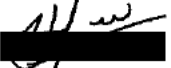




**IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)**

Case No.: 2107/2025

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES/NO
<u>13 MAY 2025</u> DATE	 <u>FOURIE AJ</u> SIGNATURE

In the application between:

DN SIBANYONI

APPLICANT

and

THE SPEAKER OF THE CITY OF MBOMBELA

FIRST RESPONDENT

THE MAYOR OF THE CITY OF MBOMBELA

SECOND RESPONDENT

THE CITY MANAGER OF THE CITY OF MBOMBELA **THIRD RESPONDENT**

THE COUNCIL OF THE CITY OF MBOMBELA

FOURTH RESPONDENT

**THE MEC FOR CORPORATE GOVERNANCE,
HUMAN SETTLEMENT AND TRADITIONAL
AFFAIRS, MPUMALANGA PROVINCE**

FIFTH RESPONDENT

JUDGMENT

FOURIE AJ

INTRODUCTION:

- [1] The matter at hand concerns an application in which the Applicant seeks certain declaratory orders declaring certain directives, reports and resolutions of the Respondents unlawful and to have them set aside.
- [2] Initially when the application was opposed, the Second to Fourth Respondents also issued a Counterapplication to declare a certain resolution that the Respondents themselves had taken, in respect of the employment of the Applicant, and to appoint the Applicant as the Chief Financial Officer be declared unlawful, invalid and in contravention of Section 56 of the Local Government and Municipal Systems Act of 2000.
- [3] After engagement by the Court, Advocate Zwane, appearing on behalf of the Second to Fourth Respondents, specifically on the urgency of the Counterapplication, the Counterapplication was withdrawn. The concession by Advocate Zwane on behalf of his clients was well-made in that their application, specifically the Notice of Motion part thereof made no mention of a request for the matter to be heard as one of urgency and similarly their papers substantiating the application did not set out a case in respect of urgency at all. The submission initially by Advocate Zwane that the urgency ought to “piggyback” on the urgency of the Applicant’s case is a principle foreign to our law and one which the Court would in any event not have accepted. The only issue accordingly pertaining to the Counterapplication of the Second – Fourth Respondents remains the issue of costs which I will deal with later.

URGENCY:

- [4] Before the Court can deal with the issues as between the respective parties, and as in all matters of a nature such as the current where any of the parties averred the matter to be urgent, the Court is vested with the obligation to first determine whether the matter is urgent and only after making such a determination, will the merits of the application be considered.
- [5] I accept that in certain instances the merits of a matter might be intertwined with the submissions pertaining to urgency to the degree that they cannot be separated, but I do not believe the current matter is one where that is the case. I have similarly not been advised by any of the counsel that they wish to deal with the matter as a whole as a result of the aforesaid proposition.
- [6] The previous practice directives of this division expressly stated that the Court would not deal with urgent applications exceeding a specific number of pages. The current practice directives as enacted by this Court on 14 April 2025 do not allow any such provisions and it is accepted that the Court ought to deal with the matter as per the general principles pertaining to urgent applications.
- [7] Ordinarily, this Court would have appreciated the opportunity to have more time available to deal with a judgment in respect of the issue of urgency, but having considered that the matter at hand is of great public interest and the relief the parties ultimately seek might be of great public importance I have found it necessary to deal with the drafting and delivering of a Judgment on the point of urgency immediately after argument by the respective counsels on the point, to enable the Applicant, should it be necessary, to advance the remainder of her argument and pursue the relief she ultimately does.
- [8] A litigant who approaches Court for leave on an urgent basis must comply with Rule 6(12)(b) of the Uniform Rules of Court. The Rule reads as follows:

"In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the Applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reason why he claims that he could not be afforded substantial redress at a hearing in due course."

