OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **21748/2017**

In the matter between:

DANIEL WILLIAM JANSE VAN RENSBURG Applicant

and

THEODORIN NGUEMA OBIANG First Respondent

THE CITY OF CAPE TOWN Second Respondent

AND

THEODORIN NGUEMA OBIANG Applicant

and

DANIEL WELMAN JANSE VAN RENSBURG	First Respondent
SHERIFF CAPE TOWN WEST	Second Respondent
REGISTRAR OF DEEDS WESTERN CAPE	Third Respondent

Coram: Hockey, AJ
Date of Hearing: 08 August 2022
Date handed down: 26 September 2022

JUDGMENT (HANDED DOWN ELECTRONICALLY)

INTRODUCTION

[1] The parties before me have been engaged in protracted litigation for the past five years. In the main action proceedings to which the present applications relate, Mr Daniel Welman Janse van Rensburg ("Mr Janse Van Rensburg") obtained an order in his favour on 18 June 2021 from Lekhuleni AJ (as he then was) against Mr Theodorin Nguema Obiang ("Mr Obiang") for payment of the sum of R39 882 000.00 ("the Lekhuleni order").

[2] There are presently two applications before me. The first application is one brought by Mr Obiang, amongst other, for;

(a) A declaration that an interim order granted by Ndita J on 5 August 2021 ("the Ndita order"), as requested in Part A of the notice of motion in an application for the rescission of an order by Dolamo J as well as the Lekhuleni order ("the rescission application"), suspended the Lekhuleni order pending the outcome of any and all appeals processes related to Part B of the notice of motion.

(b) A declaration that Mr Van Janse van Rensburg is held in contempt of the Ndita order and that a sanction of a suspended sentence of imprisonment, alternatively, a fine be imposed.

(c) As an alternative (to (a) and (b) above), Mr Obiang requested that the operation and execution of the Lekhuleni order be suspended pending the outcome of any and all appeals processes related to the rescission application.

[3] The second is an application by Mr Janse van Rensburg for the authorisation of a warrant of attachment against two immovable properties owned by Mr Obiang situated in Bishopscourt and Camps Bay, Cape Town respectively, and for the sheriff to be authorised to execute the warrant of attachment against these immovable properties. This application is brought in terms of Rule 46A of the Uniform Rules of Court ("the Rules").

BACKGROUND

[4] At all material times during the saga between Mr Obiang and Mr Janse van Rensburg, the former was the Vice President of the Republic of Equatorial Guinea ("the REG"). Mr Janse van Rensburg instituted action against Mr Obiang in his personal capacity for damages suffered as a result of his wrongful arrest and detention in the REG from 2013 to 2015 ("the main action").

[5] Mr Obiang defended the main action. Pleadings were exchanged, however, on 13 July 2020, Mr Obiang terminated the mandate of his erstwhile attorneys and remained legally unrepresented in South Africa until the appointment of his current attorneys of record.

[6] During the time that Mr Obiang was unrepresented, at least two significant steps were taken in the litigation process for present purposes. These are:

[6.1] On 17 August 2020, Dolamo J, on application by Mr Janse van Rensburg, struck out the defenses of Mr Obiang on the grounds of non-compliance with discovery obligations ("the Dolamo order").

[6.2] The main action was heard by Lekhuleni J, who gave his judgment and order in favour of Mr Janse van Rensburg on 18 June 2021 (i.e. the Lekhuleni order)[1].

---

[1] See the judgment of Lekhuleni AJ at Van Rensburg v Obiang (21748/2014 [2021] ZAWCHC 128 (18 June 2021)

[7] After the Lekhuleni order was handed down, Mr Obiang instructed his current attorneys to apply for the rescission of both the Dolamo and the Lekhuleni orders.

[8] The notice of motion in the rescission application consisted of a Part A with a prayer for the interim relief, namely a suspension of the Lekhuleni order pending the determination by the High Court of Part B of the application, namely for a final order of the rescission of the two orders.

[9] Part A of the rescission application came before Ndita J who, on 5 August 2021, by agreement between the parties, ordered as follows:

> "*The operation and execution of the order granted by the Honourable Mr. Justice Lekhuleni AJ on 18 June 2021, under case number 21748/2017, is suspended pending the determination by the High Court of Part B of the application instituted by the Applicant on 29 July 2021.*"

[10] Part B of the rescission application was heard by Slingers J who dismissed the application on 13 December 2021 ("the Slingers judgment").

