

SOUTH AFRICA / JUDGMENT

Voigt NO and Another v EGH IP (Pty) Ltd and Others (1076/2021) [2021] ZAECHGC 40 (4 May 2021) [2021] ZAECHGC 40

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

1076/2021

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****EASTERN****CAPE DIVISION, GRAHAMSTOWN****CASE NO: 1076/2021****Date**

heard: 29
April 2021
Date

delivered: 04
May 2021
In

the matter between:

GARTH
MERRICK VOIGT N.O.
First
Applicant
JANINE
ADELE SNYDERS N.O.
Second
Applicant
and
EGH
IP (PTY) LTD
First
Respondent
TYRONE WILLIAM POWER
(Identity
Number 671[...])
Second
Respondent
MELINDA POWER
(Identity
Number 730[...])
Third
Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

- [1] In this matter, an application, came before me on 29 April 2021.
- [2] It was launched and pursued as a matter of urgency on a Certificate of Urgency by Mr Strathern SC for Applicants, and a consequent directive from a Judge.
- [3] The certificate itself urged that the matter was sufficiently urgent for the Court to dispense with the usual requirements of the Rules, on shortened time periods, in terms of Rule 6(12), but did not set out the degree of urgency or suggested timetable.
- [4] The Directive given by Mnqandi AJ on 14 April 2021 reads as follows:

“Having considered the certificate of urgency placed before me in the abovementioned matter, I hereby issue the following direction(s) with regard to the hearing and further conduct of the matter:

1. The founding papers shall be issued by 16h00 on 14 April 2021.
2. The respondent shall file a notice to oppose by 14h00 on 16 April 2021 and file answering affidavits if any on or before Wednesday 21 April 2021.

3. Respondents shall file his replying affidavits on or before 12h00 on Monday 26 April 2021 together with their heads of argument.
4. The respondents shall file heads of argument by 10am on 28 April 2021 and the matter to be heard on 29 April 2021 at 9h30. If there is no opposition the matter will be heard in the unopposed roll of 28 April 2021.

Remarks : Matter is sufficiently urgent to be heard as such.

Mnqandi, AJ”.

[5] The Notice of Motion adopted these time frames.

[6] It should immediately be said that a directive in such circumstances does not in any way finally dispose of the issue of urgency which is to be determined in due course by the Judge hearing the application on all the relevant facts and circumstances including those put forward by a Respondent in due course.

[7] That this is the position, was correctly recognised by both counsel for the parties[1].

[8] The relief sought in this matter is as follows:

“1. Dispensing with the requirements of form and service as provided for in the Uniform Rules of Court and directing that this application be and is hereby heard as a matter of urgency, as provided for in Rule 6(12);

2. Ordering that the Deed of Assignment dated 24 February 2020 concluded between Elzea Manufacturing (Pty) Ltd (“Elzea”) and the first respondent, in terms of which the trademarks listed in Annexure

‘A’ hereto (“the assigned trademarks”) were assigned to the first respondent, is hereby set aside;

3. Declaring that the trademarks belong to and vest in the insolvent estate of Elzea, and fall under the control of the first and second applicants by virtue of their appointment as provisional liquidators of Elzea, with extended powers as provided for in annexure “FA4” to the founding affidavit herein;
 4. Alternatively to 3 above, directing the first respondent forthwith to transfer and assign the trademarks to Elzea;
 5. Directing the first, second and third respondents, jointly and severally, the one paying the other to be absolved, alternatively one or more of them, to pay the costs of this application on the scale as between attorney and client.
 6. Granting the applicant further and/or alternative relief.”
- [9] When the matter was called I heard argument from the parties on both urgency and the merits of the application.

[10] I reserved judgment in order to deal with urgency and, depending on my decision thereon, the merits if appropriate.

URGENCY

[11] Urgency must be judged against the background of Rule 6(12) of the Uniform Rules of Court and Rule 12(d) of the Eastern Cape Practice

Directions[2].

