



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION**

Not Reportable
Case no: 3832/2023

In the matter between:

MANTSOPA LOCAL MUNICIPALITY

Applicant¹

and

INZALO ENTERPRISE MANAGEMENT SYSTEMS (PTY) LTD

Respondent²

Coram: Opperman, J

Heard: 21 August 2023

Delivered: The order was handed down on 22 August 2023 at 08h00. The reasons for the judgment were handed down electronically by circulation to the parties' legal representatives *via* email and released to SAFLII on 23 August 2023. The date and time of hand-down is deemed to be 08h00 on 23 August 2023

Summary: Urgent application – amendment of Notice in terms of Uniform Rule 30(2)(b) and Uniform Rule 30A

¹ “The Municipality”.

² “Inzalo”.

JUDGMENT

- [1] This is an opposed urgent interlocutory application³ in terms whereof the Mantsopa Local Municipality seeks to amend its rule 30/30A-Notice dated 15 August 2023.
- [2] There are two cases/court files in this matter running parallel. It is case number: 1582/2023, the case on which the 5 May 2023-order (“the original order”)⁴ was made. Then there is this application for declaring the non-compliance of the original court order to be contempt of court (the contempt of court application) under case number: 3832/2023. The urgent interlocutory application, in terms of rule 6(11), was brought under case number

³ The urgency is reflected in the application of the Municipality, and it is for the application of rule 6(11). The adjudication of urgency does not fall away because it is a rule 6(11)-application. This is acknowledged in the application of the Municipality wherein they apply: “That the applicant’s non-compliance with any requirements in the Uniform rules of Court that may apply to interlocutory applications and rules of practise be condoned and this interlocutory application be enrolled as an urgent application.”

⁴ Inzalo in this application is the applicant in case number 1582/2023. On 5 May 2023, Mhlambi, J from this court, issued an order against the Mantsopa Local Municipality, the applicant *in casu*. It is this order that Inzalo now claim that the Municipality does not comply with and is in contempt of. The order reads as follows:
Having considered the documents filed of record and having heard the legal practitioners,

IT IS ORDERED THAT:

1. The Respondent shall cancel and re-advertise the tender for the supply of Hosting, supply, delivery, installation and commissioning of MSCOA compliant Financial Management and Internal control system to the Municipality that complies with MFMA Circular 80, which stipulates the requirements of the municipal financial systems and processes in support of the Municipal Standard Chars of Accounts (MSCOA) and all subsequent MFMA MSCOA circulars as promulgated, under Bid Number: MLM-27/23/24 (“the Tender”) including the specified statutory time periods;
2. The Respondent is ordered to provide the applicant with the proof of information in respect of the Tender within 5 days of this court order. Proof of the Respondent’s compliance with MSCOA obligations in terms of the Circulars issued by the National Treasury in respect of the appointment and replacement of the Respondent’s financial management system and service provider including but not limited to compliance with:
 - 2.1 MFMA Circular no. 123
 - 2.2 MFMA Circular no 80 and annexure B thereto.
3. The Respondent shall pay the costs of this application on the attorney and client scale including the cost of counsel.

3832/2023. The interlocutory application was the subject of the urgent application on 18 August 2023 and 21 August 2023.

- [3] An urgent contempt of court application was launched in July 2023 but was struck off the urgent court roll on 1 August 2023 for lack of urgency.

- [4] Inzalo's contempt of court application was hereafter set down on 4 August 2023 for hearing on 24 August 2023. The Municipality took proper cognizance of the date of 24 August 2023 when the matter was set down to be vented in a hearing of a formal opposed motion. Strangely enough, was the file (case number 3832/2023) located on the unopposed motion court roll on 18 August 2023 when it was drawn for the urgent roll. I instructed that the attorney for Inzalo be informed of the situation. The files were immediately referred to the Judge President for decision of the placement thereof. From a quick perusal of the file, it does not seem as if the Municipality has filed their heads of argument for the 24 August 2023-hearing or timeously so. The matter might not be ready to be heard on the 24th of August 2023.

- [5] The background facts are that the Municipality curiously so, served the Notice in terms of rules 30/30A only on 15 August 2023. Two complaints came to the fore; namely, (i) that Inzalo enrolled the contempt application without first amending its notice of motion after the matter was struck from the urgent court roll on 1 August 2023, and (ii) that Inzalo did not afford the Municipality the ordinary court time periods to file an answering affidavit in the contempt application.

- [6] The Municipality demanded that Inzalo remove the complaints within the usual period of 10 days prescribed by rules 30 and 30A of the Uniform Rules of Court, failing which the Municipality threatened to bring its exception. Strangely, the *dies* set in the Notice expired on 25 August 2023, that is a day after the hearing of the pending contempt application on 24 August 2023.

