

SOUTH AFRICA / JUDGMENT

D.T.M and Another v M.C Van Der Berg Attorneys and Others (2025/028096) [2025] ZAGPPHC 387 (4 April 2025) [2025] ZAGPPHC 387

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M Kubushi

CASE / FILE NUMBER

2025/028096

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 2025-028096

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE:

04 APRIL 2025

SIGNATURE

In

the matter between: D[...]
T[...]
M[...]
First Applicant
J[...]
N[...]
M[...]
Second Applicant
and
M.C
VAN DER BERG
ATTORNEYS
First Respondent
M[...]
P[...] (FORMALY
M[...])
Second Respondent
P[...]
L[...] M[...]
M[...]
Third Respondent

Delivered: This judgment was prepared and
authored by the Judge whose name is reflected and is handed down
electronically by circulation to
the parties/their legal
representatives by e-mail and by uploading it to the electronic file
of this matter on Caselines. The date
for hand-down is deemed to be
04 April 2025.

JUDGMENT

KUBUSHI, J

Introduction

[1] The First Applicant and the Second Applicant (“the Applicants”) launched an urgent application seeking an order in the following terms:

1. Condoning the failure by the Applicants to comply with the ordinary

rules relating to enrolling, timeframes and sittings of this Honourable Court, on the basis that the application is urgent as envisaged by Uniform Rule 6(12);

2. That the First Respondent is interdicted and restrained from

releasing and/or dispersing an amount of R304 619.20 from the Second Respondent's 50% share of the sale proceeds in respect of the sale of the immovable property, fully described as, ERF 9[...] Clubview Extension 63 Township, to the Second Respondent;

3. That, pending the final determination of the legal proceedings

instituted by the Applicants against the Second Respondent under case number: 2025-027728, the Second Respondent's portion of the 50% share of the sale proceeds, in the amount of R304 619.20 still in the possession of the First Respondent, be retained in the First Respondent's Attorneys Trust Account and invested accordingly;

4. In the event that the First Respondent has already dispersed R304 619.20 of the sale proceeds to the Second Respondent:

4.1 That the Second Respondent is hereby interdicted and restrained from utilising the amount of R304 619.20 from the 50% sale proceeds received from the Third Respondent in respect of the sale of the immovable property, ERF 9[...] Clubview Extension 63 Township, pending the final determination of the legal proceedings under case number: 2025-027728;

5. Costs of the Application in the event of opposition; and

6. Granting the Applicants such further and/or alternative relief as this Honourable Court may deem justified by the facts set out in the Founding Affidavit.

[2] Essentially, the Applicants seek the preservation of the amount of R304 619.20 pending the final determination of the legal proceedings instituted by the Applicants against the Second Respondent under case number: 2025-027728. The said amount is a portion of the Second Respondent's 50% share of the sale proceeds of the property ERF 9[...] Clubview Extension 63 Township.

[3] The First Respondent has, together with a submission affidavit, filed a notice to abide by the decision of the court, subject to the relevant statement it addressed in the submission affidavit. In the submission affidavit, the First Respondent alleges that it was instructed to attend to the transfer of the immovable property previously owned by the Second Respondent and Third Respondent. The transfer was duly registered in the name of the purchasers on 19 February 2025. The net proceeds from the sale were to be shared equally between the Second Respondent and the Third Respondent. According to the First Respondent, an amount of R304 619.20 was erroneously paid into the Third Respondent's bank account, instead of being split in accordance with the agreed terms of the divorce settlement between the Second Respondent and the Third Respondent. Despite numerous demands, the amount remains with the Third Respondent. This is not denied by the Third Respondent, and as such, at the time of the hearing of this application, the Third Respondent had still not paid over the money to the First Respondent. This is the money that the Applicants seek to have preserved pending the finalisation of the legal proceedings instituted against the Second Respondent by the Applicants.

