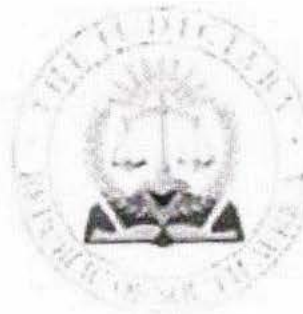




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISIT: YES
Date: 3 October 2023 Signature: [REDACTED]	

CASE NO: A96/2022

In the matter between:

RICHARD NDOU

Appellant

and

BEAGLE WATCH ARMED RESPONSE (RF) (PTY) LTD

Respondent

NEUKIRCHER J:

1] This appeal comes before us with leave of the court a quo and is directed against the judgment and order, specifically paragraphs 2, 3, 4 and 5 of the order, granted on 10 February 2022.

2] The crux of the issue in this appeal is whether the court a quo could (or should) have granted any order on the merits of the application at all as, according to the

appellant (Ndou)¹ the sole focus of the argument present had been directed at the issue of urgency – this at the behest of the court.

3] If indeed this argument is correct, there is no issue taken with the fact that the appeal should succeed and the matter remitted to the High Court for hearing on the merits on the opposed motion roll. Accordingly, no argument was presented to us on the merits. It is also not in dispute that during argument a quo, prayer 2 of the Notice of Motion was abandoned.

THE ORDER GRANTED

4] In order to give context to the facts of this appeal, it is apposite to set out paragraphs 2 to 5 of the order that was granted on 10 February 2022.² It reads as follows:

- “2. *Interdicting and restraining the first respondent from utilising and/or divulging or otherwise sharing any confidential information relating to the applicant to any third party including the second respondent.*
3. *Interdicting and restraining the first respondent from soliciting business from the customers on the applicant’s customer list/s and/or from otherwise interfering with the existing contractual relationships between the applicant and the aforesaid customers on the applicant’s customer list/s.*
4. *Interdicting and restraining the first respondent from soliciting the applicant’s employees to work for any third party resulting in a breach of the first respondent’s contractual duties to the applicant, and/or otherwise interfering with the existing contractual relationships between the applicant and its employees.*
5. *The first respondent to pay the costs of this application including the costs of two counsel.”*

THE FACTS

5] On 14 January 2022 the respondent (Beagle Watch) launched an urgent application against Mr Ndou and one other³ for interdictory relief to prevent them from inter alia disclosing confidential information, soliciting its clients and employees and

¹ The respondent a quo

² Paragraph 1 is the finding of urgency which is not in issue in this appeal

³ A company known as Suburban Control Centre (Pty) Ltd t/a SCP Security (SCP)

generally interfering with its contractual relationships with its clients and employees. The relief sought was based on the terms of a written employment contract concluded between Ndou and Beagle Watch during November 2009 pursuant to Ndou's employment commencing with Beagle Watch. According to Beagle Watch, when Ndou resigned, he took up employment with SCP and thereafter breached the confidentiality, restraints and patents provisions of his employment contract.

6] The application was enrolled for hearing in the urgent court for 8 February 2022, and by that time it had become opposed with a full set of papers before court at the time it was heard, as well as heads of argument. Importantly, Ndou's view was that the application was not urgent and that it ought to be struck from the roll with costs and if found to be urgent, it should be dismissed with costs based on his defences to the application.

7] When the matter was called, the court informed Beagle Watch's counsel (Mr Swanepoel) that he "*can concentrate on urgency*", which is exactly what he did. Of course, given the subject matter of the dispute where it is alleged that it is the conduct of Mr Nou and SCP that gave rise to the urgency of the matter, it was not possible to ignore the merits completely in order to explain why the matter was so urgent that a hearing in due course would not suffice.

8] Be that as it may, Mr Swanepoel addressed the court in respect of urgency and there are several references to this found throughout his address which makes it very clear that the focus of his argument was the issue of urgency – for example:

(a) "*M'Lord, and then the urgency M'Lord we will deal with afterwards, whether Your Lordship – I would M'Lord respectfully submit that prior to Your Lordship dealing with the actual merits of the application which will take some time M'Lord. Finally, if Your Lordship will deal – obviously M'Lord will deal with it as you want to with the question of urgency and whether the matter should be enrolled or not.*"⁴

(b) "*MR SWANEPOEL: 2-26 M'Lord. Founding affidavit paragraph 42 under the heading 'Urgency'.*"⁵

⁴ CL 27-222

⁵ CL27-226

(c) *"MR SWANEPOEL: Thank you M'Lord. M'Lord so still on the question of urgency, M'Lord. The question is just, what does the first respondent say about this contractual clause I have just read..."*⁶

(d) *"Therefore M'Lord, the applicant says to Your Lordship, if we are not heard on an urgent basis it would be cadit quaestio, there will not be a relied for us in future, we need to protect our interest. That is the urgency of this case, M'Lord. It does not go much beyond that, M'Lord."*

There are of course various allegation in the answering affidavit and I can direct Your Lordship's attention to two of them quickly as follows, which has a bearing on the issue of urgency M'Lord and it is always nice if one M'Lord, can argue urgency from a reading of the respondent's own answering affidavit in a case, M'Lord..."

9] Suddenly, at the end of his argument in chief, Mr Swanepoel states the following:

"I know this M'Lord that the issue of urgency in this case is intertwined and interlinked with the issue of the merits of the case. You cannot just divorce the two and speak only about urgency,

*I know that 'Lord, because in this particular case M'Lord, you cannot just close your eyes to the merits. I have already addressed Your Lordship fully on the issue of urgency and the merits..."*⁷

10] Unsurprisingly, this created confusion for Mr Pincus who then pertinently asked the following question:

*"M'Lord, I am just a bit confused now. Are we arguing the point of urgency only or the merits as well? Sorry M'Lord, I thought we were only arguing the point of urgency."*⁸

The response to this from the court was

"We are arguing urgency."

