

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 2024-118227

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 13 November 2024 E van der Schyff

In the matter between:

Kelebogile Stephinah Mashele

and

Gildenhuys Malatji Attorneys

Greyling Erasmus

Moribe Attorneys

Katlego Moribe

Legal Practice Council

Legal Practitioner's Indemnity Insurance Fund

Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicant approached the court on the basis of extreme urgency for an order in the following terms:
- i. that the first or third respondent, whoever of the two holds funds of the applicant in trust paid by the Road Accident Fund as compensation for a claim against the Road Accident Fund within a period of no more than 72 hours, the amount being R1 973 403,79;
 - ii. alternatively, the second and fourth respondents be ordered to inform the applicant and the court in writing, what transpired after the funds from the Road Accident Fund were paid to either of them.
- [2] I struck the matter from the roll and undertook to provide reasons for my decision. I also afforded the applicant's attorneys of record the opportunity to file an affidavit providing reasons why a costs order *de bonis propriis* should not be granted against it.
- [3] This judgment contains the reasons for my decision to strike the matter from the roll and deals with the issue of costs.

Revisiting the requirements for urgency

- [4] The facts of this matter, and particularly the explanation provided by the applicant's legal representatives for approaching the urgent court on the truncated timelines of this application, highlight the need to revisit the purpose of urgent court proceedings and the jurisdictional factor implicit to urgent court applications.
- [5] The procedure provided for in Rule 6(12) is designed to address situations that require immediate judicial intervention. Certain matters cannot wait to be adjudicated

on the standard court schedule because an applicant would not be afforded substantial redress at a hearing in due course if the matter is not heard on an expedited timeline.

- [6] The rule entails two requirements. The circumstances relating to urgency have to be set out explicitly, and the reasons why the applicant in this matter could not be afforded substantial redress at a hearing in due course. The second requirement was emphasized in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*:¹

'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, *which is involved in the time and the day for which the matter be set down*'. [My emphasis]

- [7] *Luna Meubelvervaardigers* is authority for the proposition that the applicant must not only explain why it approaches the urgent court, as opposed to setting the matter down on the ordinary opposed motion roll, but also why the time lines provided for opposing the application were truncated to the effect that it was in that particular application. The rule and practice in this Division is that an urgent matter must be enrolled for the Tuesday before the previous Thursday.
- [8] Two different principles underlie these requirements. The first is, that an applicant who approaches the urgent court 'cuts the line' and is afforded preferential treatment in that its application is heard by a judge months before other applicants, whose legal matters might be of equal importance (to them at least) have to await their allocated hearing date patiently. The second principle is rooted in the well-known maxim *audi et alteram partem*. The Rule of Law requires a court to have regard to both sides of a matter, and respondents must be provided with a reasonable and fair opportunity to put their 'side of the story' sufficiently before the court. The timelines

¹ 1977 (4) SA 135 (WLD) at 137F.

prescribed in the Uniform Rules of Court are deemed to provide such a reasonable time frame, and any deviation must be justified and substantiated.

- [9] Our courts have acknowledged that there are different degrees of urgency.² The degree of urgency determines how much an applicant can prescribe a deviation from the normal time periods, and requirements for service.
- [10] It is trite that a party's failure to institute proceedings on an issue that existed and of which that party may have been aware for some time would make it difficult for such a party to have the issue adjudicated on an urgent basis. It would, however, not, necessarily, close the doors of the urgent court to such an applicant, particularly where an ongoing violation of rights occurs. It might impact only the time frames laid down by the applicant in its notice of motion for filing a notice to oppose and an answering affidavit. Where reasonable time frames for the delivery of opposing papers are provided that correspond with the periods prescribed in the Uniform Rules of Court, an applicant only needs to explain why the matter cannot be heard on the ordinary opposed motion roll since the respondent's rights in relation to fair procedure have been safeguarded.
- [11] The need for the applicant to explicitly deal with the question as to why the facts of this particular matter render it apposite to deal with the matter in the urgent court, however, remains. The facts of each case will determine whether the applicant has made a case demonstrating that substantial redress would not be obtained in due course. The substantial redress must relate to the applicant herself; it is fact and context-specific.
- [12] In this regard, parties are referred to the Constitutional Court's approach in *Hotz and Others v University of Cape Town*,³ where the applicants averred that a significant degree of urgency attends the application because the 'matter concerns the exercise of constitutional rights and the manner in which the boundaries of the exercise ought to be interpreted, particularly in the context of student protests.'

