



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 867/2022

In the matter between:

**MEC FOR THE DEPARTMENT OF
PUBLIC WORKS**

FIRST APPELLANT

**MEC FOR THE DEPARTMENT
OF HEALTH**

SECOND APPELLANT

MEC FOR FINANCE, EASTERN CAPE

THIRD APPELLANT

and

IKAMVA ARCHITECTS CC

FIRST RESPONDENT

THE SHERIFF OF THE HIGH COURT

KING WILLIAM'S TOWN

SECOND RESPONDENT

THE SHERIFF OF THE HIGH COURT

DISTRICT OF ZWELITSHA, MDANTSANE

AND STUTTERHEIM

THIRD RESPONDENT

Neutral citation: *MEC for the Department of Public Works & Others v
Ikamva Architects CC and Others* (867/2022) [2024]
ZASCA 95 (13 June 2024).

Coram: DAMBUZA, MBATHA and MABINDLA-BOQWANA
JJA and WINDELL and UNTERHALTER AJJA

Heard: 25 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 13 June 2024.

Summary: Civil Procedure – on appeal, the appellants were not entitled to an order they did not seek in the court of first instance – attachment of a bank account held by an organ of State – order of this Court on appeal would be of no practical effect – issues raised were moot – costs order of the court *a quo* reversed on account of serious injustice suffered by the first respondent.

ORDER

On appeal from: Eastern Cape Division of the High Court, Bhisho (Van Zyl DJP, Tokota and Govindjee JJ sitting as court of first instance):

1. The appeal is dismissed.
2. The appellants are ordered to pay the first respondent's costs of the appeal, including the costs of two counsel, jointly and severally, the one paying the other (s) to be absolved.
3. Save to the extent set out in paragraphs 4 and 5 below the cross-appeal is dismissed.
4. Each party is ordered to pay its own costs in relation to the cross-appeal.
5. The order of the full court is amended to read as follows:
 - '1. The intervening party is given leave to intervene in the matter as the third applicant.
 2. The third appellant is to pay the first respondent's costs of the application for intervention, including the costs of two counsel.
 3. The further execution of the writs of attachment dated 11 March 2016, including the removal of the attached movables, is stayed pending the final determination of the application for leave to appeal the order of Bheshe J dated 16 February 2021 (case number 2610/2019), including any consequent appeals.
 4. The appellants are to pay the first respondent's costs of the application, jointly and severally, including the costs occasioned by the Rule 30 applications dated 22 June 2021 and 30 July 2021, and the reserved costs of the hearing of the application on 5 August 2021, such costs to include the costs of two counsel where so employed.'

JUDGMENT

Dambuza JA (Mbatha and Mabindla-Boqwana JJA and Windell and Unterhalter AJJA concurring)

Introduction

[1] The three appellants are Members of the Executive Council of the Eastern Cape Departments of Public Works, Health and Finance. They appeal against parts of the judgment of the Eastern Cape Division of the High Court, Bhisho (Van Zyl DJP, Tokota and Govindjee JJ, the full court). That court granted the third appellant, Member of Executive Council for the Department of Finance, Eastern Cape (MEC for Finance), leave to intervene in an application brought by the first appellant, the Member of the Executive Council for the Department of Public Works (MEC for Public Works), and the second appellant, the Member of Executive Council for the Department of Health (MEC for Health) in the Eastern Division of the High Court, Bhisho (high court). It then granted an order staying execution of two warrants of attachment that were issued at the instance of the first respondent, Ikamva Architects CC (Ikamva) against the Departments of Public Works and Health. The order staying execution of the warrants was granted provisionally, pending finalisation of an application for leave to appeal that had been brought by the two appellants against an order granted by Bheshe J of the same Division.

[2] In the same order the full court granted an order of costs against Ikamva, in respect of two applications that had been brought by it against the first and second appellants (the appellants) in terms in terms of Rule 30 of the Uniform Rules of Court. It also granted a punitive costs order against Ikamva in relation

to a supplementary affidavit that it had filed.¹ Ikamva cross-appeals against the orders granted by the full court. Leave to appeal and cross appeal was granted by the full court.

