

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4763/11

In the matter between:

SAPCOR HARRISMITH (PTY) LIMITED

Applicant

and

THERESA GERTRUIDA MARIA HORN

First Respondent

**PSG KONSULT FINANCIAL
PLANNING (PTY) LTD**

Second Respondent

BRONZE ARROW TRADING (PTY) LTD

Third Respondent

JUDGMENT BY:

KUBUSHI, AJ

HEARD ON:

10 NOVEMBER 2011

DELIVERED ON:

17 NOVEMBER 2011

KUBUSHI, AJ

[1] The applicant approached this court by way of an urgent application in which he sought to enforce a restraint of trade agreement. The first respondent was formerly employed by the applicant in terms of a service agreement and was subsequently dismissed. The first respondent is now employed by the second respondent a competitor of the applicant. Such employment, according to the applicant, is

in contravention of the service agreement in particular a restraint of trade clause in the service agreement.

- [2] The first respondent's counsel, Adv Knoetze, SC, raised a point *in limine* on the question of urgency or lack thereof. The point was raised only after the applicant's counsel, Adv Van Niekerk, SC, had already addressed me on the merits. I however, ordered Mr Knoetze to address me only on urgency. He based his argument on three points, namely, that

- 2.1 The applicant's urgency was self created;
- 2.2 The applicant's founding affidavit does not comply with the provisions of rule 6 (12) (b); and
- 2.3 there was no request by the applicant for the court to condone his non- compliance with the rules.

URGENCY SELF CREATED

- [3] According to Mr Knoetze, the applicant's urgency was self created. The applicant knew as far back as 18 August 2011 that the first respondent was employed by the second respondent but took no steps against her. He contended

that the applicant's notice of motion and the founding affidavit thereto were signed on the 31 October 2011, two months after the applicant knew of the first respondent's new employment. The application itself was issued on the 2 November 2011, enrolled for set down on the 10 November 2011 and was served on the first respondent on the 7 November 2011. It took the applicant about three months before he could launch the application, so he argued. He contended also that the TRANSNET LTD v RUBENSTEIN 2005 (3) All SA 425 (SCA) at 434 - 435 case was not applicable in this instance. The case, according to him, would only be apposite where the parties have been engaged in ongoing negotiations and they finally did not reach settlement. In this instance however, there was only two letters dated 13 October 2011 from the applicant's attorneys informing the first and second respondents that the applicant has given them instructions. He argued that the delay was undue and unexplained.

- [4] The applicant's counsel, Mr Van Niekerk, argued that the urgency was not self created. According to him, the whole process started on the 18 August 2011 when the applicant

became aware that the first respondent has been employed by the second respondent and escalated until in October 2011. However, at that time when he became aware he did not know what effect such employment will have on his business. Once the first respondent started working there, there was a flurry of brokers notes sent by the second respondent to applicant's company. The applicant received seventeen such brokers notes, which according to the attrition rate in this industry was unusual. It was as a result on these brokers notes that he decided to take action. The first action the applicant took was to write a letter to the first and second respondents to inform them that the first respondent was in breach of the restraint of trade agreement. No response was received. It was only then that he thought it fit to launch the present application. Settlement negotiations, according to Mr Van Niekerk, did not diminish the urgency, the matter remained urgent at all times. He contended that the TRANSNET-case *supra* was thus apposite in this instance.

- [5] It has been held that where an applicant first seeks compliance from the respondent before lodging an

application it cannot be said that the applicant had been dilatory in bringing the application or that the urgency thereof was self-created. See **NELSON MANDELA METROPOLITAN MUNICIPALITY AND OTHERS v GREYVENOUW CC AND OTHERS** 2004 (2) SA 81 (SE) at 94C – D and 2007 (2) SA 9 (C) 12I -13A and **TRANSNET LTD v RUBENSTEIN** *supra* at 434 – 435.

- [6] I agree with Mr Van Niekerk on this issue. The urgency was not self created. I am satisfied that, from the time the applicant became aware of the first respondent's employment by the second respondent he took the necessary steps to have the situation remedied. According to his counsel, he initially did not know whether this employment will have any effect on his business or not. It was only when he received an unusual number of brokers notes from the second respondent that he became concerned. The brokers notes as attached to the founding affidavit indicate a continuous pattern. The applicant received some notes in the month of August, some in September and also in October. He then wrote letters to the first and second respondents to make them aware of the

breach. These letters were written on the 13 October 2011 and when no response was forthcoming, he launched the application on the 31 October 2011. In these circumstances, my view is that the applicant cannot be penalised for having attempted to settle the matter before he could approach the court for a remedy.

FAILURE TO COMPLY WITH RULE 6 (12) (b)

[7] Mr Knoetze contended that the applicant did not comply with the provisions of rule 6 (12) (b). According to him the applicant's counsel in his address to the court did not refer me to any paragraph in the applicant's founding affidavit that showed that the applicant complied with the sub-rule and explained why it was necessary to have inconvenienced the court. According to him the sub-rule enjoins the applicant to explicitly set forth the circumstances which he or she avers render the matter urgent and the reasons why he or she claims that he or she could not be afforded substantial redress at the hearing in due course.

[8] The applicant's counsel contended that the urgency in this instance was quiet clear and self evident from the papers.

