IN THE HIGH COURT OF SOUTH AFRICA

[EASTENR CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 1043/2022

In the matter between:

LAVELIKHWEZI INVESTMENTS (PTY) LTD	1st Applicant
WANDISILE SIPHO MTI	2nd Applicant
NOMPILO MTI	3rd Applicant
and	
MZONTSUNDU TRADING (PTY) LTD	1st Respondent
DEN MZONTSUNDU DABULA	2nd Respondent
YANDISWA SONAMZI ATTORNEYS	3rd Respondent
YANDISWA SONAMZI	4th Respondent
ADVOCATE WALTER SONAMZI	5th Respondent
THE SHERIFF OF THE HIGH COURT: MTHATHA	6th Respondent

JUDGMENT

JOLWANA J:

Introduction

[1] On 4 March 2022 the applicants applied to this Court as a matter of urgency, for an order suspending the summary judgment and order previously issued by the court. Interdictory and other relief are also sought which appear to be predicated upon the granting of the suspension order.

[2] The matter served before me as a fully-fledged opposed application on the 22 March 2022, all the papers including heads of argument having been filed. The relief sought as it appears from the notice of motion, to the extent that it was still being pursued, some of it having been conceded and abandoned, is couched in the following terms:

> "2.1 That the first and second respondents, acting through the 6th respondent, or anyone for that matter, be and are hereby forthwith interdicted and restrained from attaching and removing any of the applicants' properties wherever they are found/situated, pursuant to an order or judgment issued by the above honourable Court by the late Judge Dukada AJ being "X" herein.
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> 2.2 That the court order/judgment issued by the above honourable court by the late honourable Judge Dukada AJ be and is hereby suspended, pending the determination by the court as to how much the 1st and 2nd applicants should pay to the 1st and 2nd respondents in instalment terms.
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> 2.3 That the Sheriff of the High Court, being the 6th respondent, be and is hereby interdicted and restrained from removing the goods and items as listed under annexure "Z" herein, being the properties of the 3rd applicant, pending the finalization of the interpleader proceedings already instituted by the 3rd applicant, under case number 3996/2019, forthwith.
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> …
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> 2.8 That the 6th respondent be and is hereby directed and ordered to return all the goods removed from the premises of the applicants forthwith; and restore them to their original position.

2.9 That the closure of the shop of the 1st applicant by the 6th respondent, the Sheriff being ENGEN, CITY MOTORS situated at Nelson Mandela Drive, Mthatha be and is hereby declared unlawful, illegal and of no force and effect; and the 6th respondent be and is hereby directed to return the keys of the shop with immediate effect.

3. That paragraphs 2.1 and 2.9 shall operate as an interim relief and mandamus in the applicants' favour pending the finalization of this application."

[3] The orders which appeared at paragraphs 2.4 to 2.7 of the notice of motion were conceded and abandoned during the hearing of the application before Malusi J before whom the matter initially served. It later transpired during the hearing of the matter that he had to recuse himself for reasons that I need not traverse. When the matter served before me, there was an attempt to resuscitate and revisit the conceded issues on the basis that research was done after the concessions had been made. I was taken aback that concessions made on record because of the probing by the court can just be sought to be re-argued on the basis of some later research. Parties are generally entitled to argue their case. They do not have to concede when they believe they have a case to argue. If a concession is made, that should be the end of the matter. What the court does with the concession is a different matter as the court is not bound by the concession in its assessment and evaluation of the case, as a general principle.

[4] I shall henceforth refer to the first and second applicants as "the applicants" and the first and second respondents as "the respondents" these parties being the main protagonists in the swell of litigation that has been taking place between the parties, at times at the Supreme Court of Appeal and even the Constitutional Court. Reference to a specific applicant or respondent will be made only where I consider it necessary to do so in a specific context.

[5] This application is fraught with many difficulties which will be pointed out in the course of the judgment. The atrocious manner in which the applicants' papers were drafted with some pie in the sky relief being sought in totally inappropriate proceedings deserves special mention. Some of the relief ended up being abandoned at the hearing of this matter in circumstances where that relief should never have been sought having neither hope of being granted nor merit warranting their pursuit. Simply put, the applicants' approach to this Court both on urgency and merits was, on the facts of this matter, both misguided and ill-advised. One does not often encounter the level of carelessness in the drafting of court papers as was evident herein.