- [7] It is the case for the Municipality that on the evening of 16 August 2023, its counsel became aware that the time periods in the Notice were an oversight. The Municipality launched this urgent application on 17 August 2023 to amend the time periods in the Notice from 25 August 2023 to 22 August 2023; two days before the hearing of the contempt application. This does not make sense since the complaints cannot effectively, practically, and procedurally be removed before the 24th of August 2023. The application seems to be still born and moot; the prejudice to Inzalo grave and the effect on the administration of justice real.
- [8] The right of access to courts is essential in a constitutional democracy under the rule of law and specifically so in terms of section 34 of the Constitution of the Republic of South Africa, 1996: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”
- [9] Condonation granted on the facts of this case in terms of the Uniform Rules of Court may break any limitation placed on this right.
- [10] The right of access to courts that is a fundamental right, is eclipsed by the right to justice that also entails, *inter alia*, a fair trial. Section 34 of the Constitution refers to the application of law decided in a fair public hearing.
- [11] This case is a reminder that the rules of courts may not be utilized to play litigatory games that delay justice and cause costs and procedural misery. Litigation must be proper and timeous and may not cause trials or hearings to become chaos.
- [12] Courts may also not be held hostage by the reliance on section 34 of the Constitution. Litigation and access to courts are constitutional rights that may not be trampled and ridiculed; it must be conducted with the utmost decorum and respect for the rule of law.

[13] An interlocutory application, such as *in casu*, is an urgent request made to court to compel compliance with procedure and time periods; or otherwise, is to secure some end and purpose necessary and essential to the progress of a case. The application at hand obstructs this vision. It causes a regression of the litigation.

[14] It is not clear how the rule 30/30A-Notice only came to be served on 15 August 2023 whilst it was well known on 4 August 2023 that the hearing was on 24 August 2023. The oversight cannot be condoned and does not cause urgency in terms of rule 6(12). Careless litigation cannot be cured by an urgent application especially if the prejudice to the other party and administration of justice is clear. The law is well known. Harms⁵ with reference to case law came to the following conclusions:

1. In a case of urgency, the court or a judge in chambers may dispense with the forms and service provided for in the rules and may hear the matter at such time and place and in such a manner and according to such procedure as the circumstances require.
2. The rules must, however, be complied with as far as is practicable, including the use of the long form, but basic principles, such as jurisdiction or legal standing, cannot thereby be jettisoned.
3. The applicant must apply for an order condoning the non-compliance with the rules.
4. There are degrees of urgency.
5. Some matters may be so urgent as to necessitate an immediate hearing, albeit at night or during a weekend and may even be so urgent that no time is available to prepare any documents, in which case *viva voce* evidence may be heard. Others again, whilst they may be such that the time limits imposed by the rules may be ignored, may not be so urgent as to require a hearing out of normal court hours.
6. The applicant must set forth explicitly the circumstances which render the matter urgent, firstly, and, where necessary, require that the matter be heard outside of a court's usual urgent procedures.
7. The applicant must show an absence of substantial redress if not heard in as a matter of urgency. This is not the equivalent of irreparable harm. Delay will not automatically result in the matter not being considered urgent. (*Molosi and Others v Phahlo Royal Family and Others* [2022] 3 All SA 160 (ECM))
8. Once such a requirement is established, other factors come into consideration. These factors include but are not limited to whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents

⁵ Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 6 APPLICATIONS, Urgent Applications, Updated: February 2023 - SI 76, <https://www.mylexisnexis.co.za/Index.aspx> on 22 August 2023.

and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by Counsel acting for respondents, self-created urgency.

9. Delay will not automatically result in the matter not being considered urgent. This is particularly the case where the applicant's rights are being continuously infringed.
10. Commercial interests may justify the invocation of the rule. Application may also be made for a rule *nisi* (with or without interim effect) if, in the circumstances of the case, notice cannot be given to all interested parties.
11. If the matter is not urgent the application for substantive relief is not affected. All that can happen is that the court may refuse to deal with the matter as one of urgency – it cannot dismiss the application on that ground because urgency is a matter of form and not of substance.
12. The more urgent the matter, the more readily and more radically the provisions of the rule may be deviated from and in case of extreme urgency, the matter may even proceed without service or notice to the registrar.
13. Effective service, where appropriate, is not a collegial courtesy, but a mandatory duty. An applicant cannot create his own urgency by simply waiting until the normal rules can no longer be applied.
14. Failure to justify the deviation from the ordinary rules sought should not as a matter of course lead to the dismissal of the application.
15. Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the rule of law and may have a detrimental impact upon the public purse, the relevant relief sought should normally be urgently considered. The opposite is also true; the government or public officials may not use the rules to warp the system.
16. In *Gigaba (born Mngoma) v Minister of Police and Others* [2021] 3 All SA 495 (GP) it was held that a requirement for establishing urgency is an explanation for the applicant's belief that substantive redress in due course is unattainable.
17. Where there are allegations of basic human rights being violated and where the alleged reasons for urgency clearly no longer existed at the time of the institution of the application, urgency is not established.