[11] On 14 December 2021, Mr Obiang's attorneys informed the attorneys for Mr Janse van Rensburg that Mr Obiang would be instituting an application for leave to appeal against the Slingers judgment. The application for leave to appeal was filed on 11 January 2022.

[12] On 22 February 2022, Slingers J granted leave to appeal to the full bench of this court. The appeal is yet to be heard.

[13] In the interim, and by virtue of the Lekhuleni order, Mr Janse van Rensburg's attorneys proceeded to execute against Mr Obiang's movable property in Bishopscourt which was sold in execution on 26 January 2022.

[14] Mr Janse van Rensburg now seeks authorisation for the sale in execution of Mr Obiang's immovable properties. I pause to mention that these properties have been under judicial attachment since 17 October 2017 at the instance of Mr Janse van Rensburg to found jurisdiction against Mr Obiang.

THE ISSUES TO BE DETERMINED

[15] The main issues for consideration in the two applications before me is firstly, whether Mr Janse van Rensburg should be held to be in contempt of the Ndita order, and secondly, whether the Ndita order suspended the execution of the Lekhuleni order pending the outcome of any and all appeals related to the rescission application.

[16] What also falls to be determined is whether the circumstances of this matter warrants for the application of rule 45A, i.e. whether the execution of the Lekhuleni order should be suspended pending the outcome of any and all appeals, if at all.

[17] The relief sought by Mr Obiang, namely a stay of execution and the application for contempt, is partially premised upon whether the appeal of the rescission application is pending. Counsel for Mr Janse van Rensburg argues that the appeal has lapsed. Therefore, it must also be decided whether this court is in a position, based on the papers before me, to determine whether the appeal has in fact lapsed.

[18] The disposal of both the execution and contempt proceedings revolves largely around the questions of whether or not the Ndita order was suspended with the dismissal of the rescission application by Slingers J, and whether the lodgment of the appeal against the Slingers judgment revived the Ndita order and conversely suspended the Lekhuleni order. A proper interpretation of the Ndita order and its effect is therefore also required.

Has the appeal in the rescission application lapsed?

[19] Mr Obiang's opposition to the application to execute against his immovable property is premised on his assertion that an appeal is pending against the Slingers judgment.

[20] Mr Janse van Rensburg argues that the appeal against the decision by Slingers J has lapsed due to Mr Obiang's failure to file his power of attorney and the late filing of the notice of appeal without an application for condonation. It is further contended in his heads of argument that Mr Obiang was required, in terms of Rule 49(6), to make a written application to the registrar of the court where the

appeal is to be heard for a date for the hearing of his appeal within 60 days of delivery of his notice of appeal, which he did on the sixtieth day. In addition Rule 49(7)(b) required Mr Obiang to serve two copies of the record on Mr Janse van Rensburg, which he failed to do.

[21] Counsel for Mr Obiang pointed out that the argument raised about the lapsing of the appeal was raised for the first time in the heads of argument and is not dealt with in the papers in either of the two applications before this court.

[22] To state the obvious, heads of argument is not evidence, nor are they pleadings or affidavits under oath. It is what its name implies – argument, or persuasive comments to advance a party's case. Such argument must be premised on the law and what is contained in the pleadings or affidavits filed with the court. The court, after all, is bound by the facts as set out in the papers and pleadings.[2]

[23] Mr Janse van Rensburg did not raise the issue relating to the alleged lapsing of the appeal in either of the two applications before me. Mr Obiang, therefore, did not have an opportunity to respond thereto in his affidavits. The danger of raising this issue for the first time in the heads of argument is evident by the fact that counsel for Mr Janse van Rensburg relied on an erroneously dated version of Slinger J's judgment granting leave to appeal. It appears that this version of the judgment was signed on 2 February 2022. Based on this version of the judgment, counsel for Mr Janse van Rensburg argued in their heads of argument that the notice of appeal (a copy of which was also attached to the papers), was

[2] See **Atlantis Property Holdings CC v Atlantis Excel Service Station CC** 2019 (5) SA 443 (GP) at para 32

delivered fifteen days late. A version of the judgement which was correctly dated and which was not disputed during argument, is attached elsewhere in the papers, indicating that it was signed on 22 February 2022. The contention that the notice of appeal was filed fifteen days late is therefore wrong and misleading.

