

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 59303/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

4 January 2022

SIGNATURE

In the matter between:

METBANK LIMITED
(Formerly the Metropolitan Bank of Zimbabwe)

Applicant

And

ABSA BANK LIMITED

First Respondent

THE LIQUIDATORS OF THE SMALL AND MEDIUM ENTERPRISES BANK LTD
(In liquidation)

Second Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 January 2021.)

JUDGMENT

MIA, J

[1] The applicant brought an urgent application on 28 December 2021 seeking the following relief:

- “1. Dispensing with the forms and service as prescribed by the Rules of Court and directing that this matter be heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court;
2. The first Respondent is ordered forthwith to unfreeze the following bank accounts held in favour of the applicant:
 - 4.1USD Trading Account-account number:[...]211
 - 4.2USD Collection Account-account number [...]210
 - 4.3ZAR Trading Account-account number [...]201
 - 4.4ZAR Collection Account-account number [...]001
3. The first Respondent is ordered to forthwith release the following payments as per instructions received from the applicant as follows:
 - 3.1 \$70 000.00 USD from account number [...]287
 - 3.2 \$750 000.00 USD from account number [...]294
 - 3.3 \$2 100 000.00USD from account number [...]300
 - 3.4 \$650 000.00 USD from account number [...]301
4. Alternatively setting aside the registration of foreign judgment granted by the High Court of Namibia on 29 October 2020, registered with the Clerk of the Magistrate’s Court, Randburg, on 29 November 2021.
5. Alternative to 4 above, the orders in paragraphs 2 and 3 above shall operate as interim interdict or order pending finalisation of the application in terms of section 5 of the Enforcement of Foreign Civil Judgment Act 32 of 1998 in the Magistrates Court, Randburg.
6. Costs in the event of opposition.
7. ...”

The first and second respondents opposed the application.

- [2] The applicant METBANK Limited is a commercial bank registered in Zimbabwe with its head office situated at Metropolitan House, 3 Central Avenue, Harare, Zimbabwe. The applicant has a registered business address in the Republic at 145 Second Street, Parkmore, Sandton. The first respondent ABSA Bank Limited, a public company registered and incorporated in terms of the company laws of South Africa. Its principal place of business is situated on the 7th Floor, ABSA Towers West, 15 Troye Street, Johannesburg. The second respondents are the liquidators, Small and Medium Enterprise Limited (SME in liquidation), operating in Namibia. Webber Wentzel attorneys represent the second respondents with offices at 90 Rivonia Road, Sandton.
- [3] The applicant sought urgent relief as it could not transact on its ABSA accounts, and it had a concern for its clients need for funds over the Christmas and New Year period for celebration necessities. ABSA refused to release funds based on a section 3(2) notice issued in terms of the Enforcement of Foreign Civil Judgments Act 32 of 1988 (the Act). The applicant averred the order was null because it was not signed by the clerk of the court and was not accompanied by a certificate indicating the interest rate and conversion of Namibian currency to South African currency to properly reflect the amount in South African Rands and the correct interest rate. Furthermore, the applicant contended that ABSA was not consistent in its freezing of the account when it permitted a transaction on 17 December 2021 and allowed a payment to be released from one of the applicants' accounts held with ABSA. The applicant also contended that the second respondent had knowledge of the judgment granted in its favour in the Namibia High Court since 29 October 2020 and only registered the foreign judgment on 26 November 2021. The applicant has appealed the judgment granted by the Court in Namibia. The appeal is pending. The applicant contends it was unnecessary to register the judgment as the applicant has funds to satisfy the debt.

- [4] The issues before this court are to determine whether:
- 4.1 whether the applicant made out a case for urgency;
 - 4.2 if the court is satisfied, there is urgency whether the applicant is entitled to the relief set out in prayers 2,3, 5 and 6 of the notice of motion.
- [5] Rule 6(12) provides for the enrolment of an urgent matter, and the relevant part reads follows:
- (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.
 - (b) **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 [she] could not be afforded substantial redress at a hearing in due course.** (emphasis provided)
- [6] The applicant alleged commercial urgency in that the Government of Zimbabwe is a client and requires access to the accounts to purchase resources to address the Covid -19 pandemic, such as PPE and similar resources. Counsel for the applicant argued that the applicant's clients could not access their funds over the festive season and New Year period to purchase necessities. This was the reason the application was launched on 28 December 2021. The applicant has simultaneously applied to set aside the enforcement of the foreign civil judgment in the Randburg Magistrates Court.
- [7] The first respondent noted that the applicant took a resolution on 9 December 2021. The company secretary and legal counsel had sent a letter of demand as late as 30 November 2021 regarding the issue of the interdict. Thus Counsel for the first respondent argued that the