- [4] The application is opposed only by the Second Respondent. Her answering affidavit was filed late, with an application for condonation. The condonation application is unopposed, as such, I am of the view that it ought to be granted.
- [5] The Third Respondent appeared personally in court without legal representation. He confirmed that he does not require legal representation and will abide by the decision of the court. It is worth noting that, although the Third Respondent is cited as a party to the proceedings, no relief is specifically sought against him.
- [6] The Third Respondent is the son of the Applicants. He was married to the Second Respondent. During the subsistence of the marriage, they purchased property, the proceeds of which are the subject matter of these proceedings. When their marriage fell apart, they entered into a settlement agreement which was made an order of court. In terms of the settlement agreement, they were to share the marital property in equal shares.
- [7] This application revolves around the proceeds of the property. It is alleged that part of the funds used to purchase the property were, according to an oral agreement, loaned to the Second Respondent and the Third Respondents by the Applicants. Now that the property has been sold, the Applicants want the proceeds of the sale to be used to refund that loan. According to the Applicants, this was also agreed upon between the parties. The Second Respondent disputes the existence of both the oral loan agreement as well as an agreement that such a loan, if it existed, would be paid out of the proceeds of the sale of the property. As such, the Second Respondent wants her share of the proceeds of the sale to be paid directly to her as per the divorce settlement, which was made an order of court. In the meantime, the Applicants are alleged to have instituted a civil claim against the Second Respondent for the refund of a portion of her share of the alleged debt (the loan), which civil claim is

still ongoing.

Urgency

- [8] As earlier stated, the Applicants seek the relief set out in the notice of motion in the urgent court. They want the application to be heard on an urgent basis, claiming that the funds they seek to preserve will be dissipated before the civil claim litigation is finalised.
- [9] Urgency is regulated in terms of rule 6(12) of the Uniform Rules of Court. The rule provides that:
- (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 reasonably practicable be in terms of these rules) as it deems fit.

- (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 in due course.

[10] In *M M v N M and Others*,^[1] the court, dealing with the rule 6(12) procedure, had this to say:

“^[6] *Notshe AJ in East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*,^[2] stated:

‘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 an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.’

- [7] The import of this is that the test for urgency begins and ends with whether the applicant can obtain substantial redress in due course. It means that a matter will be urgent if the applicant can demonstrate, with facts, that the applicant requires immediate assistance from the court, and that if his application is not heard on an urgent basis that any order that he might later be granted will by then no longer be capable of providing him with the legal protection he requires.”
- [11] For the Applicants to succeed in this application, they must show why this application should be heard in the urgent court. In doing so, they must also show that any delay in launching this application was not due to self-created urgency. In addition, they must demonstrate why they claim that they could not be afforded substantial redress in due course.
- [12] In deciding on the issue of urgency, sight should not be lost that the relief sought by the Applicants in this matter is for the preservation of the money in question, and not payment thereof, which will be decided in the action proceedings that the Applicants allege they have instituted against the Second Respondent.
- [13] The urgency, therefore, in my view, was triggered when, by email on 19 February 2025, the First Respondent informed the Applicants that the Second Respondent had instructed it to pay her portion of the proceeds directly to her. The application became more urgent when the First Respondent responded to the email sent by the Applicant’s attorneys, requesting the First Respondent to hold on to the disbursement of the money, by stating that, absent a court order, it would disburse the money to the Second Respondent on 20 February 2025.

- [14] Was the urgency self-created? No. In my view, the urgency is not self-created as it could not have been triggered at any time before 19 February 2025. It could only have been triggered as already alluded above. The Second Respondent's suggestion that the urgency is self-created because the Applicants could have instituted proceedings against the Second Respondent, for the payment of the alleged debt, at the time of the institution of the divorce proceedings or upon dissolution of the marriage through the divorce settlement and subsequent court order, is without merit.
- [15] The question that follows is whether the Applicants would be afforded substantial redress in due course. The court in *E.M.W v S. W.*, [3] stated the following:
- "[11] It is trite that the correct and the crucial test to be applied in urgent applications and confirmed that it is the true test is whether or not an applicant will be afforded substantial redress in due course. (See the matter of East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767)*
- [2011] ZAGPJHC 196 (23 September 2011). This in a nutshell means, 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. 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 a hearing in due course."
- [16] The Second Respondent contends that the Applicants will be afforded substantial redress in due course because they have issued summons against her, and she is employed.
- [17] The Applicants' contention is that if the money is used, there will be no substantial redress in due course for them. They have brought this case on the basis that there is fear of the funds dissipating if not preserved. They argue that the funds should be preserved so that their victory should not be hollow. To support the allegation of dissipation of the funds, they aver that the Second Respondent does not have assets that can be used as security for the payment of the debt in due course. They also mention the previous financial difficulties the Second Respondent endured together with the Third Respondent, during their marriage, which led to them taking a loan from the Applicants.
- [18] The Second Respondent does not address these issues in her answering affidavit. Save for the denial of the loan agreement, she does not state whether she has the necessary funds or assets to secure the amount of money the Applicants are claiming against her, should she be found liable. However, she indicates that she is in desperate need of money, as she is currently staying with a friend. She requires the money to enable her to move out of her friend's home. This, in my view, is enough to indicate that the Second Respondent's financial position is such that the Applicants may not be afforded

substantial redress in due course. Consequently, the matter ought to be dealt with on an urgent basis.

