IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***3rd May 2019*** Signature

CASE NO: 2019/8846
DATE: 3RD MAY 2019

In the matter between:

LINDEQUE, BAREND GERHARDUS	First Applicant
DU TOIT, MARIA CORNELIA	Second Applicant
BLUE BRILLIANCE PAYMENT SOLUTIONS 1 (PTY) LTD	Third Applicant

and

HIRSCH, BRIAN RICHARD	First Respondent
McCAULEY, WAYNE	Second Respondent
BLUE LABEL TELECOMS LIMITED	Third Respondent

In re:

PREPAID24 (PTY) LIMITED

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicants for urgent interim interdictory relief, pending determination of Part B, which prays for a variety of relief, including final interdictory relief, declaratory orders, declarations of delinquency of the first and second respondents and an order removing the first and second respondents as directors of Prepaid 24 (Pty) Limited. The urgent relief prayed for by the applicants in their notice of motion is as follows:

'1. Directing that the matter be heard urgently and condoning the Applicants' failure to comply with the forms, service and time periods provided for in the Uniform Rules of Court;

2. Pending the final determination of the relief set out in part B of the application:-

2.1. That the first respondent and / or second respondent, or anyone acting on their instruction or their behalf, be interdicted from implementing the Notice of Termination dated 30 November 2018 signed by the first respondent and addressed to Handmade Connections CC in terms of which Prepaid24 (Pty) Ltd purportedly terminates the Service Level Agreement with effect from 30 March 2019;

2.2. That the first respondent and / or second respondent, acting individually and / or jointly, be interdicted from taking any future decisions regarding Prepaid24 (Pty) Limited without due approval by the board of directors of Prepaid24 (Pty) Limited;

2.3. That the first respondent and / or second respondent be ordered to immediately remove all advertisements from the Web, or any other platform, for the positions of Managing Director and Chief Financial Officer with Prepaid24 (Pty) Ltd;

2.4. That the first respondent and / or second respondent, or anyone directed by them to act on their behalf, be interdicted from placing any advertisements in any format or on any platform, for the positions of Managing Director and Chief Financial Officer with Prepaid24 (Pty) Limited;

2.5. That the first respondent and / or second respondent, or anyone directed by them to act on their behalf, be interdicted to interview any person for the post of Managing Director or Chief Financial Officer with Prepaid24 (Pty) Limited;

3. Costs of part A of the application, such costs to include the costs of two counsel.'

[2]. An issue central to this urgent application relates to a resolution taken at a meeting of the board of directors of Prepaid24 (Pty) Limited ('Prepaid24') on the 20th of November 2018. At that meeting it was resolved that Prepaid24 would give four months' notice to the other contracting parties to a Service Level Agreement ('SLA') of termination of such agreement.

[3]. In March 2016 the first and second applicants, personally, concluded a service level agreement with Prepaid24 in terms of which Prepaid24, through Handmade Connections CC ('Handmade Connections'), remunerated them for services rendered to Prepaid24 at R285 000 per month. Clause 4.2 of the service level agreement provides for the agreement to be terminated on four months' notice in writing.

[4]. By January 2018 the parties had agreed to go their separate ways because of their different points of view.

[5]. On 20 November 2018 the first and second respondents as directors of Prepaid24 resolved to terminate the service level agreement. On 30 November 2018 Prepaid24 gave the first and second applicants, as well as Handmade Connections, the four – month written notice of termination of the service level agreement. The four – month notice period would end on 30 March 2019.

[6]. The applicants for the first time on the 20th of February 2019 made demand *inter alia* that effect not be given to the notice of termination. On the 26th of February 2019 the respondents refused to furnish undertakings to that effect, as demanded by the applicants. The urgent application was thereafter launched by the applicants on the 8th of March 2019, and enrolled by the applicants for hearing by the urgent court on the 19th of March 2019. On the 18th of March 2019, agreement was reached between the parties to extend the notice period for one month to the 30th of April 2019 and to remove the matter from the urgent roll so as to (a) facilitate settlement negotiations; (b) allow for an orderly exchange of affidavits if the parties could not settle their parting of the ways by the 5th of April 2019, with a reservation of the parties' respective rights including the respondents' rights to challenge the contended for urgency of the application.

[7]. The matter was not settled by the 5th of April 2019, and the respondents timeously served their answering affidavit in terms of the agreed timetable.

[8]. The applicants contend that the resolution purportedly adopted by the board of directors of Prepaid24 on the 20th of November 2018 was not a properly adopted resolution.

[9]. Mr Subel, who appeared on behalf of the respondents, submitted that on these common cause facts, any urgency is self – created and that the

enrolment of the urgent application by the applicants was an abuse of the court process.

[10]. As rightly pointed out by Mr Subel, self – created urgency does not constitute acceptable urgency for purposes of uniform rule 6(12) justifying the determination of a matter on an urgent basis. In that regards see: *Police and Prisons Civil Rights Union v Minister of Correctional Services and Another,* [2014] 5 BLLR 481 (LC) at par [6]; *Workforce Group (Pty) Limited v National Textile Bargaining Council and Another*, [2011] 11 BLLR 1136 (LC) at par [13]. In *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd*, 1969 (4) SA 443 (C), a case which has been often been cited with approval, including by the SCA in *NCSCA v Openshaw*, 2008 (4) SA 339 (SCA) at 345, it was said that an applicant for interim relief must act with maximum expedition in launching and prosecuting an application. As regards the importance in this division to strike from the roll matters that are not urgent, see the now well – known judgment of Wepener J in *In re: Several Matters on the Urgent Roll*, 2013 (1) SA 549 (GSJ), especially at para [18] to [21].

