

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 NO: UM14/2023

In the matter between:

MINISTER OF POLICE

APPLICANT

and

MTUYEDWA ZACHARIA MHLOTSHANA

FIRST RESPONDENT

PRETORIA-CENTRAL SHERIFF

SECOND RESPONDENT

JUDGMENT

MAAKANE AJ

-

Introduction

[1] This matter was set down for reconsideration of the orders granted by my sister madam Justice Djaje DJP on **1 February 2023**. The order reads as follows:

- I. **“THAT:** *This application is heard as one of urgency in terms of the provisions of Uniform Rule 6(12) and that non-compliance by the Applicant with the time limits, forms and service are condoned;*

- II. **THAT:** *The warrant of execution, in annexure “A” against the Applicant issued under the case no: **NW/KLD/RC/496/2021** is hereby stayed pending the finalization of the rescission application by the Applicant in the **Klerksdorp Regional Court**;*

- III. **THAT:** *Pending the determination of the relief sought in Part B hereof, the Respondents be and are hereby interdicted from disposing of the property in annexure “A”.*

IV. THAT: The Applicant be granted leave to supplement his papers in PART B if necessary;

V. THAT: The Respondents may in terms of rule 6(8) anticipate the return day of the order upon delivery of not less than 24 hours written notice.

VI. THAT: The Respondents may in terms of rule 6(12) (c) by similar notice, set down the matter for reconsideration of the order.”

[2] It is common cause that the orders were granted by way of urgent proceedings, and also in the absence of the respondents.

[3] Paragraph V of the order has the effect of rule *nisi* provision for respondents to anticipate the return day of the order, upon delivery of 24-hour written notice in terms of Rule 6 (8). However, the said court order does not have or specify a return day or date of such a rule *nisi*.

[4] For these reasons, the first respondent gave written notice and set down the matter, seeking reconsideration and the setting aside of the order.

[5] The matter is opposed by the applicant.

Factual background

[6] First respondent is the plaintiff in the Regional Court sitting at Klerksdorp. On or about **2 September 2021**, he instituted an action against the applicant, claiming delictual damages based on what he alleged was his unlawful arrest and detention. The issue of summons was preceded by a notice in terms of section 3 of Act 40 of **2002**, issued on **31 August 2021**.

[7] The applicant, through the State attorney in Mahikeng, filed a notice of intention to defend on **5 October 2021**. He however failed to file a plea. On **31 November 2021**, first respondent's attorneys served and filed a notice of bar. Despite this, the applicant still failed to file his plea. As a result, second respondent applied for and obtained default judgement against the applicant in the amount of R400 000.00 (Four Hundred Thousand Rands) plus costs. This was granted by the Regional Court.

[8] Following this, first respondent through his attorneys applied for and obtained a warrant of execution out of the same Regional Court of Klerksdorp. On **21 September 2022**, second respondent acting on instructions of the first respondent, proceeded to the police Headquarters in Pretoria, and attached certain movables in the enforcement and carrying out of the said warrant of execution. These goods, according to the founding affidavit consist of approximately 317 computers.

[9] It was also common cause at the time of hearing of this matter, that the sale in execution of those computers by public auction, has already been scheduled for **22 February 2023**.

[10] On **31 January 2023**, applicant launched on extremely urgent basis, an *ex parte* application out of this court. The urgent application was heard by Djaje DJP, who having done so, issued an interim order which now forms the subject matter of this reconsideration.

The issues

[11] The respondent attacks the granting of the order and or manner in which it was obtained and more specifically raises the following points:

[11.1] Lack of jurisdiction

[11.2] Lack of urgency and non-service

[11.3] Applicant did not make a proper case, i.e. has not satisfied all the requirements of an interim interdict.

Parties' submissions

The Respondent:

[12] Counsel for the first respondent submitted, that this Court, being a division of the High Court, does not have jurisdiction to hear the matter. The action has its genesis in the Regional Court of Klerksdorp. It is that Regional

Court that granted the default judgement and also, the warrant of execution that is now at the centre of these proceedings. It is therefore the Regional Court of Klerksdorp, that has jurisdiction to hear the matter. This court, so goes the argument, does not have the jurisdiction to hear and or grant the interim order.

