

SOUTH AFRICA / JUDGMENT

H.C.C and Another v N.E.M and Others (Reasons) (1790/2023)

[2025] ZALMPTHC 12 (25 July 2025)

[2025] ZALMPTHC 12

COURT

Limpopo High Court, Thohoyandou

BEFORE

Du Plessis

CASE / FILE NUMBER

1790/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

CASE NO: 1790/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 25 July 2025

SIGNATURE:

In the matter between:

H[...] C[...] C[...] 1ST APPLICANT EMELDA NOMHLE NDLOVU 2ND APPLICANT And N[...] E[...] M[...] 1ST RESPONDENT TEBOGO ASHLEY MIYENI 2ND RESPONDENT TIYANI THEODORE CHAUKE 3RD RESPONDENT SHERIFF KRUGERSDORP 4TH RESPONDENT IN RE: In the matter between: N[...] E[...] M[...] APPLICANT / PLAINTIFF And H[...] C[...] C[...] 1ST RESPONDENT / DEFENDANT EMELDA NOMHLE NDLOVU 2ND RESPONDENT / DEFENDANT

REASONS**FOR JUDGMENT**

DU PLESSIS AJ:

Introduction:

- [1] On 26 June 2025 the court was tasked with hearing an interdict application on an urgent basis.
- [2] This case originates from the High Court of Limpopo held at Thohoyandou where the court file is kept. The High Court of Limpopo held at Polokwane was not given the court file, but only the documents pertaining to this application was emailed to the High Court at Polokwane.
- [3] It must therefore be stated that this Court did not have access to any other information or documentation that is relevant to the main matter.
- [4] This is an urgent application in terms whereof the Applicant applies for the following relief:
- 1.1 Condoning the Applicant's non-compliance with the Uniform Rules of Court and the Practice Directive of the Limpopo Local Division, Thohoyandou, relating to the filing of urgent applications and applicable timeframes, in terms of Rule 6(12);
- 1.2 Interdicting and restraining the Sheriff from selling or disposing of the Applicant's motor vehicle on public auction following its attachment;
- 1.3 Directing that the hearing of this application be conducted via Microsoft Teams;
- 1.4 Ordering the Sheriff to return the said motorvehicle to the Applicant immediately;
- 1.5 Ordering the First Respondent and her attorney to pay the costs of this application, as set out in the founding affidavit;
- 1.6 Setting aside the fraudulently obtained court order granted by Honourable Tshidada J on 19 December 2023;
- 1.7 Granting such further and / or alternative relief as the Honourable Court deems fit.
- [5] In terms of prayer 5, the applicant prayed for a cost order against the respondent's attorney, even though the attorney is not a party to this application.
- [6] The 1st Respondent's Attorney therefore applied to be joined to the proceedings before this Court, which application was unopposed by the First Applicant and therefore granted.
- [7] From the onset it has been explained to the parties that this Court did not have the Court file in its possession and only had sight of the affidavits pertaining to this Urgent Application.

- [8] It was expressly brought to the parties' attention that this Court cannot make any determination on the allegations of fraud, any aspects of the Rule 43 application nor any other interim applications which might be pending between the parties.
- [9] The Court was therefore only in a position to hear and make a ruling in respect of the First Applicant's urgent application aimed at interdicting and restraining the Sheriff from selling the First Applicant's motorvehicle on a public auction and returning the said motorvehicle to the First Applicant.

Factual

Background:

- [10] The First Applicant and the First Respondent are the main parties to divorce proceedings and an order for the payment of interim maintenance in terms of Rule 43 was granted against the First Applicant herein.
- [11] The First Applicant is disputing his paternity to the child born of the marriage with the First Respondent and stopped paying the interim maintenance as per the order granted on 19 December 2023.
- [12] The First Respondent is further alleging that the Court Order granted by Tshidada J on 19 December 2023, has been obtained fraudulently.
- [13] On the 6th day of June 2025 the Sheriff removed the motorvehicle of the First Respondent upon the instruction of the First Respondent's Attorney for purposes of selling the motorvehicle on a public auction.
- [14] The First Applicant then issued the Application for an Urgent Interdict that is now before this court.

