

SOUTH AFRICA / JUDGMENT

H.S.W v Masanti CC (1310/2025) [2025] ZAMPMHC 20 (26 March 2025)

[2025] ZAMPMHC 20

COURT

Middelburg High Court, Mpumalanga

BEFORE

Phahlamohlaka

CASE / FILE NUMBER

1310/2025

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IN

THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION,
MIDDELBURG

CASE NO: 1310/2025

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

SIGNATURE

DATE 2025/03/26

In the matter between: H[...]
S[...]
W[...]
APPLICANT
and
MASANTI CC
RESPONDENT
Delivered: This
judgment was handed down electronically by circulation to the
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JUDGMENT

Phahlamohlaka AJ

Introduction

- [1] The applicant, H[...] S[...] W[...], launched an urgent application against the respondent, seeking a compulsory winding up of the respondent.
- [2] The application is opposed, the respondent contending that the matter is not urgent, and further that the applicant is not a creditor of the respondent.

The legal position

- [3] The applicant relies on section 344(f) of the Companies Act 61 of 1973 (“the Act”), which provides that a company may be wound up by the court if the company is unable to pay its debts as described in section 345.
- [4] The applicant also relies on section 345(1)(c) of the Act which provides as follows:
“(1) A company or body corporate shall be deemed to be unable to pay its debts if –
(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.”

Factual Background

- [5] The relationship between the applicant and B[...] W[...] (“B[...]”), a sole member of the respondent, is relevant to this application. Before the launching of this application, the appellant and B[...] had been involved in countless litigation proceedings which also included criminal charges against B[...]. The applicant, among others, alleged that B[...] stole the respondent from him.

- [6] In the founding affidavit the applicant avers that he got married to B[...] in 2008 and thereafter, during or about 2013, he signed a CK2 document in which he resigned as a member of the respondent and had 100% of his members interest in the respondent transferred to B[...]. He did this to make it easy for B[...] to take control of the respondent in case he died. Later he discovered that B[...] transferred the 100% member's interest to herself, and the applicant regarded this as a fraudulent activity.
- [7] I must hasten to say that there is a genuine dispute regarding the date at which B[...] had to transfer the member's interest and the reason why the applicant signed the CK2 form.

Issues

- [8] From the papers it is clear that the issues to be determined are the following:

8.1 Whether the matter is urgent.

8.2 The locus standi of the applicant.

8.3 Whether the debt alleged by the applicant is disputed on bona fide and reasonable grounds.

8.4 Whether the applicant has made out a proper case for the winding up of the respondent.

Urgency

- [9] I will first deal with urgency. This application was brought in terms of rule 6(12) of the Uniform Rules of Court, the applicant contending that the matter is urgent.
- [10] Rule 6(12)(b) requires the applicant in his founding affidavit to 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. The applicant must therefore make out its case in his founding affidavit and mere lip service to the requirements of rule 6(12)(b) will not assist the applicant.
- [11] The applicant lists a number of factors in an endeavour to set forth the circumstances that render the matter urgent. It appears from those factors that the applicant complains mainly about the hijacking of the respondent by B[...] and that B[...] fraudulently and without the applicant's knowledge, transferred various movable assets to the respondent, which were previously registered in the applicant's personal name. The applicant also refers to the criminal case which is still pending against B[...] and asserts that should B[...] be found guilty it would be detrimental to the creditors because B[...] is the sole member of the respondent and there would be no one in charge of the respondent.
- [12] In *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd*,^[1] the court held that:

“Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief.”

- [13] Accordingly, an applicant seeking urgent redress from the court must make out a case for urgency in the founding affidavit. This aspect was well articulated in the case of *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*,^[2] where the court held as follows:

"The degree of relaxation should not be greater than the exigency of the case demands... Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

- [14] In casu, one is cognisant of the established principle that winding up applications are inherently urgent in their very nature. However, that does not suggest that the provisions of Rule 6(12) should be parked only because the application is for a winding up of the respondent. Still, the applicant ought to aver in his founding affidavit why he could not be afforded substantial redress at a hearing in due course.

- [15] The applicant relies heavily on the judgment of the Supreme Court of Appeal in the matter of *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd*,^[3] where the court stated the following:

"[30] ... Winding-up applications are, in general by their nature, urgent. The urgency, the appellant alleged, lay in the fact that the respondent's director had made false statements to it regarding the source of funds which he represented would permit payment to be made by the respondent of the amounts owed to the appellant. Further, the respondent had been receiving payment from South 32 but was not paying the appellant."

