



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 27743/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>05 / 06 / 2015</u>	
DATE	SIGNATURE

5/6/15

In the matter between:

GOLDEN FALLS TRADING 116 (PTY) LTD

APPLICANT

And

THE MINISTER OF ENERGY NATIONAL GOVERNMENT
CONTROLLINER OF PETROLEUM PRODUCTS
MJW ONTWIKKELINGS (PTY) LTD
BP SOURTHEN AFRICA (PTY) LTD
SONITA PETROLEUM (PTY) LTD

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT

JUDGMENT

MAVUNDLA J;

- [1] The applicant applied for condonation for noncompliance with Uniform Court Rules, in terms of rule 6(12) and that an interim interdict that the third, fourth and fifth respondents be prohibited with immediate effect from continuing to construct a filling station at Erf 678 Willow Acres Ext 13, Kungwini, also known as Erf 3 of the Remainder of Portion 12 of the Farm Zwartkoppies 364 JR ("the property") or to conduct the retailing of petroleum products from such premises; with ancillary reliefs be issued pending finalisation of Part B of this application. The application was opposed by fourth and fifth respondents.
- [2] Although the application was set down on the urgent roll of the 19 May 2015, it only got the attention of this Court on the 21 May 2015, when it was struck from the urgent roll for lack of urgency, with punitive costs order on attorney and client scale, which costs to include the costs of two counsel where applicable and costs of senior counsel, where one counsel was employed. The reasons were not given at the time but are chronicled herein below.
- [3] The Court has a discretion to condone noncompliance with Uniform Court Rules. However, such indulgence is not there for a take. It is trite that an applicant in an urgent application may depart from abiding with and abridge the prescribed form and time frames prescribed in rule 6(5).¹ The applicant in an urgent application must set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded a substantial redress at a hearing in due course.²
- [4] The question of abridging the prescribed time frames in Rule 6(5), is dictated upon by the exigency and circumstances of the particular case. The Courts have warned that an applicant who believes that the matter is urgent, must truncate the period

¹ This rule prescribes 5 days after services of the application for filing of notice of intention to oppose and thereafter fifteen days to file opposing affidavit.

² Rule 6(12)(b) is peremptory.

afforded to the other party, mindful of and proportionate to the degree of urgency. Not every matter is urgent and therefore a kneejerk approach in truncating the period will not be tolerated; *vide Gallagher v Norman's Transport Lines (Pty) Ltd*.³

- [5] The application was served on the respondents on the 8 May 2015 and set down on the urgent roll on Tuesday, 19 May 2015. The respondents were invited to file their notice of intention to oppose the application on or before 12h00 on Tuesday, 12 May 2015, and to file their opposing affidavits on or before 12h00 on Wednesday 13 May 2015, where after the applicant was to file its replying affidavit on Thursday, 14 May 2015. According to the fourth respondent the applicant's papers only reached its in-house legal division on Monday 11 May 2015, thus affording it virtually 3 days to file its opposing affidavit in a complex and voluminous matter.
- [6] The application was prolix, consisting of at least 632 pages, before the filing of the opposing affidavits and replying affidavit. After all set and done, there were 12 volumes consisting of 894 pages, contrary to the practice directive that in an urgent application papers must be limited to 500 pages, otherwise the matter must be set before a special court, which was not the case *in casu*. The day on which the papers were served on the respondents fell on a Friday, therefore excluding the weekend, the respondents had one day and few hours to consider the voluminous papers and take a decision to file a notice to oppose on Tuesday the 12 May. They then had to file their opposing affidavit on Wednesday 13 May at 12h00, giving them virtually one day. In my view the circumstances *in casu*, assuming that the matter was urgent, which was not, did not warrant such an abridgment of time frames to a bare minimal hours to comply with the time frames decided by the applicant. The conduct of the applicant was, in my view, "the illogical knee-jerk reaction" referred to in the *Gallagher v Norman's Transport Lines (Pty) Ltd* matter, and unreasonable such as to demand the Court's displeasure expressed in the form of a punitive costs order against the applicant, as was granted.
- [7] In arriving at the conclusion that the matter was not urgent, let alone being extremely urgent, I took into account the following factors. The applicant's interim relief sought was to halt further construction of a filling station by the fourth respondent, and the "selling" of petroleum products from such premises by the fifth respondent. Whatever harm the applicant was afraid of, which could have had negative impact on his business, was in my view, of a commercial nature. That

