

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 04183/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
2 May 2024	
DATE	SIGNATURE

In the matter between:

First Refiners (Pty) Ltd

Applicant

and

Hyprop Investments Limited

First Respondent

Rishaan CC t/a Branded

Second Respondent

Sheriff of the High Court Roodeport

Third Respondent

JUDGMENT

Strydom, J

[1] The Court is now going to deliver a short ex tempore judgment

on this issue of urgency and whether the Court should entertain this matter on its urgent roll. I do not intend to set out the total factual matrix of this matter which between the parties is now known, suffice to say that the first respondent (which I will refer to as Hyprop) obtained a court order in terms of which Rishaan CC, trading as Branded, (and I will refer to the second respondent as Branded) was to vacate a commercial properties in a shopping centre in Clearwater Mall by a certain date. If not, Branded could be evicted in terms of this court order.

[2] What transpired thereafter is there was correspondence between Hyprop and the applicant and in this correspondence the applicant referred to a notarial bond which it obtained previously against Branded in terms of which goods in the relevant shop was attached.

[3] Now when it gets to urgency of a matter on the Court's urgent court roll, the Court must consider firstly if the matter is sufficiently urgent to be on the court's roll of a specific week, on a specific day. That is just a general finding pertaining to the urgency with reference to the factual matrix, and further to consider whether the urgency was self-created.

[4] Now I will deal first deal with the question whether the urgency was self-created. It was argued on behalf of Hyprop that in light of the correspondence during about 14/15 September

2023 between the applicant and Hyprop, it became clear that Hyprop will execute upon that order should Branded not vacate the property.

- [5] The order was at that stage made against Branded only.
- [6] It was argued that although the applicant knew that there will be execution in terms of the order, it did not threaten its position, because in its own mind at the time it was in possession of the relevant property and not Branded. But be that as it may, I am not going to decide this matter on the alleged self-created urgency. The second leg of urgency, which I refer to is just the way in which this matter found its position on my court roll and to consider this the Court will first look at a couple of facts.
- [7] It is common cause between the parties that on 9 October 2023 the sheriff executed the warrant it obtained in terms of the court order to evict Branded from the property. When it arrived at the premises it was faced with an allegation that the applicant was in fact in possession but the sheriff continued to evict Branded from the property by locking Branded out from the property.
- [8] It should be mentioned as far as the stock is concerned, on the evidence presented before me, I can make a finding that the stock is still in the shop and was not removed. Consequently, the only question as far as the application is

concerned, is whether there was a spoliation as far as the premises are concerned. But be that as it may, take the timeframe further, on the next day on 10 October 2023 this application was filed and served on Hyprop at 10:52 on the same day.

[9] According to the Notice of Motion the matter was placed on the roll for 12 October 2023 at 10 o'clock, which is today. Hyprop was given until 2 o'clock of the same day to file a Notice of Intention to Defend. So within a matter of hours, it was required of Hyprop to engage with the attorneys and get instructions to oppose the matter and then, to file an answering affidavit on the next day at 12 o'clock. That is Wednesday, 11 October 2023. So more or less 24 hours were provided for Hyprop's Answering Affidavit.

[10] The Notice of Motion itself in prayer 2 asked that the first and/or third respondent be directed to restore the applicant's possession of the following property until 31 December 2023 and then the description is given of the shop which I do not repeat.

[11] So, what was intended is to obtain possession of the shop immediately or as soon as the order can be made, but for a duration of up to 31 December 2023. That is for a further say two and a half months.

[12] Considering the facts and the timelines provided, it cannot be

argued that the matter was brought on the most extreme urgent basis.

[13] In my view the timelines provided to the first respondent, although it was met, was unreasonably short. I can see no reason why this application could not have followed the Thursday for Tuesday rule. That means, to set the matter down in such a way or provide timelines in such a way to afford the opposing party sufficient time to file an Answering Affidavit leaving some time for a Replying Affidavit, with the aim that the papers can be finalised by 12 o'clock on the Thursday, for the application to be set down for Tuesday the next week.

[14] The nature of this application where relief is not sought only for immediate repossession but also for an extended period informs the Court that a week would not have made a difference specifically in a case where the stock was in any event secured and the Notice of Motion does not refer to the stock in any event.

[15] The rule is quite clear and the directive. If a party elects to deviate from the Thursday for Tuesday rule, the matter must be extremely urgent, number one. Number two, the applicant must set out sufficient facts in the founding papers to explain why the matter was not set down on the Tuesday but on another day within an urgent week.

[16] I have looked at the Founding Affidavit and could not find

allegations to substantiate that high degree of urgency. For urgency to have brought the application on such truncated time periods, reliance was placed on the fact that the application is a spoliation application which normally will be regarded as urgent, but it does not mean when there is a spoliation that it is so urgent that the Thursday to Tuesday rule should just be ignored.

[17] In my view the urgency with which this application was brought does not commensurate with the degree of the urgency if one has regard to the facts.

[18] Hyprop's counsel asked this Court to order that the matter be struck off the roll with a punitive cost order.

[19] I am of the view that a punitive cost order would not be justified under circumstances where there is spoliation, and although there was reliance placed on stock in the founding affidavit and the security of stock, it really deals at the end of the day with the alleged possession which was interfered with.

[20] Consequently, in these circumstances the order of the Court is the following:

ORDER

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



CL

**R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

For the applicant:	Adv. I. Nongogo
Instructed by:	MB Attorneys
For the first respondent:	Adv. C. Erasmus SC
Instructed by:	Mark Efstratiou Inc
Date of hearing:	12 October 2023
Date of judgment:	12 October 2023