REPUBLIC OF SOUTH AFRICA

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

Case No: 36515/2021

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

..... **.....**
SIGNATURE **DATE**

In the matter between :

JOHANNES JACOBUS ROETS N.O.	First Applicant
LUNGISANI SIPHIWE BUTHELEZI	
(ACTING IN THEIR CAPACITIES AS THE REMAINING CO-TRUSTEES OF THE NCAMANE TRUST) (IT4714/1999)	Second Applicant

and

SB GUARANTEE COMPANY (RF) (PTY) LTD	First Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Second Respondent
SHERIFF OF THE HIGH COURT, PALM RIDGE	Third Respondent
MARTINUS JACOBUS BEKKER N.O.	Fourth Respondent
KRISHNI PILLAY N.O.	Fifth Respondent

JUDGMENT

STRYDOM J

[1] This is an application for leave to appeal against this court's judgment and order striking the application from the urgent court roll of 21 June 2022.

[2] The applicants in this matter are the trustees of the Ncamane Trust ("the Trust") which brought an urgent application against the first respondent, a financier, and others.

Brief history

[3] Previously a default judgment was granted by Malindi J on 10 October 2021 in terms of which the Trust was ordered to pay to the first respondent the amount of R5,957,520.13, plus interest and costs.

[4] The immovable property registered in the name of the Trust ("the property") was declared to be specially executable and further ancillary relief was granted. From this day the sale in execution became a possibility.

[5] On or about 5 April 2022 the applicants brought an urgent application for the stay of execution pursuant to the money judgment, which was going to take place on 6 April 2022.

[6] On 5 April 2022 my brother Adams J made an order that the applicants' urgent application be struck from the urgent court roll for lack of urgency.

[7] After this date the applicants amended their notice of motion and filed a supplementary affidavit but on or about 8 June 2022 this urgent application was withdrawn.

[8] Even before this withdrawal, the applicants brought a fresh urgent application on 7 June 2022 which was set down for hearing on this court's urgent roll of 21 June 2022. It was alleged that the applicants obtained new legal representatives who made the applicants aware of a defence against the default judgment which was granted on 10 October 2021.

[9] In part A of this fresh urgent application, a prayer for urgency was sought and also a stay of the execution which was scheduled to take place the day after the date of set down of the matter, to wit, 22 June 2022.

[10] In part B of the notice of motion, the following relief was sought:

10.1 An order directing that the home loan agreement allegedly concluded between the second respondent and the deceased on behalf of the Trust, be declared null and void, having been secured in fraudulent circumstances;

10.2 An order condoning the Trust's failure to comply with the 20 day time limit prescribed by the provisions of rule 31(2)(b) read with rule 27(1) of the Uniform Rules of court;

10.3 An order rescinding and setting aside the default judgment granted by His Lordship the Honourable Mr Justice Malindi on 10 October 2021;

10.4 An order consequent upon the said rescission, setting aside the “writ of execution – Immovable Property” dated 13 April 2022, issued in pursuance of the said court order

10.5 A costs order was sought against the Trust.

[11] When this matter was heard, it was argued on behalf of the respondents that the urgency was self-created. On behalf of the applicants, it was argued that the applicants only after the first urgent application was launched became aware of available defences in terms of which the rescission of the judgment should be granted.

[12] The court to some extent heard counsel on the merits of the urgent application but found that the urgency was self-created. A short judgment was delivered by the court which speaks for itself but in essence the court found that from 12 April 2022 the applicants became aware that a sale in execution would take place on 22 June 2022. Despite this, the applicants only brought their urgent application on 7 June 2022 requesting the court to make an order to stop a sale the following day.

[13] The mere fact that the sale was scheduled for the following day made the matter urgent but the court found that this urgency was self-created and struck the matter from the roll with costs.

[14] The effect of this order was that the sale in execution could go ahead. This also meant that some of the relief sought in part B became moot. No purpose would be served for the setting aside of the writ of execution of the property.

[15] It is against this order in terms of which the matter was struck off the roll with costs that leave to appeal is sought.

[16] It was argued that this court erred in its finding on the question of urgency. In particular, it was argued that the delay in instituting proceedings was not, on its own, a ground for refusing to regard the matter as urgent, more particularly in circumstances where the applicants only learned of the additional defences espoused in their second application, when they met with their attorney and counsel on 2 June 2022 and thereafter moved with the greatest alacrity in preparing and instituting their second application by 7 June 2022.

[17] It was argued that the court should have taken a more holistic approach by considering the requirements for an interim interdict, *inter alia*, the prejudice the parties stood to suffer together with the balance of convenience which the applicant submitted favoured the granting of the order.

[18] It was argued that the court should have restored the status quo by granting the stay of execution.

[19] In essence it was argued that the court should have granted the interim relief and should not have struck the matter from the roll pursuant to a finding of self-created urgency.

[20] It was argued that the grant of interim relief under part A would not prejudice the main proceedings under part B, yet the order of this court axiomatically recognised the right of the first respondent to invoke the relief under the continuing covering mortgage bond which was, according to the applicants'

version, invalid having been secured by way of a resolution signed by the deceased, who had no authority from a non-existing Trust to do so at the time.

[21] Further, by striking the matter from the urgent roll, the order had a final effect as no interim relief was granted to prevent the sale in execution scheduled for a day after the striking of the application. This further meant that the relief sought in part B of the application for the setting aside of the writ of execution became nugatory. On this premise it was argued that the effect of the order was final and therefore appealable.

