

**IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,**



PRETORIA)

- | | |
|-----|----------------------------------------|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES:
YES/NO |
| (3) | REVISED. |

.....

DATE

SIGNATURE

Case No: 36596/2016

In the matter between:

ROBERT SLAUGHTER

First Applicant

SHAHIT WADVALLA

Second Applicant

REGINALD LEGOABE

Third Applicant

STEVEN NJIIRI

Fourth Applicant

and

**MUNICIPAL INFRASTRUCTURE SUPPORT
AGENT**

First Respondent

THE SHERIFF: PRETORIA EAST

Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 13 June 2023.

JUDGMENT

LG KILMARTIN, AJ:

INTRODUCTION

[1] The first application before me is an opposed application in terms of Rule 45A (“the stay application”) to stay execution and set aside a Writ of Execution dated 24 January 2019 (“the Writ of Execution”) issued in respect of the Third Applicant to the First Respondent, pending the outcome of an opposed judicial review application brought by the First to Fourth Applicants (hereinafter referred collectively as “the Applicants”) under case no. 36596/2016 (“the main review application”).

[2] The Applicants seek the following relief in the stay application:

[2.1] that the Writ of Execution be declared irregular, unlawful and be set aside;

[2.2] that an interim order be granted interdicting the First and Second Respondents and staying the execution of any cost order under case no. 36596/2016, pending the outcome of the main review application;

[2.3] that the First Respondent be ordered to comply with its written undertaking of 20 August 2018 (“the undertaking”) to stay execution of all cost orders under case no. 3616/2016 and case no. 39077/2016, pending the outcome and determination of costs in the main review application; and

[2.4] that the First Respondent be ordered to pay the costs of the stay application.

[3] The second application before me is an application which was brought by the First Respondent for an order directing the Applicants to provide the First Respondent, *alternatively*, its legal representatives with “*the correct details of [the Applicants’] physical addresses and residential addresses within one (1) day of the order*”, failing which the First Respondent be allowed to approach the Court on the same papers, duly supplemented, for an order declaring the Applicants to be in contempt of court. The First Respondent also seeks that the costs of this application be paid on an attorney and own client scale. This application is referred to below as “the First Respondent’s application to compel”.

[4] Before dealing with the relevant legal provisions and authorities applicable in these applications, it is necessary to consider the relevant background facts as this provides the backdrop against which the matters before me are to be adjudicated. As will be apparent from what is set out below, this matter has a lengthy and complicated history and the dispute between the parties has enjoyed the attention of at least 12 judges (including two Supreme Court of Appeal judges) since 2016. The litigation has thus been ongoing for 7 years.

RELEVANT BACKGROUND FACTS

(a) Relationship between the Applicants and the First Respondent

[5] The Applicants were initially employees of the Development Bank of Southern Africa (“DBSA”) and were transferred to the employ of the First Respondent between 1 April 2012 to 30 September 2012. Between 1 October 2012 to 30 September 2015, the Applicants were re-contracted by the First Respondent as specialist consultants through specialist consultancy contracts.

[6] Pending the end of the Applicants’ contracts, the First Respondent published a request for public tender proposals under tenders PPM/003/2015 and CE/003/2015 to contract specialist consultants (Programme Managers under tender PPM003/2015 and Civil Engineers under tender CE/003/2015) through public tender, in respect of which the Applicants did bid in line with their then-existing specialist consultancy contracts.

[7] The tender briefing session for the respective tenders was held on 30 July 2015 and the tender bids were submitted on 11 August 2015.

[8] On 30 September 2015, the First Respondent disqualified the Applicants’ tender bids due to the Applicants allegedly possessing no relevant work experience or academic qualifications.

[9] The Applicants’ specialist consultancy contracts were terminated on 30 September 2015.

(b) The main review application and litigation stemming therefrom

[10] The main review application is based on Rule 53 and the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) and was launched on 6 May 2016. In the main review application, the Applicants seek the review and setting aside of the administrative actions of the First Respondent in relation to tenders PPM/003/2015 and CE/003/2015 as well as compensation.

