



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO: 1284/20

In the matter between:

TEKOA ENGINEERS (PTY) LTD

Applicant

and

ALFRED NZO MUNICIPALITY

First Respondent

**THE MUNICIPAL MANAGER: ALFRED NZO DISTRICT
MUNICIPALITY**

Second Respondent

**ZINZAME CONSULTING ENGINEERS/CYCLE
PROJECTS/ UBUNTU BAM JV**

Third Respondent

EMLANJENI JV

Fourth Respondent

**OLON CONSULTING ENGINEERS JV
IMP PLANT HIRE**

Fifth Respondent

BM INFRASTRUCTURE JV MAGNACORP

Sixth Respondent

JUDGMENT: URGENT APPLICATION

LOWE J:

INTRODUCTION

1. By way of a notice of motion filed of record and issued on 7 October 2022, applicant in this application seeks an order condoning its non-compliance, forms, time limits and service period in terms of Uniform Rules 6(12) and an order, effectively arising from section 18 of the Superior Courts Act 10 of 2013,

that the order of Laing J of 14 June 2022 relevant to the matter between the same parties not be suspended pending the decision of the Supreme Court of Appeal on the application for leave to appeal against that order, or in any subsequent appeal.

2. In essence then applicant seeks that respondents are prohibited from continuing with the works on a contract between first respondent and the third to sixth respondents, in respect of the tender referred to and dealt with in the judgment of Laing J.
3. The matter was brought as one of extreme urgency supported by a certificate of urgency drafted by applicant's attorney and, being a matter set down by way of the notice of motion for hearing on a Tuesday, did not require a directive of this court.
4. The time table constructed was that the matter having been issued on 7 October 2022 (a Friday) respondents must notify applicant's attorney by Tuesday 11 October 2022 of their intention to oppose and file their answering affidavits, if any, by no later than 16h00 on Thursday 13 October 2022, no reply being referred to, the matter was to be heard on 18 October 2022, a Tuesday.
5. In point of fact, the founding papers were not served in terms of Rule 6 of the Rules of this court, but were delivered by email to all the respondents' various attorneys only on 10 October 2022 (a Monday) some three days after the issue of the papers in fact.

6. Whilst the matter was a new self-standing application, it should have been served on the respondents themselves, and not their attorneys, this is not an issue of which respondents made much, seeming to accept the service on their attorneys as adequate, although complaining about the time limits.
7. In due course, and on 11 October 2022, first and second respondents gave notice of opposition and filed their answering affidavits on 13 October 2022 complying with the stringent time limits imposed upon them. Third to sixth respondents gave notice of their intention to oppose the application on 18 October 2022, the day of the hearing, and their answering affidavit was filed similarly on the 18 October 2022.
8. In due course, and during the course of motion court on 18 October 2022, and received by me at approximately midday, applicant filed its replying affidavit to third, fourth, fifth and sixth respondents' answering affidavit, having already filed its replying affidavit to first and second respondents on 14 October 2022.
9. Counsel for applicant handed to me his heads of argument at approximately 13h45, in motion court on the day of the hearing, and as I stood the matter down to the next day, counsel for all the respondents handed in their heads of argument at 9h30 the next morning, 19 October 2022.
10. All the above demonstrates that the time line chosen by applicant can only be described as one of extreme urgency, and having regard to late service afforded respondents on the time table chosen, one day to give notice of intention to oppose (served on 10 October 2022 intention to oppose to be given by close of business 11 October 2022); and from receipt of the papers on the

morning of the 10 October 2022 to close of business on Thursday 13 October 2022 to file their answering affidavits, a period of no more than three and a half days.

11. That first and second respondents managed to meet the time table is remarkable, but this was completely missed by the remaining respondents who only managed to comply therewith on the day of the hearing.
12. It is also plain from the summary above, that I received the papers in dribs and drabs, and that papers were still being handed in by the remaining respondents and in reply by applicant during the course of the day intended for the hearing, and that applicant had only been able to file its heads, being handed to me at 13h45 on the day of the hearing, respondents' only the next day.
13. The above course of conduct brings these urgent proceedings into the category of those launched with and proceeding along the lines of extreme urgency.
14. It should be said that the main application was complex and that the founding papers were some 91 pages in length. By the time the matter was finally before me and the papers complete these were some 199 pages in length.
15. It will thus be seen that not only was the matter proceeded with as one of extreme urgency, but involved a complex set of facts raising various issues of law, going to some 199 pages.
16. The matter was literally forced onto the roll on Tuesday, 18 October 2022, and applicant persisted in its view that the matter must not only be heard but dealt with similarly as one of extreme urgency.