[24] Aside from the fact that it is irregular to raise a potential defence for the first time in heads of argument[3], I do not have the facts, duly ventilated in the papers before me to conclude that the appeal against the Slingers judgment has in fact lapsed.

The Ndita order and the Rule 45A application.

[25] Mr Obiang instituted the rescission application on 29 July 2021. The relief sought in Part A of his notice of motion, namely the suspension of the operation and execution of the Lekhuleni order was granted in terms of the Ndita order. The relief in Part B of the notice of motion, namely the rescission of both the Dolamo and Lekhuleni orders was refused by Slingers J. However, the learned judge granted leave to appeal against her order in this respect.

[26] The parties are now at loggerheads as to the effect of the Slingers judgment and/or the pending appeal of that judgment on the Ndita order.

[27] It bears mention that in relation to Part A of Mr Obiang's notice of motion, he asked for the suspension of the operation and execution of the Lekhuleni order

[3] See **Nel and Others v Cilliers** 44111/2020) [2021] ZAGPPHC 113 (15 February 2021 at para 34

"[p]ending the final determination of the relief sought in Part B . . .". The Ndita order which was granted by agreement, does not contain the adjective "*final*" in front of the word "*determination*".

[28] Counsel for Mr Janse van Rensburg argues that the absence of the word "final" is significant, as concluded by Riley AJ in **Auction Alliance (Pty) Ltd and Another v Minister of Police and Others**[4] that "*'final determination' of an application must therefore be read to mean something distinct from the mere 'determination' of the application. In my view the word 'final' . . . , can and must on its ordinary meaning only mean to include determination on review or appeal.*"

[29] Mr Janse van Rensburg contends that when Slingers J dismissed the final relief sought in Part B, the interim order of Ndita J was discharged which opened the way for him to execute upon the Lekhuleni order. In this regard, reliance is placed on **MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd**[5] where it was held by Harms JA:

> *"Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed as there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same court (albeit not the same judge) in the same proceedings after having heard the other side."*[6]

---

[4] (8324/2014) [2014] ZAWCHC180 (3 December 2014)
[5] 2000 (4) SA 746 (SCA)
[6] Ibid at para 6 page 752

[30] In **School Governing Body of Uitzig Secondary School and Another v MEC for Education, Western Cape and Another; In Re: School Governing Body of Uitzig Secondary School and Others v MEC for Education Western Cape and Others**[7], Masuku AJ held that the judgment in **Snow Delta** does not deal with section 18(1) of the Superior Courts Act 10 of 2013, but rather states what is trite in common law.[8] The court held further to that "*Harms JA did not deal with a situation . . . where the appellant has lodged an application for leave to appeal to the Supreme Court of Appeal and wishes to stop the implementation of an administrative decision until that application for leave to appeal is disposed of.*"

[31] It is appropriate, at this stage to have regard to the relevant portions of Section 18 of the Superior Court Act, as follows:

> "*(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
>
> *(2) Subject to subsection 3, unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of*

[7] 2020 (4) SA 618 (WCC)
[8] Ibid para 9.

an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) and (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court do orders"

[32] It is important to note the context of the judgment of Masuku AJ in **Uitzig**. In that matter, Saldanha J had granted an interim order suspending an administrative decision to close down a school, pending the main application for review of such decision. Hack AJ dismissed the review application, which brought an end to the Saldanha J order. Masuku AJ held that the Saldanha J order was revived, and the Hack AJ decision was suspended when an application for leave to appeal was lodged against the order of Hack AJ.

[33] It is in this context, and his interpretation of the **Delta Snow** judgment, that Masuku AJ held:

"The First Respondent's contention, based on her understanding of the Harms JA's remarks in MV Snow, that an order dismissing an application cannot be suspended in terms of the common law, does not, in my view apply under s 18(1) with the equal force that it applied under common law. While the common law creates a distinction between the orders that may be suspended pending an appeal, s 18(1) does not do so. Section

18(1) applies to all decisions or orders. It does not apply, as the First Respondent contends, only to orders or decisions that are granted. I cannot think of any reason why an interpretation of s 18(1) in terms of which the suspension doctrine applies only to granted orders and not those that are not granted is possible under s 18(1). Harms JA did not purport to give an interpretation of s 18(1) and its scope of application. But even if I am wrong on this – on the basis of Harms JA in MV Snow, it is clear to me that the purpose of the suspension requirement in applications for leave to appeal would be frustrated if it were to operate in a discriminatory manner to granted orders only."