[11] On 21 June 2016, a default order against the First Respondent (the Respondent in that application) was granted in the main review application on an unopposed basis by Botes AJ, which read as follows:

- “1. *The Respondent is ordered to settle the full expected contract value of the Applicants as Consultants in terms of the Tender Bid PPM/003/2015 and Bid CE/003/2015 respectively.*
2. *The Respondent is ordered to settle the outstanding professional fees of the Applicants for the 3 months contract extension period granted by the Respondent from 1 October 2015 to 31 December 2015.*
3. *The Respondent is ordered to settle the Applicants unpaid accumulative leave days.*
4. *The Respondent is ordered to settle the costs of this application.”*
(sic).

[12] On 25 July 2016, the First Respondent launched a rescission application against the default order granted by Botes AJ. That rescission application was set down for hearing on 15 June 2018 and 18 September 2018 before Fourie J who

granted the rescission and granted the First Respondent leave to file opposing papers in the main review application.

[13] On 30 May 2019, the main review application came before Jacobs AJ in the opposed motion court. Jacobs AJ, *inter alia*, granted the Applicants leave to amend their founding papers in terms of Rule 53 and to file a supplementary founding affidavit.

[14] The main review application was subsequently set down for hearing on 14 February 2020 as a special motion before Coppin J who *mero motu* ordered that all successful bidders be duly enjoined as interested parties in the matter. Coppin J ordered that the Applicants pay the wasted costs of the hearing of 14 February 2020.

[15] On 18 August 2021, the Office of the State Attorney, Pretoria (“the State Attorney”) filed a bill of costs on behalf of the First Respondent, incorporating the wasted costs of 14 February 2020 as ordered by Coppin J.

[16] The application for taxation was opposed and a Rule 30 notice was filed by the Applicants as they alleged that the First Respondent was irregularly attempting to claim cost items which took place prior to the State Attorney coming on record on 29 August 2018.

[17] A notice of set down of the taxation was filed by the First Respondent’s tax consultants on 18 May 2022, setting the matter down on the taxation roll of

20 June 2022. The Taxing Master did not proceed on that day due to the objections by the Applicants.

[18] On 22 June 2022, the taxation proceedings were postponed *sine die* by the Taxing Master for purposes of allowing the First Respondent's taxing consultant to amend its bill of costs.

[19] It is clear from the above that, at the time that the stay application was brought, there were no taxed costs in respect of the main review application. It was only on 22 August 2022 that the first valid taxation order in respect of the main review application was granted.

(c) Litigation stemming from the Applicants' PAIA request

[20] On 28 October 2015, the Applicants submitted an information request to the First Respondent in terms of the Promotion of Access to Information Act, 2 of 2000 ("PAIA") in terms of which, *inter alia*, all bid evaluation and adjudication records relating to tender bids CE/003/2015 and PPM/003/2015 were requested.

[21] The Applicants allege that the First Respondent failed to fully comply with the PAIA request of the Applicants and refused to hand over the minutes and attendance registers of its Bid Committee meetings and *curricula vitae* of all appointees and its officials who participated in tender bids PPM/003/2015 and CE/003/2015.

[22] As a result, the Applicants launched an urgent application on 2 November 2015 in this Court under case no. 95285/2015 (“the urgent interdict application”) in an attempt to prevent the First Respondent from proceeding with the process of appointing successful bidders. The urgent interdict application was dismissed by Pretorius J.

[23] On 19 January 2016, the Applicants brought an application to compel in this Court under case no. 3616/2016 (“the application to compel”) and sought orders compelling the First Respondent to: (i) provide written reasons in terms of the PAJA; and (ii) hand over all tender records. On 4 March 2016, the application to compel was granted by Nobanda AJ on an unopposed basis. According to the Applicants, notwithstanding the order of Nobanda AJ, the First Respondent failed to fully comply with the order to hand over the documentation requested.

