

SOUTH AFRICA / JUDGMENT

Chetty v Chetty and Another (1362/20) [2020] ZAMPMHC 30 (24 June 2020)

[2020] ZAMPMHC 30

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

1362/20

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION, MIDDELBURG

(LOCAL

SEAT)

CASE

NO: 1362/20

In

the matter between:

SAMANTHA

CHETTY APPLICANT

AND

SUMESHEN

CHETTY RESPONDENT

SHERIFF

OF WITBANK

(EMALAHLENI) SECOND

RESPONDENT

JUDGMENT**JUDGMENT**

HANDED DOWN VIA EMAIL DUE TO COVID 19. JUDGMENT DEEMED TO HAVE BEEN HANDED DOWN ON 24 JUNE 2020.

BRAUCKMANN AJ

[1] This urgent application that was launched by the applicant for the following relief:

[1.1] Compelling and/or directing the First Respondent with immediate effect to deliver to the Applicant an Argosy Freightliner truck bearing registration number HTW 947 MP accompanied by two semi-trailers bearing registration numbers: NJW 055 GP and NJW 053 GP (alternatively registration numbers: JXY 902 MP and JXY 904 MP)(hereinafter referred to as the ‘truck and trailers);

[1.2] Alternatively, in the event of the First Respondent failing or refusing to comply with prayer [1.1] above, then the Sheriff (Second Respondent) is authorized to enter the First Respondent’s premises or any premises in which the aforesaid truck and trailers are kept and forcibly removing the truck and trailers and delivering the said truck and trailers to the Applicant

[1.3] Costs of the Application against the First Respondent only in the event of opposition.

[2] The applicant also prays for condonation for her non-compliance with the rules (Rule 6) and practice directives of this Court as the application is brought on an extreme urgent basis. Before I turn to deal with the applicant’s grounds for urgency and why substantial redress will, according to applicant, not be afforded to her in due course, should the application be brought on the normal opposed roll, I want to make some remarks on urgency.

[3] The law on urgency is abundantly clear. Urgent applications must be brought in accordance with the provisions of rule 6(12) of the Uniform Rules of Court, with due regard to the guidelines set out in cases such as *Die Republikeinse Publikasies (Edms) Bpk vs Afrikaanse Pers Publikasies (Edms) Bpk*[1] as well as a well-known case of *Luna Meubelvervaardigers (Edms) Bpk v Makin and Another*[2].

[4] The Practice Directives require an applicant, in an urgent application, to set out explicitly the circumstances which render the matter urgent. It is further emphasised that while an application may be urgent, it may not be sufficiently urgent to be heard at the time selected by the applicants. Further to the aforesaid, the Practice Directives provide that should the practices

regarding the proceedings in urgent application not be adhered to, and the application not be enrolled on a date or at a time that is justified, the application will not be enrolled and an appropriate punitive cost order will be made.

- [5] In the judgment of In re: Several Matters On Urgent Roll 18 September 2012 the Court held that:-

“Further, if a matter becomes opposed in the urgent motion court and the papers become voluminous there must be exceptional reasons why the matter is not to be removed to the ordinary motion roll. ‘The urgent court is not geared to dealing with a matter which is not only voluminous but clearly includes some complexity and even some novel points of law.’ See Digital Printers vs Riso Africa (Pty) Limited case number 17318/02, an unreported judgment of Cachalia J delivered in this division[3].” (own underlining)

- [6] The Court further held that:

“Urgency is a matter of degree. ... Some applicants who abuse the court process should be penalised and the matters should simply be struck off the roll with costs for lack of urgency. Those matters that justify a postponement to allow the respondent to file affidavits should in my view summarily be removed from the roll so that the parties can set them down on the ordinary opposed roll when they are ripe for hearing, with costs reserved[4].”

21. The Court went on to further state that the procedure set out in Rule 6(12) is not simply there for the taking[5]. In this regard, the Court further confirmed the principle set out in a case of East Rock Trading 7 (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited and Others in which it was held:-

“The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in the application in due course. The rules allow the court to come to the assistance of a litigant because of the latter, were to wait for the normal course laid down by the rules, it will not obtain substantial redress.

