BP SOUTHERN AFRICA (PTY) LTD v MEGA BURST OILS AND FUELS (PTY) LTD AND ANOTHER AND A SIMILAR MATTER 2022 (1) SA 162 (GJ)

Citation	2022 (1) SA 162 (GJ)
Case No	39170/2019 and 41350/2019
Court	Gauteng Local Division, Johannesburg
Judge	De Villiers AJ
Heard	February 24, 2020
Judgment	February 24, 2020
Counsel	*MT Shepherd* for the applicant. *HJ Potgieter* for the first respondent in case No 31970/2019. *HJ de West SC* (with *DC Robertson*) for the first respondent in case No 41350/2019.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Practice — Judgments and orders — Suspension of execution of court order — Application for suspension of order pending completion of petition for leave to appeal — Discretion of court — Factors to be considered.

Execution — Suspension pending appeal — Application for suspension of judgment pending outcome of petition for leave to appeal — Discretion of court — Factors to be considered.

Headnote : Kopnota

The respondent in each of these matters had, in separate High Court applications, obtained money judgments against the applicant. On 31 January 2020 the applicant's applications for leave to appeal were dismissed by the same court. Immediately thereafter, the respondents requested the applicant to pay, and a few days later they issued writs of execution under which the sheriff, on 5 and 7 February 2020, attached equivalent funds in the applicant's bank account.

In the present matter the applicant sought an order suspending the execution of the judgments pending the outcome of a petition for leave to appeal that was yet to be delivered. It argued that its causes of action in each case was an interim interdict and an application under rule 45A of the Uniform Rules of Court. * It argued that it had a 'clear right' to an interdict suspending the High Court's order pending the finalisation of the appeal process. As to relief under rule 45A, the applicant argued that a stay was required to prevent an injustice. It also argued that the present court could not, in exercising its discretion under rule 45A, have regard to the merits of the underlying dispute.

Held

The principle that the judgment creditor was entitled to seek payment almost immediately after judgment has never been overturned. † In exercising its discretion to stay execution, it would weigh heavily with the court that the respondents were entitled to payment. (See [11], [27.2].)

The 'clear right' the applicant relied on did not exist: the law was not that execution could only be levied once the time periods for lodging an application or petition for leave to appeal had expired. Hence the applicant's contention that it had a 'right' to demand that execution be stayed until the right to petition lapsed was ill-founded and could not form the basis for an interim interdict. (See [14] – [15], [27.1].)

This left the interests of justice under rule 45A and the court's inherent jurisdiction. Rule 45A involved a discretionary indulgence based on an apprehension of injustice: the court had to ask if real and substantial justice required a stay, and this required, *inter alia*, an inquiry into the balance of harm and convenience (see [27.4]).

In exceptional circumstances a residual equitable discretion to stay execution could be exercised to prevent an injustice, even where a litigant had an enforceable judgment and was entitled to payment. The imminent service of a petition for leave to appeal was a potentially significant factor, and if an applicant undertook (as the present

applicant did) that an application for leave to appeal would be delivered, the court ought to consider the prospects of success of this step as best it could. (See [21], [23] – [25].) ‡

This was not a matter in which the court would exercise its power to intervene in the normal execution process and respondents' rights: the respondents had enforceable claims for payment, the applicant had weak prospects of success on appeal, and the balance of convenience favoured the respondents (see [32]). Both applications accordingly dismissed (see [35]).

Cases cited

Erasmus v Sentraalwes Koöperasie Bpk [1997] 4 All SA 303 (O): dictum at 307 – 308 approved
Firm Mortgage Solutions (Pty) Ltd and Another v Absa Bank Ltd and Another 2014 (1) SA 168 (WCC): not followed
Gois t/a Shakespeare's Pub v Van Zyl and Others 2011 (1) SA 148 (LC): qualified
Municipal Workers Retirement Fund v Kopanong Local Municipality [2019] ZAFSHC 159: criticised
National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) (2000 (1) BCLR 39; [1999] ZACC 17): dictum in para [11] applied
Naylor and Another v Jansen 2007 (1) SA 16 (SCA) ([2006] ZASCA 94): dictum in para [14] applied
Perelson v Druain 1910 TS 458: applied
Road Accident Fund v Strydom 2001 (1) SA 292 (C): dictum at 304E approved
South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A): dictum at 544H – 545B applied

Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC) (2015 (10) BCLR 1199; [2015] ZACC 22): dicta in paras [88] – [89] applied
Whitfield v Van Aarde 1993 (1) SA 332 (E): dictum at 337F – G applied.