[19] It is also worth noting that there were two applications launched. The first application was for interdictory relief to stop the First Respondent from paying out the money to the Second Respondent. This application was filed prior to the payment being made. The application could not proceed because, in the meantime, the First Respondent had already paid out the money. However, fortunately (or unfortunately), the money was erroneously paid to the Third Respondent instead of the Second Respondent. Based on a letter of demand written by the First Respondent to the Third Respondent, demanding that the money be paid back into its banking account, the Applicants launched the present application seeking to interdict the First Respondent and the Second Respondent from dealing with the money.

Mootness of the relief sought

[20] First and foremost, from the papers as they stand, the relief sought by the Applicants is improper. They seek an order to preserve funds which are neither in the possession of the First Respondent nor the Second Respondent. The funds, it appears, are in the possession of the Third Respondent, but no relief is sought against him. The Applicants knew, at the time of drafting their founding papers, that the money they seek to preserve is with the Third Respondent. This is clearly stated in paragraph 48 of the founding affidavit, which reads as follows:

“48. I was informed by the Third Respondent that he was erroneously paid an amount of R331 522.19, which seemingly/presumably is Second Respondent's 50% proceeds of the sale of the immovable property.”

[21] The Applicants' excuse for not seeking any relief against the Third Respondent is their understanding that the Third Respondent was to pay that money back to the First Respondent. However, by the time the matter appeared before me, the money had not been paid over to the First Respondent and there was still no relief sought against the Third Respondent. Hence, the relief sought by the Applicants is improper.

[22] At the commencement of the hearing, it was conceded on behalf of the Applicants that the money was still with the Third Respondent, who was not in court. The matter was stood down twice to grant the Applicants' counsel an opportunity to rectify the Applicants' papers and to await the appearance of the Third Respondent.

[23] When court resumed, the Applicants, through their counsel, and without having amended their papers, sought to rectify the situation by invoking Prayer 6 of the notice of motion, which reads as follows:

“6. Granting the Applicants such further and/or alternative relief as this Honourable Court may deem justified by the facts set out in the Founding Affidavit.”

[24] The Applicants sought to make use of the prayer for further and/or alternative relief, by proposing to abandon Prayers 1 and 2 of the notice of motion and substitute them with a prayer reading as follows:

“That pending the final determination of the legal proceedings instituted by the Applicants against the Second Respondent for the recovery of the loan advanced by the Applicants to the Second and Third Respondents for the initial acquisition of the immovable property ERF 9[...] Clubview Extension 63 Township by the First and Second Respondent, under case number 2025-027726, Second Respondent's 50% share of the sale proceeds still in the possession of the Third Respondent be deposited in the Trust Account of Ezra Matlala Attorneys and invested accordingly;”

[25] To fortify this argument, the Applicant's counsel referred to an old judgment of 1946 in *Queensland Insurance Co Ltd v Banque Commerciale Africaine* (“Queensland Insurance”), [4] which was applied with approval in *Hirschowitz v Hirschowitz*. [5] The submission is that even though *Queensland Insurance* was decided in 1946, the principles enunciated therein, still apply today.

[26] It was brought to the attention of the Applicants' counsel that, without an amendment of the notice of motion, the proposal she seeks under the rubric of further and/or alternative relief will not pass muster. Counsel then moved an application from the bar for the amendment of the notice of motion to read that ‘the Third Respondent is the one interdicted from spending the money’. This, however, was not a well thought out amendment because it now differed materially from the Applicants' initial proposition, which sought to include the payment of the money into the trust account of the Applicants' attorneys.

[27] If an order is made that the Third Respondent should not spend the money, it means that the money remains with him until the finalisation of the main action. He should simply not spend it. This contrasts with the initial proposition which was for the Third Respondent to pay the money in the trust account of the Applicants' attorneys.

[28] The law regarding the necessity for an appropriate amendment of a claim and the limits of a prayer for alternative relief, is contained in the judgment of Tindall JA in *Queensland Insurance*. From my own research, I could not locate any judgment from the Supreme Court of Appeal that was decided in the constitutional dispensation, nor could I find any judgment from the Constitutional Court on this point. None was also referred to by any of the counsel in this

matter. Therefore, although old, *Queensland Insurance* appears to be the only authority from the Supreme Court of Appeal (then the Appellate Division) that must be followed by all courts, on the issue under discussion.

