IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 031536/2021

DELETE WHICHEVER IS NOT APPLICABLE

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

21 November 2023 .....
DATE SIGNATURE

In the matter between:

MBIZA: PONANI RUSSELL First Applicant

MBIZA: NXALATI SIPHIWE Second Applicant

and

PHOLA COACHES LIMITED First Respondent

MBITA CONSULTING SERVICES CC Second Respondent
(In Business Rescue)

SUMAIYA KHAMMISSA N.O. Third Respondent

SHERIFF OF THE HIGH COURT Fourth Respondent

PALM RIDGE

in re:

PHOLA COACHES LIMITED Plaintiff

and

MBIZA: PONANI RUSSELL First Defendant

MBIZA: NXALATI SIPHIWE Second Defendant

LEGAL SUMMARY

Order granted to stay and suspend the operation of a warrant of execution pending the outcome of a rescission application, on an urgent basis.

Applicants had 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. Then, Applicants and the second Respondent had entered into a settlement agreement with the first Respondent in terms of which the they conceded indebtedness to it and agreed on certain payment terms towards settlement of this debt. The first Respondent then instituted an application against the Applicants; the cause of action was the suretyship, and further claimed it extends to the settlement agreement. The application was allegedly served by the Sheriff of Kempton Park at two addresses. The issue was not raised, however the Court noted it is uncertain why the second service was necessary, and it was unclear from the return of service, whether service was effected in Ormonde or Kempton Park, and why it was not effected by the Sheriff under whose jurisdiction the address in Ormonde falls.

The court granted default judgment against the Applicant - writ of execution was issued by the Registrar. 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 were not in wilful default of not entering appearance to oppose. The Applicant then brought this urgent application, in terms of Rule 45A of the Uniform rules, after the Respondent was progressing to execute on the warrant of execution.

Having considered *Otshudi v Minister of Home Affairs and Others* [2012] JOL 28454 (GSJ), wherein it was held "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", the Court found that though that matter did not deal with an application to stay or suspend an execution order, there is no reason the principle should not apply.

As this is an interlocutory application, to stay the writ until the rescission application is finalised, the Court found the Applicants in the normal course only need satisfy the requirements of an interim interdict; which 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, the Court added that the remedy is a discretionary remedy and that the Court has a wide discretion.

The Court found 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 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. If thereafter the first Respondent attempted to execute, it may have made itself guilty of contempt of court. 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 that won't be held against them.