[24] On 13 May 2016, the First Respondent instituted a rescission application against Nobanda AJ’s order. That rescission application was set down for hearing on 19 February 2018 and was dismissed with costs by Peterson AJ on 23 February 2018, thus upholding and reinstating the initial order to compel granted by Nobanda AJ on 4 March 2016.

[25] According to the Applicants, the First Respondent only produced records relating to the *curricula vitae* of its tender bidders, Supply Chain Management officials, Bid Committee members and written reasons on 5 March 2018, after the Applicants caused a complaint letter to be lodged with the office of the Deputy Judge President of this Court.

[26] After the finalisation of the First Respondent's rescission application, the Applicants filed a Notice of Taxation incorporating a bill of costs for the application to compel under case no. 3616/2016. The opposed taxation was set down for 31 July 2018 before the Taxing Master who handed down two cost orders in the quantum of R59 849.50 (annexure "RS3" to the founding affidavit) and R43 080.73 (annexure "RS4" to the founding affidavit) with a total quantum of R102 930.38 against the First Respondent.

[27] The Applicants therefore have two cost orders with a combined value of R102 930.38 against the First Respondent which they allege have not been executed based on the "*mutual agreement*" concluded with the First Respondent on 20 August 2018.

[28] On 30 May 2016, the Applicants instituted an application for contempt of court against the First Respondent and its key officials under case no. 39077/2016 ("the contempt application"). The contempt application was heard and granted by Baqwa J on 30 June 2016 on an unopposed basis. According to the First Respondent, the contempt application was enrolled for hearing on 15 July 2016 but, for reasons unknown to it, the matter was set down and heard on the unopposed roll of 30 June 2016, without notice to the First Respondent.

[29] The First Respondent then launched an urgent application to rescind the order of Baqwa J on 30 June 2016. On 13 July 2016, Swartz AJ granted an order rescinding Baqwa J's order in the absence of the Applicants.

[30] The Applicants filed an application for leave to appeal the order of Swartz AJ but this was dismissed on 29 November 2017 by Tonjeni AJ, who also granted costs in favour of the First Respondent. The Applicants then petitioned the Supreme Court of Appeal (“the SCA”) for leave to appeal the decision of Swartz AJ, but this petition was also subsequently dismissed with costs.

[31] On 14 August 2018, pursuant to an opposed taxation, the Taxing Master taxed costs in favour of the First Respondent in the amount of R220 216.98. It is evident from the taxed bill of costs attached to the founding affidavit as annexure “RS6C” that they related to case no. 39077/2016 and there can be no doubt that it was these taxed costs upon which the Writ of Execution was issued, albeit that the incorrect case no. 36596/2016 was used on the Writ of Execution, an aspect which I deal with below.

[32] In August 2018, the Applicants responded by launching an urgent application under case no. 58991/2018 (“the urgent stay application”), which was enrolled for hearing on 21 August 2018, wherein they sought, *inter alia*, that the First Respondent be ordered to stay its execution of judgment under case no. 39077/2016 pending the determination of the Applicants’ leave to appeal and/or appeal to the SCA under case no. 719/2018, in compliance with section 18(1) of the Superior Courts Act, 10 of 2013, and further that any Writ of Execution granted in favour of the First Respondent under case no. 39077/2016, including costs arising therefrom, be set aside.

[33] After the launching of the urgent stay application, the First Respondent, through its erstwhile attorneys of record, Ngeno & Mteto Inc, addressed a letter

to the Applicants' erstwhile attorneys, Ramatshosa Attorneys, on 20 August 2018, which reads as follows:

"RE. MUNICIPAL INFRASTRUCTURE SUPPORT AGENT //
ROBERT SLAUGHTER & OTHERS 58991/2018

1. *We refer to the above matter and your urgent application set-down on Tuesday the 21st of August 2018.*
2. *As you are aware, your urgent application does not comply with the Practice Directive relating to the set-down of urgent applications and thus falls to be struck off the roll.*
3. ***Our client has not even issued a warrant of execution in respect of the cost order awarded to it and consequently your urgent application is premature and burdening the court unnecessarily.***
4. ***Notwithstanding your non-compliance with the Practice Directive and without prejudice to any of our client's rights, our client has taken a decision and hereby undertakes not to execute the cost order pending the finalisation of your client's appeal at the SCA.***
5. *Should you persist with your urgent application in circumstances where our client has given an undertaking our client will seek a cost order against you.*
6. *Kindly but urgently let us have your undertaking before 17.00 today the 20th of August 2018 that you will not proceed with the urgent application failing which we will have no choice but to brief counsel. Should this be the*

case we will seek costs against your client on a punitive scale.” (Emphasis added).

