

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-135959

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

20 December 2024

DATE

SIGNATURE

In the matter between:
SPOTPROPS 34 (PTY) LTD

Applicant

and

THE COMMUNITY SCHEMES OMBUD SERVICES

First Respondent

**THE ACTING CHIEF OMBUD.
KEDIBONE PHETLA N.O.**

Second Respondent

LUNGISWA TSHAKA N.O.

Third Respondent

**BLACKPEARL INVESTMENT PRIMARY CO-OPERATIVE
(PTY) LTD**

Fourth Respondent

THE BODY CORPORATE OF BRIDGETOWN

Fifth Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date and time for hand-down is deemed to be 10:00 on 20 December 2024.*

Summary: Urgent application – rule 6(12)(b) – requirement of absence of substantial redress in the ordinary course.

JUDGMENT

PG LOUW, AJ

Introduction

[1] This is an application to review and set aside the decision of the first and second respondents (collectively referred to as the Ombud) to appoint the third and fourth respondents (collectively referred to as the EMA) as the executive management agent of the fifth respondent (the Body Corporate). The applicant also seeks leave to supplement its papers under case number 131988-2023, in the application for the appointment of an administrator in terms of s 16 of the Sectional Titles Schemes Management Act 8 of 2011 (the Act). The relief is sought on an urgent basis.

[2] The EMA and the Body Corporate delivered a notice of intention to oppose the application but the EMA subsequently withdrew its opposition and filed a notice to abide by the decision of the court. The Ombud filed a notice to abide by the decision of the court but reserved its right to oppose “*if the need arises*”.

[3] The applicant delivered a notice in terms of rule 7 challenging the authority of Mdzulwana Attorneys Inc. to represent the Body Corporate. The Body Corporate delivered a reply to the notice in terms of rule 7, to which is attached *inter alia* a power of attorney signed by the EMA appointing the attorneys. The applicant delivered a supplementary affidavit which the Body Corporate objected to. The third respondent delivered an explanatory affidavit, which was objected to by the applicant. My finding of a lack of urgency in this matter makes it unnecessary for me to make any finding in respect of these issues.

[4] On 14 October 2024, the Ombud appointed the EMA for the Body Corporate. On 21 October 2024, the applicant’s attorney addressed a letter to the Ombud requesting the documentation relied upon for its decision in this regard. On 24 October

2024, the Ombud requested the applicant to complete a PAIA form to access the documents. On 29 October 2024, the applicant submitted the PAIA form to the Ombud. On 8 November 2024, the Ombud furnished the applicant with all the requested documents save for the resolution of the Body Corporate to apply to the Ombud for the appointment of the EMA. On 14 November 2024, the applicant (through its attorneys) was able to inspect the resolution at the offices of the Ombud. According to the applicant, the inspection revealed that the resolution is insufficient to support an appointment of an EMA. The applicant's case is that it was only able to truly ascertain the facts which led to the decision of the Ombud to appoint the EMA, on inspection of the resolution.

[5] The applicant claims that if the relief sought is not granted on an urgent basis, it will result in a situation that *"cannot be rectified by an appropriate cost order, and the prejudice suffered will not be able to be mitigated"*. According to the applicant, the matter cannot be addressed in the ordinary course and the Body Corporate and its members are suffering severe prejudice. The applicant contends that there is a *"very real threat of further prejudice to be suffered by the [Body Corporate] and its members – should this relief sought not be granted on an urgent basis"*.

[6] The alleged prejudice turns on the conduct of the EMA. The EMA is said to be acting on behalf of the Body Corporate, despite the alleged unlawful appointment. The applicant alleges further that the EMA has not made payment to third party service providers, has not taken any steps to collect the outstanding arrears of R39,750,370.95 owed to the Body Corporate by members, but has made payment to the EMA for its *"services"*.

[7] The applicant contends that the Body Corporate *"is in desperate need of an administrator"*. An administrator will *inter alia* have the power to proactively attend to reducing the arrears.

