IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No.2023/085724
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
DATE OF JUDGMENT 6 SEPTEMBER 2023

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**APPLICANT**
And	
ALLIANCE FLEET (PTY) LTD	**FIRST RESPONDENT**
ABSA VMS (PTY) LTD	**SECOND RESPONDENT**
STANDARD BANK OF SA LTD	**THIRD RESPONDENT**
ABSA BANK LTD	**FOURTH RESPONDENT**
FIRSTRAND BANK LTD	**FIFTH RESPONDENT**
NEDBANK LTD	**SIXTH RESPONDENT**
SHERIFF: JOHANNESBURG CENTRAL	**SEVENTH RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 6th SEPTEMBER 2023.

JUDGMENT

COLLIS J
INTRODUCTION

1. On an extremely urgent basis the Applicant (*the City*) after hours applied for relief on the following terms:

1.1 The applicant will apply to this Court on Saturday 2 September 2023 at 14h00 for an order in the following terms:

1.2 That the applicant's non-compliance with the forms of service and the time periods prescribed in the Uniform Rules of Court be condoned and that the application be heard on an urgent basis in terms of Rule 6(12).

1.3 Directing the third respondents to immediately uplift the attachments of the applicant's following bank account so that the applicant can be transact thereon:

1.3.1. First National Bank: 514[…]

1.3.2. Absa Bank: 406[…]

1.3.3 Standard Bank: 410[…]

1.3.4 Nedbank: 115[…]

1.4 Interdicting and restraining the third to sixth respondents (*the Banks*) from attaching the applicant's aforesaid bank accounts pursuant to the writ of execution dated 8 August 2023 in the amount of R 68 445 788,04 pending the final determination of the main application.

1.5 That the costs of this application be paid by a respondent opposing it on an attorney and client scale."

2. In essence in terms of the relief, the City seeks an order against the banks, whereby they are directed by the Court to immediately unfreeze the applicant's bank accounts to enable the applicant to transact thereon.

3. Only the first respondent (*Moipone*) opposes the application with amongst others the Sheriff of the court having intimated through correspondence that it will abide by the Court's decision. No affidavit had thus been filed by the Sheriff in question.

BACKGROUND

4.The City and Moipone have been engaged in litigation with each other around the implementation of and the validity of two Public-Private Partnership Agreements concluded between them in March 2016. The dispute about the validity of the Public-Private Partnership Agreements is one of the disputes between the parties which is still pending before this Court.

5.The Public-Private Partnership Agreements provided for, amongst others, the following:

5.1 the leasing of vehicles for a period of not more than 60 months;

5.2 managed maintenance services in respect of the leased vehicles;

5.3 the payment of fees for the above by the City to Moipone.

6. The second respondent (*AVMS*) provided Moipone with finance to enable it to comply with its obligations in terms of the Public-Private Partnership Agreements and Moipone ceded to AVMS its right, title and interest in the payments due to it by the City in terms of the Public-Private Partnership Agreements.

7. Moipone disputes the validity of the cessions and that dispute is the subject of other pending proceedings between the parties. The effect of Moipone disputing the validity of the cessions is that AVMS shall not be paid in terms thereof and must, if so advised, find some other viable cause of action against it.

8. When AVMS did not receive payments in terms of the cessions, it instituted proceedings under case number 2021/34518 against the City and Moipone to enforce the cessions. This application is also still pending in this Court.

9. The writ being the subject-matter of the present urgent application is pursuant to an order granted by agreement between the parties by Wesley J on 23 January 2023 (*the January order*).

10. In terms of the January 2023 order this Court directed that pending the final determination of the matter, the City shall pay into the trust account of Fluxmans Attorneys the following amounts:

10.1 an amount of R 111 500, 00 (paragraph 5.1);

10.2 all such other amounts that have been invoiced by Moipone and are due and payable in terms of the Public-Private Partnership Agreements which the City had so far not paid to Moipone (paragraph 5.2);

10.3 any other amounts from the date of the order which Moipone may invoice or claim from the City arising from and pursuant to the Public-Private Partnership Agreements (paragraph 5.3);

10.4 The only amount which the January 2023 order expressly fixed and determined for payment by the City into the escrow account is the amount of R 111 500 000, 00. This is the only amount for which Moipone was entitled and the Registrar was empowered to issue a writ of execution.