[34] Based on the undertaking in paragraph 4 of the letter, the Applicants removed the urgent stay application from the roll of 20 August 2018.

[35] The very next day, 21 August 2018, the SCA dismissed the Applicants’ application for leave to appeal the order of Swartz AJ.

(d) Ambit of the undertaking of 20 August 2018

[36] The question that now arises is what was meant by the undertaking in the letter of 20 August 2018 and when it would fall away.

[37] In paragraph 6.33 of the founding affidavit the following was stated by the Applicants about the duration of the undertaking:

“6.33 *On the 20th August 2018, First Respondent’s then attorneys of record gave written undertaking **not to execute the above costs order pending the finalization of all pending matters and related appeals and final adjudication of costs.**” (Emphasis added).*

[38] Furthermore, in paragraph 8.10 of the founding affidavit, the following is stated:

“8.10 *At all material times, it has always been the understanding of the Applicants, based on the First Respondent’s written undertaking that notwithstanding the taxation of mutual costs orders, **no***

execution of mutual costs order will take place pending the final outcome of the main review application on the Special Motion roll. (Emphasis added).

[39] Having regard to the clear wording of the undertaking, I agree with the First Respondent that the Applicants' interpretation of the undertaking is distorted. It is, in my view, clear from the undertaking that it was limited to not executing the costs order "*pending the finalization of [the Applicants] appeal at the SCA*". The appeal that was being referred to was one which would have proceeded had the Applicants obtained leave to appeal the decision of Swartz AJ from the SCA, but that did not happen. Hence, the undertaking came to an end when the application for leave to appeal to the SCA was dismissed on 21 August 2018. There was clearly no undertaking not to execute the relevant cost order pending the "*finalization of all pending matters and related appeals and final adjudication of costs*" or "*pending the final outcome of the main review application on the Special Motion roll*" as contended by the Applicants.

[40] There is no dispute that the bill of costs in respect of case no. 39077/2016 was taxed on 14 August 2018 in the amount of R220 216.98 and that the Applicants are indebted to the First Respondent in that amount, including interest. The Applicants fail to challenge the taxed bill by way of a review application and it was represented during the opposed taxation.

[41] That being said, the only aspect that remains is that the Writ of Execution was issued under the incorrect case number, an error which could subsequently be rectified by the Registrar of the Court. In this regard, the First

Respondent referred to the fact that a further Writ of Execution dated 15 February 2022 (“the 2022 Writ of Execution”) was subsequently issued under the correct case number and that the Writ of Execution which the Applicants seek to have set aside “*has fallen away following the rectification of the case number by the issuing of the [2022 Writ of Execution].*” Upon closer scrutiny, however, it appears that the Writ of Execution was issued in respect of the Third Applicant and the 2022 Writ of Execution was issued in respect of the Fourth Applicant. I therefore do not agree that the 2022 Writ of Execution could be considered a “*rectification*” of the Writ of Execution. Be that as it may, I also do not believe that the use of the incorrect case number renders the Writ of Execution irregular, unlawful or liable to be set aside.

