IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 2010/2020

Date Heard: 11 December 2020

Date Delivered: 21 January 2021

In the matter between:

MAIN ROAD CENTURION 30178 (PTY) LTD	APPLICANT

and

FIXTRADE 378 (PTY) LTD	FIRST RESPONDENT
CHRISTO GROBLER	SECOND RESPONDENT
THE MINISTER: NATIONAL DEPARTMENT OF HEALTH	THIRD RESPONDENT
SOUTH AFRICAN PHARMACY COUNCIL	FOURTH RESPONDENT
KOUGA LOCAL MUNICIPALITY	FIFTH RESPONDENT
HUMAN CARE PHARMACY (PTY) LTD t/a CM PHARMACY	SIXTH RESPONDENT
THE DIRECTOR-GENERAL: DEPARTMENT OF HEALTH	SEVENTH RESPONDENT

JUDGMENT

MULLINS AJ

INTRODUCTION

[1] On 1 September 2020, and in accordance with Rule 12(a)(i) of the Eastern Cape Joint Rules of Practice ("the Local Rules"), the Applicant placed a certificate of urgency

before a judge in chambers in order for the judge to consider whether to certify the matter as urgent or not and, if so advised, to issue a directive as to the further conduct of the matter.

[2] The judge in question was not satisfied that a case had been made out for urgency and issued the following directive:

> "*1. On perusal of the certificate of urgency, I am not persuaded that "prima facie" the matter is urgent. Accordingly the Registrar may issue the papers and the application be dealt with in the ordinary course.*
>
> *2. The application should be set down only once all the necessary affidavits have been filed, upon a date arranged with the DJP."*

[3] I deal below with the further conduct of the matter and why this became such a contentious issue.

THE PARTIES

[4] The Applicant is a private company which is the holder of a pharmacy licence issued in accordance with s22 of the Pharmacy Act, 53 of 1974, read with the Regulations thereto ("the Pharmacy Act" and/or "Regulations", as the case may be). The Applicant trades as Oos-Kaap Pharmacy in Main Street, Humansdorp.

[5] The First Respondent is a private company, which is the owner of a property in Humansdorp, also situated in Main Street, approximately 270m from the Applicant's pharmacy ("the Premises").

[6] The Second Respondent is a pharmacist, who holds a licence issued by the Fourth Respondent to practice as such.

[7] The Third Respondent is the National Department of Health, which department is, *inter alia*, responsible for matters relating to the licencing of pharmacists and pharmacies ("the Department"). No relief was sought against the Department in this application.

[8] The Fourth Respondent is the South African Pharmacy Council, a statutory body established in accordance with the Pharmacy Act, whose function is, *inter alia*, to regulate the pharmacy profession, one of its functions being to issue licences to pharmacies and pharmacists ("the Council"). No relief is sought against the Council in this application.

[9] The Fourth Respondent is the Kouga Local Municipality, a local municipality within which the town of Humansdorp is situated, whose constitutional obligation is, *inter alia*, to enforce the legislation applicable to land use rights and building works within its jurisdiction ("the Municipality").

[10] The Sixth Respondent is a private company which entity intends to conduct the business of a pharmacy from the Premises. The Second Respondent is a director of the Sixth Respondent.

[11] The Seventh Respondent is the Director-General: National Department of Health, which official has also been cited insofar as he/she may have an interest in the outcome of the application.

[12] The Sixth and Seventh Respondent's were joined as a result of an application for joinder brought by the Applicant, which application was not opposed. The reason for the joinder of the Sixth Respondent being apparent from what is set out below. The Director-General was belatedly cited in that it would appear that this official should have been cited rather than the Department. For this reason an amendment was also sought to cite the Department as: The Minister: National Department of Health. The amendment was not opposed. For present purposes nothing turns on this aspect and for convenience sale I will refer to the Third and Seventh Respondents collectively as "the Department".

[13] The First, Second and, after its joinder, the Sixth Respondents oppose the relief sought by the Applicant. The other Respondents elected not to enter the fray.

THE RELIEF

[14] The Applicant initially sought a final interdict, alternatively an interim interdict pending a final interdict, further alternatively an interim interdict pending the institution of a review application. Costs were only sought against those Respondents opposing the application.

