

SOUTH AFRICA / JUDGMENT

Democratic Alliance v Thabazimbi Municipality and Others (475/2023; 762/2023) [2023] ZALMPPHC 35 (17 March 2023)

[2023] ZALMPPHC 35

COURT

Limpopo High Court, Polokwane

BEFORE

Pillay AJ

CASE / FILE NUMBER

475/2023; 762/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

No: 475/2023

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date:

17 March 2023

In

the matter between: DEMOCRATIC
ALLIANCE
APPLICANT
And
THABAZIMBI
LOCAL MUNICIPALITY
1ST
RESPONDENT
LETSEKA
GLADWIN TLOUBATLA
2ND
RESPONDENT
THE
MUNICIPAL MAYOR: JUDITH MOKGAPI
3RD
RESPONDENT
THABAZIMBI
LOCAL MUNICIPALITY
THE
SPEAKER: TSHEGOFATSO RAMOAPI
4TH
RESPONDENT
THABAZIMBI
LOCAL MUNICIPALITY
THE

CHIEF FINANCIAL OFFICER: 5TH
RESPONDENT
THABAZIMBI
LOCAL MUNICIPALITY
In

Re: THABAZIMBI
LOCAL MUNICIPALITY
1ST
APPLICANT
LETSEKA
GLADWIN TLOUBATLA
2ND
APPLICANT
THE
MUNICIPAL MAYOR: JUDITH MOKGAPI
3RD
APPLICANT
THABAZIMBI
LOCAL MUNICIPALITY
THE
SPEAKER: TSHEGOFATSO RAMOAPI
4TH
APPLICANT
THABAZIMBI
LOCAL MUNICIPALITY

CHIEF FINANCIAL
OFFICER:

THE
5TH
APPLICANT
THABAZIMBI
LOCAL MUNICIPALITY
And
ABSA
REGIONAL BANK: THABAZIMBI
1ST
RESPONDENT
LINDIWE
MAKAYA
2ND
RESPONDENT
Heard
:28 February 2023
Delivered
:17 March 2023 by circulation to the parties' legal
representatives

JUDGMENT

In the matter between: CASE №: 762/2023 DEMOCRATIC ALLIANCE APPLICANT/INTERVENING PARTY And THABAZIMBI LOCAL MUNICIPALITY 1ST RESPONDENT LETSEKA GLADWIN TLOUBATLA 2ND RESPONDENT THE MUNICIPAL MAYOR: JUDITH MOKGAPI 3RD RESPONDENT THABAZIMBI LOCAL MUNICIPALITY THE SPEAKER: TSHEGOFATSO RAMOAPI 4TH RESPONDENT THABAZIMBI LOCAL MUNICIPALITY In Re: THABAZIMBI LOCAL MUNICIPALITY 1ST APPLICANT LETSEKA GLADWIN TLOUBATLA 2ND APPLICANT THE MUNICIPAL MAYOR: JUDITH MOKGAPI 3RD APPLICANT THABAZIMBI LOCAL MUNICIPALITY THE SPEAKER: TSHEGOFATSO RAMOAPI 4TH APPLICANT THABAZIMBI LOCAL MUNICIPALITY THE CHIEF FINANCIAL OFFICER: 5TH APPLICANT THABAZIMBI LOCAL MUNICIPALITY and BUTANA BEN TLHABADIRA 1ST RESPONDENT ANY OTHER MEMBERS OF THE MUNICIPAL 2ND RESPONDENT COUNCIL AIDING AND ABETTING THE FIRST RESPONDENT IN HIS UNLAWFUL MEETINGS OR ANY COUNCILLOR INTERESTED IN THE OUTCOMES OF THESE PROCEEDINGS LINDIWE MAKAYA 3RD RESPONDENT

("THE MAIN APPLICATION")

Heard : 28 February 2023

Delivered: 17 March 2023 by circulation to the parties' legal representatives

PILLAY AJ:

