

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 DIVISION, JOHANNESBURG**

10225/2013

CASE NO:

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

25 August 2023

In the matter between:

C[...], A[...]

Applicant

And

P[...], G[...]

Respondent

In re:

P[...], G[...]

Applicant

and

C[...], A[...]

Respondent

JUDGMENT

Mdalana-Mayisela J

Introduction

1. This is an opposed urgent application in which the applicant seeks an order compelling the respondent to furnish security for applicant's costs. Alternatively, in the event that the court finds that the matter is not sufficiently urgent to be heard in the urgent court, the applicant seeks an order that the matter be postponed to an expedited date to the ordinary motion court.

2. In the main application the respondent seeks to set aside a writ of execution for arrear maintenance debt of R1 140 373.56 issued by this court on 26 September 2013. The applicant seeks an order directing the respondent to furnish the security by an undertaking in the amount of R450,000.00 for the costs to be incurred by her in the main application. The applicant further seeks an order directing that should the respondent fail to furnish the security within 10 working days from the date of the order, she shall be entitled to launch a further application upon the same papers filed herein, duly supplemented for an order dismissing the respondent's application for the setting aside of the writ of execution, with costs payable on the scale between attorney and own client. Further, she seeks an order directing that pending the finalization of this application, neither of the parties shall be entitled to take any further steps in the application of the respondent for the setting aside of the writ, and any further proceedings in such application shall be stayed pending and until the completion of this application.

3. The respondent is opposing the application on various grounds including that the application is not urgent, or the urgency was self-created. He also raised a point *in limine* that the application is irregular or defective. He disputed both his liability to provide security and the amount of security being demanded by the applicant.

Urgency

4. First, I deal with the issue of urgency. Rule 6(12)(b) of the Uniform Rules of Court requires the applicant in her founding affidavit to set forth explicitly the circumstances which she avers render the matter urgent and the reasons why she claims that she could not be afforded substantial redress in a hearing in due course. Mere lip service 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 (*Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* [1977] 2 All SA 156 (W) 157-158; 1977 (4) SA 135 (W) 136C-137G).
5. The applicant in her founding affidavit stated that the application is urgent because if it were to be heard in the ordinary course and given the fact that this application was launched subsequent to the date upon which the main application was launched, it is likely that it would only be finalized subsequent to the hearing of the main application. Any order obtained in this application would then be academic, since her costs relating to the further proceedings in the main application would already have been incurred.
6. The respondent contended that this application is not urgent, or the urgency was self- created. He stated that the main application was launched on 14 April 2023. The rule 47 notice for security for costs was served on 3 May 2023. The response to the rule 47 notice was served on 17 May 2023. The security application was launched on 21 June 2023. There was a lapse of more than two months between the launching of the main application and security application. He contended that the applicant has failed to give an explanation for the delay in her founding affidavit.
7. The applicant has to explain in her founding affidavit the reasons for the delay and why despite the delay she claims that she cannot be afforded substantial redress at a hearing in due course. It is true that she has failed to give such explanation in her founding affidavit. The fact that she wants to have the application resolved urgently does not render the application urgent (*East*

Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd 2011 JDR 1832 (GSJ) (23 September 2011).

8. In her replying affidavit the applicant disputed the contention that the urgency was self-created and blamed the respondent for the delay. She stated that the respondent served his response disputing the liability and amount for security for costs on 17 May 2023. She waited for the respondent to file his replying affidavit in the main application, which was due on 23 May 2023, to obtain a complete overview of the respondent's application, before launching the security application. The respondent delayed in filing the replying affidavit in the main application. As a result, she brought this application on 21 June 2023 without the benefit of having had sight of the replying affidavit.
9. In my view the explanation for a delay given in the replying affidavit does not justify the enrolment of this application in the urgent court. If indeed this application was urgent, it was not necessary to wait for the filing of the replying affidavit in the main action because the applicant knew from the date she was served with the main application that she required security for costs.
10. It is common cause that the main application has not been set down for hearing. The practice directive dated 4 October 2021 provides that *'the ultimate practical test as to whether to set down a matter as urgent is whether an irreparable harm is apparent if an order is not granted in that week; if there is none, it ought not to appear on the roll'*. The respondent has failed to show that she would suffer an irreparable harm if the order was not granted in the week this matter was heard.
11. The ground for urgency stated in her founding affidavit does not meet the requirements of rule 6(12)(b) because she could be afforded substantial redress in due course. The main application has not been set down. All the relevant pleadings have been filed in the main application, and this application could also be heard simultaneously with the main application, or she could apply for the postponement or the stay of the main application pending the finalization of this application in the ordinary course. I find that this application is not urgent and I decline to exercise my discretion in terms of rule 6(12)(a).

12. With regard to the alternative relief she seeks that this application be given a preferential date, the urgent court does not allocate a preferential date for ordinary motion court. The applicant should approach the office of the Deputy Judge President in this regard.
13. The respondent seeks costs on the scale as between attorney and client. I am not persuaded that such scale of costs is justified in this application.
14. Accordingly, the following order is made:
 1. The application is struck from the roll for lack of urgency.
 2. The applicant is ordered to pay costs.

MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 25 August 2023

Appearances:

On behalf of the applicant: Adv T Barnard
Instructed by: Stein Scop Attorneys

On behalf of the respondent: Adv C Cremen
Instructed by: Fluxmans Inc