Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO.: UM185/2022

In the matter between:

RATLOU LOCAL MUNICIPALITY	**APPLICANT**
And	
SEBATANA CASSIUS SEJAKE	**1ST RESPONDENT**
FIRST NATIONAL BANK LIMITED	**2ND RESPONDENT**
THE ACTING SHERIFF: ITSOSENG (DITSOBOTLA)	**3RD RESPONDENT**

URGENT APPLICATION

MONGALE AJ

DATE OF HEARING:	**07 OCTOBER 2022**
DATE OF JUDGMENT:	**11 OCTOBER 2022**
FOR THE APPLICANT:	**MR W SCHOLTZ**
FOR 1ST RESPONDENT:	**ADV C Z MUZA**

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for hand-down is deemed to be 11 OCTOBER 2022.

JUDGMENT

MONGALE AJ

Introduction

[1] The applicant launched this matter on an urgent basis. The application was opposed by the first respondent. Not only did the first respondent oppose the merits of the application but he also raised lack of urgency and three other preliminary points. The first respondent's preliminary points will become evident hereinunder.

[2] On 5 July 2021 an urgent application came before **Petersen J** under case number UM 137/2021 wherein the applicant sought, other than the prayer that the matter be heard on an urgent basis in terms of Rule 6(12) and a cost order in the event of opposition, the following prayers:

2.1 The warrant of execution, attachment in execution or the removal of items against the applicant issued under case number 255/2021 be stayed pending the finalisation of the application for rescission of judgment by the applicant;

2.2 That the stay in execution against the fist applicant under case number 255/2021, intended for 2021 be stayed pending the finalisation of the application for rescission of judgment by the applicant;

2.3 That the stay in execution against the first applicant under case number: 255/2021, intended for 2021 be stayed pending the finalisation of the application for rescission of judgment by the applicant;

2.4 Further and/or alternative relief;

2.5 Cost of the application in the event of opposition

[3] In the current application, the applicant sought the following relief:

3.1 That the Applicant's non-compliance with the forms and service provided for in the rules be dispensed with and condoned in terms of Rule 6(12) and the application is heard as one of urgency;

3.2 That the writ of execution, issued by the Registrar of this Honourable Court on 9 September 2022, under case number 255/2021, be set aside;

3.3 That the notice of attachment, in terms of Uniform Rule 45(8) and (12), issued by the 3rd Respondent (Sheriff) on 14 September 2022, be set aside and any pending attachment as a result of the said notice uplifted with immediate effect;

3.4 That, to the extent that funds have been disbursed from the applicant's bank account, held with the 2nd respondent, to the 3rd respondent as a consequence of the notice of attachment (Uniform Rule 45(8) and (12), or if those funds have already been paid by the 2nd respondent to the 1st respondent or his attorneys, these funds be returned to the applicant's bank account from which the funds were disbursed;

3.5 That the operation and execution of paragraph 3 of the Order by Hendricks DJP, granted by default on 21 May 2022, under case number 255/2021, be suspended pending judgment in the rescission application, under case number 255/2021;

3.6 That the costs of the application be borne by any respondent opposing the same, the scale of such costs to be determined by this Honourable Court;

3.7 That the applicant be afforded such further and/or alternative relief which this Honourable Court deems fit and appropriate.

[4] The respondent raised four points *in limine*, which I will briefly deal with as follows:

Res judicata and lis pendens

[5] In Sedwin Investments (Pty) Ltd v Nathan Alec Datnow and Another case number ZAECPEHC1819/2017 the court held:

> *"[16] That these two defences are both governed by the principle that there should be finality in litigation."*

[6] I will deal with these two points in *limine* simultaneously as their elements overlap.

[7] The first respondent contends that the prayers sought by the applicant is duplicate relief from what the applicant sought in case number UM137/2021, referred to above, which was struck from roll for lack of urgency.

[8] The first respondent further contends that the main prayer sought by the applicant in UM 137/2021, which is common to the current application and is the crux of the applicant's case is the stay of the writ of execution of the default judgment granted by Hendricks DJP,

as he then was, under case number 255/2021 pending the finalisation of the applicant's rescission application.

[9] The first respondent calls for the dismissal of this application on the basis that the matter has been put to rest by Petersen J under case number UM137/2021 when he stuck the matter from the roll.

[10] In response, the applicant disputes the submissions made. The crux of the applicant's argument is that the relief sought by the applicant in the two cases is different in that, what the applicant sought under case number UM 137/2021 was pertaining to the first writ of execution that was issued by the Registrar on 9 June 2021, which is different from the relief currently sought by the applicant because the current application deals with the third writ of execution that did not exist when that order was granted under case number 255/2021.

[11] The Constitutional Court in Ascendis Animal Health (Pty) Limited and Merck Sharpe Dohme Corporation & Others [2019] ZACC 41 dealt with the definition of *res judicata* and defined it as follows:

> *"[69] Res judicata means that a matter has been decided by a competent court on the same cause of action and for the same relief between the same parties"*

[12] As stated further in Ascendis case *supra*, at paragraph 70, in the current matter before me, the question to be asked is whether or not the cause of action was litigated to finality between the same parties on a previous occasion under UM137/2021. The answer to this question lies in the judgment by **Petersen J** where he held that:

"[9] Notably the applicant fails to deal pertinently with the reasons why the applicant could not be afforded substantial redress at a hearing in due course as required by Rule 6(12)(b).