Rules of court cited
The Uniform Rules of Court, rule 45A.
Case Information
MT Shepherd for the applicant.
HJ Potgieter for the first respondent in case No 31970/2019.
HJ de West SC (with *DC Robertson*) for the first respondent in case No 41350/2019.

Order

1. The forms and service provided in the Uniform Rules of Court are dispensed with, and the matters heard as urgent applications.

2. Both applications are dismissed.

3. The applicant is ordered to pay the costs of both applications, including of two counsel where so employed.

Judgment

De Villiers AJ:

[1] There are two applications that require adjudication. The facts are almost identical and the two matters were argued as one. Accordingly, I refer to 'respondents' when I am in reality referring to the two first respondents. Where necessary I refer to Mega Burst Oils and Fuels (Pty) Ltd and to ZA Petroleum (Pty) Ltd as individual respondents. The second respondent in both applications, the sheriff, did not oppose the relief.

[2] The applications came before me in urgent court on Thursday 20 February 2020. The two respondents had each obtained an order against the applicant in the urgent court on 18 December 2019 before Budlender AJ for payment of about R16 million, in similar applications launched separately. The background is that the respondents had ordered fuel from the applicant, paid for it, and the applicant has not delivered the fuel, and never will be called upon to do so. In the case of ZA Petroleum, the applicant gave an undertaking to repay the funds already in September 2019, and payment was demanded on 25 September

2019. Budlender AJ's judgment reflects similar facts with regard to Mega Burst Oils and Fuels.

[3] The applicant delivered notices of application for leave to appeal on 23 December 2019. The applicant's application for leave to appeal in each case was dismissed on 31 January 2020. In this process, the applicant advised Budlender AJ that it would seek leave to submit further evidence on appeal. Interpreted at its most benevolent, the further evidence to date is that authorities in Zimbabwe are also investigating some fraud and other crimes pertaining to fuel imports. It takes the current matter no further, and I need not address the counter-evidence put up by Mega Burst Oils and Fuels.

[4] Immediately after dismissal of the application for leave to appeal Mega Burst Oils and Fuels asked the applicant to make payment within

three days and its intention to proceed to execution was communicated on 5 February 2020. ZA Petroleum also demanded payment on 31 January 2020. Mega Burst Oils and Fuels issued a writ of execution on 5 February 2020, and the sheriff attached funds in the applicant's bank account on 5 February 2020 in terms of that writ. ZA Petroleum attached the funds on 7 February 2020, also having issued a writ on 5 February 2020.

[5] The applicant learned of both of the attachments on 12 February 2020 when the writs were served upon it. On 14 February 2020 it learned that the funds attached by Mega Burst Oils and Fuels would be transferred to the sheriff. In the case of ZA Petroleum, it learned on 17 February 2020 that its bank had already transferred the funds to the sheriff. The sheriff stands poised to make payment to the respondents, and these applications followed.

[6] The applicant seeks a suspension of execution of the judgments against it pending the final outcome of a petition for leave to appeal. It has until 28 February 2020 to deliver such a petition but undertook to deliver it by Tuesday 25 February 2020. I reserved the judgment until Monday 24 February 2020. I further would have preferred more time to prepare the judgment.

[7] Both respondents asked me to strike the applications from the roll for self-created urgency. The respondents had declined any opportunity to supplement their answering papers, and in the absence of prejudice caused by the applicant having brought the applications on very short notice, I allowed argument on the merits and dealt with the matters as urgent applications. There is clear commercial urgency to the matter.