[15] Prior to the matter being argued the Applicant applied to amend its notice of motion, which application was not opposed, to read as follows:

> "*1. That the First, Second and Sixth Respondents be interdicted from:*
>
> *1.1. Continuing with any construction activities or renovation work in respect of the intended operation of a pharmacy and clinic on the property known as Erf 1720, Humansdorp, Eastern Cape ("the subject property").*

1.2. Commencing or continuing with the business of a pharmacy and clinic from the subject property until such time as the following approvals have been obtained:

1.2.1. The issuing of a pharmacy licence in terms of Section 22(2) of the Pharmacy Act, 53 of 1974 and the Regulations promulgated in terms thereof;

1.2.2. Consent use from the Fifth Respondent, authorising, in terms of the Land Use Planning Ordinance, 15 of 1995 ("LUPO") read with the provisions of the Spatial Planning and Land Use Management Act, 16 of 2013 ("SPLUMA"), the land use of a pharmacy and clinic to be operated from the subject property; and

1.2.3. The approval of building plans and the issuing of an occupancy certificate in terms of Sections 4(1), 7(1) and 14 of the National Building Regulations and Building Standards Act, 103 of 1997 ("the Building Standards Act").

*2. **In the alternative to paragraph 1 above,** that an interim interdict be granted in the same terms (paragraph 1.1 and 1.2 above) pending the final determination of an application for a final interdict, **further alternatively** the finalisation of a review application, aimed at the review and setting aside of:*

2.1. The pharmacy licence granted in terms of Section 22 of the Pharmacy Act, 53 of 1974 in respect of the subject property;

2.2. The registration and issuing of registration certificate by the Fourth Respondent in respect of the subject property.

3. *That the Fifth Respondent be directed to, in terms of its empowering provisions, including the provisions of LUPO, read with the provisions of SPLUMA and the Building Standards Act, prohibiting the First and Second Respondents from acting unlawfully and taking steps to prosecute such Respondents in terms of the aforesaid empowering legislative provisions.*
4. *That the First and Second Respondents be ordered to pay the costs on the scale is between attorney and client jointly and severally, the one paying the other to be absolved.*
5. *Further and/or alternative relief."*

[16] By the time the matter came to be argued what work that had to be done on the Premises had been completed and the pharmacy in question had opened for business. In addition, the Applicant had launched the threatened review application. In the circumstances the relief sought against the Municipality had become moot, and a final interdict was no longer relevant or appropriate. As I understand it the relief now being sought by the Applicant is the further alternative relief contained in paragraphs 2 and 4 of the amended notice of motion.[1]

THE LEGISLATIVE FRAMEWORK

[17] Pharmacists and pharmacies are governed by the Pharmacy Act and Regulations promulgated in accordance therewith.

[18] According to sec 22A of the Pharmacy Act the Department may prescribe who may own a pharmacy, the conditions of such ownership and the basis upon which ownership may be withdrawn.

[1] Whether the omission in paragraph 4 that the Sixth Respondent also be responsible for costs is an oversight is not clear. The issue was not addressed in argument.

[19] According to sec 22(1) of the Pharmacy Act a person authorized in terms of s22A shall apply to the Department for a licence for premises from which to operate a pharmacy, which shall to issue or refuse such licence.

[20] According to sec 22(2) of the Pharmacy Act a person issued with a licence shall notify the Council thereof in writing, which shall make a record thereof.

[21] The Regulations dealing with Ownership and Licencing of Pharmacies (GN R533, dated 25 April 2003) defines the various categories of pharmacies, a "Community Pharmacy" being one of them, which is defined as follows:

> *"Community pharmacy means a pharmacy wherein or from which some or all of the services as prescribed in terms of regulation 18 of the Regulations Relating to the Practice of Pharmacy are provided to the general public or any defined group of the general public, but excludes an institutional pharmacy."*

[22] If one has reference to the Regulations Relating to the Practise of Pharmacy (GN R1158, dated 20 November 2000), reg18 states the following in respect of a community pharmacy:

> *"18. Except as provided for in the Medicines Act, the following services pertaining to the scope of practise of a pharmacist may be provided in a community or institutional pharmacy –*
>
> *…*

6. the promotion of public health in accordance with guidelines and standards as determined by a competent authority which includes but shall not be limited to:

…

(b) the provision of immunisation, mother and childcare, blood pressure monitoring; health education; blood-glucose monitoring; screening tests for pregnancy; family planning; cholesterol screening tests; HIV screening tests; urine analysis; and visiometric and audiometric screening tests;

…"

[23] The relevance of this last quoted regulation, particularly sub-regulation (b), is dealt with below.