[34] As for the reliance by counsel for Mr Obiang on the judgment in **Uitzig**, counsel for Mr Janse van Rensburg contends that this judgment is wrong. Instead, reliance is placed on the judgment of Windell J in **Royal AM Football Club v National Soccer League and Others**[9] where the applicant, Royal AM unsuccessfully applied for an arbitration award to be set aside. An application for leave to appeal the order of refusal was dismissed. Royal AM subsequently petitioned the SCA and argued that, the petition, as a matter of law and in terms of section 18 of the Superior Courts Act, suspended the implementation of the arbitration award.

[35] In **Royal AM**, the court gave consideration to the judgments in **Snow Delta** and the decision in **Uitzig**, and concluded:

[9] (21/27854) [2021] ZAGPJHC 423 (26 July 2021)

"[55] In other words, this court must find that despite the fact that Sutherland DJP had dismissed its review of the Epstein award, Royal AM's application for leave to appeal had nonetheless somehow given Royal AM the relief it sought in the review, namely, that the Epstein award would not operate? This argument, and the judgment in Uitzig, is directly at odds with the binding authority of the SCA in Snow Delta, and would have the effect that the dismissal of the review application would somehow confer some benefit to Royal AM, in this instance to get Royal AM to where it wants to be, namely at the top of the GladAfrica Championship.

[56] I do not intend to follow the decision in Uitzig. Sutherland DJP had dismissed the application to review the award of Epstein SC. There was accordingly nothing that could be "suspended" by Royal AM's application for leave to appeal against the order of Sutherland DJP. It follows that Royal AM's petition for leave to appeal against the order of Sutherland DJP also does not entitle it to the declaratory relief it seeks in the current application, namely reinstating it as the "lawful occupant of the first position in the GladAfrica Championship until lawfully removed."

[36] **Royal AM** and **Uitzig** are decisions of two different divisions of the High Court. In **Royal AM** the court held that it was bound by **Snow Delta**, whereas in **Uitzig**, the court held that it was not. In the latter instance, Masuku AJ held that **Snow Delta** did not deal with section 18 of the Superior Courts Act, but rather with the common law. Despite making the distinction, there still appears to be a conflict between **Royal AM** and **Uitzig**.

[37] The doctrine of precedent is an intrinsic feature of the rule of law[10]. This doctrine is often expressed by in the Latin maxim *stare decisis et non quieta movere* (to stand by decisions and not to disturb settled matters). In **Gcaba v Minister for Safety and Security and Others**[11] the Constitutional Court explained the maxim to mean "*that in the interest of certainty, equality before the law and the satisfaction of legitimate expectations, a court is bound by the previous decisions of a higher court and by its own previous decisions in similar matters.*"

[38] Counsel for Mr Janse van Rensburg urged this court to follow the decision of **Royal AM** over **Uitzig**. It is trite that I can do so only if the **Uitzig** decision, which is a decision of this division of the High Court, is wrong. It is an age old principle that a court must follow its own precedent over that of other courts of equal status, unless its own precedent is wrong. In **Bloemfontein Town Council v Richter**[12], it was held:

> "*The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors - such preference, if allowed, would produce endless uncertainty and confusion.*"[13]

---

[10] See **True Motives 84 (Pty) Ltd v Mahdi and Another** 2009 (4) SA 153 (SCA) at para 100
[11] 2010 (1) SA 238 (CC) at para 58
[12] 1938 AD195
[13] Ibid at 323

[39] I am mindful that even if I agree with counsel for Mr Janse van Rensburg (I am not saying that I do) I will still have to consider whether the Lekhuleni order should be suspended by virtue of Rule 45A. It convenient, therefore, to consider the relief sought under Rule 45A at this stage. Rule 45 A reads:

> *"The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act."*

[40] In addition to Rule 45A, the Superior Courts have inherent power, in terms of section 173 of the Constitution, to protect and regulate their own process, taking into account the interest of justice. Such power includes the inherent discretion to order a suspension of execution of any order. The SCA confirmed the court's power to order a stay of execution in **Van Rensburg NO and Another v Naidoo NO and Others; Naidoo and Others NNO v Van Rensburg NO and Others**[14] when it held:

> *"[51] Apart from the provisions of Uniform rule 45A a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.*

[14] 2011 (4) SA 114 (SCA)

[52] A court will grant a stay of execution in terms of Uniform rule 45A where the underlying causa of a judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial justice compels such action."

