

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case no: **038277/2022**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: **14 JULY 2023**

SIGNATURE

In the matter between:

In the matter between:

FABIAN ZIMPANDE MSIMANG N.O

(In his capacity as executor of the estate late
Meinrad Mendi Themba Boyi Msimang)

First Applicant

AFRIKA MSIMANG

Applicant

Second

And

TEBOGO CHRISTOPHER MAOTO N.O

First Respondent

MANTOMBAZANA FARMS (PTY) LTD

(IN BUSINESS RESCUE)

Second Respondent

ITHALA DEVELOPMENT FINANCE

CORPORATION LIMITED

Third Respondent

THE LAND BANK

MENDI MSIMANG INNOVATION HUB

(PTY) LTD

Fourth Respondent

Fifth Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTIES COMMISSION**

Sixth Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Seventh Respondent

DEPARTMENT OF JUSTICE

Eighth Respondent

PARK VILLAGE AUCTIONEERS

Ninth Respondent

J U D G M E N T

MAKHOBABA, J

- [1] This is an urgent application brought before me in terms of Rule 6(12). It is an opposed application to stay a sale in execution of a farm belonging to the second respondent.
- [2] The application is brought by Fabian Zimpande Msimang in his capacity as executor of the estate of Meirand Mendi Themba his late father who was the owner of the farm. Applicant own 100% of the shares in the farm. The first applicant and his brother inherited the farm in question from their father.
- [3] First respondent is the business rescue practitioner of the second respondent. The second respondent was placed in business rescue in November 2022.
- [4] The applicant seeks to remove the first respondent as business rescue practitioner and to appoint one Malebo Elias Moloto as the business rescue practitioner and or to be appointed as joint business rescue practitioner, pending the finalization of the application
- [5] The relief sought is only against the first respondent, the remainder of the respondents are merely cited as they may have an interest in the relief sought.

[6] The farm was placed under business rescue by the first applicant in his capacity as executor of the estate on 15 November 2022.

[7] The purpose for the business rescue is because the farm was financially in distress.

[8] The reasons furnished for the application in this court are as follows:

8.1. There is an online auction on the farm which commenced on 29 May 2023 and will close on 31 July 2023. The first respondent did not inform the creditors and the applicants about such sale.

8.2 The first respondent has since being appointed not implemented any rescue plan. He has not communicated any plan to the creditors, the shareholders and workers.

8.3. The first respondent had initially communicated that the farm will not be sold in execution.

8.4. Profitable and viable options were suggested to the first respondent but he refused to respond thereto.

8.5. He only visited the farm for the first time on 11 July 2023.

[9] Counsel for the first respondent submitted that the auction is in fact a means to “source potential buyers”. He argued against the removal of the first respondent.

[10] It is further argued on behalf of the respondents that the applicants knew of the sale at least by 26 June 2023 when a circular was sent to creditors by the business rescue practitioner.

- [11] The applicant submitted further that in enrolling the matter the applicants failed to abide by the practice manual for that reason the matter must be struck from the roll.
- [12] All applications brought on an urgent basis must meet the requirements of Rule 6 (12) of the Uniform Rules of Court, as a first hurdle before the matter can be enrolled and heard. Absent such satisfaction, the court will decline to entertain the application and will simply strike it from the roll. The applicant must set out explicitly the terms and circumstances which he avers renders the matter urgent and also why the applicant contends that he will not be afforded substantial redress at a hearing in due course.
- [13] Notshe AJ in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011), had occasion to say the following:

“[5] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of 6(12) of the Uniform Rules. The aforesaid sub rule allows the court or a Judge in urgent applications to dispense with the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as to it seems meet. It further provides that in the affidavit in support of an urgent application 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.”

[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. 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.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.”

[14] In my view, the actions of the first respondent toward his duties upon the second respondent, applicants and creditors is indifferent. For instance, he only visited the farm on 11 July 2023 the day the matter was to be heard.

[15] There is nothing on the papers and submissions on behalf of the first respondent that indicates that he has made efforts to save the farm other than put it on auction.

[16] It is further my view that the first respondent has failed to perform the duties of a business rescue practitioner.

[17] It is imperative that the court protect the interests of the creditors and the applicants. If the farm is sold on auction without exhausting all available avenues the economic rights of the creditors and the applicants will be infringed.

[18] However it will not be proper for the court to remove the first respondent or replace him. Removing the first respondent will have to be ventilated properly in another forum and not in the urgent court.

[19] I make the following order:

19.1. This matter is heard as an urgent application and that the non-compliance with the Rules and directives pertaining to time periods be condoned in term Rule 6 (12).

19.2 The applicants are granted leave to institute these proceedings as affected parties.

19.3 That the sale in execution (or any private sale) of the farm of the second respondent known as The Remainder of Portion 6 Farm 8639 Blesbok, Registration Division HS Natal, Kwazulu Natal, is stayed, pending the final adjudication of this matter.

19.4 Costs to be paid by the first respondent.

MAKHOB A J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED JUDGMENT: 12 JULY 2023

JUDGMENT HANDED DOWN ON: 14 JULY 2023

Appearances:

For the Applicant: Adv N Nortje (instructed by) AARON STANGER & ASSOCIATES
ATTORNEYS

For the Respondent: Adv T Moloi (instructed by) RAMS ATTORNEYS