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

IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

CASE NUMBER: M195/15

In the matter between:-

TSWAING LOCAL MUNICIPALITY Applicant

and

TSHIDISO MOFFAT RAMPHELE 1st Respondent

THE SHERIFF OF THE HIGH COURT, LICHTENBURG 2nd Respondent

FIRST NATIONAL BANK,DELAREYVILLE 3rd Respondent

In re:

TSHIDISO MOFFAT RAMPHELE Applicant

and

TSWAING LOCAL MUNICIPALITY Respondent

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be **25 March 2024.**

ORDER

i) *The writs of execution issued on 22 May 2019 and 20 May 2020, and any and all other writs issued pursuant to the order of 11 October 2018 are stayed pending the final determination of the dispute between the parties.*

ii) *The matter is referred for oral evidence.*

iii) *The notice of motion shall be deemed to be the summons and the founding affidavit, the particulars of claim.*

iv) *The answering affidavit shall be deemed to be the plea.*

v) *The replying affidavit shall be deemed to be the replication.*

vi) Any party wishing to amend shall do so in accordance with the provisions of Rule 28 of the Uniform Rules of Court.

vii) Further exchange of pleadings, pre-trial processes, discovery and the request of further particulars for trial shall follow the usual processes as regulated by the Uniform Rules of Court.

JUDGMENT

MFENYANA J

[1] The applicant, Tswaing Local Municipality (the municipality) seeks an order declaring that a valid settlement agreement was concluded between itself and the first respondent. The municipality also seeks an order setting aside a writ of execution obtained by the first respondent writs of execution, which were sought to be executed by the respondent in 2019 and 2020 respectively.

[2] It is necessary to set out a brief summary of the facts leading up to the dispute between the parties. The history relevant to this application can be traced back to an order granted by this Court on 11 October 2018, per Chwaro AJ in the following terms:

"It is ordered that:

Resolution 001/10/2014 taken by the Tswaing Local Municipality Council which was intended to rescind the contract between the municipality and the applicant is hereby set aside as being unlawful.

It is declared that the Tswaing Local Municipality breached the contract of employment it entered into with Tshidiso Ramphele on the 1st day of October 2014.

The respondent to pay the costs of the application, such costs are limited to the costs of one counsel".

[3] The contents of the order are self- explanatory and point to a contractual dispute between the first respondent and the municipality as employee and employer, respectively.

[4] According to the applicant, and relevant to this application, after the court order was granted on 11 October 2018, the

first respondent issued a writ, seeking to execute the order. The applicant, at that stage, applied for a stay of the writ issued on 22 May 2019. Before the application could be finalised, the parties entered into settlement negotiations, which saw the applicant paying an amount of R2 500 000.00 to the first respondent. The applicant avers that this was in compliance with the settlement agreement concluded between the parties, while the first respondent avers that this was in satisfaction of a debt of R4 450 499.00 owed by the applicant to the first respondent in terms of the October 2018 order.

[5] According to the applicant, despite agreement and payment by the applicant as stated, the first respondent, sought to execute against the applicant again on 20 May 2020 and on 1 July 2021, only on the latter occasion, the amount on the writ had increased to R8 415 156.

[6] The applicant thus, contends that the parties concluded a valid settlement agreement, and the first respondent is not entitled to execute the writs. The applicant further contends that the order on which the writs are premised, does not

specify a definite amount to be paid by the applicant to the first respondent. On these bases, the applicant avers that the writs ought to be set aside.

[7] The first respondent's contention on the other hand, is that the applicant is liable for damages suffered by the first respondent due to a breach of the employment contract between the parties, including *mora* interest, and less any amounts already paid by the applicant. The amount of the writ represents that amount, and interest thereon.

[8] Regarding the settlement agreement, the first respondent concedes that settlement negotiations took place between the parties but denies that there was a meeting of minds between the parties, and thus, no settlement was reached. Had that been the case, such settlement agreement would, in any event, not take precedence over the Basic Conditions of Employment Act 75 of 1995 (BCEA) which governs the employment contract between the applicant and the first respondent, the first respondent further averred.

[9] The question that comes to mind is whether the writ was

sanctioned by a court order. This is the same issue that the parties at loggerheads about. The same, rings true for the subsequent writs obtained by the first respondent, who exhibits inclination to issue writs on every change of circumstance. To make a determination, the court must establish whether the order granted by the court was *ad factum praestandum* or *ad solvendam pecuniam*.

[10] From the papers it is clear that having approached the court in motion proceedings, a material dispute of fact which, in my view, cannot be resolved on the papers, particularly in respect of the following issues:

10.1. whether the applicant is indebted to the first respondent, and if so, in what amount.

10.2. whether there was an agreement concluded between the parties, and if so, the nature thereof, and on what terms.

10.3. whether interest is payable on the amount, and if so, on what basis, and the amount thereof.

[11] In terms of rule 6(5)(g) of the Uniform Rules of Court, where an application cannot be properly decided on affidavit, the court may dismiss the application, or make such an order as it

deems fit, to ensure a just and expeditious decision, including directing that oral evidence be heard on specified issues, to resolve any dispute of fact.

[12] Motion proceedings are ideally suited to resolve issues based on common cause facts as they are not concerned with probabilities. In view of the factual disputes emanating from the submissions by the parties, I am unable to determine the matter on the papers as presented before me. The disputes are in my view material to the issues to be decided, and incapable of being resolved on the papers. I have considered that it would not be desirable to settle these disputes of fact solely on the parties' contentions as they point at opposing directions.

[13] The SCA in *Pahad Shipping CC* v *Commissioner for the South African Revenue Services*[1], noted that the court has a wide discretion with regard to a referral for oral evidence where an application cannot properly be decided on affidavit. Corbett JA opined that rule 6(5) (g) is not inflexible. It has come to be accepted following the decision of the Supreme Court of Appeal (SCA) in *Du Plessis and another NNO v*

[1] (529/08) [2009] ZASCA 172; [2010] 2 All SA 246 (SCA) (2 December 2009).

Rolfes[2] *Ltd* that a court may decide that a matter should be referred for oral evidence, even where no application has been made for such referral.

[14] All these reasons in my view indicate the interests of justice would be better served if the matter is referred for oral evidence on the specified issues. I consider such approach to have a bearing on the interests of both parties and the final disposal of the matter.

ORDER

[15] In the result I make the following order:

i) The writs of execution issued on 22 May 2019 and 20 May 2020, and any and all other writs issued pursuant to the order of 11 October 2018 are stayed pending the final determination of the dispute between the parties.

ii) The matter is referred for oral evidence.

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[2][1996] ZASCA 45, 1997 (2) SA 354 (A).

iii) *The notice of motion shall be deemed to be the summons and the founding affidavit, the particulars of claim.*

iv) *The answering affidavit shall be deemed to be the plea.*

v) *The replying affidavit shall be deemed to be the replication.*

vi) *Any party wishing to amend shall do so in accordance with the provisions of rule 28 of the Uniform Rules of Court.*

vii) *Further exchange of pleadings, pre-trial processes, discovery and the request of further particulars for trial shall follow the usual processes as regulated by the Uniform Rules of Court.*

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S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

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Date reserved:	25 May 2023
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