

SOUTH AFRICA / JUDGMENT

Kgentlengrivier Local Municipality v Bertorbrite (Pty) Ltd and Another (UM118/2023) [2023] ZANWHC 66 (2 June 2023)

[2023] ZANWHC 66

COURT

North West High Court, Mafikeng

BEFORE

Khan

CASE / FILE NUMBER

UM118/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO:UM118/2023

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In

the matter between: -

KGETLENGRIVIER

LOCAL MUNICIPALITY

Applicant

And

BERTOBRITE

(PTY) (LTD)

First Respondent
(REG
NO: 2[...])
THE
SHERIFF OF THE HIGH COURT,
Second
Respondent
VENTERSDORP

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JUDGEMENT

KHAN AJ

[1] The Applicant brings this application as a matter of urgency and seeks to stay the operation and execution of the order granted by the Honourable DJP, Djaje on the 17 April 2023, further that the operation and execution of the writs of attachment to attach the Applicant's movables and bank accounts be stayed pending the outcome of any and all appeals

processes and the return of the movables attached and any money attached at the costs of the Applicant. The First Respondent opposes

the relief sought. The Second Respondent has not reacted to the Notice of Motion.

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

[3] Rule 6(12)(b) of the Uniform Rules of Court provides:

"In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, 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". Two requirements must thus be set forth in the founding affidavit in order to satisfy the requirements of the rule, the Applicant must set forth explicitly the reasons it avers render the matter urgent and the reason why it claims it would not be afforded substantial redress at a hearing in due course. Whether an Applicant has succeeded in satisfying the requirements for urgency must be determined by the contents of the Founding Affidavit[4]

[4] In re: Several Matters On the Urgent Roll 18 September 2012,[5] Wepener J held that, the procedure set out in Rule 6(12) is not simply there for the taking and at paragraph 7, repeated what Notshe

AJ stated in the case of East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767)[6] .-

"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 if 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."

[5] The abovementioned principle was once again considered in the case of Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others[7], at paragraphs 63 and 64, in which this Honourable Court confirmed:

'I proceed to evaluate the Respondent's submission that the matter is not urgent. The evaluation must be undertaken by an analysis of the Applicant's case taken together with allegations by the Respondent which the Applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently...It seems to me that when urgency is an issue the primary investigation should be to determine whether the Applicant will be afforded substantial redress at a hearing in due course. If the Applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the Respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the Respondent's and the administration of justice, the strength of the case made by the Applicant and any delay by the Applicant in asserting its rights. This last factor is often called, usually by counsel acting for Respondents, self-created urgency."

- [6] This application was filed on the 30 May 2023, the Notice of Motion indicated that same would be heard on the 1 June 2023. At about 18h24 on the 30 May 2023, this Court was advised that the matter had become so urgent that the Applicant could no longer wait for the matter to be heard on the 1 June 2023 and the Applicant required the matter to be heard urgently on the 30 May 2023.
- [7] Arrangements were made to have the hearing via Microsoft Teams at approximately 19h30 on the 30 May 2023. The Court was advised that the reason for the urgency was that the Second Respondent had already attached the Applicant's bank accounts and intended withdrawing the funds from such bank account on the morning of the 31 May 2023.
- [8] On the basis of this and the fact that the First Respondent had not filed its papers as yet, this Court ordered that the payments in terms of the writs of execution of the Applicants bank accounts be stayed pending the filing of the Respondents Answering Affidavit and the hearing of this matter on the 1st of June 2023.
- [9] The First Respondent filed its Answering Affidavit on the evening of the 31 May 2023. The Applicant filed a Replying Affidavit thereafter and heads of argument was filed by both the Applicant and the First Respondent.
- [10] It is necessary to briefly state of the history of this matter. I start first with the Applicant's account of events.

10.1 On the 17th of April 2023, judgement was granted in favour of the First Respondent in the amount of R 12, 466,266.22.

10.2 The Municipal manager and deponent to the Applicant's Founding Affidavit, Clement Gopolang Letsoalo, ("Letsoalo")

indicates that he only became aware of the litigation on the 26 April 2023 when the Second Respondent attended at the premises of the Applicant to mark any movables intended to attach to an inventory list. The Second Respondent produced the writ of execution, return of service of the Summons and Judgement of the court a quo.