[13] He went on to submit that while the High Court does have inherent jurisdiction to hear matters before it, this “*does not give the High Court Carte Blanche to meddle in the affairs of inferior courts...*” In this regard, reliance was placed on the matters of

Oosthuizen v Road Accident Fund 2011 (6) SA 31 (SCA)

Victor and Another v Pollock N.O. and Others 2581/2021 {2022} ZAFSHC 29

[14] He also argued that the matter was not urgent. For that reason, the applicant was not entitled or justified in bringing the application on urgent basis and also without even service thereof on the respondents. More specifically, he submitted that there has been undue delay on the part of the applicant to bring this application, with the result that the urgency is self-created.

[15] Regarding the court order itself, he pointed out that the order makes provision for the respondent to anticipate the return day on written notice. However, such a return day or date is not specified in the court order. The result thereof is that the respondent is unable to anticipate such an unspecified return date. His only option was to set down the matter for reconsideration.

[16] Finally, he submitted that the applicant has not satisfied all the requirements of an interim interdict relief. For that reason, he has failed to make out a proper case justifying the order and relief granted.

The Applicant

[17] The applicant submitted that this court does have jurisdiction to hear the matter, for the reason that Klerksdorp, falls within the territorial jurisdiction of this court. Over and above that, he placed reliance on the inherent jurisdiction, which this court, as a division of the High Court enjoys.

[18] Regarding urgency and non-service, he argued that the matter was indeed extremely urgent. This was because in the first place, the respondent had already started with execution processes and had even advertised and set a date on which the goods are to be sold. These goods consist of computers that store confidential police information. The scheduled date for sale of these goods by public auction, is **22 February 2023**. For that reason,

the extreme urgency of the application and the bringing thereof on *ex parte* basis are justified.

[19] Finally he submitted that on the totality of the evidence presented by way of affidavit and the general circumstances surrounding the matter, applicant has satisfied and proved all requirements of an interim interdict. For those reasons a proper case has been made, justifying the granting of the interim order as Djaje DJP has done.

Legal principles and analysis

[20] Reconsideration of a court order obtained on urgent basis is provided for in Rule 6 (12) (c) of the uniform rules of this court. The rule provides as far as necessary as follows:

“(c) A person against whom an order was granted in such a person’s absence in an urgent application may by notice set down the matter, for the reconsideration of the order”

[21] It follows from the reading of this rule that the jurisdictional factors for the purpose of reconsideration of such an order are:

21.1 The granting of an order in the absence of a party affected thereby:

21.2 The order was granted by way of urgent proceedings brought in terms of Rule 6 (12).

[22] **In Oosthuizen v Mijs 2009 (6) SA 266 (W) the court held:**

“The dominant purpose of the subrule is to afford an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his absence. The rationale is to address the actual or potential prejudice because of an absence of audi alteram partem when the order was made.”

[23] I am therefore satisfied that the respondent has satisfied the two jurisdictional requirements. However, this is not the end of the enquiry. I now have to consider the order in its entirety, and also the general circumstances that led to the order being sought and granted, its implications and legal effect and consequences on both parties. I will do so by dealing with and considering submissions of the parties in this regard, and in particular, issues raised by the first respondent, as well as legal principles specifically applicable to those issues.

Jurisdiction

[24] With regard to jurisdiction, I have had regard to and considered authorities referred to and relied on by both counsel. None of those authorities suggest that a division of the High Court is absolutely and

completely barred from hearing matters brought before it, which matters can also be heard by a lower court, or put differently, in respect of which it has concurrent jurisdiction.

[25] In Victor (Supra) Reinders J in the Free State High Court referring to and relying on the Supreme Court of Appeal (“the SCA”) decision of Oosthuizen (supra) said the following:

“Obviously, in my view a High Court will exercise its inherent jurisdiction when justice requires it to do so”.

[26] It is important to emphasise that in the authorities to which I have referred, including the SCA in the Oosthuizen matter, courts emphasised and confirmed this basic principle that the High Court will always exercise its inherent power of jurisdiction whenever it is in the interest of justice to do so. This inherent power of jurisdiction is confirmed and enshrined in section 173 of the Constitution. Having said so, I must immediately point out that on the facts, the matter before me is clearly distinguishable from that of Oosthuizen in the SCA and on which reliance was placed. For this reason, I find it necessary to deal with and analyse the facts of Oosthuizen.