[12] Urgent applications require an Applicant to persuade the Court that non-compliance with the Rules, and the extent thereof, is justified

on the grounds of urgency. Applicant must demonstrate inter alia that it will suffer real loss or damage were it to rely on normal procedure.

[13] The Rules adopted by an Applicant in such an application must, as far as practicable, be in accordance with the existing Rules both as to procedure and time periods applicable.

[14] A Respondent faced with an urgent application, and to avoid the risk of judgment being given against it by default, is obliged provisionally

to accept the Rules set by Applicant and then, when the matter is heard, make its objections thereto if any[3].

[15] In *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others* [4] Plasket AJ (as he then was) said as follows:

"[37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case'.

[38] ... it is not in every case in which the applicant may have departed from the Rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is implicitly recognised by Kroon J in the *Caledon Street Restaurants CC* case when he held - looking at the issue from the other perspective, as it were - that the 'approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the Rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not'.

...

[40] ... Indeed, the erstwhile Appellate Division has on a number of occasions turned its back on such formalism in the application of the Rules. For instance, in *Trans-African Insurance Co Ltd v Maluleka Schreiner JA* held that 'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits'. ...

in *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket, Harms JA* held that the Rules '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 entrenched fair trial right' contained in s 34 of the Constitution.”[5]

[16] There are degrees of urgency of course. An Applicant must set out explicitly the circumstances which render the matter urgent such as to justify the curtailment of the Rules, procedures and time periods adopted. That there will be a loss of substantial redress, if not heard on the basis chosen, must be shown.

[17] If the above is satisfied other issues come to be considered, some of which are:

[17.1] Whether Respondent can adequately present its case in the time given;

[17.2] Other prejudice to Respondent and the administration of justice;

[17.3] The strength of Applicant's case and any delay in asserting its rights (self created urgency).

[18] In this matter Respondents contend that:

[18.1] The urgency is self-created by the substantial delay in Applicants' launch of the application;

[18.2] That in any event the procedures and time limits adopted were completely unjustified and unsupported by the relevant facts as to urgency.

[19] It was immediately apparent on a reading of the papers including founding, answering and replying affidavits and annexures, that

Applicants would have difficulty in meeting the requirements of establishing the urgency for which it contended as also the argument

that this was, in any event to an extent, self-created.

[20] The timeline relevant can be set out succinctly as follows:

[20.1] On 8 December 2020 the company referred to in the papers as Elzea was provisionally liquidated, and finally liquidated on 9 February 2021.

[20.2] The liquidator was appointed on 25 January 2021 and their powers extended on 11 February 2021.

[20.3] The crux of the application is to set aside allegedly voidable dispositions by Elzea to First Respondent, and Applicants were advised, on 9 February 2021, by their attorneys to pursue an urgent application for the recovery of certain trademarks, the subject matter of the impugned transactions, in the event that a demand to reverse the transaction was not acceded to on 24 hours notices to do so.

[20.4] With no explanation for the delay in acting on their attorney's advice to make demand, and to bring an urgent application if the demand was not met in 24 hours, it was nearly a month later, on 2 March 2021, that the liquidators demanded, in writing, that First Respondent must return the trademarks failing which proceedings would be instituted. The demand was addressed to Second and Third Respondents.

[20.5] On 3 March 2021 Second and Third Respondents declined to do so with an explanation as to why not and stated that proceedings would be defended.

[20.6] With no explanation for the further delay (from 3 March 2021) the Judge's directive was obtained on 14 April

2021. The founding affidavit was commissioned on 12 April 2021 and application launched on 14 April 2021, served at around 16h00 that day.

[20.7] The time limits then applied are apparent from the above directive and effectively afforded the Respondents two days to file a notice to oppose and a further five days (to 21 April 2021) to file its answer of which two full days were over a weekend. Applicants then afforded themselves from Thursday, 22 April 2021 to 12 noon on Monday, 26 April 2021 to reply.

[21] This application is substantial and raises interesting and challenging questions of fact and law[6].