It is important to note that the rules require absence of substantial redress. This is not equivalent to irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in this regard.[6]”

- [7] The abovementioned principle was further once again considered in the case of Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others[7] in which this Honourable Court confirmed:

“I proceed to evaluate the respondent’s submission that the matter is not urgent. The evaluation must be undertaken by an analysis of the applicant’s case taken together with allegations by the respondent which the applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently ... It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.”

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent’s and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.”

[8] Possible financial prejudice does not entitle a party to any preference before other parties. The loss that the applicant

may allegedly suffer in this matter, which has not been identified at all, is not sufficient to allow the applicant to be afforded an immediate hearing and it is not the kind of loss that justifies the disruption of the roll and prejudice to other parties, who are awaiting their turn to be heard.[8] The fact that irreparable loss may be sustained is in any event in itself not sufficient to establish urgency, especially where an applicant took no action against the respondents for some time[9].

[9] The abovementioned decisions were discussed and yet again confirmed in *Export Development Canada v West Dawn Investments*[10]. An applicant must show the absence of substantial redress eventually. It is not equivalent to irreparable harm that is required before the granting of interim relief. If the matter is enrolled to be heard in the normal course the applicants will still be able to prove their case and obtain the

necessary redress, should a court find in their favour. There will still be the possibility of substantial redress in future.

[9] The facts are simple. The applicant and the respondent used to be in a romantic relationship which terminated. The respondent

purchased a truck and two trailers with the financial assistance of the applicant. Applicant alleges that the parties entered into some joint venture with the truck earning an income for both of them; The profits derived from the business venture would be shared equally between the Respondent and Applicant; This allegation is denied by respondent; The vehicles were registered in the applicant’s

name and the vehicles remained in the possession of the respondent; respondent would then repay the truck and trailers to the applicant.

[10] Applicant states that he received the truck on or about 5 October 2019 and did repairs on the truck from the aforementioned date up to 1 November 2019 in Durban and Johannesburg. The truck and trailers are insured in the amount of R480 000.00. He states that he have duly complied with all my obligations in terms of the verbal agreement, and have made the payments as agreed upon on the dates as agreed as he is utilising the truck and trailer to do business.

[11] During December 2019 the applicant, with the assistance of the eSwatini Police, spoliated the respondent by luring the respondent's

driver to the police station and taking the keys of the truck from the driver. The respondent launched an urgent spoliation application

under case number 5510/19 in this Court. A rule nisi was made in respondent's favour by Mankge AJ on 17 December 2019, and the rule was confirmed by me after arguments were heard on 14 January

2020. The written version of the ex tempore judgment is available on the Court file. An application for leave to appeal the order was launched which was dismissed with costs on 25 February 2020.

[12] Applicant's case in the spoliation application was also that she is the owner of the truck and trailers, and therefore entitled to be in possession thereof. She also relied on an "informal partnership" agreement between herself and the respondent. Applicant stated, at that stage (09 January 2020), in her opposing affidavit that:

"2.13. During the course of November 2019 and up to date, I have received no rental payments for the use of the horse and trailer" [Own emphasis][11].

[13] She then raised the defence against the respondent that he was not meeting his obligations towards her in respect of the truck and trailers, and that he "was gambling compulsively". Despite being aware of the fact that she "terminated" the "informal partnership" agreement between herself and respondent during 2019 already, and further that respondent's alleged payment delinquency had started in October 2019 already, the applicant failed to launch this application against the respondent during December 2019, or even in the first two months of 2020. I have scrutinised her founding affidavit thoroughly, and could not find any explanation for the delay since October 2019. One would have expected applicant to at least file a counter application, or a substantial application, being aware of the facts at that stage already.