[27] The relevant facts of that case are by way of summary to the effect that during **2003** the appellant was involved in a motor collision from which he sustained serious bodily injuries. Acting through his attorneys, he then

issued summons out of the magistrate court, against the Road Accident Fund (“the Fund”) claiming delictual damages for injuries he sustained.

[28] In the course of investigation of the claim his attorneys during **2004** obtained detailed expert reports of specialists, that include an Orthopaedic Surgeon who estimated his future medical expenses to be approximately R133 000-00. A further report by a Maxillofacial and Oral Surgeon estimated future medical expenses at an amount in excess of R100 000-00. It was clear at that early stage that these figures obviously far exceeded the monetary jurisdiction of The Magistrate Court. Over and above that, further reports by a Radiologist, as well as an Occupational Therapist were obtained. Clearly all of these reports showed that the appellant had sustained injuries which were far more serious in nature than initially thought and also far in excess of the monetary jurisdiction of the magistrate court. Despite this appellant’s attorneys persisted and continued to litigate in the magistrate court.

[29] It was only during **June** of **2008** that the applicants, in an attempt to try and remedy this unfortunate situation, brought an application to have the matter transferred from the Magistrate court to the High Court. The application failed in the Pretoria High Court, and went on appeal to the SCA. The SCA dismissed the appeal on the basis that it will not be in the interest of Justice for the High Court to exercise its power of inherent jurisdiction, given the specific facts and circumstances of that case.

[30] In coming to this conclusion Bosielo JA relied among others on the following grounds:

- (i) By granting the order and relief sought, the court will effectively be reviving a claim which has otherwise long prescribed. This the court cannot do.

- (ii) The granting of the order will have the effect that the Fund will effectively be deprived of an opportunity to raise a special plea or defence of prescription, under circumstance where it is fully entitled and justified to raise such a defence.

- (iii) The application is all about trying to save and protect the interests, not of the litigant as such, but that of his attorneys who as he found, were to blame for the situation.

- (iv) That the appellant, Oosthuizen under these circumstances has an alternative remedy, which is to claim the balance of his delictual damages from his said attorneys based on their conduct.

He summarised his reasons as follows:

“Acceding to the appellant’s request would have a substantive effect, namely the revival of a prescribed claim... The Fund, like any other litigant, is entitled to raise a defence based on prescription. The appellant seeks to deprive the Fund of such a lawful defence in circumstances in which his attorneys have been remiss.”

[31] Despite this finding on the specific facts Bosielo JA nonetheless and still confirmed and recognised the principle that the High Court does have inherent power of jurisdiction which will be exercised whenever the interest of justice so demands. He said the following:

“[19] Courts have exercised their inherent jurisdiction when justice required them to do so. In this regard the following dictum by Botha J in Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another should be noted.

“I would sound a word of caution generally in regard to the exercise of the Court’s inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rule when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.”

[32] In this case, the interests of justice should be inferred and considered from allegations made in the founding affidavit, where the following is stated under oath:

“9.4. I am further advised that the rescission application does not have an effect of an appeal which suspends the warrant of execution against the applicant.

9.5. The attached properties are used by the Applicant in executing its constitutional obligations and service delivery for the general good of the entire populace of the country.

9.6. It will be an injustice to the Applicant if such could be disposed without the merits of the matter being ventilated in an open court of law.

9.7. The said properties are used in the everyday running of the Department of Police, meaning that should they be removed the entire police department might grind to a halt, with resultant dire consequences.”

[33] Subsequent to Oosthuizen, the SCA again considered the issue of concurrent jurisdiction in **Standard Bank of South Africa LTD v Mpongo 2021 (6) SA 403 (SCA)**. In that case, the SCA concluded and made a declaratory order to the following effect:

(1) “The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrate’s Court, if brought before it because it has concurrent jurisdiction with the Magistrate’s Court.”

(2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrate's Court because the High Court has concurrent jurisdiction.

(3) The main seat of a Division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local seat of that Division because the main seat has concurrent jurisdiction.

(4)...