[10] The stay of execution of the writ is inextricably linked to the pending review application. The applicant deals extensively with the history giving rise to the review application in the founding affidavit and prospects of success of the review application. However, as stated aforesaid the applicant fails to pertinently furnish reasons as required by Rule 6(12)(b) why it would not be afforded substantial redress at a hearing in due course. Clearly, the review application is an application in terms of which the applicant may be given substantial redress, if successful. The applicant would have a claim against the first respondent for any disbursements made pursuant to the default judgment, if successful in the review application."

[13] In Hassan & Another v Berrage N.O 2012 (6) SA 329 (SCA) stated that:

"[19] Fundamental to the plea of lis alibi pendens is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause."

[14] The parties in case number 255/2021, the judgment of which is sought to be rescinded and/or reviewed are different from the parties in UM137/2021 and in the current application in that First National Bank Limited and the Acting Sheriff for Ditsobotla were not parties under case number 155/2021, and under UM137/2021. First National Bank Limited and the Acting Sheriff were joined in the

current application. Of importance is that the application under UM 137/2021 was struck from the roll for lack of urgency and the court did not entertain the issue of merits.

[15] I find that the first respondent has failed to show that the previous judgment under UM137/2021 dealt with merits, disposed of the merits and that the matter was between the same parties as the current matter.

[16] These points in *limine* are dismissed.

Non-Joinder of the Municipal Council

[17] The first respondent submits that failure to join the Municipal Council to these proceedings is fatal to the applicant's application mainly because it is the same Municipal Council that took a resolution to appoint him to a senior position; that the same Municipal Council later suspended him from the same position lastly, all the decisions taken to institute the myriad of court proceedings against him were sanctioned by the Municipal Council.

[18] The applicant disputes this with reference to section 2(b)(1) of the Local Government: Municipal Structures Act, 32 of 2000 ("The Systems Act"), which provides that: a municipality consists of the political structures and administration of such municipality. Other than this, neither party referred me to any authority to support their respective submissions.

[19] The Systems Act defines political Structure as:

"The council of the municipality or any committee or other collective structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act."

[20] In Nelson Mandela Bay Municipality and Others v Anele Qaba and Others Case No: 862/2022 the court held that:

"[26] What section 2 of the Systems Act does not contemplate is that 'a municipality' is a separate incorporated entity to that of its 'council'.

[27] Section 2(b) plainly conceives of a municipality as an amalgam of the political structures and administration of which it consists. Neither the Constitution nor the legislation enacted to give effect to its provisions clothes a 'municipal council' with separate legal personality from the 'municipality' of which it is a component. Rather a municipality acts and performs its functions through the agency of its council."

[21] I therefore find that the non-joinder of the Municipal council is not fatal and was not necessary. This point in *limine* is dismissed.

Urgency

[22] The first respondent submits that the matter was not urgent but a self-created urgency. He contends that a period of five days from the time the applicant was formally informed of the writ of execution by the second respondent's official on 21 September 2022 lapsed

before the applicant could respond to that formal communication and that such period was unaccounted for by the applicant in his papers that are before the court.

[23] According to the first respondent from the date the applicant was informed about the writ of execution by the official of the second respondent until the launching of this application on 30 September 2022, a period of 9 days lapsed, which remains unexplained by the applicant.

[24] The first respondent referred the court to the well-known case of East Rock Trading and Another v Eagle Valley Granite and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at paragraph 9 where the court held that:

> *"...the fact that the applicant wants to have the matter resolved urgently does not render the matter urgent and that the procedure set out in Rule 6(12) is not for the taking".*

[25] The first respondent further highlighted to this court that the writ of execution that is the subject matter of this application was, according to the applicant's own version, served on the applicant on 15 September 2022 and the court papers were only launched on 30 September 2022.

[26] Lastly, the first respondent submits that it has already been found in the judgment by Petersen J in UM 137/2021, which remains unchallenged, that the applicant has substantial redress in due course.

[27] In response the applicant submits that after the writ was served on the applicant on 15 September 2022 the subject matter was to be discussed at the Council meeting that was scheduled for 21 September 2021 but could not proceed because the meeting was interdicted by the Court order and once again, another attempt was made for the subject matter to be tabled at the Council meeting that was scheduled for 26 September, which was also interdicted. It is only on the third attempt that the Council meeting was held on 30 September 2022 where the resolution was passed and the papers were issued on the same day.

[28] According to the applicant the meetings were interdicted because there were no proper notices.

[29] In East Rock Trading supra, it was held that:

> *"[6] An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course".*

[30] The applicant's current application emanates from the order granted by default in case number 255/2021 by Hendricks DJP, as he then was. The applicant has since served papers for the rescission and

review of that order, which have been postponed to February 2023. Had it not been for the judgment by Hendricks DJP, the first respondent would not have caused the Registrar to issue the writ of execution on 9 September 2022 and the third respondent would not have issued a notice of attachment in terms of Rule 45(8) and (12) of the Uniform Rules of court.

[31] In paragraph 3.2.1 of the founding affidavit the applicant states that the third writ of execution appeared to have been issued in partial execution of paragraph 3 of an order by Hendricks DJP, granted by default on 21 May 2021.

[32] The applicant has instituted a rescission application against the order of Hendricks DJP granted under case number 255/2021, which is to be heard in due course. As it has correctly been found in case number UM137/2021 that the applicant has substantial redress in due course, such substantial redress is now not only in the form of a review application but also in the form of rescission application.

Conclusion

[33] The applicant has failed to make out a case for urgency.

Order

[34] The application is struck from the roll for lack of urgency with costs.

[redacted]

K MONGALE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION: MAHIKENG

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