

SOUTH AFRICA / JUDGMENT

Iteco (Pty) Ltd v Hartsenberg (122761/2023) [2024] ZAGPPHC 899 (2 September 2024)

[2024] ZAGPPHC 899

COURT

North Gauteng High Court, Pretoria

BEFORE

Khwinana ENB

CASE / FILE NUMBER

122761/2023

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:122761/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED NO.

DATE: 02 September 2024

SIGNATURE:

In the matter between

ITECO (PTY) LTD

APPLICANT

AND

ADOLF JOHAN HENDRIK HARTSENBERG RESPONDENT

REASONS

FOR JUDGMENT

Introduction

[1] This is an application brought on urgent basis with the following prayers

1. That the applicant's non compliance with the rules of the above honourable Court in regard to service and time limits is condoned and this publication is permitted to be heard as one of urgency in terms of provisions of Rule 6 (12) of uniform rules. Of Court

2. The respondent

2.1 directed forthwith to provide the applicant with the script/code in respect of the computer program known as CIPHER and or restore the full access to and/or functionality and utilisation of the applicant to the computer program known as CIPHER.

2.2 Interdicted and restrained from

2.2.1 interfering with, the exercise by the applicant of its rights in relation to CIPHER;

2.2.2 interfering with the contractual relations between the applicant and the APBCO group and clients/policy holders of the APBCO group in relation to the functionality of the CIPHER program;

2.2.3 interfering with the applicant's performance of any of its obligations in respect of the CIPHER program, success thereto and utilisation thereof by the applicant and the APBCO group.

3. The relief set out in prayer 2 shall operate as an interdict pending arbitration inter partes, alternatively pending outcome of an application for final relief, further alternative, pending final judgment in an action to be instituted by the applicant against the respondent for a final interdict on the basis set out in prayer 2 and such other relief the applicant may deem necessary including but not limited to an enquiry into damages, and a claim for damages alternatively, pending determination of any issues that may be referred to oral evidence (collectively referred to as "the proceedings for final relief).

4. The applicant is directed to institute the proceedings for final relief within 30 days of the date of the date of this order, failing which the interim order in terms of prayer 2 will lapse.

5. Ordering the respondent to pay costs of this application.

BACKGROUND

[2] In this application the applicant's counsel explained that the respondent, Mr. Hartsenberg, filed what he termed a "counter application" late on 4 December 2023. However, this document was not accompanied by an opposing affidavit and was, in fact, a separate substantive application. He further stated that the counter-application was flawed in several respects: it lacked a scheduled date for a hearing, did not specify timeframes for opposing documents, and contained no request for urgent relief.

- [3] However, it sought damages, including R150,000 for loss of income and an unspecified amount for emotional distress, as well as a request to set aside the urgent application. The applicant's counsel argued that this counter-application was not properly before the court, lacked urgency, and was an attempt to delay proceedings. He requested that the counter-application be struck from the roll with costs.
- [4] It is alleged that information provided indicates that the applicant is a software and IT service provider for the APCO group, using a system called Cipher to manage insurance-related tasks. Mr. Hartsenberg, the respondent, was previously an employee and director responsible for developing and implementing this system before his resignation in October 2022.
- [5] The applicant is seeking codes or scripts necessary to operate the Cipher system, which the respondent, Mr. Hartsenberg, possesses or knows how to implement. The respondent acknowledges knowing what is required but refuses to assist, citing poor treatment by the applicant as the reason for his refusal. The applicant argues that the respondent's refusal has serious consequences, as it affects 25,000 policyholders from Hollard and Santam Insurance who may be left without coverage over the festive season.
- [6] In his affidavit, Mr. Hartsenberg admits the applicant is in a crisis but insists he will not help due to how he was treated. Despite this, the respondent did not address key paragraphs of the applicant's founding affidavit and instead raised unrelated issues, including his own lack of time and pending matters before the CCMA. He argued that complying would amount to forced labor but did not claim that compliance would cause him undue hardship.
- [7] Counsel for the applicant argues that the matter is urgent, and the respondent's assistance would only take one to two hours, for which he would be compensated. The urgency is underscored by the potential damage to the applicant's business and the harm to policyholders if the order is not granted.
- [8] Mr. Hartsenberg, addressing the court, highlighted the urgency issue and the timeline. He explained that he was approached by the applicant's attorney to assist but declined due to prior commitments. He offered to help on a later date, but before that could happen, the applicant initiated an urgent application. Mr. Hartsenberg questioned the necessity of the urgency, noting that the court date was already set for December 5th, and relief could have been sought without the urgent application.
- [9] Mr. Hartsenberg, representing himself, is addressing the court on the issue of urgency in an application. He argues that the debit orders in question were processed before the urgent application was filed, which he believes negates the need for urgency. He references his answering affidavit, stating that the applicant was warned about upcoming debit orders on October 13th and that the orders were indeed processed before the application. He suggests that the court could subpoena the relevant documents to prove his claim.