[11]. As regards the applicants' complaints relating to the advertising of and interviewing for certain posts in Prepaid24, the first and second respondents furnished undertakings in their answering affidavit that they will remove any advertisements and will not advertise or interview for replacement positions without first convening board meetings to consider such actions. This, in my judgment, removes any cause of complaint in this respect, particularly for purposes of urgency.

[12]. The first and second respondents, as the disinterested directors of Prepaid24 at a board meeting, on the 20th of November 2018 resolved to give four months' notice to terminate the service level agreement. Prepaid24 then furnished the written four – months' notice on the 30th of November 2018. It is

the case of the respondents that Prepaid24 exercised a contractual entitlement to terminate the service level agreement on four months' written notice.

[13]. The first and second respondents as the disinterested directors of the board entitled to vote in terms of section 75 of the Companies Act made the business decision to terminate the service level agreement, and so the services rendered by the first and second applicants through Handmade Connections, in what they believe to the best interests of Prepaid24.

[14]. The termination of the service level agreement does not affect the first and second applicants in their capacities as directors. Regardless of the termination of the service level agreement, they remain directors. And in any event their position as directors, in the context of the decision of the board to terminate the service level agreement, is regulated by section 75, and which section precludes them from voting in respect thereof.

[15]. At the commencement of the hearing of the urgent application, I made a ruling that the issue of urgency should be dealt with first. I had deemed this course expedient in the circumstances of the matter. In the end, and probably due to the fact that the issue of urgency is so closely linked to the merits of the application, Mr Acker, who appeared on behalf of the applicant, argued the merits as well when he made his submissions initially. Mr Subel followed suit.

[16]. As I indicated above, the applicants are aggrieved by the fact on the 20th of November 2018 Prepaid 24 passed a resolution, or, as the applicants put it, purported to pass a resolution, which had the effect of approving the giving of notice of termination of the SLA. The applicants were present at that meeting, but, in view of the fact that they had a personal financial interest in the subject matter of the resolution, they were excluded from participating in the vote on the

resolution as per the provisions of section 75(5) of the Companies Act, 2008. Therefore, the very first time the issue relating to this urgent application arose was on the 20th of November 2018. Subsequently, on the 30th of November 2018, the four months' notice of termination was in fact addressed to the first and second applicants, as well as to the Handmade Connections. By then it should have become clear to the applicants that Prepaid24 was determined to proceed full steam ahead with the cancellation of the SLA.

[17]. Only on the 20th of February 2019, that is some two and a half months later, did the applicants for the first time raise an objection to the cancellation of the SLA. Mr Acker submitted that the explanation for the delay relates to the fact that since early 2018 the parties had been engaged in settlement discussions with a view to dissolving the business relationship between them. I am not convinced that this explanation is sustainable.

[18]. It is the respondents' contention that the alleged urgency of the matter is self – created and that there was non - compliance with the provisions of Uniform Rule of Court 6(12). It was submitted on behalf of the respondents that despite the fact that the applicants were aware, at the latest being on the 30th November 2018, that Prepaid 24 intended terminating the SLA, they only decided to start taking action during February 2019.

[19]. Rule 6 (12) (b) of the uniform rules of court reads as follows that:

> '(b) In every affidavit or petition filed in support of the application under para (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.'

[20]. On behalf of the applicants it was submitted that the fact that the parties were involved in ongoing settlement discussions justified the delay in bringing this application. I do not believe that this bald averment that the parties were engaged in settlement discussions explains the failure by the applicants to take action between the 30th November 2018 and the 20th of February 2019, when their attorneys demanded an undertaking from the respondents that they (the respondents) would not act on the rescission notice of the 30th of November 2018.

[21]. I am of the view that the urgency of this application is self – created. Had the applicants not been tardy in filing their application, urgency would not have been an issue. As soon as the respondents commenced the process of the cancellation of the SLA, it was incumbent on the applicants to as soon as possible thereafter launch proceedings to challenge the cancellation. There is no explanation as to why the applicants waited for over two months to object to the notice of cancellation.

[22]. I am not convinced that the applicants have passed the threshold prescribed in Rule 6(12)(b) and I am of therefore the view that the application ought to be struck from the roll for the reasons given above.

Costs

[23]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[24]. I can think of no reason why I should deviate from this general rule.

[25]. I therefore intend awarding cost against the first, second and third applicants in favour of the respondents.

Order

Accordingly, I make the following order:-

(1) The urgent application of the first, second and third applicants be and is hereby struck from the urgent court roll.

(2) The first, second and third applicants, jointly and severally, the one paying the other to be absolved, shall pay the cost of the first, second and third respondents, including the cost consequent upon the employment of two Counsel, the one being a Senior Counsel, and the cost reserved on the 19th of March 2019.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	2nd May 2019
JUDGMENT DATE:	3rd May 2019
FOR THE FIRST, SECOND & THIRD APPLICANTS:	Advocate C Acker, together with Adv C J C Nel
INSTRUCTED BY:	Tertius Schoeman Incorporated
FOR THE FIRST, SECOND & THIRD RESPONDENTS:	Advocate A Subel, together with Adv B M Gilbert
INSTRUCTED BY:	Barkers Attorneys