REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2023/101032

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES/ NO
DATE: 16 October 2023	JUDGE: T THUPAATLASE AJ

BOARDWALK TRADING 175 CC Applicant

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY First Respondent

CITY POWER JOHANNESBURG SOC LIMITED Second Respondent

Judgment

Introduction

[1]. This application arises from the disconnection of the applicant's electricity supply to its business premises by the first respondent, City of Johannesburg Metropolitan Municipality ("the City"). The property is described in the papers as Remaining Extent of Erf 171 and Portion 1 of Erf 171 Cleveland Ext 5 Township.

[2] The court was requested to interdict and restrain the respondents from terminating the applicant's electricity, pending the final determination of the formal dispute raised by the applicant with reference on its municipal account. The applicant alleges that it has declared a dispute with the municipality regarding its accounts.

[3] The papers show that the application was served on the respondents on 05 October 2023 via email. The electricity supply was disconnected on the 03 October 2023. The Respondents was given very truncated timelines to respond and as a result when the matter was called on the urgent roll, they had not had opportunity to file opposing papers. Despite this, the Respondents were still able to brief counsel to appear.

[4] In the meantime, the electricity supply was reconnected on the 04 October 2023. This means that when the matter was enrolled the applicant's electricity supply was already restored. The importance of this fact will became apparent in the course of the judgment.

[5] Despite the reconnection of the electricity supply the applicant still persisted to seeking relief that: '*That the Respondents be interdicted and restrained from disconnecting the electricity supply to the properties pending the final end and determination of the formal dispute raised by the Applicant on its municipal account number: 5557884842'.*

[6] The main contention by the respondents was that given the limited time period afforded to deliver its answering papers to oppose application was unreasonable. The point was emphasised as Organs of State the respondents were constrained by procurement process in engaging legal representation.

[7] The respondents argued that the remainder of the orders sought in the notice of motion were not urgent. The applicant's insistence to proceed with an urgent application was an abuse of court processes.

[8] It obvious on the papers that the respondents were not afforded sufficient time and opportunity to consult with their legal representatives in order to draft the answering affidavit. During hearing, the respondents confined their arguments to the issue of urgency.

Parties

[9] The applicant is Boardwalk Trading 1975 CC duly incorporated in terms of the Close Corporation Act, 69 of 1984 and owner of the property whose electricity was disconnected.

[10] The first respondent is the City of Johannesburg Metropolitan Municipality, a municipality as described in Section 2 of the Local Government: Municipal System Act, 2000. The second respondent is City Power Johannesburg (SOC) Ltd, a State company with limited liability duly incorporated according to the company law of the Republic of South Africa.

Urgency

[11] The starting point for urgency is that a party is seeking to bypass the rules relating to service and time periods prescribed by the Uniform Rules of this Court. The applicant is seeking to avoid having to wait in the queue of litigants waiting to have their matters being heard in the ordinary time periods. It is imperative that a party that seeks to secure such indulgence from the court must comply with the provisions of Rule 6(12) as well as the Practice Manual of this Division relating to urgency. The applicant seeks an indulgence to have rules and time periods abridged in its favour.

[12] It is clear that over a long period of time, Rule 6(12) has been abused by litigants to varying degrees. This is despite judicial officers showing their displeasure towards this practice. I shall take liberty to quote some judgments to illustrate this point.

[13] The starting point are remarks by Coetzee J ***LUNA MEUBELVERVAARDIGERS (EDMS) BPK V MAKIN AND ANOTHER (T/A MAKIN'S FURNITURE MANUTACTURERS)*** 1977 (4) SA 135 (W) at 136. that '*undoubtedly the most abused rule is rule 6 (12) which reads as follows:' Rule12 (a) In urgent applications the court or a judge may dispense with 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 seems meet.(b) In every affidavit or petition filed in support of the application under para (a) of the sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent'.

[14] The court in ***LUNA MEUBELVERVVARDIGERS*** continued to set out the important aspects of urgency as follows*: 'For the sake of clarity I am going to set forth the important aspects of 'urgency'. In so doing I shall not deal with those ex parte applications which fall under Rule 6(4). Urgency involves mainly the abridgment of times prescribed by the Rules and secondarily, the departure from established filing and sitting times of the Court. The following factors must be borne in mind. They are stated thus, in ascending order of urgency*:

> *1. The question is whether there must be a departure at all from the times prescribed in Rule 6(5) (b). Usually this involves from the time of seven days which must elapse from the date of service of the papers until the stated day of hearing. Once that is so, this requirement may be ignored, and the application may be set down for hearing on the first available motion day, but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court judge on duty that week.*
>
> *2. Only if the matter is so urgent that the applicant cannot wait even for the next Tuesday, without having filed his papers by the previous Thursday.*
>
> *3. Only if urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing in the next Court day at the normal time of 10:00 am or for the same day if the Court has not yet adjourned.*
>
> *4. Once the Court has dealt with the cases for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next day Court day at the normal time that the Court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even if that be at night or during a weekend.*

Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should be greater than the exigency of the demands. It must be commensurate therewith. Mere lip

service to the requirements to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down'.