Parties

Submissions:

- [15] The Applicant submitted that he would suffer irreparable harm if the application was not heard on an urgent basis and the Sheriff were to proceed with selling of his motorvehicle on a public auction, seeing that the amount to be repaid in terms of the warrant of execution is R21,000.00 whereas the value of the motor vehicle is approximately R300,000.00.
- [16] The Applicant further submits that he is disputing his paternity to the child which he was ordered to support by way of maintenance payments, in terms of the Court Order of Tshidada J dated 19 December 2023.

- [17] The Applicant alleged that the Court Order of Tshidada J dated 19 December 2023 was obtained under a false premise and that there is a pending Rule 43(6) application, directly addressing the issue of paternity. According to the Applicant it would be a grave injustice if the execution of this warrant is allowed before the finalisation of the pending Rule 43(6) application.
- [18] The Applicant finally argued that the Court Order of Tshidada J dated 19 December 2023 was obtained through fraudulent misrepresentation, concealment of material facts and paternity fraud.
- [19] The First Respondent argued that the First Applicant's request that the matter be heard virtually was an abuse of court process and that it amounted to self created urgency for the First Applicant.
- [20] The First Respondent argued that she and the First Applicant entered into a valid customary marriage and that he has accepted the minor child to be his child.
- [21] The Court Order of Tshidada J dated 19 December 2023 is an Order for the payment of interim maintenance by the First Applicant to the First Respondent.
- [22] The First Respondent further argued that the Court Order of Tshidada J dated 19 December 2023 was granted more than one year and six months ago, however the First Applicant failed to act at the first available opportunity, thereby causing self-created urgency.
- [23] The First Respondent submits that the First Applicant's failure to bring the application to set aside the Court Order of Tshidada J dated 19 December 2023 on an urgent basis in itself was a further cause of self created urgency in the matter before this court.
- [24] Finally, the First Respondent submitted to Court that the Court Order in terms of which the warrant of execution was issued was for the maintenance of a minor child. The Court is the upper guardian of all minor children and therefore should protect the rights of the child.

Discussion:

Virtual Hearing:

- [25] The First Respondent argued that the First Applicant's request that the Application be heard virtually was an abuse of the Court process.
- [26] However, this matter was set down to be heard virtually as per the instructions of the Honourable Judge President Phatudi MG.
- [27] In terms of Section 8(4)(b) of the Superior Courts Act[1], provides that:
- "The management of the judicial functions of each court is the responsibility of the head of that court."*
- [28] These judicial functions are set out in Section 8(6)(a) – (e) of the Superior Courts Act[2] that provides as follows:

“(8)(6) *The Judicial functions referred to in subsection (2) and subsection (4)(b) include the –*

- (a) Determination of sittings of the specific courts;
- (b) The assignment of judicial officers to sittings;
- (c) Assignment of cases and other judicial duties to judicial officers;
- (d) Determination of the sitting schedules and places of sittings for judicial officers;
- (e) Management of procedures to be adhered to in respect of –
 - (i) Case flow management;
 - (ii) The finalisation of any matter before a judicial officer, including any outstanding judgment, decision or order; and
 - (iii) Recesses of the Superior Courts.

[29] The allocation of the virtual hearing for this matter was therefore within the scope and judicial function of the Honourable Judge President as provided for in terms of the Section 8(4)(b) read with Section 8(6)(a) – (e) of the Superior Courts Act.[3]

[30] The parties were all present and all the necessary affidavits were filed for the Court to be able to hear the application for the urgent interdict.

[31] This Court therefore finds that the First Applicant did not abuse any court process by requesting that the matter be heard virtually and made an order that the matter should proceed.

Urgency:

[32] In the matter of East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others[4], the court dealt with the test to be applied in urgent applications and confirmed that the true test is whether or not an applicant will receive substantial redress in due course.

[33] The Court held as follows:

“(9) It means that if there is some delay in instituting the proceedings, an applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at the hearing in due course. I must also mention that the fact that the applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an application he can be afforded a substantial redress in an application in due course, the applicant does not qualify to be enrolled and heard as an urgent application.”[5]

[34] Section 34 of the Constitution[6] provides for access to Courts in terms of which:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court...”

