REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 053391/2024
DOH: 05 JUNE 2024

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

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

In the matter between:

NEWNET PROPERTY (PTY) LTD

TRADING AS SUNSHINE HOSPITAL **APPLICANT**

and

THE ROAD ACCIDENT FUND **FIRST RESPONDENT**

COLLINS PHUTJANE LETSOALO **SECOND RESPONDENT**

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 13 June 2024

JUDGMENT

Mali J

[1] On 5 June 2024 the applicant, being the company trading as the hospital treating victims of road accidents approached this court by way of urgency. The applicant sought orders against the second respondent, the Chief Executive Officer of the Road Accident Fund ("the first respondent"), a public entity established in terms of section 2(1) of the Accident Fund Act 56 of 1996.

[2] In the notice of motion, the orders sought are couched as follows:

"(i)The first respondent is hereby ordered to make payment of the judgments obtained in favour of the applicant in the amount of R 92 085 106.36 within 7 days from date if service of the Order on the first respondent.

(ii)The first respondent is hereby ordered to provide the applicant with an updated Requested Not Yet Paid (RNYP) list within 7 days from date of service if this order.

(iii)That the first respondent is hereby ordered to provide an updated Requested Not Yet Paid (RNYP) list to the Applicant every 14 days after compliance with prayer 2 supra.

(iv)The first respondent is hereby ordered to adjudicate all accounts issued to the first respondent by the applicant within 120 days from receipt of such account from the applicant.

(v)The first respondent is directed to make payment to the applicant of all mounts fur to the applicant on the May 2023 RNYP list within 30 days from date of service of this order on the first respondent, and thereafter to make payment to the applicant of

all amounts due to the applicant as per a current RNYP list within 30 days of such adjudicated account appearing on the RNYP list.

(vi)The second respondent be directed and ordered to ensure that the first respondent complies with prayers 2 to 6 above....”

BACKGROUND

[3] It is common cause that the applicant as a hospital specialising in treating victims of road accidents attended to the patients whose medical bills are normally paid by the first respondent. Some of the patients get admitted directly from the accident scene and other patients get transferred from other hospitals. The first respondent makes payments based on invoices issued by the applicant to it. The first respondent utilises a method referred to as Requested Not Yet Paid (RNYP) to validate the applicant’s payments. The significance of the RNYP list is that same is confirmation of the amounts due for payment by the first respondent to the applicant. Once an amount is placed in the RNYP list, it is effectively an admission by the first respondent that such invoice has been checked and audited and is therefore due for payment. The first respondent is obligated to pay the applicant as a supplier within 30 days of adjudication of the accounts which are then placed on the RNYP list.

[4] The first respondent did not make payments in time. As a result, in 2020 the applicant approached the high court on urgent basis and obtained an order directing the first respondent to make payment to the applicant of the outstanding amount of R353 443 850.34 in respect of RNYP claims. By agreement between the parties, the first respondent would make payment by way of monthly instalments of R36 908 000.00 being the applicant’s minimum monthly requirement to avoid closing.

[5] After 18 (eighteen) months the first respondent stopped paying in terms of the above order. The first respondent’s failure to make payment compelled the applicant to attach in execution various movable assets of the first respondent to sell in an auction. In response to the attachment, the first respondent launched an

application to suspend the sale of attached assets, which the applicant opposed. The applicant further brought a counter application against the first respondent for an amount of R301 721 492.50 together with a payment proposal of monthly instalments in the amount of R45 581 098.50. The first respondent appealed the above order up to the Constitutional Court, but to no avail.

[6] The applicant continued obtaining judgments against the first respondent as the applicant did not stop servicing the patients, thus resulting in the first respondent's indebtedness to the applicant. The amount of R92 085 106.36 which is subject of this application is based on judgments obtained by the applicant. During May 2023 the first respondent stopped sending updated lists of RNYPs, at that stage the amount owing on RNYPs was R380 000 .00. The first respondent also stopped adjudicating the applicant's new claims since October 2023.

[7] The applicant would continue to service the road accident victims in between non- payments and short payments from the first respondent. In April 2023 due to non- payments the applicant shut down its operations and retrenched some staff members. Since the applicant's re-opening in August 2023, it has treated more than 970 (Nine Hundred and Seventy) patients.

[8] The applicant commenced engagements with the first respondent which did not bear much fruit. On 26 March 2024 the applicant's auction flowing from the abovementioned order of 2020 was interrupted by the South African Police Service (SAPS) at the instance of the first respondent. The auction did not take place, subsequently the applicant served a warrant of execution to South African Revenue Service (SARS), as the government collecting agent of fuel levy, the levy used to fund the first respondent's coffers. The said execution did not yield positive results. The applicant further engaged the South African Reserve Bank (SARB), Department of National Treasury also to no avail. Due to the unsuccessful efforts mentioned above the applicant brought this application.

[9] In opposing the application, the first and the second respondent did not file an answering affidavit but only filed heads of arguments dealing with a point *in limine*. The first point being lack of urgency.

URGENCY

[10] The applicant put the following undisputed version; that the applicant has 28 (twenty-eight) patients in its wards as at date of this application and which patients are extremely ill and in need of constant medical care. Some of the aforesaid patients need critical care. Should the hospital not receive payment of those amounts due in terms of the judgments, the applicant will be unable to render medical care and medication to the patients and their health and lives shall be placed at severe risk. Many of the patients, some with such serious injuries have been in the care of the applicant for several months (depending on the injuries). The care provided by the applicant is therefore ongoing and critical to save the lives of these patients.

[11] Furthermore, the applicant has 150 (One Hundred and Fifty) staff members who are associated with and employed by the hospital and who make up the administration, medical and cleaning staff of the applicant. Should the applicant not receive payment of the funds due to it, then it will have no option but to retrench all the 150 (One Hundred and Fifty) employees, cancel contracts with the service providers of certain employees and close down the hospital. The applicant, other than struggling to provide medical care and pay salaries, is struggling to pay suppliers and employees, purchase PPE to be provided to its employees (specifically the frontline medical employees), medical equipment and medical supplies which are so desperately needed to treat the current patients let alone the patients which are admitted on a weekly basis.

[12] The question is whether the application meets the requirement of Rule 6 (12) of the Uniform Rules which provides as follows:

> *"(12) (a) In urgent applications the court or a judge may dispense with the 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 it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

(c) A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

[13] In East Rock Trading 7 (PTY) LTD and another v Eagle Valley Granite (PTY) LTD and others [1] the court held:

‘*"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."*

[14] Regarding the substantial redress, the applicant made submissions as to why it cannot be afforded substantial redress in the ordinary course. In the process of getting the matter to be heard in the ordinary course the hospital would have been closed. Furthermore, the first respondent's conduct threatens the lives and well-being of a number of patients. The respondents did not place any version pertaining to the closure of the hospital with its attendant consequences, except to state that the applicant have self-created urgency. There are no facts to support the above in their heads of arguments, save to say, "*the applicant must make out a case for urgency in its founding affidavit*." They also refer to the case of *Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another t/a Makin Furniture Manufacturers* and restated the law there as follows:

[1] Case Number 11/33767 South Gauteng High Court Johannesburg para 9

“"The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. 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."

[15] The submissions made in respect of urgency relating to the order sought on RNYPs and the order sought on enforcing payments needs to be differentiated. There is no version put forward by the applicant as to the steps it took since May 2023 when the first respondent stopped sending RNYPs and when the first respondent further stopped adjudicating RNYPs in October 2023. In a nutshell the applicant did not explain the delay in bringing an urgent application for an order seeking the first respondent to issue and adjudicate RNYPs.

[16] In respect of the monetary order of R 92 085 106.36, by 30 April 2024 the applicant became aware that the National Treasury complained of the applicant’s ineffective purported attachment due to non- compliance with the law and that the National Treasury was in no position to pay the first respondent’s debt. In the circumstances of this case, I cannot not find that the delay of three weeks after all the efforts by the applicant is so inordinate. Furthermore, I am persuaded that the applicant will not be afforded substantial redress in the ordinary course. In the result the application is urgent, insofar as it concerns the judgment debt in the amount of R92 085 106.36

RESPONDENT’S CASE

[17] On behalf of the respondents the following points of law were raised (i) That the matter is res judicata, (ii) no cause of action and (iii) non- joinder.

RES JUDICATA

[18] According to the respondents the matter has been finalised and the applicant already have judgments; it cannot seek another judgment. The applicants seek relief

based on alleged court orders providing for payment. The applicant's attempt to change the nature of their own orders from being *ad pecuniam solvendam* to *ad factum praestandum* is not competent. The applicant does this in circumstances where it has raised the very same issue against the same party, being the first respondent.

[19] The applicant's counter argument is that this application is about forcing the second respondent to make the first respondent to effect payment. It is apposite to repeat the prayer pertaining to the payment.
"(ii)The first respondent is hereby ordered to make payment of the judgments obtained in favour of the applicant in the amount of R 92 085 106.36 within 7 days from date if service of the Order on the first respondent."

[20] In paragraph 7 of the founding affidavit, it is stated; "*The Second Respondent is cited herein insofar as it has an obligation to ensure that the RAF is delivering on its mandate. As shall be shown below, the RAF and the Second Respondent are intentionally and contemptuously not doing so."* The applicant's case for mandamus is aimed at the second respondent. The submissions made are that the order sought in order for the second respondent *"to press the button"*. In support of its argument the applicant referred to section 12 (1) (b) of the Road Accident Fund Act 56 of 1996 (the Act), which provides that the Chief Executive Officer shall be the person who is suitably qualified and experienced to manage the day-to-day affairs of the Fund.

[21] The applicant further asserts its argument for the enforcement against the second respondent by making reference to Nyathi v MEC for Department of Health, Gauteng and Another[2]. The apex court was seized with whether section 3 of the State Liability Act[3] precluding execution of judgment orders against state functionary was unconstitutional. The issue arose from the failure of the state attorney to honour the court order to pay the judgment debt.

[2] 2008 (5) SA 94 (CC)
[3] S 3 of Act 20 of 1957 Subject to subsections (4) to (8), no execution, attachment or like process for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, but the amount, if any, which may be required to satisfy any final court order given or made against the nominal defendant or respondent in any such action or proceedings must be paid as contemplated in this section.

[22] At paragraph 75 the court held that "The *judgment creditor would have to obtain a mandamus order and if the* ***State functionary*** *does not comply with the mandamus then he or she would be held in contempt of court. This process is a tedious one which places an onerous burden on the judgment creditor and does not translate into money in the pocket for the judgment creditor…."* (own emphasis).

[23] At paragraph 79 it is held *"The practical effect of s 3 is that the State cannot be forced to honour court orders as there is no manner in which compliance can be enforced. In the result, the ordinary citizen has no effective remedy available in a situation where the State and its officials fail to comply with a court order. In terms of contempt of proceedings, the High Court found that s 3 of the Act does not mean that a Minister cannot be arrested for inherent power to protect and regulate their process, especially in light of s 173 of the Constitution. However, contempt of court proceedings do not put money in the pocket or food on the table."*

[24] The case of Nyathi is distinguishable, herein there is nothing prohibiting the execution of judgment orders as the applicant had already done. In fact, the applicant submitted that it did not arrange another auction, and made it clear that it has no appetite for same as it will only get the fraction of what is being owed.

[25] Secondly the first respondent is not a state functionary as Nyathi dealt with judgment orders within the state functionaries. In terms of Schedule 3 of the Public Finance Management Act[4] Schedule (PFMA) the first respondent is a public entity. Furthermore, in terms of section 49 (2) of the PFMA if the public entity has a board or other controlling body, that Board or controlling body is the accounting authority. Section 11 of the Act provides for the powers and functions of Board and procedure. In the present case the legal position regarding public entities has no inhibitions regarding the attachment of assets, the assets were attached however the issue is the alleged obstruction by the first respondent.

[26] The applicant raised the very same issue against the same party, being the first respondent. The applicant does not bring a different case against the first respondent, except that the court must order the second respondent to make payment. There is no substantial case made against the second respondent bar that

[4] Act 1 of 1999.

he is cited *"herein insofar as it has an obligation to ensure that the RAF is delivering on its mandate."* There are no allegations made against the second respondent proving that he precluded the first respondent to deliver on its mandate. The applicant's argument assumes that were the orders in the first place issued against the second respondent, the current problems would be non-extant. I cannot agree with this contention, because the second respondent acts on behalf of the first respondent. In essence the judgment is against the first respondent, there is no legal position changing same. The order sought mirrors the order that has already been granted. In my view the first respondent remains the sole judgment debtor.

[27] In conclusion I am inclined to agree with the respondents' contention that the applicant has already made the same case for the application it seeks herein. This point alone is dispositive of the application, it is not necessary to deal with other points of law. In the result the respondents' point *in limine* must succeed.

ORDER

1. The application is dismissed with costs to include the costs of two counsel where so employed.

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N P MALI

JUDGE OF THE HIGH COURT

Appearances

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