The facts

[3] The order of the full court was preceded by protracted litigation which was instituted by Ikamva against the appellants. The background is the following. During 2003 the Department of Public Works offered to appoint Ikamva as ‘Consulting Architects/Principal Agents’ for a construction project described as ‘Frere Hospital (East London): Maintenance (Various): Masterplan, Upgrade’. A written agreement was concluded on 15 September 2003. During March 2007, the Department of Public Works appointed Coega Development Corporation (Coega) as the implementing agent for the same project. Coega appointed a different firm of architects to do the work that Ikamva had been contracted to do. On 9 July 2007 the Department of Public Works wrote to Ikamva advising that it would not be honouring its obligations under the contract. Ikamva accepted the repudiation of the contract and instituted an action against the two appellants, claiming an amount of R41 031 279.48 as damages for breach of contract.

[4] In the action for damages, the Departments pleaded that the consultancy contract, in terms of which Ikamva was appointed, was invalid because it was concluded contrary to the provisions of the Constitution, the Preferential

¹ The order of the full court reads thus:

‘1The intervening party is given leave to intervene on the matter as third applicant.

2 The further execution of the writs of attachment dated 11 March 2016, including the removal of the attached movables, is stayed pending the final determination of application for leave to appeal the court order of Beshe J dated 16 February 2021 (case number 2610/2019), including any consequent appeals.

3 The first respondent is to pay the costs of intervention, the costs occasioned by the Rule 30 applications dated 22 June 2021 and 30 July 2021 and the reserved costs of the hearing of the application on 5 August 2021, such costs to include the costs of two counsel where so employed, but excluding any costs associated with the presentation of the ‘Majiki J bundle’ and the ‘SCA bundle’ to the court.

4 The costs of the first respondent’s supplementary and confirmatory affidavits dated 21 July 2021 and the applicants’ answering affidavit dated 28 July 2021 are to be paid by the first respondent on the attorney and client scale’.

Procurement Policy Framework Act 2000 (PPPF), and the Regulations promulgated in terms of the PPPF. During the course of the litigation, Ikamva called upon the Departments to make discovery in terms of Rule 35(1). When they failed to do so, Ikamva obtained an order compelling them to make discovery within 10 days, on pain of having their defence struck out.

[5] In compliance with that court order, the appellants made discovery. Ikamva was not satisfied and obtained a court order directing them to make further and better discovery of listed documents, in terms of Rule 35(3). Further and better discovery was not made, leading to Ikamva approaching the high court, yet again, to obtain an order compelling further and better discovery within 10 days, failing which the defence filed by the appellants would be struck out and judgment would be sought ‘. . . based on the same papers, amplified if necessary’. (Majiki AJ order, granted on 10 November 2011).

[6] When the appellants failed to comply with the order granted by Majiki AJ, Ikamva brought an application for default judgment before Dukada J. An issue arose as to whether the order granted by Majiki AJ meant that the defence tendered by the appellants was automatically struck out once they failed to comply with the order of Majiki AJ or whether Ikamva had to first approach the court to have the defence struck out. In the relevant part, the order granted by Majiki AJ was framed as follows:

‘The Defendants [are] granted a period of ten (10) days from the date of service hereof to reply to the Plaintiff’s Notice in terms of Rule 35(3) dated 22 July 2011, failing which the Defendant’s defence will be struck out and the plaintiff will apply for judgment against the Defendants based on the same papers, amplified if necessary.’

Dukada J refused to grant default judgment, insisting that Ikamva should first bring an application for an order that the defence raised by the Departments be struck out.²

[7] Ikamva's appeal to the full court against Dukada J's refusal order was successful. The full court (in a judgment written by Plasket J) noted that Majiki AJ's order was drafted differently from other orders of its type, in that it did not provide that in the event of non-compliance by the appellants, Ikamva could apply, on the same papers, amplified if necessary, for their defence to be struck out. The court concluded that the terms of the order indicated that an order having a different effect from the usual order was intended. It held that the order granted by Majiki AJ meant that 'if the defendants have not complied within ten days of the date of service of the order on them, their "defence will be struck out" and then 'the Plaintiff will apply for judgment against the Defendants, based on the same papers, amplified if necessary'. The full court found the conduct of the appellants, in failing to make discovery, to have been 'startlingly contumacious' in that they did not appeal the order granted by Majiki AJ, but simply failed to comply with it. It held that Ikamva was entitled to set the matter down for default judgment. However, the appellants could still comply with the order compelling discovery and then approach the court to have their defence reinstated.³

