

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: Yes |

Date: **22nd August 2022** Signature:

CASE NO: 2328/1993

DATE: 22nd August 2022

In the matter between:

MOSTERT, JOHANNES PETRUS

Applicant

and

BANDS (previously MOSTERT), MICHIELLE ANN

First Respondent

**THE SHERIFF OF THE COURT,
RANDBURG SOUTHWEST**

Second Respondent

Heard: 16 August 2022 – The ‘virtual hearing’ of this opposed application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 22 August 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 09:30 on 19 August 2022.

Summary: Civil procedure – arrear maintenance payable pursuant to divorce order and divorce settlement – warrant of execution against property – arising out of failure to pay maintenance in terms of agreement of settlement – Application to stay writ – Uniform rule of court 45A – application refused.

ORDER

(1) The applicant's application is dismissed with costs.

JUDGMENT

Adams J:

[1]. On 6 April 2021 the first respondent caused to be issued a warrant of execution against the property of the applicant on the basis of a divorce settlement entered into between them during September 1995, which settlement agreement was made an order of this court (per Levy AJ) on 20 September 1995. According to the said warrant of execution and the documents in support thereof, an amount of R2 154 461.81 is due and payable by the applicant to the first respondent in terms of the divorce order, which incorporated the settlement agreement, in respect of arrear maintenance for their daughter born of the marriage between the parties.

[2]. On 26 April 2021 the second respondent ('the Sheriff') rendered a *nulla bona* return of non-service in respect of the writ to the effect that he (the Sheriff), when he attempted to execute the writ, was informed by the applicant, who 'declared' that, he (the applicant) 'has no money or disposable property sufficient to satisfy the judgement'. The sheriff also certified in his return that the applicant was requested to declare whether he owns any immovable property which is executable, to which the following reply was furnished: 'No'. On the aforementioned date the applicant also in fact signed a written declaration confirming that '[he] Informed [the Sheriff] that [he] [has] no money or disposable property to satisfy the judgment'. This claim by the applicant that he is impecunious is patently false in view of what he says in his founding papers in this application. So, for example, the applicant says the following at para 32 of his founding affidavit:

'The entire Warrant seems to be orchestrated. The timing thereof is also not coincidental, as I earlier in the year inherited some money from my father who passed away in 2015. Within a few weeks of inheriting, this Warrant is served upon me.'

[3]. All the same, in this opposed application, the applicant applies for a stay of the warrant of execution against his property, pending the finalisation of action proceedings to have set aside the said writ. The applicant questions the amount claimed in the warrant of execution against his property. I say that the applicant 'questions' the said amount, as against 'disputing' it, because, whilst he does not, on my reading of his founding papers, unequivocally denies liability for the sums alleged by the first respondent to be owing by him, he does take issue with the fact that he was kept completely in the dark as to the incurrence of the expenses claimed. So, for example, he says the following at para 25 of his founding affidavit:

'Whatever amounts I had to pay after 2010, I have no knowledge of, as I was never contacted, never requested to pay anything and if either the respondent or [our daughter] had any claim against me, I can only assume that they had abandoned such a claim.'

[4]. This is the general theme of the applicant's response to the first respondent's claim – he does not believe that he is liable, because, so he contends, he was never requested to make payment in all these however many years. Furthermore, he has doubts about the amounts claimed, which make up the total debt. He also denies that he is liable to pay any maintenance for the period preceding 2010, when the child was still at school, because he avers, without giving any more details, that he settled all school fees directly with the school for her matric year and received confirmation (presumably from the school) that her school fees were paid up. On this basis, therefore, the applicant applies to have the warrant of execution stayed, pending an action which he has instituted to have set aside the writ.

[5]. In issue in this opposed application is whether the applicant has made out a case to stay or suspend the warrant of execution against his property. This issue is to be decided against the factual backdrop as set out in the paragraphs which follow. But before I deal with the facts in the matter, it may be apposite to

briefly refer to the principles applicable to the stay of warrants of execution against property, to place in context the issues which require adjudication.

[6]. Uniform Rule 45A reads as follows:

'45A Suspension of orders by the court

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 appeal, such suspension is in compliance with section 18 of the Act.'