[24] Reference was also made by the Applicant to a document titled Guidance for the Issuing of Licences for Pharmacy Premises, (published in the Government Gazette on 22 December 2017) ("the Guidelines"), which will also be referred to hereunder.

THE APPLICANT'S CASE

[25] According to the Applicant the following are the relevant background facts:

(a) On 18 August 2020 the Applicant's director, one Nel, heard a rumour about a competing pharmacy and clinic that intended to conduct its business from the Premises;

(b) As the Premises are zoned Business 1, which does not permit the operation of a clinic, this would be in contravention of LUPO and SPLUMA, as (according to the Applicant) a clinic does not fall within the permitted land use rights. Attached to the Applicant's papers is the zoning certificate for the Premises, which sets out what is permitted under Business 1;

(c) On 20 August 2020 the Applicant's attorneys sent a letter to the Department complaining that, unbeknown to the Applicant, a licence to operate a pharmacy from the Premises had been issued, that the Applicant had a vested interest which had been ignored and that it intended lodging an appeal against the decision. The Applicant also requested copies of all the relevant documentation in order to lodge the appeal;

(d) On the same day a lengthy letter was sent to the First and Second Respondents stating, *inter alia*, that:

(i) It was their instructions that the First and Second Respondent intended to establish a pharmacy *"with an adjoining clinic"* on the Premises;

(ii) The Applicant had established that, *prima facie*, the intended pharmacy/clinic had unbeknown to the Applicant been irregularly sanctioned by the Department, that the licence had been issued to the Applicant's detriment and was in conflict with the Regulations to the Act;

(iii) As soon as the relevant documentation was provided the Applicant intended to appeal the decision to grant a licence, which appeal the Applicant had good reason to believe would be successful, which would have the effect of suspending the licence;

(iv) In addition, the Premises from which the pharmacy/clinic was to operate had not been suitably zoned for such purposes and if the business commenced an interdict would be sought;

(v) The First and Second Respondents were called upon to give a written undertaking that the business would not commence until:

(aa) The appeal had been finalised;

(bb) The land use rights had been amended accordingly;

(cc) The building plans complied with the relevant laws;

(vi) In the event of the First and Second Respondents failing to give the undertaking an urgent application would be launched for an interdict;

(vii) The First and Second Respondents were warned that the continuation of their actions was at their own risk;

(e) There was no response to the above letter of demand from either the First or Second Respondent;

(f) The Applicant subsequently established that there was no appeal available to it;

(g) The Applicant also believed, again erroneously as it turns out, that the proposed pharmacy was to be called the Human Care Pharmacy;

(h) As the requested documentation was not forthcoming, on 21 August 2020 the Applicant made an application to the Department in accordance with the Promotion of Access to Information Act, 2 of 2000 ("PAIA");[2]

(i) On 25 August 2020 the Applicant's attorney addressed further correspondence to both the Department and the Council conceding that the Applicant had no right of appeal, complaining about the process that had been adopted and requesting the information / documentation previously demanded. There was, once again, no response;

(j) According to the Applicant the Council's website did not reflect that the First and Second Respondents had been issued with the requisite licence to operate a pharmacy and in this regard attached a print-out from the Council's website;

[2] The application was launched before the PAIA request was finalised.

(k) The Applicant also took photographs of the interior of the Premises, which it alleges proved that there was on-going renovations and construction work taking place;

(l) On 28 August 2020 the Applicant's attorneys addressed a further letter to the First and Second Respondents, *inter alia*, recording that the undertaking had not been forthcoming and that unless it was given by 31 August 2020 its instructions were to bring an urgent interdict for the necessary relief;

(m) The First and Second Respondents ignored this letter of demand as well.

[26] With reference to the Act and Regulations thereto the Applicant submitted that the First and Second Respondents were in breach thereof, in that:

(a) The licence had not been registered with the Council within 30 days of the approval thereof by the Department as required by reg 8(4) of the Regulations relating to Ownership of Pharmacies;

(b) The pharmacy had not commenced business within 90 days of the registration of the licence as required by clause 4.7 of the Guidelines.

[27] The Applicant also attacked the registration by the Council of the licence in the first place, this being the basis of the intended review in that, in accordance with reg 7(2) of the Regulations relating to ownership an applicant must satisfy the Department that there is a need for a pharmacy in the area.