[42] In relation to the 2022 Writ of Execution, it is alleged in (the second, incorrectly numbered) paragraph 6.4 of the Applicants’ heads of argument, that:

*“...it is clear that the First Respondent is attempting to mislead the Honourable Court through fraudulent malfeasance and deceit since a second unsigned self-crafted alleged writ of execution dated 22nd February 2022 is annexed to First Respondent’s Opposing affidavit (**Annexure LS11, Page 44, First Respondent’s opposing affidavit**) which differs markedly from the impugned writ of execution issued on the 21st January 2019”.*

[43] The statements in the paragraph of the Applicants’ heads of argument go far beyond the response to the existence of the 2022 Writ of Execution in the replying affidavit. All that was stated in the replying affidavit is that: (i) annexure “LS11” had never been served on the Applicants or their attorneys of record; (ii)

the date of issue of annexure “LS11”, namely 22 February 2022, serves to confirm that there has been a period of 6 years since the Applicants commenced review proceedings in 2016 and 4 years have elapsed since the undertaking not to execute, “*but [the First Respondent] has only commenced execution of costs only in 2022 in order to maliciously impede Applicants ability to prosecute the main review application*” (sic). Nothing in the papers before me indicates that the 2022 Writ of Execution was: (i) an attempt to mislead the Court through “*fraudulent malfeasance and deceit*”; and/or (ii) was “*self-crafted*”.

RELEVANT LEGAL PROVISIONS AND AUTHORITIES IN RESPECT OF STAY APPLICATION

[44] 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.”

[45] In the matter of *Stoffberg NO and Another v Capital Harvest (Pty) Ltd*¹ (“*Stoffberg*”) Binns-Ward J stated the following regarding Rule 45A:²

“[26] *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*

¹ 2021 JDR 1644 (WCC).

² *Stoffberg* at para [26].

*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; and, if they are, on what terms any suspension it might be persuaded to allow should be granted."*
(My emphasis).

[46] In *Stoffberg*, Binns-Ward J also dealt with the principles for a grant of a stay in execution as follows:³

"[15] Mr White, who appeared for the respondent, relied on the judgment of Davis J in Firm Mortgage Solutions (Pty) Ltd and Another v Absa Bank Ltd and Another 2014 (1) SA 168 (WCC), to argue that unless there was a basis to believe that there might be an inherent flaw in the judgment that was being executed or the 'causa' of the respondent's claim, the court lacked any authority under rule 45A to suspend the execution of the judgment. It would appear that Davis J proceeded on an acceptance that 'the basic principles for a grant of a stay in execution' were expressed in the judgment of Waglay J in Gois t/a Shakespeare's Pub v Van Zyl and Others 2011 (1) SA 148 (LC) at para 37, where the learned judge held:

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

³ *Stoffberg*, at para [15].

- (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, ie 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.”*

[47] In *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others*,⁴ (“*Van Rensburg*”) Navsa JA stated the following:⁵

⁴ 2011 (4) SA 149 (SCA).

⁵ *Van Rensburg* at paras [51] and [52].

“[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.

[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.”

MERITS OF THE STAY APPLICATION

[48] The Applicants allege that real and substantial prejudice requires stay of execution in this matter for the following reasons:

[48.1] the First Respondent failed to comply with *“an earlier mutual undertaking not to execute mutual costs pending the hearing of the main review application.”* [For the reasons explained above, the undertaking cannot be interpreted in the manner contended for by the Applicants.];

[48.2] the underlying regularity, lawfulness and authenticity of the First Respondent’s Writ of Execution is disputed. [The mere fact that the Writ of Execution bore the incorrect case number, i.e. the case number of the main review application does not, in my

view, render it irregular, unlawful and inauthentic. The Writ of Execution could have been amended to reflect the correct case number.];

[48.3] the First Respondent has maliciously, irregularly and unlawfully levied execution through deceit, malice and unlawful means by executing the Writ of Execution where no underlying taxed costs order had been granted under case no. 36596/2016 (being the case number reflected on the first page of the Writ of Execution). [The Court was advised that the First Respondent only obtained a valid taxation order on 22 August 2022 under case no. 36596/2016. There is, in my view, no basis to allege any malice, irregularity or unlawfulness in respect of the Writ of Execution.]; and

[48.4] the execution of the Writ of Execution is aimed at the attainment of a malicious ulterior motive namely to mislead the court and to deny justice to the Applicants. [There is, again, in my view, no basis to make these serious allegations].

