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.: UM56/2023

In the matter between:

MINISTER OF POLICE Applicant

and

KISANI JANTJIE MOKOENA 1st Respondent
THE SHERIFF OF THE REGIONAL COURT POTCHEFSTROOM 2nd Respondent

This judgement was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **11 April 2023**.

ORDER

In the result, I make the following order:

(i) **The applicant's non-compliance with the forms and service prescribed in the Uniform Rules of Court is condoned and the application is entertained as a matter of urgency in terms of Rule 6(12).**

(ii) **The execution of the warrant of execution issued by the Regional Court, Potchefstroom on 4 October 2022, under case number: NW/POT/RC432/2021, is hereby stayed pending the finalisation of the rescission application, which is pending before the Regional Court.**

(iii) **There shall be no order as to costs.**

JUDGEMENT

MFENYANA AJ

[1] On **16 March 2023** the applicant issued a notice of motion in which he seeks an order for the stay of a warrant of execution issued by the Regional Court, Potchefstroom on **4 October 2022**, under case

number: NW/POT/RC432/2021, pending the finalisation of the rescission application which is pending before the Regional Court, against a judgement of that Court.

[2] The matter was brought on an urgent basis with a prayer that the applicant's non-compliance with time periods, forms, service and processes, be condoned in terms of Uniform Rule 6(12).

[3] The first respondent has opposed the application.

[4] The matter served before me on **24 March 2023**. On that day, the parties put each other on terms and such terms were made an order of this Court. The matter was to be heard on **5 April 2023**.

[5] On **5 April 2023** the matter proceeded. In view of certain administrative, procedural, and other issues which transpired during the hearing of the matter, I reserved judgement. These pertained to the clarity or otherwise, of the applicant's papers, which might have a bearing on the order the Court would make.

[6] The following issues arose during the hearing:

6.1 whether the founding affidavit relied on by the applicant is in fact an affidavit.

6.2 whether the matter is urgent.

6.3 whether the applicant has made out a case for the relief sought.

[7] The factual context of the matter is that on **18 August 2022** the Regional Court, Potchefstroom granted default judgement against the applicant. The default judgement followed on an action brought by the respondent against the applicant for unlawful arrest and detention, claiming, as a consequence, an amount of R400 000 in damages. Having accepted service of the summons, the applicant sent a notice of intention to defend the action, to the respondent's attorneys of record, via email. The said notice is dated **27 January 2021**. Apart from the fact that there was no agreement between the parties for electronic service of documents, the notice of intention to defend did not comply with the Rules of Court in that it did not specify an address within a 15km radius from the Seat of the Court, where the applicant would accept service. That the notice of intention to defend is defective, is common cause, the only issue in contention

being whether the respondent was entitled to obtain judgement in light of its failure to notify the applicant of the defects in its notice.

[8] On **27 January 2022** the respondent addressed an email to the applicant advising him that the notice of intention to defend did not comply with the Rules in the manner described above, and requested the applicant to remedy the non- compliance. In the same email, the respondent further advised the applicant that the respondent had already applied for default judgement and that same could not be withdrawn in the absence of a notice of intention to defend which complies with the Rules of Court.

[9] The applicant did not respond to the respondent's email. The respondent proceeded with the default judgement, which was granted on **18 August 2022** in the absence of the applicant.

[10] On **30 September 2022**, the respondent issued a warrant of execution which was served on the applicant on **21 November 2022.** It was not until **11 January 2023** that the applicant brought the warrant of execution to the attention of his attorneys. In his letter, the applicant instructed the State Attorney to make an application

for rescission of the default judgement within 20 days. This also did not happen until **15 March 2023**, and on **16 March 2023**, the applicant issued the present application.

[11] The applicant contends that the default judgement was obtained by fraud, as the first respondent failed to bring the true facts to attention of the court, in particular that the applicant had 'delivered' a notice of intention to defend, albeit, a defective one. The applicant further contends that a real injustice would occur to him if the execution of the warrant is not stayed, pending the determination of the rescission application which is currently pending before the Regional Court.

