



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2025/059995

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: no |
| (2) | OF INTEREST TO OTHER JUDGES: yes |

23 May 2025

DATE

SIGNATURE

In the matter between:

SOUTH AFRICAN RESERVE BANK

Applicant

And

YWBN MUTUAL BANK

Respondent

Heard: 22 May 2025

Delivered: This Judgement was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Court-online and release to SAFLII. The date and time for hand down is deemed to be 16h00 on 23 May 2025.

ORDER

1. The contempt application brought by YWBN Mutual Bank against the South African Reserve Bank for a failure to comply with an interim order of court dated 7 May 2025 requiring it to register a name change of the YWBN Bank within 48 hours of service of such order is dismissed,

2. The urgent rescission application brought by the South African Reserve Bank to set aside the order of Court on 7 May 2025 requiring it to register a name change of the YWBN Mutual bank is granted.
3. The costs of these applications shall be borne by YWBN Mutual Bank on scale C including the costs of two Counsel.

REASONS FOR JUDGMENT

Sutherland DJP,

Introduction

- [1] Two interrelated applications concerning an order granted in an earlier urgent -+application have been brought before the urgent motion court. The parties are variously applicants and respondents, hence, herein they are called by their names. The YWNB Mutual Bank is YWBN; the South African Reserve Bank is SARB.
- [2] Initially, YWBN obtained an urgent interim order (The name change application) against SARB, directing it to register a name change of the YWBN Mutual Bank to eIMutual Bank and do so within 48 hours of the service of the order. SARB is the repository of the statutory authority to confer and approve the name of a bank. When SARB was served with the order, it sought first to persuade YWBN to abandon it, but upon refusal, brought a rescission application. (The rescission application). In response thereto YWBN brought a contempt application against SARB for refusing to comply with the name change order. (The contempt application)

The Recission application

- [3] This application must succeed. There are two grounds: first, that the service of the urgent name change application was cynical and improper and there was therefore no effective service, and second that the order was granted in error in that the objective facts were not properly put before the court hearing the urgent application.
- [4] The roots of the YWBN name change application are deep. As long ago as 2022 it wanted to change its name. That 2022 application came to nought. In July 2024, the application was renewed. It waited for an answer with mounting exasperation. The chief cause for anxiety is that it had committed itself to a marketing launch on 12 May 2025 using the new name.
- [5] From February 2025, several exchanges took place about progress towards a decision. On 26 March 2025 SARB said a decision would be taken at a meeting scheduled for 25 April 2025. On 1 April 2025, the parties' representatives met. The same statement was made. On 23 April 2025 SARB wrote that the decision was still under consideration.
- [6] The date of 25 April 2025 passed. On 29 April 2025, YWBN, in a letter, threatened an urgent application but did not when it might be brought. There was no immediate reply, and indeed a reply was dispatched only on 6 May, after the horse had bolted.
- [7] On Wednesday 30 April 2025 the urgent name change application was issued. The sheriff served it at 16h43 on the security guard at SARB's premises. The notice of motion called on SARB to file an answer the next day by 16h00 - ie, within 24 hours of service - and further stated that the case would be enrolled on 6 May 2025, the Tuesday of the following week.
- [8] The circumstances of this service bear close examination. First, Wednesday 30 April was the day before a public holiday, Workers Day. The Friday was therefore a trapped 'working' day between the public Holiday and the weekend,

rendering the period 1 May 2025 to Sunday 4 May 2025 a *de facto* long weekend for many people. What might a reasonable person in the shoes of the attorney of YWBN expect to have happen? Why was it necessary to serve outside of business hours? Was it not foreseeable that the documents would not reach the desk of a responsible official before Monday? Indeed, the expectation that an answer would be forthcoming within 24 hours on a public holiday was manifestly absurd. Moreover, this was a service on an organ of state, a category of litigant whose officials show no evidence of being burdened by a Calvinistic work ethic, a matter about which YWBN had first-hand experience and had justifiably wailed about.