10.5 Paragraph 5.2 of the January 2023 order further requires the City to pay into the trust account of Fluxmans Attorneys "*all such other amounts that have been invoiced by the second respondent and are due and payable in terms of the Public-Private Partnership Agreements*". The City is not liable to pay amounts which are not "*due and payable in terms of the Public-Private Partnership Agreements*."

10.6 Paragraph 5.3 refers to amounts which Moipone may claim or invoice "*arising from and pursuant to the PPP Agreements*."

APPLICANTS CASE

11. It is the Applicant's case that in terms of both paragraphs 5.2 and 5.3 of the January 2023 order, a determination must first be made that the amounts claimed or invoiced by Moipone are "*due and payable in terms of the Public-Private Partnership Agreement*" or that they are amounts "*arising from and pursuant to the PPP Agreements*."

12. It thus follows that until such time that this is done, counsel for the Applicant had argued that Moipone is not in law entitled to issue a warrant of execution in the amounts claimed in its invoices.

13. Furthermore, that there is an onus upon Moipone to first demonstrate that the amounts claimed by it are "*due and payable in terms of the Public-Partnership Agreements*" or that they are amounts "*arising and pursuant to the PPP Agreements*" before it is lawfully issued with a writ of execution.

14. This is not something so the argument went, which Moipone can unilaterally do by itself and on its own and thereafter cause a writ of execution to be issued against the City. Otherwise, that would amount to *parate executie*, in simple terms being, that it will be taking the law into its own hands.

15. The paragraphs in question do not in any way authorize Moipone to bypass this Court and on its own and by itself determine as and when to execute against the City's assets. This is inimical to the rule of law as we know it.

16. Support for this view is found in the decision *Chief Lesapo*[1], where the Constitutional Court said:

> "*[11] A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the state can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalising the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by section 1(c) of our Constitution, which provides:*
>
> > *"The Republic of South Africa is one, soverein, democratic state founded on the following values:*
> >
> > *. . . .*
> >
> > *(c) Supremacy of the constitution and the rule of law."*
>
> *Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law.[2]"*

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[1] Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC).

[14] If the debt itself is disputed, the seizure of property in execution of the debt must equally be disputed. To permit a creditor to seize property of a debtor without an order of court and to cause it to be sold by the creditor's agent on the conditions stipulated by the creditor to secure payment of a debt, denies to the debtor the protection of the judicial process, and the supervision exercised by the court through its rules over the process of execution. Yet this is what section 38(2) purports to do. It entitles the Bank to seize and sell property in execution whether the debt alleged to be due is disputed or not.

[15] The judicial process, guaranteed by section 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution, and includes the control that is exercised over sales in execution.

[16] On this analysis, section 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of section 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land. Dicey's first principle of the rule of law is that:

> *". . . no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the*

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[2] See Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 (1) SA 508 (A) at 511H-512A and Nino Bonino v De Lange 1906 TS 120 at 122.

exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[3]"

So, too, in De Lange v Smuts NO and Others, Ackermann J held:

"In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) 'citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors."

17. It is on this basis that counsel had argued that it was unlawful for Moipone to determine by itself and on its own without a Court that the amounts claimed by it in its invoices were "*due and payable in terms of the Public-Private Partnership Agreements*" or that they were amounts "*arising and pursuant to the PPP Agreements*."

18. As mentioned, the writ in question was executed upon on 8 August 2023, when Moipone caused the Registrar of this Court to issue a warrant of execution against the City purportedly authorising the banks to pay over an amount of R 68 445 788, 04 from the City's bank accounts.

19. This happened on instruction of Moipone and without a Court order directing that the City must pay the amount of R 68 445 788, 04 to it.

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[3] Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (Macmillan, London 1959) at 188.

20. It is common cause that there was no judicial process undertaken which preceded the issuing of the warrant of execution, and on this basis, counsel for the Applicant had argued, that taking this step renders the warrant of execution unlawful.
21. In respect of the amount so claimed in terms of the warrant, it is the City contention that the amount of R 68 445 788, 04 is not due and payable in terms of the Public-Private Partnership Agreements.