[14] The facts relied upon by the applicant to substantiate her claim to urgency in the current application are also, to say the least, not convincing, and contradictory. The tendency by applicants in urgent applications to lay the blame for their own lack of timeous conduct before the Registrar or COVID-19 lockdown's door should be stopped in its tracks once and for all. It has never been the practice of this division during the lockdown-period, or any extension thereof that urgent applications should, or could not be launched. The directives

are clear. In the event of an urgent application being envisaged, the urgent court number appearing in the directive should be called, and the application, if deserved urgency existed, would be enrolled for hearing. In casu, applicant should in any way have launched her application, or instituted action, during 2019 when, according to her, the respondent failed to pay “rental” for the “use” of the goods, if she felt it was urgent.

- [15] What is even more concerning in the current application is the fact that the Respondent states in his opposing affidavit that the nature of the agreement between the applicant and himself was a money lending transaction, akin to an instalment sale agreement, and once he settled the amount that applicant loaned to him to purchase the goods, the truck and trailers will be registered in his name. That draws the agreement into the scope and application of the National Credit Act[12] (“The NCA”). Under section 40(1) of the NCA a credit provider must register as such if the principal debt exceeds a fixed sum. The obligation to register is applicable to all credit agreements irrespective of whether the agreement was a once-off transaction or the credit provider involved in the credit industry[13]. In the event that a credit provider failed to register as such in terms of section 40(1) of the NCA, the agreements are unlawful due to non-compliance[14]. It is therefore clear that, if the respondent’s version is to be accepted as the Court should, the applicant fails to get out of the starting blocks as she is asking the Court to enforce an agreement that is void due to the unlawfulness thereof.
- [16] The facts above, together with the fact that the truck is, according to the applicant, daily being used by the respondent in 4 (four) provinces, leads to the conclusion that the alleged “depleted battery” version of the applicant is also not true. Although I am no expert on vehicle batteries, it is common knowledge that a vehicle that is being used battery is normally charged whilst driving by the alternator.
- [17] The applicant’s true reason for approaching this Court urgently is apparent from her founding affidavit. In paragraph 10.4 she states:
- “Furthermore I require my truck to sell to satisfy my personal debts and to sustain a comfortable lifestyle”*
- [18] I am of the view that this matter is not urgent at all. The applicant attempted to create urgency in her founding affidavit, but failed to do so. Any urgency that may exist is not real, and created by the applicant herself.
- [19] On 23 June 2020 the parties attempted to dispose of the matter by way of video link. The internet connection was however not of such a nature that the matter could be finalised. It was agreed that the matter should stand to 09h00 on 24 June 2020, and that the wasted costs should be reserved. Such an order was made by me.

[20] There are no reason why the usual order in matters found not to be urgent should not be made. I am of the view that the applicant should pay the costs. With reference to the wasted costs of 23 June 2020, I am of the view that nobody can be blamed for the lack of proper internet access. Therefore I am not going to make any order in respect of those costs.

[21] I accordingly make the following order:

“The application is struck off, and the applicant is ordered to pay the costs.”

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

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DATE OF JUDGMENT: 24 JUNE 2020

[1] 1972(1) SA 773 (A) at para 782A - G.

[2] 1977(4) SA 135 (W), see further also Sikwe vs SA Mutual Fire and General Insurance 1977 (3) SA 438 (W) at 440G - 441A.

[3]

(2012) 4 All SA 570 (GSJ) 8 para 15.

[4] At para 18.

[5] At para 7.

[6]

(2012) JOL 28244 (GSJ) at para 6 and 7.

[7]

(2014) JOL 32103 (GP) at para 63 – 64.

[8] L & B Marcow Caterers (Pty) Ltd v Greatermans SA Lt and another 1981

(4) SA 108 (C)

[9] Trustees BKA Besigheidstrust v Enco Produkte en Dienste 1990 (2) SA 102 (T)

[10]

(2018) 2 All SA 783 (GJ)

[11] Case no 5510/19, page 34 of indexed bundle.

[12] Act 34 of 2005.

[13] DU BRUYN NO AND OTHERS v KARSTEN 2019 (1) SA 403 (SCA)

[14] Du Bruyn NO, para [30].

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