REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 11124/2023

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
REVISED ~~YES~~/NO
DATE 13/11/2024 SIGNATURE [redacted]

In the matter between:

PATRICK MALEPE METENE — **FIRST APPLICANT**
(In his capacity as a joint co- Trustee of Ekaya Trust)

PROMISE METENE — **SECOND APPLICANT**
(In her capacity as a joint co- Trustee of Ekaya Trust)

And

THE LEGAL PRACTITIONERS FIDELITY FUND SA — **FIRST RESPONDENT**

JOHAN VAN DER BERG — **SECOND RESPONDENT**

REUBEN MILLER N.O. — **THIRD RESPONDENT**

SAJIDA ABDULLA N.O. **FOURTH RESPONDENT**

In re:

PATRICK MALEPE METENE **FIRST APPLICANT**
(In his capacity as a joint co- Trustee of Ekaya Trust)

PROMISE METENE **SECOND APPLICANT**
(In her capacity as a joint co- Trustee of Ekaya Trust)

And

JOHAN VAN DER BERG **RESPONDENT**

Heard	**:**	**15 October 2024**
Delivered	**:**	**13 November 2024 by circulation to the parties' legal representatives**
Coram	**:**	**PILLAY AJ**

JUDGEMENT

PILLAY AJ

Introduction

[1] The Applicants sought on an urgent basis that the Court dispense with the requirements of time limits, forms and service and permit the application to be heard as one of urgency as contemplated in terms of Rule 6(12) of the Uniform Rules of Court. The Applicants further sought amended relief and the amplification of the founding affidavit as contained in the second urgent application.

[2] The Applicants request a declaratory order that the Fidelity Fund was obliged to indemnify the Applicants in respect of:

[2.1] Its claim for interest on the capital sum of R2 000 000,00 at the rate of 11.75% per annum a *tempora more* from 5 July 2022 until date of payment;

[2.2] The legal cost incurred in excussing the offending attorney Van der Berg and parties whom he represented, which was at the Fidelity Fund's instance.

[2.3] Payment of the amount of R1 098 909,82.

[3] The application was opposed by the First Respondent who sought condonation for the late filing of the answering affidavit which was not opposed. The First Respondent raised a point in limine concerning the lack of urgency which needed ventilation and if the Court found that the matter was urgent the First Respondent opposed the relief sought in respect of the merits.

The Brief Facts:

[4] The Applicants were embroiled in litigation to recover their R2 000 000,00 investment and other funds, which was stolen by Van der Berg Attorneys. The Applicants were not successful in recovering the funds and subsequently lodged a claim on 25 August 2022 to the First Respondent being the Fidelity Fund, on account of the theft by Van der Berg Attorneys. The Applicants had to institute sequestration proceedings against Van der Berg which was finalised on 9 March 2023 at the behest of the First Respondent.

[5] Despite undertakings to make payment of the money stolen and cost incurred in excussing Van der Berg, the indemnity undertook by the First Respondent, was not forthcoming. A flurry of emails was exchanged between the parties concerning the above-mentioned issue. The Applicants launched a second urgent application against the First Respondent on 6 December 2023 as per the notice of motion, wherein relief was sought for the R2 000 000,00 interest and costs. This application by agreement was removed from the roll as the Applicants received payment of the R2 000 000,00 from the First Respondent on 5 December 2023.

[6] From January 2024 to August 2024 the Applicants and First Respondent were communicating concerning the costs and interest issue. On 2 September 2024 the applicants address a further letter to the First Respondent as follows;

> ***"In the circumstances we are constrained to address this formal demand to you. The Bill of Costs taxed total the sum of R1 240 166,95. All the necessary details have previously been submitted to you. Should payment of the aforementioned sum not be paid within five(5) days from date hereof it is our intention to bring application proceedings against the Fidelity Fund. The cost of which will be for the Fidelity Fund's account."***

[7] On 17 September 2024 the First Respondent addressed a letter to the Applicant's attorney ignoring their previous undertakings, according to the Applicants, stating as follows;

"I have pleasure in advising that the Fund's Board of Control resolved to make a contribution towards the costs incurred by the claimant in the preparation and submission of this claim against the Fund. I accordingly enclose a copy of the deposit slip reflecting the payment into your trust account of the amount of R 141 257,13."