- [31] Even if the high court was correct to find that the application was not urgent, it should have struck the application off the urgent roll, not dismissed it. As Cameron JA in *Commissioner for SARS v Hawker Services (Pty) Ltd* explained:

'Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance.'

- [16] It is clear from the *Imperial Logistics* judgment that even where the applicant approached the court seeking an order for the winding up of the respondent, urgency is not there for the mere taking. The onus is still on the applicant to satisfy the provisions of Rule 6(12),

especially subrule (b). It is for this reason that in the current proceedings the applicant must, in the founding affidavit, explicitly explain the circumstances that render the matter urgent and why he could not be accorded substantial redress at a hearing in due course. It is not enough for the applicant to contend that the matter is urgent because winding up proceedings are urgent in their nature.

[17] It is the applicant's own case that the demand for the payment of the debt was made as far a back as

2022. This averment was made to counter the respondent's contention that the applicant's indebtedness, if the court finds it exists, has prescribed. However, for the purposes of the current application, the applicant avers that on 17 February 2025 it came to his attention that a court order was granted against the respondent. The applicant does not explain why he waited twenty-one days to launch the current application. This is in the face of the fact that there is a history of litigation between

the applicant and B[...], and the applicant even laid charges against B[...] for "hijacking" the respondent from him.

[18] Dealing with the delay in instituting proceedings, Notshe AJ in the case of *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[4] said the following:

"In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the applicant was attempting to settle the matter or collect more facts with regard thereto."

[19] In casu, the applicant has not explained the delay, save to say that winding up proceedings are inherently urgent in their nature. I cannot find that the applicant delayed because he was collecting more facts regarding the matter. Having said that, the second inquiry

should be whether the applicant can or cannot be afforded substantial redress at a hearing in due course.

[20] In the founding affidavit the applicant avers that urgency is underpinned by the fact that it is clear that the respondent is commercially insolvent and unable to pay its debts. The applicant further says that the urgency is exacerbated by the fact that it was confirmed to him that as a result of the respondent's failure to pay its debts and comply with a settlement agreement, creditors are now starting to take certain steps to attach assets in satisfaction of their debts. I must interpose here and indicate that this information is hearsay evidence and therefore inadmissible.

[21] The respondent contended that according to the statement of account that the applicant is relying on for its indebtedness, the debt depicted therein is in favour of B[...]. The applicant implored the court to interpret “B W[...]” to refer to the applicant whose full names are H[...] S[...] W[...]. Ex facie the document I cannot conclude that the debt is in favour of the applicant. This, in my view, creates a bona fide dispute of fact regarding the applicant’s locus standi, and of course the respondent’s indebtedness to the applicant. (see *Badenhorst v Northern Construction Enterprises (Pty) Ltd.*)[5]

Conclusion

[22] As alluded to earlier, there is a history of litigation between the applicant and B[...], who are entangled in an acrimonious divorce action. The applicant alleges that B[...] “hijacked” the respondent from him and even changed ownership of some of his assets into her name. In my view, the real reason why the applicant launched this application is that he cannot wait for the other legal processes to unfold because those will take long. It is the applicant’s own case that criminal charges have been laid against B[...]. Further, there is a process of a divorce action between the applicant and B[...] in which the respondent is cited as the second defendant and one of the prayers is the transfer of 100% of the members interest in the respondent to the applicant.

[23] In the circumstances, I am of the view that the applicant failed to satisfy the requirements of urgency. The applicant will be afforded substantial redress at a hearing in due course.

[24] This brings me to the issue of costs. It is trite that costs must follow the result although the issue of costs is in the discretion of the court. I find no reason why costs should not follow the result in this case.

Order

[25] In the result, I make the following order:

- (a) The application is struck off the roll for lack of urgency.
- (b) The applicant is ordered to pay costs on party and party scale B.

KF PHAHLAMOHLAKA

ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicant: Adv R de Leeuw Instructed by: Tintingers Incorporated Email: bpotgieter@tintingers.co.za admin@djhatterneys.co.za For the Respondent: Adv Tyson Instructed by: Harvey Nortje & Motimele Inc. Email: collections@harveynotje.co.za vicky@vjvnattorneys.co.za Date of judgment: 26 March 2025 Date judgment reserved: 25 March 2025

[1] Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd;
Commissioner, South African Revenue Service v Hawker Aviation Partnership and Others

[2006] ZASCA 51; 2006 (4) SA 292 (SCA) para 9.

[2] Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture
Manufacturers) 1977

(4) SA 135 (W) at 137F.

[3] Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd

[2022] ZASCA 143 para 30-31.

[4] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others

[2011] ZAGPJHC 196 para 8.

[5] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T).

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