10.3 Letsoalo immediately contacted the First Respondent to attempt to settle this matter and gain knowledge of the cause for judgement in dispute. On the 12 May 2023 the Second Respondent attached the movables and the Applicant then instructed its attorney to investigate the matter and provide legal advice.

10.4 On the 15 May 2023, the Applicant's attorney of record attended court to obtain copies of the Court file and was advised to return on the Monday.

10.5 On the 17 May 2023, Letsoalo requested the supply chain management to provide the file between the Applicant and the First Respondent and he obtained the tender documents.

10.6 The Court file was obtained on the 19 May 2023 and Counsel was appointed on the 21 May 2023. Counsel was instructed to prepare various applications, amongst them, an application for leave to appeal, an application for condonation for the late filing of the leave to appeal, an application to adduce further evidence, and an urgent application to stay the execution of the writ and suspend the operation of the court order and judgement.

10.7 That on the 29th of May 2023 the sheriff attached any and all bank accounts held by the Applicant. This was given by Letsoalo as the most important reason for this urgent application, “that on the 29th of May 2023 the sheriff attached any and all bank accounts held by the municipality,” (my emphasis). This was the same day the Applicant received its Provincial Infrastructure Grants and that the Applicant was now being held ransom by this attachment and cannot operate to provide basic and essential services.

- [11] The Applicants relief is rooted in Rule 45A and section 173 of the Constitution. In terms of Rule 45A a Court may on application suspend the operation and execution of any order for such period as it may deem fit where the underlying causa of a judgement debt is being disputed or no longer exists. A court may grant a stay of execution in terms of rule 45A if it is proven that the applicant has a well-grounded apprehension that the execution is taking place at the instance of the Respondent and that irreparable harm will result if the execution is not stayed and the Applicant ultimately succeeds in establishing a clear right. In terms of section 173 of the Constitution the court has an inherent jurisdiction to order a stay of execution or to suspend an order.
- [12] The Applicant alleges that the ongoing dispute is the Application for leave to Appeal. The Applicant in its founding Affidavit refers to its leave to appeal as something that has already occurred or is ongoing. This is not so. The leave to appeal was not brought previously and was served simultaneously with this urgent application together with the application for condonation for the late filing of the Appeal and the Application to adduce further evidence.
- [13] The Applicant submits that the appeal should have been brought on or before the 10 May 2023. It is noted that despite being aware of the judgement on the 26 April 2023 no steps were taken to file an appeal. No explanation is given as to why upon becoming aware of the judgement and considering the time periods allowed for bringing an appeal, this was not done. Such Appeal would have had the effect of automatically suspending the judgement, which is conceded by the Applicant. Until such time as condonation is granted, there is no application for leave to Appeal before this court, it cannot then be said that there is an ongoing dispute between the parties.
- [14] Before this Court deals with the merits of the Application in terms of Rule 45A and 173 of the Constitution, the Applicant must first satisfy this court that this application is urgent, so urgent that it warrants the severe truncation of the time limits under which it was brought and deserves to be heard ahead of all other matters on the roll, further that the Applicant will not be afforded substantial redress at a hearing in due course.

[15] The Applicant alleges that it will not obtain substantial redress at a hearing in due course as the Second Respondent has already attached its movables and bank accounts and will dispose of same at a sale in execution in order to satisfy the order. By the time the Appeal is heard the return of the assets and bank account will be moot as they will already have been sold or expended. That the Applicant has not been informed of the date of sale therefore every day urgency exists

on an ongoing basis.

[16] The Applicant then makes the startling announcement that the urgency is not self-created as he was required to investigate and obtain all documents relevant to this matter for himself and his legal representatives to appraise themselves and institute the relevant applications. Yet as will appear from the Applicants Replying affidavit, the Second Respondent was not contacted prior to the 30 May 2023, to ascertain when the funds would be withdrawn from the Applicant's bank account or when the movables would be auctioned.