[41] The principles generally applied by a court in exercising its discretion to stay an execution, was neatly summarised by Waglay J, as he then was, in **Gois t/a Shakespeare's Pub v Van Zyl and Others**[15], as follows:

"The general principles for the granting of a stay in execution may therefore be summarised as follows:

(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

[15] 2011 (1) SA 148 (CLC) at para 37

(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, i.e. 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."

[42] I agree with the contextualisation of Rule 45A by Binns-Ward in the recent judgment, **Stoffberg N.O and Another v Capital Harvest (Pty) Ltd**[16] namely:

"*The broad and unrestricting wording of rule 45A suggests that it was intended to be a restatement of the courts' common law discretionary power. The particular power is an instance of the courts' authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that execution will be suspended where real and substantial justice requires that. 'Real* and substantial justice' is a concept that defies precise definition, *rather like 'good cause' or 'substantial reason'. It is for the court to decide on the facts of each given case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment;*

[16] (2130/2021) [2021] ZAWCHC 37 (2March 2021) at para 26

and, if they are, on what terms any suspension it might be persuaded to allow should be granted."

[43] According to the reasoning in **Van Rensburg**, a court will grant a stay of execution where the underlying causa of the judgment in question is being disputed or no longer exists, or when an attempt is made to use the machinery of execution for ulterior or improper purposes.[17] Counsel for Mr Janse van Rensburg adds to this his reliance upon **BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another; BP Southern Africa (Pty) Ltd v ZA Petroleum and Another**[18], where it was held:

"A litigant with an enforceable judgment is entitled to payment, and only in rare cases would be delayed in that process. In my view there may be exceptional cases where a court would still exercise a discretion to prevent an injustice in staying execution."

[44] Even where the causa of a claim is undisputed, a court may still grant a stay where otherwise an injustice will be done.[19] This will be the case, in my view, where the possibility exist that the order on which the execution is predicated, may be expunged.

[45] I am mindful that in the present matter, the Lekhuleni order was granted on an unopposed basis after the defence of Mr Obiang was struck by Dolamo J.

---

[17] See Erasmus, **Superior Court Practice** RS 17 2021, D1-106
[18] 2022 (1) SA 162 (GJ) at para 25
[19] See **Strime v Strime** 1983 (4) 850 (CPD) at 854 H – 855 D.

Slingers J refused an application for the rescission, but granted leave to appeal against her judgment. In granting leave to appeal, she stated:

> *"[3] After considering the papers filed in the application for leave to appeal and the argument presented by the parties' counsel, I am of the view that there is a reasonable possibility that another Court would come to a different interpretation off Uniform Rule 16(3) and/or find that the provision of Uniform Rule 16(4) were applicable to the service of the striking out application and to the notice of set down which resulted in the Orders of 17 August 2020 and of 18 June 2021 being taken against the applicant."*

[46] To put the Slingers judgment in context, it is necessary to mention that Mr Obiang terminated the mandate of his erstwhile attorneys during July 2020. A notice of withdrawal of attorneys of record was accordingly filed with the court on 28 July 2020 wherein it was stated that Mr Obiang was reachable through a certain Ms Hombria, an official of the embassy of the REG.

[47] Mr Obiang remained unrepresented until 24 June 2021 when he appointed his current attorneys of record. In the interim, Mr Janse van Rensburg caused a notice to strike-out Mr Obiang's defence, as well as a notice of set down of the proceedings which commenced before Lekhuleni AJ to be served and filed. (The form of service is under scrutiny and will be dealt with in the pending appeal of the Slingers judgment). Mr Obiang failed to appear in both instances, which resulted in orders being made against him. According to my

understanding the primary issue raised in the rescission application, was whether proper and effective service was effected on Mr Obiang during the period that he was unrepresented, in respect of the strike-out application and in respect of the set down of the matter.