- [9] As was reasonably predictable, the application only came to the attention of a person who knew what to do on 6 May 2025. The security guard was clueless as to the urgency and apparently denied that the urgency of the matter has been explained to him by the sheriff. A telephone call at the time between the guard and an official of SARB about the arrival of the documents was afflicted by connectivity problems and confusion as to what should have happened. Plainly, YWBN is in no position to contradict these averments.
- [10] What this saga of mishaps illustrates is that it is unprofessional to take a pedestrian approach to the service of urgent applications. It is no part of our legal procedure to move by stealth to court against an adversary.
- [11] Manifestly, it is the duty of attorneys who bring urgent applications to apply their minds to whether effective service can take place and to ensure that reasonable steps to ensure that it is indeed effective occurs. In the circumstances of this case, it would have been expected that, in the course of the business hours of 30 April 2025, direct contact should have been made with the persons with whom earlier exchanges about the name change issue had occurred and that they be notified of the impending service of an urgent application. An inference of a cynical disregard of the likely failure of SARB to respond and an appetite to take advantage of that circumstance is inescapable.

[12] A similar impropriety occurred in the service of an urgent application in the case of *SAA v BDFM Publishers 2016 (2) SA 561 (GJ)*. That case offered an example of a more egregious impropriety than in the present case and concerned an application made at around midnight on a Saturday on about 30 minutes notice. This conduct was criticized and a guideline about how to deal with a very urgent application was stipulated in paras [22] to [26]. It was held there:

‘[22] The principle of *audi alterem partem* is sacrosanct in the South African legal system. Although, like all other constitutional values, it is not absolute and must be flexible enough to prevent inadvertent harm, the only times that a court will consider a matter behind a litigant's back are in exceptional circumstances. The phrase 'exceptional circumstances' has regrettably, through overuse and the habits of hyperbole, lost much of its impact. To do that phrase justice it must mean 'very rarely' — only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established.

[23] In this case the purported service was, de facto, no service at all. The order was taken ex parte, and the service was a farce. The single paragraph in the founding affidavit which stated that service had been performed by email was true only in the meanest possible way.

[24] The nature of the relief sought is not such that an ex parte order could ever have been justified. Doubtless, SAA appreciated this obvious fact that service was necessary. However, what it and its legal representatives did, pursuant to a responsibility to achieve effective service in order to respect the principle of *audi alterem partem*, was not simply clumsy, but unprofessional. When a litigant contemplates any application in which it is thought necessary to truncate the times for service in the rules of court, care must be taken to use all reasonable steps to mitigate such truncation. In a matter in which less than a day's notice is thought to be justifiable, the would-be applicant's attorney must take all reasonable steps to ameliorate the effect thereof on the would-be respondent. The taking of all reasonable steps is not a collegial courtesy, it is a mandatory professional responsibility that is central to the condonation necessary to truncate the times for service. When there is the prospect of a hearing before a judge after business hours and, even C more so, when there is the prospect of the hearing taking place elsewhere than in a courthouse, the duty to take reasonable steps is ever more important and imperative.

[25] In this case, without any forewarning, on at most 30 minutes notice, the application was emailed at 22h00, a time at which it is unreasonable D to have expected that the email would at once be read. The phone calls from SAA, 30 minutes later, reached one out of the three persons to whom the papers had been sent, who was fortuitously awake to receive it. The notice omitted to state the venue for the hearing. In any event, by then it was too late to offer even token opposition. None of this could not E have been appreciated by SAA.

[26] In my view it is incumbent on the attorney of any person who contemplates an urgent application on less than 24 hours' notice, to undertake

the following default actions in fulfilment of the duty to ensure effective service:

[26.1] Once the respondents are properly identified, the names and contact details, ie phone, cell, email, fax and physical addresses of persons who have the authority to address the application must be ascertained. Obviously, if the issue has already been the subject of debate between the parties and an attorney has already been retained by a respondent, such attorney's contact details will top the list.