11] At no stage during his entire argument was Mr Pincus informed that the court's focus had shifted from the issue of urgency to the issue of the merits. In fact, the court's express indication was to the contrary as is clear from the above exchange. Thus,

⁶ CL22-236

⁷ CL27-244

⁸ CL27-244

even when Mr Swanepoel once again in reply stated that he had addressed both the urgency and the merits, the latter was not a relevant consideration outside of whether or not the application was urgent. And in response to this, Mr Pincus states the following:

*"M'Lord, can I just say, I am arguing urgency only. I am not arguing the merits. I just want to put this to you in reply because we were dealing with urgency I thought M'Lord would respect that..."*⁹

Even then, the court did not point out that he should address the merits of the matter. Instead, the court adjourned and when it resumed, judgment was given on both urgency and merits.

12] In the application for leave to appeal, the court expressed the view that as the urgency was intertwined with the merits, it disposed of the matter on that basis but that leave to appeal was granted in the interests of Mr Ndou *"as well as the matter be put to rest in a proper way"*. But I must respectfully disagree with the court a quo: the fact is that during his argument a quo Mr Pincus argued that were the matter to be found urgent, he would make submissions why the orders sought by Beagle Watch should not be granted – he was never given an opportunity to do so, nor was he ever instructed by the court to make submissions on the merits.

13] Mr Pincus argues that he had touched on the merits only in order to found his argument that the application was not urgent and should therefore not be enrolled or be struck off the roll – the record (through the various exchanges with the court and both counsel) clearly show this to be so. He has also argued today that had he been given a proper opportunity to argue the merits, he would have handed up, and referred extensively, to a bundle of authorities in order to demonstrate that the relief sought was not competent – but he was deprived of this opportunity. This too is clear from the record. Thus, Mr Pincus was not provided with any opportunity to debate the issues with the court. Mr Swanepoel attempted to argue that Mr Pincus had an obligation not to remain supine when he realised that the merits of the matter were being canvassed and especially when the court was giving judgment – but the record clearly reflects Mr Pincus' efforts to emphasize that only the issue of urgency was being canvassed, and

this at the specific behest and direction of the court itself. Most importantly, the court on several occasions confirmed that only urgency need be addressed. Thus any attempt to lay blame for the *volte face* of the court cannot be laid at the respondents' door.

14] Section 34 of the Constitution states:

"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."

15] Inherent in the entire process that is the cornerstone of a "*fair public hearing*" is the *audi alteram partem* principle which is a foundation of the rule of natural justice. The argument is that the failure of the court a quo to give the respondents an opportunity to address it on the merits violated the principle that every litigant should be given a fair opportunity to address the court and therefore constituted a gross irregularity in the proceedings which is fatal to it. I agree. In my view, it also cannot be ignored that an argument in respect of urgency and one in respect of merits have completely different focuses.

16] In **Brian Khan Inc v Samsudin**¹⁰ the court stated:

"In my view the approach suggested by Mr Kaplan was not one upon which the court a quo should have acted at all. And whilst there may be some doubt as to whether full argument was allowed on the separation of the point in limine, there is no doubt that no argument was heard on the substance thereof. When granting leave to appeal, the court a quo accepted that counsel for the appellant did not present argument in respect of the point in limine. I am convinced that the omission by the court a quo to have afforded counsel for the appellant the opportunity to address the court, happened per incuriam and not by design. Nevertheless, the omission deprived the court of the benefit of oral argument 'in which counsel can fully indulge their forensic ability and persuasive skill in the interest of justice and their clients'."¹¹ (my emphasis)

¹⁰ 2012 (3) SA 310 (GSJ) at para [4] – [5]

¹¹ With reference to *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (AD) 628G.

17] In my view, the failure to hear argument on the merits constitutes a fatal irregularity and misdirection in the conduct of the proceedings, and on this basis alone the appeal must succeed.

COSTS

18] As to costs: it was argued that Beagle Watch was not the cause of the irregularity that occurred, but a reading of the record shows that, whilst it was not the sole cause, the submission that both urgency and merits had been canvassed, had a hand in the outcome. Furthermore, both the application for leave to appeal and this appeal itself were vigorously opposed by it. Had Beagle Watch simply abided by the decision of this court, perhaps one could argue that each party should pay their own costs – but in this case there is no argument to be made on that score. Thus there is no reason to depart from the usual rule that costs should follow the result.

THE ORDER

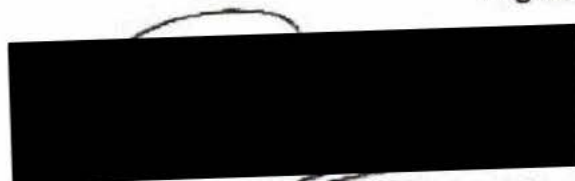
19] The order that is made is the following:

1. The appeal is upheld with costs.
2. Paragraphs 2, 3, 4 and 5 of the order dated 10 February 2022 are set aside in their entirety.
3. The application is remitted back to the Gauteng High Court, Pretoria for a hearing on the opposed motion roll.



NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

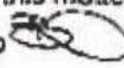


HOLLAND-MÜTER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree



MOOKI AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are 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 for hand-down is deemed to be 3 October 2023 

For the appellant	:	Adv Pincus SC
Instructed by	:	Mouris Cohen Inc
For the respondent	:	Adv Swanepoel SC
Instructed by	:	Douglas McCusker Attorneys
Matter heard on	:	30 August 2023
Judgment date	:	<u>3 October 2023</u> 