Background

[6] I consider it useful for a better appreciation of the issues and the dynamism that characterized this matter that I give a background to these proceedings which I hope will contextualize the motley issues that find expression herein. On 18 August 2020 Dukada AJ granted a summary judgment in favour of the respondents against the applicants in the sum of just over ten million rand. In that judgment it is recorded that in March 2016 the applicants and the respondents concluded an oral agreement of sale of a business being a garage referred to as City Motors trading as Lavelikhwezi (Pty) Ltd. An acknowledgment of debt was signed by the applicants in respect of the said transaction, *inter alia*, acknowledging receipt of the payment of a deposit in the sum of R10 156 568.56.

[7] The court found that at the time the acknowledgment of debt was signed the said amount had already been paid in full to the second applicant. Apparently, the sale of business fell through which resulted in the action being instituted by the respondents against the applicants for the repayment of the aforesaid amount of money. Summary

judgment was granted against the applicants in the sum of R10 156 568.56 together with interest thereon at the prevailing legal rate calculated from 31 October 2018 to date of payment. This, after the applicants defended the action and the respondents applied for summary judgment against them.

[8] Having obtained summary judgment, the respondents were delayed in executing against applicants' properties for some time for different reasons some of which are mentioned herein. First, there was an application for leave to appeal against the judgment and order of Dukada AJ which was refused on 30 September 2020. On 22 February 2021 the Supreme Court of Appeal dismissed an application for leave to appeal to it. On 30 April 2021 the Supreme Court of Appeal dismissed a subsequent application to it launched in terms of section 17(2)(*f*) of the Superior Courts Act 10 of 2013 for it to reconsider its decision dismissing the application for leave to appeal. On 10 May 2021 the applicants attempted to amend their counterclaim to the proceedings which had been concluded by the granting of the summary judgment. That ultimately led to a rule 30(1) application which served before Mbenenge JP who declared the steps taken after the granting of the summary judgment to be irregular and ordered the applicants to pay costs on an attorney and client scale. I digress momentarily to look at how the Judge President expressed himself about the matter.

[9] The learned Judge President referred to *Soil Fumigation Services*[1] in which the legal position as it relates to a counterclaim in proceedings in which a summary judgment had been granted was stated as follows:

> "With regard to the court's overriding discretion to refuse summary judgment even where the defendant's affidavit does not measure up to the requirements of Rule 32(3)(b), it has been said that, in view of the extraordinary and stringent nature of the summary judgment remedy, that discretion may be exercised in a defendant's favour

[1] *Soil Fumigation Services Lowveld CC vs Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at para 11.

> if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is good. … The reason why the remedy of summary judgment is referred to as 'stringent' and 'extraordinary' is because it effectively closes the door of the Court on the defendant without affording an opportunity to ventilate the case by way of a trial. When the answer raised in the opposing affidavit is in the nature of a counterclaim instead of a plea, the position is, however, somewhat different. Even where summary judgment has been granted for that part of the claim that would be extinguished by the counterclaim, the defendant can still pursue the counter-claim by issuing summons in a separate action."

[10] In his judgment the learned Judge President went on to characterize the applicants' conduct as follows:

> "I am satisfied that the conduct of the respondents can fairly be described as vexatious. It is reprehensible and cries out for an award of a punitive costs order. This conduct was persisted in at all twists and turns in proceedings preceding the instant case."[2]

[11] The misguided attempt of the applicants to introduce an amendment to concluded proceedings was given short shrift by the Judge President. However, the applicants were undeterred in their determination to defeat the very purpose of the summary judgment procedure which was described in *Edwards*[3] as "…*clearly designed to prevent a plaintiff's claim being delayed by what amounts to an abuse of the process of the Court*."

[12] On 20 May 2021 the applicants took their appeal against the summary judgment to the Constitutional Court. They applied for leave to appeal against the decision of the Supreme Court of Appeal dismissing their application for leave to appeal. On 8 December 2021 the Constitutional Court dismissed the application for leave to appeal to it on the basis that the matter did not engage its jurisdiction.

[13] The decision of the Constitutional Court should ordinarily have brought an end to what can fairly be referred to as the applicants' multipronged litigation stratagem. Unfortunately, that was not to be as the applicants applied for leave to appeal against

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[2] *Mzontsundu Trading (Pty) Ltd and Another v Lavelikhwezi Investments (Pty) Ltd and Another* (ECM) unreported case no 3996/19 of 7 December 2021 at para 40.
[3] *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303 E-F.

the judgment and order of the Judge President in which he essentially found the continuation of litigation in what was obviously concluded proceedings to be irregular. That application for leave to appeal was dismissed on 22 February 2022.