[49] As stated above, in my view the undertaking did not go beyond an undertaking not to execute the cost order pending the outcome of the petition to the SCA which was dismissed on 21 August 2018. Thereafter, the undertaking fell away.

[50] I am further of the view that the main review application is entirely separate from the cost order which formed the basis of the Writ of Execution (and the 2022 Writ of Execution).

[51] From the papers before me and the arguments that were presented to me I find that there is no basis to grant a stay of execution in this instance. In this regard:

[52.1] no real and substantial justice requires it and no injustice will result;

[52.2] I am not satisfied that the Applicants have shown that irreparable harm will result if the execution is not stayed; and

[52.3] there is no possibility that the underlying *causa* for the cost orders upon which the Writ of Execution was issued will be changed or removed.

[52] In the circumstances, the stay application falls to be dismissed.

[53] As far as the issue of costs is concerned, I was referred by the Applicants to *Biowatch Trust v Registrar Generic Resources and Others*⁶ (“*Biowatch*”) where the Constitutional Court stated the following:

“[43] As stated above the general rule for an award of costs in constitutional litigation between a private party and the State is that

⁶ 2009 (6) SA 232 (CC) at para [43].

if the private party is successful, it should have its costs paid by the State, and if unsuccessful, each party should pay its own costs. In the present matter, Biowatch achieved substantial success. Not only did it manage to rebut a number of preliminary objections aimed at keeping the case out of court altogether, it also succeeded in getting a favourable response from the court to eight of the eleven categories of information it sought. In these circumstances the 'misconduct' of Biowatch would need to have been of a compelling order indeed to justify a failure to award costs against the State. The reasons advanced by the High Court for making no award of costs do not, however, persuade.”

[54] The Applicants further submitted that the Court must, in deciding whether a party must be awarded costs, take into consideration that this matter raises important constitutional issues and, the general rule is that in constitutional litigation the successful party must be awarded the costs.

[55] The First Respondent acknowledged the *Biowatch* principle that seeks to shield unsuccessful litigants from the obligation of paying costs to the State in litigation between the Government and a private party seeking to assert a constitutional right. However, it was pointed out that this rule was subject to exceptions which were formulated in the matter of *Affordable Medicines Trust and Others v Minister of Health and Another*,⁷ where the court stated the following in paragraph [139]:

“[139] *In awarding costs against the applicants, the High Court noted that the applicants were not indigent persons. In addition, it noted that they were 'in a position to finance the litigation which*

⁷ 2006 (3) SA 247 (CC).

they pursued "with vigour". While accepting that as a general matter an unsuccessful litigant in constitutional litigation should not be ordered to pay costs, the Court concluded that in the circumstances of this case it would not be unfair to order the applicants to pay costs. The Court was no doubt influenced by both the vigour with which they pursued the litigation and their perceived ability to pay. The Court erred in this regard. The Court did not pay sufficient account to the general rule in constitutional litigation referred to above. The fact that the litigant has pursued litigation with vigour is not a material consideration. Nor is the ability to finance the litigation a relevant consideration. This litigation cannot be described as vexatious or frivolous. On this basis alone the order for costs made by the High Court ought to be set aside. But there is the further reason why it should be set aside, namely that the applicants have been partially successful."

[56] The First Respondent submits that in the event of the Honourable Court granting an order to set the Writ of Execution aside, the Applicants would still need to launch a different application to set aside the 2022 Writ of Execution. This is so.