[26.2] At the earliest moment after deciding to bring an urgent application, contact must be made to demand compliance with the relief to be sought and to alert one or more of such persons of the intention to bring an application, stating where it is likely to be heard, when it is likely to be served, and the identity of the judge on urgent duty. Agreement should be reached about who should receive service on behalf of the respondent by email or fax, or other method.

[26.3] Next, the urgent judge shall be alerted, and a report made, I whether or not the respondents have been alerted.

[26.4] When the papers are ready for service, direct contact shall again be made with the persons dealing with the matter on behalf of the respondent. Where delays occur, the respondents must be kept informed by interim calls to report progress.

[26.5] Sufficient time must be allowed for the respondents to read and digest the papers. It is appropriate to send a notice of motion in advance of the founding papers to give the respondents a chance to formulate a view about the relief being sought.

[26.6] When the papers are about to be served electronically or otherwise, the urgent judge should be consulted about when and where the hearing will occur, if at all, and how much notice must be given, in the context of earlier alerts to the respondents.

[26.7] Once served in any manner other than by personal physical delivery, the attorney must immediately call the respondent's representatives directly to confirm actual receipt of all the papers.'

[13] The intrinsic principle derived from this dictum is that care must be taken that proper allowance is made for a response from the respondent. Moreover, it follows from that value choice that reasonable steps must be taken to ensure the adversary is alerted under circumstances where it will be reasonably able to respond, if it so chooses. Thus, in the absence of active opposition a court can be satisfied that the respondent has chosen not to resist. This is the practical application of respect for the cardinal norm of *audi alterem partem*. An awareness of this professional ethical obligation was absent in this case.

[14] Because of these circumstances, the conclusion I reach is that the service was ineffective and the application could have been struck off the roll for that reason.

- [15] The second ground why the rescission application must succeed relates squarely to the application of Rule 42(1) and the contention that the court which heard the name change application was not provided with all the relevant facts.¹ Two contentions were advanced.
- [16] The first contention arises from the fact that a decision was taken by SARB on 25 April 2025 to refuse the name change request. The merits or demerits of that decision *per se* are not of any concern to the current controversies. Whether the refusal can withstand a review is a debate for another case.
- [17] Thus, so the argument runs, it was improper to approach a court upon the premise that no decision had been made. This criticism is separate from the criticism that the court hearing the application should have simply ordered SARB to decide the question rather than substitute its own decision for that of SARB.
- [18] However, it seems to me that the evidence on record goes no further than to show that YWBN knew a decision was due on 25 April 2025, not that it learned, prior to either 30 April 2025 or 7 May 2025 when the order was granted, that a decision had indeed already been made. The SARB letter of 6 May 2025, put before the court in a supplementary affidavit by YWBN, was an answer to the demand of 29 April 2025 to decide on the request for a name change, in which letter, SARB, somewhat perversely, did not reveal that a decision had been

¹ 42 Variation and rescission of orders

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

made but rather that a result would be forthcoming. Why this stance was taken seems to be derived from SARB's sloth-like bureaucratic practises. Accordingly, YWBN is not susceptible to criticism for misrepresenting that the relief sought was premised on an incorrect factual assumption.

[19] Nonetheless, the order was in truth granted upon wrong factual premise. When the order was taken, unknown events had overtaken the viability of the relief sought. Moreover, it is trite that as a formal administrative act by an organ of state having an external effect, the decision by SARB can only be set aside pursuant to review in terms of Promotion of Administrative Justice act 1 of 2000. That has not occurred, at least not yet, and *ipso facto*, the order of 7 May 2025 cannot stand in competition with it.

[20] The second and crisp ground in support of the rescission is the misrepresentation in the founding affidavit of YWBN concerning compliance with section 35 of the Banks Act 134 of 1993. The section reads:

‘35 Change of name of mutual bank

(1) A mutual bank may, with the approval of the Registrar, by special resolution change its name.

(2) Any application for the Registrar's approval in terms of subsection (1) shall be lodged with the Registrar before the proposed special resolution authorizing such change is laid before a general meeting of members of the mutual bank, and any such application shall be accompanied by-

- (a) two copies of such proposed special resolution; and
- (b) an explanation of the reasons for the resolution.