[22] It was further argued that this court failed to take cognisance of the fact that there was a pending rescission application in place when the third respondent notified the applicants on 6 May 2022 that a second sale in execution had been scheduled to take place on 22 June 2022.

[23] The court was referred to the matter of *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and others* 2011 (SGH) in which Notshe AJ found the following in relation to self-created urgency:

> "[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to grant the matter as urgent. The court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at the hearing in due course. The delay might be an indication that the matter is not as urgent as the applicant would want the court to believe. On the other hand a delay may have been caused by the fact that the applicant was attempting to settle the matter or collect more facts with regard thereto. See *Nelson Mandela Metropolitan Municipality v Greyvenouw* 2004

(2) SA 81 (SE) at 94 C-D; *Stocks v Minister of Housing* 2007 (2) SA 9 (C) 12 I – 13 A.

[9] If it means that there is some delay in instituting the proceedings an applicant has to explain the reasons for the delay and why despite the delay, he claims that he cannot be afforded substantial redress at the hearing in due course. I must also mention that the fact that the applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If he cannot be afforded substantial redress at the hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however, despite the anxiety of an applicant he can be afforded substantial redress in an application in due course the applicant does not qualify to be enrolled and heard as an urgent application."

[24] According to this judgment, the only determining factor in an urgent application is whether the applicant can be afforded substantial redress in an application in due course.

[25] It is common cause that the applicants would never have been able to obtain substantial redress in due course considering that the sale in execution was going to take place the following day.

[26] In my view, urgency which is self-created in a sense that an applicant sits on its laurels or take its time to bring an urgent application can on its own lead to a decision that a matter is struck off the roll. It would of course depend on the explanation provided but if the explanation is lacking and does not cover the full period from when it was realised, or should have been realised, that urgent

relief should be obtained. If this criteria to strike a matter from the roll is not available to a court, a court would be compelled to deal with an urgent application where for instance nothing was forthcoming for weeks or months and a day or two before an event was going to take place a party who wants to stay that event can approach a court and argue that if an order is not immediately granted such party would not obtain substantial redress in due course. If this is the approach to be adopted by a court there exist no reason why any explanation for the delay should be provided at all. An applicant only have to show that should interim relief not be granted it will suffer irreparable harm.

[27] The court considered the circumstances why the urgent application was only set down one day before the scheduled date for the sale in execution and found that the delay was not fully explained. The court found that the delay could not be overlooked and the matter should not be dealt with in preference to other matters on the court's urgent roll set down for the Tuesday, being the first day of urgent court. It was held in decisions of this court that a ground for striking an urgent matter from the roll could be found in self-created urgency. See *Schweizer Reneke Vleis Mkpy (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1) ph 711 T. Accordingly I am of the view that the matter could have been struck from the roll on the ground that the urgency was self-created.

[28] The question at this stage is whether this court is of the view that the appeal would have a realistic chance of success should leave to appeal be granted. Even if the applicant has a reasonable prospect of success against my finding,

the question remains whether such an interim order is appealable and will serve any purpose at this stage.

[29] As far as the appealability is concerned, the court will accept that by striking the matter off the roll the relief in part A, i.e. the stay of the execution, was finally refused. The sale in execution could go ahead on the day after the striking of the urgent application and in fact did take place. It was argued that the court cannot take this fact into consideration in its consideration of the application for leave to appeal. It became common cause that the sale took place and in such situation the court could not ignore this fact. Even if the sale cannot be considered, what can be considered is that it was common cause between the parties that the sale was scheduled for 22 June 2022 and if not stayed it would have proceeded.

[30] The court will also accept that the further impact of its order was that certain portions of the relief sought in part B became moot, more particularly the prayer for the setting aside of the writ of execution. The remainder of part B, i.e. the condonation and rescission application, can however go ahead. By striking the application the matter could be proceeded with in ordinary cause and the remaining relief sought could be obtained.

[31] Fact is the court was asked to grant interim relief which has now become moot. Section 16(2)(a)(i) of the Superior Courts Act determines that where an appeal will have no practical effect or result, it may for this reason alone be dismissed. What the applicants now ask from this court is to grant them relief to appeal against the court's decision on urgency which had the practical effect that part A to grant interim relief, was not granted. Even if this court was wrong in its

decision the appeal will have no practical effect as it cannot turn the clock backwards. If the success on appeal will have no practical effect then in my view leave to appeal should also not be granted.

[32] In my view it serves no purpose to grant the applicants leave to appeal only for the appeal to be dismissed as the appeal will have no practical effect.

[33] If a matter is struck from the roll on urgency an applicant can simply set the matter down again on proper notice in compliance with the rules as the only finding which was made was that the matter was not properly on the roll.

[34] Accordingly, it is ordered that the application for leave to appeal is dismissed with costs.

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RÉAN STRYDOM

JUDGE OF THE HIGH COURT

GAUTEMG DIVISION

JOHANNESBURG

Date of hearing:	13 September 2022
Date of Judgment:	6 October 2022

Appearances

For the Applicant:	Adv. L. Berlowitz
Instructed by:	Okafor MA Attorneys Inc

For the 1st and 2nd Respondents:	Adv. A.J Venter
Instructed by:	Martins Weir-Smith Inc