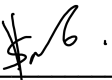


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
<u>20 September 2024</u> 	
DATE	SIGNATURE

In the matter between:

Case number:070685/2024

ANNIE DORGES MICHAELS

Applicant

and

FIRSTMILE PROP JHB CBD CROWN MINES (PTY) LTD

First Respondent

TAKE SHAPE PROPERTY MANAGEMENT

Second Respondent

and in the matter between:

Case number: 070849/2024

AFRICAN CELLULAR (PTY) LTD

First Applicant

WAJAHAT CHOUDARY

Second Applicant

and

FIRSTMILE PROP JHB CBD CROWN MINES (PTY) LTD

First Respondent

TAKE SHAPE PROPERTY MANAGEMENT

Second Respondent

Summary: Urgency – set down on Thursday for following Tuesday – meaning – not to wait until Thursday to ambush opponent but matter to be ripe for hearing when the roll closes on Thursday at noon. Proper time periods to be set out in notice of motion taking into account prejudice to respondent as well as need for urgent enrolment. Every deviation from Rules to be substantiated.

JUDGMENT

YACOOB, J

- [1] The applicants in these matters are, or were, commercial lessees of the respondents and were locked out of the premises that they leased on 23 June 2024. They instituted urgent proceedings, filing a notice of motion with a founding affidavit on 27 June 2024 setting the matter down for 28 June, a Friday, on extreme urgency. The founding affidavits were commissioned on 24 June and there is no explanation was provided as to why the matters were only issued and served on 27 June, or of why the applications were set down on 28 June.
- [2] The matters were removed from the roll of 28 June on the basis that extreme urgency had not been established and on the basis that the respondents had not been given an opportunity to file opposing papers. It must be noted that neither notice of motion provided for a time period within which the respondents should file their notices to oppose or their answering affidavits or that the applicants should file their replying affidavit.
- [3] Not discouraged by this setback, the applicants then did nothing from Friday 28 June until the following Thursday, 4 July. They then simply set the matter down again on the Thursday for the following Tuesday, 9 July. There was no amendment to the notice of motion despite the deficiencies having been pointed out. There was no supplementary affidavit explaining the urgency. And there was no justification or substantiation for the condonation that has to be sought from the Court for the non-compliance with the rules.

- [4] The respondents were taken by surprise and had to file an answering affidavit, after the roll was closed, which the court then had to read and take into account, in the midst of a busy urgent week in recess. A replying affidavit was then filed, the last paragraph of which sets out what Mr Silamulela for the applicant states is the basis of the urgency. I will come back to this paragraph shortly.
- [5] The Rules and practice of this court regarding urgency are clear and well established. Rule 6(12)(b) requires an applicant to “set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course”.
- [6] In *East Rock Trading 7 (Pty) and Another v Eagle Valley Granite (Pty) Ltd and Others*, it was emphasised that an applicant must set out facts and circumstances which support the conclusion that the matter is urgent and the applicant cannot get sufficient redress in due course.¹ The degree of urgency imposed must be properly considered and supported, and the notice of motion must be tailored to the relevant degree of urgency.² That means that the time periods imposed must be related to the degree of urgency and prejudice claimed.
- [7] In addition it should be trite that, unless there are strong reasons that balance the prejudice to the respondents, service and the procedure set out in the notice of motion must be sufficient to permit the respondents a proper opportunity to consider and respond to the application. This principal is fundamental to the rule of law.³ An applicant should not need a court, or, indeed, an opponent, to tell it that.
- [8] In this court, the Practice Manual specifies at paragraph 9.23 that the ordinary time of bringing an urgent application is 10h00 on a Tuesday, with the relevant papers to be filed by the preceding Thursday at 12h00. A set down at any

¹ [2011] ZAGPJHC 196 at para [6].

² *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004 (2) SA 81 (SE) at para [37]; *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137A-E

³ *South African Airways SOC v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at para [22]

other time is the imposition of a further degree of urgency, which must be properly substantiated. This is a codification of the principles articulated in *Luna Meubel Vervaardigers (Edms) Bpk v Makin*.⁴ In addition, paragraph 28 of the latest consolidated Practice Directive of this court,⁵ in an apparently vain attempt to assist practitioners and litigants in determining whether a matter is urgent and successfully navigating the urgent court, also explains that the urgent roll closes at noon on a Thursday for the following Tuesday, and advises an applicant to consider the appropriate notice period to give to the respondent.

