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

CASE NO: 117670/2023

In the matter between:

GBS OLD MUTUAL BANK Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

04 DECEMBER 2023

TRSOTSKIE CONSULTANTS (PTY) LTD First Respondent
CONRAD TROSKIE Second Respondent

CASE NO: 117725/2023

GBS OLD MUTUAL BANK Applicant

and

MARJUNE TRUST First Respondent
CONRAD TROSKIE Second Respondent
KAREN RIETTE TROSKIE Third Respondent

JUDGMENT

NGALWANA AJ

[1] These are two separate applications, brought on an urgent basis in urgent court, in which the Applicant seeks an order in the following terms:

> "2. That the Respondents point out the location of the equipment stipulated in [named annexures] within 3 days of the granting of this Court Order.
> 3. That the Sheriff, or his deputy, having jurisdiction be authorised to attach and remove the equipment stipulated in [named annexures] and retain possession of the equipment pending the return day of the rule nisi in prayer 4 below.
> 4. That a rule *nisi* be issued calling upon the Respondents to, on a date determined by the Honourable Court, show cause why the following Order should not be made final:
> 4.1 That the equipment immediately be delivered into the possession of the Applicant
> 4.2 ...
> 4.3 ..."

[2] The Applicant also seeks costs against the Respondents on attorney and client scale.

[3] By agreement between counsel, and by reason of identical facts, identical cause of action, identical relief sought, identical *dramatis personae*, and identical issues for consideration, the two applications were heard together and are to be decided in one judgment. Counsel also agreed that argument in respect of the one application applies with qual force to the other, and so it was not necessary to address two sets of argument, each for one application. And so it was that full argument was addressed based on the pleadings in the case under case number 117670/2023, and counsel agreed that the outcome in that case would also apply to the second case under case number 117725/2023.

[4] Both applications were launched on Friday 10 November 2023, calling on the Respondents to file answering papers by 09h00 on Tuesday 21 November 2023. The

notice of motion informed the Respondents that the application would be heard at 10h00 on Tuesday 28 November 2023. For ease of reference, I shall refer to the application under case number 117670/2023 as *"the Troskie application"*, and the application under case number 117725/2023 as *"the Marjune Trust application"*.

[5] Answering papers were filed in both applications on Friday 24 November 2023, and the Applicant filed its replying papers on Monday 27 November 2023. The application then served before me in the afternoon on Friday 01 December 2023.

[6] While both applications were launched on Friday 10 November 2023, service thereof in the Troskie application was effected only on Wednesday 15 November 2023, while the Marjune Trust application was served only on Thursday 16 November 2023.

[7] The Respondents in both applications contend that neither application is urgent. In addition, and in the Marjune Trust application, it is contended that the trustees are not properly cited in their representative capacity as trustees and have therefore not been properly joined. The Applicant's retort is that the Second and Third Respondents are cited as sureties. Nothing in the papers points to this intention. I agree that the trust has not been properly cited and the trustees not joined as such.

[8] The other issue raised by the Respondents in the Marjune Trust application is that it was unnecessary to launch two separate applications raising identical issues, based on identical facts, seeking identical relief, by the same applicant effectively against the same Respondents. This is not, *stricto sensu*, a point *in limine* that could justify dismissal of the application. But Counsel for the Respondent contended that it is raised for purposes of determination of the costs question.

[9] The Applicant has a bigger problem than improper citation of trustees and needless duplication of applications. Neither application is urgent. It is clear from the undisputed facts in the pleadings (and relevant annexures) that little, if anything, was done to advance an urgent case between 24 October 2023 – when the Applicant's

attorneys demanded to know, urgently, the exact whereabouts of the equipment (solar panels) which, according to them, appeared to have been removed from premises to which they had been delivered, after they had informed the Respondents' attorneys on 16 October 2023 that they *"hold instructions to lodge an urgent application in order to secure possession of the equipment"* – and 10 November 2023 when both applications were finally signed. Mr Minnie, for the Applicant, conceded in argument that he could not explain what precisely was done to advance the urgent applications during this period other than to say the applications were being prepared. So, the delay of just over two weeks in bringing these applications remains unexplained. While delay is not by itself a basis for striking an application off the urgent roll for lack of urgency, the delay still needs to be explained. In the absence of any explanation, there is no reason for the urgent court to come to the Applicant's assistance.

[10] In any event, the Applicant cannot explain why it cannot obtain substantial redress in due course. The Applicant launched these applications on at least two bases. The first is the alleged refusal of the Respondents to tell the Applicant of the whereabouts of the equipment. The second is the alleged breach of the MRA by the Respondents allegedly removing the equipment from the premises in which they were installed. But in their letter of 19 October 2023, the Respondents' attorneys confirmed that the equipment was still installed at the premises for which it had been acquired. There could therefore have been no breach, and the whereabouts of the equipment was known to the Applicant. The applications were therefore unnecessary after 19 October 2023.

[11] But even if there may have been doubt on the Applicant's part on this score before launching these applications, that doubt must surely have been laid to rest on 16 November 2023, a day after the Troskie application had been served, and the day the Marjune Trust application was served. On that day, the Respondents' attorneys in both matters informed the Applicant as follows:

> "5. The financed moveable assets are at the address at Pinacle [sic] Point.

6. We have already supplied you with written confirmation that the items are and remain insured.
7. Your client is welcome to send representatives to the premises later today or tomorrow, a time slot to be arranged, to avail [sic] themselves that the items are still at the address and have not been removed.
8. As such, there is no urgency regarding your client's application and we submit that the application is a misuse of process. Under the circumstances your client is required to avail themselves of the presence of the financed items at the address, your office to thereafter withdraw your client's urgent applications, each party to pay their own costs."

[12] The Applicant says its *"mindset"* in relation to this invitation was shaped by a previous experience where its representative – who had been dispatched to the First Respondent's premises to *"inspect and uplift"* the equipment – was in September 2022 threatened by the First Respondent's representative at gun point and warned never to return. But there is no indication that on that occasion the Applicant had been invited in writing by the Respondents' attorneys to inspect the equipment at the premises in question. In any event, the Applicant could have requested the South African police to accompany its representative when going to inspect the equipment at the Respondents' invitation. This is not a satisfactory explanation for not accepting the invitation.

[13] In my view, neither application is urgent. If this was not clear after 19 October 2023 it must have become clear to the Applicant after 16 November 2023. There was no reasonable basis on the latter date for the Applicant to believe that the equipment had been removed from the addresses at which they had been installed. There was also no reasonable basis on which the Applicant could claim not to know the whereabouts of the equipment after 16 November 2023 and so it should not have persisted in this application.

[14] I am constrained to agree with Counsel for the Respondents that this constitutes abuse of court process. Consequently, costs on attorney and client scale must follow the cause.

Order

In the result, I make the following order:

1. The application is struck off the roll for lack of urgency.
2. The Applicant is to pay the costs of this application on attorney and client scale, including costs consequent upon the appointment of junior counsel.

V NGALWANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 04 December 2023.

Date of hearing: 01 December 2023
Date of judgment: 04 December 2023

Appearances:

Attorneys for the Applicant:	Thomas Minnie Attorneys
Counsel for the Applicant:	T Minnie (084 223 3330)
Attorneys for First Respondents:	Dawie Beyers Attorneys
Counsel for First Respondents:	L Louw (074 155 9696)