[48] When an attorney is appointed to act, or ceases to act on behalf of a party, Rule 16 requires certain processes to be followed. Slingers J, as alluded to above, raised a possible concern about the interpretation of Subrule 16(3) and also whether Subrule 16(4) finds application when Mr Obiang's erstwhile attorney withdrew. For the sake of completeness, I quote these subrules without saying anything more (as these are issues to be considered by the full bench on appeal):

> *"(3) Upon receipt of a notice in terms of subrule (1) or (2), the address of the attorney or of the party, as the case may be, shall become the address of such party for the service upon such party of all documents in such proceedings, but any service duly effected elsewhere before receipt of such notice shall, notwithstanding such change, for all purposes be valid, unless the court orders otherwise.*
>
> *(4) (a) Where an attorney acting in any proceedings for a party ceases so to act, such attorney shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom such attorney acted may be given by facsimile or electronic mail in accordance with the provisions of rule 4A. (b) The party formerly*

represented must within 10 days after the notice of withdrawal notify the registrar and all other parties of a new address for service as contemplated in subrule (2) whereafter all subsequent documents in the proceedings for service on such party shall be served on such party in accordance with the rules relating to service: Provided that the party whose attorney has withdrawn and who has failed to provide an address within the said period of 10 days shall be liable for the payment of the costs occasioned by subsequent service on such party in terms of the rules relating to service, unless the court orders otherwise. (c) The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them. (d) The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b)."

[49] Should the appeal against the Slingers judgment succeed, it will have the effect of the expungement of the Lekhuleni order and Mr Obiang will be granted leave to defend the main action proceedings. In this scenario, and if Mr Janse van Rensburg is allowed to proceed with the execution of Mr Obiang's immovable properties, such properties would be sold by auction and the net proceeds would be paid to Mr Janse van Rensburg to satisfy the Lekhuleni order. This would lead to substantial prejudice for Mr Obiang as he could be without any satisfactory remedy, besides trying to recover from Mr Janse van Rensburg.

[50] On the other hand, if a stay of execution is granted, it will not affect the Lekhuleni order in the event of the appeal against the rescission application

being unsuccessful. In addition, the properties, which remain under attachment, will be available for execution.

[51] Should a stay of execution not be granted at this stage, Mr Obiang would have suffered irreparable harm in the event of the Lekhuleni order ultimately being set aside. However, no such harm would have been suffered by Mr Janse van Rensburg should Mr Obiang be unsuccessful in his challenge of the orders against him.

[52] With regard to the balance of convenience, counsel for Mr Janse van Rensburg contends that this favours his client, as Mr Obiang is an extremely wealthy man, whereas Mr Janse van Rensburg has been unemployed and has suffered under financial constrains since his return to South Africa from the REG. I have sympathy for Mr Janse van Rensburg in this regard, but the harm that Mr Obiang will suffer should a stay not be granted and he succeeds in having the orders against him expunged, would be far worse.

[53] In the result, I am of the view that justice would be best served if the operation and execution of the Lekhuleni order is suspended pending outcome of all and any appeals related to the Slingers judgment. Such order, with reference to the proviso in Rule 45A, will not offend section 18 of the Superior Courts Act.

[54] It goes without saying that the request made by Mr Janse van Rensburg's application to have Mr Obiang's immovable properties declared executable under Rule 46A should not be granted at this stage. This is not to say that the

application should be dismissed, but rather postponed, in which case it may be re-enrolled following any and all appeal processes of the rescission application.

The contempt application.

[55] The application to hold Mr Janse van Rensburg in contempt of the Ndita order arises from the sale in execution of Mr Obiang's movable property on 26 January 2022.

[56] After the Slingers judgment was handed down on 13 December 2021, the parties disagreed as to whether that judgment suspended the Ndita order or not. Additionally they also disagreed as to whether the application for leave to appeal against the Slingers judgment, as well as the granting of such leave, suspended the order in question.

[57] On 14 December 2021, Mr Obiang's attorneys wrote to Mr Janse van Rensburg's attorneys informing the latter that Mr Obiang would be instituting an application for leave to appeal against the Slingers judgment and requested, in the light thereof, an undertaking that the execution process be held in abeyance pending the outcome of the application for leave to appeal. Mr Janse van Rensburg's attorneys responded the same day refusing to give the undertaking as requested.

[58] Mr Obiang's application for leave to appeal against the Slingers judgment was duly filed on or about 6 January 2022.

