

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)**

**COURT A QUO CASE NO: T801/2019
APPEAL CASE NO: CIV APP FB 10/2023**

In the matter between: -

HARRY'S TYRES (PTY) LTD

Applicant/Appellant/Defendant

And

SYMES N.O., MARYNA ESTELLE

First Respondent/Plaintiff

MEDUPE N.O., TSHEPO

Second Respondent/Plaintiff

MOOLLAJIE N.O., ABDURUMAN

Third Respondent/Plaintiff

(in their capacities as the joint liquidators
of Over-All Road Express (Pty) Ltd
(in liquidation))

MR A. L SHABALALA, ACTING SHERIFF

POTCHEFSTROOM

Fourth Respondent

This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 14 February 2024.

JUDGMENT

MOAGI AJ

Introduction

[1] This is an application in terms of which the Applicant sought a relief on an urgent basis in the following terms:

- "1. The rules relating to forms, service and time periods, provided for in the Uniform Rules of Court, be dispensed with and the application be enrolled and heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court.*
- 2. That execution of the court order dated 16 September 2021 stayed pending the outcome of the condonation application and appeal itself, enrolled for 16 February 2024;*
- 3. First, Second and Third Respondents be ordered to pay the costs of this application;*
- 4. Granting the Applicant such further and/or alternative relief as the above Honourable Court may deem appropriate."*

[2] This court was required to determine whether the Applicant has made out a case to stay the execution of the court order dated 16 September 2021, pending the outcome of the Applicant's application for condonation and appeal, which is set down for 16 February 2024?

Litigation history

[3] On 16 September 2021, Djaje J (*as she then was*) granted an order in favour of the First to Third Respondents (*Plaintiffs in the court a quo*), wherein, seven separate voidable dispositions, made by OverAll Express (Pty) Ltd to the Applicant (*Defendant in the court a quo*) during 2018 and 2019, were set aside in terms of section 29(1) of the Insolvency Act 24 of 1936.

[4] The Applicant applied for leave to appeal the above judgement, which leave to appeal was dismissed by Djaje J on 23 February 2022.

[5] On or about 25 March 2022, the First to Third Respondents caused the Registrar to issue a writ of execution, authorising the Fourth Respondent to attach and take into execution the movable assets of the Applicant.

[6] The Applicant petitioned the Supreme Court of Appeal ("SCA") for leave to appeal the above judgement. On or about 1 June 2022, the SCA granted the Applicant's leave to appeal to the full bench of this court.

- [7] The First to Third Respondents suspended the execution of the issued writ pending the outcome of the Applicant's appeal.
- [8] On 24 June 2022, the Applicant filed notice of appeal in terms of Rule 49(6)(a) and filed written application with the Registrar for a date of appeal within 60 days thereafter.
- [9] The Applicant, however, neglected or failed to comply with the Uniform Rule 7(2) and Rule 49(7)(a), regarding the filing of power of attorney and appeal records.
- [10] On 22 November 2022, the First to Third Respondents launched an application before this court to declare that, the Applicant's appeal had lapsed in terms of the Uniform Rule 49 (6)(a) and Rule 49(7)(d), as the parties were not *ad idem* in respect of the interpretation and implication of the deemed lapsed appeal.
- [11] The Applicant served and filed opposing affidavit together with application for condonation for non-compliance with Rule 49(6)(a) and Rule 49(7).
- [12] On 15 September 2023, Reid J granted an order in the following terms:

"i. The respondent's appeal to the full court has become lapsed ex lege in terms of the Uniform Rule 49(6)(a);

- ii. *The respondent's application for condonation on the reinstatement of the appeal in terms of Rule 49(6) and Rule 47(7) is to be considered by the court of appeal constituted by the full court;*
- iii. *The Applicants are ordered to pay the costs of this application."*

Applicant's case

[13] It was contended on behalf of the Applicant that, on or about 31 October 2023, the First to Third Respondents instructed the Fourth Respondent to proceed to remove the attached movable property, despite being aware that the Applicant disputed the merits of the First to Third Respondents' claim which was the subject of the application for condonation and appeal set down for hearing on 16 February 2024.