[34] Taking the above into account it is important to be mindful that the first respondent resides within the Regional Division of Klerksdorp. However, the second respondent carries out his business in Pretoria, Gauteng Province. Again, the execution processes were carried out and movable goods attached at the Police Headquarters in Pretoria. The proposed or intended sale by public auction was to take place in Pretoria. All of these facts should be considered in the light of the provisions of section 62 of the Magistrates' Courts Act 32 of 1944 (as amended) which provides as follows:

"62 Power to grant or set a warrant

(1) Any court which has jurisdiction to try an action shall have jurisdiction to issue against any party thereto any form of process in execution of its judgment in such action.

(2) A court (in this subsection called a second court), other than the court which gave judgment in an action, shall have jurisdiction on good cause shown to stay any warrant of execution or arrest issued by another court against a party who is subject to the jurisdiction of the second court.

(3) *Any court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by itself, including an order under section seventy-two.*”

[35] It must be borne in mind that the relief sought by the applicant in this urgent application is merely interim. The specific interim relief sought herein is not pending in the Klerksdorp Regional Court. In other words, although the main delictual action emanates from that court, the specific issue on the pleadings for determination in this High Court namely, suspension of a warrant of execution pending rescission application, is not pending for determination before or by that Regional Court.

See: Gcaba v Minister for Safety and Security 2010 (1) SA 238 at page 75

[36] It is my view therefore that, taking into account all of the above it is in the interest of justice that this exercise its inherent power of jurisdiction and hear the matter.

URGENCY

[36] Rule 6 (12) (b) of the uniform rules of this court provides:

“In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which it avers render the matter urgent and the reason why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”

[37] In IL & B Marco Cateters (PTY)LTD v Greatermans SA Ltd and Another 1981 (4) SA 108 (C), the court held:

“When an applicant believes that his matter is one of urgency, he may himself decide what times to allow affected parties for entering appearance to defend and for delivering answering affidavits...

Applicants, by so doing, became obliged to persuade the Court that the matters were of such urgency that their non-compliance with the Rules should be condoned and that the matters should be heard forthwith... See Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) where at 782A -E this course and its implications are discussed by RUMPF J A as he then was.

In terms of Rule 27 and 6 (12), applicants thus had to show good cause why the times should be abridged and why applicants could not be afforded substantial redress at a hearing in due course.”

See: Republikeinse Publikasie (Edms) Bpk v Afrikaanse Press Publikasies (Edms) Bpk 1972 (1) SA 773 (AD)

[38] In Luna Meubel Vervaardigers (Edms) Bpk v Makin and another 1997(4) SA 135(W), the court regarding urgency said the following:

“Practitioners should carefully analyse the facts of each case to determine, for the purpose 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 day for which the matter be set down." (our underlining)

[37] Similarly, in Eniram (Pty) Ltd v New Woodhome Hotel (Pty) Ltd 1967 (2) SA 491 (E) the court held:

"I regard it as desirable that an Applicant seeking to dispense with the ordinary procedure should set out in his affidavit that he regards the matter as one of urgency, and should refer explicitly to the circumstances on which he bases this allegation and the reason why he claims that he could not be afforded substantial relief at the hearing in due course."

[39] In his founding affidavit and in support for urgency the applicant makes allegations to the following:

[39.1] Acting on instructions of the first respondent, second respondent has already attached the applicant's movables.

[39.2] The movables consist of some 837 computers. These computers are used in the day to day running of the affairs of the

applicant in the discharge of his constitutional obligations and duties.

[39.3] The 837 computers were attached at the Police Headquarters in Pretoria and contain data and information at national level, including that of all nine provinces in the country.

[39.4] Not only have these computers been attached, but a date of their sale of by public auction has already been set, being the **22 February 2023**.

[40] Applicant explains that initially the police case docket in this matter was misplaced and could not be found. The reason for this is that the Police Station at Jouberton, where the docket was always kept, went under refurbishment. As a result, a number of dockets were unfortunately misplaced. This specific docket was only found on **30 January 2023**. It was only hereafter that the circumstances surrounding the arrest of the first respondent became known to those dealing with the case and also, the *bona fide* defence that the applicant has against the first respondent in his delictual claim. This *bona fide* defence is to the effect that the respondent's arrest was pursuant to a warrant of arrest issued under circumstances of prevention of domestic violence and or breach of a protection order issued against him. The first respondent's arrest was under these circumstances, lawful.