[12] The first respondent, on the other hand, contends that the urgency is self- created, as the applicant, by his own admission, became aware of the default judgement on **11 November 2022** when he was served with the warrant of execution, but only brought this application only four months later. It is so that the applicant did not bring application until **16 March 2023** after it had served an application for rescission on the respondent. The question is whether or not the applicant would be afforded substantial redress

in due course, were the execution not stayed. In my view, it would not.

[13] The application is brought in terms of Rule 45A which states that:

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

[14] Ms Williams argued on behalf of the applicant that a real and substantial injustice would occur if execution of the warrant is not stayed. She relied on the judgement in **Firm Mortgage Solutions (Pty) Ltd and Another v ABSA Bank Ltd and Another**[1], arguing that if the underlying *causa* is in dispute and may be removed, the interests of justice dictate that the application should be granted.

[15] The general principles for the granting of a stay in execution were set out in **Gois t/a Shakespeare's Pub v Van Zyl and Others**[2] as follows:

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1 2014 (1) SA 168 (WCC)
2 2011 (1) SA 148(LC)

(a) *A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.*

(b) *The court will be guided by considering the factors usually applicable to interim interdicts,* ***except where the applicant is not asserting a right, but attempting to avert injustice.***

(c) The court must be satisfied that:

(i) *the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and*

(ii) *irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.*

(d) ***Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, ie where the underlying causa is the subject-matter of an ongoing dispute between the parties.***

(e) *The court is not concerned with the merits of the underlying dispute -* ***the sole enquiry is simply whether the causa is in dispute.***

[16] The applicant contends that the validity of the default judgement is in dispute, as the applicant avers that had the Regional Court been apprised of the true facts of the matter, default judgement would not have been granted. The respondent, however avers that the Regional Court proceeded to grant default judgement, having been

apprised of all the facts. Whether or not there is merit to these contentions, either on behalf of the applicant or the first respondent, what serves before this Court is whether a real and substantial injustice would occur were the execution not to be stayed. The prospect of success in the pending rescission application is not a decisive factor in the exercise of the discretion of this Court to order a stay of execution.

[17] The Court observed in **Gois** that:

> *"Since the applicant is not, in the present matter, asserting a right, but attempting to prevent an injustice being done, the court need not consider factors that are applicable for purposes of interim interdicts. The facts presented satisfy the requirement of apprehension and irreparable harm. Furthermore, while this court is not required to comment on whether or not the application for the rescission of the award has any prospects of success, this court issatisfied that there is an application for rescission before the third respondent which requires the third respondent's consideration. The stay of execution should in these circumstances be granted."*[3]

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3 at para 40

[18] Likewise, in this matter, the applicant does not seek to assert a right, but simply to prevent an injustice. The merits of that injustice is something that would inevitably, play out in the hearing of the rescission application, and are not relevant to the determination of the present application. *"The grant of a stay of execution is in the nature of an interlocutory order that a court would be at liberty to revisit on new facts."*[4]

[19] It is trite that what the Court considers to be real and substantial injustice will vary from case to case. It involves the exercise of the Court's discretion. It follows that the Court's power, should be exercised judicially. On the facts of the present matter, it appears to me that the injustice that would occur if the execution is not stayed is far greater that any inconvenience that could be suffered if is granted. I align myself with the words of Binns-Ward J in **Stoffberg**[5] where the learned Judge in granting an application for a stay of execution, stated, 'I consider that real and substantial injustice would be done if the judgment debtor were permitted to proceed with execution of the warrant when the harm that would be caused

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4 Stoffberg N.O and Another v Capital Harvest (Pty) Ltd (2130/2021) [2021] ZAWCHC 37 (2 March 2021) at para 9

5 Supra, at para 27

thereby seemed unnecessary and eminently avoidable.' This consideration is on all fours with the present matter. The harm that could result should the applicant be successful in the rescission application seems unnecessary and can be avoided. On the other hand, nothing would prevent the respondent from proceeding with the execution if the rescission is not successful. That seems to me, to be a necessary balance that should be struck.