- [10] The legal representative for the applicant objects, arguing that Mr. Hartsenberg's points are not supported by the documents on record and that he should stick to the law. The court reminds Mr. Hartsenberg to focus on the urgency of the matter.
- [11] Mr. Hartsenberg continues, detailing the timeline of his resignation as a director and employee of the company, emphasizing that he resigned as a director on October 1st and as an employee on October 9th. He mentions that despite resigning, he continued to assist the company without remuneration until October 25th, which he did in good faith.
- [12] The essence of his argument is that the matter should not be considered urgent because the circumstances surrounding the debit orders do not support the claim for urgency, and he questions the necessity of the application. The respondent argues he had planned to transfer the responsibility of debit order runs to a colleague, namely Ronald Ledwaba, over three months. He further states that the applicant underestimated the time needed for this transition, believing it could be done in a few hours.
- [13] The respondent expressed his frustration about being asked to continue working on tasks without a formal contract or agreement. He says he repeatedly requested an agreement to clearly define the work, responsibilities, and compensation. He says he was informed on short notice about an urgent legal application filed against them. He compared this as an attempt to pressure or burden them unfairly, comparing it to wrongful arrest or detainment.
- [14] He further stated that he felt it was an undue burden. He alluded to a conversation he had with Louis Fivaz, wherein they tried to negotiate a contract to protect both parties' rights. He stated that the negotiation was unsuccessful, leaving the respondent without any formal agreement to continue working. The respondent argued that he perceived the actions of the applicant as threats particularly when they were told that failure to comply could result in legal consequences, including potential jail time.
- [15] The respondent argues that he has a constitutional right to choose his profession, and this right cannot be interfered with. He challenged the claim that fiduciary duties extend beyond resignation, asserting that the only residual fiduciary duty is the duty of good faith, which primarily involves not using information gained during employment to harm the former employer. He contends that there is no legal duty requiring him to perform any specific positive action post-resignation.
- [16] The respondent says he has no legal duty and therefore cannot be compelled to act. He says the damages claimed are non-existent, as the harm was mitigated, and there was no urgency when the application was filed. The respondent further says that he had to file a counter-application because the initial application caused them significant harm, which forced him to put his life and career on hold.

- [17] Mr. Hartsenberg argues that his counter-application should be treated with the same urgency as the initial application filed by the applicant, which he believes lacks validity. He emphasizes that the applicant must produce a specific document to support their claims, as he believes the information will disprove their claim
- [18] Counsel for the applicant replied that there is no basis for many of Mr. Hartsenberg's arguments, as his papers before the court do not support his claim. Counsel highlights that Mr. Hartsenberg failed to respond to a critical letter from November, which led to the application being brought to safeguard the applicant's interests and that respondent did not make an undertaking.
- 19] Counsel for the applicant argued that the respondent, Mr. Hartsenberg, did not object to the arbitration at the CCMA but rather to the process where arbitration starts immediately after conciliation. He further clarified that the debit orders mentioned by Mr. Hartsenberg did go through, but the details were explained in the founding affidavit, highlighting the manual processing due to the volume of policyholders and the associated risk of human error.
- [20] He further said the Legal Representative emphasized that they were not seeking to change Mr. Hartsenberg's profession but were requesting urgent interim relief to resolve the matter quickly, proposing a fair payment for his time. Counsel alluded to the salary mentioned in the draft order, which was clarified as a fair price for his work under the employment contract that ended in October.
- [21] The matter was postponed to the 06th December 2023 for the court's ruling. The court decide matter was urgent and did not furnish reasons. The draft order was amended with regard to costs order to read party and party scale. On the 08th day the respondent came to court and the counsel for the applicant was requested to appear. He complained that the court order was different from the notice of motion and wanted the court to recall the said order.
- [22] In terms of Rule 42 the court recalled the order in the presence of both the counsel for the applicant and the respondent. The draft order that was made an order of court tallied with the notice of motion. The respondent informed court that he was happy and the matter was adjourned.