[8] The applicant argued that its cause of action in each case is an interim interdict and/or an application in terms of rule 45A of the Uniform Rules of Court. It seems that in practice the two remedies often would overlap, but that rule 45A has wider application to prevent injustices. This court also has inherent jurisdiction to control its processes to prevent injustices and this remedy also would overlap with rule 45A. The common law on this court's inherent jurisdiction is now reflected in the Constitution. Section 173 of the Constitution provides:

> 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[9] Long ago, in *Perelson v Druain* 1910 TS 458, Innes CJ (Solomon J and Bristowe J concurring on this point) dealt with a case where a writ was issued the day after judgment [1] and stated at 462:

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De Villiers AJ

> 'Is a successful party bound to wait a reasonable time before taking out a writ for his judgment and costs? *Van Zyl* says he is not, by South African practice. Certain of the Dutch authorities quoted by Mr. *Jeppe* look the other way. I do not wish to decide the point, or to say anything to encourage the idea that a successful plaintiff is justified in taking out a writ at once without allowing any time at all for the defendant to satisfy the judgment. I do not think it is necessary to do so, because if such a thing were done the position of the other party would be this: he ought to say, "There is no reason for taking out the writ; here is your money."'

[10] Bristowe J in the same judgment stated at 463 – 464:

> 'I am of the same opinion. I quite see the force of Mr. *Jeppe*'s observation that a reasonable interval should be allowed between the giving of the judgment and the issue of the writ. A man cannot be expected to come into court with sufficient money in his pocket to meet any judgment which may be given against him, and it is only reasonable that he should have enough time, for instance, to go to his house, or to a bank, to obtain the money necessary to satisfy the judgment. But that, it seems to me, is only a question of the costs of the writ.
> It has not been shown to us that there is any rule of law that a writ of execution issued without allowing such an interval is invalid. It seems to me if the defendant were to say: "I had the money all the time, and if I had been given an opportunity I would have paid, without the writ", then probably the plaintiff would have to pay the costs of the writ . . . .'

[11] These remarks reflect reasoning that it is in order to seek payment almost immediately after the judgment. Even if the law were that a reasonable time had to be given for payment, it would be a very short period, on the reasoning in this judgment. It does not seem that *Perelson v Druain* has been overruled.

[12] This judgment too would not seek to address the question if Van Zyl [2] correctly sets out the law, or not, as several days were allowed for payment in the case before me. Accordingly, the periods from date of dismissal of the appeal to date of attachments of the applicant's funds are not unreasonable periods, even if the law were to be that the respondents had to wait a reasonable period for payment of a judgment debt.

[13] In reply in the Mega Burst Oils and Fuels matter, the applicant describes the basis for its application as follows:

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De Villiers AJ

> 'In essence these proceedings are necessitated by the First Respondent's attempt to infringe on Applicant's right to fair procedure. The Applicant has a clear right to have the order of Budlender AJ suspended pending the finalisation of the appeal process unless a Court order otherwise in terms of the provisions of Section 18 of the Superior Courts Act under exceptional circumstances and if the First Respondent can persuade the Court that the Applicant will suffer no prejudice should the Court make such an order. The Applicant has one month to file the application for leave to appeal and would have done so already but for the fact that Budlender AJ has not provided his reasons for the refusal to grant leave to appeal. Of further importance is that the period (one month) for filing an application for leave of appeal to the Supreme Court of Appeal, has not yet expired.'

[14] The right that the applicant seeks to rely on does not exist. Our law is not that execution may only be levied once the time periods for lodging an application for leave to appeal (or a petition) have lapsed. This would have required legislative intervention, and the Superior Courts Act 10 of 2013 does not contain such a provision. Interim execution in terms of s 18 of the Superior Courts Act would only come into play once the petitions for leave to appeal have been delivered. Inasfar as the applicant has contended that it has a right to demand that execution be delayed for the period within which the right to petition still exists, such an argument is ill-founded and cannot form the basis for an interim interdict.

[15] As such, it is my view that relief based on an interdict must fail as no protectable right has been established. The applications further do not meet the requirements of an anti-dissipation order, and no attempt was made to argue that they do. Despite this finding, it does not mean that the matter ends here. I still have to consider the interests of justice in terms of either rule 45A or my inherent jurisdiction. Before I set out the chronology, I address the wording of rule 45A and the leading cases in point. Rule 45A reads:

> 'The court may suspend the execution of any order for such period as it may deem fit.'