[20] As far as the respondent's contention concerning the admissibility of the founding affidavit goes, it is true that the applicant's papers are not a model of clarity in that the arrangement and pagination of the papers are not what they should be. Importantly, the commissioning of the affidavit took centre stage, with issues relating to the dates and the positioning of the certificate of the Commissioner of Oaths. Our law recognises the Court's power to condone an affidavit if it is found to be defective, but substantially complies with the provisions of the Act, unless there is evidence of transgression of the Act which cannot be condoned. There is no such evidence before this Court. Mr Lifhiga, who appeared on behalf of the respondent contended that there is no affidavit before this Court, as Ms William's submission that the Commissioner's

certificate following after paragraph 46 (page 16) belongs to the confirmatory affidavit, simply means that the founding affidavit was not commissioned. This is not correct. Undesirable, though the discrepancies may be, this does not translate to there not being an affidavit before this Court. The situation is simply that the Commissioner's certificate to the founding affidavit, features on page 38, while the certificate to the confirmatory affidavits appears in its stead. All these, form part of the record of this Court. They cannot simply be ignored. That is not to say, that ineptness of the nature displayed by the applicant in this application, should be encouraged. At the same time, it cannot vitiate the whole of the applicant's case.

[21] The discrepancy with regard to the date of commissioning of the founding affidavit, has, in my view, been sufficiently explained by the applicant's counsel, and is apparent from the balance of the papers as well as the date stamp that appears on the same page. It is no more than error, and can be condoned. The Court in **Ladybrand Hotels**[6] held that the maxim *omnia praesumuntur rite esse acta*,

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6 Ladybrand Hotels v Stellenbosch Farmers 1974 (1) SA 490 (O)

applies in circumstances such as the present. There is thus no merit to the respondent's contention in this regard.

[22] In the notice of motion, the applicant also seeks costs against the respondent in the event of opposition. Ms Williams however, submitted during the hearing of the matter, that costs should be costs in the rescission application. What this translates to is that the costs of this application would be determined by the Regional Court upon hearing of the rescission application. This is not ideal. The Regional Court is not privy to the papers before this Court. It would thus be unfair to defer the issue of costs to the Regional Court.

[23] The fact that a matter is brought as one of urgency, does not give a blanket licence to trump the Rules, nor does it exonerate a party from correcting glaring errors and shortcomings in its papers where doing so would alleviate the burden from the Court in having to sift through messy submissions in a bid to see to it that justice is done. The applicant had in excess of a week to arrange to court file and deal with any discrepancies occasioned by the bringing of the matter on an urgent basis. This, the applicant did not do. *"It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent*

applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case".[7]

[24] Even though the applicant is the successful litigant and would ordinarily be entitled to costs, I am of the view that in light of the administrative discrepancies afflicting the application, a departure from the general rule that the costs should follow the result, would be warranted. The appropriate order in the circumstances, would be that there be no order as to costs.

[25] In the result, I make the following order:

(i) The applicant's non-compliance with the forms and service prescribed in the Uniform Rules of Court is condoned and the application is entertained as a matter of urgency in terms of Rule 6(12).

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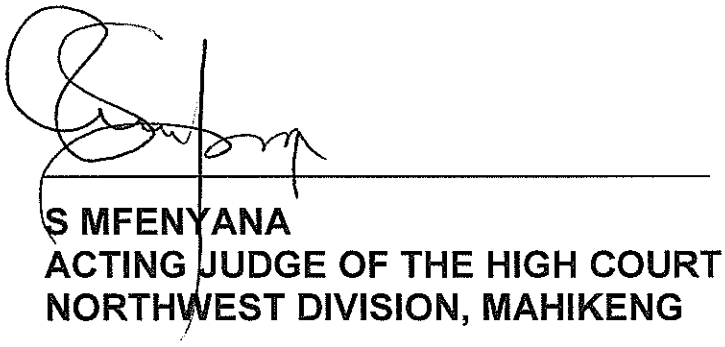
7 Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE) at para 37

(ii) **The execution of the warrant of execution issued by the Regional Court, Potchefstroom on 4 October 2022, under case number: NW/POT/RC432/2021, is hereby stayed pending the finalisation of the rescission application, which is pending before the Regional Court.**

(iii) **There shall be no order as to costs.**



S MFENYANA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

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