[8] On 27 September 2024, the Applicants legal representative addressed a letter to the First Respondent indicating the following;

"We are most surprised that you have ignored your undertaking to make payment of the sum of R1 240 166,95 and have without explanation simply paid the sum of R141 257,13, in respect of the sequestration application, which is one of the three amounts taxed, but not the other bills of costs taxed in the sums of R410 309,80 and R 688 600,02 in respect of the legal costs incurred in excussing Mr Van der Berg and his entities under case number 7144/2022.

We are accepting the sum of R141 257,13 on account but are constrained to address this formal demand for you to pay the sums of R410 309,80 and R 688 600,02 in respect of the Bills of Costs taxed. All the necessary details have previously been submitted to you.

In light thereof, our client is proceeding to file an amplifying affidavit and setting down the previous application instituted under case number 11124/2023 as a matter of urgency"

[9] The Applicants launched this third urgent application flowing from the above-mentioned circumstances. The Applicants motivated the issue of urgency on the premise that they would not receive substantial redress, at a hearing in due course. They highlighted the following as justification for the urgency in launching this application;

[9.1] "*The Trust owes the attorneys over one million rand (R1 000 000,00) in legal cost incurred at the request of the Fidelity Fund to exhaust all remedies against Van der Berg and other parties involved in the transaction, including the other seller of the property.*

[9.2] These legal costs were incurred at the specific instance and request of the Fidelity Fund.

[9.3] The Trust attorney has deferred taking legal action against the Trust based on the undertakings of the Fidelity Fund to pay and reimburse the Trust for the legal costs incurred.

[9.4] The Trust does not have the resources to pay its attorney in the absence of reimbursement by the Fidelity Fund.

[9.5] The Trust's attorneys who also acts for me and my company Kipp Consulting's (Pty) Ltd, is threatening not only to withdraw as our attorneys of record but also to launch urgent legal proceedings against the trust for non-payment of the outstanding legal costs as per the attached communication.

[9.6] There was no justification for the Fidelity Fund not to make payment and commercial urgency is a recognised ground of urgency and the present

matter falls within such category. Moreover, the parties agreed that the Applicants could approach the Court on the same papers duly supplemented on an urgent basis.

[9.7] If the funds are not immediately released by the Fidelity Fund grave and irreparable harm will be occasioned to the Trust, not only will it be sequestrated, as it has no defence to its attorneys claim but the beneficiaries thereof, my minor children, would have lost the opportunity to recover their legal costs and interest that should not be allowed to happen."

[10] The Applicants prayed for the orders sought in the notice of motion.

[11] The application was opposed and in answer to the abovementioned allegations the First Respondent raised the point in limine concerning urgency. The First Respondent submitted that urgency was a procedural issue, allowing a Court to dispense with the forms and services provided for in the Uniform Rules of Court. It was for the Applicants to show the circumstances, that rendered the matter urgent and the absence of substantial redress, if the matter was not heard as a matter of urgency. This was not the equivalent of irreparable harm required, before granting interim relief, but something less.

[12] The First Respondent noted that the application was based on two separate causes of action, one for payment of interest and the second for payment of legal fees. In addressing urgency in the founding affidavit, the Applicants only relied on the alleged non-payment of legal fees and did not address the first course of action, being the non-payment of interest on which the Applicants were silent.

[13] The First Respondent indicated that commercial urgency did not apply in this matter. The Applicants were aware from 17 September 2024 that their claim for costs had not materialised as sought. They waited until 27 September 2024 when they wrote a letter of demand to the First Respondent and threatened to set this matter down. The First Respondent denied that there was any agreement between the parties entitling the Applicants to approach the Court on an urgent basis for the non-payment of interest or the legal costs as alleged. Moreover, even if such an agreement existed, it would not bind the Court in the exercise of its discretion and that the application was not urgent.