[14] It is the above instruction to the Fourth Respondent, which the Applicant sought to stay pending the outcome of the Applicant's application for condonation and appeal.

[15] It was contended that, the Applicant had a right to pursue its appeal and will be severely prejudiced if its trade assets were remove prior to the hearing of the application for condonation. The attached assets will be subjected to forced sale.

[16] The balance of convenience favoured the Applicant as the First to Third Respondents, suspended the execution of the court order since

November 2022, and there was no cogent reason why the First to Third Respondents cannot wait for the determination of the application for condonation and appeal set down for 16 February 2024. The Applicant had no other remedy available, save for approaching the court on an urgent basis, as the threat of execution and removal of assets was real.

First to Third Respondents' case

[17] It was contended on behalf of the First to Third Respondents that, the Applicant's perceived urgency was self-created as it was aware that the Fourth Respondent had attached its movable assets since November 2022 and did not approach this court to stay the execution process. The Applicant had acquiesced to the execution, thereby losing its right to stay the execution.

[18] Due to the Applicant's appeal having lapsed, the Applicant's application for condonation and reinstatement of Appeal did not suspend the execution of the judgement of 16 September 2021, as such, the Applicant enjoys no right to a stay of execution, not even a *prima facie* right open to some doubt, relying on the case of *Sabena Belgian World Airlines v Ver Elst and Another 1980 (2) SA 328 (W)* and *Panayiotou v Shoprite Checkers (Pty) Ltd and Others 2016 (3) SA 110 (GJ)* at paras [13] to [15].

[19] The Applicant will not suffer any harm if the attached movables are removed and sold in execution, as the Applicant was able to continue

to trade despite the attached movable assets since 8 November 2022 to date.

[20] The First to Third Respondents are in law entitled to execute the court order of 16 September 2021, due to the Applicant's lapsed appeal. The stay of execution of the issued writ will prejudice the First to Third Respondents' right as successful judgment creditor to execute the order.

[21] The balance of convenience favoured the First to Third Respondents and the Applicant has an alternative remedy and may claim damages against its attorneys of record.

Applicable legal principle

[22] Rule 45A of the Uniform Rules of Court provides that, 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 Superior Court Act, Act 10 of 2013.

[23] The court has, apart from the provisions of the above rule, a common-law inherent discretion to order a stay of execution. As a general rule, the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done [see *Erasmus: Superior Court Practice 20, 2022, D1-604*].

[24] The general principles for the granting of a stay in execution were summarised as follows in Gois t/a Shakespeare's Pub v Van Zyl, 2011 (1) SA 148 (LC) at 155H–156B:

“

- (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 insistence of the respondent(s); and*
 - (ii) *irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.*
- (d) *Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e. where the underlying causa is the subject matter of an ongoing dispute between the parties.*
- (e) *The court is not concerned with the merits of the underlying dispute —the sole enquiry is simply whether the causa is in dispute.* (emphasis underlined).

Analysis

- [25] In my view, the submission made on behalf of the First to Third Respondents that, the Applicant's urgency was self-created as the execution process commenced as far back as 8 November 2022, does not take into consideration that, the implementation of the judgment of 16 September 2021 was suspended in terms of section 18 (1) of the Superior Court Act Act, 2013 (**Act No. 10 of 2013**) until October 2022.
- [26] The appeal was deemed to have lapsed during October 2022, when the Applicant failed to comply with Rule 7 and Rule 49(7)(d).
- [27] On 22 November 2022, the First to Third Respondents launched an application to declare the Applicant's appeal to have lapsed, in terms of Rule 49(7)(d) (see *Quantibuild (Proprietary) Limited v Ngaka Modiri Molema District Municipality, case no.: (3352/2019) [2021] ZANWHC 39 (2 March 2021) Civ App FB12/2019*).
- [28] On the other hand, the Applicant filed a letter of authority in terms of Rule 7 with an application for condonation for failure to file the power of attorney and appeal record timeously. The record of appeal was filed on 21 June 2023.
- [29] On 15 September 2023, Reid J ordered that the Applicant's application for condonation on the reinstatement of the appeal in

terms of Rule 49(6) and Rule 47 (7) is to be considered by the court of appeal constituted by the full court.