[14] Following the dismissal of the said application for leave to appeal the applicants wasted no time in coming to this Court again, now in these proceedings. They launched an urgent application on 4 March 2022 seeking to suspend the judgment and order of Dukada AJ in which summary judgment had been granted against them. This, after they had exhausted all legal avenues to no avail and the respondents were continuing to execute a warrant of execution issued pursuant to the granting of the summary judgment.

The current proceedings

[15] It appears from the papers that the applicants seek to have the judgment and order granting summary judgment suspended "*pending the determination by the court as to how much the 1st and 2nd applicants should pay to the 1st and 2nd respondents in instalments*." This on its own is rather unorthodox as I will attempt to demonstrate below.

[16] Even assuming that it was a prayer that could be sought and granted there are a number of other difficulties. I mention a few of them hereinbelow. First, it is nowhere stated in the founding affidavit what the legal basis is for the suspension of a judgment that was lawfully sought and obtained and against which all avenues of appeal have been exhausted. What is clear though is that the judgment itself is not sought to be impugned. What is impugned and is relied upon to seek the suspension order is some or other conduct of the respondents in the execution of a warrant of execution or some other attempt of theirs at getting the judgment satisfied. The papers are replete with

allegations of malevolence on the part of the respondents in attempting to execute the warrant of execution. Courts should ordinarily not be concerned with the motives of those who execute court orders. Court orders stand on their own and must be given heed to regardless of the motives of those who execute them or cause them to be obtained and executed, which may not necessarily always be honourable.

[17] The real question is always whether the sheriff or whoever is charged with executing a court order is armed with a valid warrant of execution or court order. If the answer is in the affirmative, *cadit quaestio*. Even if the judgment creditor has the worst of motives, that cannot be used to suspend a lawful judgment absent evidence of unlawful conduct on his part. If the judgment debtor were to suffer some or other form of loss or indignity which results from the execution of a lawful judgment or order — that deserves no protection from the operation of the law especially if it is a natural consequence of the judgment itself. The judgment debtor is always entitled to claim damages against anybody that causes him loss of one form or another. Some loss may be delictual while some may be pecuniary. However, orders of the court must be lawfully executed and nothing and no one is allowed to stand in the way of that process.

[18] One of the reasons why a judgment or order of a court can only be interfered with or even suspended under stringent and very exceptional circumstances is a constitutional injunction. The whole constitutional framework and the rule of law have, as their pillars, the unhindered execution of court orders and obedience to them by all citizens, especially those to whom they apply. The force of court orders lies not in their being issued but in their execution once they are issued. It is this principle that is liable to be tempered with under strictly circumscribed and exceptional

circumstances and for very valid reasons. That this is so appears from the Constitution itself [4].

[19] The second difficulty with the suspension order that is being sought is that it is sought pending the determination by the court of the amount the applicants should pay in instalments. In these proceedings there is no prayer sought for this Court to make that determination nor has an attempt to make such a case been made. It follows that it is not expected of this Court to make the determination of the amount to be paid in instalments in these proceedings even if one were to assume for a moment that it was a determination that a court could make. There is also no indication of which are the proceedings in which the court will be asked to make the determination. The authority of the court to suspend a lawful judgment for it to determine in some unspecified proceedings an amount to be paid in instalments is, as far as I know, unprecedented even on the basis of the court exercising its inherent jurisdiction.

[20] There are other obvious difficulties with what the applicants seek to do. I will illustrate this with an example. What this means is that as soon as judgment debtors have exhausted their defences and a judgment sounding in money is issued against them, they can come to the court and ask for that judgment to be suspended. That suspension would be for the court to make a new arrangement separate from the original agreement, for the payment of the judgment debt in instalments. This not only defies logic in as much as it is unprecedented but it would dismantle the whole foundation of execution against property and lead to endless litigation. Needless to

[4] Section 165 of the Constitution provides:

> "(1) The judicial authority of the Republic is vested in the courts.
> …
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

say that court rolls would be clogged up with a deluge of litigation for courts to now determine how the judgment debts are to be paid even in circumstances where there is property that can be attached and sold in execution to satisfy the judgment debt.