Introduction

- [1] The Applicant has three matters on the Urgent Court roll seeking adjudication. Case numbers 475/2023 (24/01/23) and 762/2023 (9/03/23), anticipation, intervening and reconsideration applications. The 3rd is case number 13268/2022 the urgent review application. This judgment is in respect of both cases 475/2023 and 762/2023 respectively. I do appreciate that these are anticipatory, reconsideration intervening applications before Court, but for clarity, I will be referring to the parties in the following manner, Applicant (intervening party) and Respondent in the Judgment.
- [2] The applicant's joint practise note, in respect of these matters, indicated that the 3 matters were interrelated and the 2023 matters flowed from the decisions on which the application to be reviewed is based. The Court was to read all the founding and supplementary documents of case number 13268/22 first and then these documents. The applicant indicated that if successful on the urgent review application the orders in respect of these two matters would as a consequence no longer need adjudication. It was brought to the Court's attention that the notice to anticipate the return date in respect of the two urgent ex-parte applications, and reconsideration of the said orders (475/23 and 762/23) on account of being interrelated could be disposed of simultaneously.
- [3] On appearing in Court it was established that the urgent Review application was opposed by one Counsel whilst the other 2 anticipated interdict proceedings were opposed by another Counsel. The applicant elected that the Court proceed with the review application first and thereafter the other two applications.
- [4] In respect of the two matters before court the applicant sought the following:
1. The applicant enrolls the main application on the urgent roll for 28 February 2023.
 2. This enrollment is by virtue of the provisions of rule 6(11) and 6(12)(c) under circumstances where:
 - a. the application was heard in the urgent court roll
 - b. the application was brought without notice to any respondents
 - c. the Court granted a rule nisi in the absence of the respondents; accordingly;
 - d. the applicant is entitled to anticipate the return date of the rule nisi on 48 hours notice; and
 - e. the applicant is entitled to re-enroll the application for reconsideration.
 3. The applicant will seek the following relief at date of hearing;
 - a. that the applicant be granted leave to intervene in the main application, and be joined as the 3rd respondent in case number 475/2023 and 4th respondent in case number 762/2023.
 - b. No order as to costs in the application for leave to intervene save in the event of opposition.

- c. That the rule nisi granted in both matters be discharged.
 - d. Costs are ordered to be tendered by the relevant applicants in their personal capacity the one paying the other to be absolved.
- [5] At the time of the matters being argued the Court canvassed with the applicant whether the matters were ripe for hearing in light of the fact that notice to oppose the applications were filed but no opposing and or replying, documents were on file. The matters were subsequently argued with the respondent raising various issues and in light of same, the parties were requested to file heads of argument pertaining to the relevant issues.
- [6] Before attending to the merits of these applications it would be prudent to attend to the issues raised being urgency, locus standi of the applicant in respect of anticipating the return date of the urgent ex parte applications and the application to intervene in the aforesaid proceedings. The relevant rules being rule 6 (8), 6(11), 6(12) and rule 12.

Brief Background

- [7] The current Thabazimbi Municipal Council, approached the High Court in respect of the two abovementioned urgent ex-parte applications dated 24 January 2023 and 31 January 2023, wherein the 6th respondent was interdicted from holding meetings and access was gained to the municipal banking accounts. These interim interdicts
- return date was anticipated for reconsideration and an intervening application was also sought.
- [8] The respondent argued that the applicant (intervening party), elected to approach the court urgently in terms of rule 6(11) and 6(12), without the relevant prayer seeking for the matter to be entertained on an urgent basis in either of the applications. The Court could not mero meto entertain the matter on an urgent basis when same was not sought in the application.
- [9] There was a further concern in respect of service of the said applications especially as the applicant (intervening party) failed to inform the respondents when to file their answering affidavits in respect of the intervening application, or the reconsideration.
- [10] The respondents argued that the Court was not in a position to hear the application in respect of the anticipation and reconsideration of the two Court orders without 1st entertaining the application to intervene in accordance with the provisions of rule
12. The application to intervene is a substantive one and the applicant (intervening party) would need to meet the required test before same was granted and before the reconsideration of the Court orders could be sought by the applicant (intervening party). The application to intervene should have been sought first by the applicant (intervening party) then once joined to the proceedings, the process in respect of the reconsideration could have be anticipated for hearing.

