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

CASE NO: 2023 - 102660

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

21/10/2023
DATE

[redacted]
SIGNATURE

In the matter between

THE HOUSE OF TANDOOR ENTERTAINMENT	First Applicant
ESTATE OF THE LATE ERIC MNTUVEDWA MPOBOLA	Second Applicant
MOKHEMA, MAHLOKO SIMON	Third Applicant
MOKHEMA, GLORIA DINAH	Fourth Applicant
MRADU, BUYISILE	Fifth Applicant

And

TUHF URBAN FINANCE (RF) LTD	First Respondent
ACTING SHERIFF OF JOHANNESBURG EAST	Second Respondent
SHERIFF OF JOHANNESBURG CENTRAL	Third Respondent
SHERIFF OF RANDBURG WEST	Fourth Respondent
FIRST NATIONAL BANK	Fifth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Stay of execution – appeal lapsed – application for leave to appeal out of time – applicants not entitled to a stay

Contempt of court – third applicant's professed understanding of the law wrong – is represented by attorneys – litigant expected to familiarise him or herself with law applicable to his or her actions – professed ignorance of the law no excuse

Order

[1] In this matter I make the following order:

1. *The applicants' application is dismissed;*
2. *The applicants jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the application on the scale as between attorney and own client;*
3. *The third applicant is declared to be in contempt of court of the order granted on 10 December 2021 under case number 2020/42518;*
4. *In the event of the third applicant persisting with his conduct in collecting rent in breach of the said order the first respondent is granted leave to approach the court on amplified papers to seek an order for imprisonment or other relief;*
5. *The third applicant is ordered to pay the costs of the counter-application. on the scale as between attorney and own client*

[2] The reasons for the order follow below.

Introduction

[3] In this urgent application the applicants seek orders to stay

3.1 the execution of a cost order,

3.2 a writ of execution against movable property,

3.3 execution against bank accounts,

3.4 the setting aside of the attachment of the applicants' bank accounts, and

3.5 the stay of a sale of execution.

[4] The applicants also seek in order that the respondent be prohibited from interfering with the business of the first applicant pending the adjudication of an appeal in the Supreme Court of Appeal and before the full court.

[5] The applicants seek these order pending applications for -

5.1 condonation and leave to appeal to the Supreme Court of Appeal and

5.2 condonation and an appeal to the full court.

[6] The first respondent says that the present application is merely a stratagem to avoid and delay execution. The first respondent also challenge the applicants' entitlement to a stay[1] and seeks a punitive cost order on the ground that the application is frivolous.

[7] The first respondent is a secured creditor of the first applicant in terms of a written loan agreement and mortgage bond over commercial property situate at Erf 444 Belle

[1] See *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ).

Vue Township in Gauteng. The mortgage bond secured the loan.

[8] The second, third and fifth applicants are sureties for and co- principal debtors with the first applicant for the debt owed to the first respondent. The deeds of suretyship were signed in 2012.

The interdict

[9] On 10 December 2021 the applicants were interdicted and restrained under case number 2020/42518 from interfering with the first respondent's right to collect rent from tenants occupying the property. The interdict was obtained on the basis that the applicants were unlawfully misappropriating the rental money paid by tenants at the property.

[10] After the unfortunate passing of Monama J leave to appeal was granted by Sutherland DJP on 4 March 2022.

The notice of appeal was due by 4 April 2022 but was not filed. On 16 May 2022 the first respondent informed the applicants that the appeal had lapsed.

[11] The applicants filed a notice of appeal out of time on 15 September 2022. The applicants say that the notice does not comply with rule 49(4)(b) in that in that it does not state the particular respect in which variation of the order is sought.

[12] On 20 October 2022 the applicants launched an application for the condonation of the late filing of the notice of appeal. The first respondent filed an answering affidavit on 17 November 2022. The applicants took no further steps to bring the application to finality.

[13] It is also argued on behalf of the first respondent that the applicants have perempted the right to appeal in that they reached an agreement with the first respondent to settle the costs of the interdict proceedings and the settlement is inconsistent with an intention to continue to challenge the interdict order. When a litigant unequivocally

indicates that it intends to acquiesce in an adverse judgment it cannot subsequently change its mind and commence appeal or review proceedings.[2]

[14] By agreeing to settle the cost of the interdict proceedings the applicants perempted the appeal.

The foreclosure order

[15] On 9 March 2022 the first respondent obtained an order ("the foreclosure order") under case number 2020/42518 against the applicants for payment of R1,556,482.59 together with interest and costs. The property of the first respondent subject to a mortgage bond was declared specially executable.

[16] The applicants applied for leave to appeal the foreclosure order and the application was dismissed with costs on 1 June 2023. On 21 September 2023 the applicant filed an application for leave to appeal to the Supreme Court of Appeal. The application was filed out of time.

[17] The first respondent disputed the authority of the applicants attorneys by filing a notice in terms of SCA rule 5. The applicants did not respond.

On 9 October 2023 the first respondent's attorneys served a notice in terms of uniform rule 7.[3] The applicants did not respond.

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[2] *Dabner v South African Railways & Harbours* 1920 AD 583 at 594; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A); *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA); *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC) para 26.

[3] Rule 7(1) reads as follows: *"(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."*

[18] The last payment in terms of the loan was paid in October 2021.

Attachment of money in a bank account

[19] The applicants argue that the attachment of money in a bank account[4] "without judicial authority" is wrongful. In this regard the applicants refer to the judgment in *CB v ABSA Bank Limited and Others.*[5] I do not understand the *ratio* in the CB matter to be applicable in this case and if it were applicable, I am in respectful disagreement.