[17] What is particularly worrisome about the way the Founding Affidavit is framed is that the Applicant creates the impression that the Court is dealing with 2 entities and not one, the first entity being that entity against whom judgement was taken on the 17 April 2023 and the second entity being that entity "which must eradicate any illegalities

and prevent and recoup any irregular and wasteful expenditure".

[18] The Applicant was an active participant in the matter when Judgement was granted by this court on the 17 April 2023, had filed a plea and counterclaim, had made the election not to call any witnesses or adduce any evidence and withdrew its counterclaim. The statement that "had the Court a quo been aware, judgement would never have been granted in the First Respondent's favour" is startling as it indicates that the Applicant's legal representatives did not place information before the court that it should have. The Applicant can accordingly not lay the blame at the court for its failure to present its case adequately and must take responsibility for the various Municipal managers appointed under whose authority and instruction the litigation proceeded.

[19] When one has regard to the Respondents Answering affidavit a different picture emerges, to wit the following:

19.1 Summons was issued on the 3rd of December 2019, the action was defended and the Applicant filed a plea and a counterclaim, raising the same defence that it seeks to raise on appeal.

19.2 The matter was heard on the 13th of February 2023 when the Applicant withdrew its defence and counterclaim and closed its case.

19.3 On the 26 April 2023, the Second Respondent attended at the Applicant's premises with the writ of execution and attached the Applicant's movable assets.

19.4 On the 12 May 2023 having realised that there was insufficient assets, the Second Respondent proceeded to attach specific bank accounts of the Applicant which were within its knowledge.

19.5 On the 12 and 15 May 2023, the movable assets which had been attached on the 15 May 2023 was removed to a storage facility by the Second Respondent.

19.6 On the 15 May 2023, Bank Account numbers 4[...] and 4[...] were attached.

19.7 On the 15 May 2023, the First Respondent's Attorney of record directed a letter to the Applicant informing it of the further attachment as required in law.

19.8 At no point after the movables and bank accounts were attached on the 15 May 2023, did the Applicant approach the court on urgency, the First Respondent surmises that this was because the assets and bank accounts were of no value.

19.9 On the 26 May 2023, following the First Respondent's attachment of the Applicant's banks accounts with value, the urgent application was brought on the 30 May

2023. The attachment of the bank account with value was the trigger for the leave to appeal application, the Applicant's urgency is thus self-created.

[20] The First Respondent records that no enquiries were made with the Applicant's bank or the Second Respondent as to when payment will be released and auctions will be held, which is what the Applicant should have done prior to rushing off to court on the 30 May 2023.

[21] The First Respondent records that it has been prejudiced in having less than 24 hours to prepare its response to the urgent application and records that the Applicant's papers are in excess of 205 pages, are voluminous for an urgent application and that no exceptional circumstances have been provided as to why this urgent court should deal with a voluminous application which involves some complex issues and points of law.

[22] The Applicant's Replying affidavit now indicates that on the 29 May 2023 at 13h33, the Applicant received direct communication from Pulane Tong ("Tong") of Absa Bank, its official relationship manager informing the Applicant of the notice of attachment which was served on it by the First Respondent's attorney indicating that, "an updated instruction was received to attach all accounts."

[23] The Applicant now concedes that the Notice was not served by the Second Respondent and that the Applicant did not act immediately as there was no compliance with Rule 45 (8)(c) and no notice had been given by the Second Respondent, neither was there an indication that any funds are to be withdrawn. It is surprising that this was the Applicants stance on the 29 May 2023, yet on the 30 May 2023 when the position was still the same and there was no compliance with Rule 45(8)(c), the Applicant approached this Court urgently.

