Pretorius AJ granted default judgment against the Applicants jointly and severally for the sum of R7 271 222-64 with costs on an attorney and client scale. On the 13th of June 2023 a writ of execution was issued by the Registrar for this sum based on the aforesaid order. It is highly doubtful whether the anomalies in the second return of service were brought to the attention of Pretorius AJ. They were certainly not raised before me.

10. On the 31st of August 2023 the Applicants launched an application for a rescission of the aforesaid order. One of the grounds cited is that the applicants did not receive service of the application and hence that they were not in wilful default of not entering appearance to oppose. The application is based on the provisions of rule 42(1)(a). The applicants claim that the order granted by Pretorius AJ was granted in error. The rule reads as follows:

"42(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby"

11. On the 28th of September 2023 the third Respondent called the first Applicant to request access to his premises in order to execute on the warrant of execution. It was this event that ultimately prompted this urgent application after the Respondent's attorneys failed to provide an undertaking that they would not stay the execution pending the outcome of the rescission application.

12. At the hearing of this matter I enquired from the parties whether or not the application to suspend or stay the warrant of execution was brought in terms of Rule 45A of the Uniform Rules of Court even though it was not expressly stated to be such. I was informed that it was, and that this was the rule applicable to this matter. The rule reads as follows:

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

[Rule 45A inserted by GN R1262 of 1991.]

13. In the past our courts have held, based on the now deleted rule 49(11)[3] of the Uniform Rules, that an application for rescission automatically stays any warrant of execution issued in terms of the judgment or order which is the subject matter of the application.[4] The view has been expressed that the legal position now appears to be that in terms of section 18(1) of the Superior Courts Act 10 of 2013, unless the court under exceptional circumstances orders otherwise, it is only the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal that is automatically suspended pending the outcome of the application or appeal[5], and that parties who wish to suspend or stay warrants of executions should do so in terms of Uniform Rule 45A. In terms of section 18(3) a court may only order an execution to proceed where an appeal or application for leave to appeal is pending where a party can prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

14. I asked counsel whether service of an application under rule Uniform 45A automatically suspended the subject matter of the application pending the

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[3] by GN R317 of 17 April 2015. The rule read as follows before it was deleted:

> "Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such an order, on the application of a party, otherwise directs."

[4] See for instance Peniel Development (Pty) Ltd and Another v Pietersen and Others 2014 (2) SA 503 (GJ)

[5] Hlumisa Technologies (Pty) Ltd and Another v Nedbank Ltd and Others 2020 (4) SA 553 (ECG); Erstwhile Tenants of Williston Court and Another v Lewray Investments (Pty) Ltd and Another 2016 (6) SA 466 (GJ)

outcome thereof, which in this case is the execution of the warrant of execution. Both counsel made the submission that it did not do so. However, Counsel for the first Respondent accepted that until such time as I handed down judgment herein they would not proceed with execution.

15. In his supplementary heads of argument counsel for the Respondent referred to the case of Otshudi v Minister of Home Affairs and Others[6]. In Otshudi the applicant brought a an urgent application declaring that his continued detention under the provisions of section 34(1)(d) of the Immigration Act was unlawful. The application was brought inside the additional ninety day period authorised by a Magistrate in terms of the Act extending the initial thirty day period allowed for his detention before he could be deported. It was heard on the day before the ninety day period was set to expire, but judgement was handed down after the expiry of the period.

16. During the course of his judgment Wepener J stated the following:

> "In any event Ms Manaka, appearing for the respondents, advised me that the respondents are of the view that once an application is served upon them by an illegal foreigner they are prevented from deporting such an applicant despite being within the 120 day period in fear of being found in contempt of court. This apprehension is well justified as a person who interferes with the administration of justice will be in contempt of court. If the respondents deported the applicant whilst these proceedings are pending, they could, in my view, depending on

[6] (12/05018) [2012] ZAGPJHC 15 (23 February 2012)

the circumstances, be guilty of contempt of court or of obstructing the course of justice as the deportation could influence the effectiveness of any order granted resulting from the application."

17. The judgment went on to hold that:

> "any act performed by the respondents that could prejudice or defeat the possible future court order, may constitute contempt of court once the respondents have received notice of the application" (my emphasis).

In support of this view Wepener J approved the reasoning in an earlier decision by De Villiers JP in *Yamomoto v Athersuch and Another* **1919 TPD 105** at 108 which reads as follows:

> '*But it would be interfering with the administration of justice when the same act is done with the object of defeating a possible order of court, for the due and effective administration of justice demands that acts with such an object should not be allowed*.'

18. While the above cases were not dealing with applications to stay or suspend execution orders based on court orders already granted, there is in my opinion no reason why they should not apply to these as well. This would then beg the question as to why an application to suspend or stay an execution needs to be brought on an urgent basis if the mere notice of the application would suffice to do so at least until the matter is heard and judgment is delivered.