[21] In this matter the applicants rely on a draft agreement allegedly drawn after negotiations between the legal representatives of the applicants and those of the respondents. The first problem is that the alleged agreement is signed only by and on behalf of the applicants. How it is even referred to as an agreement is difficult to comprehend. If the negotiations were conducted and concluded by and between the parties' legal representatives as alleged, I find it very strange if not bewildering that there is not a single letter or email exchanged between them in which the terms of the agreement are recorded and confirmed. There is simply no evidence of an agreement having been reached at all beyond the mere *ipse dixit* of the applicants. This is important because the alleged agreement seems to be the main basis on which the court in this case might somehow be expected to make an order for the applicants to pay their debt in instalments. I am actually surprised that the applicants' attorneys came to court seeking a suspension order on the basis of what is clearly a non-existent agreement. Legal representatives are, in my view, not just mouth pieces of their clients. They have a duty to advise their clients properly and have a right and indeed a duty not to accept instructions that offend against their ethical obligations to the court.

Rule 45A of the Uniform Rules of Court.

[22] It appears for the first time in the replying affidavit that the legal basis on which the suspension order is sought is rule 45*A* of the Uniform Rules of Court. This rule provides:

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

[23] There is no doubt that a court does have jurisdiction to suspend the execution of any order. However, that discretion must be exercised in such a way that court orders are not undermined by being suspended for speculative reasons in circumstances where the judgment or order is not or cannot be put in dispute. Sound factual and legal basis for the suspension so sought must be clearly established by the applicant to enable the court to carefully exercise its discretion.

[24] The applicable principles and the considerations that are relevant in an application based on rule 45A have been considered by our courts before. I can do no better than refer to the exposition of the legal position by Davis J in *Firm Mortgage Solutions*[5]. I am in respectful agreement with the learned Judge's exposition of the law in that matter. Therein the court said:

> "The question that arises is: on what basis, given that there is no application for rescission of judgment, would a court exercise a discretion to grant the application as urged upon me by the applicants? The answer is to be found in rule 45A of the Uniform Rules of Court. In turn this necessitates an answer to a further question, as to whether the particular rule is applicable in a case such as the present. In *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (LC) Waglay J (as he then was) set out the basic principles for a grant of a stay of execution which, as Erasmus in *Superior Court Practice* writes, is applicable to rule 45A. These principles were summarized by the learned judge (at para 37) as follows:
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> '(*a*) A court will grant a stay of execution where real and substantial justice ` requires it or where injustice would otherwise result.
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> (*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.
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> (*c*) The court must be satisfied that:
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> (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.

[5] *Firm Mortgage Solutions (Pty) Ltd & Another v ABSA Bank Ltd and Another* 2014 (1) SA 168 (WCC) 167 at paras 4-9.

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

To the extent that there is any uncertainty as to the meaning of these dicta, further clarity is to be found in the judgment, where the learned judge examines the facts of the case, and, in particular, whether a stay of execution should be granted, pending the outcome of a rescission application. Waglay J then said (para 38):

'The applicant will furthermore suffer irreparable harm if execution is not stayed, and the rescission application is successful.'

It is clear that what was intended in this case was that, where the causa for the execution is a judgment, and the judgment is placed in dispute because an application for rescission has been brought, grounds may well exist for the exercise of a favourable discretion by a court.

In the present case there is no such application. The question arises as to whether rule 45A provides a residual, equitable discretion to a court confronted with the present set of facts.

What then does the applicant offer as the justification for an exercise of a court's discretion in its favour?

In essence, it puts up a set of proposals by which second applicant seeks to ensure that the total debt to first respondent will be discharged by no later than 31 January 2014. In both the founding affidavit and a further affidavit the court is informed that the second applicant has the means to settle the debt and, accordingly, a discretion should be exercised to achieve this purpose, particularly because of the notorious fact that, if property is sold in execution, the property fetches a lower purchase price than otherwise would be the case."

[25] It is clear from the applicants' founding affidavit that the judgment is not being impugned. The applicants indicate that they intend to pay the debt and satisfy the judgment debt. They seek the suspension order so that they can get time "to arrange the necessary finance". It is even indicated that "[a] period of six months after the *ex parte* application has been disposed of will be reasonable to arrange for the payment of the judgment debt."

[26] The applicants have made a big issue about the *ex parte* order the respondents applied for and was granted by the court, which it is alleged, makes it impossible for the applicants to raise finance. The *ex parte* order was granted on 01 February 2022 and the relevant rule *nisi* was, on 15 February 2022, extended to the 29 March 2022. The parties were put to terms regarding the filing of papers with the 01 April 2022

being the date given for the hearing of that matter on the opposed roll. I must mention that the applicants were legally represented on the 15 February 2022.