² *Commissioner, SA Revenue Services v Hawker Air Services* 2006 (4) SA 292 (SCA) at 299 paras [9]-[11].

³ [2017] ZACC 10 at para [15].

The Constitutional Court, however, explained that the applicants:

'[H]ave not established urgency, particularly why this matter is more urgent than any other matter where constitutional rights are implicated.'

[13] The same reasoning finds application in this matter.

Context

- [14] This application was brought on the basis of extreme urgency. The periods allowing the respondents to answer this application were severely truncated. The notice of motion is dated 15 October 2024. The respondents were instructed to file notices of their intention to oppose by 18 October 2024 and answering affidavits by 21 October 2024. The application was served on the respondents on 17 October 2024.
- [15] Since it is important for the costs order that I grant in this application, it needs to be mentioned that the applicant's attorney of record issued the urgent application after a letter was delivered to the first and second respondents on 6 September 2024, demanding that the money paid over to the first respondent by the Road Accident Fund, be paid over to them. The applicant's attorneys never received a reply to this letter, and proceeded with the urgent application. It became apparent when the answering affidavit was filed that the first respondent did respond to the letter but that an incorrect email address was used. The answer never reached the applicant's attorney of record. Instead of picking up a phone and calling a colleague to enquire why communication went unanswered, the applicant's attorney of record pursued litigation.
- [16] Collegiality is not an old-fashioned concept that should be ignored when an attorney is to pursue litigation against another attorney on behalf of a client. This application might have had a completely different outcome had it not been instituted and feverishly persisted with, against the first and second respondents.

- [17] It is also important to note that the Legal Practice Council (LPC) directed a letter to the applicant personally in July 2023, after the applicant lodged a claim against the third and fourth respondents with the LPC during April 2023. The applicant was clearly, already at that stage, aware of the fact that the first respondent paid the money received from the Road Accident Fund over to its instructing correspondent, herein represented by the third and fourth respondents. The LPC responded by informing the applicant that the third respondent was guilty of misconduct and that the nature of the proceedings warranted misconduct proceedings to be instituted.
- [18] Despite knowing that the first and second respondents accounted to their instructing correspondent already in July 2023, the applicant instituted these urgent court proceedings with severely truncated timelines against not only the third and fourth respondents but also the first and second respondents.
- [19] *In casu*, the applicant did not state why she would not be afforded substantial redress in due course if the application was not heard on the Tuesday it was enrolled for. She does not provide a sufficient explanation or acceptable reason for the severely truncated time periods. To be clear, she does not explain why it was necessary to deviate from the time periods prescribed in the Uniform Rules of Court to afford the respondents sufficient time to respond to her claim, even if she approached the urgent court for an expedited hearing of the application. She averred that should she wait a day longer than she already had, the funds might be used by the first to fourth respondents. The LPC already in 2023 found, and communicated, that there was misconduct on the third and fourth respondents' side and that the applicant only sought legal advice in August 2024. In this context, there was no need for the severely truncated periods to file answering papers.
- [20] Applicant's legal team, in the affidavit filed on my request, indicated that they relied extensively on a recent judgment from this division *Lotriet and Another v Oosthuizen and Others*.⁴ I fail to understand why the applicant's legal team relied on this judgment as the court in the *Lotriet* matter explained that the relief sought by the

⁴ (14413/2022) [2023] ZAGPPHC 285 (5 May 2023). A copy of the judgment was handed up. I requested counsel to provide me with another copy after I misplaced the copy handed up, and he emailed it to my registrar.

applicant on urgency requires, among others, that the applicants demonstrate absence of alternative relief that they may obtain at a later stage in ordinary proceedings.⁵ The court subsequently held that 'the applicant's demand for the deposit of compensation into the account of the third respondent is an indication that there exists alternative relief that the applicant could obtain in an ordinary hearing of the matter – this also would have been fatal for a matter brought on urgency'.