[7]. As correctly pointed out by the learned authors in *Erasmus Superior Court Practice (Volume 2): Uniform Rules and Appendices*, the court has, apart from the provisions of this rule, a common-law inherent discretion to order a stay of execution and to suspend the operation of an ejection order granted by it. It is a discretion which must be exercised judicially but which is not otherwise limited. (*Road Accident Fund v Legal Practice Council*¹; *Brothers Property Holdings (Pty) Ltd v Dansalot Trading (Pty) Ltd t/a Chinese Fair*²).

[8]. Moreover, this Court has, under s 173 of the Constitution, the inherent power to stay execution if it is in the interests of justice. So, for example, in *Road Accident Fund v Legal Practice Council* (supra), the Full Court invoked s 173 of the Constitution (and its common-law inherent power), and not rule 45A, to stay execution. In that matter, it was also held that, as a general rule, the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done. Thus, the court will grant a stay of execution where the underlying *causa* of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution. (*Bestbier v Jackson*³; *Brummer v Gorfil Brothers Investments (Pty) Ltd*⁴; *Road Accident Fund v Strydom*⁵).

¹ *Road Accident Fund v Legal Practice Council* 2021 (6) SA 230 (GP) (a decision of the full court) at paras [31] to [32];

² *Brothers Property Holdings (Pty) Ltd v Dansalot Trading (Pty) Ltd t/a Chinese Fair* (unreported, WCC case no 6149/2021 dated 1 September 2021) at para [40];

³ *Bestbier v Jackson* 1986 (3) SA 482 (W) at 484G - 485C;

⁴ *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 418E-G;

⁵ *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) at 300B;

[9]. The general principles for the granting of a stay in execution were summarized as follows in *Gois t/a Shakespeare's Pub v Van Zyl*⁶;

- '(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
- (b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.
- (c) The court must be satisfied that:
 - (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and
 - (ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.
- (d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, 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.'

[10]. That brings me back to the facts *in casu*.

[11]. The settlement agreement, which was made an Order of this Court on 20 September 1995, provided that the applicant would be liable to pay maintenance for the minor child of the parties at the rate of R750 per month, which amount was to be reviewed on an annual basis. The agreement furthermore provided that the applicant would be liable for and should pay all educational expenses at 'Nursery School and Play School, Primary School, Secondary School and at University / Technical College / Technikon / Institute of Higher Education incurred for and on behalf of [their daughter] including, but not limited to fees and levies, books and stationery, sport equipment and clothes, extra murals and extra lessons'.

[12]. Importantly, the agreement also provided that:

'In the event that the [first respondent] makes payment in respect of any of the [applicant's] obligations as set out above, the [applicant] shall refund the [first respondent] forthwith on demand'.

⁶ *Gois t/a Shakespeare's Pub v Van Zyl* 2011 (1) SA 148 (LC) at 155H - 156B;

[13]. Additionally, the applicant was liable for fifty percent of the extraordinary medical and dental expenses relating to their child.

[14]. Based on the foregoing maintenance orders, contained in the settlement agreement, the first respondent meticulously calculated the amount due by the applicant as and at the date of the issue of the writ on the 6 April 2021. Her calculations – as per a table, which tabulates on a yearly basis, from 1997 to 2018, the cash maintenance due and/or the expenses incurred and paid by her, less the amounts actually received from the applicant during each of the years – came to an amount of R2 154 461.81. So, for instance, the first respondent calculated that during 1997 the total sum of R16 778.90 was due and payable by the applicant for that year and he made no payment to her for that period. By way of a further example, the first respondent calculated that for the 2016 calendar year the total due by the applicant was the total sum of R231 919.88, and, for that year similarly no payments were received from the applicant. There were some years during which the first respondent, according to her table, in fact received payment from the applicant. So, for example, she received from him during 2004 the total sum of R28 040. However, the amount due to her in terms of the court order was the sum of R70 369.72, leaving a net balance due and payable by the applicant of the amount of R42 329.72.

[15]. In her affidavit in support of her application to the Registrar of this Court for the issue of the writ, the first respondent confirmed that she has in her possession the necessary source documents – some 2000 pages – in corroboration of the amounts claimed. She tendered inspection of these source documents to the registrar and also confirmed that the said documents are available for inspection.

