Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: UM221/2023

In the matter between:-

UNITING REFORMED CHURCH IN THE SOUTHERN AFRICA: WOLMARANSTAD CONGREGATION	1st Applicant
REVEREND KENNETH MOHKABE	2nd Applicant

and

KAKANYO SERAME SEWEDI	1st Respondent
SHERIFF FOR DISTRICT OF WOLMERANSTAD	2nd Respondent
SHERIFF FOR DISTRICT OF STILFONTEIN / KLERKSDORP	3rd Respondent

The judgment is handed down electronically *via* e-mail. The date and time of the handing down of the judgment is deemed to be 2023-12-12 at 08h00.

ORDER

The following order is made:

i) The application is dismissed for want of urgency as the applicants created their own urgency.

ii) The applicants are ordered to pay the cost of the respondents, individually and severally, the one paying the other to be absolved, on a scale as between party and party.

JUDGMENT

FMM REID J

Introduction:

[1] This is an application to suspend the operation of a writ of execution for the sale of movable property of the applicants in fulfilment of a debt. The respondents oppose the application on the basis that an appeal has been noted against the cost order. In ancillary relief the applicants pray for return of the movable property.

[2] The litigation between the parties commenced in 2021.

[3] There are several applications, counter-applications and interlocutory applications that the parties launched against each other. In order to prevent confusion, I will refer to the parties cited in this application, in the following manner:

3.1. The 1st applicant is the Uniting Reformed Church in South Africa (or "the Church");

3.2. The 2nd applicant is Reverend Kenneth Mohakabe ("the Reverend");

3.3. The 1st respondent is "Sewedi";

3.4. The 2nd and 3rd respondents are "the Sheriffs" respectively.

[4] A summation of the factual matrix serves as follows:

4.1. On 21 July 2022 an application to review and set aside certain actions taken by the Church and the Reverend was heard on an unopposed basis by Djaje ADJP (as she then was) under case number M342/2021. The application was successful and the actions were

reviewed and set aside. In addition, a cost order was granted against the Church and the Reverend and the cost order reads as follows:

> *"6. THAT first and second Respondent (sic- the Church and Reverend) to pay the costs of this application on the attorney and client one paying the others to be absolved*".

4.2. On 11 August 2022 the Church and Reverend filed with the office of the Registrar a request for reasons of the order dated 21 July 2022. On 24 October 2022 a reminder for the reasons was filed with the office of the Registrar, which was only brought to the attention of Djaje DJP on 28 October 2022. In the reasons for judgment, Djaje DJP deals with the time delay, as well as the reasons for the order, in detail.

4.3. On 12 September 2022 (which was prior to the reasons being granted, but nothing turns on it) the Church and the Reverend filed a notice of application for leave to appeal under case number M342/21.

4.4. On 27 September 2022 the Registrar of this court issued a directive regarding the application for leave to

appeal. The leave to appeal was to be heard on 27 January 2023 subject to a notice of setdown being filed on/before 25 November 2022. The notice of setdown was filed, but indicated that the matter was to be heard on 26 January 2023.

4.5. On 3 October 2022 the Church and Reverend filed a Notice in terms of Rule 30 and Rule 30A (dealing with irregular proceedings).

4.6. On 18 January 2023 the Church and Reverend filed a notice of removal of the application for leave to appeal. The wording of this notice of removal is important in dealing with the dispute of whether an appeal has indeed been lodged by the Church and Reverend. The notice of removal reads as follows:

> *"NOTICE OF REMOVAL OF THIS MATTER FROM THE COURT ROLL OF THE 27TH JANUARY 2023*
>
> ***PLEASE TAKE NOTICE*** *that the applicants (sic – Church and Reverend) hereby serve and file the* ***Notice of Withdrawal*** *of this matter from the Court Roll of the* ***27th JANUARY 2023****, in line with the Registrar's Directive dated the* ***27th SEPTEMBER 2022****…"*
> *(own emphasis)*

4.7. Of importance to note, is that it is argued on behalf of Sewedit that the application for leave to appeal was withdrawn (in terms of the notice) and that the application for leave to appeal was also not proceeded with, since the Church and Reverend has taken no further steps since 18 January 2023 to pursue the application for leave to appeal. This is denied by the Church and Reverend, who argue that they are awaiting a date for allocation of the application for leave to appeal.

4.8. The application for leave to appeal was set down to be heard on 27 January 2023, and it was ordered that the matter be removed from the roll. The order reflects:

> *"HAVING HEARD Adv CA Kilowan on behalf of the applicant and Mr Maleshane on behalf of the respondents and having read the Notice of Motion and other documents filed of record;*
>
> ***IT IS ORDERED***
>
> *1. THAT: The matter be and is hereby removed from the roll."*

4.9. On 22 February 2023 the Church and Reverend

applied for a date of hearing for the application for leave to appeal. The representatives of the Church and Reverend did not follow up to enquire about a date for the hearing of the application for leave to appeal.