17. Having stood the matter down on the 18 October 2022 to the 19 October 2022 in order that I might read the heads of argument and papers which were filed during the Tuesday motion court day as I have set out above, argument then proceeded for some three hours.
18. I reserved judgment having regard to the complexity of the matter requiring to consider all the arguments advanced which were many.
19. Three questions arose in the argument:
 - 19.1 whether the matter was properly enrolled at all;
 - 19.2 whether the matter was of such urgency as to warrant being heard on the time table and date chosen unilaterally by applicant; and
 - 19.3 the issues surrounding the merits of the application being the issues raised by applicant in terms of section 18 of the Superior Courts Act.

THE BACKGROUND TO THE APPLICATION

20. On 14 June 2022 Laing J gave judgment in an application to have reviewed and set aside first respondent's decision to refuse to award applicant a tender under a particular bid number ("the tender") as well as the awarding of the tender to the third to sixth respondents herein.
21. Having heard argument Laing J found that the process followed by first respondent with regards to the tender was unlawful and that its decision to disqualify applicant's bid in response to the tender be reviewed and declared unlawful and set aside. Laing J found further that second respondent's decision to award the tender to the third to sixth respondents was such as to be

reviewed, declared unlawful and set aside and similarly such contracts concluded between first respondent and third to sixth respondents being declared unlawful and void *ab initio*. Finally, to enable certain of the projects that were near to completion to be completed, Laing J suspended certain parts of his order for a period of thirty days, that period ending on 15 July 2022.

22. Not agreeing with the correctness of the judgment and order of Laing J respondents filed a notice of application of leave to appeal which was argued on 31 August 2022, judgment reserved and then handed down on 6 September 2022 dismissing the application for leave to appeal.
23. Out of time, but seeking condonation, third to sixth respondents served their petition to the Supreme Court of Appeal, upon applicant's attorneys on 4 October 2022 serving at the Supreme Court of Appeal on 5 October 2022.

THE SECTION 18 APPLICATION

24. Applicant's case is that in terms of section 18(1) of the Superior Courts Act, and subject to subsections 2 and 3 thereof, and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
25. Applicant seeks an order allowing enforcement of the main judgment of Laing J which is the subject of the application for leave to appeal to the SCA contending that material exceptional circumstances exist which justify the grant of leave to

execute the judgment with potential irreparable harm or prejudice to be sustained by applicant if the leave to execute the judgment is refused and was so, it is alleged, the absence of irreparable harm or prejudice to respondents if leave to execute the order pending appeal is granted.

26. It is this application which was brought before me as a matter of extreme urgency.

URGENCY

27. Urgency must be judged against the background of Rule 6(12) of the Uniform Rules of Court and Rule 12(d) of the Eastern Cape Practice Directions¹.
28. Urgent applications require an Applicant to persuade the Court that non-compliance with the Rules, and the extent thereof, is justified on the grounds of urgency. Applicant must demonstrate *inter alia* that it will suffer real loss or damage were it to rely on normal procedure.
29. The Rules adopted by an Applicant in such an application must, as far as practicable, be in accordance with the existing Rules both as to procedure and time periods applicable.
30. A Respondent faced with an urgent application, and to avoid the risk of judgment being given against it by default, is obliged provisionally to accept the

¹ *Bobotyana supra*

Rules set by Applicant and then, when the matter is heard, make its objections thereto if any².

31. In **Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others** ³ Plasket AJ (as he then was) said as follows:

“[37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case'.

[38] ... it is not in every case in which the applicant may have departed from the Rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is implicitly recognised by Kroon J in the *Caledon Street Restaurants CC* case when he held - looking at the issue from the other perspective, as it were - that the 'approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the Rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not'.

...

[40] ... Indeed, the erstwhile Appellate Division has on a number of occasions turned its back on such formalism in the application of the Rules. For instance, in *Trans-African Insurance Co Ltd v Maluleka* Schreiner JA held that 'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if

² *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE). *In re: Several Matters on the Urgent Roll* [2012] 4 All SA 570 (GSJ) [15]

³ 2004 (2) SA 81 (SE) [37], [38] and [40].

possible, inexpensive decision of cases on their real merits'. ... in *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket*, Harms JA held that the Rules 'are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right' contained in s 34 of the Constitution."⁴

32. 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.
33. An Applicant cannot create its own urgency by simply waiting till the normal rules can no longer be applied⁵
34. If the above is satisfied other issues come to be considered, some of which are:
 - 34.1 Whether Respondent can adequately present its case in the time given;
 - 34.2 Other prejudice to Respondent and the administration of justice;
 - 34.3 The strength of Applicant's case and any delay in asserting its rights (self-created urgency).