LEGAL MATRIX

- [23] The Court further held that:

“Urgency is a matter of degree.[1] ... 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

[24] The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ said in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) in paras 6 and 7 as follows:

‘[6] The import thereof is that the procedure set out in rule 6(12) is not there for 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.

[25] It is important to note that the rules require absence of substantial redress. This is not equivalent to the 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 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 that regard.’

APPLICATION OF THE LAW TO THE FACTS

[26] In analysing the supra facts it is evident that the urgency of the application stems from several critical factors:

1. The applicant, a software and IT service provider for the APCO group, manages insurance-related tasks for 25,000 policyholders from Hollard and Santam Insurance. The refusal of the respondent, Mr. Hartsenberg, to provide or assist with the necessary codes or scripts for operating the Cipher system directly threatens these policyholders' coverage. Given the proximity to the festive season, a period where people might heavily rely on their insurance coverage, any disruption could have severe consequences for a large number of people.

The respondent, despite acknowledging that he knows what is required to operate the system, refuses to assist due to his grievances with the applicant. His refusal is not based on an inability to assist but on a subjective reason, which adds to the urgency as the applicant has no other recourse to ensure the system's functionality.

The counter-application filed by the respondent on 4 December 2023 appears to be an attempt to delay the main application. It was filed late, is not accompanied by an opposing affidavit, and lacks critical elements such as a scheduled hearing date, specified

timeframes for opposing application, and a request for urgent relief. These omissions suggest that the counter-application is not genuinely urgent but rather a tactical move to complicate or delay the proceedings.

If the counter-application were to be entertained, it could delay the resolution of the main application, which could exacerbate the harm to the policyholders who rely on the system for their insurance coverage. The urgency is primarily due to the immediate risk posed to a large group of policyholders if the system cannot be operated without the respondent's assistance. The respondent's refusal to cooperate, combined with the timing and nature of his counter-application, underscores the need for an urgent relief to prevent potentially significant harm.

[27] Urgency is a matter of degree, and some cases warrant immediate attention while others do not. The applicant in casu must demonstrate that the circumstances are such that waiting for a hearing in the ordinary course would deny them substantial redress.

The essence of the urgency test is whether the applicant will be able to obtain substantial redress if they are required to wait for the matter to be heard in the normal course. This is not the same as proving irreparable harm, but it does require showing that any relief granted later would be inadequate or significantly less effective.

[28] The applicant has argued that the respondent's refusal to provide or assist with the necessary codes or scripts for the Cipher system directly affects 25,000 policyholders from Hollard and Santam Insurance, who may be left without coverage over the festive season. This potential disruption could have severe consequences, making the matter urgent as the harm could be widespread and significant if not addressed immediately.

[29] The respondent's refusal to assist is not due to an inability but rather due to personal grievances, which does not mitigate the urgency. The applicant argues that without immediate relief, they cannot ensure the proper functioning of the system, which could lead to substantial harm to the policyholders. The respondent does not deny being the person that has the codes nor the knowledge to operate the system.