[15] The recent remarks by Vally J in ***39 VAN DER MERWE STREET HILLBROW CC v CITY Of JOHANNESBURG METROPOLITAN MUNICIPALITY AND ANOTHER*** (2023-069078) [2023] ZAGPJHC 963 (25 August 2023) bears testimony to this observation. At para [27] of the judgment the learned judge remarks as follows: *'Interim interdicts are capable of being, have been, and continue to be, abused by a party that succeeds in securing or resisting one. The applications wherein they are sought are often split into two, a Part A and a Part B, with the former being a call for an interim interdict while the latter constitutes a claim for final relief. The relief sought in Part A would be crafted along the lines of: 'Pending finalisation of Part B of the application the respondent is interdicted from …' They are also brought without a Part B. This would be in a circumstance where the final relief is sought in an action proceeding. In such a case the relief would be crafted along the lines of: 'Pending the finalisation of an action (or to be brought) by the applicant …'. In either case, once the interim relief is granted or refused the successful applicant has little interest in having either Part B or the action finalised. Having secured victory, albeit only on an interim basis, the successful party can easily frustrate the finalisation of the matter by taking advantage of the rules set out in the Uniform Rules of Court. The experience thus far demonstrates that courts have to be more vigilant when dealing with applications for interim interdicts, especially when granting them'.*

[16] In ***RE: SEVERAL MATTERS ON THE URGENT COURT ROLL*** 2013 (1) SA 549 at 17 Wepener J stated that: '*An abuse of the process regarding urgent applications has developed (in all likelihood with a hope that the respondents would not be able to file opposing affidavits in time). This practice must be addressed in order to stop matters being unnecessarily enrolled and to clog a busy urgent court roll. In these matters, sufficient time should be granted to the respondents to file affidavits, and they can rarely do so when papers are served less than a week before a matter is to be heard…"*

[17] The learned judge went further to remark that: '*The aforementioned practices will be strictly enforced by the presiding judge. If an application is enrolled on a day or at a time that is not justified, the application will not be enrolled, and an appropriate punitive cost order may be made.* See para [5].

[18] The DJP of this division has observed similar trend and issued a Notice dated 04/10/2021 titled 'Notice to legal practitioners about urgent motion court, Johannesburg' and directed as follows:

> *Para [6] 'The requirement to consolidate the case on urgency in a discrete section of the founding papers is mandatory. Often this is not done. In future a failure to observe the practice shall attract punitive costs orders'*
>
> *Para [7] Argument on urgency must be succinct. Too often a flaccid and lengthy grandstanding performance is presented. This must stop. If the matter is truly urgent an argument in support of it must be prepared before hearing and quickly and clinically articulated.'*

[19] As I have already indicated, at the time the application was served, electricity supply was already restored a day preceding such service. The reason why applicant still persisted with the application on the urgent roll is baffling. The primary relief that the Applicant sought was to have the electricity restored. That much is clear from the founding affidavit.

[20] Ancillary relief which is clearly secondary is that the court should issue a prohibitory interdict, as the applicant feared repeat conduct from the respondents. It is well established that in pronouncing the issue of urgency, the court exercises wide discretion. I am not persuaded that the applicant was justified in approaching the court with such extreme urgency. The urgency was deemed by the applicant to be so extreme that the respondents were given very little opportunity to file an answering affidavit. In the meantime, electricity had been restored.

[21] In the case of SOUTH ***AFRICAN AIRWAYS SOC V BDFM PUBLISHER (PTY) LTD AND OTHERS*** 2016 (2) SA (GJ) at para [38] the court Sutherland J (as then was) stated that '*Moreover, an interdict is an appropriate form of relief to prevent future harm, not afford redress for past harm. See further* ***PHILLIP MORRIS INC. AND ANOTHER V MALBORO SHIRT CO, SA LTD AND ANOTHER*** *1991 (2) SA 720 at 735A.*

[22] I also refer to ***STAUFFER CHEMICALS CHEMICAL PRODUCTS DIVISION OF CHESEBROUGH-PONDS (PTY) LTD v MONSANTO COMPANY*** *1988 (1) SA 805 (T)* at 809F *'As far as interdicts are concerned, the ordinary rules relating to interdicts apply. Terrell on The Law of Patents 13th ed at 419 correctly points out that the basis of an interdict is the threat, actual or implied, on the part of a defendant that he is about to do an act which*

is in violation of the plaintiff's right and that actual infringement is merely evidence upon which the Court implies an intention to continue in the same course. I would have thought it axiomatic that an interdict is not a remedy for past invasions of rights. It is for the protection of an existing right'.

