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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Case no: 2025/072679

In the matter between:

**OLD MUTUAL LIFE ASSURANCE COMPANY
(SOUTH AFRICA) LIMITED**

APPLICANT

and

DAVID MAKHUBELA

RESPONDENT

Coram: MANTAME J

Heard: 11 September 2025

Delivered: 16 February 2026

ORDER

- 1 The *rule nisi* is discharged.
- 2 The applicant is ordered to pay costs of this application on Scale B.

JUDGMENT

Mantame J

Introduction

[1] The applicant (Old Mutual) seeks a final interdict preventing the respondent (Mr Makhubela) from allegedly defaming, communicating, intimidating, threatening and/or harassing Old Mutual and its employees, after a *rule nisi* was granted by this Court on 22 May 2025 on an urgent basis. The return date for the *rule nisi* was 29 July 2025.

[2] After the *rule nisi* came to the attention of the respondent, the matter became opposed and removed from the unopposed roll on 29 July 2025. On 30 July 2025, an order was issued postponing the matter to the opposed roll on an expedited basis on 12 September 2025.

[3] However, the matter served before this Court on 11 September 2025. After the respondent raised the issue that the matter was not properly set down before this Court on that date, and it has not been withdrawn on the roll of 12 September 2025, the parties were ultimately *ad idem* that the matter would be argued and finalised before this Court.

Background Facts

[4] Old Mutual approached this Court on an urgent *ex parte* basis, having been embroiled with the respondent in an array of disputes since September 2024, for an order interdicting the respondent from communicating, intimidating, threatening, and/or harassing Old Mutual and its employees. The respondent is the sole director of Madlophe Business Enterprises Propriety Limited (Madlophe) operating in Bushbuckridge, Mpumalanga.

[5] The respondent was initially employed by Old Mutual Financial Services industry in 1998 as a Sales Advisor, currently known as a Financial Advisor in Bushbuckridge, Mpumalanga. He worked his way up, and in 2012, he held the position of Branch Sales Manager. The respondent later resigned and worked for himself at Madlophe. On 29 August 2022 and 1 August 2023, he and Madlophe entered into written agreements as independent contractors with Old Mutual and were to provide financial services to Old Mutual.

[6] On 17 September 2024, Old Mutual, represented by the Broker Distribution Executive, issued a notice of termination of agreements in writing to the respondent and Madlophe with effect from 30 September 2024. This termination notice was said to be arguably defective as it was contrary to the terms of Clause 25 of their written contract. Madlophe and the respondent challenged the validity of the termination by Old Mutual at the regional court in Thulamahashe, Mpumalanga. This application was not opposed by the applicant, and the court issued an interim order on 30 September 2024 in favour of the respondent. The interim order issued called for Old Mutual to show cause why a final order should not be granted on 20 November 2024.

[7] Old Mutual, through its attorneys, proceeded to issue a new letter of termination of contract on 25 October 2025 that remedied the non-compliance with the agreement. No reference was made to the legal standing of the initial letter of termination.

[8] The regional court granted the final order on 20 November 2024, and the order was served on Old Mutual on 4 December 2024.

[9] Since the 25 October 2024 termination notice was not part of the regional court order, the respondent and Madlophe approached the Mbombela High Court on an urgent basis for reinstatement of the agreements. Old Mutual opposed this application on 28 January 2025 and was struck from the roll on 29 January 2025. Pursuant thereto, a litany of unsavoury correspondence was exchanged between the applicant's and the respondent's attorneys.

Impugned Conduct

[10] The applicant contended that after receipt of the regional court order on 4 December 2024, the respondent and Madlophe confirmed that the 25 October 2024 termination notice came to their attention. The respondent's attorneys challenged the applicant's attorneys' authority in respect of these notices. They demanded to know the identity of the relevant employees of Old Mutual who instructed the applicant's attorneys. If that demand was not met, the respondent and Madlophe would ignore the contents of these notices and refer the matter to the Old Mutual Board of Directors, Old

Mutual Legal Department, and Old Mutual Forensics for investigation that Old Mutual was put into this disrepute without its knowledge.

[11] The applicant further alleged that on 4 December 2024, at approximately 17:18, Dewald Heenop, the Executive Head of Sales, Old Mutual Mass and Foundation Cluster, received an SMS threat from a cell number 0[...], which reads as follows:

‘Please note that you will be arrested should you act contrary to the final order.’