[28] To this end, in accordance with the Guidelines, which deals with the criteria to be taken into account before a licence will be issued:

(a) A licence will not be issued for the establishment of a pharmacy within 500m of an existing community pharmacy;

(b) A licence will not be issued for a pharmacy where the population density in an urban area does not warrant it, the formula being one pharmacy per 5000 people;

(c) The relationship between the proposed pharmacy and the number and proximity of other pharmacies must be taken into account.

[29] The Applicant alleges that the licence was issued and registered in contravention of all three of the above criteria and that the decision stands to be reviewed and set aside.

[30] The Applicant submitted that it had satisfy the requirements for an interim interdict, in that:

(a) As the owner of a pharmacy in Humansdorp it has a *prima facie* right, if not a clear right, to enforce the provisions of the Act and Regulations;

(b) If the interdict is not granted the Applicant stands to suffer irreparable harm in that the existence of another pharmacy 270m away will have a devastating effect on it and its financial survival will be at stake;

(c) The balance of convenience favours granting the relief sought in that the review application has good prospects of success;

(d) These no alternative remedy in that proving a damages claim will be impossible to do.

THE FIRST RESPONDENT'S OPPOSITION

[31] The First Respondent's opposition to the application is quite simple:

(a) It is the owner of the Premises and in that capacity it concluded a lease agreement with the Second Respondent;

(b) It denies *"in the strongest possible way"* that it intends to operate a pharmacy from the Premises jointly with the Second Respondent.

[32] In short, it is the First Respondent's case that its only connection to the matter is that it is the owner of the Premises, which premises it has leased to the Second Respondent. It has nothing to do with the application for a pharmacy licence and the operation of a pharmacy from the Premises.

[33] The First Respondent also denied that the proposed pharmacy would be in breach of the land use rights applicable to the Premises and that any construction work was taking place.

[34] I must add that the First Respondent's opposing affidavits were filed before the amendment to the notice of motion. Despite pointing out to the Applicant that its only involvement was as the landlord of the Second Respondent, the Applicant still sought costs against it on the basis that the First Respondent should not have opposed the application in the first place.

[35] In the circumstances the First Respondent submitted that the Applicant should pay its costs.

THE SECOND RESPONDENT'S OPPOSITION

[36] At the outset the Second Respondent opposed the application on the basis that the Applicant had laboured under the erroneous belief that the licence had been issued to him in his personal capacity, whereas it had in fact been issued to Human Care Pharmacy (Pty) Ltd (which, as stated above, was subsequently joined as the Sixth Respondent). Had the Applicant awaited the outcome of its PAIA application it would have been aware of this and it had, in effect*, "jumped the gun".*

[37] The Second Respondent submitted that on this basis alone the application against him stood to be dismissed with costs.

[38] Dealing with the Applicant's allegations on the merits the Second Respondent stated that the Sixth Respondent:

(a) Would not be operating a clinic, only a community pharmacy;

(b) Was in possession of all the necessary statutory approvals in order to commence trading;

(c) Had not contravened LUPO or SPLUMA and the intended business fell within the Municipality's definition of Business 1.

[39] As proof that the licence had been duly issued and registered the Second Respondent attached the following documents:

(a) A licence issued by the Department in the name of Human Care Pharmacy (Pty) Ltd t/a CM Pharmacy;

(b) A registration certificate issued by the Council in the name of CM Pharmacy in the community pharmacy category;

(c) A registration certificate issued by the Council reflecting the Second Respondent as the *"Responsible Pharmacist"* of CM Pharmacy*;*

(d) A printout of the Council's website reflecting the registration of CM Pharmacy.

[40] As for the failure to commence business within 90 days of registration, the Second Respondent states that the certificate only came to hand on 23 June 2020 and, largely due to Covid-19 related reasons the shopfitting of the Premises had been delayed, hence it was not possible to open the business timeously. An extension would in any event be applied for.

[41] The Second Respondent deals with the criteria in the Council's Guidelines in some detail. While disputing the Applicant's interpretation thereof he makes the point that the Guidelines are merely what they purport to be – guidelines – and do not have the force of law.

[42] Which criteria were more important in considering a licence was also in dispute. The Applicant alleged it was the distance factor, the Second Respondent the population factor.

[43] A sharp dispute of fact emerged in respect of the number of community pharmacies in Humansdorp. According to the Applicant there are six community pharmacy serving a population of 28 928 people. Not so, alleges the Second Respondent, on the basis that two of these are doctors practices, two are situated in hospitals and one is a government clinic, the sixth being the Applicant's business. Thus, according to the Second Respondent, the only other existing community pharmacy in Humansdorp is that of the Applicant's business.