[59] On 25 January 2022, the day before the sale in execution of Mr Obiang's movable property, his attorneys again wrote to the attorneys for Mr Janse van Rensburg, reminding them of the Ndita order, the fact that an application for leave to appeal was instituted against the Slingers judgment, and opining that in terms of section 18(1) of the Superior Courts Act, the operation and execution of the Slingers judgment was suspended. They stated that "*[o]ur courts have held that the effect of an application for leave to appeal on a rescission application is that it has not been finally determined and is therefore still pending*" and as a result, "*the operation and execution of the Lekhuleni AJ judgement remains suspended.*"

[60] Mr Janse van Rensburg's attorneys responded the same day. To demonstrate the divergent positions held by the parties, it is necessary to quote the letter of the attorneys for Mr Janse van Rensburg in some detail:

> "*1. We initially agreed to your request to stay the writ of execution pending the outcome of the rescission - provided that an expedited date for the hearing be obtained. The parties agreed on time limits for the delivery of affidavits. It is clear that the purpose of that agreement was to defer execution until judgement in the rescission application was handed down. That agreement is embodied in the precise wording of the order of Ndita of 5 August 2021, stating that the order of Lekhuleni AJ is suspended 'pending the determination by the High Court of Part B of the Application.'*

2. Had it been the intention that execution be stayed pending the final *determination of the rescission application, that would have been stated in the order. it would make no sense to agree upon an expedited date for the hearing of the matter – but render execution subject to the outcome of an appeal months, if not years, later.*

3. It follows that on 13 December 2021, when slingers J dismissed Part B of the Application, our client became entitled to proceed with the execution of Lekhuleni AJ's order.

4. As of 14 December 2021 your firm clearly understood this to be the case. You then asked us to hold execution in abeyance pending the outcome of the Application for Leave to Appeal. We responded in the negative that same day. The sale was duly advertised on 10 January 2022. Yet you waited until 24 hours before the advertised date, to take further steps. We submit this is symptomatic of your client's contempt for the Court's process. It is unfortunate that, from the initiation of this litigation in 2015, your client has treated it as a dilatory game.

5. It does not avail your client to invoke s 18(1) of the Superior Courts Act, No 10 of 2013. Because our client is not attempting to exercise the decision of Slingers J, there can be no question of her decision being 'suspended'. Slingers J simply determined not to rescind the order of Lekhuleni AJ. That leaves Mr Janse van Rensburg free to execute on

the order of Lekhuleni AJ, remains binding in its own right until such time as it is itself set aside on appeal."

[61] In the words of Sachs J in **Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others**[20], *"the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained."*

[62] It is no surprise, therefore, that the intentional disobedience of a court order is a criminal offence. In **Fakie NO v CCII Systems (Pty) Ltd**[21] it was held that contempt proceedings in the hands of a private party, *"is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat."*[22]

[63] Contempt of court in civil proceedings was defined in **Fakie** as follows:

> *"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively*

---

[20] 1995 (4) SA 631 (CC) at para 61
[21] 2006 (4) SA 326 (SCA)
[22] Ibid at para 8.

unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."[23] (Internal references removed.)

[64] Once an applicant in civil contempt proceedings established non-compliance with an order which has been duly served on a respondent, the onus shifts to the latter to show the existence of a reasonable doubt whether the non-compliance was willful and *male fide*. If the respondent fails to furnish evidence raising such reasonable doubt, the offence of contempt would have been established beyond reasonable doubt.[24]

[65] In the present matter, the correspondence between the attorneys representing the respective parties clearly demonstrates divergent views on the executability of the Lekhuleni order after the Slingers judgment has been handed down and with an appeal still pending. It can be inferred that the parties, acted on the advice of their attorneys. Mr Janse van Rensburg's belief, therefore, as expressed by his attorney in the letter dated 25 January 2022, was that he became entitled to proceed with the execution of the Lekhuleni order when Slingers J dismissed Part B of the rescission application.

[66] Mr Janse van Rensburg further argued that the anticipated application for leave to appeal did not assist Mr Obiang, since Slingers J, in his view, simply determined not to rescind the order of Lekhuleni AJ and there was therefore no order that was being suspended.

---

[23] Ibid at para 9
[24] **Fakie** (supra) at para 22

[67] In these circumstances, and given these facts, it cannot be said that Mr Janse van Rensburg acted willfully and *male fide* in proceeding with the execution of the Lekhuleni order by way of the sale in execution of the movables.

COSTS

[68] What remains is the question of costs.