[12] On 5 December 2024, the applicant’s attorneys addressed a correspondence to the respondent’s attorneys demanding immediate cessation of all communication with the employees of the applicant and that all communication be directed to their offices, failing which an application will be made for an interdict compelling the demand.

[13] On 29 January 2025, the respondent addressed correspondence to Jayaseelan, Head of Franchise Distribution at Old Mutual, and Caroline Mokwena of Old Mutual, alleging that Old Mutual had failed to make payments due to the respondent and Madlophe, failed to comply with court orders, unlawfully blocked access to Old Mutual’s systems “without any explanation and without waiting for the court process to unfold”, accused Old Mutual of racist conduct, and threatened to publish the a foregoing allegations to the media, the public and the FSCA.

[14] On 10 February 2025, the applicant's attorneys addressed a cease-and-desist letter to the respondent's attorneys, from intentionally defaming, injuring the reputation and communicating with employees of Old Mutual.

[15] On 13 February 2025, the respondent's attorneys addressed a letter to the applicant's attorneys, attaching the same letter that had been sent to the Old Mutual CEO, the Old Mutual Executive Board members, various Old Mutual group companies, the Head of Old Mutual Group Forensics, and the Chief Legal Officer and Head of Legal of the Old Mutual Group. The letter further attached correspondence dated 5 February 2025 from the respondent's attorneys to the Provincial Manager and the HR Manager, together with a copy of the regional court order, alleging that Old Mutual had unlawfully terminated the agreements and failed to comply with the orders of the regional court.

[16] On the same day, the Chief Legal Officer of Old Mutual responded to this letter, confirming that the issues addressed in the letter are the subject of ongoing legal proceedings in the High Court and refused to address the allegations in the correspondence. The letter implored the respondent's attorneys to address all issues with the applicant's attorneys and refrain from engaging directly with the employees of Old Mutual.

[17] On 22 February 2025 the respondent addressed correspondence to Mr Trevor Manuel (Mr Manuel), the Chairperson of the Board of Directors, and attached copies of correspondence of 5 and 13 February 2025 stating that Old Mutual failed to comply with the regional court orders, unlawfully terminated agreements as a consequence of the

respondent's unwillingness to pay subscription fees, failed to make payments due to Madlophe and the respondent and unlawfully blocked access to the Old Mutual system.

[18] Further, the respondent communicated by telephone, email and message with Surina Meintjies, Old Mutual's Head of Compliance and made statements similar to those made to Mr Manuel. He requested that these allegations be investigated.

[19] On 6 May 2025, the applicants attorneys sent another correspondence to the respondent's attorneys reminding them that a cease and desist letter was sent to them by Craig McLeod, the Chief Legal Advisor, whereby a demand was made for them to cease and desist from engaging in direct communication with the employees of Old Mutual, and that they should address all the correspondence intended for the employees to their attorneys.

[20] On 12 May 2025, the respondent addressed a correspondence to Ms Meintjies, lodging a complaint in respect of the failure by Old Mutual to take action against their employees.

[21] On 16 May 2025, the respondent addressed a letter to Craig McLeod, Bevin Gajoo (legal advisors) and to Louis Kriel, an executive at Old Mutual in the legal department, complaining about the unlawful actions and that if the injustice made to them is not reversed and payments made to them, they will report the matter to the Western Cape Law Society. In fact, the Law Society matter was said to be spearheaded by the Political Party lawyers, the labour desk and the media.

[22] Old Mutual, as a trading corporation, postulated that it has a right to its reputation and not to be defamed. The fact that the respondent transmitted various correspondences to various employees of Old Mutual containing allegations to the effect that it is engaged in racist conduct, unlawful conduct, not law-abiding, engaged in corrupt activities, and discriminatory conduct is defamatory.

[23] In communicating with the employees of Old Mutual, the purpose thereof is aimed at influencing the outcome of the Mpumalanga applications and to extort Old Mutual and the employees into reinstating the agreements. The communication is intended to cause mental, psychological or economic harm to Old Mutual and its employees if the respondent's demands are not met, including a threat to publish defamatory statements to the public and the media. Accordingly, it was asserted that the respondent's communication constitutes harassment of Old Mutual and its employees.

[24] To the extent that Old Mutual had a duty to protect its reputation and that of its employees, it was suggested that it had the necessary *locus standi* to bring the application. Likewise, since employees such as Mr Williamson, Mr McLeod, Mr Manuel and Ms Meintjies fall within the jurisdiction of this Court, this Court has the requisite jurisdiction to hear this matter. The communication by the respondent was published within the jurisdiction of this court.