⁴ But see: **Murray & Others NNO v African Global Holdings (Pty) Ltd & Others** 2020 (2) SA 93 (SCA) [35], [38], [39] and [40]

⁵ **Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited** (2019/8846) [2019] ZAGPJHC 122 (3 May 2019) [10]; **Masipa & Another v Masipa** 2020 JDR 1054 (GP); **Edrei Investments 9 Ltd (In Liquidation) v Dis-Chem Pharmacies (Pty) Ltd** 2012 (2) SA 553 (ECP); **Bandle Investments (Pty) Ltd v Registrar of Deeds and Others** 2001 (2) SA 203 (SE) 213; **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others** (11/33767) [2011] ZAGPJHC 196 (23 September 2011) [6] and [9] – The fact that Applicant now wants the matter resolved urgently does not render the matter urgent; **Ntozini and Others v African National Congress and Others** (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) 415.

35. In this matter Respondents contends that:

35.1 The urgency is self-created by the substantial delay in Applicants' launch of the application;

35.2 That in any event the procedures and time limits adopted were completely unjustified and unsupported by the relevant facts as to urgency.

36. I have set out the relevant time line exhaustively above and the remaining issues relevant.

APPLICANTS SUBMISSIONS AS TO URGENCY

37. Applicant contends that the urgency with which the matter has been brought is justified by the prejudice that applicant might suffer by having to wait for a hearing in the ordinary course; the prejudice that other litigants might suffer if the applicant is given preference; and the prejudice that respondents might suffer by the abridgment of the prescribed times and early hearing.

38. It is argued for applicant that it has shown sufficient and satisfactory grounds to permit the hearing sought, not only seeking to exercise its right to approach a court for relief not solely for financial reasons, but also in protection of unlawful spending of tax payers' money which it is alleged cannot be reversed in the event that the appeal proceedings are not in respondents' favour. It is alleged that there has been no undue delay in bringing the application and that on the

facts applicant may not obtain substantial redress in the event that it is successful but forced to wait in the queue to argue the application.

39. In essence applicant contends that the apparent delay from the original date of the judgment of Laing J and its suspension having lapsed on 15 July 2022, is adequately explained by the exchange of correspondence between the parties, and that it was only upon the filing to the Supreme Court of Appeal of the petition in early October (5 October 2022) which precipitated the need to bring the application. As I understand the argument is that although it is conceded the application could have been brought at an earlier stage, there was really no need to do so having regard to the correspondence between the parties, and the delay between the judgment of Laing J dismissing the application for leave to appeal, on 6 September 2022 and the filing of the petition in early October 2022.
40. As to the extreme time line adopted in the application, applicant sought to justify this particularly with reference to the fact that it was attempting to protect the loss of public funds in the matter that would have been occasioned had the matter been delayed, effectively arguing that this all on its own justified the extreme time line, as well as the fact that it was argued that the money would never be able to be recovered, and would be lost to the public purse on the one hand, and to applicant's prejudice on the other.
41. As to urgency respondents join issue with every allegation and argument put forward by applicant.

42. Relying on the judgment in **Bobotyana** supra⁶, and various other authorities on urgency, it was argued that firstly the section 18 application could have been brought on or after 15 July 2022, some 84 days prior to the actual launch of the urgent application and thus any urgency in the matter was self-created, alternatively, even were that not the case, that in the circumstances the time line adopted was entirely inappropriate, prejudicial and one which should not be countenanced by this court.
43. Respondents argued in addition that the applicant failed to show that it would not be afforded substantial redress in due course.
44. Respondents in argument perceived that applicant relied upon the submission that it was not essentially obliged to comply with the usual principles relevant to the bringing of urgent applications as section 18(3) proceedings were inherently urgent on the one hand, and on the other this was an application brought in protection of public funds, were simply fundamentally incorrect.
45. It was strongly argued that the urgency was in fact self-created, it having stood back and done nothing and then sought the court's assistance as a matter of the utmost urgency with no reasonable explanation as to the three months delay in launching the application at all.
46. Quite apart from the merits, it was argued that on either of the above main grounds the application should be struck from the roll.

⁶ **Bobotyana and two others v Dyantyi and five others** case no 1198/2020, Eastern Cape Division, Makhanda, judgment by Mbenenge JP.

47. I proposed to deal only with the question of urgency and not the merits of the application, having regard to the conclusion which I have reached.