[44] I should add that by the time the matter was argued the work on the Premises had been completed and CM Pharmacy had commenced trading. It was the Applicant's argument that it did so at its own risk.

THE SIXTH RESPONDENT'S OPPOSITION

[45] Having been joined as a party to the proceedings the Sixth Respondent's opposition mirrored that of the Second Respondent. In addition thereto the Sixth Respondent stated the following:

(a) On 19 October 2020 the it was granted a temporary occupation certificate by the Municipality, valid for six months, and it opened its doors on the same day;

(b) It services approximately 70 customers a day and fills chronic/recurring subscriptions for approximately 100 people;

(c) It holds stock of approximately R450,000.00, which has a limited shelf life;

(d) It employs four people;

(e) It has average monthly expenses of approximately R80,000.00.

THE APPLICANT'S RESPONSE

[46] As already alluded to above, as a result of what emerged from the opposing affidavits the Applicant was obliged to bring a joinder application to reflect the Sixth Respondent as a party to the proceedings and also an application to amend the notice of motion.

[47] Insofar as the Regulations / Guidelines are concerned the Applicant attached a letter from the Department refusing an application for a pharmacy in the town of Brits on the basis that, firstly, it was within 500 meters of other pharmacies and, secondly, the population density did not warrant another pharmacy.

[48] Other than that, nothing new emerged from the Applicant's replying affidavits.

THE CASE AGAINST THE FIRST RESPONDENT

[49] The Applicant initially believed that the First and Second Respondents where in some sort of partnership. What led it to believe this is not known. In fact, the First Respondent is the owner of the Premises and it had concluded a lease agreement with the Second Respondent. That is its only connection to the matter.

[50] Notwithstanding this error on its part, was the Applicant in any event entitled to interdict the First Respondent continuing with the alleged "*construction activities or renovation works"* in respect of the Premises? I do not believe so. Even if the works in question were being done without the necessary planning permission – and there is no evidence that this is so – the Applicant, whose own premises are 270m away, does not explain the basis upon which it had *locus standi* to compel the Municipality to take steps to prevent the works from continuing and to have the First Respondent prosecuted from contravening the law.

[51] In any event, not only does the First Respondent deny doing construction and renovation work at the Premises, the Applicant's own photographs used in support of this allegation do not bear this out. The First Respondent (and the Second Respondent) states that the work that was being done amounted to shopfitting – shelves and the like. This is what the photographs depict. The Premises had previously been a showroom for a motor dealership and the internal lay-out was being altered to house a pharmacy. This does not amount to construction/renovation works requiring planning permission from the Municipality. No structural work is proved and in the circumstances no case has been

made out against the First Respondent. It is therefore not necessary to consider whether the requirements for an interim interdict have been met in respect of the First Respondent.

THE CASE AGAINST THE SECOND / SIXTH RESPONDENTS

[52] The case against the Second / Sixth Respondents is premised on the allegations that the Department and/or the Council had committed a material irregularity in approving the pharmacy licence, which decision stands to be reviewed and set aside.

[53] Secondly, the Applicant alleges that the pharmacy, which apparently includes a clinic, would be in breach of LUPO and SPLUMA.

[54] In the circumstances the Applicant sought an interim interdict prohibiting the pharmacy from operating pending the review application.

[55] For the reasons set out below I am of the view that the Applicant failed to make out a case.

REQUIREMENTS FOR AN INTERIM INTERDICT

[56] The requirements are trite law. See **LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C)** at 267 A – F.

[57] The Applicant submitted that as an owner of a pharmacy in Humansdorp it had established a *prima facie* right to ensure that another pharmacy is legally entitled to open its doors in opposition to it.

[58] Insofar as a reasonable apprehension of harm is concerned, the Applicant's papers are to a large extent generic in nature. The Applicant states that its business has only just started breaking even and that any further competition will have a devastating effect on it. In the main the Applicant relies on the allegation that Humansdorp is already over-traded.

[59] As for the balance of convenience, it was argued that this favoured the Applicant and that the Second / Sixth Respondent had commenced trading at their own risk and could not be heard to complain if they were ordered to close pending the outcome of the review.