[15] The Municipality did not manage to overcome the hurdle of urgency. If this finding is wrong and the court must adjudicate the matter purely on rule 6(11) then the application must still fail. The awkward way in which the Municipality litigates is of grave concern. As said, a mistake cannot be cured to the prejudice of other parties and the administration of justice, specifically not on the facts of this case.

[16] The matter was set down for hearing of the urgent application⁶ in terms of rule 6(11)⁷ before Chesiwe, J on 18 August 2023. On this day chaos apparently broke out. This is how the events are described by counsel for Inzalo and how the application landed on the roll of the 21st of August 2023 at 9h00. The urgency of the matter went awry and the obstruction of the hearing set down for 24 August 2023 became gravely affected. It stands undisputed.
7.

7.1 On 17 August 2023, at **13h58** in the afternoon, the Municipality served on the front desk of the Respondent's correspondent's attorney in Bloemfontein an urgent application. The Municipality served on Honey Attorney's a signed but unissued copy of the urgent application to be heard the next day at **12pm** on **18 August 2023** (the first urgent application).

7.2 Later in the afternoon at **15h28**, the Municipality served on Honey Attorney's a second signed and unissued set of papers for an urgent application to be heard the next day at **14h15** on **18 August 2023** (the second urgent application).

7.3 However, Inzalo did not know of the second urgent application and only discovered the existence thereof the following day at approximately 10am on 18 August 2023 when it placed its answering affidavit to the first urgent application on the Court file.

8. As appears from the two sets of urgent papers:

8.1 the Municipality did not **withdraw** the first urgent application despite serving two urgent applications on the Respondent;

8.2 both sets of urgent papers served on Inzalo were **unissued** and did not bear a **stamp** of this Court;

8.3 both notices of motion do not cater for Inzalo's **participation** in the urgent applications in that:

⁶ Rule 6(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 it deems fit.

(b) In every affidavit filed in support of any application under paragraph (a) of this sub-rule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.
[Substituted by GNR.2133 of 3 June 2022.]

(c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.
[Substituted by GNR.3 of 19 February 2016.]

⁷ Rule 6(11)

Notwithstanding the foregoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.

[Substituted by GG 39715 of 19 February 2016 – *Regulation Gazette* 10566, Vol 608.]

- 8.3.1 There are no time periods for the Respondent **to oppose** these urgent court proceedings;
 - 8.3.2 There are no time periods for the Respondent **to file an answering affidavit** in these proceedings;
 - 8.3.3 There is no provision for the Respondent to **appoint** an attorney of record;
 - 8.3.4 There is no provision for the Respondent **to be notified** of the matter.
 - 8.4 There is **no prayer** that the Registrar of this Honourable Court set the matters down accordingly;
 - 8.5 The Municipality's attorney of record **describes itself** as the respondent's attorney of record i.e., Inzalo's attorney of record;
 - 8.6 Both urgent applications were set down for hearing at specified times **without** being issued by this Court;
 - 8.7 Both urgent applications were served on Inzalo with **less than 24 hours' notice** of the hearing thereof;
 - 8.8 No attempt was made by the Municipality's representatives to **clarify or explain the status** of the two unissued urgent applications served on the Respondent set down at different times.
- 9 Inzalo served its answering affidavit to the first urgent application at 9h26 on Friday, 18 August 2023. However, at approximately 10h00 Inzalo's representatives discovered that **only** the second urgent application was put in the **Court file** despite the Municipality serving **two unissued** urgent applications on it.
- 10 The parties' representatives duly approached the judge **in chambers** to obtain direction as to the status of the matters (given that Inzalo was served with two urgent applications to be heard at two different times). During the discussions, Municipality's attorney of record informed the judge in chambers that the Municipality's senior and junior counsel were **unavailable** and would **only be attending court at 3pm**, and **not at 12pm** or at **14h15** as stated in the notices of motion served on the Respondent.
- 11 Compounding the situation, the senior or junior counsel referred to by the Municipality's attorney of record did **not** arrive to court; instead, the Municipality briefed another **third** junior counsel **on the day** to argue the matter i.e., on Friday 18 August 2023.
- 12 This Court duly postponed this matter on Friday, 18 August 2023 for hearing on Monday, 21 August 2023 to be argued on the second urgent application. The court reserved the costs of the first urgent application.
- 13 The Municipality knows Inzalo, and its legal representatives are **based in Johannesburg** and that it would have less than 24 hours to obtain instructions, secure counsel, prepare and commission an answering affidavit, travel 5 hours to Bloemfontein, and prepare oral argument. But for Inzalo's intervention, the Municipality's urgent application, whether by design or otherwise, would have

resulted in the Municipality **stealing a march** from Inzalo and essentially obtaining a court order **by stealth**.