THE RELEVANT FACTS, CONSIDERATION AND CONCLUSION IN RESPECT OF URGENCY

48. In the founding affidavits, it is certainly so that applicant appears to rely on the fact that this is a section 18(3) application as rendering it sufficiently urgent to justify the method in which this application was brought.
49. Conceding as did applicant's counsel that the applicant could certainly have been brought at an earlier date, it was nevertheless contended that having regard to the factors already elucidated above, this was by no means fatal. Heavy reliance was placed upon the exchange of correspondence between the parties justifying the delay in launching the proceedings.
50. As conceded by applicant's counsel, and correctly so, of course it is plain that this application could have been brought at any time after the initial application for leave to appeal was filed in respect of the judgment of Laing J dated 13 June 2022. Certainly, having regard to applicant's fears, it could appropriately have been brought both before and certainly at the time of or soon after the 30 day lapsed period expiring on 15 July 2022. The applicant would not have been faulted for bringing that application at any time up to 6 September 2022 when the application for leave was dismissed.

51. Whilst the applicant delayed considerably in launching its application to the Supreme Court of Appeal, and whilst the order of Laing J was certainly operative during the intervening period, this of itself is not such as to have been any bar to the earlier bringing of an application which would, on the authorities have determined the matter between the parties whatever the result of the application for leave to the SCA may have been or may be.
52. There is, however, a further and perhaps even more difficult issue for applicant in this matter.
53. Having delayed, and there can be no doubt that applicant did delay its actual launch of the application on 7 October 2022, this may have been such as to be condoned, notwithstanding the delay, had it adopted a sensible and less stringent time line.
54. I say this on the basis that certainly section 18 proceedings are, by their nature, usually of some urgency, and warrant being dealt with generally accordingly. However, the degree of that urgency must be justified taking into account also the backgrounds, history and facts.
55. When considering the launch of an urgent application, not only the convenience of the parties but the court and all issues relevant to the reasonableness of the time limits imposed against the size of the papers and complexity of the matter must be weighed, carefully considered and applied.
56. I have already set out carefully above and in some detail the principles applicable to urgent applications.

57. I emphasise that there are degrees of urgency, each of which must be justified on the papers after careful consideration by an applicant when launching its urgent application.
58. I am not suggesting that there was the complete absence of some urgency but the application could and most certainly should in the circumstances, at least have been brought on a less stringent time line to have any prospect of passing the urgency test. Indeed, I have considerable difficulty in understanding how the stringent time line with which applicant itself was unable itself to comply could have been thought to be appropriate. It placed an entirely unreasonable and pretty much unachievable time line upon respondents and at the end of the day not only were there no heads of argument ready for the hearing from applicant, in a complex and difficult matter, but applicant's own replying affidavit had to be handed in in respect of the third to sixth respondents halfway through the day of the intended hearing. Whilst respondents were obliged provisionally to accept the rules set out by applicant and then when the matter is heard make objections thereto, this does not in any way indicate that an application brought other than in a justifiable manner should nevertheless be determined and this does not relate or apply to formalism in the application of the Rules.
59. In this matter the applicant it seems failed to consider whether respondents could adequately present their case in the time given, this constituting prejudice to respondents and the administration of justice, let alone the delay in applicant asserting its rights (self-created urgency).

60. In my view applicant erred in failing, when finally proceeding, to carefully consider what had passed, the full ambit of its application, the elements of delay which could be attributed to it (as set out above) and then the setting of an absurd time table in the context of the complicated issues to be decided and answered. Applicant in so doing acted to the clear detriment of the matter itself as to it being properly and sensibly adjudicated. It did so, in my view, against the background that to have afforded a greater period for respondents to answer and itself to reply with heads of argument to be filed and the duty judge having adequate time to consider and read the matter would have made a very considerable difference and would of itself not by any means have much aggravated the urgency contended for having regard to the time that had already been allowed to lapse. This in my view simply cannot be endorsed.
61. In my view, the allegations made in the founding affidavit and in reply, do not serve to address or cure the defects pointed out above. It seems to have been applicant's attitude that having regard to the fact that public moneys were involved, it was the court's duty to deal with the matter however inappropriate the time line may have been. This is obviously an unsustainable argument.
62. In my view accordingly and having regard to all of the above, this is a matter which simply cannot proceed on the urgency time line adopted by applicant as a result of both the self-created urgency adverted to above and quite separately from that the unreasonable and unnecessary stringent and unsustainable time line adopted.
63. It must be accepted that matters factual and legal required thought and careful consideration by respondents, its deponents, the legal team and not to mention

the court. This was denied for no good reason, applicant having afforded itself a considerable period to consider the issues and draft answers and having had the luxury thereof itself forced an unreasonable and stringent time line upon the parties and the court. The issues of the merits of applicant's claim in terms of section 18, whilst certainly arguable is not such tous to change or alter the issue as to urgency above in the circumstances of this matter.