[23] It is my considered view that the Applicant should have reconsidered its attitude after electricity supply was restored at its property. It was still open for the applicant to enrol the matter on the normal motion roll. In this case it is common cause that such conduct complained of had ceased.

[24] The notion that simply because legal proceedings were commenced in the urgent court, renders whatever follows also urgent, is also misconceived, more so where the facts relied on in the urgent basis are evidently in dispute. The issue of the existing dispute between the applicant and respondents regarding electricity account clearly belongs on the normal motion roll.

Requirements of Interdict

[25] Whilst the court is satisfied that the matter should be removed from the urgent court roll purely on the ground of lack of urgency, I also feel the need to comment on the requirements of interdict. The requirements are clearly articulated in the leading case of ***SETLOGELO v SETLOGELO*** 1914 AD 221 at 226 where the court stated that: '*The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended and absence of similar protection by any other ordinary remedy'*.

[26] The requirements were found to be extant and still good law in ***V & A WATERFRONT PROPERTIES (PTY) LTD AND ANOTHER v HELICOPTER & MARINE SERVICES (PTY) LTD AND OTHERS*** 2006 (1) SA 252 (SCA) *'The leading common-law writer on the subject of interdict relief used the words 'eene gepleegde feitelijkheid' to designate what is now in the present context, loosely referred to as 'injury'. The Dutch expression has been construed as something actually done which is prejudicial to or interferes with, the applicant's right. Subsequent judicial pronouncements have variously used 'infringement' of right and 'invasion of right'. Indeed, the leading case, Setlogelo, was itself one involving the invasion of the right of possession. (references omitted).* The constitutional court gave imprimatur to these well-established requirements in

MASSTORES (PTY) LTD v PICK N PAY RETAILERS (PTY) LTD 2017 (1) SA 613 (CC) at para [8].

Conclusion

[27] I am satisfied that no urgency has been established by the Applicant. This is clear from chronology of events. The disconnection of electricity supply happened on 03 October 2023 and electricity supply was reconnected the following day on the 04 October 2023. The applicant filed its application on the 05 October 2023 and set the matter for hearing on 06 October 2023. The application was served via email on the respondents. The urgency was contrived by the applicant with no facts to back it up. At best the fear of future disconnection was speculative.

Costs

[28] The practice of ignoring established procedures regarding urgent matters has attracted judicial opprobrium. This legal obduracy among some litigants has in some instances resulted in courts mulcting litigants who embark on this route with punitive costs orders.

[29] It was recently stated as follows in ***MANAMELA v MAITE*** (2023/055949)

[2023] ZAGPJHC 1011 (6 September 2023) per Dippenaar J that: [1] *The pernicious effect of legal practitioners simply disregarding the rules of court is that the very fabric of the Rule of Law is being eroded.*

[2] There appears to be an alarming trend that legal practitioners through apparent hubris or feigned ignorance directly ignore or flaunt their indifference towards the rules of Court and worse yet merely do not comply with Court orders'.

[27] It is clear in my view that sagacity from legal practitioners who are employed to launch these applications is required, lest they are found to be contumelious. This will be sad for the administration of justice and will imperil the essence of our democracy and access to justice.

[30] The general rule in matters of costs is that the successful party be given 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 ***MEYERS v ABRAMSON*** 1951(3) SA 438 (C) at 455. I can think of no reason why this court should deviate from this general rule.

[31] The court has been urged to consider the costs *de bonis propriis.* A court will make this kind of order where it believes that it was the legal representative's fault that certain legal costs were incurred. See ***MULTI-LINKS TELECOMMUNICATIONS LTD V AFRICA PREPAID SERVICES NIGERIA LTD*** 2014 (3) SA 265 (GP) at para [35] where the court said this type of order would be granted where the conduct of an attorney so deviates from the norm that it would be unfair to expect the client to bear costs.

[32] I have a wide discretion with regard to costs. The discretion is to be exercised in accordance with well-established principles. There is no basis to deviate from the normal principle that costs follow the result. The issue is what costs order would be appropriate. The conduct of the litigants was egregious enough to merit a punitive costs order.

Order

[33] Application struck of the urgent court roll. The applicant to pay costs on attorney and client scale.

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Thupaatlase AJ

Heard on: 06 October 2023

Judgment delivered on: 16 October 2023

Appearances:

For the Applicant:

Adv. S Schulenburg

Instructed by Boruchowitz Attorneys

For the Respondents:

Adv. E Sithole

Instructed by Buthelezi Vilakazi Incorporated