[41] To protect and prevent the harm and or potential harm and prejudice to the applicant, the application was launched on extremely urgent basis on **31 January 2023** and heard the following day on **1 February 2023**. Applicant therefore denies that there was undue delay in the launching of the urgent application. He launched the application at the earliest available opportunity, after the docket was found.

[42] Putting aside all legal technicalities considering the substance and the totality of the evidence presented by way of affidavits, allow the facts show that the matter in indeed urgent.

Requirements for an interim interdict.

[43] The requirements for an interim interdict in a general sense, the onus of proof as well as the court's approach have been summarized by Fabricus J in **Annex Distribution (PTY)LTD and Others v Bank of Baroda 2018 (1) SA 562 (GP)** as follows:

"In my view, a party that seeks interdictory relief on an interim basis must show that it has at the very least a prima facie right, that such right will be unlawfully infringed, that the balance of convenience is in its favour, and that irreparable harm will result if an interim order is not granted in the meantime which would protect that right.

Most applications for an interdict are decided on the basis of balance of convenience, which must favour the grant of an interdict. This is an exercise that must involve weighing the harm endured by an applicant if interim relief is not granted as against the harm that a respondent will bear if the interdict is granted. A court must assess all relevant factors carefully in order to decide where the balance of convenience rests”.

Prima Facie Right

[44] Proof of a prima facie right in a nutshell entails proof of facts that establish existence of a right in substantive law. This right can be established even if it is open to some doubt.

See: **Webster v Mitchel 1948 (1) SA 1186 (W) at 1189;**

Gool v Minister of Justice 1955 (2)

[45] It is trite that a litigant against whom default judgement has been granted in absentia has a right to bring an application for rescission of such judgement. This is the position in both the lower and higher courts. It follows therefore that such a litigant has a right to apply for and or obtain stay of execution processes pending finalization of such application. This is particularly so where the applicant has demonstrated that it has prospects of success, and that grave injustice and prejudice will result if such interim relief is not granted.

Irreparable harm

[46] In my view, Irreparable harm has been established in that the 837 computers contain valuable information pertaining to police crime investigation, crime intelligence, crime prevention and all related police activities at national level. A date of sale has already been set to have the computers sold by public auction. If sold, such valuable information will be lost, and never to be regained. The harm and prejudice therefore, is extremely high. Of importance however is the fact that the police will be seriously and negatively affected in the carrying out of their constitutional obligations.

The balance of convenience

[47] The balance of convenience is measured by having regard to the prejudice a party may suffer if the order is not granted. In this case, if the order is granted, both parties will still be entitled and have an equal opportunity of having all of their issues heard and adjudicated upon in the Regional Court. This being the case, the balance of convenience favours the granting of the interim order.

No alternative relief

[48] Applicant submitted that he has no alternative relief. This is so because launching of an application for rescission of judgement itself, unlike an appeal, does not have an automatic effect of suspending execution processes. In other words, in the absence of this interim relief, nothing in law

will prevent the respondent from proceeding with execution process to finality including the sale by public auction of the 837 computers. In this context therefore, the applicant does not have an alternative relief.

Prospects of success

[49] In practice, the exercise of the court's discretion includes consideration of the applicant's prospects of success in the intended application as well as the balance of convenience. In other words, the stronger the prospects of success, the less the need for the balance to favour the applicant. Conversely, the weaker the applicant's prospects of success the greater the need for the balance of convenience to favour him.

[50] In **Olympic Passenger Services (PTY) LTD v Ramlagan 1957 (2) SA 382 (D)** the court summarised the correct approach as follows:

"Usually this will resolve itself into consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less the need for such balance to favour the applicant, the weaker prospects of success the greater the need for balance of convenience to favour him. I need hardly to add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."

See also: **Cipla Medpro (PTY)LTD v Aventis Pharma SA 2013 (4) SA 579 (SA) at paragraph 61.**

[51] In this case, respondent argued strongly that applicant does not have reasonable prospects of success in the intended rescission application. Over and above that he has been barred from pleading. On the other hand, applicant submitted that he does have reasonable prospects of success in the application for rescission of judgement. He has demonstrated that as set out hereunder.

[52] Regarding wilful default, applicant explains that at all material times during the pleading stages the application could not file a plea as the police case docket could not be located. It was only on **30 January 2023** that this docket was found. As soon as the docket was found, he launched the urgent application the following day being **31 January 2023**. He was therefore not in wilful default of the rules of this court.