[8] The Departments merely brought an application for reinstatement of their defence without complying with the order of discovery. However, they withdrew the application for reinstatement on the day that it was due to be heard in court. On 1 December 2015, Ikamva obtained default judgment against the

² *Ikamva Architect CC v MEC for Department of Public works and Another ECD (Bhisho)* Case No 596/2008 (unreported decision handed down on 9 May 2013).

³ *Ikamva Architects CC v MEC for the Department of Public Works and Another* 2014 JDR 1700(ECG).

appellants in the amount of R41 031 279 48 (the Malusi AJ order).⁴ The appellants' application for leave to appeal the default judgment was refused by Malusi AJ.

[9] On 11 March 2016 a warrant of execution against property was issued in relation to the judgment debt, at the instance of Ikamva. The appellants brought an application for stay of execution of the warrant, pending the finalisation of an application for rescission of the order granted by Malusi AJ. The application for rescission of the default judgment was dismissed (Hartle J's order).⁵ In the judgment refusing rescission, Hartle J found that the appellants had litigated recklessly and ignored the prejudice they had caused to Ikamva and to the public purse. An appeal before a full court, against the order refusing rescission of judgment failed. This Court and the Constitutional Court refused to grant leave to appeal.

[10] Subsequent to the dismissal of the rescission application, Ikamva took steps to execute in respect of the judgment debt. This led to an application by the appellants for a stay of further execution of the writ. An order staying execution of the warrant was granted by Rugunanan J by agreement between the parties. The order included a waiver by the appellants, of the right to raise the applicability of the *in duplum* rule on the interest payable on the judgment debt.

[11] During September 2019, the appellants returned to the high court with a self-review application seeking an order that Ikamva's appointment as a consultant for the Frere Hospital project, and the contract concluded pursuant to that appointment, be reviewed and set aside. In opposing the self-review

⁴ *Ikamva Architects CC v MEC for the Department of Public Works and Another* ECD (Bhisho) Case No 596/2008.

⁵ *MEC for the Department of Public Works and Another v Ikamva Architects* ECD (Bhisho) Case No 596/2008 dated 19 September 2017. Majiki and Malusi AJJ have since been appointed as judges of the Eastern Cape Division of the High Court.

application, Ikamva contended, amongst other things, that the Departments should be non-suited because of the delay in bringing the self-review application. Ikamva also maintained that the issue of the validity of the consultancy contract was rendered *res judicata* by the default judgment granted by Hartle J.

[12] The high court agreed with Ikamva's contentions and dismissed the self-review application (Bheshe J's order). Ikamva again proceeded to take further steps to execute the writ. This led to attachment of all the office furniture, equipment and vehicles of the appellants. The Sheriff rendered inventories framed in similar terms, that the attached goods were:

'All the office furniture and related office equipment and vehicles of the Department of Public Works Health, Eastern Cape, Qhasana [Dukumbana] Building, Bhisho', to the value of R42 million.

[13] The appellants approached the court, on an urgent basis, seeking a stay of execution of the writ. That application was struck from the roll for lack of urgency (Lowe J's order).⁶ On the same day, Ikamva issued another warrant of attachment, dated 10 March 2021, specifically directing the Sheriff to execute against a bank account held by the Department of Health with the Standard Bank of South Africa. That writ was duly executed, leading to attachment of the right title and interest to moneys held by the Department of Health with the Standard Bank. The Sheriff rendered a notice of attachment which indicated that the right, title and interest of the MEC for Health, in respect of the Standard Bank account had been attached for the amount of the judgment debt and costs.

[14] The appellants approached the high court once more, as a matter of extreme urgency, seeking an order staying further execution of the two notices

⁶ *MEC for Public Works and Another v Ikamva Architects CC* ECD (Bhisho) Case No 596/2008; an unreported decision dated 19 June 2015.

of attachment dated March 2016, and that the attachment of the bank account of the Department of Health, be set aside or stayed, pending determination of an application for leave to appeal, the dismissal of the self-review application, and any consequential appeals.