22. It is further common cause that the Public-Private Partnership Agreements came to an end by the effluxion of time in August 2021 and that the de-fleeting of vehicles is not regulated by the order granted by this Court in July 2022.

23. In addition the Applicant had argued that the invoices upon which Moipone relied to persuade the Registrar to issue the writ of execution further do not even amount to R 68 445 788, 04.

24. This Moipone does not dispute this in its answering affidavit and cannot amend the writ of execution. There is therefore, no basis to keep the City's bank accounts frozen in circumstances where the amount sought to be collected in terms of the writ of execution is incorrect.

25. Pursuant to the writ of execution, the Sheriff for Sandton South attached the City's bank account held with Nedbank in order to collect the amount of R 68 445 788, 04 therefrom. Before Nedbank could pay the aforesaid amount to the Sheriff for Sandton South, Nedbank was served with the main application in which the City seeks an order in terms of which the writ of execution is set aside. This main application was enrolled for 31 August 2023, and removed by agreement between the parties to exchange their affidavits before an expedited hearing date on the urgent roll is applied for.

26. Upon being served with the main application, Nedbank decided, correctly so, to keep the amount of R 68 445 788, 04 in a suspense account to which the City does not have access pending the final determination of the main application. The amount of R 68 445 788, 04 is accordingly secured in Nedbank's suspense account.

27. The position adopted by Nedbank counsel had argued protects both parties pending the final determination of the main application. It also protects the integrity of both processes, the writ of execution and the main application which is still pending before the Court.

FIRST RESPONDENT'S CASE

28. The first respondent had opposed the application on a number of grounds namely, the lack of urgency of the application, attacking the authority of the deponent to the founding affidavit, the non-joinder of a party and lis alibi pendense amongst others.

29. On urgency counsel for Moipone had argued that in terms of the January order the City agreed to effect payments to the Escrow accounts within 7 days of demand and invoices having been provided to it.

30. Notwithstanding the January order and as a result of failure to effect payment when demanded without any explanation, and its continued use of the assets without payment, is what prompted the First Respondent to issue the First Writ of Attachment against the Applicant which the Applicant duly complied with.

31. In April 2023 then the Applicant was issued with the second invoice, which the Applicant failed to honour. This prompted the second writ of attachment. On or about 11 May 2023 Moipone forewarned the Applicant that failure to make payments as invoiced would result in a writ of attachment being issued to enforce the payment of the amount due.

32. Thereafter on or about 07 July 2023 a final invoice was issued against the Applicant, and here to, the applicant did nothing with the result that a final writ was issued which forms the basis of this application.

33. As already stated above, these invoices were provided to the Applicant around July 2023 and still, the Applicant did nothing. The writ in question was thereafter issued 18 August 2023.

34. On behalf of the first respondent it was as a result submitted that the application is not urgent as the Applicant has always been aware of the process of payment (i.e issuing of invoices in accordance with the agreed order, opportunity to pay and issue of writ of attachment) from as far as when the order of Wesley J was made by agreement. More specifically where two writs of attachments were previously issued against the Applicant. The third writ having been issued against it, could hardly be argued had taken it by surprise.

35. The First Respondent having dragged the parties to court with two urgent applications within a space of less than 4 (four days) cannot be justified when the Applicant failed to explain why it did nothing in the periods stated above. By the step so taken by the Applicant in the present application it seeks in essence to appeal or set aside the Wesley J order albeit through the back door.

36. The present application was launched on 01 September 2023, literally one day after the main application, at around 15:44 for hearing of the matter on 02 September at 14:00hrs which is unaccompanied by the explanation as to why, on a Saturday the court had to sit and not wait for the following Tuesday. This counsel submitted is an absolute abuse of court process and the urgency procedure and that the Court ought to express its absolute displeasure of this conduct by issuing a cost order against the Applicant at the highest punitive scale.

37. As I see it, the urgency of the application for the unfreezing of the bank accounts of the City, is prompted by the inability of the City to access its bank accounts in circumstances where the money demanded in terms of the writ executed on 18 August 2023, has been moved into a suspense account and thus secured until the final determination of the main application.

38. These facts, as mentioned, is common cause between the parties, and the Applicant being a municipality, it can be accepted will be severely hamstrung if it is unable to access its bank accounts in order to attend to the business of the municipality. This to my mind brings about the urgency of the application and it is for this reason that this Court is inclined to enrol the application in terms of Rule 6(12)(a) of the Uniform Rules of Court.