[25] Old Mutual stated that the respondent, in his email of 16 May 2025, imposed a timeline for compliance with his demands by 22 May 2025, failing which he threatened to publish defamatory statements in respect of Old Mutual and its employees in public, the media and to political parties. In short, this conduct amounted to extortion of Old Mutual. The threats highlighted the potential damage to Old Mutual's business interests and reputation. The threats were viewed by Old Mutual as imminent, and if Old Mutual were to bring this application in the ordinary course, it would not be afforded substantial redress. Similarly, were notice of this application to be given to the respondent in the ordinary course, there was a possibility that he would publish the defamatory statements before interdictory relief could be obtained. It was important that the matter be brought on an urgent *ex parte* basis.

[26] In opposing this application, the respondent raised several points *in limines*, i.e. lack of urgency; non-compliance with Rule 41A, non-disclosure of material facts in the *ex parte* application, non-disclosure that Old Mutual failed to comply with the Court Order dated 20 November 2024, non-disclosure that the respondent has policies and investments with Old Mutual, non-disclosure that Old Mutual unlawfully, revoked the contracts and non-disclosure that Old Mutual has failed to pay the respondent's commission.

[27] The respondent pointed out that Old Mutual relied on the events contained in the letter dated 16 May 2025, whereas the whole dispute has its origins in the cancellation of the contracts on 17 September 2024. Even though Old Mutual threatened to bring an

urgent application on 10 February 2025, it waited until 22 May 2025 to launch this application. In their view, this amounts to an abuse of Court process.

[28] When the dispute arose, the respondent always wanted to engage Old Mutual to resolve it amicably, so the urgency in launching the application was self-created. The respondent insisted that he has a right to argue the point on urgency as he was not given notice to attend Court when the *rule nisi* was granted on an expedited basis. The Court has to hear him on urgency before proceeding to the confirmation of the *rule nisi*.

[29] Further, Rule 41A (2) requires that in every new application proceeding, the applicant shall, together with the notice of motion, serve on each respondent a notice indicating whether such applicant opposes referral of the dispute to mediation. The respondent at all times intended to engage Old Mutual to resolve the dispute amicably. A deliberate failure by Old Mutual to comply with this rule renders the urgency self-created.

[30] The applicant, in bringing the urgent application, contended firstly that it failed to disclose all material facts which might influence an order being obtained *ex parte*. For instance, Old Mutual failed to disclose that it did not comply with the Court Order of 20 November 2024. That order was valid as no attempt by Old Mutual was made to rescind, vary or appeal it. Secondly, the respondent had pensions and investments with Old Mutual worth approximately R1 416 824. 90. If he is then interdicted from communicating with Old Mutual, he would be unable to claim these funds, as that would constitute a violation of the Court Order. Thirdly, Old Mutual failed to disclose that the

contracts were unlawfully terminated without any breach on the side of the respondent. As such, no substantial reason/s was put forward to revoke them. Fourthly, despite Old Mutual having cancelled the contracts, it proceeded to accept the respondent's new business until December 2024. Old Mutual has not compensated the respondent for that business.

Issues

[31] Whether Old Mutual is entitled to a final interdict, and whether the points *in limine* raised by the respondent are valid.

Discussion

[32] To the extent that the urgent *ex parte* order that was granted by this Court, having the respondent excluded from participation, this point will now be dealt with upfront. The respondent complained about the fact that the *ex parte* urgent order was unprocedurally and unethically taken. The respondent resides in Mpumalanga, Bushbuckridge. There has been a history of litigation between the parties, and both litigants were legally represented. The fact that Old Mutual proceeded with the application without notifying the legal representatives of the respondent speaks to a lack of ethics from the applicant. The urgent application was threatened in February 2025 but was filed in May 2025. In this situation, the urgency was self-created.

[33] A requirement of utmost good faith is central to an *ex parte* application.¹ The SCA in *NDPP v Basson* held the following:

'Where an order is sought *ex parte*, it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision and the withholding or suppression of material facts, by itself entitles a court to set aside an order, even, if the non – disclosure or suppression was not wilful or male fide (*Schlesinger vs. Schlesinger*, 1979 (4) SA 342 (W) at 348E-349B).'²

[34] The fact that there has been ongoing litigation between the parties should have triggered Old Mutual to notify the respondent about the launch of the urgent application. The allegations relied on in obtaining an order from Mayosi AJ on 22 May 2025 were already known to the respondent in December 2024. In fact, the respondent threatened to publish the allegations in the media and public on 29 January 2025 already. Hence, Old Mutual, on 10 February 2025, proceeded to respond with a cease-and-desist letter that threatened to launch an urgent application in February 2025.