- [24] On the 30 May 2023 at 15h46 there was a further email from Tong indicating, "further to the communication below, we have received an instruction from legal to transfer an amount of R3, 498, 700.00 on all accounts with available funds. Fixed deposit accounts were not attached". This being the reason the Applicant rushed to Court after hours on the 30 May 2023.
- [25] The Applicant then submits that the document titled Notice of Attachment of Bank Account, drafted by the First Respondent's Attorneys misled ABSA Bank and that any party who reads this Notice would be misrepresented to believe, at their detriment, that the document is an instruction from the Second Respondent in terms of Rule 45(8)(c). This then prompted the Applicant to rush to Court after hours on the 30 May 2023.
- [26] At paragraph 13 of its Replying Affidavit, the Applicant concedes that for the attachment to be complete, the notice of attachment must be given in writing by the Second Respondent to all interested parties. The Applicant thus now concedes that the Second Respondent did not inform the Applicant that the funds would be withdrawn on the 31 May 2023 and that ABSA was never served with the writ of execution by the Second Respondent, nor the Notice of attachment and to date the Applicant is yet to be served with such writ, it only received same from its bank.
- [27] Despite this knowledge the Applicant persists with its allegation that the matter is urgent and now states that the Applicant was unfairly compelled to institute an extremely urgent application on the 30 May at 21 h00 in order to prevent the withdrawal of the funds in the Applicants bank accounts which had been attached.
- [28] It is apparent from the paragraphs recorded above that it was not the Second Respondent who advised that the money would be paid from the Applicant's attached bank accounts on the 30 May 2023, despite what is stated in the Founding Affidavit. It is further apparent that there was no need to approach the Court on such urgency and with such truncation of time limits, as the accounts of the Applicants were in no danger at the time of being emptied by the Second Respondent. The Second Respondent was only contacted after the 31 May 2023 and it is then that he confirmed that the only warrant he had served was that on the 3 May 2023, but that he would check his records and revert. When this application was argued on the 1 June 2023, this information
- was not to hand.
- [29] Realising its error, the Applicant now seeks to hold the First Respondent liable for having acted, without verifying the information that the Second Respondent had attached the bank accounts and would withdraw the funds by the 31 May 2023 and simply acting on the say so of Tong. It is apparent that when the Applicant brought the urgent application on the 30 May 2023, it laboured under the mistaken belief that the Second Respondent had attached its bank accounts and would be withdrawing the funds contained therein by the 31 May 2023.

- [30] The Applicant did not do its due diligence to ascertain whether the information provided by Tong was in fact correct before acting on such information and rushing to court. Now that the Applicant has had the opportunity of speaking first hand to the Second Respondent it is evident that no such warrant had been issued by the Second Respondent and that the letter referred to at Annexure "RA1", dated 26 May 2023 was not a warrant of execution and had not been served by the Second Respondent.
- [31] The Applicant's basis for urgency is accordingly flawed and based on an incorrect assumption. To date there is still no information before this court as to when the sale in execution of the movable assets will take place or when the funds in the bank account would be withdrawn. The Applicant has accordingly failed to justify the basis for its urgent application or that it will not be afforded substantial redress at a hearing in due course.
- [32] The Applicant has further created its own urgency by not reacting with haste on the 26 April 2023 when the judgement came to its attention and by failing to approach this court on the 12 May 2023 when its bank account was attached for the first time. The Applicant's justification for the severe truncation of the time limits and the Court rules is as a result of its own error and failure to verify the facts before approaching the Court. Rule 6(12) is not there for the taking, the Applicant has failed to set forth the circumstances which he avers render the matter urgent and the reasons set forth in the Founding Affidavit are incorrect.
- [34] The matter is accordingly struck from the Urgent Court roll, and the Applicant is ordered to pay the wasted costs.

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

APPEARANCES:

DATE OF HEARING: 30 MAY 2023 AND 01 JUNE 2023 DATE OF JUDGMENT: 02 JUNE 2023

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

[2] 1977(4) SA 135 (W)

[3] 1977

(3) SA 438 (W) at 440G -441A.

[4] IL & B Marcow Caterers v Gretermans SA 1981 (4) SA 108 (C) AT 111A

[5]

[2012] ZAGPJHC 165; [2012] 4 All SA 570 (GSJ); 2013 (1) SA 549 (GSJ) (18 September 2012)

[6] 2011(ZAGPJHC) 196 (23 September 2011) in paras 6 and 7.

[7] (35248/14) [2014] ZAGPPHC 400; 4 All SA 67 (GP) (19 June 2014)

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