[57] The First Respondent further points out that:

[57.1] several cost orders have been granted against the Applicants in the amount of more than R600 000.00 and the First Respondent has been struggling to execute the cost orders;

[57.2] the First Respondent has been dragged to court on several occasions for frivolous litigation and it is an organ state and relies on the public purse to fund its litigation;

[57.3] the Applicants knew and were well aware of the costs order against them when they brought the application and were also aware that the Writ of Execution was not issued for an ulterior motive since it was based on an order rightfully granted by the court;

[57.4] the Applicants knew or ought to have known that the court case number depicted in the Writ of Execution was merely erroneous but continued with this litigation none the less. The Applicants further elected to misinterpret the undertaking given by the First Respondent in order to mislead the court; and

[57.5] since 2015, the Applicants have brought numerous applications, some of which were frivolous, and costs were awarded against them. In the matter in question, the Applicants sought to rescind an order of recission granted in favour of the First Respondent. They were unsuccessful but again, despite all warnings by the First Respondent, they went ahead to bring a petition to the SCA which was also unsuccessful.

[58] In the circumstances, the First Respondent argued that this application warrants a deviation from the *Biowatch* principle.

[59] Having regard to the factors mentioned by the First Respondent, I agree that the facts of this matter warrant a deviation from the *Biowatch* principle. In particular, it should have been obvious to the First Respondent that the use of the main review application case number on the Writ of Execution was an error as the amount referred to therein was clearly the amount awarded by the taxing order under case no. 39077/16. In addition, the allegations of “*fraudulent malfeasance and deceit*” are entirely unsubstantiated. Furthermore, I also do not believe that the wording of the undertaking could, on any conceivable basis, be interpreted as contended for by the Applicants. The stay application is, in my view, frivolous and vexatious and was aimed at preventing the First Respondent from executing in respect of the cost orders granted to it (which were unchallenged and have not been set aside).

THE FIRST RESPONDENT’S APPLICATION TO COMPEL

[60] On 1 July 2022, the State Attorney addressed a letter to the Applicants’ attorneys which reads as follows:

**“RE: ROBERT SLAUGHTER & OTHERS /// MUNICIPAL
INFRASTRUCTURE SUPPORT AGENT**

PRETORIA HIGH COURT

1. *With reference to a number of cost orders which have been granted against your client in favour of our client, we have been trying to execute these costs orders against your client, however, the Sheriff is unable to execute them and in all these addresses, your clients are unknown.*

2. *Kindly provide us with the correct addresses of your clients, apart from the ones that are used in the pleadings that, according to the Sheriff, seem to be incorrect within a period of five (5) days. Should you fail to do so, we intend to approach the court to request security for cost.*
3. *We urgently await to hear from you with the correct addresses.”*
(sic)

[61] On 4 July 2022, the Applicants' attorneys directed correspondence to the State Attorney, requesting that they be furnished with the Writ of Execution and taxation order allegedly served on the Applicants as referred to in the letter of the State Attorney. This was followed up by further email requests and telephonic enquiries to the State Attorney and the taxing consultant for the First Respondent, Lawrence Sepua (“Mr Sepua”) of Sepua Cost Consultants.

[62] On 5 July 2022, Mr Sepua furnished the Applicants' attorneys with the Writ of Execution which the Applicants describe as an *“irregular Writ of Execution dated 21st January 2019 incorporating the date stamp of the Registrar of the Court dated 24th January 2019”*.

[63] Annexed to the Writ of Execution were three non-returns of service from the Sheriff of the Court for the District: Pretoria East (the Second Respondent) dated 12 March 2019; 18 February 2022 and 10 March 2022 (all in respect of the Third Applicant). It is clear from these returns that attempts were made to serve at the incorrect address, namely 19 Ponda Rosa, Equestria, as opposed to 29 Ponda Rosa, being the address furnished in the founding affidavit and the list of the Applicants' last known addresses furnished by the Applicants on 21 July

2022 (a month before the First Respondent's application to compel was launched). It also appears that the Trace and Locate report attached to the First Respondent's application to compel provided the incorrect address for the Third Respondent. The Applicants allege that these returns of service indicate that *"the First Respondent had irregularly attempted to execute a self-crafted and fraudulent Writ of Execution under Case No 36596/2016 without the existence of any taxated costs order signed by the Taxing Master under Case No 36596/2016 (the main review application) currently on the special motion roll of the above Honourable Court."* (sic).