39. A further ground in opposition is the material non-joinder of the deponent to the Answering Affidavit. In this regard the First Respondent had argued that the Applicant should have joined him in his personal capacity as a respondent in these proceedings in that he could be held personally liable jointly and severally with the First Respondent herein and the failure to join him denies him the opportunity to address this court and in turn is prejudicial to him.

40. It is on this basis that counsel had argued, that this point should be upheld and the application should be dismissed with costs either costs de bonis propriis, alternatively, on an attorney and own client scale.

41. On the point so raised, the Applicant had argued that the non-joinder point is bad in law as the unblocking of the City's bank accounts will not in any way prejudice the deponent to Moipone's Answering Affidavit.

42. For a person to be joined to proceedings the test has always been that a party is joined to proceedings if the order sought cannot be executed without prejudicing the rights of such a person, or of a party's rights will be affected by the order so granted. This is not so in the present application.

43. Support for this argument is found in the decision of *Amalgamated Engineering Union*[4], where the court said that a court should not make an order that may

[4] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A).

prejudice the rights of parties who are not cited before it. The Court put the position as follows:

> "*Indeed it seems clear to me that the court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interests without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudiciously affect that party's interests. There may also, of course, be cases in which the court can be satisfied with the party's waiver of his right to be joined, e.g., if the court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both.*
>
> *Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgment binding on him as res judicata …*"

44. As the relief in the present application relates to the unfreezing of the hold placed on the bank accounts of the Applicant, no rights of the deponent to the Answering Affidavit will be affected and consequently, I must agree with counsel for the Applicant that the point of non-joinder is bad in law.

45. Consequently, the point so raised is dismissed with costs.

46. A further point raised by Moipone is the defence of lis alibi pendens (lis pendense).

47. In order to succeed with this defence, the suit must already have started to be mooted before another judge between the same persons, about the same matter and on the same cause of action.

48. Support for this defence is found in the decision Socratous v Grindstone Investments[5] where the Supreme Court of Appeal, per Navsa JA, held as follows:

> [13] It is necessary to consider the underlying principle of the defence of lis alibi pendens. In Nestle (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA) para 16 this court said the following:
>
> > 'The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally.'

49. In Spencer v Memani[6] , the SCA, per Meyer AJA (Lewis JA, Ponnan JA and Pillay JA concurring), reaffirmed its decisions in Nestlé (South Africa) (Pty) Ltd and Socratous, and held as follows:

> [9] In Nestlé (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA), Nugent AJA said the following:
>
> > 'The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that

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[5] 2011 (6) SA 325 (SCA), at para. 13.

[6] 2013 JDR 2223 (SCA).

tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally.'

50. On behalf of Moipone it was argued, that the issue of lis alibi has been demonstrated by succinctly using the very application before this Honourable Court in the following terms: -

50.1 The Applicant approaches this court seeking to set aside a writ issued under case number 2021/34518 on the basis that such writ has been obtained without basis;

50.2 Attaches to this application, the Notice of Motion that resulted in the order giving life to the writ under case number 2021/34518;

50.3 Attaches the order of Wesley J under case number 2021/34518 which has been the genesis and primary strength of the writ sought to be set aside;

50.4 And all other material related to case number 2021/34518.

51. The question so counsel had argued that then arises, which the Applicant has failed to explain is why he is not before Wesley J, seeing that the application alleges that the order of Wesley J is under abuse?

52. This is so counsel contends, as the Applicant knows that it has no case to make before Wesley J, who is well aware of the reasons why the order was obtained in the manner that it was, albeit by consent with the Applicant.

53. In my view, the argument so raised on lis pendens, is one which is best suited with the Court which will in due course adjudicate upon the validity of the writ executed upon on 18 August 2023.

54. It is not one which can successfully be raised before this Court, as all this Court is tasked upon to adjudicate, is whether in law any basis exists for the freezing of the bank accounts of the City in circumstances where the money to satisfy the writ is held in a suspense account and thus secured.

55. It then must follow that the ground of lis pendens is also without merit and consequently also to be dismissed with costs.