[27] During the hearing of this matter I asked Mr Mtshabe, the attorney for the applicants, why did the applicants not apply on an urgent basis for the reconsideration of the order that was obtained *ex parte* for which they were complaining about bitterly. He could not explain with any degree of cogency why this route was not considered and even taken on an urgent basis as soon as the applicants became aware of the *ex parte* order. He could only incoherently submit that the applicants have chosen the rule 45*A* route. The importance of this lies in the fact that the papers are replete with allegations of the injustice of obtaining an *ex parte* order which the respondents are accused of using to close the applicants' access to financial assistance by the banks.

[28] Rule 6(8) of the Uniform Rules of Court provides:

> "Any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty–four hours' notice."

[29] Rule 6(12) (*c*) reads:

> "A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

[30] The applicants have ignored these readily available remedies which are clearly applicable to the issue of the *ex parte* order. They have come before this Court relying, apparently, on rule 45*A*. This is again difficult to understand because it is alleged numerously that the *ex parte* order is central to the applicants' inability to obtain bank finance to pay the debt. The rule providing for the obtaining of an *ex parte* order does obviously also provide for a fast remedy so as to discharge the order obtained *ex parte* or ameliorate the effects of the fact that the impugned order had been obtained *ex parte*. It does appear that the applicants chose not to avail themselves of any of these

remedies. Be that as it may, the issue of the *ex parte* order is still pending before court in other proceedings. I find it strange that the applicants have come before this Court and sought to also rely on the pending *ex parte* order issue in these proceedings. It behooves of me to emphasize once again that in all the applications the applicants have launched the judgment of Dukada AJ granting the summary judgment was not being challenged. What is now sought to be achieved is that the warrant of execution issued pursuant thereto should not be executed and that the judgment be suspended.

[31] It is difficult not to see the craftiness of the applicants. They go on *ad nauseum* about the plight of their employees and even invoke our time honoured principle of Ubuntu. What the applicants do not even try to explain is why did they put their employees in the situation in which they are claiming to be salvaging them from now. First, they have always known that they owe the respondents the amount claimed. Second, and in any event if they had ever given themselves some irrational reason to doubt being indebted to the respondents on the face of the acknowledgment of debt, the judgment of Dukada AJ which was delivered in August 2020 would have dispelled that doubt. They launched multiple appeal processes all the way to the Constitutional Court. All those appeals failed as they never had merit and were indeed nothing more than an attempt to subvert a judicial process of execution by abusing the legal process of appeals. Since August 2020 until February 2022 the applicants have not used that time to apply for finance — only to now suddenly use the *ex parte* court order which was only obtained on 1 February 2022, to complain about being blocked from getting funding from financial institutions. Clearly the serious plight of the employees is now being used as a pawn and another misguided attempt at obfuscation to avoid having to pay if possible or for the applicants to pay on their own terms.

[32] All those considerations bring me to the question pertinently posed by Davis J in *Firm Mortgage Solutions* (*supra*) which he went on to answer which is congruously applicable to the facts of this matter. The learned Judge said:

> "Could it possibly be that rule 45*A* envisaged the exercise of an equitable jurisdiction unhinged from any legal causa, but simply predicated on the equities of a case?
>
> If this were the case, almost every default judgment, which provides for a sale in execution of a property, at some point is likely to require a second hearing, pursuant to stay in terms of rule 45*A*. If this were what was intended, rule 45A should so provide expressly or by clear, necessary implication. In my view it does not so provide, for the very reason which is highlighted in my example."

[33] Rule 45A is simply not available to a litigant in circumstances in which the execution is pursuant to a lawful judgment obtained in accordance with our law and the rules of court. Such a judgment is constitutional in every sense of the word. When it is not being impugned speculative theories about the concept of Ubuntu and even the rights of employees should never be used to undermine the effectiveness of court orders lawfully obtained which are enforced through a legally sanctioned mechanism. I have hereinbefore already alluded to the many reasons why this application cannot succeed as it is devoid of any merit. It is at best part of a craftily conceived stratagem to frustrate and undermine a judicial process with no hope of success in the final analysis. It cannot succeed, if for no other reason, then certainly for the reason that the underlying *causa* which forms the basis for the judgment has been numerously confirmed all the way to the Constitutional Court which is the court of last instance in this country. The applicants' application therefore falls to be dismissed not only for being unmeritorious and vexatious but also because it is a clear and unbridled abuse of the court process.

