REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED:

27 November 2023

DATE: SIGNATURE:

1

CASE NR: 084568/2023

In the matter between:

SOLLY MAPHAHLAGANYE PHALA **APPLICANT**

and

PATIENCE MASETE **FIRST RESPONDENT**

FIRST RAND BANK **SECOND RESPONDENT**

Delivered: *This judgment was prepared and authored by the Acting 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 of the judgment is deemed to be 27 November 2023.

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] This matter is quite unusual. The actual applicant before the court is the first respondent who brought a reconsideration application of an order that was granted on 5 September 2023. This application was placed on an urgent court's roll. Attached to this application is an answering affidavit to the applicant's urgent application for an interim interdict that was heard on 5 September 2023.

[2] The reconsideration application effectively calls upon the applicant to demonstrate why his application, part of which was heard on 5 September 2023 is urgent. The first respondent seeks to demonstrate that the applicant's application is or was not urgent.

[3] The confusion arises from the fact that the applicant successfully applied for an interim interdict, and in terms of the order granted by Pistorius J, can only approach the court for a final order once he has prosecuted his variation/rescission application which is also pending before this court.

[4] This essentially means that the applicant cannot bring an application for the final interdict before the finalisation of the variation/rescission application. Rightly so, the applicant did not bring his application for the final interdict to be considered by the urgent court. The matter was brought to the urgent court by the first respondent who seeks the reconsideration of Pistorius J's order.

[5] The issue before the court is not whether the applicant's application, be it the interim or final interdict, is urgent. The applicant's application is not before the court. The only issue before this court is whether the first respondent's application for reconsideration, which has been placed in an urgent court, is urgent and should be dealt with by the urgent court. It is only when it is found that the first respondent's application for reconsideration is urgent that the merits of this application can be entertained.

B BACKGROUND

[6] On 3 October 2018, the first respondent instituted divorce proceedings against the applicant in this court. While there are disagreements with respect to the issues relating to service between the parties, it appears that a plea was filed on behalf of the applicant on 29 April 2019.

[7] On 15 July 2019, a decree of divorce was granted by this court. There are accusations and counter-accusations with respect to the way in which this decree of divorce was obtained. On 26 August 2019, the applicant brought an application to vary/rescind this divorce decree. The rescission/variation application is yet to be heard and finalised.

[8] On 26 June 2023, the first respondent obtained an order against the applicant for the attachment of an emolument on the strength of the disputed divorce decree. This led the applicant to approach this court on an urgent basis to stay the execution of an order for the attachment of emoluments against him pending the finalization of his application to vary/rescind the disputed divorce order, which was granted by Pistorius J on 5 September 2023.

[9] On 26 September 2023, the first respondent responded by serving and filing an application for reconsideration. Attached to this application is the answering affidavit to the applicant's application to stay the execution of an order for the attachment of emoluments against him. Part A of the applicant's application had already been heard and an interim interdict was granted.

[10] The first respondent's application for reconsideration was served and filed after the interim interdict was granted. It is this order that the first respondent applied for this court to reconsider on an urgent basis. Thus, the onus is on the first respondent to establish urgency, not the applicant. The applicant is the respondent in this matter.

C URGENCY

i) Overview

[11] Unfortunately, the better part of the oral hearing was consumed with arguments relating to whether the applicant's application was/is urgent. It was correctly submitted on behalf of the applicant that the applicant neither applied for a hearing date for its application for the final interdict to be heard nor set

this matter down on the urgent roll. In other words, the applicant did not bring an application on an urgent basis to dispose of Part B of its application.

[12] It was correctly argued that the applicant was not clothed with the burden of establishing urgency in this matter, as it was when Part A of its application was heard by Pistorius J in an urgent court. Further, it is the first respondent who should satisfy the court that its application for reconsideration is urgent. It is the first respondent who placed its application for reconsideration on an urgent roll. I agree with this submission.

ii) Test for urgency

[13] Urgent applications must be determined against the background of Rule 6(12) of the Uniform Rules of Court. In these applications, those who wish their applications to jump the queue and be heard before other matters that were enrolled before theirs are heard should persuade the court that their non-compliance with the ordinary rules of court is justified having regard to the facts upon which their alleged urgency is based. They should in the main, demonstrate to the court that they will suffer real loss or damage if they were to be required to join the queue and utilise the normal court processes.[1]

[14] For the court to exercise its discretion in favour of those who desire that their cases be heard urgently, they must explicitly set out the circumstances that render their matters urgent to justify the curtailment of the Rules, procedures, and time periods adopted. To succeed, they are also obliged to demonstrate

[1] *Tekoa Engineers (Pty) Ltd v Alfred Nzo Municipality and Others* (1284/20) [2022] ZAECMKHC 84 (25 October 2022) para 28.

that there will be a loss of substantial redress, if not heard on the basis chosen.[2]

iii) Factors relied on for urgency

[15] The first respondent in his affidavit starts by attacking the applicant's application, particularly Part A thereof. According to the first respondent, the applicant's application was brought on a contrived urgent basis. She states that this application was neither served on her nor her legal representatives. She argues that the applicant was not entitled to an order granted by Pretorius J because his application was not urgent, the urgency was self-created, and he had another remedy in the form of the maintenance court.

[16] Unfortunately, the first respondent in his answering affidavit addresses all other issues except why his application for reconsideration is urgent. In other words, the first respondent does not provide a sense of why there was a need to place his application for consideration on an urgent roll to justify the ordinary rules of the court being dispensed with.

[17] This is the first hurdle that the first respondent must overcome before this court can entertain the substance of his application for reconsideration. It seems like the first respondent took it for granted that all that she had to do

[2] See East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011) para 6 where it was stated that 'More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress'.

was to attack the applicant's application without justifying why her own application for reconsideration should be heard on an urgent basis.

[18] The first respondent's heads of argument are also silent on why this court should entertain her application on an urgent basis. In her heads of argument, as was done during oral hearing, there was an attempt to convince the court that the applicant's application is not urgent. There was no corresponding effort to convince the court that the first respondent was properly placed in an urgent roll and the matter is so urgent that the Rules should be dispensed with to entertain the merits of her reconsideration application.

D FURTHER AFFIDAVITS

[19] Despite the matter being enrolled in an urgent court's roll, the parties managed to find time to file supplementary affidavits which have nothing to do with the actual application before the court. None of these supplementary affidavits provide any insight as to why the matter that is actually before this court is either urgent or lacking in urgency. The only matter before this court is the first respondent's application for reconsideration. The applicant filed his supplementary replying affidavit. This triggered the first respondent to also file a supplementary affidavit.

[20] In his supplementary replying affidavit, the applicant also brought an application for condonation where he sought an indulgence of the court to file this affidavit. I did not find the contents of this affidavit useful with respect to what I am required to decide.

[21] In her supplementary affidavit, without any explanation of what rendered the reconsideration application to be placed on an urgent roll on 3 October 2023, the first respondent simply proceeded to explain why the matter was not heard on that day. The first respondent provided an explanation of what led to the matter not being heard on 03 October 2023. It appears that with this affidavit, the first respondent also sought to justify why she deviated from the practice directive requiring urgent applications to be placed on Thursday before noon or on the following Tuesday. However, this affidavit does not appear to be properly before the court.

[22] Apart from the difficulty the first respondent is facing with respect to urgency, unlike the applicant's supplementary affidavit which is accompanied by an application for condonation, the first respondent did not apply for condonation for the court's indulgence to file her supplementary affidavit.

[23] It is trite, as was pointed out in *Mabizela v Minister of Police and Another* (2020/24049) [2022] ZAGPJHC 170 (11 March 2022) para 17, that *'[a]ny additional affidavits may only be filed with the leave of the Court*'. An additional affidavit refers to any affidavit outside the normal sequence of affidavits: founding, answering/opposing, and replying. In other words, any party that wishes to file and serve either a supplementary affidavit or further affidavit must make an application with a view to seeking leave of the court to allow the filing of the intended additional affidavit. Such an affidavit is not filed as of right.

[24] The Supreme Court of Appeal in *Hano Trading CC v J R 209 Investments (Pty) Ltd,*[3] accepted and endorsed the following principles:

[24.1] Where an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court.

[24.2] The litigant who wishes to file a further affidavit must make a formal application for leave to do so. It cannot simply slip the affidavit into the Court file, otherwise, such an affidavit falls to be regarded as *pro non scripto*.

[25] In *Standard Bank of SA v Sewpersadth and Another*, it was stated that:

'for a court to exercise its discretion in favour of a litigant who applies for leave to introduce an affidavit outside of the rules relating to the number of sets of affidavits and the sequence thereof, such litigant must put forward special circumstances explaining its failure to deal with the allegations therein within the parameters of the applicable rules'.[4]

[26] It is clear that the court can only consider a further affidavit when there is an application for condonation where the court's indulgence has been sought.

E EVALUATION

[27] The Applicant successfully brought an urgent application to obtain an interim interdict against the first respondent. This application is constituted of Part A

[3] 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) para 12.
[4] 2005 (4) SA 148 (C),

and Part B. Part A is the interim interdict whereas Part B is the Final Interdict. Pistorius J only dealt with Part A and ordered the stay of the execution of the first respondent's order for the attachment of emoluments against the applicant.

[28] Following Pistorius J's order, the applicant was entitled to re-enrol the matter once the application for the variation of the divorce order between the parties had been finalized. It appears that the first respondent desires that the applicant should satisfy this court that generally its application is urgent, despite the applicant not yet having brought Part B to the court. In terms of Pistorius J's order, Part B could only be brought once the variation (or rescission) application of the divorce order has been finalised. The variation (or rescission) of the divorce order has not yet been heard and finalised.

[29] If however, the first respondent desires that the applicant should demonstrate that his application for interim interdict was urgent, surely the horse has bolted on that score. The application has already been heard and decided. The only issue that can be determined at this stage is whether the applicant was entitled to be granted an interim interdict. On this score, there is no need to discuss urgency with respect to the applicant's application for an interim interdict.

[30] With her application for reconsideration, the first respondent desires to have an order granted by Pistorius J rescinded and set it aside. It is not clear why the first respondent formulated a view that the urgent court was the most appropriate court to deal with her application. Was it because the applicant's

application for an interim interdict was heard by an urgent court and the first respondent automatically thought that her reconsideration application should automatically also be placed in the urgent court's roll? If this was the thinking behind bringing the application for reconsideration in an urgent court, this approach is incorrect. This matter ought to have been placed on an ordinary court's roll, unless of course it is shown to be urgent.

[31] The application for reconsideration or even rescission of Pistorius J's order is an independent application that can only be brought on an urgent court in line with Rule 6(12) of the Uniform Rules of Court. The first respondent was obliged to satisfy the test of urgency and provide to the court the circumstances that rendered this application urgent. The first respondent failed to do so. Instead, she incorrectly focused on demonstrating why the applicant's application is/was not urgent.

[32] This court is not seized with the applicant's application. There is no reason why the court should require the applicant to comply with the requirements of Rule 6(12) of the Uniform Rules of Court. The applicant did not bring any application before the urgent court after Pistorius J granted his order. In terms of Pistorius J's order, Part B of the applicant's application can only be heard once his application for the variation (or rescission) of the divorce order has been finalised.

F CONCLUSION

[33] The first respondent set the matter down in an urgent court for hearing. The applicant's application cannot be before this court because of Pistorius J's

order. This order made it very clear that the applicant can only bring Part B of his application to court after the finalisation of his variation (or rescission).

[34] This means that for Pistorius J's order not to be complied with, the first respondent's application for reconsideration must be heard and finalised. However, this application cannot be finalised by the urgent court because the first respondent did not satisfy the test of urgency. The duty to establish urgency fell on the first respondent who is the actual applicant in this matter. I am of the view that the first respondent failed to discharge this duty.

ORDER

[35] In the result, I make the following order:

1 The first respondent's application for the reconsideration of Pistorius J's order is struck of the roll for want of urgency.

2 The applicant's application is not before this court.

3 The first respondent is ordered to pay the wasted costs as a result of this matter being struck from the roll.

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C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

COUNSEL FOR THE APPLICANT: ADV CID BENNETT

INSTRUCTED BY:	McTAGGART EKSTEEN INC
ATTORNEY FOR THE RESPONDENT:	MR MARWESHE
INSTRUCTED BY:	MARWESHE ATTORNEYS
DATE OF THE HEARING:	17 October 2023
DATE OF JUDGMENT:	27 November 2023