4.10. On 19 July 2023 the attorney for Sewedi informed the attorney of the Church and the Reverend that they have compiled the bill of costs and it would be taxed on 23 August 2023. The costs were that of NP Williams Attorneys and DC Kruger Attorneys as granted in the court order of 21 July 2022 by Djaje J was costs on an attorney and client scale in favour of Sewedi.

4.11. On 23 August 2023 the bill of costs of the attorneys acting for Sewedi were taxed.

4.12. On 29 August 2023 the taxed bill of costs was served on the correspondent attorneys of the Church and Reverend.

4.13. The attorneys of the Church and Reverend were duly aware of the taxation, but elected to not oppose the

taxation. The reason for not opposing the taxation is set out in correspondence dated 10 September 2023 in which the attorneys for the Church and Reverend say:

> *"6. Due to the pending application for leave to appeal, which as we have said suspended the execution of the order, we chose to ignore your client's "bill of costs". We would not be drawn into your emotional and reckless conduct."*

4.14. On 2 October 2023 a writ of execution was issued by the Sherriff in favour of Sewedi against the Church and Reverend for the payment of R460,039.98, together with interest of 10% per annum from 23 August 2023 for the taxed costs of Sewedi which was granted on 23 August 2023.

4.15. On 7 October 2023 the Sherriff attached movable property of the Church and the Reverend with a writ of execution.

4.16. On 12 October 2023 Mfenyana J ordered that the application be struck off the roll for non-compliance with the Practice Directive. Sewedi, who was the applicant,

was ordered to pay the costs occasioned by the striking off of the matter.

4.17. An advertisement was placed in the local newspaper, namely the Klerksdorp Record on 17 November 2023 that a sale in execution of movable property will take place on 12 December 2023.

4.18. This application was launched on 16 November 2023 and set down for hearing on an urgent basis on 23 November 2023. In the urgent application it is prayed that:

4.18.1. The matter is to be heard as urgent;

4.18.2. The sale in execution is to be stayed pending the appeal proceedings;

4.18.3. The respective Sheriffs' be ordered to return the movable goods to the Church and Reverend.

4.19. On 21 November 2023 Sewedi filed a notice of intention to oppose, and an opposing affidavit was filed on 23 November 2023. A replying affidavit was filed on

23 November 2023.

4.20. On 23 November 2023 an order was granted by Mfenyana J to the effect that:

4.20.1. The matter is to be removed from the roll;

4.20.2. The Reverend is to pay the cost of the application on an attorney and client scale.

4.20.3. That the Church and Reverend's, Mr Morathi Mataka is ordered to pay the costs of the application jointly and severally with the 2nd applicant on a punitive scale *de bonis propriis.*

[5] The events that followed the setting down of the matter on 23 November 2023, and the events preceding the setting down of the matter for 29 November 2023 is unclear. There is factual disputes relating to whether the matter was to be postponed, stood down, or agreed to be heard at a later stage. Due to the urgent nature of this application, I am not going to venture into the detail of the aforesaid factual disputes. I do not regard the detail of the events preceding the hearing of the matter on 29 November 2023 relevant in

the determination of this matter on an urgent basis.

[6] The application before me is heard on 29 November 2023 and is a reinstatement of the urgent application as dealt with by Mfenyana J on 23 November 2023. The manner in which the matter was reinstated is also disputed between the parties and I similarly do not deem it necessary to deal with the factual disputes in determination of the matter.

[7] The above chronological events highlight that there is a factual dispute whether the application for leave to appeal is pending. It is argued on behalf of the Church and the Reverend that the application for leave to appeal remains in place, and it is contended in argument that they are awaiting a new allocation to argue the leave to appeal. It is conceded on behalf of the Church and Reverend that no follow up or reminder has been sent to either the Registrar of the Court or the Secretary of Djaje DJP in obtaining a date to hear the application for leave to appeal, since the removal of the application from the roll on 27 January 2023.

Urgency

[8] Rule 6(12) of the Uniform Rules of Court deals with urgent applications and reads as follows:

> *"6(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.*
>
> *(b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.*
>
> *(c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order."*

[9] The above quotation emphasise that the two (2) pertinent requirements for urgent applications are:

9.1. That the applicant must set forth explicitly the circumstances which is averred render the matter urgent; and

9.2. The reasons why the applicant claims that applicant

could not be afforded substantial redress at a hearing in due course.

[10] The *locus classicus* of urgency is the matter of **Luna Meubelvervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)** 1977 (2) All SA 156 (W) where the following is held from page 158:

> *"Urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court. The following factors must be borne in mind. They are stated thus, in ascending order of urgency:*
>
> *1. The question is whether there must be a departure at all from the times prescribed in Rule 6 (5) (b). Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge on duty for that week.*
>
> *2. Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed his papers by the previous Thursday.*
>
> *3. Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing on the next Court day at*

the normal time of 10.00 a.m. or for the same day if the Court has not yet adjourned.

4. Once the Court has dealt with the causes for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next Court day at the normal time that the Court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even if that be at night or during a weekend.

Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

[11] *In casu* the applicants claim that the matter is urgent as it is evident that the sale of execution is to proceed to satisfy the cost order. The argument in favour of urgency is set out as follows in the founding affidavit:

"Urgency
58. The Church and I were deprived of our property unlawfully. The Sheriff attended at my premises on 7 November 2023 and proceeded to remove the movable property under my dominion.

59. The Church and I suffer daily. We suffer as we

have lost our property without any justification. The harm we face is on-going and we feel it every single day. I am advised that the test for urgency is whether the applicant will be afforded substantial redress in due course.

60. The Church and I will not be afforded substantial redress in the normal course as the Church is unable to provide its congregants a space where it can congregate and practice their constitutional right to religion whilst it does not have furniture. The Church and I cannot wait for the appeal to be finalised as the Sheriff may have sold the attached property.

61. I also cannot be afforded substantial redress in the ordinary course as the property which was removed from my premises, when I had not been cited in my personal capacity, will be sold and sold to a third party. I would have to institute proceedings against a third party to recover my property. I proceed to enclose the advert for the sale of the said properties on 12 December 2023 as Annexure K.

62. The application is accordingly urgent to stave off impending sale that will follow the subsequent attachment. I cannot wait to have the matter enrolled in the ordinary course as my property would in all likelihood have been sold in execution.

63. The relief is further urgent as the property held by the sheriff is my property and it needs to be returned to me urgently. The respondent will not suffer any prejudice if the property is returned to the church and I."

[12] The argument on behalf of the Church and the Reverend is

that the notice of application for leave to appeal *ex lege* suspends the order of Djaje DJP, and Sewedi is acting opportunistic in attaching and selling the property seized under the writ of execution.

[13] A category of urgency that has developed in our law, is one of so-called self-created urgency. This is instances where an applicant waits and does not take action when the proceedings that leads to the current urgent proceedings, commence to take course.

[14] In **Financial Fiscal Commission v Commission for Conciliation, Mediation and Arbitration, Pretoria and others** [2018] JOL 40179 (LC) the following was held:

> *"[6] The review application was not brought on an urgent basis. One can only presume that the reason for the inclusion of a prayer for the staying of the arbitration proceedings in that application was tactical rather than premised on any legal basis. There is no explanation as to why the applicant did not seek to review the condonation ruling urgently once it was issued, that is during the period that the set down date for the arbitration hearing was awaited.*
>
> *[7] In the court's view, this application is a case of self-created urgency, the timing of its lodging carefully crafted. The matter of staying the arbitration proceedings was urgent as soon as the*

condonation ruling was issued on 7 June 2018. The applicant only served the review application on the third respondent on 9 July 2018, the day that it received the notice of set down for arbitration."

[15] In my view, the application became urgent when the notice of taxation was served on the Church and Reverend on 19 July 2023. This indicated, in no uncertain terms, to the Church and the Reverend that Sewedi intends to execute on the order obtained in her favour by Djaje DJP.

[16] Further, the applicants did not act when the property was attached on 2 October 2023 and removed on 7 October 2023. At this stage, the applicants had ample time to oppose the attachment and removal.

[17] Instead of opposing the taxation of the bill of costs, the attachment or removal of the property, or bringing an application to stay the proceedings on the normal course, the applicants waited until they became aware of the sale in execution.

[18] The argument of the applicant that the notice of application

for leave to appeal stays the proceedings falls flat when the court has regard thereto that this notice was issued, the application for leave to appeal was removed from the roll on 27 January 2023, but the applicants did nothing for a period of almost a year to follow up and pursue the application for leave to appeal.

[19] This is, in my view, a text book example of self created urgency. The application is doomed to fail.

Costs

[20] The normal rule is that the successful party is entitled to be reimbursed for their costs.

[21] I find no reason to deviate from the normal rule.

[22] The applicants are ordered to pay the costs of the respondents.

Order

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

i) The application is dismissed for want of urgency as the applicants created their own urgency.

ii) The applicants are ordered to pay the cost of the respondents, individually and severally, the one paying the other to be absolved, on a scale as between party and party.

_____

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF ARGUMENT:	**29 NOVEMBER 2023**
DATE OF JUDGMENT:	**12 DECEMBER 2023**

APPEARANCES:

FOR THE APPLICANT:

COUNSEL:	**ADV L NYANGIWE**
ATTORNEYS FOR APPLICANT:	**MORITHI & MOTAKA INC** **C/O MALESHANE ATT INC** **3590 WILDEVY STREET** **EXT 34** **DANVILLE** **MAHIKENG**
TEL:	**018 381 0164**

FOR THE RESPONDENT:

COUNSEL:	**ADV C A KILOWAN**
ATTORNEYS FOR RESPONDENT:	**NP WILLIAMS ATTORNEY** **3 SWARTVLEI STREET** **PAARL,7646**
TEL:	**062 671 9647**
	C/O DC KRUGER ATT **29 NORTH STREET** **MAFIKENG**