The interpleader proceedings

[34] However, the third applicant stands on a different footing. It is not in dispute that the third applicant is neither a judgment debtor nor involved in the myriad of cases

between the first and second applicants and the first and second respondents. She comes into the picture because of the interpleader proceedings in which she claims personal ownership of some of the goods that have been attached in execution of the summary judgment. She was not a litigant in the proceedings that culminated in that judgment. The interpleader proceedings are still pending and their merits and demerits are not to be determined in these proceedings. That being the case I will not traverse the issues in dispute in respect of the interpleader proceedings. In his founding affidavit contents of which have been confirmed by the third applicant, the second applicant indicates that with the exception of vehicles all the other goods have not been removed. They are still at the premises of the third applicant. He further makes it clear that the vehicles listed in annexure "Z" were removed long time ago. There is no suggestion in the papers that any of the vehicles belongs to the third applicant. In fact the second applicant says that the only vehicle he mentions specifically being a Mercedes Benz vehicle is still under an instalment credit agreement and does not belong to him or the third applicant. It seems to me that the third applicant must succeed because interpleader proceedings have been instituted and are still pending.

The Urgency

[35] Urgency has been raised pertinently in this matter. The wanton abuse of the urgency rules is unfortunately prevalent in this Court. The applicants have also joined the fray. Just to mention one or two issues, firstly, the judgment was granted in August 2020 and that judgment which is sought to be suspended on an urgent basis is not being challenged. Secondly, the execution process, on the applicant's own papers, started "long ago" when the vehicles were attached. How they, in those circumstances rushed to this Court on an urgent basis is a clear manifestation of the abuse of the

court process and the urgency rules. However, all the papers having been filed including heads of argument I exercised my discretion and heard the matter in full. Full submissions having been made and the matter being ripe for a final order, it would therefore serve no purpose to deal with the respective parties' contestations on urgency. Furthermore, and besides the issues of urgency that the respondents have raised, the matter did suffer some inexplicable and regrettable delay in court and was not heard timeously even though at times the parties were ready to ventilate their respective cases.

Requirements for interdicts

[36] I do not intend to enumerate or elaborate on the requirements for an interdict. Those requirements are well known and there is a plethora of case law on them. I must, however, point out that none of them have been met in this matter. The reason for that is clear elsewhere in this judgment. In any event what the applicants have done in trying to deal with the requirements for an interdict is largely to mention some of the requirements and repeat the allegations already made. The attempt to interdict the execution of the writ or the attachment of the goods in pursuit of a judgment in circumstances where the intention is not to impugn the judgment but so that a court may determine the amount to be paid in instalments based on a non-existent agreement is bewildering to say the least. What colour of right can be asserted in those circumstances is not addressed in the papers. I do not see how irreparable harm, even if it were to be feared that it might eventuate, which can only be a natural consequence of the execution of a court judgment that is not being challenged, arises on the facts before me. I have already indicated that none of the requirements for an interdict have been established in this case. It follows that the first and second

applicants' application must fail even for this reason in addition to everything else that has been addressed elsewhere in this judgment.

The issue of costs

[37] In the answering affidavit the respondents have cited many reasons in asking the court to dismiss the application with costs on a scale as between attorney and own client to be paid *de bonis propriis* against the applicants' legal representatives. This issue is not confronted squarely by the applicants or their attorneys on the papers nor did Mr Mtshabe seriously deal with it during the hearing. He was, at best incoherent and did not attempt to explain the recklessness that characterized the applicants' papers, more especially the vexatiousness of this application.

[38] The history of this matter becomes very pertinent and at the risk of being repetitive I refer to some of it. It appears from the judgment of Dukada AJ that the applicants could not have had a proper basis for raising any defence. In fact it is clear that there was never a *bona fide* defence and defending the matter was clearly being done for the impermissible purposes of delay. The court granted the summary judgment only for the applicants to launch a baseless application for leave to appeal in circumstances in which they had no reasonable prospects of success at all on appeal. That application was dismissed with costs. Unfazed, the applicants petitioned the Supreme Court of Appeal for leave to appeal. Predictably, that application was dismissed with costs. The applicants continued with this senseless litigation and applied to the President of the Supreme Court of Appeal for the reconsideration of that court's decision refusing the application for leave to appeal. That application was also dismissed with costs.