[15] Following the first postponement of the urgent application, the court issued a directive, inviting the parties to make submissions on whether Ikamva was entitled to “freeze” the funds in the bank account held by the Department of Health without a court order. The full court (court *a quo*) was constituted to hear this application because of the attachment of a bank account held by a State organ.

[16] Prior to hearing the application, the full court invited further submissions from the parties on whether: (1) Majiki AJ had jurisdiction to strike out the first and second applicants’ defence, and (2) if she did not have jurisdiction, and her order was a nullity, whether the order of Malusi AJ (default judgment) was valid.

At this stage the MEC of Finance entered the fray, seeking leave to intervene and to also challenge the validity of the warrants of execution issued pursuant to the order of Malusi AJ. The MEC for Finance joined the appellants in contending that the attachment of State funds in execution of a money judgment was impermissible under the State Liability Act 20 of 1957.

[17] Ikamva filed two notices in terms of Rule 30, objecting to the directives issued by the court. In a related affidavit, Ikamva’s legal representatives expressed concern about the involvement of the Judge President of the Division in the case management of this application as he had signed some of the pleadings and represented the appellants in the application prior to his appointment to the bench. They asserted that the issues raised in the directives

were never raised by the parties. They pleaded irremediable prejudice as a result of the raising of further issues by the court. They suggested that the raising of the new issues reinforced a perception that the court had “descended into the arena”, and they requested that the directives be withdrawn. It is these contentions by Ikamva that led to the punitive costs order against it.

[18] In granting the order staying further execution of the attachment notices, the full court found that the order of Majiki AJ was erroneous as provided under Rule 42(1)(a) because the court followed a one-stage, instead of a two-stage procedure, in striking out the Defendants’ defence. However the order was not invalid, so said the full court. It was binding because Majiki AJ had the necessary power under Rule 35(7) to grant the order striking out the appellants’ defence. Consequently, Malusi AJ was duly empowered to grant judgment.

[19] In addition, the full court found that the attachment of incorporeal movable property of government departments, more particularly in relation to this appeal, the attachment of the right to the funds in the bank account held by the Department of Health with the Standard Bank, was in accordance with the law and the Constitution. The full court, however, found that the second warrant of execution was over-specific in requiring the sheriff to attach, specifically, the funds held in the bank account of the Department of Health. It found that, contrary to Rule 45(1), the wording of the second writ did not correspond substantially with Form 18 of the First Schedule to the Uniform Rules of Court. This resulted in the Sheriff being unable to comply with the steps prescribed under Rule 45, such as, demanding that the writ be satisfied, and affording a representative of the relevant Department opportunity to point out sufficient movable property, other than the bank account, to satisfy the debt.

[20] In their application to this Court for leave to appeal against the dismissal of the self-review application,⁷ the appellants contended that the findings of the full court, on nullity of Majiki J's order and its interpretation of the provisions of the State Liability Act were *obiter*. That application for leave to appeal was referred for hearing before an open court in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. This Court, in a unanimous judgment (penned by Gorven JA) dismissed the application.⁸ Significantly, amongst the issues considered in that application was that in the self-review application the appellants had sought, as a just and equitable relief under s 172 of the Constitution, orders reviewing the decisions to appoint Ikamva as a professional consultant, together with orders that:

‘3. The contract concluded between the Department of Public Works and Ikamva Architects CC in September 2003 . . . is declared void *ab initio*;

4.[Ikamva was] entitled to no further payments under the contract referred to in paragraph 3 above and in terms of the default and in terms of the default order of Malusi AJ’.

[21] In dismissing the application for leave to appeal, Gorven JA, considered that, during argument, the appellants had accepted that the application for rescission had been definitely disposed of. Consequently, ‘any contention that the default judgment was anything other than competent, valid and binding was expressly abandoned [by the Departments]’.⁹

[22] Gorven JA further referred to the appellants’ reply in the self-review application, to the effect they were resisting payment of the judgment debt by way of self- review. They sought to render the default judgment nugatory. In the circumstances there was no legal basis for the order sought by the Departments,

⁷ See para 14 above.