[30] The late filing and deficiencies in the respondent's counter-application suggest an attempt to delay the proceedings rather than a genuine urgent matter. These further underscores the urgency of the applicant's situation, as any delay could exacerbate the harm to the policyholders. If the applicant is forced to wait for the normal course of legal proceedings, the harm to the policyholders could already have occurred, meaning that any later redress would be insufficient. This aligns with the principle that substantial redress might not be available if the matter is delayed.

[31] Mr. Hartsenberg acknowledges that the applicant is in a crisis but refuses to help due to how he was treated by the applicant. He does not address key aspects of the applicant's founding affidavit and instead raises unrelated issues, including his own lack of time and other matters before the CCMA. Mr. Hartsenberg claims that being compelled to assist would amount to forced labour but does not argue that complying would cause him undue hardship.

[32] The applicant's counsel argues that the matter is urgent and that the respondent's assistance, which would take only one to

two hours, is critical. The applicant emphasizes the potential damage to its business and harm to policyholders if the order is not granted. Mr. Hartsenberg questions the urgency of the application, noting that debit orders were processed before the urgent application was filed, and claims that this negates the need for urgency. He suggests that the applicant could have sought relief without an urgent application.

[33] Mr. Hartsenberg resigned as a director on 1st October and as an employee on 9TH October. Despite resigning, he continued to assist the company without remuneration until 25TH October. He argues that the applicant underestimated the time required for the transition of responsibilities to a colleague.

[34] Mr. Hartsenberg repeatedly requested a formal contract to define the work, responsibilities, and compensation but was never provided

one. He felt pressured by the applicant's urgent legal application and perceived it as a threat, particularly when informed

that failure to comply could have legal consequences, including potential jail time.

[35] The respondent mentions failed negotiations with Louis Fivaz regarding a contract that would protect both parties' rights, leaving

him without any formal agreement to continue working. It is evident that the respondent understood the urgency except he could not bring himself to make an undertaking, despite that he had forewarned the applicant.

[36] Mr. Hartsenberg raised concerns about the debit orders, claiming they were processed before the urgent application, thereby negating urgency. However, the applicant's counsel clarified that the debit orders were indeed processed, but manually due to the volume of policyholders, this manual processing posed significant risks, including human error, which underscores the urgency. Mr. Hartsenberg's argument fails to account for these risks and the necessity of automated processing, thereby weakening his stance on the urgency of the matter.

[37] The respondent argued against the urgency of the matter, yet the applicant was not seeking to change his profession but merely requesting urgent interim relief to resolve a critical issue quickly. The proposal of fair compensation for Mr. Hartsenberg's time further undermines his argument, as the applicant was not imposing an undue burden but rather offering payment for his work and time. His comparison of this request to forced labour is therefore exaggerated and not supported by the

facts.

[38] Mr Hartsenberg's complaint about the court order being different from the notice of motion and enabled that same be recalled, it is safe to mention that the notice of motion was not explicit with regard to the amount to be paid which fact was canvassed with the respondent.

[39] I considered the argument raised and proceeded to recall the order in terms of Rule 42, and the draft order was confirmed to align with the notice of motion, Mr. Hartsenberg expressed satisfaction with the outcome, leading to the matter being finalised.

CONCLUSION

[40] I have considered all the facts as presented before me, taken into account submissions by both the counsel for the applicant and the respondent. I have concluded that the principles laid out in Rule 6(12) and the facts of this case, it is evident that the applicant has successfully demonstrated the urgency of the matter. The potential harm to the policyholders, the respondent's refusal based on personal grievances, and the inadequate nature of the counter-application all point to an urgent intervention, through an interdict. The draft order was made an order of court.

[41] Therefore, I found that the matter was indeed urgent, and the applicant should be granted the relief sought to prevent irreparable harm. I have been requested to prepare reasons for judgment without proper procedure being followed. On the 31 July I was furnished the transcript.

KHWINANA ENB

ACTING JUDGE OF THE HIGH COURT

Counsel for Applicant: Adv. C Morkel Respondent: In person Date of Hearing: 08 December 2023
Request for Reasons: (not received)

Reasons

for Judgment: 02 September 2024

[1][1] See Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makins Furniture Manufacturers) 1977

(4) SA 135 (W)

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