[16] Van Loggerenberg & Bertelsmann *Erasmus Superior Court Practice* vol 2 at PD1 – 603 **3** summarise the law as follows (footnotes omitted):

> '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. Thus, the court will grant a stay of execution where the underlying causa of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution.
> It has been held that, in particular circumstances, the court could, in the determination of the factors to be taken into account in the exercise of its discretion under this rule, borrow from the requirements for the granting of an interlocutory interdict, namely that the applicant must show *(a)* that the right which is the subject of the main action and which he seeks to protect by reason of the interim relief is clear or, if not

> clear, is prima facie established though open to some doubt; *(b)* that if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in the establishing of his right; *(c)* that the balance of convenience favours the granting of interim relief; and *(d)* that the applicant has no other satisfactory remedy.'

[17] The applicant relied on *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (LC) para 37 to argue that it meets the criteria for relief:

> 'The general principles for the granting of a stay in execution may therefore be summarised as follows:
> *(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 instance 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, ie 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.'

[18] These summarised principles are the principles generally applied by a court to exercise its discretion to stay execution. I do not read them to be anything more than guidelines. The applicant argued that the last sentence in the quoted part of *Shakespeare's Pub* means that I may not have regard to the merits of the underlying dispute. This is of course premised on the view that the applicant seeks to assert a right, which I have found not to exist. I am not convinced that, even where a right is being enforced, a court should not consider the dispute in an appropriate case. It was sufficient for the learned Judge Waglay (in *Shakespeare's Pub*) that a rescission application was pending. The merits of that application were not considered, principally as the balance of convenience favoured that applicant.

[19] I would differ from any attempt to read into rule 45A a limitation that I may not consider the prospects of success in a petition still to be served in exercising my discretion to stay execution. It seems to me that the cases do not reflect such a limitation on my discretion, even where (by way of analogy) a rescission application has been served. The real issue is if the applicant has shown that an injustice would result if the application to stay execution were to be dismissed. In my view my discretion in considering such a matter should not be limited by requirements not stated in rule 45A.

De Villiers AJ

[20] I find support in *Whitfield v Van Aarde* 1993 (1) SA 332 (E), where Nepgen J (although he did not deal with the scope and effect of rule 45A) held as follows at 337F – G with regard to the court's inherent jurisdiction:

> 'In my judgment a Court does have an inherent discretion to order a stay of a sale in execution. Execution is the process which enables a judgment creditor to obtain satisfaction of a judgment granted in his favour. The effect of holding that a Court is unable to control its own process would be to deprive a Court of what has always been considered to be an inherent power of such Court. Of course, the discretion which a Court has must be exercised judicially, but it cannot be otherwise limited, for example by stating that such discretion can only be exercised in favour of a judgment debtor in certain circumscribed circumstances. In view of this conclusion it is not necessary to deal in detail with the further submission made on behalf of the respondent, namely that if a Court has a discretion to grant a stay of execution it only has such a discretion where the underlying causa of the judgment debt is being disputed or no longer exists.'

[21] In *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) Immerman AJ at 304E questioned if the analogy of interim interdict in considering rule 45A was entirely appropriate in the circumstances of that matter: 'For one thing the applicant is not asserting a right in the strict sense but a discretionary indulgence based on the apprehension of injustice.' I agree.

[22] Wright J in *Erasmus v Sentraalwes Koöperasie Bpk* [1997] 4 All SA 303 (O) at 307 – 308 (time does not allow for a full translation) stated that a detailed evaluation of prospects of success in the further step, need not take place: **4**

> 'In die mate stem die onderhawige geval ooreen met 'n voorlopige interdik dat daar gevra word vir 'n tydelike beletsel op die uitoefening van die respondent se reg om eksekusie te hef op grond van applikant se beweerde reg op voormelde krediet. Ek meen dat dit nie nodig is dat die Hof 'n bevinding moet maak oor wat die vooruitsigte op sukses van die applikant is in die betrokke saak wat in Gauteng ingestel is nie. In sake waar die lasbrief vir eksekusie vir agterstallige onderhoud opgehef is, was daar nie noodwendig 'n eksakte bepaling van die vooruitsigte van die betrokke vonnisskuldenaar om sukses te behaal in sy aksie om hersiening van die bedrae wat verskuldig was nie.'