[14] The First Respondent indicated that the threat by the instructing attorney to withdraw as attorney of record in respect of all seven matters, wherein they act on behalf of the Applicants was not a ground of urgency, and the instruction by the Applicants to the attorney, to pursue the balance of the funds, from the First Respondent on an urgent basis, also did not justify urgency.

[15] The First Respondent argued that the Applicants failed to provide any reason why they would not be afforded substantial redress at a hearing in due course in respect of these claims. It was based on this aspect that the First Respondent prayed that the application be struck from the roll with costs, due to lack of urgency.

[16] On the main issues the First Respondent indicated, that the Applicants believed that they were entitled to interest, in terms of the Common Law. The claim for indemnification, for the Applicant's claim for interest on the capital sum of R2 000 000,00 was prohibited by section 56(2)(a) of the Legal Practice Act 28 of 2014, which determined payment of any claims from this Fund. The Applicants did

not allege that they have earned interest on the capital sum which was given in trust to Van der Berg or that the First Respondent in its discretion, had decided to pay interest to the Applicants. Therefore, the Applicants were not entitled to the relief sought.

[17] In respect of the legal fees, the First Respondent indicated that the claim for indemnification, for the Applicant's legal costs for excussing Van der Berg, and the claim for the payment of the sum of R1 098 909,82 were subject to the discretion of the First Respondent as provided for in section79(2) of the Legal Practice Act 28 of 2014. The Applicants failed to provide any grounds for payment of the sum of R1 098 909,82 especially as the First Respondent, had made a discretionary payment of an amount of R141 257,13.

[18] The First Respondent highlighted that it was common cause that the Applicant's attorney sent three taxed bills of costs to the First Respondent on 15 August 2024. The First Respondent paid the bill submitted in respect of the sequestration of Van der Berg. It did not pay the other two bills for the very reason that the First Respondent disputed that the costs claimed in these two bills relate to Van der Bergs excussion. These two bills were not attached to the founding affidavit, moreover it was impossible to determine from these two bills, that they were for the excussion of Van der Berg. The amounts claimed on these two bills were disputed as being relevant for the excussion of Van der Berg. If the Applicants sought to persist in respect of these two claims they were welcome to institute Summons for these amounts.

[19] The First Respondent indicated that this was an abuse of the Urgent Court roll and that the matter be struck off with costs. On the merits of the claim in respect to interest and costs, there was a dispute concerning the amounts and the Applicants would not be successful in respect of the merits. The First Respondent prayed that the application due to lack of urgency, be struck from the roll with costs, alternatively it be dismissed with costs.

[20] In reply the Applicants indicated that there was an agreement that the matter could be set down, on a future date, on the Urgent Court roll, for the issues to be ventilated between the parties. Inasmuch as it was a discretion of the Court, both parties could have jointly approached the Court on the basis that they were in agreement, that the matter was urgent, and for the Court to then make a determination. The Applicants indicated that they had made out a case for urgency, both in respect of interest and legal costs, reliant on the agreement between the two parties as well as independently of the agreement.

[21] The Applicants denied that the delay of 10 days was unreasonable or that the threat of the Applicant's attorney to withdraw as attorney was not a ground of urgency. The application was brought as soon as reasonably possible, and the Applicants denied that they would obtain substantial redress at a hearing in due course. The Applicants sought the Court to grant the application as prayed.

Issues

[22] The following issues were identified to be adjudicated on by this Court;

[22.1] The first issue to be determined was whether this matter was an urgent matter where the provisions of Rule 6(12) of the Uniform Rules of Court applied.

[22.2] The issue of interest on the amount of R2 000 000,00 as claimed by the Applicants.

[22.3] The issue of the amount of R1 098 909,82 being the outstanding two taxed Bills of Cost, being sought to be paid by the First Respondent.