64. The usual order in these circumstances is to strike the matter from the roll.⁷ Of course in appropriate circumstances the papers may be such and the circumstance such as to justify the dismissal of the matter as set out in **Vena v Vena and two others**⁸. Such a dismissal is on technical grounds being lack of urgency and not on the merits.
65. In this matter applicant's papers and the circumstances are not, however, such as to justify such a dismissal order nor is this contended for by respondents. It seems to me that the usual striking off order is appropriate.

CASE FLOW MANAGEMENT

66. It is worth saying that this entire issue surrounding the urgency difficulty and set down dates could have been avoided had the parties sought that their matter be dealt with by way of case flow management by the Judge President or his nominee as to procedure and dates for hearing. In this regard, and whilst not completely on all fours, the matter of **Bobotynana** (*supra*) is relevant.

⁷ **SARS v Hawker Services** 2006 (4) SA 292 (SCA)

⁸ 2010 (2) SA 248 (ECP) [6], [7] and [8].

67. If applicant is to proceed with the matter, and having regard to the order I intend to give, it must do so in the manner and procedure required by law and in addition thereto engage the case flow management process by way of the Judge President or his nominee.

COSTS

68. In **Biowatch Trust v Registrar, Genetic Resources and Others**⁹ it was pointed out that generally in Constitutional litigation against the State the successful litigant should not be ordered to pay the costs. This is a judicial discretion having regard to all relevant considerations, and only if not frivolous, vexatious or manifestly inappropriate.
69. In matters raising Constitutional issues against Universities¹⁰ the Constitutional Court found the **Biowatch** principle applicable.
70. The usual Rule that a successful party should be awarded costs in any event is always subject to judicial exercise of the Court's discretion. Where Constitutional issues are raised *bona fide* this must necessarily be taken into account in respect of an appropriate just and equitable costs order. The judicial discretion has been described as "*very wide*" or "*overriding*"¹¹. Judicially in this

⁹ 2009 (6) SA 232

¹⁰ **Harrielall v University of KwaZulu-Natal** (CCT100/17) [2017] ZACC 38; 2018 (1) BCLR (CC) (31 October 2017); **Rhodes University v Student Representative Council of Rhodes University and Others** (1937/2016) [2016] ZAECHGC 141; [2017] 1 All SA 617 (ECG) (1 December 2016). In the **Constitutional Court Ferguson v Rhodes University** 2017 JDR 1768 (CC) [23]-[28].

¹¹ **K & S Dry Cleaning Equipment (Pty) Ltd and Another v South African Eagle Insurance Co Ltd**

context means “*not arbitrarily*” one must consider the circumstances, weigh the various issues that have a bearing on costs and make an order that is fair and just between the parties¹².

71. In my view, the principles relating to costs impact upon access to justice – this includes the chilling effect adverse costs orders have on Constitutional litigation¹³. It is also important to consider the position of the litigants. In this matter there has however been an egregious failure in respect of urgency, unsatisfied and deserving of censure.

72. It seems to me that in all the circumstances and having regard to the above considerations, and **Biowatch** and in my general costs discretion, and further on the basis of justice and equity it is justified to order that Applicant pay Respondent’s wasted costs occasioned by the striking of the matter from the roll.

ORDER

73. The following order issues in the result:

1. The application is struck from the roll.

and Another 2001 (3) SA 652 (W) at 668; *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A); *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) para [3].

¹² Cilliers on Costs 2.01 to 2.04

¹³ Minority Judgment of Poswa J in *Biowatch* [45] – [46].

2. Applicant is to pay respondents' wasted costs relevant to the argument as to urgency and those consequent upon the matter being struck from the roll.
3. Should applicant proceed further with the matter in due course and in whatever manner it chooses to do so, applicant must refer the matter to the Judge President for case flow management directives.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant:	Adv. Ndamase with Ms. Masiza, instructed by Moletsnae PN Attorneys Inc., East London, Mgongatho Attorneys, Makhanda.
Appearing on behalf of the Respondent:	Adv. Maliwa, instructed by V. Funani Incorporated and Gilindoda Attorneys, Makhanda
Date heard:	19 October 2022.
Date delivered:	25 October 2022.