[23] I agree — the evaluation of success in the further step will depend on the facts of each case. It does not seem that Wright J is against an evaluation of prospects of success in an appropriate case. Davis J in *Firm Mortgage Solutions (Pty) Ltd and Another v Absa Bank Ltd and Another* 2014 (1) SA 168 (WCC) paras 5 – 7 explained the reasoning in *Shakespeare's Pub* as follows:

> '[5] To the extent that there is any uncertainty as to the meaning of

> these dicta, further clarity is to be found in the judgment, where the learned judge examines the facts of the case, and, in particular, whether a stay of execution should be granted, pending the outcome of a rescission application. Waglay J then said (para 38):
>
> > "The applicant will furthermore suffer irreparable harm if execution is not stayed, and the rescission application is successful."
>
> [6] It is clear that what was intended in this case was that, where the causa for the execution is a judgment, and the judgment is placed in dispute because an application for rescission has been brought, grounds may well exist for the exercise of a favourable discretion by a court.
> [7] In the present case there is no such application. The question arises as to whether rule 45A provides a residual, equitable discretion to a court confronted with the present set of facts.'

[24] Davis J found that there is no such residual, equitable discretion and dismissed the application. *Firm Mortgage Solutions* was supported in *Municipal Workers Retirement Fund v Kopanong Local Municipality* [2019] ZAFSHC 159 (19 September 2019), a judgment by Daffue J (Reinders J and Pohl AJ concurring), in para 33 (footnotes omitted):

> 'It is correct that rule 45A of the Uniform Rules of Court states that the court has a discretion to suspend the execution of any order for such period as it deems fit, but that does not mean that a court has a general equitable jurisdiction to stay execution. The cases referred to by Mr *Burger* are clearly distinguishable and it is not necessary to consider them at all. I fully agree with Davis J that rule 45A does not envisage "the exercise of an equitable jurisdiction unhinged from any legal causa, but simply predicated on the equities of a case". *In casu*, the Municipality conceded to judgment being granted. It has no defence. In fact, it is in breach of the PFA and is liable to criminal prosecution. Its neglect has serious consequences for affected employees. The urgent application was issued more than a year after judgment was granted and the writ of execution issued. The court *a quo* was approached on the basis of alleged urgency by giving only about 2 hours' notice to the Fund. The equities did not favour the Municipality who apparently did nothing for a year to utilize alternative remedies provided for in the MFMA.'

[25] This seems to me, with great respect, to be too narrow an application of the court's discretion. Of course a discretion must be judicially exercised, and not a judge's whim. A

litigant with an enforceable judgment is entitled to payment, and only in rare cases would be delayed in that process. In my view there may be exceptional cases where a court would still exercise a discretion to prevent an injustice in staying execution. The fact that a petition for leave to appeal is to be served soon is potentially a significant factor in staying execution. If an applicant were to undertake (as has happened in this case) that an application for leave to appeal will be delivered, one should, in my view, then consider the prospects of success with such a step as best one can (and as was in fact done in *Municipal Workers Retirement Fund*) to determine if an injustice would be done. An intended petition may have no merit at all.

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De Villiers AJ

[26] I am not prepared not to consider prospects of success, as argued by the applicant. I find the common law on exercising a discretion to execute pending an appeal instructive. See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H – 545B:

> 'Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another*, 1961 (2) SA 118 (T) at pp. 120 – 3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally *Olifants Tin ''B'' Syndicate v De Jager*, 1912 AD 377 at p. 481; *Reid and Another v Godart and Another*, 1938 AD 511 at p. 513; *Gentiruco A.G. v Firestone SA (Pty.) Ltd.*, 1972 (1) SA 589 (AD) at p. 667; *Standard Bank of SA Ltd. v Stama (Pty.) Ltd.*, 1975 (1) SA 730 (AD) at p. 746.) The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's* case, *supra* at p. 513). The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet*, 49.7.3; *Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another*, *supra* at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. *Fismer v Thornton*, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.
> (See in this connection *Ruby's* case, *supra* at pp. 127 – 8; also *Rood v Wallach*, 1904 T.S. 257 at p. 259; *Weber v Spira*, 1912 T.P.D. 331 at pp. 334 – 4; *Rand Daily Mails Ltd. v Johnston*, 1928 W.L.D. 85; *Frankel v Pirie*, 1936 E.D.L. 106 at pp. 114 – 6; *Leask v French and Others*, 1949 (4) SA 887 (C) at pp. 892 – 4; *Ismail v Keshavjee*, 1957 (1) SA 684 (T) at pp. 688 – 9; *Du Plessis v Van der Merwe*, 1960 (2) SA 319 (O).)

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De Villiers AJ

Although most of the cases just cited dealt with the exercise of the Court's discretion under a statutory provision or Rule of Court, the statute or Rule concerned did not prescribe the nature of the discretion except in broad general terms (e.g. secs. 36 and 39 of Proc. 14 of 1902 (T) empower the Court to give directions as "may in each case appear to be most consistent with real and substantial justice") and the same general approach would be appropriate to the exercise of a discretion under the aforementioned rule of practice.'

[27] In summary:

[27.1] The applicant in these cases has no right upon which to base an interdict against execution, whether to protect a right to be given a reasonable opportunity to make payment, or for the period within which to petition for leave to appeal to lapse.

[27.2] In exercising its discretion to stay execution, it will weigh heavily with a court that the respondents are entitled to payment.

[27.3] Execution would not affect the applicant's right to petition for leave to appeal but may cause it irreparable harm. The general principle that an appeal suspends execution exists for good reason and a petition for leave to appeal is imminent.

[27.4] In exercising its discretion to stay execution pending completion of a petition for leave to appeal, this court must ask if real and substantial justice requires such a stay (if an injustice will otherwise be done). There is merit in exercising the discretion under these circumstances of a pending petition by having regard to the factors listed above and to the following factors (freely borrowed from *South Cape Corporation v Engineering Management Services* supra [26]) and not intended to limit the court's discretion to see that justice be done:

[27.4.1] The potentiality of irreparable harm being sustained by the applicant on appeal if execution were not stayed.

[27.4.2] The potential of irreparable harm being sustained by the respondent if execution were not stayed.

[27.4.3] 'The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg to gain time or harass the other party.'

[27.4.4] Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

[28] The applicant's prospects of success on appeal are very weak. In essence it seeks time for Sars to complete investigations into tax fraud pertaining to the purported export of fuel. It believes that the outcome of such investigations might lead to substantial tax claims against itself, and that it might have substantial claims against the two respondents. Sars informed the applicant of its investigations on 25 September 2019. By

27 November 2019 the applicant learnt that 13 000 of its transactions are being investigated by Sars, involving staggering amounts of money. The applicant suspects that

some of these transactions would involve the two respondents, even a considerable number in one case. Accordingly, it sought a postponement of the applications for payment to March 2020 to allow Sars to conduct and complete investigations, alternatively for the court to exercise an alleged discretion not to order (immediate) restitution of the funds paid to it by the respondents. Budlender AJ assumed that he had both such discretions, but found that even if he had them, he would not exercise them on the facts of the two applications.

[29] The applicant does not deny the central basis for the claims against it. The two respondents each paid about R16 million to it to deliver fuel; the orders did not and will not proceed; the two respondents asked for the return of their money; the applicant agreed to do so in September 2019, but failed to make payment. These are simple, uncontested claims. The applicant concedes that it has no defence to the claims as matters stand, and cannot state that, given time, it will have counterclaims.

[30] There must be very little room for a court of appeal to interfere in the judgment of Budlender AJ. Budlender AJ gave a comprehensive judgment and reasons for refusing leave to appeal. He exercised a true judicial discretion, which could only be overturned —

> 'when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'.