- [9] The importance hereof is that the procedure as set out in Rule 6(12) is not there for the mere 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 it claims that it 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 the 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 a normal trial date, it would not obtain substantial redress. It is important to note that the Rule requires the absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of 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 its case in this regard (**See Eastrock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others (11133767) [2011] ZAGPJHC 196 (23 September 2011)**).
- [10] There are thus two requirements that must be outlined in the Founding Affidavit in order to satisfy the requirements of the Rule (**See Salt & Another v Smith 1991 (2) SA 186 (NM) at 197 A**). Whether an Applicant has succeeded in satisfying the requirements for urgency must be determined from the contents of the Founding Affidavit (**See Il & B Marcow Caterers v Gretermans SA 1981 (4) SA 108 (C) at 111 A**).

[11] In **LUNA MEUBELVERVAARDIGERS (PTY) LTD V MAKIN & ANOTHER**¹ Coetzee J held with reference to Rule 6(12)(b) the following:

“Mere lip service to the requirement of Rule 6(12)(b) will not do, and an Applicant must make out a case in the Founding Affidavit to justify the particular extent of the departure from the norm which is involved in the time and day for which the matter be set down.”

[12] The test in as far as it relates to urgency remains, at its core whether, if the Court does not deal with the matter at the current junction, and the Court allows the matter to be heard in the normal course, whether the Applicant will be able to obtain substantial redress. Substantial redress will depend on the facts of each specific matter.

[13] The Court takes judicial notice of the fact that should a matter be enrolled to be heard on the opposed Motion Court roll as at the date of this judgment, the date obtained from the Registrar will be approximately one year from the date of such enrolment.

[14] Counsel for the Applicant, Advocate Ngwenya, premised in argument, the urgency of the Applicant on the matter of **APLENI v THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER** (65757/2017) [2017] ZAGPPHC 656; [2018] 1 ALL SA 728 GP (25 October 2017)(“hereafter **APLENI**”) where the Court held as follows:

“I hold that the application is urgent. Where allegations are made relating to abuse of power by a Minister or other Public Officials, which may impact upon the Rule of Law, and may have a detrimental impact upon the public purse the relevant relief sought ought normally be urgently considered.”

- [15] The Court accepts that, irrespective of the test regarding urgency, the notion of inherent urgency, as one that litigants loosely refer to, is a notion the Courts ought generally to disregard. Each matter premised upon the facts and legal principles applicable to that matter needs to be set out explicitly, and proven in order for a Court to find that matter to be urgent.
- [16] If a party fails to set out explicitly why the matter is to be regarded as urgent, they do so at their own peril.
- [17] I pause for a moment to evaluate the requirements of Rule 6(12)(b) and specifically the fact that an Applicant is required to set forth explicitly the circumstances which they aver render the matter urgent. The fact that the Legislator deemed it necessary to impress upon litigants the need to make certain express and explicit statements indicates the importance of highlighting the relevant facts for the Court's consideration when evaluating whether a matter is urgent. It can never be accepted that the Courts are required to, by matter of inference deduct from a reading of affidavits and annexures that a matter is to be regarded as urgent.
- [18] The reliance by the Applicant on the matter of **APLENI** *supra* is correct but the principles of **APLENI** need to be evaluated to ensure that compliance in respect of **APLENI** has been met in order to enforce the same relief that the Court granted in the matter of **APLENI**. The matter of **APLENI** was properly evaluated and I align myself with the evaluation thereof by Yacoob J in the matter of **GOVENDER v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS** (2024/088827) [2024] ZAGPJHC 779 (20 August 2024).
- [19] Yacoob J held that it must be noted that **APLENI** did not set a precedent that any allegation of abuse of public power resulted in an automatic enrolment on the urgent roll. It required a probable impact on the Rule of Law and an impact on

the public purse. Then the relief would *normally* be urgently considered. This does not oust the Judge's discretion. The Judge would still have to consider all the relevant elements for a claim of urgency. There is nothing in **APLENI** that exempts an Applicant from justifying the degree of urgency imposed. To mention the principles of **APLENI** is simply not sufficient; they need to be proven.

[20] I accordingly align myself with the view that **APLENI**, although finding application and deserving serious consideration in respect of the current matter, does not dispense with the normal principles pertaining to urgency being proven which in essence would be the principles as enunciated by **EAST ROCK** *supra* dealing with substantial redress and then the specific degrees of urgency.