- 14 However, the appalling conduct of the Municipality does not end there. This is because this urgent application was **entirely avoidable**, including the **massive bill of costs** that the taxpayer will be saddled with. Instead of withdrawing the Notice and issuing a new notice with the desired dates, which would have cost **a few hundred Rands**, the Municipality has **wasted hundreds of thousands of Rands** on a **doomed urgent application** that is itself **riddled with incurable defects and flaws**.
- 15 Ultimately the Municipality has **run riot** over the practices, processes, and Rules of this Court, and made **a mockery** not only of the rule of law, but also undermine the fundamental tenant of our constitutional dispensation that guarantees the Respondent will obtain a fair hearing in terms of section 34 of the Constitution.
- 16 Moreover, section 164 of the Constitution vests in the **judicial authority** in this Honourable Court. It must **protect** its practices and process, including the rules that govern litigation in South Africa and the litigants that enter that arena. This Honourable Court simply cannot permit the Municipality, an organ of state, to **thumb its nose** at obligations that bind other litigants and run riot in its court.
- 17 From what appears below, Inzalo's case is **unanswerable**: the urgent application is procedurally and substantially defective. It must be dismissed with costs on the punitive scale, including costs of two counsel.

[17] The application was issued on 17 August 2023 at this court. It reads as follows:

Be pleased to take note that the Mantsopa Local Municipality (the applicant) intends to make application on Friday 18 August 2023 at 14h15 for an order with the following terms:

1. That the applicant's non-compliance with any requirements in the Uniform rules of court that may apply to interlocutory applications and rules of practice be condoned and this interlocutory application be enrolled and heard as an urgent application.⁸
2. That leave be granted to the applicant and the notice in terms of Uniform rule 30(2)(b) be read with Uniform rule 30A be deemed to be amended in the manner represented by Annexure "A" to the founding affidavit.⁹
3. That the applicant is authorized to deliver the amended notice in terms of Uniform rule 3(2)(b) read with Uniform rule 30A on the respondent's attorney per e-mail without delay.
4. That the applicant pays the cost of this application on taxed party and party basis if unopposed
5. That the respondent pays the cost of this application on the scale as between attorney and client, alternatively party and party in the event of the application being opposed.

⁸ Urgency and its concomitant legal consequences are acknowledged by the Municipality.

⁹ The rule 6(11)-application.

6. Further and all alternative relief as the court deems meet.

Annexure A

...TAKE NOTICE FURTHER that the applicant is afforded the opportunity to remove the cause of complaint before or on Tuesday, 22 August 2023 at 14h00, barring which the respondent will make application before the main application is heard for an order with the following provisions:

- (a) That condonation be granted for the respondent's failure to comply with the requirements of rule 30 read with 30A pertaining to the time for removal of the cause of complaint and, insofar as relevant the urgent application in terms of the provisions of rule 30 read with 30A.
- (b) That the notice of enrolment, alternatively the enrolment be set aside, and the main application be struck, alternatively removed from the Court's roll.
- (c) That the applicant pays the respondent's cost on the scale as between attorney and client, alternatively party and party.
- (d) Further and/or alternative relief. (Accentuation added)

[18] All the factors above regarded, the application itself included, the matter is not urgent, and the relief prayed for may not be granted if the conduct of the Municipality and the facts of the case are regarded. It will bring the administration of justice into disrepute to do so.

[19] Inzalo is the successful party here and the way in which the Municipality litigated demands from the court to show its displeasure with a punitive costs order.

[20] **ORDER**

- 1. The urgent application is dismissed.
- 2. The applicant (Municipality) to pay the costs that includes the costs of Friday, 18 August 2023 on an attorney and client scale.


M OPPERMAN, J

APPEARANCES

For the applicant

S REINDERS
Matlho Attorneys
BLOEMFONTEIN

For the respondent

C OPPERMAN
Di Siena Attorneys
Sandton
c/o Honey Attorneys
BLOEMFONTEIN