⁸ *MEC for Department of Public Works, Eastern Cape and Another v Ikamva Architects CC* (544/2021) [2022] ZASCA 184 (20 December 2022).

⁹ *MEC for Department of Public Works, Eastern Cape and Another v Ikamva Architects CC* [2022] ZASCA 184 para 9.

of permanently preventing execution of a valid and binding order, which was not susceptible of being set aside.

[23] Gorven JA also highlighted that the source of the judgment debt was the judgment or order of Malusi AJ, rather than the decisions sought to be reviewed. He emphasised that the judgment of Malusi AJ was not susceptible to being rescinded or set aside. Consequently, the effect of the relief sought by the appellants in prayer 4 of the Notice of Motion, amounted to permanent prevention of execution of a valid and binding judgment, which had not been abandoned or set aside. The Court held that an order preventing enforcement of an order of another court could not be just and equitable. Furthermore, the novel order sought by the appellants in prayer 4 of the Notice of Motion was an attempt to enlist the assistance of the court in their efforts to undermine the “dignity and authority of the courts, by rendering nugatory a perfectly valid, binding, enforceable, and extant judgment’. That could not be countenanced, the Court held.¹⁰

Discussion

[24] In this appeal the appellants advanced the same arguments that they made in the full court (court *a quo*) in relation to the directives issued by the court. These include the distinction drawn by the full court in the judgment by Plasket J between the power that Majiki AJ had to consider the application that served before her in terms of Rule 35 (7) and her granting of the ‘impermissible’ order striking out their defence. They contended that the full court erred in not rescinding the order of Majiki AJ as provided in Rule 42(1)(a). They persist in the argument they made in the full court that, because the order granted by Majiki AJ was a nullity, the consequential order granted by Malusi AJ, and further court processes resulting from the incompetent order, were all a nullity.

¹⁰ Ibid para 35.

They denied having accepted the finality of the orders granted by Majiki AJ and Malusi AJ and argued that they demonstrated their non-acquiescence to these orders by repeatedly resisting the application for default judgment and the execution of the order. They maintained that they could not consent to invalid orders.

[25] I need only refer to the findings of this Court (per Gorven JA) in paragraphs 22 to 23 above, in terms which this Court found that there were no prospects of success to the appellants' attempts to nullify the orders of Majiki and Malusi AJJ. The contentions made by the appellants in this appeal were conclusively considered by this Court in that application. There is no reason to depart from the findings made in that instance.

[26] At the start of the hearing of this appeal, counsel for the appellants was asked to make submissions on whether this Court can grant an order that was never sought in the full court. For clarity, in their urgent application, brought on the basis of extreme urgency, to set aside or stay execution of the writs, the applicants sought an order in the following terms:

‘2 The following writs and attachments are declared invalid and set aside:

2.1 the second respondent's [Sheriff's] notice of attachment dated 11 March 2016 of “all the office furniture and related office equipment and vehicles of the Department of Health, Eastern Cape”, which vehicles and movables have not been properly identified and inventoried pursuant to this attachment;

2.2 the second respondent's [Sheriff's] notice of attachment dated 11 March 2016 issued by the sheriff of “all the office furniture and related office equipment and vehicles of the Department of Public Works, Eastern Cape” which vehicles and movables have not been properly identified and inventoried pursuant to this attachment;

2.3 the writ of attachment dated 10 March 2021 issued by the first respondent,

2.4 the second respondent's attachment of the Department of Health's Standard Bank account number 273021567 on 11 March 2021,

Alternatively, to the relief set out in prayer 2

3 The further execution of the writs of attachment dated 11 March 2016 including the removal of the attached movables is stayed and the attachment of the Department of Health's Standard Bank account number 273021567 on 11 March 2021 by the second respondent is uplifted, pending the final determination of the application for leave to appeal the whole judgment and order of her Ladyship Bheshe J dated and handed down on 16 February 2021 in case number 2610/2019 including any consequent appeals.'

