



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- | | | |
|-----|------------------------------|-----------------------|
| (1) | REPORTABLE: | |
| (2) | OF INTEREST TO OTHER JUDGES: | |
| (3) | REVISED: | |
| (4) | Signature | Date: <u>04/02/25</u> |

CASE NO.: 2024/148733

In the matter between:

DR. NOMBASA TSENGWA

Applicant

and

EXXARO RESOURCES LIMITED

Respondent

JUDGMENT

Kumalo J

INTRODUCTION

- [1]. The applicant in this matter seeks on urgent basis an order declaring the resolution of the Board of directors of the respondent of 4 December 2024 is unlawful and that the set resolution be set aside. The applicant further seeks

to declare the notice of her suspension as the Chief Executive Officer unlawful and that it be set aside.

- [2]. The matter was served on the respondent on 17 December 2024 and advised that if it intended to oppose same, it must serve and file its notice on or before 17H00 on 19 December 2024 and serve and file its answering affidavit no later than 27 December 2024 and the matter to be heard on 7 January 2025.
- [3]. The respondent through its attorneys protested the applicant's timelines and suggested different timelines including the hearing date of this matter. It also challenged the applicant on the urgency of the matter.
- [4]. On the day of the hearing, I raised the appropriateness of this matter before this Court due to the volume of the papers. In my view, it was voluminous, and parties ought to have approached the Deputy Judge President for a special allocation.
- [5]. My view was not only informed by the total number of pages in the application which exceeded the number stipulated in the practice directive of this division but also by the parties' indications how long they anticipated they will have to argue the matter.
- [6]. The applicant had indicated in her practice note that they anticipate that it would take four hours to argue and respondent anticipated that it would take one hour 30 minutes to argue urgency and another four hours to argue the merits, if it comes to that.

- [7]. Those estimates were clearly indicative that the parties ought to have approached the Deputy Judge President for a special allocation. The numbers certainly are not suitable for an urgent court.
- [8]. Despite all the above, the applicant insisted she would want to be heard in the urgent court.
- [9]. I reluctantly granted the applicant's wish to be heard albeit I directed that I would hear the parties on urgency only. It is history now that arguments on this point alone went on for a period more than four hours.
- [10]. Perhaps it is apposite that I restate the law here in so far as urgency is concerned.
- [11]. Before a court makes a finding on the merits of an urgent application, the court must first consider whether the application is indeed so urgent that it must be dealt with on the urgent court roll. Where an applicant fails in convincing the court that he/she will not be afforded substantial redress at a hearing in due course, the matter will be struck from the roll. This will enable the applicant to set the matter down again, on proper notice and compliance.¹
- [12]. Likewise, where the facts indicate that the urgency is self-created, an applicant will not be entertained and the application will be struck from the roll

¹ See SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA)

- [13]. Uniform Rule 6(12) affords an applicant to create its own rules within which a respondent must file a notice to oppose and an answering affidavit. This is why condonation must be sought when the court is approached. A respondent who ignores the timeline so set by an applicant does it at his own peril and runs the risk of an order been granted against him by default. However, an applicant who cannot convince the court of the rationality and necessity for the timeline devised by it, should expect its application to be struck from the roll with costs.
- [14]. The law on urgency is abundantly clear. Urgent applications must be brought under the provisions of Rule 6(12) of the Uniform Rules of court, with due regard to the guidelines set out in cases such as *Die Rrepubliekseine Publikansies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*² as well as the well-known case of *Luna Muebelvervaardigers (edms) Bpk v Makin and Another*³.
- [15]. Notshe AJ in the matter of *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*(11/33767) [2011] ZAGPJHC 196 (23 September 2011) held that well known principle of whether it has been sufficiently explained that an applicant cannot be afforded substantial redress at a hearing in due course. The Applicant must make out her case in this regard.

² 1972 (1) SA 773 (A) at pars 782A-G

³³³ 1977 (4) SA 135(W)

- [16]. This in a nutshell means, if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If she cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application.
- [17]. I must also mention that the fact the applicant wants to have the matter resolved urgently does not render the matter urgent. Therefore, whether a matter is urgent depends on the relief sought seen in context with the facts of a case. As a result, urgency is determined on a case-by-case, context specific basis.
- [18]. The import of all the above is that the test for urgency begins and ends with whether the applicant can obtain substantial redress in due course. It means that a matter will be urgent if the applicant can demonstrate, with facts, that it requires immediate assistance from the court, and that if her application is not heard earlier than it would be in due course, any order that it might later be granted will by then be no longer capable of providing her with the legal protection she requires.
- [19]. To that extent, the application is opposed, and the respondent also challenges the urgency thereof and as such, urgency must be dealt with.
- [20]. The respondent contended, amongst other factors that should be taken into consideration that the urgency is self-created. It is argued that the issues

between the parties crystallized as far back as the 4th of December 2024 when the applicant was served with her notice of suspension. She disputed that the respondent's board has the right or power to place its Chief Executive Officer on such precautionary suspension.

- [21]. The application was issued on 17 December 2024 and called upon the respondent to file its notice of intention to oppose before 17h00 Tuesday 19 December 2024 and its answering affidavit on Monday 27 December 2024 and the matter was set down for the hearing on Tuesday 7 January 2025.
- [22]. The respondent challenged the applicant on the delay on issuing the "urgent" application in that she was placed on precautionary suspension on 4 December 2024, and she consulted her attorneys and immediately on 5 December 2024, addressed correspondence which according to the respondent, fully articulated the issues raised in these proceedings.
- [23]. Without going into further details of the respondent's submissions, it is contended on its behalf that the clock for urgency began ticking, at the latest, on 6 December 2024.
- [24]. It is correct that there is no explanation for the period 6 December 2024 to 17 December 2024 or why the applicant took that long to issue her application. All that the court can glean from the papers is that she was required at some stage to avail herself for some meeting which her attorneys requested that it be postponed to 10 December 2024 which the respondent agreed to.

- [25]. This lends itself to the conclusion that the urgency hereof is self-created. Even if the court may be wrong in this regard, there is one essential element lacking in the applicant's founding papers namely what harm would she suffer if she is not heard on the urgent basis.
- [26]. As pointed out in the respondent's heads of argument, the applicant stated at paragraph 83 of her founding affidavit that she would not be afforded substantial redress in due course as the damage to the company would have been done by the time her suspension is lifted or notified that a disciplinary enquiry will be held.
- [27]. Although it was argued that the Applicant is in this instance the company, it is settled law that a company has a separate identity to those that constitute it. It therefore cannot be correct in this case that she would not be afforded substantial redress in due course due to what would have happened to the company.
- [28]. The damage to the company cannot therefore be equated to a damage to her person.
- [29]. Further, there is no case made in the founding affidavit for the urgent relief that the applicant seeks. It is trite that one does not make out a case in reply but must do so in the founding affidavit. Her failure in this regard is fatal to her application.

[30]. I do not believe that this Court must traverse all other issues raised during argument and in the circumstances the following order is made:

1. The matter is struck off the roll for lack of urgency;
2. The Applicant is to pay the costs of this application including the costs of two counsels on scale "C".



MP Kumalo
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: Adv PF Louw SC and Adv C Louis

Instructed by: Edward S Classen & Kaka Attorneys

For the respondents: Adv T Motau SC and Adv Z Ngakane

Instructed by: Edward Nathan Sonnenbergs Inc

Date of the hearing: 30 January 2025

Date of judgment: 03 February 2025