- [35] A Court must therefore be cautious that it does not deny an Applicant this Constitutional right merely because of a perceived delay. Especially where an Applicant will not be afforded substantial redress in due course.
- [36] The Applicant argued before this Court that he would not be afforded substantial redress in due course of the Court’s procedure due to the fact that the amount owing being a mere R21,000.00 and the value of his motorvehicle being about R300,000.00. Should his motorvehicle be sold on a public auction his loss would be inordinate in relation to the amount owing. He would never be able to recover the loss.
- [37] The Applicant further argued that the warrant of execution is based upon a Court Order which was obtained fraudulently. Should the execution thereof not be suspended and the Court Order is eventually set aside, the Applicant will have suffered unjust prejudice and there will be no substantial redress therefore.
- [38] This Court finds that the explanation given by the Applicant why he will not be afforded substantial redress in due course of ordinary litigation is sufficient.
- [39] The Respondents further argued that the Applicant’s urgency was self-created, however in the matter of *Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others*[7] the Court explained that: “Self created urgency is not constituted by delay alone. Self created urgency implies a degree of contrivance to queue jump.”
- [40] This Court finds that the Applicant did not create his own urgency. There are various applications between the parties deriving from the main divorce action between the First Applicant and the First Respondent.
- [41] One such application is an application to set aside the Court Order of Tshidada J dated 19 December 2023 having a direct bearing on the events that brought about this application. The First Respondent argued that the application to set aside should have been brought on an urgent basis and the Applicants failure to do so caused the Applicant’s self-created urgency.
- [42] There is no doubt that had the Applicant brought the application to set aside on urgent basis, the Respondents would also have opposed that application on the basis that it lacked urgency.
- [43] This Court finds that the Applicant did not create any urgency and that he did not err in bringing the Application to set aside, in the normal course of court procedure.
- [44] The Applicant immediately proceeded to institute this application once the warrant was served and the Applicant’s motorvehicle was removed.

[45] The Court therefore finds that this matter is urgent and that a satisfactory explanation was given why the First Applicant would not be afforded substantial redress if the matter is heard within the normal timeframes in due course.

Interdictory Relief:

[46] The four requirements of an interdict are as follows:

- (a) There must be a clear right;
- (b) The Applicant must have a well founded fear that he will suffer irreparable harm;
- (c) The balance of convenience must favour the Applicant; and
- (d) There must be no alternative remedy available to the Applicant.

[47] The First Applicant has a clear right to his property, which right can only be infringed under specific circumstances. The Court Order dated 19 December 2023, in terms of which the warrant of execution was issued, is a valid ground for such infringement.

[48] However, the problem with the Court Order is that the First Applicant alleges that it has been obtained fraudulently. If this is the case it renders the basis upon which the First Applicant's right to his property was infringed unlawful and voidable.

[49] As previously stated, this Court is not in a position to make a determination in respect of the status of the Court Order of Tshidada J dated 19 December 2023. This issue will be dealt with once the Application to set it aside is heard.

[50] The First Applicant has a well founded fear and belief that he will suffer irreparable harm if his motorvehicle is sold in order to settle the amount due under the warrant of execution.

[51] The amount due under the warrant of execution is R21,000.00 whereas the First Applicant's motorvehicle is worth approximately R300,000.00. He will not only suffer a financial loss, but he has also submitted to this Court that it will also have a negative effect on his business as he needs his motorvehicle to attend to it.

[52] It follows that the balance of convenience favours the First Applicant since he will be greatly prejudiced if he is deprived of motorvehicle which is worth far more than the amount due under the warrant of execution, if the Court Order of Tshidada J dated 19 December 2023 is ultimately set aside.

[53] The Respondents will not be prejudiced by the granting of the interdict, as they will be afforded a proper opportunity to respond to the Application for setting aside the Court Order of Tshidada J dated 19 December 2023. The Respondents' rights are therefore protected in this regard.

[54] The First Applicant simply has no other satisfactory remedy, but to seek the urgent intervention of the Court.