(*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (2000 (1) BCLR 39; [1999] ZACC 17) para 11.) See too *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) ([2006] ZASCA 94) para 14 and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) (2015 (10) BCLR 1199; [2015] ZACC 22) paras 88 – 89.

[31] The balance of convenience also favours the respondents. Mega Burst Oils and Fuels states that it needs the funds for operational use. It fears that it will go out of business without payment. ZA Petroleum intends to refund its (unhappy) customers. The applicant will then be in the same position as any other litigant; if it has claims against the respondents, it will run the risk that they cannot satisfy a judgment. No such case has been made out. There is an indication that Mega Burst Oils and Fuels does have assets as it offered security in the form of unencumbered trucks in a related application in terms of s 18 of the Superior Courts Act. The respondents have been out of pocket for months. The applicant has not given an undertaking to pay damages should payment be delayed further.

[32] It seems to me that this is not a matter where I should exercise any power to intervene in the normal execution process and the rights of the

respondents. The respondents have enforceable claims for payment, the applicant has weak prospects of success on appeal, and the balance of convenience favours the respondents.

[33] If this judgment comes into effect on a day that is most inconvenient for the applicant, then it would have only itself to blame. It knew that the respondents would seek to execute. The applicant was in possession of the judgment (and its own notice of application for leave to appeal) since 23 December 2019. The applicant had all the matter required to prepare and serve a petition for leave to appeal when Budlender AJ refused leave to appeal on 31 January 2020. It did not have to wait for his reasons for refusing leave to appeal, as suggested. An appeal does not lie against the reasoning of the court a quo but against its

order. In any event, those reasons have been provided, on the day of the hearing before me. Had the applicant moved at a reasonable pace, its petition would have been served. Instead, only in the replying affidavit (served on the day before the hearing) is it stated that senior counsel has been briefed to prepare the petition. Even if this instruction was given at such a late stage, the applicant had time to prepare such petitions thereafter between Thursday and this morning. It is not a factually complicated matter.

[34] The applicant, although not in appearing before me, is making use of senior counsel. The matter involves significant amounts of money, issues of great importance to the parties and some application of the law. I am of the view that the briefing of senior counsel was warranted.

[35] Wherefore I make the following order in respect of the two applications:

1. The forms and service provided in the Uniform Rules of Court are dispensed with, and the matters heard as urgent applications.

2. Both applications are dismissed.

3. The applicant is ordered to pay the costs of both applications, including of two counsel where so employed.

Applicant's Attorneys: *Shepstone & Wylie*, Johannesburg.

First Respondent's Attorneys in case No 39170/2019: *Birgit Cronau Attorneys*, Midrand.

First Respondent's Attorneys in case No 41350/2019: *WRA Attorneys*, Pretoria.

***** Rule 45A states that the court has an equitable discretion to suspend the execution of any order for such period as it deems fit.

† As expressed in *Perelson v Druain* 1910 TS 458.

‡ The court held in this regard that rule 45A should not be read so as to prevent a consideration of the prospects of success in the next step, which should be conducted if the facts of the case required it — see [19], [23].

1 Matters proceeded more quickly at that time:

'The appellant obtained judgment against the respondent on the 14th April 1910, in the magistrate's court, Pretoria, for £1 with costs. The plaintiff's costs were taxed on the 15th April, and the taxation was brought in review on the same day, judgment being given thereon at 2.45 P.M. At 3.7 P.M. the plaintiff notified the defendant that unless the capital and costs were paid before 3.30 P.M. a writ of execution would issue. This demand not having been complied with, a writ of execution for the amount of the judgment debt and costs, together with the costs of the writ, was served on the defendant at 5 pm, and the stock-in-trade of the firm of Druain Bros, in which the defendant was a partner, was attached.'

2 CH van Zyl *The Theory of the Judicial Practice of South Africa* 4 ed at 261. The learned author in his discussion reflects that the Twelve Tables did allow a minimum period of 30 days for payment.

3 RS 6, 2018.

4 The headnote translates and summarises:

'The Court need not estimate exactly what the Applicant's prospects of success in that action were, and it was at least arguable whether or not he would succeed.'