[27] The full court granted an order in terms of the appellants' alternative prayer. In their notice of appeal to this Court, the appellants (including the MEC of Finance), seek an order that:

- '1. the orders of Majiki AJ of 11 November 2011 and Malusi AJ of 1 December 2015, are declared to be nullities and as such, may be disregarded as having no binding effect in law;
2. the Third Respondent's (Sheriff) notices of attachment dated 11 March 2016, are declared to be unlawful and of no legal force and effect;
3. an attachment of the banking account of either the First or the Second Appellant or any organ of state for that matter, is unconstitutional and/unlawful and as such, invalid.'

[28] The order sought as per the Notice of Appeal was never sought in the high court. Counsel for the applicant acknowledged the 'novelty' of their appeal - in which the order sought on appeal was never sought in the court *a quo*. He explained that this appeal has its roots in the issues raised in the full court's directives. If that court had granted an order of nullity, that would have put an end to this case, including the self-review, he explained. He urged this Court to 'advance the frontiers of the law' by entertaining the appeal, and granting the order sought in the notice of appeal, even if that was not the order sought by the

appellants in the high court. Unsurprisingly, when pressed to provide authority for a court's power to grant an order which was never sought, he could not recall any. This is because, generally, courts do not have the power to grant orders that were never sought by the parties.¹¹

[29] Regarding the directives of the full court it is so that a court may, on its own, raise a point of law that is apparent on the papers. This is necessary where the common approach of the parties, on the papers, is premised on a wrong approach of what the law is, and the decision of the court would therefore be founded on an incorrect application of the law.¹² That was not the case with the application for a stay of the writs. The appellants sought to set aside or to stay execution of the warrants. They acknowledged the validity of the judgment debt. However, they explained that after consulting a fresh team of legal representatives and reconsidering 'the entire matter', they resolved to launch the self-review application.

[30] The case made by the appellants in their application to set aside the writs was based on a contention that the writs were 'not preceded by compliance with ss 3(4) to (6) of the State Liability Act. In the alternative they sought 'upliftment of the attachment until the final determination of the leave to appeal [the] application before Bheshe J, including any consequent appeals'. The full court (Plasket J) had considered comprehensively the issues raised in the directives. It seems to me that if the full court (court *a quo*) had to consider the question of nullity of the order of Majiki J, it had to take into account the conclusions reached in the judgment written by Plasket J. There is no indication in its judgment that it did.

¹¹ *The National Commissioner of Police and Another v Gun Owners of South Africa* [2020] ZASCA 88; [2020] All SA 1 (SCA) 2020 (6) SA 69 (SCA); 2021 SACR 44 (SCA) at 27-29.

¹² *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 (3) SA 96 (SCA).

[31] Furthermore, it is trite law that an appeal is directed at undoing the result of a judgment. For that reason, an appeal can only lie against a substantive order of court and not against the reasons given for the order or findings made in the judgment. This Court has repeatedly held as much.¹³ In *Tecmed Africa (Pty) Ltd v Minister of Health and another*¹⁴ this Court explained the principle as follows: ‘First, appeals do not lie against the reasons for the judgment but against the substantive order of a lower court. Thus, whether or not a court of Appeal agrees with a lower court’s reasoning would be of no consequence if the result would remain the same’.

[32] Apart from having no power to grant an order that was not sought in the high court, this Court has no jurisdiction to consider an appeal which is primarily directed only at the reasons. This is particularly so in this case, in which the contested reasons did not form the basis of the order granted by the court *a quo*.

[33] In any event, the order granted by the full court in August 2021, including the order granting the intervention by the Minister of Finance was of no practical effect. So would any order that this Court would make on both the appeal and the cross-appeal. By 3 May 2021 the attached Standard Bank account had been closed by the Department of Health. It was operating a ‘Paymaster General (PMG) bank account with ABSA Bank. This fact was not in dispute before us. The details appear in an affidavit deposed to by the Head of the Eastern Cape Treasury Department, Mr Daluhlanga Majeke, which was filed in *Member of the Executive Council for Finance, Economic Development,*

¹³ *Manana v King Sabata Dalindyebo Municipality* All SA [2011] 3 (SCA 140); *S A Reserve Bank v Khumalo and Another* All SA 26 (SCA); *Atholl Developments (Pty) Limited v Valuation Appeal Board for the City of Johannesburg* JOL 33081 (SCA) [2012] 4 All SA 149 (SCA) para 1. *The Law of South Africa*, vol 4, 3rd ed, para 785. In *Lebea v Menye and Another* 2023 (3) BCLR 257 (CC) the Constitutional Court refused leave to intervene to an applicant who sought to have set aside adverse credibility finding that had been made against him; See also; Uniform Court Rule 49(4)(a).