[64] Although the Writ of Execution bore the incorrect case number, if one has regard to the content thereof, it is clear that the cost order upon which it was based was a valid one and related to case no. 39077/2016. This cost order was never challenged further and is final. It must have been evident to the Applicants that the use of the incorrect case number on the Writ of Execution was an error. As a matter of logic, there would have been no reason for the First Respondent to deliberately use the incorrect case number as, on the Applicants' version, the *"mutual agreement"* would, in any event, have precluded execution in respect of any cost orders (even those granted under case no. 36596/2016) pending the outcome of the main review application and a determination of costs in that application.

[65] As mentioned above, the 2022 Writ of Execution was issued in respect of the Fourth Applicant with the correct case number. There is only one return on record in respect of an attempt to serve at the address identified by the Trace and Locate report, but it is not the address which was provided in the list of last

known addresses dated 21 July 2022, namely 44 Kleynbosch, Muisvoel Street, Kempton Park, Gauteng Province. It is also not the address provided for the Fourth Respondent in the founding affidavit.

[66] The First Respondent's application to compel the provision of the addresses of the Applicants was not pursued with any vigour at the hearing and the answering papers contain serious allegations about infringement of Constitutional rights.

[67] The Applicants allege that the First Respondent failed to serve any of the writs of execution on the Applicants' attorney of record and that it has been harassing them and their families through malicious service of fraudulent writs.

[68] The last known addresses of the Applicants were furnished to the First Respondent on 21 July 2022 and the First Respondent's application to compel was brought on 22 August 2022 (i.e. a month later). During the hearing, counsel for the Applicants indicated that:

[68.1] there had never been any attempt to serve on the First Applicant. [In this regard, in the founding affidavit and in the list of addresses produced, his address is provided as 161 Gezina, Kruger Street, Pongola];

[68.2] the Second Applicant works in Zimbabwe but stays at the same address that has been provided. [There is no evidence of any attempt to serve on the Second Applicant whose address is

provided in the founding affidavit and the list of addresses produced as 21 De Havilland, Helderkruijn, Roodepoort, Gauteng.];

[68.3] in respect of the Third Applicant, the attempts that were made to serve the Writ of Execution were made at the wrong address, namely 19 Ponda Rosa as opposed to 29 Ponda Rosa;

[68.4] as far as the Fourth Respondent is concerned, it was confirmed that he is Kenyan and does not live in South Africa and is still out of the country. [I note that there is no evidence of any attempt to serve on the Fourth Respondent at the address referred to in the founding affidavit, namely 2 Hawk Street, Montana Park, Pretoria North or the address in the list of addresses, namely 44 Kleynbosch, Muisvoel Street, Kempton Park, Gauteng Province.].

[69] In my view, the First Respondent has clearly not “*exhausted all the remedies*” insofar as tracing and attempting to execute the writs of execution is concerned.

[70] In the circumstances, I am not inclined to grant the relief referred to in the counter-application.

[71] Insofar as the issue of costs is concerned, the Applicants argued that the First Respondent's application constitutes an abuse of the Court process and I was requested to grant a punitive cost order against it.

[72] The failure of the First Respondent to exhaust all avenues available to it before bringing its application and the failure to attempt service after receiving the list of last known addresses and before its application was brought warrants a cost order being granted against it. Litigants should be discouraged from prematurely bringing applications where there is no basis for the relief sought, thereby resulting in it being necessary for the other party to oppose the application and to incur unnecessary costs in doing so. Having said that, I am not inclined to grant punitive costs.

ORDER

In the circumstances, I make the following order:

1. The Applicants' application to stay execution is dismissed;
2. The Applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the First Respondent in the application to stay execution;
3. The First Respondent's application to compel is dismissed; and

4. The First Respondent is ordered to pay the costs of the Applicants in the First Respondent's application to compel.

LG KILMARTIN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:	15 March 2023
Date of judgment:	13 June 2023
For the Applicants:	Adv V Makofane
Instructed by:	Serepong Attorneys
For the First Respondent:	Adv MH Mhambi
Instructed by:	The State Attorney, Pretoria