19. Be that as it may, and since both parties submitted that the mere notice of an application in terms of rule 45A does not suspend an order, I am of the further view that the court dealing with the rescission application may well find that the main application should have been served on both the domicilium address in the settlement agreement as well as the address of the applicants cited in the suretyship agreement. The Respondent itself was alive to this possibility when it requested the sheriff to effect an additional service on the address in the suretyship agreement. In addition or alternatively the Court may find that it should have been served on the address cited in the master rental agreement. If the court finds that the application was erroneously sought or granted, the additional requirements under Uniform Rule 31 and the common law that the applicants show good cause for rescission fall away[7].

20. I digress here to add that even where an application is brought under Uniform Rule 42(1)(a) for rescission of judgment, it may be entertained under Uniform Rule 31(2)(b) or the common law as long as a case is made out in the founding affidavit justifying such relief.[8]

21. I note that the Applicants do admit some liability to the first Respondent even though the extent of that liability is disputed. There are decided cases which hold that if a writ of execution is competent for part of the amount in respect of which it has been issued, it cannot be set aside[9]. However there are cases

[7] Ferris v FirstRand Bank Ltd 2014 (3) SA 39 (CC) at paragraph [13].
[8] Mutebwa v Mutebwa 2001(2) SA 193 (TkHC) at paragraph [12]
[9] Perelson v Druain 1910 TPD 458; Dunlop Rubber Co Ltd v Stander 1924 CPD 431; Du Preez v Du Preez 1977 (2) SA 400 (C) at 403G as stated in Graphic Laminates CC v Albar Distributors CC 2005 (5) SA 409 (C) at paragraph [13].

which also hold that, depending on the facts of the case, this may not always be so.[10] In light of the fact that the court hearing the rescission application may find that the default judgment was erroneously sought and granted, there is no need for me to give a definitive ruling on this issue.

22. This application is interlocutory to the rescission application, which rescission application if granted will itself not finally dispose of the matter. In essence the applicants are seeking an interlocutory interdict staying the writ until the rescission application is finalised. To this end they would in the normal cause only need to satisfy the requirements of an interim interdict.

23. The traditional requirements of an interim interdict are well established in our case law. They are a prima facie right, a well-grounded apprehension of irreparable harm, that the balance of convenience had to favour the granting of the interdict, and that the applicant had to have no other satisfactory remedy. To these must be added the fact that the remedy is a discretionary remedy and that the Court has a wide discretion.[11]

24. In *Road Accident Fund v Strydom* **2001 (1) SA 292** (C) at 301A-C it was held:

> "This application is brought in terms of Rule 45A. *This Rule provides that a Court may suspend the execution of any order for such period as it may deem fit. The Rule itself affords the Court a discretion of the widest*

[10] Graphic Laminates CC v Albar Distributors CC 2005 (5) SA 409 (C) supra.
[11] Hix Networking Technologies v System Publishers (Pty) Ltd 1997 (1) SA 391 (A) ([1996] 4 All SA 675) at 398I to 399A.

kind and imposes no procedural or other limitations or fetters on the power it confers."

At 304G – H it was further held that

't*he analogy of interim interdict does not appear to be entirely appropriate in the circumstances of this matter. For one thing the applicant is not asserting a right in the strict sense but a discretionary indulgence based on the apprehension of injustice. The Court in Erasmus's[12] case was nevertheless at pains to point out that it was not laying down that only the principles relative to an interim interdict had to be followed in the exercise of a discretion under Rule 45A. It stressed that other factors might play a role in the question as to whether a writ should be suspended*'.

25. In argument, Mr. Cremen for the first Respondent submitted that the third Respondent who executed on the writ of execution had returned a nola bona return. The next step was for the first Respondent to execute against any immoveable property owned by the Applicants. This, he submitted, could take some time and as such the application was not urgent and that I should strike it off the roll for want of urgency.

26. Applicants who bring applications to stay or suspend a warrant of execution find themselves in an invidious position regarding the timing of the application. If they bring it too early, they can be accused of launching an urgent

[12] Erasmus v Sentraalwes Koöperasie Bpk [1997] 4 All SA 303 (O)

application when it was non urgent. If they do it too late, they can be accused of only acting when the matter became urgent. This application to suspend the warrant of execution could have been brought together with the rescission application dated the 31st of August 2023. If thereafter the first Respondent attempted to execute, it may have made itself guilty of contempt of court.

27. Be that as it may, it was prudent for the Applicants to bring this application as soon as it became clear that the first Respondent was intent on executing the warrant despite their request to stay or suspend same. It may be that they could have brought it on less truncated time periods, but I will not hold this against them.

28. In the premises I make the following order:

    28.1. The application for a suspension of execution of the judgment of Pretorius AJ dated the 9th of May 2023 is granted

    28.2. Costs shall be in the cause.

CAJEE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Heard on: 17 October 2023
Delivered on: 21 November 2023

APPEARANCES:

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COUNSEL FOR RESPONDENTS:	Adv. Cremen
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