[11] The application for intervention needed to meet the direct and substantial interest test in order to succeed. Further the applicant must show a substantial legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This required that the applicant must show that it had a right adversely affected or likely to be affected by the order sought or granted. The Court could then decide the issue and once granted the applicant would be joined to the proceedings and then litigate therein. The Court was referred to *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) and *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC 4.

[12] The respondent indicated that in light of aforesaid the Urgent Court could not muddy itself by entertaining these defective applications. The applicant did not take the Court into its confidence in respect of urgency, to jump the queue to be heard in respect of these defective applications. Both intervention applications were not urgent. The applicant failed to plead the grounds of urgency.

The Respondent indicated that the issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of 6(12) of the Uniform Rules. This sub rule allows the court or a Judge only in matters deemed urgent, to dispense with the forms and service provided for in the rules and to dispose of the matter at such time and place in such manner and in accordance with such procedure as to it seems meet. It further provides that in the affidavit in support of an urgent application the applicant "... shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course." In light thereof these matters were not urgent and must be struck from the roll with costs.

[13] The applicant (intervening party) indicated in response that both applications were anticipatory applications of the return date and was sought in terms of rule 6(8), 6(11) and 6(12) (c) respectively and conjunctively.

[14] The applicant contended that an undue subjugation to formalism, would have absurd results, in that the respondents seek the Court to overlook a fraud on unrelated and technical grounds. The Court was directed to the case of *Social Justice Coalition and Another v Minister of Police and Others* 2022 ZACC 27, and *EKE v Parsons* 2016

(3) SA 37 CC.

Both applications were enrolled in the urgent Court. This was specifically stated in the notices for reconsideration/ anticipation. The respondents could not now claim surprise by the fact that the applications were sought on an urgent basis especially as they were in Court. The argument of there being no prayer for urgency is rendered moot and thus the matters were attended to as urgent applications.

[15] Further, the right to be heard in terms of rule 6(8), 6(11) or 6(12)

(c) emanates from the procedural prescripts of these rules, to wit an entitlement to anticipate a return date where an order was granted in the absence of a party in the urgent Court under rule 6(12) (c). The Applicant referred the Court to *United Medical Devices (LLC) v Blue Rock Capital Limited* (2016) JDR 0570(KZD).

[16] The applicants sought in each notice of anticipation and reconsideration, an order granting leave to intervene simultaneous with the invocation of the abovementioned rules and a concomitant order seeking dismissal of the orders granted ex-parte. This was a practical approach under the circumstances. The judicial authority for same was highlighted in the case of *Ex parte Money Global (Pty)Ltd t/a Aviation Sales International, in re: Cassim NO and Another v Coetzee NO and Others* [2022] JOL 57486(GP).

[17] the Applicant (intervening party) indicated that coercive action pursuant to these irregular appointments results axiomatically, in an abuse of power, and is to be treated by Courts as inherently urgent. The applicant referred the Court to the case of *Democratic Alliance v National Commissioner of Correctional Services; Helen Suzman Foundation v National Commissioner of Correctional Services; Afriforum NPC v National Commissioner of Correctional Services*[1] wherein the Court held;

“In Apleni, it was held that where allegations are made relating to abusive power by a Minister or other public official, which may

impact the rule of law and have a detrimental impact on the public purse, the relevant relief sought ought normally to be urgently

considered. The alleged abuse of power in the present proceedings if proven would impact the rule of law and the matter is accordingly

urgent.”

[18] The applicants indicated that the Court considering the subject matter and the allegations made, the matters were in any event inherently urgent. The applicants sought the orders as prayed in the notice of motions.

The Legal principles applicable to the matters before Court;

[19] In *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket*[2] the Supreme Court of Appeal held that rules of court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the right to a fair trial entrenched in s 34 of the Constitution of the Republic of South Africa, 1996.