[60] The Applicant argued that it had no alternative remedy in that it would be nigh on impossible to prove its damages in due course. It was argued that it would not be possible to attribute any loss of income to the opening of the new business.

[61] I am satisfied that the Applicant established a *prima facie* right. As the owner of an existing pharmacy it is entitled to take steps to ensure that the proposed new business complied with all the legal requirements in order to do so.

[62] I am not satisfied that the Applicant will suffer irreparable harm if the interim interdict is not granted. Its case in this regard essentially amount to a bald allegation that the business has only just started breaking even. No details are forthcoming in support of the Applicant's financial position. In fact, it would appear that when it comes to commercial pharmacies, Humansdorp is under-represented. At the very least there is a genuine dispute of fact in this regard.

[63] I am also not satisfied that the balance of convenience favours the Applicant. Granted, the Second/Sixth Respondent's carried on setting up the pharmacy despite the

threat of an application to interdict them. But the Second Respondent had concluded a lease with the First Respondent, which came with financial obligations. Money was also being spent on fitting out the Premises. As far as the Second / Sixth Respondents were concerned the application for a licence to operate a pharmacy was properly completed and granted. Although the Applicant alleged that the relevant licence was obtained in an irregular and/or improper manner, no proof was forthcoming and, as I understand it, the Applicant's gripe is with the Department. The review application will in all probability take many months to be finalised and, realistically, will only be argued in the second half of 2021. Given all these factors I am not satisfied that the balance of convenience favours an interim interdict, particularly in the light of my views in respect of irreparable harm and an alternative remedy.

[64] Finally, I am not satisfied that the Applicant does not have an alternative remedy. The fact that it may be difficult to prove damages in due course, which I accept, is not sufficient grounds for rejecting a damages claim. The process of discovery should give the Applicant a very good idea as to how much business it has lost to the new pharmacy, if any. A plaintiff is not obliged to prove its delictual damages with precision and to the last cent. See **Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 (AD)** at 969 H – 970 H.

[65] Finally, the Court always has a discretion whether or not to grant an interim interdict. Given what has been stated above I am not inclined to exercise that discretion in favour of the Applicant.

[66] In conclusion, I find that the Applicant has not made out a case for an interim interdict.

DISPUTES OF FACT

[67] In addition to having failed to satisfy the requirements for an interim interdict, the Applicant faces another hurdle: material disputes of fact.

[68] By way of example:

(a) The Applicant alleges that the relevant licences were obtained and/or granted in an irregular / improper manner. The Second / Sixth Respondent deny this and in support of this denial attach the relevant documents issued by the Department and the Council. On the face of it these certificates are valid until set aside. There are allegations, but no evidence before me of any irregularity;

(b) The Applicant alleges that the Second / Sixth Respondents intend conducting a clinic from the Premises. This is denied, being asserted that the business is a community pharmacy. What amounts to a clinic was never properly dealt with. If one has reference to reg 18(6)(b) of the Regulations Relating to the Practise Pharmacy (quoted above), the activities recorded therein are akin to what a clinic might offer. Presumably the Applicant's pharmacy is entitled to offer the same services. Whether these services offend the land use rights was never established. Even if a clinic is not permitted, the Applicant's case is based on a bald allegation, which is denied;

(c) The Applicant alleges that the Premises are not appropriately zoned. This is denied and in support thereof states that a temporary occupation certificate had been issued to it by the Municipality;

(d) There are also disputes as to the interpretation of the Regulations and Guidelines and what weight is to be attached thereto. This is something I cannot decide at this stage as it will be pre-empting the review application.

[69] I am not in a position to resolve any of these disputes. Based on the Plascon-Evans rule they must be decided in the Second / Sixth Respondent's favour.

[70] The disputes of fact can be partly attributed to the fact that the Applicant did not do its homework beforehand. It rushed to Court without first confirming the correctness of the information available to it. For example, it initially cited the First Respondent on the basis that it was going into a pharmacy business together with the Second Respondent. This was patently incorrect. Had it waited for the outcome of the PAIA application it would have been in a much better position to assess the merits of the matter.

[71] In the circumstances the relief sought against the Second / Sixth Respondent must also fail.

COSTS

[72] All three Respondents pray for costs on an attorney and client scale.

[73] There is merit in the argument that the application was brought with the ulterior motive of preventing an opposition business from opening. While motive may have no

bearing at the review stage where only the legality of the decision is at stake, at this stage I am of the view that it is relevant. The Applicant's case is premised on the desire to stifle a rival business.