[29] The following passages in *Queensland Insurance* have relevance at 286:

‘In regard to the judgment for £2 450, in my opinion, the plaintiff was not entitled to claim it on the action as framed. The action is based on the policy; the claim for £2 450 is based on the compromise arising from the acceptance of the tender in the alternative pleas. The prayer for

alternative relief does not help the plaintiff over the difficulty. It is unnecessary to consider whether the practice of including such a prayer is derived from the Roman-Dutch or the English practice. In the Roman-Dutch practice according to Van Leeuwen RDL5.15.8, this prayer (the so-called clause salutare asking for such other relief as the court may deem best for the plaintiff) is of such effect that every right to which the plaintiff

may in any way be entitled upon the allegations in his claim, is thereby considered to be included in the prayer. See also Voet

2.13.13 and Van der Linden Jud Pract 2.3.7 vol 1 at 147. The effect of the prayer for 'such further or other relief as the nature of the case might require' in the English practice seems to be the same. See *Cargill v Bower* 10 ChD502 at 508, in which Fry LJ pointed out that the prayer for alternative relief is limited by the statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternative relief, anything that is inconsistent with those two things.

The fact, however, that the plaintiff could not properly get judgment for £2 450 on his action as framed does not necessarily

entitle the defendant to have the judgment set aside. Mr Horwitz contended that if an application for an amendment of the declaration

had been made at the trial, the learned Judge should have and would have granted it, and he asked that, if this court upheld the

defendant's point based on the form of the action, it should now allow the necessary amendment. The terms of the reasons of Blackwell

J in addition to what I have stated above, also lead one to infer that the point that the form of the action disentitled the plaintiff

from getting judgment for £2 450 was not taken before him. Be that as it may, I can find nothing in his reasons which bears out the argument on behalf of the defendant that, if an amendment had been applied for, the learned Judge would have refused it. And I think that in the interests of justice this court should now allow the necessary amendment, which would take the form of an alternative claim alleging that, if the chemicals in question were not harmless, but dangerous and liable to catch fire spontaneously, and in consequence the policy was voidable and the defendant elected to avoid it, any concealment or misrepresentation by the plaintiff as to the nature of the goods insured was innocent and the plaintiff is entitled to a refund of the premium paid; and a prayer for judgment for £2 450. It seems to me that such an alternative claim would validly have been included in the original declaration.'

[30] In *Johannesburg City Council*, the court, relying on *Queensland Insurance*, overturned the judgment of the court a quo where the Applicant relying on the prayer for further and/or alternative relief, did not amend the notice of motion. In that judgment, the Applicant's counsel conceded at the hearing that the interim relief had been sought on an incorrect

cause of action, in that, the Applicant should instead have attacked the respondent's decision, and that the interim interdict should have been based on that cause of action. Counsel argued, however, that because the Applicant has justified this decision in the replying affidavit, the Applicant could change its cause of action and substitute it with the one stated in the replying affidavit. Without an amendment to the notice of motion, the court could, under the cloak of the prayer for alternative relief, issue a temporary interdict to remain in force pending the determination of the review proceedings. The court *quo* upheld this argument. This was, however, overturned on appeal. The appeal court held that:

"I think that the learned Judge misdirected himself in the following respects:

1. It was not appreciated that this was not a case of merely "new matter" appearing in the replying affidavit. It amounted to an abandonment of the existing claim together with its cause of action and the substitution of a fresh and completely different claim based on a different cause of action.
2. Once this new course of action is the basis of a new claim the original notice of motion, without suitable amendment was inadequate to sustain a claim for a temporary interdict as the original temporary interdict was being claimed on the basis of a completely different alleged right. The prayer for alternative relief then became a rather torn "cloak" which could not provide any refuge for the applicant."