[22] Whilst Respondents somehow, and no doubt by huge effort, managed to file a full and well drafted answer, they unsurprisingly complained of prejudice due to the haste forced upon them.

[23] Mr Strathern SC quite correctly in his Heads of Argument stated that:

"Whilst it is not suggested that the matter is so urgent that it must be heard during the week of 26 April 2021, it is still sufficiently

urgent enough that it cannot wait enrolment in the ordinary course."

[24] In argument he again correctly accepted that effectively had the matter been heard during May 2021 at any time or date this would, on the urgency of the matter, have been such as to afford it such preference as it deserved.

[25] Once this was conceded the difficulties for Applicants became practically insurmountable.

- [26] At the outset Applicants delayed almost a month after their attorney's advice that they must proceed urgently should the trademarks not be returned on demand, in even making such demand.
- [27] From 3 March 2021 when return was refused with reasons, Applicants took until 14 April 2021 to obtain a directive and to issue and serve the papers, more than a month.
- [28] The urgency, such as it was, was thus to a large extent aggravated by the above delay and self-created in that sense.
- [29] The very limited time periods this imposed on Respondents were totally unjustified against the issues raised in the papers as quite

correctly accepted by Mr Strathern SC. There was far from sufficient alleged in the papers to justify same and indeed no

cognisable justification therefor. Whilst a feared diminution in value of the trademarks was relied on, not only was this disputed but on its own created only a degree of urgency far less than that contended for.

- [30] Effectively Mr Strathern SC argued that in any event having regard to the well drafted answers and that the matter was fully before me I should overlook these difficulties, and as the matter was relatively simple and concise it should thus be heard anyway.
- [31] This argument founders simply on the basis that it fails to address the fact that the temptation to brush the lack of urgency under the mat, simply going on to decide the matter is to be resisted, as set out in Caledon supra as follows:

"However, the attractiveness of finally disposing of the litigation should not be allowed to govern. The approach should rather be that there are times where, by way of non-suiting an applicant, - the point must clearly be made that the rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a [case] [7] or not."

- [32] This is clearly such a case and more especially that Respondents, whilst no doubt working night and day putting up a well-drafted response, nevertheless and understandably complained of prejudice.
- [33] It must be accepted that matters factual and legal usually require thought and careful consideration by clients and the legal team.

In this matter this was substantially denied Respondents and their legal team for absolutely no good reason, Applicants having afforded themselves a considerable period to consider and draft and having had the luxury thereof.

- [34] The founding papers on urgency thus fail to justify the procedure and time limits imposed to such an extent that the matter warrants being struck from the Roll with costs.

[35] As to costs Respondents' Counsel, Mr Lourens, sought wasted costs only accepting that this matter will in all likelihood proceed on proper terms in due course.

ORDER

[36] The application is struck from the Roll for want of urgency.

[37] Applicants are ordered to pay Respondents' wasted costs as a result of the matter being struck from the Roll.

M.J. LOWE

JUDGE OF THE HIGH COURT

Obo Applicants: Adv P R V Strathern SC

Instructed by: Grant & Swanepoel Attorneys Inc, Pietermaritzburg

c/o Netteltons Attorneys, Grahamstown

Obo Respondents: Adv P Lourens

Instructed by: Adams & Adams, Pretoria

c/o Huxtable Attorneys, Grahamstown

[1] See generally *Bobotyana & Others v Dyantyi & Others* (ECD 1198/2020, 21 August 2020, Mbenenge JP)

[2] *Bobotyana supra*

[3] *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE). In re: Several Matters on the Urgent Roll [2012] 4 All SA 570 (GSJ) [15]

[4] 2004

(2) SA 81 (SE) [37], [38] and [40].

[5] But see : *Murray & Others NNO v African Global Holdings (Pty) Ltd & Others* 2020

(2) SA 93 (SCA) [35], [38], [39] and [40]

[6] The papers alone go to 236 pages.

[7] Quotation corrected replacing the word 'time' with 'case'.

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