[21] The fact that judicial resources are a scarce commodity fortifies the position that the urgent court ought to be reserved for only the most deserving of cases which necessitates litigants "jumping the queue" of other litigants who were patiently waiting in line for their matters to be heard. It has long been held that the urgent Court is not the forum in which to argue and evaluate overly technical matters or matters of extremely voluminous papers. A Court dealing with an urgent application simply does not have the luxury to prepare on overly technical issues or overly voluminous papers.

[22] It similarly places opposing litigants at an inconvenience, as, if the matter is overly voluminous or overly technical, parties may not be in a position to advance their case as sufficiently and thoroughly as they would have ordinarily liked if the matter were brought on the normal roll.

[23] At least to a certain degree, the time frames chosen in the current matter has indeed affected the Second to Fourth and Fifth Respondents as they indicated at the commencement of the matter they would have wanted to still file a Replying Affidavit to the Explanatory Affidavit of the First Respondents who did not oppose or support the application but explained their position with the filing of an affidavit. At least to this degree, the Court needs to accept that the manner in which the

application was brought had some prejudice in the preparation of papers that parties would have liked to file before the matter was heard.

[24] I agree that the matter at hand is one of great public interest, the position the Applicant holds or at least held up until the termination of her employment necessitates full transparency in how this matter is dealt with and given the importance of the issues at hand, not only pertaining to the Applicant, but also the Rule of Law, this Court cannot be left to speculate or guess on certain issues which are crucially important to dispense with the matter and for justice to be done.

[25] The Applicant, in substantiating urgency in the matter, in her Founding Affidavit, deals with urgency in paragraphs 28 and 29 of her affidavit.

[26] Besides the Applicant stating that the matter is inherently urgent, an aspect with which I have already dealt, she states that:

[26.1] The matter involves an allegation about the abuse of public power.

[26.2] The matter involves her fundamental right to job security and dignity; and

[26.3] The matter involves public interest.

[27] Insofar as it relates to substantial redress, she states that she will not be afforded substantial redress in due course because the effect of the termination is that she will lose her salary, which is the only source of her income.

[28] The substantial redress portion of the Applicant's statements relates only to the proposed financial effect on the Applicant if the matter is not disposed of in this Court.

- [29] The Applicant does not deal with the issues of substantial redress insofar as it relates to the abuse of public power or the effect on the public purse.
- [30] Having premised her application on the principles of **APLENI** *supra*, the Court would have expected the Applicant to at least deal with these requirements when addressing substantial redress also. The Applicant's founding papers are, in essence, silent on the effect on the public purse. During the argument, Advocate Ngwenya, appearing on behalf of the Applicant, requested the Court to draw an inference to the effect on the public purse from the submission that the matter involves public interest and the fact that the Applicant's office is closely connected to service delivery and certainty regarding the office of the CFO. The Applicant did not address in any way how, pending the matter being heard on the normal roll, the decisions of the Respondents would impact not the Applicant in her personal capacity but the public purse and the general working of the Respondents.
- [31] I have already stated that the Applicant needed to explicitly set out these issues in her Founding Affidavit.
- [32] The Applicant wished for the court to read into her Founding Affidavit the content of her answering affidavit in a previous litigious process. In paragraph 17 of her founding affidavit, she mentioned her previous affidavit for "the benefit of the court". She does not ask for the affidavit to be incorporated, nor does she seek the court to take specific notice of specific portions on which she relies to substantiate the relief she seeks.
- [33] The general principle is that a party cannot merely annexe a document or an affidavit to its papers and require the court to prepare on the document without having been directed to which portions of the document or affidavit they will be relying on. I believe this general principle finds even greater traction when a matter is heard in the urgent court.

[34] I agree with the dictum of Joffe J where it was stated in the matter of **SWISSBOROUGH DIAMOND MINES (PTY) LTD AND OTHERS v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 1999 (2) SA 279 (T)** at p 324 F-G that:

“ Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to their affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so, the essence of our established practice would be destroyed. A party would not know what case must be met.”