[8] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valey Granite (Pty) Ltd and Others*,¹ the court stated the following:

¹ (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[6] 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 redress 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 an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm 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 that regard.” [Emphasis added.]

[9] In *Arcfyre International (Pty) Ltd and Others v Govender and Another*,² Adams J referred to *Mlezane and Others v South African Civic Organisation*³ and stated that:⁴

“A party seeking to approach the Court on an urgent basis needs to justify why his matter is so urgent as to warrant other litigants being shifted further down the queue.”

[10] Adams J also held that:⁵

“Moreover, the applicant must justify the invasion of the respondent’s rights to proper notice and an adequate opportunity to prepare. ... The applicant must fully set out the facts supporting the conclusion advanced; mere lip service will not do. If there is some delay in instituting the proceedings an applicant has to explain the reasons for the delay and must also explain why, despite the delay, it claims that it cannot be afforded substantial redress at a hearing in due course. This however does not mean that an applicant can create its own urgency by simply waiting until the normal rules of court

² (2023-098452) [2023] ZAGPJHC 1243 (31 October 2023).

³ (3208/18) [2018] ZAECHC 114 (12 November 2018) at para 5.

⁴ *Arcfyre* at para 23.

⁵ *Arcfyre* at para 24.

can no longer be applied and a delay in bringing the application, or self-created urgency, is a basis for a court to refuse to hear a matter on an urgent basis.”

[11] In this matter, the applicant became aware of the appointment of the EMA, which it seeks to challenge, on 21 October 2024 at the latest. The application is dated 22 November 2024, that is more than a month after the applicant first became aware of the appointment of the EMA. There is, however, merit in the applicant’s explanation that it started gathering evidence and that it was only on 14 November 2024, when it was able to inspect the resolution, that it was able to truly ascertain the facts which led to the decision of the Ombud to appoint an EMA. This matter does not appear to be one where the urgency was self-created.

[12] However, the application fails to meet the second leg of the test for urgency in that I am not persuaded that the applicant will not obtain substantial redress in the ordinary course. On the applicant’s version, its application in terms of s 16 of the Act *“is ripe for hearing”* and an administrator could be appointed *“in a matter of a few months”*. It was argued on behalf of the applicant that the relief sought in the s 16 application is not the same as the relief sought in this application. That does, however, not mean that the applicant cannot obtain substantial redress in the ordinary course.

[13] In addition, Management Rule 28(3)⁶ provides as follows:

- “(3) An executive management agent –
- (a) ...
 - (b) is obliged to manage the scheme with the required professional level of skill and care;
 - (c) is liable for any loss suffered by the body corporate as a result of not applying such skill and care;
 - (d) ...”. [Emphasis added.]

⁶ Prescribed in terms of s 10(2)(a) of the Act.

[14] This provision provides protection to the Body Corporate.

[15] In the circumstances, I am not persuaded that this matter is so urgent that it justifies the applicant to jump the queue.

[16] In my view, the applicant has not passed the threshold prescribed in rule 6(12)(b) and the application ought to be struck from the roll for lack of urgency.

[17] Insofar as the issue of costs is concerned, by virtue of the fact that I make no findings pertaining to the issues mentioned in paragraph [3] above, particularly the issue of the authority of the attorneys acting on behalf of the EMA, the issue of costs ought to be reserved to be dealt with when all the issues raised in the application are fully ventilated.

[18] Accordingly, I make the following order:

1. The urgent application is struck from the roll for lack of urgency.
2. The issue of costs is reserved.



PG LOUW

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Appearances

Counsel for applicant:	Adv L de Wet
Instructed by:	Verdon Moodley and Associates Inc.
Counsel for fifth respondent:	Adv A Gxogxa
Instructed by:	Mdudzulwana Attorneys Inc.
Date of hearing:	4 December 2024
Date of judgment:	20 December 2024