The Relevant Law and Applicability to the Issues

[23] For an Applicant to succeed on any grounds of urgency the Applicant needs to show that this was not self-created urgency and that the Applicant would not be afforded substantial redress, if the matter was to be heard in due course.

[24] The law on urgency is abundantly clear. Urgent applications must be brought in accordance with the provisions of rule 6(12) of the Uniform Rules of Court ("The Rules"), with due regard to the guidelines set out in cases such as *Die Republikeinse Publikasies (Edms) Bpk vs Afrikaanse Pers Publikasies (Edms) Bpk*[1] *as well as a well-known case of Luna Meubelvervaardigers (Edms) Bpk v Makin and Another*[2]*, and further Sikwe vs SA Mutual Fire and General Insurance.*[3] Before a Court makes a finding on the merits of an urgent application, the Court must first

[1] *1972(1) SA 773 (A) at para 782A - G*
[2] *1977(4) SA 135 (W),*
[3] *1977 (3) SA 438 (W) at 440G - 441A.*

consider whether the application is indeed so urgent that it must be dealt with on the Urgent Court roll.

[25] The rule has a two-step process to be present before urgency can properly be founded, namely; firstly, the urgency should not be self-created and secondly, the applicant must provide reasons why substantial relief cannot be achieved in due course.

[26] The application is re-enrolled on proper notice and compliance. In each and every matter that is brought on urgent basis, the reasons for urgency must be clearly and concisely set out in the founding affidavit and it must be clear that urgency was not self-created.

[27] The principle set out in a case of East Rock Trading 7 (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited and others[4] in which it was held:-

> "*The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An Applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial reddress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in the application in due course. The rules allow the Court to come to the assistance of a litigant because if the*

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[4] *[2012]JOL28244(GSJ)at paragraph 6 and 7*

latter, were to wait for the normal course laid down by the rules, it will not obtain substantial redress.

It is important to note that the rules require absence of substantial redress. This is <u>not equivalent to irreparable harm</u> that is required, before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an Applicant will not be able to obtain substantial redress in an application in due course, will be determined by the facts of each case. An Applicant must make out his case in this regard."

[28] The High Court, Pretoria, in *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited*[5] stressed the importance of providing viable reasons for dispensing with the formalities in application proceedings, when instituting an urgent application, as set out in Rule 6(12) of the Uniform Court Rules.

[29] The Applicants referred the Court to the case of Avis Southern Africa (Pty)ltd v David Porteous[6] where the Court noted, *"that there is no category of proceedings that is intrinsically urgent, that crippling commercial loss was likely to be urgent in the context of commercial matters".* The Applicants highlighted that commercial interests are equally worthy of protection to justify reliance on Rule 6(12) and that this matter was more than protecting the Applicant's financial interests. The Applicants motivate that they would not be able to obtain redress at a hearing in due course, as it will be too late due to the threat of sequestration by the Applicant's attorney. This would

[5] *[2023] ZAGPPHC 709 (21 August 2023)*
[6] *2023/0817898 see paragraph 6*

also prejudice the Applicant's children, to seek redress against the First Respondent for the abovementioned claims.

[30] The Applicants made specific reference to the agreement that existed between the parties that the matter could be set down in future, on the Urgent roll for ventilation flowing from the second Urgent Application. This Court notes that the second Urgent Application was in December 2023. The Applicants indicated that Judgment could have been granted then, on the amended papers for the costs and interest, but they trusted the First Respondent to follow through with the undertakings.

[31] The Court had regard to the following concerning attending to a matter on the basis of urgency and considered the following;

[31.1] The prejudice that the Applicant may suffer by having to wait for a hearing in the ordinary course

[31.2] The prejudice that other litigants might suffer if the application were to be given preference.

[31.3] The prejudice that the Respondents might suffer on account of the abridgement of the prescribed terms and an early hearing of the matter.