[39] The applicants at some point also issued what was purported to be a notice to amend relating to a claim for the performance of an oral sale agreement demanding to be paid R12 857 804.67. The strangest part of this purported amendment is that the amendment was sought to be introduced in proceedings that had been determined. The respondents had to approach the court in terms of rule 30 of the Uniform Rules of Court for the setting aside of the irregular steps taken by the applicants and they were successful. The applicants were ordered to pay costs on an attorney and client scale. The applicants launched a baseless application for leave to appeal against that judgment. That application was dismissed with costs on an attorney and client scale. In the rule 30 matter and the application for leave to appeal Mbenenge JP described the conduct of the applicants as vexatious, reprehensible and an abuse of the process of the court. In both judgments he ordered the applicants to pay costs on an attorney and client scale.

[40] In the meantime and while all of this was happening the applicants took the dismissal of their application for leave to appeal the judgment of Dukada AJ by the Supreme Court of Appeal to the Constitutional Court. The highest court in the land dismissed the application for leave to appeal to it. The first and second applicants are now before this Court purportedly on the basis of rule 45*A*. I have already dealt with the merits thereof and the conclusion is that just like all the other litigation of the applicants in respect of the judgment of Dukada AJ it is hopeless and devoid of any merit. In all this pointless litigation since August 2020 to date, the applicants have, with the assistance of their lawyers, relentlessly litigated with no hope of succeeding in any of them. This abuse of court process has succeeded in ensuring that court's time all the way to the Constitutional Court is wasted for more than a year now in countless applications of one form or another. In my view, the time has now come for

the punitive orders for costs to be meted out also to the legal representatives who are either ill-advising the applicants or are complicit in the applicants' stratagem of delaying the obviously inevitable if they do not pay.

[41] The poor drafting and the poor advice given to the applicants have always been a major contributor in this matter in the wastage of the court's time in adjudicating senseless and unmeritorious litigation in what the Judge President called "twists and turns". In this case the right of access to courts is being used clearly to defeat the very purpose of a court judgment. What an irony!! I do need to highlight a few instances of the ill-conceived and misplaced advice the applicants' attorneys gave to the applicants which have also manifested themselves in poor draftsmanship in respect of the papers. I do so because that is also very central to the exercise of this Court's discretion in the determination of the respondents' application for costs to be paid by the applicants' attorneys *de bonis propriis*.

[42] First, the whole case is based on the wrong idea that a court judgment can be suspended for any reason on the basis of a fundamentally flawed understanding of the inherent jurisdiction of the court. In this instance the relevant prayer in the notice of motion is for the suspension of the judgment or order of Dukada AJ "*pending the determination by the court as to how much the 1st and 2nd applicants should pay to the 1st and 2nd respondents in instalments*"[6]. Nowhere in the papers is it indicated what the legal basis is for the court to suspend a judgment for the determination by it in some unspecified proceedings of instalments that must be paid. There is no indication of the process that will lead to the court making that determination and when will that be. It appears from the founding affidavit that all of this is based on an alleged

[6] My emphasis.

agreement that turns out not to be an agreement as the document embodying the so-called agreement was signed only by and on behalf of the first and second applicants themselves. Surely the applicants' attorneys could not have reasonably believed that because negotiations might have taken place, therefore there was an enforceable agreement on the basis of which a lawful judgment of the court could be suspended. They never even referred to any case law for any of their weird propositions.

[43] Second, and very startlingly, in the heads of argument filed for the applicants Mr Mtshabe who is the attorney of the applicants and who drew the heads of argument makes this shocking proposition:

> "2.10 It will be noticed that in prayer 2.2 of the notice of motion the applicants have included "… pending the determination by the court as to how much the 1st and 2nd applicants should pay to the 1st and 2nd respondents in installments." <u>This aspect can be removed, and the court can use its inherent discretion as it</u> pleases."[7]

[44] The question that follows logically is that with the proposed removal of the only reason beyond the rest of the roof top allegations for the prayer for the suspension of the judgment, what is left on the basis of which the court can now suspend the judgment and to what end. Nothing remains after that surgical excision, for lack of a better expression, that Mr Mtshabe suggest the court should do. The whole basis on which some discretion could possibly be exercised falls away so do the interdict prayers sought. This is one of the clear indicators of legal practitioners advising their clients or even encouraging them and assisting them in coming to court to pursue senseless litigation. This instead, of giving them proper, honest and sound legal advice. Legal practitioners have a duty to be candid and play open cards with their clients and the court in pursuit of whatever their clients' cause may be. They must

[7] My underlining.

also stay clear of anything that could mislead the court. Legal practitioners owe this duty not only to their clients who pay them but also to the courts which in the end adjudicate the issues to establish where the truth lies and how it should exercise its discretion. They have an overarching duty to assist the court in arriving at a just conclusion.