Intervening Party:

- [55] After the Fifth Respondent's application to be joined as an intervening party was granted, the Fifth Respondent promptly applied that the matter be postponed in order for further affidavits to be filed.
- [56] This application for a postponement was denied by this Court.
- [57] The only relief sought by the First Applicant against the Fifth Respondent (The Intervening Party) is costs de bonis propriis for her involvement in the case between the parties.
- [58] It must be specifically noted that the costs are prayed for on the basis of alleged fraudulent actions by the First and Fifth Respondents.
- [59] As previously stated, this Court did not have any insight into the complete Court file, and seeing that there is a pending Application for the setting aside of the Court Order of Tshidada J before another Court, this Court cannot make a determination on an aspect that is pending before such other Court, including the allegations of fraud made by the First Applicant.
- [60] This Court is not in a position to make a determination in respect of the granting of costs de bonis propriis against the First or the Fifth Respondents in relation to the urgent interdict application before it today as it is intertwined with other pending applications between the parties, including an Application to set aside the Court Order of Tshidada J granted on 19 December 2023 and an Application in terms of Rule 43(6).
- [61] The Court hearing the Application for the setting aside of the Court Order of Tshidada J dated 19 December 2023, will be the correct Court to make a determination in respect of the costs as prayed for.
- [62] On this basis and in order to protect the First and Fifth Respondents from an unjust cost order granted in respect of the Urgent Interdict application, the aspect of costs is postponed to be determined together with the Application for the setting aside of the Court Order of Tshidada J dated 19 December 2023.

Rights of the Minor Child:

- [63] The Court is the upper guardian of all minor Children and it is the Court's duty to protect the rights of the minor child.
- [64] The Court Order of Tshidada J dated 19 December 2023 is for the payment of maintenance in respect of the minor child of the First Respondent.

- [65] As stated above, the First Applicant alleged that the Court Order of Tshidada J dated 19 December 2023 was obtained under a false premise and that there is a pending Rule 43(6) application, directly addressing the issue of paternity. According to the Applicant it would be a grave injustice if the execution of this warrant is allowed before the finalisation of the pending Rule 43(6) application.
- [66] This begs the question: Does the minor child not have the right to know who her biological father is?
- [67] It is aposite to state at this point that it is this Court view that the First Applicant has a duty to step up and shoulder his responsibility if the Court Order is not set aside and it is established that he is the child's father.
- [68] Unfortunately, this Court cannot ignore the allegation made by the First Applicant that the Court Order of Tshidada J dated 19 December 2023 has been obtained fraudulently.
- [69] For this reason this Court endeavours to approach this dilemma with an abundance of caution and to balance and protect the rights of all parties until the matter is finally resolved.

Costs:

- [70] The Court is not in possession of sufficient information or documentation in order to hear and make a just determination in respect of the prayer for costs de bonis propriis to be granted against the First and Fifth Respondents.
- [71] The Court finds that the Intervening party as well as the First Applicant must first be allowed to file the necessary affidavits in respect of the allegations of fraud as well as the costs prayed for.
- [72] Therefore, the prayer for costs is postponed to be heard together with the Application for the setting aside of the Court Order of Tshidada J dated 19 December 2023.

Order:

[73] In the result the following order is made:

1. Condoning the Applicant's non-compliance with the Uniform Rules of Court and the Practice Directive of the Limpopo Local Division, Thohoyandou, relating to the filing of urgent applications and applicable timeframes, in terms of Rule 6 (12).
2. Interdicting and restraining the Sheriff from selling or disposing of the Applicant's motor vehicle on public auction following its attachment.
3. Ordering the Sheriff to return the said motor vehicle to the Applicant immediately.
4. Prayers 5 and 6 postponed to be heard together with the application for setting aside of the court order dated 19 December 2023.

5. Intervening parties to file opposing papers in the normal times as prescribed in the rules.

S DU PLESSIS

ACTING JUDGE OF THE HIGH COURT,

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DATE OF HEARING

: 26 June 2025

DATE OF REASONS DELIVERED : 25 July 2025

[1] The Superior Courts Act 10 of 2013.

[2] The Superior Courts Act 10 of 2013.

[3] The Superior Courts Act 10 of 2013.

[4] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others
(11/33767) [2011] ZAGPJHC 196 (23 September
2011).

[5] My own emphasis.

- [6] Constitution of South Africa, 1996.
- [7] Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others (2023/080436) [2023] ZAGPJHC 1162 (13 October 2023).
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