According to him there was nothing more that the applicant needed to say in the papers. A restraint of trade agreement has a finite lapse of time which lapses every day which passes. The sooner one acts on it the sooner the loss will be curbed. This is the reason why applications of this nature are invariably brought as a matter of urgency. This appears from the papers, he said. There was nothing more that the applicant needed to say in the papers. The first respondent has not suffered any prejudice, she was given a chance to respond to the papers and she was able to file a lengthy and extensive response. The counsel she instructed was also able to file lengthy heads of argument. The merits must be heard because the applicant will continue to be prejudiced by the continued employment of the first respondent with the second respondent, so he argued. This is not the type of case to be struck off the roll for lack of urgency, he said.

- [9] The applicant approached this court by way of a notice of motion for a rule *nisi*. A rule *nisi* is not substantially provided for in the Uniform Rules of Court. The rule nisi procedure has, however, been engrafted onto the application procedure by practice and the procedure thereof is regulated by rule 6,

in particular sub-rule (12). In **SAFCOR FORWARDING (JOHANNESBURG) (PTY) LTD v NATIONAL TRANSPORT COMMISSION** 1982 (3) SA 654 (A) at 674H – 675A it is stated that

“The procedure for a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. . . . in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons. The rule *nisi* procedure must be considered in conjunction with the provisions of Rule 6 (12) . . . ”

[10] The relevant provisions of Rule 6 (12) read:

“(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 to it seems meet.

- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, 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 hearing in due course.”

[11] In this instance, the applicant did not comply with rule 6 (12)

(b). He did not, in his founding affidavit, set out the circumstances which he averred render the matter urgent nor state the reasons why he claimed that he could not be afforded substantial redress at a hearing in due course. His counsel contended that an application about the enforcement of a restraint of trade agreement, by its very nature requires to be attended to on an urgent basis. According to him, the applicant did not have to state more than what was contained in his founding affidavit to justify the urgency.

[12] I do not agree with Mr Van Niekerk on this point. Rule 6 (12)

(b) is very clear, it enjoins an applicant to explicitly set forth firstly, the circumstances which he or she avers render the matter urgent and secondly, the reasons why he or she claims that he or she could not be afforded substantial

redress at a hearing in due course. Coetzee J in **LUNA MEUBEL VERVAARDIGERS v MAKIN AND ANOTHER**

1977 (4) SA 135 (W) at 137F stated as follows:

“Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, . . .”

- [13] The provisions of rule 6 (12) (b) are imperative and failure to comply therewith is fatal to an application. See **SALT AND ANOTHER v SMITH** 1991 (2) SA 186 (Nm) at 187D-G.

FAILURE TO APPLY FOR CONDONATION

- [14] Mr Knoetze contended further that there was also no request by the applicant on the notice of motion to the court for an order that the application be heard on urgency, and for non-compliance with the rules.

- [15] It has been held that if an applicant requires the operation of any rule to be dispensed with, such as rules relating to the service of any order made, he or she should in his or her

application make out a case for dispensing with such a rule. The applicant must in his or her founding affidavit ask the court that his or her non-compliance with the rules be condoned as well. **LUNA MEUBEL VERVAARDIGERS v MAKIN AND ANOTHER** *supra* at 137F; **I L & B MARCOW CATERERS (PTY) LTD v GREATERMANS SA LTD & ANOTHER; AROMA INN (PTY) LTD v HYPERMARKETS (PTY) LTD & ANOTHER** 1981(4) SA 108 (C) at 110G – H and 111A;

- [16] Conradie J in refusing a rule nisi application, held in **KAYAMANDI TOWN COMMITTEE v MKHWASO AND OTHERS** 1991 (2) SA 630 (C) at 633I – J and 634A

“In an urgent application an applicant can, and usually does, in accordance with the provisions of Rule 6 (12) of the Uniform Rules of Court, apply for the Rules regarding the ‘usual forms of service’ to be dispensed with. The applicant asked only for its non-compliance with the Rules regarding service to be condoned. It did not, either in the earlier application . . . or in the hearing before me, ask for the operation of any other Rules to be dispensed with and has not made out a case for dispensing with them.”

[17] I agree with the learned judge's findings. In terms of Rule 6 (12) (a) only a court or a judge may in urgent applications dispense with the forms and service provided for in these rules. It is not the applicant who must dispense with the rules but a court or a judge. The applicant must therefore approach the court or a judge to dispense with the rules and to condone his or her non-compliance.

[18] In this instance the applicant did not comply with the rules. The notice of motion was issued on the 2 November 2011, enrolled for hearing on the 10 November 2011 and served on the first respondent on the 7 November 2011. These time frames are in contravention of the time frames set out in rule 6 (5). The applicant was supposed therefore to have applied to this Court, for me to dispense with Rule 6 (5) and to the non-compliance thereof. However, neither in his notice of motion nor during the hearing of this application, did the applicant pray for such condonation. In my view, this failure by the applicant to request me to dispense with the rules and to condone his non-compliance is fatal to his application.

[19] I do agree that a litigant may approach a court by way of an

urgent interdict application for the enforcement of a restraint of trade agreement and that a rule *nisi* procedure would be a proper procedure to follow in that respect. However, this does not mean that proper procedures must not be followed or the rules of court flouted. Based on these two grounds I am satisfied that the applicant did not make a case for this application to be heard on an urgent basis.

[20] In the premises, I grant the following order:

20.1 The application is struck off the roll for lack of urgency with costs.

E.M. KUBUSHI, AJ

On behalf of the applicant:	Adv. G.O. van Niekerk SC Instructed by: Webbers BLOEMFONTEIN
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On behalf of the first respondent:	Adv. Barnard Knoetze SC Instructed by: Horn & Van Rensburg BLOEMFONTEIN
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