[74] In my view the application was ill-advised and in the circumstances an attorney and client costs order is warranted.

COSTS *DE BONIS PROPRIIS*

[75] The First and Second Respondents both brought an application for an order that the costs occasioned by the matter having been set down on Tuesday, 8 September 2020 be paid by the Applicant's attorney, Jan Adriaan Venter, *de bonis propriis*, on an attorney and client scale.

[76] The events unfolded as follows:

(a) The Applicant intended to bring the urgent application on Tuesday, 10 September 2020;

(b) When the duty judge ruled that the matter was not urgent, on 2 September 2020 the Applicant's attorneys filed a notice removing the matter from the roll for 10 September 2020 and re-enrolling it on the unopposed roll for Tuesday, 8 September 2020. The Applicant's attorney alleged that this was done "*provisionally*" and on the advise of the Registrar;

(c) This notice was served on the Respondents together with the application papers (as I understand it);

(d) Both the First and Second Respondents filed notice of opposition on the same day, i.e., 2 September 2020;

(e) On 3 September 2020 the Second Respondent's attorneys addressed a letter to the Applicant's attorney requesting more time in which to file opposing papers. The Applicant's attorneys would only agree thereto if the Second Respondent gave an undertaking that it would not persist with its intention to open a pharmacy (pending the finalisation of the matter). The Second Respondent refused to give such an undertaking and stated that it would be filing opposing papers and also applying for a postponement of the matter;

(f) On the basis that the matter would "*in all probability*" be opposed by the Second Respondent, the Applicant's attorney notified the duty judge that it would not be necessary to read the papers, which he did on Friday, 4 September 2020. What is important about this development is that neither the First nor the Second Respondents were informed thereof;

(g) The First Respondent filed opposing affidavits electronically on 4 September 2020 and the Second Respondent on 6 September 2020;

(h) On becoming aware of the opposing papers on Monday, 7 September 2020 the Applicant's attorney addressed a letter to the First and Second

Respondent's attorneys informing them that due to the fact that it had become opposed the matter, which had "*tentatively*" been enrolled for the 8th, would be removed from the roll, costs to be costs in the cause, it not being necessary for the Respondents to appear;

(i) Neither Respondent was happy with this proposal and both appeared on the 8th, briefing counsel. They wanted the matter struck off the roll with costs;

(j) The presiding judge made an order that the matter be removed from the roll, costs to be determined.

[77] I should add that the above sequence of events is to a large extent the Applicant's version, which I accept for present purposes.

[78] What I do not understand, and which was never adequately explained, is why the duty judge's directive was not followed. There is nothing ambiguous or unclear about the directive. It says in plain language:

(a) The matter is not urgent;

(b) The Registrar may issue the papers and the application is to be dealt with in the ordinary course;

(c) The application is to be set down only once all the necessary affidavits are filed, on a date to be arranged with the Deputy Judge President.

[79] One cannot read into the directive, as the Applicant argued that:

> *"… the Registrar may issue the papers as is and the application be dealt with in the ordinary course."* [The words "*as is"* being imported by the Applicant's legal representative].

[80] As for the advice given to the Applicant's attorney by the Registrar (the identity the person in that office not being known), I can only surmise that, the advice having been given telephonically, whoever gave it did so in ignorance of the directive. It is unconceivable that the Applicant's attorney would have been advised to set the matter down on the next available motion court day in direct defiance of the clear wording of the directive.

[81] The Applicant's attorney apparently also received similar advice from counsel (on 1 September 2020 already), who is also not named. If this advice was indeed given, it was wrong.

[82] What the Applicant's counsel also submitted in argument is that although the matter had not been certified as urgent "*the notice of motion endures, and the timeframes set out therein remain unchanged"* (para 16 of the heads of argument dealing with costs).

[83] This is absolutely not the case and it demonstrates a total lack of understanding of Local Rule 12. Before any papers are issued by the Registrar a certificate of urgency has to be placed before a judge in chambers who considers the matter based on the certificate alone. Depending on the judge's ruling the papers may then be issued. Thus, it is only on

receipt of the judge's decision as to the further conduct of the matter that the notice of motion can be finalised. It frequently happens in practise that the notice of motion has to be redrafted in order to take the judge's directive into account. This is such a case.

