

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023/098779

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

A handwritten signature in black ink, appearing to be 'C. Mawela'.

07 December 2023

In the matter between:

RECKSON MATHATA MAWELA

First

Applicant

THAKGALANG CYNTHIA MAWELA

Second Applicant

TSHILIDZI HOPE MAWELA

Third Applicant

And

BODY CORPORATE KWIKSTERTJIE NO: 884/2006

Respondent

In re:

BODY CORPORATE KWIKSTERTJIE NO: 884/2006

Applicant

And

RECKSON MATHATA MAWELA

First

Respondent

THAKGALANG CYNTHIA MAWELA

Second Respondent

TSHILIDZI HOPE MAWELA

Third Respondent

JUDGMENT

PULLINGER, AJ

- [1] The applicants occupy a unit within the Kwikstertjie Sectional Title Scheme. They apply, urgently, for an interim interdict in terms requiring the respondent, to *inter alia* forthwith restore water and electricity to their unit pending an application for rescission.
- [2] The rescission application is part of B of the application and is not before me.
- [3] The order which the applicant seeks to have rescinded was granted by Wepener J. He authorised the termination of water and electricity supply to the unit based on a large arear debt for the provision of these services.
- [4] The question before me is whether I have jurisdiction to grant the order sought by the applicants.
- [5] As a general proposition, the court is *functus officio* upon pronouncement of its judgment, subject to certain caveats (*Firestone South Africa (Pty) Ltd vs Genticuro AG* 1977 (4) SA 298 AD at 306 F to 307 H). The Appellate Division said:

“The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order it has self no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio. Its jurisdiction in the case having been fully and finally exercised its authority over the subject matter has seized.”

- [6] Our law distinguishes between a pre-execution and post-execution scenario. (*le Roux vs Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 259 G/H).
- [7] Pre-execution, Rule 45A of the Uniform Rules, allows the court, in line with the common law, to suspend the execution of an order. Axiomatically, the rule cannot find application where the order has already been executed.
- [8] It is common cause that Wepener J’s order has been executed and thus the rule is not of application. Notwithstanding, Mr Mpiya, for the applicants, sought to persuade me that the court enjoys the power to, effectively, undo an executed order.
- [9] Mr Mpiya referred me to the decision in *BP Southern African (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another and a similar matter* 2022 (1) SA 162 (GJ), at paragraphs 16 and 17.
- [10] The facts in BP South Africa are distinguishable from those in this case. In BP South Africa, the order concerned had not been executed. A stay of execution was sought. The facts in BP South Africa and the discussion of the relevant legal provisions do not find application in the instant case for the reasons aforesaid.
- [11] Mr Mpiya also referred me to the Constitutional Court judgment in *Mokwena v Tassos Properties (Pty) Ltd* 2017 (5) SA 456 CC and particularly paragraphs 66 and 67. The facts in *Mokwena* are quite different to those in the instant case.

[12] In *Mokwena* the Constitutional Court was not concerned with either the principle of *functus officio* or the courts' power to interfere in an order that had been already executed.

[13] As appears from paragraph 15 of the judgment in *Mokwena*, the issue before the Constitutional Court concerned the question whether section 2(1) of the Alienation of Land Act, 1981 found application in relation to a right to pre-emption to purchase immovable property.

[14] In the course of that dispute the Constitutional Court considered whether an eviction order should be stayed pending the finalisation of the litigation concerning the right of pre-emption (at paragraph 64 *et seq*).

[15] Again, the question of *functus officio* or the court's power to interfere in an order which had already been executed was not before the Constitutional Court.

[16] Mr Mpiya submitted that this court has the power in terms of section 173 of the Constitution to regulate its own process which would include the power to assume jurisdiction over the dispute in the present case. However, in *Dlamini v Road Accident Fund* [2022] 4 All SA 360 GJ, this court said, at [58] in relation to inherent jurisdiction, that:

"This court's inherent jurisdiction is derived from section 173 of the Constitution. It is a power afforded to the court to regulate its own process and develop the Common Law taking into account the interest of justice but there is nothing within that power that permits a court to deviate from established precedent save in limited circumstances. This limited power gives effect to the stare decisis doctrine, a cornerstone of our law that serves to avoid uncertainty, confusion, protect vested rights and legitimate expectations."

[17] It appears to me that the court's power in circumstances where an order has already been executed is limited to the lawfulness of that process and the execution thereof.

[18] In this regard Mr Mpiya submitted that the order was executed on the same day as which it was granted without prior notice to the applicants. That however does not render the execution unlawful (*Perelson v Druain* 1910 TS 458 at 462).

[19] The correct legal position has, respectfully, been set out in *JVJ Logistics vs Standard Bank of South Africa Ltd and Others* 2016 (6) SA 458 (D) at [6] and [7]. The gravamen of this decision is a restatement of the principle set out by the Appellate Division in *Firestone (supra)*.

[20] The learned judge referred to various decisions of the Constitutional Court where the Firestone principle was endorsed and applied. He concluded, at [8], that:

“Once pronounced the judgment of a court enforceable according to its terms according to its terms. Given the correct circumstances the judgment itself may be attacked as occurs when it is sought to be rescinded or becomes a subject of an appeal...”

[21] In the circumstances, the proper forum to attack the order of Wepener J, is the rescission of judgment sought in part B of the applicants' notice of motion.

[22] Mr Mpiya submitted that should I find that this court has not enjoyed jurisdiction to grant the order sought that I should afford the applicants leave to supplement their founding affidavits and allow them to re-enrol this application for next week. Whilst I am theoretically empowered to grant the applicants leave to supplement their founding affidavit, this is an issue that arises in the rescission application and not an issue that is before me. The applicants must act on the advice of their legal representatives and take such steps as they consider necessary in the circumstances.

[23] In the result I make the following order:

The application is struck from the roll with costs.



PULLINGER AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv. M Mpya
Instructed by Nandi Bulabula Attorney

For the Respondent:

Adv. Z Kara
Instructed by Verton Moodley &
Associates Inc

Heard: 07 December 2023

Delivered: 07 December 2023