(3) The Registrar shall not grant any application referred to in subsection (2) if he is of the opinion that the proposed new name is unacceptable on any of the grounds mentioned in section 14 (2) (e).

(4) When the name of a mutual bank is changed in terms of subsection (1) the Registrar shall enter the new name in his records in place of the former name and shall issue a new certificate of registration of the mutual bank under its new name, provided the certificate previously issued by him is delivered to him for cancellation.

(5) The change of name shall not affect any right or obligation of the mutual bank or any member thereof or any other person concerned or render defective any legal proceedings by or against the mutual bank, and any legal proceedings that may or could have been continued or commenced by or against it under its former name may be continued or commenced under its new name.

(6) ...

(7)....

(Emphasis added)

- [21] In the founding affidavit of the name change application this passage appears in para 8.4:

‘The Act and in particular section 35(1) to (5) thereof and 14(2)(e) sets out the requirements in terms of which an application should be made and what it must contain and to whom , all of which it is submitted the applicant fairly complied with upon application.’

However, in the rescission application, YWBN concedes it had not complied, a contradiction of the averment in the founding affidavit.

- [22] It was argued that the passage and the use of the term ‘fairly’ in the founding affidavit should be read to mean there was ‘substantial’ or ‘partial’ compliance and no deliberate misrepresentation occurred. This is hard to do. The very point of section 35 is to prevent anyone jumping the gun. One is either compliant or delinquent: there is no middle ground. Given these circumstances, and moreover, the egregious persistence with obtaining a substitution order, it is indeed a substantial misrepresentation. It is indeed likely that had the court hearing the matter been made properly aware of the non-compliance with section 35, the substitution order would not have been made.

- [23] Accordingly, the rescission application must succeed.

The Contempt application

- [24] The contempt application was ill conceived and meritless. When Counsel was asked to point out the grounds set out to show wilful disregard he was unable to advance any cogent arguments. The thesis to support the notion of a contempt seemed to be rooted in the degree of urgency which characterised SARB’s response to the name change order. Supposedly, it was argued, a reconsideration application rather than a rescission application should have

been brought and placed before the court within 48 hours of the service of the order, thereby obtaining relief before the moment when performance of the order had been stipulated. A failure to move that quickly was culpable. The argument has no merit even on its own terms.

- [25] More importantly, the YWBN thesis does not make out a case to satisfy the test for contempt as held in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 325 (SCA). There it was held:

‘[42] To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court H application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala A fide*, contempt will have been established beyond reasonable doubt.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.’

- [26] On the other hand, the non-compliance with the order was fully and adequately explained by the considerations described above. The contempt application is dismissed.

The Costs

- [27] Applications for punitive costs were made in both directions. I have declined to make such orders.

- [28] The moral responsibility for this debacle derives from a degree of inappropriate conduct on both sides. The outward appearance of gross tardiness by SARB is not rebutted by any serious explanation of why years passed to address these issues. More significantly, the poverty of the communication between the

parties is regrettable. The chief example of which is the SARB's iniquitous sloth in delaying from 25 April 2025 until the answering affidavit to disclose the result of the decision.

[29] Nonetheless, albeit that legitimate frustration existed on the part of YWBN, the steps taken by it were inappropriate and meritless. It created its own nightmare by failing to comply with section 35 of the Banks Act and snookered itself by a commitment to the 12 May 2025 deadline to launch its marketing with the new name. YWBN is the cause of the sequence of litigation and must pay for the consequences.

[30] Thus, the order as set out above was made at the hearing on 22 May 2025.


ROLAND SUTHERLAND
DEPUTY JUDGE PRESIDENT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Appearances

For the Applicant:

Adv. M Dewrance SC and Adv. B Rowjee

Instructed by Edward Nathan Sonnenbergs Inc

For the Respondent:

Adv. N Ralikhuvhana

instructed by Katlego Ralikhuvhana Mokgolo Inc.

Date of hearing: 22 May 2025

Date of judgment: 23 May 2025