[16]. Contrast this with the version of the applicant, which is nothing more than a general and a bare denial of liability on his part for the amounts claimed by the first respondent. Tellingly, the applicant does not dispute that he did not pay anything towards the costs of the tertiary education of their daughter, who studied towards and completed, at the University of the Witwatersrand, a bachelor's degree and thereafter a postgraduate degree, thus qualifying herself

as a registered psychologist. It is therefore undisputed that the first respondent is entitled to the costs of their daughter's tuition and other fees relating to her studies at Wits University. That, in my view, is the end of the applicant's case at least on the maintenance orders relating to the cost of tertiary education.

[17]. Curiously, the applicant chooses not to deal with any of the other allegations made by the first respondent in support of her case for the issue of the writ. He evidently would like an opportunity to do so at some point in the distant future in an action instituted by him at more or less the same time that he caused to be issued this application for an interim stay of the writ. He does not deal in any way with the detailed calculations done by the first respondent. And the question to be asked rhetorically is why not.

[18]. As correctly submitted by Mr Cohen, who appeared on behalf of the first respondent, no case is made out at all by the applicant why the first respondent's schedule (which she confirmed as being correct under oath), having had regard to source documentation, is incorrect. As such, the applicant has failed to place the causa of the judgement debt in dispute. It does not, in my view, behove the applicant to bemoan the fact that he supposedly was not afforded sufficient and ample opportunity to examine the source documentation tendered and to test the veracity of the first respondent's calculations. He made his election and decided not to inspect the source documents.

[19]. The point is simply that, based on the order of this Court, dated 20 September 1995, the applicant is liable for payment of the amount of R2 154 461.81, being in respect of arrear maintenance for his daughter and which relate to *inter alia* cash payments and the costs of the child's tertiary education, as motivated and calculated by the first respondent. It does not avail the applicant to simply 'kick up enough dust' so as to cloud the issues and draw attention away from the salient unchallenged facts, notably that: (1) He was liable to pay maintenance in the form of cash payments and payment of the costs of their child's tertiary education; (2) The child did in fact get a tertiary education and those fees were in fact incurred; and (3) He either short-paid or did not pay anything towards his liability.

[20]. It is also instructive that nowhere in his papers does the applicant even attempt to give an indication of the amounts he alleges he paid to the first respondent pursuant to the maintenance orders incorporated into the court order of September 1995. It therefore has to be accepted that the first respondent's averments in that regard are correct.

[21]. In sum, there is, in my view, not much dispute about the sums, and the total amount due, as representing the cash maintenance payments payable in terms of the divorce settlement, as well as expenses actually incurred by the first respondent. In the final analysis, there is no alternative but to accept the first respondent's calculations and the fact that the applicant is liable under the divorce order for the amounts referred to in the warrant of execution and the supporting affidavit.

[22]. Applying the applicable legal principles (referred to *supra*) to the present case, I conclude that the applicant has not made out a case for the stay of the warrant of execution against his property. In my view, real and substantial justice require that the application for the stay of execution be refused – to hold otherwise would result in an injustice. The first respondent, who carried the load over the last twenty years, would be further deprived of the opportunity to recover from the applicant his fair share of the contributions towards the maintenance of their child. Moreover, in his application to stay the execution the applicant has, in my view, failed to demonstrate a *prima facie* right, entitling him to what is in essence an interim interdict – on the evidence before me, the applicant is not entitled to have the writ set aside.

[23]. Therefore, the warrant of execution was validly issued and should stand.

[24]. In that regard, it is now settled that a writ may be validly issued based on an 'expenses clause' contained in a maintenance order on condition that the amount was easily ascertainable, and is in fact ascertained in an affidavit filed on behalf of the judgment creditor. (*Butchart v Butchart*⁷). The first respondent has clearly complied with the requirements for the issue of a valid writ.

⁷ *Butchart v Butchart* 1997 (4) SA 108 (W).

[25]. The application therefore stands to be dismissed. And the costs should follow the suit.

Order

[26]. Accordingly, I make the following order: -

- (1) The applicant's application is dismissed with costs.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	16 th August 2022 as a videoconference on <i>Microsoft Teams</i>
JUDGMENT DATE:	22 nd August 2022
FOR THE APPLICANT:	Advocate Ian L Posthumus
INSTRUCTED BY:	JNS Attorneys, Randburg
FOR THE FIRST RESPONDENT:	Advocate R G Cohen
INSTRUCTED BY:	Glynnis Cohen Attorneys, Emmarentia, Johannesburg
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance
