IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Case No. 3387/2022

In the matter between:-

ASCON TRADING CC t/a ASCON CIVIL ENGINEERING Applicant

and

CLIVE WILSON First Respondent

NELSON MANDELA BAY MUNICIPALITY Second Respondent

JUDGMENT

BANDS AJ:

[1] This matter, having been brought on extremely truncated time periods, served before me as an urgent application on the ordinary motion court roll, and finds its origin in adjudication proceedings between the applicant and the second respondent. This application is the third in a succession of proceedings between the said parties.

[2] Pursuant to the adjudication proceedings, and on 27 May 2022, the second respondent was ordered to make payment to the applicant in the cumulative sum of R11,722,975.59 (including VAT) for services rendered, which payment the second respondent declined to make. Instead, the second respondent disputed the adjudicator's decision and referred the issue to arbitration. Whilst the validity of the second respondent's referral is disputed by the applicant, such issue does not fall to be determined by me. The applicant, in turn, referred the second respondent's failure to make payment in accordance with the adjudication decision to arbitration.

[3] The applicant, frustrated by the second respondent's conduct, sought interim enforcement of the adjudication decision in the arbitration proceedings in accordance

with Article 26 of the Rules for the Conduct of Arbitrations: 2018 Edition, read together with the relevant clauses of the General Conditions of Contract for Construction Works, which governed the parties' contractual relationship ("*the interlocutory arbitral proceedings*").

[4] The decision in the interlocutory arbitral proceedings, which was issued on 24 September 2022 reads for itself. The last two paragraphs thereof bear repetition herein:

"22. I must therefore find that Respondent is indeed obliged to comply with the Adjudication Decision and accordingly order that it do so forthwith.

23. Enforcement of such parties' rights and obligations, including any determined by me as arbitrator, must, if necessary, be sought by application to the competent court having jurisdiction in the place either of the adjudication and/or of this arbitration, supported by submission thereof of the Adjudication Decision and this, my Interlocutory Arbitral Decision."

[5] At the time of argument, the interlocutory arbitral decision was subject to a remittal application at the instance of the second respondent, seeking an order that such decision be remitted[1] to the first respondent for reconsideration of the question as to whether payment by the second respondent of the amount of R11,722,975.59 (including VAT), pending the outcome of the arbitration proceedings, should be made subject to the provision by the applicant of security.

[6] In essence, the applicant, by way of the present application, seeks an order that the interlocutory arbitral decision, issued on 24 September 2022 by the first respondent arbitrator, be made an order of court as envisaged in paragraph 23 thereof; and payment in the sum of R11,722,975.59 (including VAT) for services rendered, together with interest and costs.

[1] In terms of section 32(2) of the Arbitration Act, 1965

[7] The second respondent has declined to enter into the merits of the present dispute and instead opposes the relief sought by way of two points *in limine*.

[8] In the first instance, and in light of the remittal application referred to above, the second respondent contends that the issues raised (and the relief sought) herein pertain to the same cause of action as that which is currently pending between the same parties, before the first respondent. Put simply, the second respondent has raised a defence of *lis alibi pendens*. Secondly, having regard to the history of the matter, the second respondent placed urgency in issue. When the matter was argued, I heard submissions on both urgency and on the merits to enable me to give judgment on the latter, in the event of a finding that the matter was properly enrolled.

[9] It is trite that where urgency is placed in issue, it is proper to determine that matter as a preliminary point prior to entering into the merits of the dispute. I accordingly proceed on this basis.

<u>The proceedings, as elected by the applicant</u>

[10] Notwithstanding that the matter was set down by way of the applicant's notice of motion for hearing on a Tuesday, the applicant, prior thereto, sought and obtained a directive from this court on 16 November 2022, which reads as follows:

"1. The application must be served upon the respondents on or before 17 November 2022.

2. The respondents must deliver their notice to oppose and answering affidavit, if any, on or before 16h00 on Tuesday, 22 November 2022.

3. The applicant must deliver its replying affidavit, if any, on or before 16h00 on Friday, 25 November 2022.

4. The matter will be heard at 09h30 on Tuesday, 29 November 2022."

[11] I pause to make two observations.

[12] Firstly, the matter, having been set down for hearing on a Tuesday, being a day on which motion court ordinarily sits, did not require a directive from this court.[2] Secondly, the times frames contained in the court's directive, but for the date on which service was to be effected,[3] mirrored those constructed by the applicant in the certificate of urgency filed of record. I deal with the relevance of the latter observation in due course.

[13] The application, having been issued on 16 November 2022, was served on the second respondent at 09h54 on Thursday, 17 November 2022, giving the second respondent 3 court days to: (i) provide its legal representatives with instructions in respect of the allegations contained in the founding papers; (ii) allow for the preparation of answering papers and the approval thereof by the second respondent's relevant official, being the Chief Financial Officer and Acting City Manager; and (iii) the attestation thereof. The second respondent, in addition to taking issue with the alleged urgency of the application, as a whole, takes issue with the extent to which the times frames were abridged and the date unilaterally selected by the applicant for hearing, both in the context of the factual matrix of the matter and in the context of the administrative challenges which go hand in hand with an organisation such as the municipality and the considerable demands on the relevant functionary's time. Having said that, the second respondent was obliged to provisionally accept the procedure adopted by the applicant,[4] and thereafter raise whatever objection it may have.[5]

[14] The second respondent, anticipating its inability to comply with the time frames set out in the directive for the filing of papers, directed correspondence through its attorney of record to the applicant's attorney of record on Monday, 21 November 2022. In essence, the correspondence served to foreshadow the views of the second respondent in line with the points *in limine* raised herein and contained an undertaking in terms of which the second respondent endeavoured to let the applicant have the

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[2] *Bobotyana and two others v Dyantyi and others* 2021 (1) SA 386 (ECG); *Tekoa Engineers (Pty) Ltd v Alfred Nzo Municipality and Others* (1284/20) [2022] ZAECMKHC 84 (25 October 2022) by Lowe J at para [3]; and *National Ship Chandlers (Natal) 1989 (Pty) Ltd v Ellis and Another* (542/2018) [2018] ZAECELLC 6 (6 April 2018) by Hartle J at para [13].
[3] The certificate of urgency proposed service on the respondents on 16 November 2022.
[4] To avoid the risk of judgment being taken against it by default.
[5] *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE) at page 7.

second respondent's answering papers by close of business on Wednesday, 23 November 2022. The aforesaid correspondence was met with a response on behalf of the applicant, advising the second respondent that the present application was to take precedence over other matters and required the second respondent to comply with the directive issued. The second respondent thereafter provided an unsigned copy of its answering affidavit to the applicant, via email, on 23 November 2022, whereafter a signed copy was delivered on 24 November 2022 at 15h34, being one and two days later than the period selected by the applicant and directed by this court.

[15] The applicant contends that in the absence of an application for condonation for the late filing of the second respondent's answering affidavit, such affidavit should be disregarded by this court, and the matter determined on the applicant's version alone. Without wishing to belabour the point, I am of the view that the stance adopted by the applicant is highly technical and overly formalistic in the circumstances of the present dispute. This is particularly so where the applicant has failed to indicate what prejudice, if any, it has suffered by the late filing of the second respondent's answering affidavit.[6]

[16] In considering the approach to be adopted in the circumstances, I have had regard to the legal principles enunciated in the following decisions; *Ferreiras (Pty) Ltd v Naidoo and Another;*[7] *Pangbourne Properties Ltd v Pulse Moving CC and Another;*[8] and *Trans-Africa Insurance Co Ltd v Maluleka.*[9] I too have had regard to the decision of *Phasha v Mourundi N.O. and Others*,[10] to which I was referred by the applicant, and which decision I am in respectful disagreement with for the reasons stated. Taking into account the aforesaid, I am of the view that no application for condonation in the present circumstances is necessary. In the event that I am incorrect in this regard, and in the exercise of my discretion, the late filing of the second respondent's answering affidavit is condoned and accordingly the matter, in the interests of justice, falls to be determined on all the papers before the court.

[6] Other than the late filing of its replying affidavit, which I in any event condone to the extent that same may be necessary.
[7] 2022 (1) SA 201 (GJ*).*
[8] 2013 (3) SA 140.
[9] 1956 (2) SA 273.
[10] (3046/2018) [2019] ZALMPPHC 22 (7 May 2019).

[17] The applicant thereafter provided the second respondent's attorney of record with its replying papers via email on 25 November 2022 at 18h58, in which the applicant seeks condonation for the late filing thereof, whereafter they were served and filed on Monday, 28 November 2022, one day prior to the hearing of the matter. On the same day, the court file, which after the filing of all sets of affidavits comprised of some 235 pages, was duly updated.

[18] Counsel thereafter approached me in chambers on the morning of Tuesday, 29 November 2022, at which juncture I stood the matter down until 14h15 to allow the parties time to finalise their respective heads of argument and to afford me with an opportunity to consider them. Whilst I was provided with a copy of the second respondent's heads of argument prior to 14h15, the applicant's heads of argument were handed to me from the bar at the commencement of the matter. The aforesaid flurry of exchange is indicative of the time constraints placed on both parties, consequent to the time frames selected by the applicant.

[19] In argument, the applicant persisted with its view that the matter was adequately urgent and that the truncated time frames, as selected by the applicant, were appropriate. Whilst it was suggested on behalf of the applicant that the court, in issuing the directive, had determined the matter as sufficiently urgent so as to warrant the time frames in question, it was correctly conceded by Ms Olowookorun that such directive does not in any way bind the court hearing the matter insofar as the issue of urgency is concerned, which can only properly be determined on all the relevant facts of the case,[11] including the circumstances put forward by the second respondent herein.

<u>Urgency</u>

[20] At this juncture it is apposite to reiterate the cautionary words of Kroon J in *Caledon Street Restaurants CC v Monica D'Aviera,*[12] which judgment has over time, developed into a paradigmatic authority on urgency in this division:

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[11] *Voigt NO and Another v EGH IP (Pty) Ltd and Others* (1076/2021) [2021] ZAECGHC 40 (4 May 2021).
[12] [1998] JOL 1832 (SE) at page 8.

"It is incumbent on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. The intent of the rules is that a modification thereof by the applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The applicant will have to demonstrate sufficient real loss or damage were he to be compelled to solely or substantially on the normal procedure. The court is enjoined by rule 6(12) to dispose of an urgent matter by procedures "which shall as far as practicable be in terms of these rules". That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case. Practitioners must accordingly again be reminded that the phrase "which shall as far as practicable be in terms of these rules" must not be treated as pro non scriptio… The applicant, or more accurately, his legal advisors, must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects strike a balance between the duty to obey rule 6(5)(a) and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependant upon, and are thus limited by, the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies of the case demonstrate (and it need hardly be added these exigencies must appear from the papers).

[21] Whilst the applicant in the present instance did not depart from Form 2(a) of the first schedule to the rules, Kroon J's words find application not only in the context of such departure, but also in respect of the extent to which Form 2(a) is adapted to meet the specific demands of each case, for example, by the truncation of the time periods set out in rules 6(5)(b), 6(5)(d), 6(5)(e) and 6(5)(f) and/or the nomination of an advanced date for the hearing of the matter.

[22] In other words, and as succinctly put by Lowe J at paragraph [32] of *Tekoa Engineers (Pty) Ltd v Alfred Nzo Municipality and Others (supra)*:

"*There are degrees of urgency of course. An Applicant must set out explicitly the circumstances which render the matter urgent such as to justify the curtailment of the*

Rules, procedures and time periods adopted. That there will be a loss of substantial redress, if not heard on the basis chosen, must be shown."

[23] Pertinently, the question is whether the applicant has set out objective grounds, why the matter is urgent and whether it has explained why it cannot obtain substantial redress at a hearing in due course. The fact that an applicant wishes to have a dispute adjudicated upon urgently;[13] alternatively, is subjectively of the view that a matter is urgent, does not render it as such.

[24] Moreover, an applicant cannot content itself to merely sit back and delay the assertion of his or her rights, and by doing so, create his or her own urgency. Such conduct does not amount to urgency justifying the determination of the matter in accordance with Rule 6(12).[14]

[25] Having said that, I now turn to the grounds relied upon by the applicant underpinning the procedure adopted by it. In determining the adequacy of such procedure, it is also necessary for the court to consider the facts placed before it by the second respondent. Insofar as any factual disputes exist on the papers, I am obliged to apply the *Plascon-Evans* rule, given that the relief sought by the applicant is final in nature,

[26] As indicated above, the adjudication proceedings culminated in the delivery of the adjudicator's decision on 27 May 2022. Subsequent thereto, the applicant demanded compliance therewith, to no avail. On 25 June 2022, the second respondent delivered it's notice of disagreement with the said determination and referred the issue to arbitration. The applicant, thereafter, referred the second respondent's failure to make payment in accordance with the adjudication decision to arbitration. The first respondent was subsequently appointed as arbitrator, and the applicant, given the second respondent's failure to comply with the adjudication

[13] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at paragraph [9].

[14] *Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited* (2019/8846) [2019] ZAGPJHC 122 (3 May 2019); and *Masipa and Another v Masipa* (23224/2020) [2020] ZAGPPHC 214 (4 June 2020).

decision, sought interim enforcement of the adjudication decision in the arbitration proceedings on 17 August 2022, which decision was issued on 24 September 2022.

[27] Immediately apparent from the aforesaid is that no effort is made by the applicant to explain what took place during the four-week period between 27 May 2022 and 25 June 2022, other than to state that it demanded payment from the second respondent. It is also not clear from the papers on what date the applicant referred the second respondent's conduct to arbitration and whether any steps were taken to pursue the referral by the applicant prior to the second respondent having done so. Given that the applicant is silent on the date on which the arbitrator was appointed, I am also unable to ascertain the passage of time between the appointment of the arbitrator and the launch of the applicant's enforcement proceedings on 17 August 2022, the latter being a date some two months following the delivery of the second respondent's notice of disagreement. Accordingly, there exists a three-month period between the delivery of the adjudicator's decision on 27 May 2022 and the launch of the applicant's enforcement proceedings on 17 August 2022, which is largely unexplained on the papers.

[28] The decision in the interlocutory arbitral proceedings, was issued on 24 September 2022, whereafter the applicant demanded compliance therewith on 25 September 2022. The applicant's narration of events as from 24 September 2022, as set out in the founding papers, reads as follows:

*"[18] Following publication of the Arbitration Award on 24 September 2022, the Applicant demanded payment of R11 722 975.95, as per the adjudication decision, however despite the demand for payment and the obligation to pay within 30 days, no payment has been received from the Second Respondent. A copy of the Applicant's demand for payment is annexed as annexure **"GM4"**.*

[19] During the arbitral preliminary meeting, the attorney for the Second Respondent advised that it takes the Second Respondent between four to six weeks to process and effect payment. The Applicant, in a show of good faith, duly waited for a period of six weeks to expire (which expired on 5 November 2022) believing that the Second Respondent would honor its obligation to make the necessary payment to it, however,

to the Applicant's dismay, the said payment was not made by the Second Respondent."

[29] The applicant thereafter goes on to state that it received correspondence from two of its sub-contractors on 9 and 11 November 2022, respectively, in which the one sub-contractor threatened liquidation proceedings should payment of the sum of R144,256.22 not be received within 20 days from date of demand, and the other threatened to "*proceed further*" given that no payments had been received by the applicant in reduction of its debts. The application was thereafter launched on 16 November 2022 and served on the second respondent on 17 November 2022.

[30] Not only can the applicant's version as to the events which transpired between 24 September 2022 and 5 November 2022 not be accepted, given the facts put up by the second respondent, but they are patently false if regard is had to the applicant's own version. More particularly, the applicant's attempt to explain its inaction during the said period by contending that it duly awaited the lapse of a period of six weeks in "good faith" to receive payment, is nothing short of fallacious.

[31] The four to six-week period referred to by the applicant in paragraph [19] of its founding papers, as set out herein above, pertained to the payment of the arbitrator's fees and not the monies claimed by the applicant. To suggest otherwise, is not only inconsistent with the second respondent's version, but it is not borne out from the documents before me.

[32] Firstly, if regard is had to paragraph [18] of the applicant's founding papers, reference is made to an obligation on the second respondent to pay within 30 days of demand. This is in direct conflict with the suggestion contained in paragraph [19] of the founding papers that the applicant waited out the six-week period in "good faith".

[33] In any event, *ex facie* the written demand referred to in paragraph [18] of the founding papers, dated 25 September 2022, which emanated from one Sipho Gcora ("*Gcora*") on behalf of the applicant, the applicant demands payment by the end of the following week, failing which "*judgment will be taken against NMBM with a view to attach the Municipality's account…*" It is accordingly clear that as early as 25

September 2022, the applicant intended to pursue the present proceedings should payment not be forthcoming by the end of the month. Notwithstanding the aforesaid, the applicant has elected not to disclose what transpired from the end of September 2022 until the launch of the present proceedings on 16 November 2022.

[34] Moreover, on 29 September 2022, Gcora, again on behalf of the applicant, directed correspondence to the second respondent's attorney of record in which it was *inter alia* recorded that:

"*With reference to the above subject matter, you have not informed me whether you have an indication of whether NMBM will pay Ascon by tomorrow or not…*
As you have not responded to my question on when will payment be made, I am forced to place you on terms to respond by close of business today, failing, which Nolan and Cindy will escalate this matter to the Executive Mayor so that there is oversight over this violation of section 65(2)(e) of the MFMA under your watch…

Kindly therefore get back to me before close of business on whether NMBM will make payment tomorrow or sometime next week."

[35] The aforesaid passages speak for themselves and are telling in the extreme.

[36] Thereafter, on 4 October 2022, principals of the applicant, together with Gcora, attended the offices of the Municipality's Executive Major and demanded a meeting. A meeting was thereafter set up for 5 October 2022, which yielded no progress.

[37] On 13 October 2022, a representative of the applicant, advised one of its sub-contractors, via email, that "*[w]e are currently in communication with the Executive Mayor for his urgent intervention"*.

[38] It is also inexplicable why the recent threats of legal proceedings made by the applicant's respective sub-contractors renders the matter urgent, when one of the said sub-contractors had already, on 3 August 2022, informed the applicant that the matter could not be held in abeyance any longer.

[39] In a further attempt to bolster its allegations of urgency, the applicant contends that it has found itself with no other option but to dispose of its remaining construction equipment in order to cover its business expenses, including payment of salaries to employees and to finance its legal costs. The applicant, being decidedly coy as to when the disposal of the said assets took place, seeks to create the impression that same is current and ongoing. It is apparent from the papers before me that the applicant had already in February 2022 lost its fleet of construction equipment due to repossession and that the small holding used by it as a storage facility and builder's yard had been auctioned. Furthermore, it was at risk of losing its office property to a creditor that same month.

[40] It is apposite to mention that from the research conducted by the second respondent's attorney of record, in an application brought by the second respondent in the arbitration proceedings seeking an award for security for costs, it is patently clear that the applicant's financial troubles have long since preceded the present proceedings, with there being seven judgments against the applicant as at 10 February 2022. In response thereto, the applicant takes issue with the second respondent's disclosure of such information, contending same to be a smear campaign. I disagree. Whilst the applicant admits that its financial difficulties dated back to 2019, it contends that same does not detract from the current urgency of the matter.

[41] Regard being had to the aforesaid, I am of the considered view that any urgency which may have existed, if any at all, was self-created by the substantial delay in the launch of these proceedings. Further and in any event, the procedures and time periods adopted by the applicant, in the context of the present dispute, are unjustified and unsupported by the relevant facts as to urgency.

[42] It was intimated during argument on behalf of the applicant that the matter had been fully ventilated and the issue for determination in respect of the merits was crisp and could easily be determined by this court. I am mindful of the comments by Kroon J in *Caledon Street Restaurants CC* (*supra*)[15] in which he recorded that whilst there is

[15] At pages 10, 11 and 21.

a temptation to brush the wrong handling of a matter, and the applicant's presentation thereof as urgent beyond what was justified, under the rug, the attractiveness of finally disposing of the litigation should not be allowed to govern.

[43] I align myself with the aforesaid position.

[44] It is trite that in the event of a finding that the matter is not of sufficient urgency to warrant being entertained in accordance with Uniform Rule 6(12), the appropriate order is generally to strike the matter from the roll without the court making a determination on the merits.[16] I am of the view that the present application is the type of matter which calls for such an order. Given my finding in respect of urgency, I need not deal with the second respondent's remaining point *in limine*.

[45] I accordingly issue the following order:

1. The application is struck from the roll with costs.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	Ms Olowookorun
Instructed by:	Bukky Olowookorun Attorneys Inc.
	7 Bird Street, Central, Gqeberha
For the second respondent:	Mr Richards
Instructed by:	Karsans Incorporated
	Bird Street, Central, Gqeberha

Coram:	Bands AJ
Date heard:	29 November 2022

[16] *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* 2006 (4) SA 292 (SCA).

Delivered:	17 January 2023