Costs

- [21] Counsel for the first and second respondents submitted that the applicant, already a victim of misconduct, should not be required to carry the costs of this application. Sutherland DJP, in a widely published Practice Directive dated 4 October 2021, warned that to curb the abuse of the urgent court, judges shall consider the award of punitive costs *de bonis propriis* where non-urgent matters are enrolled, and also consider an order forbidding attorneys and counsel to charge their own client a fee.
- [22] The circumstances of this application are unique in that the papers filed, as it stands, clearly indicate the harm suffered by the applicant. None of the issues with this application can be attributed to the applicant in person. I am thus of the view that this is an appropriate matter where justice requires a *de bonis propriis* costs order to be granted against the attorneys representing the applicant.
- [23] To assist the applicant, I am amenable to case managing the matter since the striking of a matter from the roll does not equate to an application being dismissed, as is averred by the applicant's attorney in his affidavit. I may be approached in chambers by the applicant's legal representatives if they deem it in their client's best interest.
- [24] I cannot ignore that the first and second respondents sent the reply to the letter of demand to the wrong email address, which the applicant's legal representative did not receive. This oversight has consequences and impacts the costs order that stands to be granted.

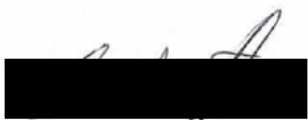
⁵ Ad para [18].

- [25] There was no appearance on behalf of the third and fourth respondents. No costs order stands to be granted in their favour.

ORDER

In the result, the following order is granted:

1. The application is struck from the urgent court roll.
2. The first and second respondents' costs incurred after the answering affidavit was delivered to the applicants, as between party and party, are to be paid *de bonis propriis* by the applicant's attorneys of record, KS Ntuli Attorneys, the remainder of the first and second respondents' costs are to be carried by themselves;
3. The third and fourth respondents are to carry their own costs;
4. The applicant's legal representatives may approach Van der Schyff J in chambers to case manage the application.


 E van der Schyff
 Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:

Adv. M. Musetha

Instructed by:

K.S. Ntuli Attorneys

For the first and second respondents:

Adv. M. Van der Westhuizen

Instructed by:

Gildenhuys Malatji Inc.

For the third and fourth respondents:

No appearance

Date of the hearing:

29 October 2024

Date of judgment:

13 November 2024

[25] There was no appearance on behalf of the third and fourth respondents. No costs order stands to be granted in their favour.

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In the result, the following order is granted:

- 1. The application is struck from the urgent court roll.**
- 2. The first and second respondents' costs incurred after the answering affidavit was delivered to the applicants, as between party and party, are to be paid *de bonis propriis* by the applicant's attorneys of record, KS Ntuli Attorneys, the remainder of the first and second respondents' costs are to be carried by themselves;**
- 3. The third and fourth respondents are to carry their own costs;**
- 4. The applicant's legal representatives may approach Van der Schyff J in chambers to case-manage the application.**

E van der Schyff
Judge of the High Court

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For the applicant:	Adv. M. Musetha
Instructed by:	K.S. Ntuli Attorneys
For the first and second respondents:	Adv. M. Van der Westhuizen
Instructed by:	Gildenhuys Malatji Inc.
For the third and fourth respondents:	No appearance
Date of the hearing:	29 October 2024
Date of judgment:	13 November 2024