[69] Regarding the contempt proceedings, Mr Obiang was aware of Mr Janse van Rensburg's position and his reasons why he believed he was entitled to execute upon the Lekhuleni order after Slingers J dismissed the rescission application. This was clearly demonstrated in the correspondence between the respective firms of attorneys. He nevertheless proceeded with the contempt application, which was unsuccessful. Mr Obiang, however, was successful in his alternative relief, namely the suspension of the Lekhuleni order in terms of Rule 45A. Both parties, under this application, therefore, were partly successful and partly not. In the result, I am of the view that it would be fair to make no cost order in relation to this application, save for the costs associated with preparation for a hearing on 12 April 2022, which I shall now deal with.

[70] Counsel for Mr Janse van Rensburg made an earnest request that I order that Mr Obiang to pay the wasted costs for the preparation of the hearing on 12 April 2022. The basis for this request is the fact that Mr Janse van Rensburg's legal team was compelled to prepare for the hearing, which ultimately did not take place. The date of 12 April 2022 was noted on Mr Obiang's notice of motion.

Mr Janse van Rensburg's attorney corresponded with the attorneys for Mr Obiang proposing that the parties approach the Judge President of this division of the High Court to seek a hearing date. Mr Obiang's attorneys nevertheless sought to have the matter placed on the semi-urgent roll for 12 April 2022 by making a written request to the Judge President to this effect on 5 April 2022.

[71] Additionally on Friday 8 April 2022, at 17h10, Mr Obiang's attorneys served an unsigned affidavit on Mr Janse van Rensburg, which for the latter, served as an indication that the matter would proceed on 12 April 2022. This prompted counsel for Mr Janse van Rensburg preparing heads of argument over the weekend before 12 April 2022. It was only on Monday 11 April 2022, when the registrar of the judge who has been allocated to hear urgent matters on 12 April 2022 was contacted, when it was discovered that the matter was not with the judge. Correspondence ensued late in the afternoon on 11 April 2022, and it was only then that Mr Obiang's attorneys confirmed that the matter would not be heard the next day.

[72] In the result of the above, I am of the view that Mr Obiang caused Mr Janse van Rensburg to incur unnecessary costs to prepare for a possible hearing on 12 April, and the former should therefore be held liable for the costs so incurred on an attorney and client scale.

[73] As for the application in terms of Rule 46A for the execution of Mr Obiang's immovable property, I do not make a finding on Mr Janse van Rensburg's entitlement to an order in terms of Rule 46A. Instead I am of the view that it

would be just to suspend the execution under the Lekhuleni order, and the application should accordingly be postponed until the finalisation of any and all appeals relating to the rescission application. I am of the view that no order of costs should be made.

THE ORDER

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

A. In relation to the application brought by Mr Teodorin Nguema Obiang ("Mr Obiang"):

(a) The prayer to hold the first respondent, Mr Janse van Rensburg, in contempt of the Ndita J order dated 5 August 2021 under case number 21748/2017 ("the Ndita order"), is refused.

(b) The operation and execution of the order of Lekhuleni AJ dated 18 June 2021 under case number 21748/2017 ("the Lekhuleni order") is suspended pending the outcome of any and all appeals processes related to the Part B of the application which was instituted under case number 21748/2017 in terms of which the applicant sought the rescission of the Lekhuleni order.

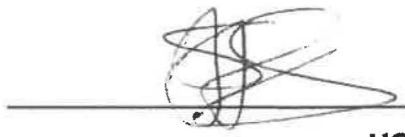
(c) Mr Obiang shall pay the first respondent's wasted costs associated with the preparation for the appearance and hearing of the matter on 12 April 2022 on an attorney and client scale, such costs to include the costs of two counsel where so employed.

(d) Save for the order in (c) above, there is no order as to costs.

B. In relation to the application brought by Mr Janse van Rensburg in terms of Rule 46A of the Unform Rules of Court:

(a) The application is postponed until the outcome of any and all appeal processes related to the Part B of the application which was instituted under case number 21748/2017 in terms of which the applicant sought the rescission of the Lekhuleni order.

(b) There is no order as to costs.



HOCKEY AJ

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant:	Adv. Hilton Epstein SC
Attorneys for the Applicant:	Fairbridges Wertheim Becker
Counsel for the 1st Respondent:	Adv. T Ngcukaitobi SC
Attorneys for the 1st Respondent:	Victor Nikhwashu Attorneys Inc.