[9] Leaving aside the also trite proposition that the case, including that for urgency, must be made out in the founding affidavit, I then consider the apparent (identical) justification for urgency contained in the applicants' belated replying affidavits. The relevant paragraph does not explain the failure to set out time periods in the notice of motion. It simply makes the bald allegations that there are employees depending on income generated; there are creditors; the business has not been operating, and that the matter remains urgent. That initial urgency was not established is apparently not a relevant consideration to the applicant's contention that the matter remains urgent.

[10] As far as explanations for the date and manner of set down is concerned, there is simply a statement that the matter was removed from the extremely urgent roll and then placed on the roll since the applicants had to "wait" for 4 July. This portrays a fundamental misunderstanding of how the urgent roll works. One does not simply wait for the Thursday to issue papers or to set a matter down. The Thursday is the day on which the urgent roll closes. By the Thursday pleadings should have closed. The papers should be properly uploaded and indexed and paginated (or the relevant digital equivalents). Heads of argument, if any, should be already filed. If pleadings have not closed by noon on Thursday when the roll closes the founding affidavit has to explain in detail why it was not possible for this to happen.

⁴ Footnote 2 above.

⁵ Revised consolidated practice directive 1 of 2024.

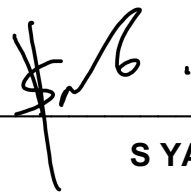
- [11] In this case it was clear that it was possible for this to happen. The applicants could have amended their notice of motion or simply made an arrangement with the respondents' legal representatives in writing or asked the Court on 28 June to make a direction that the Respondents file their papers perhaps by the Monday or Tuesday and that replying affidavits be filed by the Wednesday. Having closed pleadings heads could have been filed by the Thursday and the matter would have been ripe for hearing by the closing of the urgent roll at noon on Thursday 4 July. This how an urgent matter is should be set down, where time permits. Every deviation from that procedure has to be explained. No explanation is provided in these applications.
- [12] Mr Silamulela submitted to the Court that, while he acknowledges the fundamentally flawed nature of the procedures followed, as a matter of substance the respondents have been able to file their answering affidavits, the applicants have replied and therefore the court can entertain the matter. That is not a reason to grant condonation. There has to be more.
- [13] Another submission that was made was that the applicants' prospects of success in the spoliation application are relatively high and that this, weighed in the balance against the deplorable lack of compliance should tip the scales in favour of the applicants in the two matters.
- [14] Unfortunately, I cannot agree with this submission. There are too many failures to even attempt to comply with the Rules and directives of this court. The Rules do not exist simply to make life difficult for applicants. They exist so that all litigants know what to expect, so that everyone has proper time to respond, so that the court can properly determine whether litigants have acted reasonably and so that courts can manage their rolls appropriately. Deviations which are properly supported which impact against the purpose of the Rules can be condoned. There has been simply no attempt to deal with any of that in these applications. In addition, there may be situations where the prospects of success are so strong, or where the interests of justice so obviously outweighs the need for a proper and manageable procedure, that the lapses can be overlooked. This is not one of those instances.

[15] For those reasons I strike the matters for lack of urgency.

[16] Ms Mutenga who appeared for the respondents submitted that a punitive costs order should be made because the issue of no provision being made for filing of answering affidavits in the notice of motion was brought to the applicants attention the first time the matter was set down. This is the second time they have set the matter down and they still did not remedied the issue, either by amending the notice of motion or by filing a supplementary affidavit to explain the apparently extreme urgency and justify the irregular notice of motion. I agree that a punitive costs order is justified.

[17] I make the following order in each application:

- "1. The application is struck from the roll for want of urgency.
2. The applicant is to pay the costs on an attorney and client scale."



S YACOOB
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicants (both applications):

SF Silamulele (attorney)

For the Respondents (both applications):

H Mutenga

Instructed by:

Phambane Mokone Incorporated

Date of Hearing: 10 July 2024

Date of Judgment: 10 July 2024

Date of Revision: 20 September 2024