[20] In *Mukaddam v Pioneer Foods (Pty) Ltd*[3] the Constitutional Court stated:

“However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the high courts. The Supreme Court of Appeal and this court have their own rules. These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind

is sought. It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms of s 173 each superior court is the master of its process. “

[21] Rule 6(8) Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than twenty-four hours' notice.

Rule 6(11) Notwithstanding the foregoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.

Rule 6 (12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

Rule 6(12) (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the

reasons

why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.

Rule 6(12)(c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.

Rule 12 Intervention of persons as plaintiffs or defendants

Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.

[22] Rule 6(11) and 6(12) were relied on in the notice of anticipation proceedings wherein the applicant (intervening party) argued that these separate steps or processes can be adjudicated together in light of the merits (the ex parte fraud allegations) and maintained that same was capable of being determined together on the basis of convenience especially as the respondents (the applicants in the ex-parte application) had opposed the anticipatory reconsideration and intervening application. Rule 6(8) makes reference to the person that can anticipate an ex-parte interim order by notice. The same is also applicable to Rule 6(12) (c) anticipatory application for reconsideration. Rule 6(11) provides for an interlocutory and other applications incidental to pending proceedings may be brought on notice supported

by such affidavits as the case may require. The applicants seek to rely on these provisions interchanging them to attain the relief sought.

In as much as Rule 6(12) provides for matters to be entertained urgently 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 (“The Rules”), with due regard to the guidelines set out in cases such as *Die Republikeinse Publikasies (Edms) Bpk vs Afrikaanse Pers Publikasies (Edms) Bpk*[4] as well as a well-known case of *Luna Meubelvervaardigers (Edms) Bpk v Makin and Another*. [5]

[23] The Court indicated that the procedure set out in Rule 6(12) is not simply there for the taking. [6] It 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.” [7]

[24] It was argued by the applicants (intervening party) that the respondent’s reliance on these specific allegations not being pleaded in the notice of motion was without merit as the fact that the heading indicated, “Notice of intention to anticipate return date (Rule 6(11)) and reconsideration (Rule 6(12) (c)) was sufficient for urgency to be identified and addressed.

[25] The applicants indicated that an anticipated reconsideration was bringing forward the ex-parte cases and since they were sought urgently, this anticipation is also urgent and in compliance with the rules especially as the respondents were present.

- [26] The applicant argued that it was unnecessary to bring a formal separate application to intervene and that since the merits were so disconcerting, it required that the Court should grant this application simultaneously with the other proceedings allowing the applicants to deal with the real issue which was the manner the two Court orders were obtained and have them just on that irregular aspect set aside.
- [27] The Court was requested not to be limited by the simple processes provided by the rules and to deal with these inherent, urgent matters on its substance rather than its form. The applicant (intervening party) persisted that as an aggrieved party it was entitled to anticipate the proceedings and have the ex-parte interim Court orders reconsidered and discharged.
- [28] In response the issues as highlighted earlier were maintained by the respondents. There was no Rule 12 application, wherein the respondents could be afforded the opportunity to exercise their constitutional rights to answer to this intervening application. In as much as the applicants (intervening party) anticipated the ex-parte matters, it had no locus standi until granted permission by Court, so to just anticipate the proceedings without the relevant authority was irregular. The anticipatory and reconsideration motion provided no time lines in which the applicant sought the respondent to file their necessary answering(Rule12), replying (Rule 6(11), 6(12) affidavits which was another disconcerting aspect. Moreover, at the time that these matters were argued it was not clear if any return of services for all the respondents were filed to properly place this matter for hearing.
- [29] The respondents finally argued that amidst all these inconsistencies, the applicant (intervening party) still had not made out good grounds for why these matters needed to be burdening the Urgent Court especially as the matters were not ripe for hearing.
- [30] At the beginning of my Judgment I set out very briefly the circumstances surrounding these cases. I did so for the purpose of context, in that, based on the papers the applicant (intervening party) intended having these matters entertained as extensions of the main review application which was sought urgently especially as same were capable of being ventilated with the review. The applicant (intervening party) relied on being the aggrieved party to the matters and once given permission to intervene the reconsideration and setting aside of those orders could be granted.
- [31] However, once the two anticipated reconsideration applications were argued, all the issues and defects as highlighted by the respondents, on the applications themselves with specific reference to the non-compliance with the rules, became apparent. These issues required proper ventilation before the merits could be entertained.
- [32] In the SA Riding case the Constitutional Court stated the position to be as follows:

“If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation. Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene”

- [33] In as much as this intervening step, was argued by the applicant (intervening party) as a mere formality and could be entertained as part of the other processes in this reconsideration application, this is not the case applicable in respect of these applications as they are not so straight forward. I agree with the respondents that this is a substantive application that needed ventilation before the applicant (intervening party) was empowered to initiate this anticipation and reconsideration.

Even if Rule 6 (11) is being relied upon, there still must be an application by way of motion, which will have to be served on the respondents as this proceeding is also a separate application that according to the rules runs parallel with the main application and is adjudicated on its own merits. The reliance on this provision to intervene in this proceedings as an aggrieved party is also misplaced in the manner in which it is being canvassed in the current form.

- [34] Rule 6(8) and 6(12) (c) make specific reference to the party who was cited in the proceedings (respondent) in the main ex-parte application. The applicant (intervening party) sought reliance on the confirmatory affidavits of these parties as support for this anticipatory reconsideration being launched by it which unfortunately is not the same as if the respondents in that main ex-parte application had sought to have the matters anticipated for reconsideration themselves.

- [35] Outside of these hurdles the applicant would still be bound by the notice to oppose filed by the respondents, opposing the applications and amidst the proceeding being urgent compliance is still needed for the matter to be properly before Court. In as much as Rule 6(12) seeks condonation in respect of time frames, it cannot be so widely interpreted to excuse these shortcomings on the motion proceedings itself that is before Court.

The argument of urgency, warranting the matter be heard was based on preference being given to the applications, to prevent the prejudice and harm that may materialise or continue if the respondent's conduct complained of, continues unabated. I am of the view that the speed with which the matters (urgent applications) is dealt with and the time of filing, should, in principle never compromise the matter and the quality of the papers filed at Court.

The role of the Court is to ensure fair, orderly, and just proceedings.

It is for these reasons and the others highlighted above that I am satisfied the applicants have failed to establish that these

proceedings are ripe for hearing. Based on all that is said above, considering all the documents filed and after hearing the parties, I have to agree with the respondent that this matter is not proper before Court for the non-compliance of the rules, procedurally these matters still require serving and filing of affidavits, before the merits can be adjudicated upon.

[36] The parties both argued costs seeking punitive orders against each other. It is also a well-established principle that costs follow the successful party, there is no reason for the Court to order differently however, it is not necessary to order cost on a higher scale in respect of the two matters.

In the result I make the following order:

1. The two applications, case numbers 475/2023 (24/01/23) and 762/2023 (9/03/23) are removed from the roll. Both matters are not in order for purposes of adjudication.
2. Costs awarded to the Respondent.

Pillay AJ

Judge of the High Court

Limpopo Division, Polokwane

APPEARANCES:

HEARD ON:

28 FEBRUARY 2023

JUDGMENT

DELIVERED ON: 17 MARCH 2023

FOR THE APPLICANT: ADV. SG GOUW INSTRUCTED BY: DE BRUIN OBERHOLZER INC. REF: DEM/16/0877/US5 c.oberholzer@dbolaw.co.za FOR THE RESPONDENT: ADV. LA MOKONE INSTRUCTED BY: JL RAPHIRI INC c/o DIAMOND INC REF: NV48/23 info@raphiriattorneys.co.za

[1] [2022] 2 ALL SA 134 GP at paragraph 12

[2] 2002

(6) SA 297 (SCA) at 301G–H.

[3] 2013

(5) SA 89 (CC) At 98E–99B.

[4] 1972(1) SA 773 (A) at para 782A - G.

[5] 1977(4) SA 135 (W), see further also Sikwe vs SA Mutual Fire and General Insurance 1977 (3) SA 438 (W) at 440G - 441A.

[6] At para 7.

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

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