[35] The key requirement for an urgent *ex parte* order is that the matter complained about must be extremely urgent. The applicant must not have been able to obtain redress in the normal course. The applicant must act with the utmost good faith (*uberrima fides*). It must disclose all relevant facts, even those against the applicant's case. In the *ex parte* application, the court will make a decision based on the version of the applicant. Evidence tendered by the applicant must show that, without immediate

¹ *NDPP v Basson* 2002 (1) SA 419 (SCA) at para 21; *Recycling and Economic Development Initiative of SA NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at paras 45 – 52.

² *Ibid* para 21.

action, damage would be caused. Although Old Mutual relied on the respondent's email of 16 May 2025 that it intended to make public defamatory statements against Old Mutual and its employees, the evidence on record shows that unsavoury interaction between Old Mutual and the respondent had been ongoing since September 2024. There was no risk of imminent harm whatsoever.

[36] The respondent should have been given notice and afforded an opportunity to respond to these allegations adequately before the hearing of the *rule nisi* on 22 May 2025. The fact that the respondent was legally represented should have been a compelling reason for Old Mutual to advise his legal team. In fact, they would have been able to obtain some form of an undertaking from the respondent before the *rule nisi* was granted.

[37] It is trite that *ex parte* procedure should be invoked only where there is good cause or reason for the procedure, such as when notice is given that would defeat the very object for which the order is sought. The threatening correspondence from the respondent to different recipients had been going on for months before the *ex parte* urgent application was brought. It did not become known in May 2025.

[38] Despite Old Mutual acknowledging that it is engaged in an escalating 'campaign of defamation' with the respondent at the Mbombela High Court, Mpumalanga Division, it did not explain why these allegations were not finalised in the Mbombela High Court.³ Having pointed out that this is an 'escalation of defamation', it, however, decided to

³ Record page 8 para 10–11.

commence with a new urgent application in a court of equal status in a different division. That points to the fact that Old Mutual was resolute in bringing these proceedings behind the respondent's back.

[39] Sutherland J, in *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others*⁴ recognised that:

'The principle of *audi alterem partem* is sacrosanct in the South Africa 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 shall 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.'⁵

[40] In this matter, there is nothing out of the ordinary and exceptional that happened between September 2024 and May 2025 that compelled the matter to be heard on an urgent *ex parte* basis.

[41] *Ex parte* orders are granted on the basis that the applicant's claim is so strong, and the prejudice to the applicant from giving notice to the respondent is likely to be so severe, that a court can safely dispense with the general necessity to hear from the person against whom the *ex parte* order is to be granted. The test for granting such an order is strict and exact. Those seeking *ex parte* relief must show that giving notice of

⁴ (2015/33205) [2015] ZAGPJHC 293.

⁵ At para 22.

their application to the person whom they seek relief would defeat the purpose of that relief, and that without the relief being granted *ex parte*, the applicant would suffer irreparable harm.⁶

[42] In my opinion, the respondent's right to a fair hearing required that his side of the story be heard before an interim order is granted. I am not at all satisfied that this is a matter that should have been brought on an *ex parte* basis, given the parties' history of litigation. No harm was to be caused by giving him a notice of proceedings. The respondent resided kilometres away from this Court's jurisdiction. The fact that the applicant chose to bring these proceedings in this Court demonstrates that its object was to surprise him with a Court Order without him being made aware of the procedure that led to the granting of that Order.

[43] No exceptional circumstances were set out for Old Mutual to deviate from the requirements that are set out for the granting of an order *ex parte*. For this Court to grant a final order emanating from a procedurally flawed process would be an abuse of Court process. Not only had Old Mutual failed to establish urgency based on facts and/or allegations that had been prevailing in the preceding months, but it also failed to demonstrate why the application was brought on an *ex parte* basis. In my view, this point disposes of the matter in its entirety.

[44] For these reasons, the following order shall issue:

- 1 The *rule nisi* is discharged.

⁶ *Le Grellier and Another v Ramionsky and Another* 2023 JDR 4369 (GJ) at para 7.

2 The applicant is ordered to pay costs of this application on Scale B.

B P MANTAME
JUDGE OF THE HIGH COURT

Appearances

For the applicant: Adv. Mukesh Vassen

Instructed by: Amien Hoosain/Sinethemba Khumalo Walkers Inc.

For the respondent: Adv. N Mawela

Instructed by: T Mahlakoane