¹⁴ *Tecmed Africa v Minister of Health and Another* (495/11) [2012] ZASCA 64; [2012]4 All SA 149 (SCA).

*Environmental Affairs and Tourism (Eastern Cape) and Others v The Legal Practice Council and Others*¹⁵(LPC).

[34] *LPC* was a test case, as agreed between the parties in that matter, to determine the lawfulness of attachment of moneys in bank accounts held by government departments. In that case too, the MEC for Finance had challenged the attachment of the rights title and interest to the credit balance in the Department's ABSA Bank account. He advanced the same basis in that case, as in this one, arguing that the Paymaster General account in which the funds of the Department of Health were held, was a subsidiary of the Provincial Revenue Fund account, from which payments could only be made in accordance with s 226(2) of the Constitution and s 22 of the PFMA.¹⁶ The full court, in a judgment penned by Eksteen J, held that neither the Constitution nor the PFMA made reference to the Paymaster General account in which the attached funds were held. It found that moneys allocated to the various government departments in terms of the Provincial Appropriation Act 8 of 2023, were withdrawn from the Provincial Revenue Fund account and paid over to the account of the relevant department under s 226(2)(a) of the Constitution. The Paymaster General account is therefore not an account protected under s 226 of the Constitution. This finding is consistent with the position expressed by the Constitutional Court in *Provincial Government: North West Province v Tsoga Developers and Others (Tsoga)*.¹⁷

¹⁵ *Member of the Executive Council for Finance, Economic Development, Environmental Affairs and Tourism (Eastern Cape) and Others: The Legal Practice Council and Others* Case No 2091/2021. This application was dismissed by the high court on 21 June 2022.

¹⁶ Section 226 of the Constitution provides that:

'1 There is a Provincial Revenue Fund for each Province into which all moneys received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.

2 Money may be drawn from a Provincial Revenue Fund only

a in terms of an appropriation by a provincial Act, or

b as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act'.

¹⁷ *Provincial Government: North West Province v Tsoga Developers CC and Others* [2016] ZACC 9; 2016 (5) BCLR 687 (CC).

[35] As in this case, the argument in *Tsoga* was that attachment of the right to funds held in a departmental account is impermissible, being contrary to s 226(2) of the Constitution. Although the Court did not make a firm finding in this regard, at para 23, Madlanga J, writing for a unanimous court, said:

‘[23] Not unmindful of the provisions of sections 7 and 21 of the PFMA and regulation 15.2, the question arises whether – once monies are sitting in an account held by a government department – they have not, in fact, been appropriated to that department as envisaged in s 226(a). If they have been, can their attachment amount to a contravention of this section? If – in accordance with section 226(2) – “appropriate” includes the transfer of monies from a Provincial Revenue Fund to an account held by a department, can that understanding be trumped by the provisions of sections 7 and 21 of the PFMA and Regulation 15.2?’

[24] Section 3(3)(b)(ii) of the State Liability Act makes specific reference to funds appropriated to a department. The section provides that payment of a judgment debt by the accounting officer of a department “must be charged against the *appropriated budget of the department concerned*”. If payment is expected to be from the appropriated budget, how is it that funds held under that same budget are somehow no longer “appropriated” and thus no longer available for attachment, as the applicants appear to contend?’ (emphasis in the original text)

[36] Mr Majeke who deposed to the founding affidavit in *LPC* deposed to the founding affidavit on behalf of the MEC for Finance in this case. I therefore agree with the submission on behalf of Ikamva that, when prosecuting the application for leave to intervene and this appeal, all the appellants must have known that the attachment in relation to the bank account in this case, and the issues pertaining to s 226(2) of the Constitution and the State Liability Act had become moot. And although, notionally, the issue of attachment of incorporeal moveables owned by State organs might arise in the future, apart from *LPC*, the