56. The challenge of the authority of the deponent to the founding affidavit, is an additional ground raised by the First Respondent. In this regard, the First Respondent had served a Notice in terms of Rule 7 of the Uniform Rules of Court on the Applicant, which notice was duly replied to. In as far as the authority of the attorney who instituted proceedings on behalf of the Applicant is of concerned, there as a result can be no dispute that the Applicants attorney is mandated to act on behalf of the City.

57. In turning to the authority of the deponent to the Founding Affidavit, the First Respondent had argued, that the deponent to the Founding Affidavit does not set out her position within the Applicant nor the basis for her authority. As such the argument advanced was that the deponent lacked the necessary authority.

58. In reply, the Applicant had argued that the authority to institute proceedings is the attorney who actually files the application before Court and that this had been establish in the reply filed to the Rule 7(3) Notice. Secondly, that the authority of the deponent to the affidavit, being challenge is weak, as the deponent is a witness who is well vested to deposed to such affidavit.

59. This argument, I similarly agree with and consequently the point is also dismissed with costs.

REQUIREMENTS FOR AN INTERIM INTERDICT

60. In order to succeed on the merits of the application, the Applicant should meet the requirements for an interim interdict. These requirements are the following:

(a) a prima facie right even though open to some doubt,

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted,

(c) that the balance of convenience favours the granting of an interim interdict, and

(d) the lack of an adequate alternative remedy in the circumstances.[7]

61. As mentioned the Applicant approaches this Court, in order to seek the assistance, form this Court, to unfreeze its bank accounts to enable it, to attend to the business of the municipality. This, they do so in circumstances where engagement with both the First Respondent and the Sheriff have proven to be unsuccessful as the Sheriff is not prepared to accede to this request. The Sheriff *in casu* acts on the instruction of the First Respondent. This right to access its' bank accounts is a right to which, if not protected by an interim interdict, irreparable harm would ensue. The fact that the municipality has secured credit in the interim to attend to its business is no answer that they have not established a clear right to unfreeze its bank accounts in circumstances where the money demanded in terms of the writ have been moved into a suspense account. It is for this reason that I conclude that they have met the requirement of a clear right and the requirement that they have no other alternative remedy available at its disposal.

62. In addition in the absence of the relief which they seek being granted by this Court, the result would be that they will not be able to operate its accounts held at the various banks and that this will result in it suffering irreparable harm. As such I

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[7] Setlogelo v Setlogelo 1914 AD 221 at 227.

must therefore conclude that the balance of convenience also favours the granting of an interim interdict.

63. In the circumstances the requirements for the granting an interim interdict have been met and the Applicant should as a result succeed.

COSTS

64. Generally, costs follow the event. In awarding costs, a Court exercise a wide, unfettered discretion which discretion must be exercised judicially upon consideration of all the facts. In essence, the court must be fair to both parties, in whatever costs is to be awarded by a Court.

65. Given the conspectus of evidence placed before this Court, I am of the view that a punitive costs order as prayed for by the respective parties is not warranted in the circumstances and that party and party costs should follow the result.

ORDER

66. The applicant's non-compliance with the forms of service and the time periods prescribed in the Uniform Rules of Court is condoned and the application ids heard on an urgent basis in terms of Rule 6(12);

67. The third to seventh respondents are directed to immediately uplift the attachments of the applicant's following bank accounts so that the applicant can transact thereon:

67.1 First National Bank:	514[…]
67.2 Absa Bank:	406[…]
67.3 Standard Bank:	410[…]
67.4 Nedbank:	115[…]

68. The sixth respondent shall continue to hold the amount of R68 445 788,04 in its suspense account and ensure that such amount is not withdrawn from such account pending the final determination of the main application under the abovementioned case number.

69. The costs of this application is to be paid by first respondent on a party and party scale including costs of two counsel where so employed.

C.COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

APPEARANCES:

Counsel for Applicants:	Adv. K Tsatsawane SC
	Adv. C Marule
Instructed By:	MB MABUNDA INCORPORATED
Counsel for Respondents:	Adv. M Qofa
	Adv. T Mhlanga
Instructed By:	DYASI M Inc. ATTORNEYS
Date of Hearing:	03 September 2023
Date of Judgment:	06 September 2023