[31] In *Chao v Gomes* ("Chao"), [6] the court had an opportunity to deal with a matter where the defendant sought relief in terms of the further and/or alternative

prayer in the notice of motion in which condonation was sought. The defendant in that case argued for entitlement to seek an extension of the time period contained within Rule 18(11) of the Uniform Rules of Court, using the prayer for further and/or alternative relief. Originally, the Defendant, like in this case, sought relief without any amendment to the notice of motion, relying on the further relief prayer alone. Later, it presumably recognising the difficulty it faced, sought an appropriate amendment to the notice of motion. The court, when declining to grant the amendment, remarked as follows:

"[17] The amendment is sought at an extremely late stage with very little notice to the plaintiff. The plaintiff has not been afforded an opportunity of filing an appropriate answer to the affidavit filed by the defendant dealing with the position on the basis of an amended notice of motion. The relief claimed in the notice of motion as amended is completely at variance with the relief currently claimed and is dependent upon a different cause of action. Two courses are available for me to follow. I could allow the amendment, grant a postponement and afford the plaintiff an opportunity of dealing with the application on the basis of the amended notice of motion. I could refuse the amendment, and the defendant would then be free to take whatever further steps it wishes. The prejudice the plaintiff suffers if the latter course is followed is that the proceedings are not finalised. The prejudice the defendant suffers if I follow the first course is that it must bring a fresh application. It appears to me that the interests of justice dictate that the prejudice which the plaintiff suffers in the event of a postponement should not be permitted. There is no effect on costs as the defendant will have been substantially

unsuccessful in all the matters before me and will have to pay costs. I accordingly decline to amend the notice of motion as sought by the defendant.”

- [32] As already mentioned, in this instance, it is not clear whether the Applicants seek an amendment to stop the Third Respondent from using the money or whether they want the Third Respondent to be ordered to pay the money into the trust account of Ezra Matlala Attorneys. Fundamentally, the Applicants have not withdrawn the application against the First Respondent and the Second Respondent, who, it has been conceded, have been wrongfully cited in the papers, as suggested by the court to their counsel. The Second Respondent, as a party to the proceedings and having an interest in the money sought to be preserved, has objected to the amendment, citing that she was not provided time to file an appropriate answer to the amendment.
- [33] Like in Chao, two courses are available for me to follow. I could allow the amendment, grant a postponement and afford the Second Respondent an opportunity of dealing with the application on the basis of the amended notice of motion. I could refuse the amendment and dismiss the application.
- [34] I can accept, without concluding, that a case has been made out for the preservation of the money in question. What, however, remains a challenge for the Applicants is that the cause of action canvassed in the papers is to interdict the First Respondent and/or the Second Respondent. Nothing is said about interdicting the Third Respondent, whereas the amendment they seek to make in the notice of motion is a prayer for an order interdicting the Third Respondent. As such, the amendment and/or the proposal to substitute Prayers 1 and 2 sought by the Applicants are not justified by the facts set out in the Founding Affidavit. As is pointed out in Queensland Insurance, ‘the prayer for alternative relief is limited by the statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternative relief, anything that is inconsistent with those two things.’
- [35] The argument by the Applicants’ counsel that since a case has been made out for the preservation of the money, an interdict should be granted against whoever is found to be in possession of that money, is not sustainable. As already mentioned, much as it can be accepted that a case has been made out for the preservation of the money, an incorrect cause of action is cited in the founding papers, which renders the amendment and/or the substitute of Prayers 1 and 2 sought by the Applicants not to be justified by the facts set out in the Founding Affidavit.
- [36] Furthermore, if Chao is to be followed, it is obvious that the amendment is sought at an extremely late stage with very little or no notice at all to the Respondents. The Respondents have not been afforded an opportunity of preparing an appropriate answer to the amendment of the notice of motion sought by the Applicants. The relief claimed in the notice of motion as sought to be amended is completely at variance with the relief currently claimed and is dependent upon a different cause of action, which is not even traversed in

the Applicants' papers. This is litigation by ambush at its best and is not permissible.

Costs

[37] It is trite that costs are always within the discretion of the court. In the exercise of my discretion, it is my view that no party should be awarded costs in this matter since none is substantially successful.

Order

[38] Therefore, I make the following order:

1. Condonation for the late filing of the answering affidavit is granted.
2. The application is dismissed.
3. No order as to costs is made.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicants:

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Instructed by:

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Date of the hearing:

12 March 2025

Date of judgment:

04 April 2025

[1] (15133/23P) [2023] ZAKZPHC 117 (18 October 2023).

[2] (11/33767) [2011] ZAGPJHC 196 (23 September 2011), para 6 and 7.

[3] (26912/2017) [2023] ZAGPJHC 710 (15 June 2023).

[4] 1946 AD 272.

[5] 1965

(3) Sa 407 (W).

[6] (2010/16410)

[2012] ZAGPJHC 103 (21 May 2012).

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