[20] Different considerations come into play when an emoluments attachment order[6] or a garnishee order[7] is sought. That is not the case in this matter.

[21] An attachment of money in the bank account is only complete when notice of the attachment has been given in writing by the sheriff to all interested parties.[8] The requirement of notice provides an execution debtor with the information required to protect his or her rights. Rule 45(8) provides as follows:

> *"45 (8) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided:*
>
> *(a) Where the property or right to be attached is a lease or a bill of exchange, promissory note, bond or other security for the payment of money, the attachment shall be complete only when—*
>
> *(i) notice has been given by the sheriff to the lessor and lessee, mortgagor and mortgagee or person liable on the bill of exchange or promissory note or security as the case may be, and*

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4 See *Simpson v Standard Bank of SA Ltd* 1966 (1) SA 590 (W) and *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D).

5 *CB v ABSA Bank Limited and Others* [2020] ZAGPJHC 303.

6 *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC).

7 See rule 6(12) and *South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd* 2012 (5) SA 125 (SCA) paras 18 to 22.

8 See *Stratgro Capital (SA) Ltd v Lombard NO and Others* 2010 (2) SA 530 (SCA) paras 15 to 17 and *Schmidt v Weaving* 2009 (1) SA 170 (SCA) paras 15 to 21.

(ii) the sheriff shall have taken possession of the writing (if any) evidencing the lease, or of the bill of exchange or promissory note, bond or other security as the case may be, and

(iii) in the case of a registered lease or any registered right, notice has been given to the registrar of deeds.

(b) Where movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person, the attachment shall be complete only when the sheriff has served on the execution debtor and on the third person notice of the attachment with a copy of the warrant of execution. The sheriff may upon exhibiting the original of such warrant of execution to the pledgee, lessor, lessee, purchaser or seller enter upon the premises where such property is and make an inventory and valuation of the said interest.

(c) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,

(i) the attachment shall only be complete when —

(a) notice of the attachment has been given in writing by the sheriff to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose deeds registry the property or right is registered, and

(b) the sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;

(ii) the sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached."

[22] The attachment complained of was made in terms of a court order and due process was followed.

[23] I find that the applicants have not made out a case for interlocutory relief in the form

of a stay of proceedings, or for any form of final relief. The application is indeed frivolous when the history of the matters and the timelines are considered.

The counter application

[24] The first respondent brings a counter-application to declare the third applicant to be in contempt of court in respect of the interdict order.

[25] The third applicant collects rental owed to the first applicant that is ceded to the first respondent knowing that he is in breach of the interdict order. The applicants retain these payments received. The applicants stopped making payments towards the City of Johannesburg for municipal services and charges in September 2021 and the account is stated to be in arrears in the amount of R2,866,845.47. The City of Johannesburg has a preferent claim in respect of this amount. The rentals collected by the applicants are not used to defray the expenses of the property and tenants face the danger that municipal services may be discontinued.

[26] The criminal standard of proof, namely proof beyond reasonable doubt, applies in a contempt of court application. The first respondent must show -

26.1 that the third applicant was served with or otherwise informed

26.2 of an existing court order granted against him,

26.3 and has either ignored or disobeyed it.[9]

[9] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 6 et seq. See also *Uncedo Taxi Service Association v Maninjwa* 1998 (3) SA 417 (ECD) 429 G – I, *Dezius v Dezius* 2006 (6) SA 395 (CPD), *Wilson v Wilson* [2009] ZAFSHC 2 para 10, and *AR v MN* [2020] ZAGPJHC 215.

[27] To avoid being convicted the third applicant must establish a reasonable doubt as to whether his failure to comply was wilful and *mala fide.* In *Fakie NO v CCII Systems (Pty) Ltd,*[10] Cameron J said:

> *"[23] It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt."*

[28] Any failure to comply with an order of court undermines the Constitution and cannot be taken lightly.[11]

[29] The third applicant is the deponent to the condonation application in respect of the interdict. He is fully aware of the order. On 3 October 2023 he wrote a letter to the first respondent's attorney on behalf of the first applicant stating that it -

> *"has come to our attention that you have approached our tenants demanding that they pay you the amounts due to our company. Furthermore you have threatened our tenants with eviction should they not comply with your unlawful demands. We hereby demand that you immediately cease and desist from unlawfully demanding payment of rentals from our tenants, failing which we shall take through the urgent action. We furthermore dim and that immediately sees entering our property without prior written consent from us, failing which we shall take further urgent steps."*

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10 *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 23.

11 *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) paras 46 to 67, and the authorities referred to. See also *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T), *SH v GF* 2013 (6) SA 621 (SCA), *JC v DC* 2014 (2) SA 138 (WCC), and *Ndabeni v Municipal Manager: OR Tambo District Municipality (Hlazo) and another* [2021] JOL 49383 (SCA).

[30] The averments made by the first respondent are not seriously disputed in the replying affidavit that also serves as an answering affidavit to the counter application. The third applicant who signed to the affidavit adopts the point of view that he is entitled to collect the rentals because of the pending condonation application. This explanation can never stand as the third applicant is represented by attorneys and he cannot rely on his ignorance of the law in this regard. While no one is expected to know all of the law it is incumbent upon any person entering upon any sphere of the law to familiarise himself or herself with the applicable law. The third applicant's conduct is wilful and *mala fide*.

[31] I therefore find that the first respondent's case is unanswered and that the third applicant is in contempt of court.

Conclusion

[32] For the reasons set out above I make the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 **23 OCTOBER 2023**.

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INSTRUCTED BY:	SCHINDLERS ATTORNEYS
DATE OF ARGUMENT:	18 OCTOBER 2023
DATE OF JUDGMENT:	23 OCTOBER 2023