[45] Third, perhaps the following prayers as they appear in the notice of motion, even though on engagement with the court during the hearing of this matter, were withdrawn, do also indicate how misguided and senseless the whole litigation is:

> "2.4 That the 4th respondent be and is hereby interdicted and restrained from practicing as an attorney and legal practitioner of the above honourable court pending the availability of the Fidelity Fund Certificate (FFC) that is issued by the Legal Practice Council of the Republic of South Africa.
>
> 2.5 That the 3rd and 4th respondent (sic) are hereby interdicted and restrained from using the services of any Legal Practitioner, or attorney's firm or any Legal Practitioner for that matter, pending the 4th respondent obtaining the Fidelity Fund Certificate.
>
> 2.6 That all the processes issued by and through the 3rd and 4th respondent (sic) with effect from 01st January 2022 be and hereby (sic) declared invalid and of no force and effect as being unlawful; as the 4th respondent did not have a valid Fidelity Fund Certificate for the financial year 2022 that is normally issued by the Legal Practice Council of South Africa.
>
> 2.7 That the 5th respondent being the alleged husband of the 4th respondent be and hereby (sic) interdicted and restrained from practicing and/or pretending to be practicing as a legal practitioner; and that the said husband of the 4th respondent, whoever he is be and is hereby interdict (sic) and restrained from pretending to be working in the offices of the 3rd respondent forthwith."

[46] These prayers on their own which are not even remotely related to the case of the applicants and the very many instances of poor drafting and illogical submissions can only lead to one obvious conclusion. That is that this litigation is not intended to

achieve anything other than to ensure that the judgment of Dukada AJ is not satisfied or the execution of the warrant of execution is delayed as much as the judicial process forces a delay. It would be extremely remiss of this Court were I to do nothing about the extent of negligence that is evident in this matter. The principles applicable when a court is considering an application for costs to be paid *de bonis propriis* against legal practitioners have been part of our law for some time. They were restated in *Multi-Links* which was quoted with approval by Mathopo JA in *Adendorffs Boerderye*[8] In that matter the court said:

> "[46] In *Multi-Links Telecommunications LTD v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited & Another v Blue Label Telecoms Limited & Others* [2013] 4 All SA 346 (GNP) the principles relating to costs orders *de bonis propriis* against legal practitioners were re-stated and explained as follows:
>
> > '[34] Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. … [T]he obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner… .

[8] *Adendorffs Boerderye v Shabalala and Others* (997/15) [2017] ZASCA 37 (29 March 2017) at para 46 (unreported).

> [35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of the court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetence and a lack of care.'"

[47] All of the considerations already mentioned above necessitate that the court must show its displeasure at the abuse of the court process and the vexatiousness of this litigation and the reckless manner in which the papers were drafted with an appropriate order for costs. Not only must the application fail but also a clear opprobrium is called for which goes beyond just the applicants in this case. The recklessness, inattention and heedlessness of the applicants' attorneys and their lackadaisical drawing of the papers and inappropriate advice they gave to their clients are too glaring not to attract some censure. An appropriate order for costs against the attorney and the first and second applicants is necessary on the facts of this matter.

The results

[48] In the result the following order shall issue:

1. The first and second applicants' application is dismissed.

2. The first and second applicants are ordered to pay 80% of the costs of the application on a scale as between attorney and client, the one paying the other to be absolved.

3. The first and second applicants' attorneys' are ordered to pay 20% of the costs of this application on a scale as between attorney and client *de bonis propriis.*

4. The 6th respondent is ordered not to remove the goods listed in annexure "Z" from the 3rd applicant's premises, excluding vehicles, pending the interpleader proceedings instituted at the instance of the 3rd applicant.

_____

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Attorney for the Applicants: N.Z. MTSHABE

Instructed by: N.Z. MTSHABE INCORPORATED

MTHATHA

Counsel for the Respondents: S.G. POSWA

Instructed by: YANDISWA SONAMZI ATTORNEYS

c/o T. FONO ATTORNEYS

MTHATHA

Date heard: 22 March 2022

Date delivered: 12 April 2022