Constitutional Court considered the issue conclusively in *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and another*.¹⁸

Costs

[37] Ultimately, the only issue that required consideration in the order of the full court was that of costs. Ordinarily, an appeal against an order of costs only is not lightly granted. It may be granted where a matter of principle is involved, and where the amount of costs is not insubstantial.¹⁹ It is evident from the above discussion that grave injustice has been done to Ikamva. For an exceptionally long period it has been repeatedly prevented from executing on a valid judgment debt. Various courts, including this Court, have pronounced on the validity of the judgment debt. Despite the repeated pronouncements by the courts on the absence of prospects of reversal of the judgment debt, the appellants persistently used the courts and public funds to frustrate execution.

[38] Consequently, it is in the interests of justice that the appellants bear the costs of this appeal and the proceedings in high court. As to the costs of the cross-appeal, again it is apparent, particularly from the judgment of Gorven JA and this judgment that Ikamva was entitled to execute on the order granted by Malusi AJ, which is not likely to be rescinded. Added to that, is the fact that Ikamva was dragged to this Court for an unmeritorious appeal. When it had been attempting to execute on the judgment debt for over a decade, its exasperation is understandable. Consequently, it is appropriate that each party pay its own costs for the cross appeal.

[39] As to the punitive costs order made against Ikamva, the full court was displeased with the filing the supplementary affidavit in which it was suggested

¹⁸ *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC).

¹⁹ Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013.

that the court had descended into the arena and ‘was threatened with an application for recusal unless the legal points raised were withdrawn’. The court found the ‘conduct and tone’ of Ikamva’s objections to the directives to border on contempt and undermining respect for the judiciary.

[40] The full court, however, did not find that the factual basis on which the threat of a recusal application was made, was unfounded. Ikamva was entitled to express its anxiety regarding the directives, particularly when the issues raised in the directives had been considered by the full court (Plasket J) on appeal. Parties should be afforded the latitude, subject to applicable ethical boundaries, to express their dissatisfaction with matters they consider to affect the fairness of the conduct of their cases. Perhaps in a case where the facts on which a threatened recusal application is based is fabricated, incorrect, made in bad faith, or ethical boundaries, there could be reason for punitive costs. The fact that the threatened recusal application never materialised is not the central inquiry. In addition, where the court’s displeasure lies with the conduct of a practitioner, rather than the veracity or good faith of the underlying basis, an alternative route of reporting the professional misconduct to the relevant authority, seems more appropriate than punishing the litigant itself.

[41] Consequently the following order shall issue:

1. The appeal is dismissed.
2. The appellants are ordered to pay the costs of the appeal, including the costs of two counsel, on the attorney and client scale, jointly and severally, the one paying the other (s) to be absolved.
3. Save to the extent set out in paragraphs 4 and 5 below, the cross-appeal is dismissed.
4. Each party is ordered to pay its own costs in relation to the cross-appeal.
5. The order of the full court is amended to read as follows:

- ‘1. The intervening party is given leave to intervene in the matter as the third applicant.
2. The third appellant is to pay the first respondent’s costs of the application for intervention, including the costs of two counsel.
3. The further execution of the writs of attachment dated 11 March 2016, including the removal of the attached movables, is stayed pending the final determination of the application for leave to appeal the order of Bheshe J dated 16 February 2021 (case number 2610/2019), including any consequent appeals.
4. The appellants are to pay the first respondent’s costs of the application, jointly and severally, including the costs occasioned by the Rule 30 applications dated 22 June 2021 and 30 July 2021, and the reserved costs of the hearing of the application on 5 August 2021, such costs to include the costs of two counsel where so employed.’

N DAMBUZA
JUDGE OF APPEAL

Appearances:

For the first to third appellants: M A Albertus SC with S Sephton

Instructed by: State Attorney, Cape Town

State Attorney, Bloemfontein

For the first respondent: I J Smuts SC with A G Dugmore SC

Instructed by: State Attorney, Cape Town

State Attorney, Bloemfontein.