[30] It is not in dispute that, the Applicant's application for condonation and and the appeal, does not suspend the execution of the judgement of 16 September 2021, however one must consider the litigation history of this matter and that the underlying *causa* may ultimately be removed at the hearing of application for condonation and appeal on 16 February 2024.

[31] In my view, should a stay of execution not be granted at this stage, it would lead to substantial prejudice for the Applicant as it could be without any satisfactory remedy.

[32] Regarding the balance of convenience, it is indeed correct that the the First to third Respondents have a right to finalisation of this matter. It is however my view that, the Applicant may be seriously prejudiced should a stay of execution of the court order not be granted. Thus, if the Applicant succeeds in having the order against it expunged, the prejudice would be far worse than the inconvenience the First to Third Respondents are experiencing pending the hearing of application for condonation and appeal.

[33] In the result, I am of the view that, justice would be best served if the writ of execution is stayed pending the outcome of the Applicant's application for condonation and appeal which is set down for 16 February 2024.

Urgency

[34] It was contended on behalf of the First to Third Respondents that this matter ought to be struck off the roll for lack of urgency as the Applicant may be afforded substantial redress at a hearing in due course. The Applicant may sue its attorney of record for damages.

[9] In considering the relief sought by the Applicant and the facts which ignited this application, I am persuaded that the Applicant has made out a case for urgency as contemplated in Rule (12) (b) of the Uniform Rules of Court.

Authority to institute proceedings

[35] Although the above point was not raised substantively *in limine*, the First to Third Respondents in answering to the averments made by the Applicant in the founding affidavit, disputed that the deponent to the Applicant's founding affidavit had the requisite authority to institute this application on behalf of the Applicant.

[36] Counsel for the Applicant in response, contended that the deponent is the managing director of the Applicant. The parties have been involved in protracted litigation proceedings. The deponent is the relevant individual to institute these proceedings as he was authorised

throughout the litigation proceedings of this matter to depose to the court documents filed before this court.

[37] In contention, the Applicant's Counsel argued that the First to Third Respondents failed to challenge the authority to institute legal proceedings by serving a notice in terms of Rule 7 of the Uniform Rules of Court and reference was made to *Eskom v Soweto City Council* 1992 (2) SA 703 (W).

[38] In the matter of **Ganes and Another v Telecom Namibia Ltd 2004(3) SA 615 (SCA)** the following was stated:

"... In determining the question whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings and the prosecution thereof that must be authorised. The remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is not to challenge the authority in the answering affidavit but instead to make use of Rule 7(1) of the Uniform Rules of Court

The debtors did not avail themselves of the procedure provided for in Rule 7(1), and it is thus not open to them to challenge the authority of the deponent to the Applicant's founding affidavit either in regard to deposing to affidavits or in regard to instituting the application. During argument this line of attack on the deponent's personal knowledge is without merit.

In this matter, the personal knowledge of the deponent to the Applicant's founding affidavit is not relevant; what is relevant is whether or not the Applicant has made out a case on the papers and whether or not the Debtors have disclosed a defense to the relief sought by the Applicant".

[39] I am satisfied based on the papers before this court that the deponent to the Applicant's affidavit had the requisite authority to launch this proceedings.

Costs

[40] The general rule is that costs follow the cause, however, considering the history of this matter, I determine that each party should pay its own costs.

Order

[41] In the result, I grant following order:

1. The rules relating to forms, service and time periods, provided for in the Uniform Rules Court, be dispensed with and the application be enrolled and heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court.

2. That execution of the court order dated 16 September 2021 is stayed pending the outcome of the condonation application and appeal itself, enrolled for 16 February 2024.
3. Each party to pay its own costs.

M S MOAGI
ACTING JUDGE OF THE HIGH COURT
NORTH WEST HIGH COURT

APPEARANCES

For the Applicant:	Adv A M Heystek SC
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Date Heard:	03 November 2023
Date of Judgment:	14 February 2024