³1992 (3) SA 500 at 502E-503 D.

envisaged harm, in my view, could hardly be said to lie in the construction of the building *per se*, but the functionality after the completion of the building when the petrol station could be operational. On a more practical level, until such time the building could be operational, then there is no danger of harm eventuating. This, in my view, determines the existence or nonexistence of urgency and the degree thereof in *casu*.

- [8] It is common cause that the applicant has an Engine filling station situated at Silver Lakes Convenient Centre on the corner of Lynnwood Road and Hans Strydom Drive (now renamed Solomon Mahlangu Drive), Silver Lakes, and Pretoria. MJW "third respondent's" site which is the subject of this matter is situated a 3 kilometre radius from the applicant's site, namely 1.8 kilometres.
- [9] It is common cause that the third respondent lodged a new licence application in respect its aforesaid site, and a corresponding retail licence application during 2009 in terms of *Petroleum Products Act*, Nr 120 of 1977, which licences were granted. The applicant, *inter alia*, lodged an appeal against the grant of the said licences to the third applicant. The appeals were lodged on the 3 January 2011. The decisions on the appeal were not made until 12 April 2015.
- [10] The fourth respondent in the meantime bought the aforesaid site from the third respondent on 13 May 2013. The site was registered in the name of the fourth respondent on 19 September 2013, which in turn applied for a transfer of site licence from the third respondent into its own name. The fifth respondent applied for a retail licence to retail petroleum products from the aforesaid site. The licences were granted and the applicant and others lodged an appeal against the grant of these licences.
- [11] The applicant in its papers stated, *inter alia*, that "the third and fourth respondents discontinued construction activities on the relevant property during December 2014, after having been instructed to do so by the Controller." It can be safely accepted that the construction must have commenced much earlier than December 2014. If the applicant was aware of the fact that the site was registered in September 2013, it must also have been aware that the construction started much earlier, and I find that it did, and the applicant conveniently refrained to take the court into its confidence in this regard to disclose when it became aware for the first time thereof.

Surely, if the perceived harm the applicant was trying to avert lied in the construction *per se*, then there is no reason why the applicant did not bring this application much earlier than December 2014, even so, much earlier than the 8 May 2014. It certainly could have brought this application to stop the construction and or retailing of any petroleum product, pending the outcome of the determination of its appeal and or review against any adverse decision regarding the appeal much earlier than it did.

[12] It is also common cause that on the 5 December 2014 the applicant sought an undertaking within three working days from the fourth respondent that it would discontinue or not re-commence with the construction on the site. It would seem that three days went by without any undertaking, yet the applicant decided not to actuate its threat. The applicant decided, however, to still seek clarity on the 18 December 2014, although it observed that clearance of the site has commenced. If, indeed urgency lied in the construction, in my view, once the undertaking was not forthcoming; there was no need to wait for any further clarification before bringing this application, and by so doing lost urgency.

[13] In my view, any other subsequent perceived urgency could not stand in the light of the pre-existent urgency and loss thereof discussed herein above. In my view, the above limited aspects are dispositive of the aspect of the alleged urgency and the degree thereof.

[14] I therefore hand down the reasons for the order granted on 21 May 2015.

A handwritten signature in black ink, appearing to read 'N.M. MAVUNDLA', written over a horizontal line.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant : ADV M M RIP SC

Instructed by : A KOCK & ASSOCIATES INC

For the respondents : ADV A R BHANA SC / ADV J MITCHELL (4TH RESPONDENT)

Instructed by : NORTONS INCORPORATED

Date of hearing : 21 MAY 2015

Date of judgment : 05 JUNE 2015