application was not urgent as the applicant was aware of the s 8 interdict as early as 26 November 2021. The applicant elected to launch the application only on 23 December 2021 with severely restricted time limits. Counsel for the first respondent argued that the applicant referred to their clients' access to funds over the Christmas period as an aspect of urgency when the application was being heard after Christmas. This indicated that there was no urgency. Furthermore, counsel for the first respondent referred to the application lodged in the Magistrates Court and argued that this was an instance where the applicant sought collateral relief with the application pending in the Magistrates Court. In this regard, Counsel relied on the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1 SCA where the Court held at paragraph [36] :

“It is important to bear in mind (and in this regard we respectfully differ from- the court a quo) that those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and thus its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.”

- [8] The second respondent respondent similarly in opposing urgency notes the applicant's knowledge of the registration of the judgment on the 26 November 2021 and the applicant's failure to take any action until 9

December 2021 when it took a resolution to engage counsel for activation of the Metabank accounts and the reversal of the registration of the Namibian judgment. The applicant then demanded on 13 December 2021 from the first respondent that the accounts be unfrozen despite the knowledge from 26 November 2021 that the first respondent had received the notice in terms of s 3(2).

[9] On the issue of urgency, it is clear that the applicant had been aware of the s 3(2) notice since 26 November 2021, almost a month. It had proceeded to apply to the Randburg Magistrates Court to deregister the Namibian judgment. Despite their knowledge of the matter from 26 November 2021 to date, the applicant's inaction does not warrant any urgency, even if they were engaging with the respondents. The matter became urgent due to their inaction. The first respondent had informed the applicant about the s 3(2) notice. The applicant did not take cognisance of the effect of the s 3(2) notice and deal with it timeously. It approached this Court four weeks after it received the notice. Even if it were corresponding, the demand was made seventeen days after receiving the notice.

[10] There appears to be no urgency in the applicant's conduct. The submission that they were entitled to negotiate on the issue detracts from the urgency around securing funds in time for Christmas and the issue of securing funds to fight the Covid-19 pandemic. Moreover, as submitted by counsel for the second respondent, there is no evidence attached to support the submission that the Government of Zimbabwe is the client and required resources for the Covid-19 pandemic. The suggestion that the first respondent permitted a transaction on the account on 17 December 2021 does not take the applicant's case further, as the first respondent clarified that this was a transaction that was specifically negotiated to permit the influx of funds to the account for onward payment as opposed to the release of funds. This appears to be a matter of self-created urgency on the facts presented. In the circumstances, I am not satisfied that the applicant has put forward

grounds to indicate that this court should intervene and dispense with the requirements of Rule 6.

[10] The applicant has not presented facts that prove that any relief it might obtain in the ordinary course would not be substantial relief. I have already alluded to the self-created urgency. The applicant does not persist with the relief sought in prayer four of the notice of motion and counsel for the first and second respondents argued it was because the applicants clearly would be seeking the same relief in the Randburg Magistrates Court. Be that as it may, the applicant has not made out a case for the urgent relief it seeks in terms of Rule 6(12).

ORDER

[11] In the result this matter is struck off the roll with costs.

**S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION ,JOHANNESBURG**

Appearances:

| | |
|------------------------------------|---|
| On behalf of the applicant | : Adv W.R Mokhare SC and Adv Mahlako |
| Instructed by | : Marumoagae Attorneys |
| On behalf of the first respondents | : Adv M Glazer |

Instructed by : Lowndes Dlamini Inc

On behalf of the second respondent : Adv Heathcote and Adv M Cooke

Instructed by : Webber Wentzel Inc

Date of hearing : 28 December 2021

Date of judgment : 4 January 2022