[32] The First Respondent denied any agreement concerning the matter being re-enrolled on an urgent basis and maintained that the Applicants had not made out a case for urgency. The First Respondent argued that the application was an abuse of the Court process, indicating that the Applicants did have redress, in the normal course of proceedings and the threat of possible sequestration could never warrant

urgency. The First Respondent indicated that the Applicants received payment and had means to attend to their attorney's fees from the funds received.

Evaluation

[33] As highlighted earlier the Applicants were required to show this Court that the matter was urgent and needed immediate attention of this Court. In support of same they relied on an agreement between the parties, that they could approach the Court on the supplemented papers, on an urgent basis. It is interesting to note this agreement stemmed, from the removal of the second urgent application in December 2023. The Applicants seek this Court to accept, that based on the agreement, they had a right to access the Urgent Court, almost a year later. Such an arrangement is untenable and must be stopped, before it becomes a trend amongst practitioners, to have their cases attended to, outside of the normal course, on account of an agreement that the matter is urgent. Rule 6(12) of the Uniform Rules of Court, the Courts Practise Directives and the various case law have settled the issue on urgency. This Court is not bound by an agreement of that nature and same does not entitle an urgent hearing on account of this agreement.

[34] When considering the other grounds of urgency, in respect of the potential sequestration and or commercial urgency, it must be noted that the Applicants have been aware, as far back as December 2023, when the second urgent application was sought, that their negotiations with the First Respondent, was not straight forward and capable of being settled, without having to approach the Court a second time, and then only getting payment in respect of the R2 000 000.

[35] On the 27 September 2024, the Applicants having received the amount of R141 257,13 should have appreciated that the amount sought, as contained in the claims submitted, differed materially from the amount paid, but still they delayed till the launching of the third urgent application. They elected to negotiate further with the First Respondent rather than instituting proceedings. It is appreciated that the Applicants fear a potential sequestration however, that in itself cannot justify needing to approach the Court on an urgent basis, to be afforded preference of hearing, whilst the Applicants have failed to motivate why they would not be afforded substantial redress, at a hearing in due course and why they failed to act prior this urgent application.

[36] This Court considered what was highlighted in the case of *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited,*[7] that the need to consistently refuse urgent applications, in cases where the urgency relied upon is self-created. *"Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives (such as the actual need for urgency as prescribed by rule 6(12)) should never be ignored."* The Court concluded that the matter was not urgent and struck it from the roll.

[37] The Applicants have not made out a case for approaching the Court on an urgent basis for protection and relief, neither on the basis of agreement or any other reason. Commercial urgency is a very real circumstance when considering urgency, but it is as highlighted in East Rock Traders not just there, for the taking.

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[7] *[2023] ZAGPPHC 709 (21 August 2023)*

[38] This Court appreciates the frustration being experienced by the Applicants in recovering their funds from the First Respondent, but this cannot motivate bypassing the other matters that have been waiting to be entertained under the guise of sudden emergency, financial or otherwise.

[39] **Costs**

[40] The Applicants sought punitive costs on account of the conduct of the Respondent and requested the Court to mark its disapproval by granting an order of costs on an attorney and client scale.

[41] The First Respondent sought the matter be struck off roll for lack of urgency alternatively dismissed with costs. This Court notes that costs follow the successful party and is in the discretion of the Court, however due to the issue between the parties it would be prudent at this stage to order that same is reserved to be adjudicated at the relevant time when the matter is being adjudicated.

Order

[42] In the result I make the following order;

[42.1] The Application is struck off the roll due to lack of urgency.

[42.2] The order of costs is reserved.

[redacted]

KL PILLAY AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR THE APPLICANT	**: Adv RA Solomon SC and Adv Gumbi**
INSTRUCTED BY	**: Micheal Raphela Attorneys**
FOR THE RESPONDENT	**: Adv T P Kruger SC**
INSTRUCTED BY	**: Nentswuni Attorneys**
DATE OF HEARING	**: 15 October 2024**
DATE OF JUDGEMENT	**: 13 November 2024**