[84] I am also bemused at the submissions that the matter was set down for 8 September 2020 "*provisionally"* and/or "*tentatively"*. There is nothing equivocal about the notice of removal and re-enrolment. The body of the notice reads:

> *"BE PLEASED TO TAKE NOTICE THAT the Application enrolled for the 10th of September 2020 is hereby removed and re-enrolled on the unopposed motion roll of 8 September 2020".*

[85] What is tentative or provisional about that? In fact, when the Second Respondent's attorney requested a postponement for more time in order to file papers, he was advised that this would only be agreed to if an undertaking was forthcoming. Given this response the only conclusion to be drawn is that the matter would be proceeding on the 8th irrespective.

[86] I am equally bemused by the Applicant's attorney's submission (to the Second Respondent's attorney's letter dated 3 September 2020) that, notwithstanding a notice of intention to oppose, a matter remains unopposed until the answering affidavits are filed as stipulated in the notice of motion. While it is trite that in an urgent application a respondent would be well-advised to comply with the Applicant's unilaterally imposed time limits, once a notice of opposition is filed the matter is opposed, irrespective of whether answering affidavits are forthcoming in due course.

[87] To make matters worse, when this letter was written the Applicant's attorney knew that urgency had been rejected and a directive issued as to the further conduct of the matter, yet he still demanded that the Respondents comply with the Applicant's unilaterally imposed time limits.

[88] Even if the duty judge had not given a directive as to the further conduct of the matter the Applicant would not have been entitled to set the matter down on 8 September 2020. This was not an unopposed application which could be brought *ex parte* in accordance with Rule 6(4). After urgency was rejected, and in the absence of a directive, the application would have had to have been brought in accordance with Rule 6(5), in which sub-rule the time limits for the filing of a notice of opposition, answering affidavits and replying affidavits are set out. Only once all the papers are filed is a matter ready to be set down for hearing on the opposed roll, which is done by applying to the Registrar for a date.

[89] In conclusion, whether as a result of the duty judge's directive, or in accordance with Rule 6(5), what the Applicant's attorney should have done was to replace the notice of motion with one that conformed with Form 2 of the First Schedule to the Rules.

[90] Costs *de bonis propriis* are not awarded lightly and such an order is limited to cases where an attorney has been dishonest, has behaved improperly or has acted with gross negligence. A flagrant disregard for the Rules may also qualify. See **Immelman v Loubser en n Ander 1974 (3) SA 816 (A)**; **Napier v Tsaperas 1995 (2) SA 665 (A)**.

[91] In **South Africa Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others 2009 (1) SA 565 (CC)**, at [54] the Constitutional Court summed the issue up as follows:

> *"An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."*

[92] Ultimately, as with any costs order, it remains in the discretion of the Court, judicially exercised. See **Stainbank v SA Apartheid Museum at Freedom Park & Another 2011 (10) BCLR 1058 (CC).**

[93] The Applicant's attorney played fast and loose with the Rules. His attitude after urgency was denied defies explanation. Not only were his actions after the duty judge's directive was handed down inexplicable, he put the First and Second Respondents to a great amount of trouble, both of whom had to scramble in order to file papers as a matter of extreme urgency, only to be told on Monday the 7th that the matter would not be proceeding. In the circumstances the First and Second Respondents cannot be faulted for briefing counsel to appear on the 8th.

[94] The Applicant's attorney's attitude after all the dust had settled (as it were) also defies explanation. He persisted that he had acted correctly and even argued that the Respondents' attorney should pay the costs *de bonis propriis!* Had the Applicant's attorney given the matter sober reflection and conceded that he had acted incorrectly I might have had some sympathy for him.

[95] I am accordingly satisfied that the Applicant's attorney should bear the costs of 8 September 2020 *de bonis propriis*, such costs to be on an attorney and client scale.

[96] Up to midday on the 7th the First and Second Respondents were of the reasonable belief that they would be arguing an opposed motion the following day. In the circumstances I intend to award the costs on the basis that the matter was before Court as an opposed application.

CONCLUSION

[97] The following order will issue:

(a) The application is dismissed;

(b) The Applicant is ordered to pay the First, Second and Sixth Respondents' costs on an attorney and client scale;

(c) The Applicant's attorney, Jan Adriaan Venter, is ordered to pay the First and Second Respondent's costs occasioned by the appearance in Court on 8 September 2020 *de bonis propriis* on an attorney and client scale, such costs to be on an opposed basis.

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N.J. MULLINS

ACTING JUDGE OF THE HIGH COURT

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