[53] Applicant also submits that he has a bona fide defence to the respondent's claim in the main delictual action. The bona fide defence is fully set out in paragraph 7 of the founding affidavit as follows:

*"7.1 The first respondent was arrested by Sergeant Mpofu on the **6th of September 2017***

7.2 Sergeant Mpofu effected the arrest with a warrant of arrest duly issued by a Court of Law.

7.3 *A case of contravention of the protection order was opened by the complainant on the 4th September 2017,.. with a warrant of arrest and a protection order. The first respondent appeared in court on the day of his arrest and the matter was postponed and he was remanded in custody.”*

[54] It is clear from the founding affidavit therefore that according to the applicant, first respondent was indeed arrested by the police but that such arrest was pursuant to and in enforcement of a warrant of arrest. Applicant contends therefore that the arrest of the first respondent was lawful. The result is that the applicant and or members of the Police will not be held delictually liable for the arrest of the first respondent, if the defence raised by the applicant is successful. It is therefore in the interest of justice that the applicant be allowed an opportunity to have this issue fully ventilated and adjudicated upon, by the Regional Court.

Other considerations

[55] Respondent submitted that the appellant has been barred from filing a plea. He also raised the issue of *bona fides* in that the appellant alleges that the application has already been launched but yet, has not been served on the respondent as at date of hearing of this matter. In my view, a notice of bar does not necessarily mean an absolute bar. This can always be cured by launching of an application for the removal of the bar. However in order to

avoid any further delay, I find it important to order time limits within which such an application is to be launched.

[56] Having said that, it is important to bear in mind that in considering the interests of justice, I have to look at the interest of both parties, including those of the respondents. First respondent obtained default judgement under circumstances where the applicant failed to file a plea. The reasons why applicant could not timeously file such plea and are understandable. However, these cannot be attributed to any conduct on the part of the first respondent. Under those circumstances, an appropriate costs to order is necessary to address the situation and strike a proper balance between the interest of both parties.

Conclusion

[57] Taking into consideration the totality of the evidence and the general circumstances of this, I am of the view that the matter is indeed urgent, and that this court also, does have jurisdiction to hear and adjudicate over specific issues and aspects of the matter, brought before it.

[58] I am satisfied that for the purpose of the relief sought herein, the applicant has demonstrated that he does have reasonable prospects of success in the application for rescission of judgment. On the version presented, there is an acceptable explanation conveying both good cause

as well as the presence of a *bona fide* defence. I am aware that the final determination in this regard, will be made by the Regional Court. For this reason, I do not intent to deal with these in any detail.

Costs

[59] It is trite that in our law, two basic principle govern the award of costs. The first is that costs follow the result, with the results that the successful party generally speaking is entitled to costs. The second is that costs are primarily in the discretion of the court. This discretion is to be exercised judicially taking into account the totality of the general circumstances of the case, and the conduct of the parties.

[60] Although the police case docket was misplaced, this occurred when the applicant was still the custodiam and had possession and control thereof. None of this can be attributed to any conduct on the part of the First Respondent. The interest of justice require that such a litigant should not be left of pocket.

[61] The court order did not specify the exact date of a return day. The result is that the only option to ensure that the audi alteram partem opportunity available to the first respondent, was for him to set the matter down for reconsideration. He was entitled to be heard. The interest of justice requires that a litigant such as first respondent in this case, should not under these circumstances be left out pocket.

Order

[62] Consequently, I make the following order,

- [1] This matter is heard as one of urgency in terms of uniform Rule 6 (12) and that non-compliance by the applicant with the time limits, and service provided for in the Rule are condoned.
- [2] The warrant of execution, being annexure “A” to the founding affidavit issued against the applicant under Case No: NW/KLD/RC/496/2021 is hereby stayed pending finalisation of the application for rescission of judgement and or removal of the bar to be launched out of the Klerksdorp Regional Court.
- [3] The applicant shall launch the application(s) referred to in paragraph [2] hereof within twenty (20) days from date of this order.

[4] The applicant shall pay first respondent's agreed or taxed party and party costs of the reconsideration, at High Court scale.

S.S MAAKANE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION – MAHIKENG

Date Heard : 17 February 2023

Date of Judgment : 12 October 2023