[35] In her Replying Affidavit, the Applicant concedes that she would receive redress in the normal course but indicates that the redress would not be substantial. The substantial portion thereof again deals only with her personal interest and not the interest of the public or the public purse.

[36] Insofar as it relates to the Applicant personally, the Court is not persuaded that the unavailability of finances is deserving of a matter of the current magnitude and complexity being heard on the urgent roll. If the Courts are to allow matters of a purely personal nature relating to the termination of their employment to be heard on the urgent roll purely as a result of employment being terminated, the Courts, and specifically the Urgent Courts, would be flooded with similar applications. I am fortified in this position to state that, if the Applicant ultimately succeeds with the relief that she is seeking, she will be reinstated and compensated for the manner in which she has been dealt with.

[37] Speaking to the technical nature of the matter it is common cause that the issues at hand are not issues the Courts are regularly faced with and I am fortified in this position by the fact that, despite being engaged thereon the counsel appearing in the matter were still not in agreement on the applicability or not of whether the matter is to be regarded as a matter seeking a declarator order,

whether PAJA finds application and whether the matter is to be dealt with under the auspices of the Labour Relations Act. Each of the respective counsels held their separate views on all of these issues, and it indicates the technical nature of the matter at hand, which this Court, as an urgent Court, ought not to be burdened to deal with or dispose of.

- [38] Due to the fact that the Applicant has remained silent on specific averments that could lead the Court to find the matter to be sufficiently urgent, together with the fact that the matter is extremely technical and complicated in nature and having regard to the fact that the matter is of great public importance and that a correct ultimate decision in respect of the matter after proper evaluation needs to be achieved, I cannot find that the matter is sufficiently urgent to be dealt with as such by this Court.

COSTS:

- [39] The normal principles relating to costs are trite in that a successful litigant ought to be entitled to recover its costs from an unsuccessful litigant. In the current matter, the Applicant was unsuccessful in her submissions pertaining to urgency. Similarly, the Second to Fourth Respondents were unsuccessful in their submissions pertaining to the Counterapplication. The Second to Fourth Respondents cannot escape the cost order that flows from their Counterapplication, which was evidently made in error.
- [40] Advocate Dlamini SC, on behalf of the Fifth Respondent, argued that costs ought to include the cost of both senior and junior counsel. The Applicant and the Fifth Respondents employed the services of senior and junior counsel, Advocate Ngwenya being regarded as senior in stature although not yet in title, and I am satisfied that this would be an appropriate order.

APPROPRIATE ORDER:

[37] For all the reasons before, the following order is made:

1. The application is struck from the roll for want of urgency.
2. The Applicant shall pay the Second to Fourth and the Fifth Respondents' costs on a party and party scale, Scale B, which costs shall include in as far as it refers to the Fifth Respondent to the costs of both senior and junior counsel employed.
3. The Second to Fourth Respondents shall pay the Applicant's costs in respect of the Counterapplication withdrawn at the hearing of the matter.
4. The parties shall jointly approach the Registrar to compile a Form B for the matter to be case managed and for the allocation of a trial date on the normal Motion Court roll, which case management shall be completed by 25 May 2025.

A handwritten signature in black ink, appearing to be 'H F Fourie', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

**H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA**

Counsel for the Applicant:

Adv TS Ngwenya

Adv L Makamu

Instructed by:

**NTIWANE MGIJIMA ATTORNEYS INC
C/O NTHABISENG MADOA INC**

Counsel for the First Respondent: Adv TC Mokhare
Instructed by: **GERHARD LOURENS INC**

Counsel for the Second to Fourth Respondents: Adv Zwane
Instructed by: **WS NKOSI ATTORNEYS INC**

Counsel for the Fifth Respondent: Adv MW Dlamini SC
Adv N Nkosi
Instructed by: **OFFICE OF THE STATE ATTORNEY
C/O RS BHILA ATTORNEYS**

Judgment reserved on: 13 May 2025
Date of delivery: 13 May 2025
