IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3498/2023
3787/2023

In the matters between:

MATJHABENG LOCAL MUNICIPALITY	Applicant
and	
BAILE TRADING (PTY) LTD	1st Respondent
THE SHERIFF, WELKOM	2nd Respondent
ABSA BANK LIMITED	3rd Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	4th Respondent
In Re:	
BAILE TRADING (PTY) LTD	Plaintiff
and	
MATJHABENG LOCAL MUNICIPALITY	Defendant

CORAM: VAN ZYL, J

HEARD ON: 9 FEBRUARY 2024

DELIVERED ON: 31 JULY 2024

[1] The applicant is seeking the following relief:

"1. That this application be heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of this Honourable Court and that the non-compliance with the forms, service and time lines provided for in the Rules be condoned.

2. That the Writ of Execution in Case Number 3498/2023 issued by the Registrar of the Free State Division of the High Court on or about 4 December 2023, be set aside.

3. That the Writ of Execution in Case Number 3787/2023 issued by the Registrar of the Free State Division of the High Court on or about 4 December 2023, be set aside.

4. That the attachment by the second respondent of the applicant's bank accounts with the third respondent by way of Notice in terms of Rule 45(12)(a) (garnishee order), issued on or about 6 December 2023, in Case Number 3498/2023 and Case Number 3787/2023, be set aside.

5. That the first respondent pays the following attached sums to the applicant's bank accounts with the third Respondent within one business day of this order:

5.1 R1 223 923.06 (one-million two-hundred-and-twenty-three-thousand nine-hundred-and-twenty-three rand and six cents) in Case Number 3787/2023.

5.2 R59 435.39 (fifty-nine-thousand four-hundred-and-thirty-five rand and thirty-nine cents) in Case Number 3498/2023.

6. That the second respondent's tax invoices rendered to the third respondent in respect of Case Numbers 3498/2023 and 3787/2023 be set aside.

7. That the first respondent, and any party who opposes the relief sought jointly and severally, pay the costs of this application on an attorney and client scale, including the costs of two counsel where so employed."

Succinct background:

[2] Default judgments were granted in favour of the first respondent against the applicant by the Registrar on 22 August 2023 in case number 3498/2023 and on 8 September 2023 in case number 3787/2023.

[3] According to the applicant the first respondent`s invoices relied on for the default judgments in the two cases at issue in this application, together with their underlying procurement processes, and service level agreement breached several acts, regulations and municipal policies.

[4] The aforesaid default court orders are in dispute in a rescission application filed on 7 December 2023 and a further pending application in case number 1242/2022.

[5] Re-issued writs of execution relying on the aforesaid court orders were issued on 4 December 2023.

[6] Notices of attachment (garnishee orders) were thereupon issued based on the aforesaid writs of execution. Both garnishee orders were issued on or about 6 December 2023 in terms of Rule 45(12)(a).

[7] On Tuesday, 12 December 2023, the relationship executive of Absa Bank (the third respondent, but herein referred to as "Absa") informed the Municipal Manager and the Chief Financial Officer of the applicant by e-mail that writs have been received in favour of the first respondent in case number 3787/2023 in an amount of R1 223 923.06. According to the Municipal Manager this alerted him to this execution process and the threatened execution against the applicant's bank account with Absa.

[8] On or about 18 December 2023, the garnishee order in case number 3787/2023 was complied with by Absa and Absa paid the second respondent ("the sheriff") the sum of R1 223 923.06.

[9] On or about 20 December 2023, the garnishee order in case number 3498/2023 was complied with by Absa and Absa paid the sheriff the sum of R59 435.39.

[10] According to the applicant the aforesaid processes of execution and attachment fall to be set aside for the reasons set out in the founding affidavit. It is the applicant`s case that the writs of execution should be set aside as same are unlawful and constitutes a nullity and the garnishee orders should also be set aside as being unlawful.

[11] Mr Snijders, on behalf of the applicant, consequently submitted as follows at paragraph 9 of his heads of argument:

> "The Municipality has a clear right to the relief sought: public municipal funds have been unlawfully removed from the Municipality's bank account under pretence that there is a court order, a writ of execution and a garnishee order authorizing such removal. The writ of execution is not authorized by the court order and the garnishee order is not authorized by either the court order or the writ."

Urgency:

The applicant's case:

[12] As previously indicated, the Municipal Manager states that he was informed by Absa on 12 December 2023 that a writ was received in case number 3787/2023. It subsequently transpired that a writ had also been issued in respect of case number 3498/2023 in favour of the first respondent.

[13] At paragraph 51 of the founding affidavit, the applicant states as follows:

"51. At this time of year, days before most municipal staff were on annual leave, including the crucial legal and financial staff; it was well-high impossible for the Municipality to determine the underlying facts regarding the re-issued writs of execution.

52. By that date, on 7 December 2023, an application of rescission had already been launched. The effect of the execution process on the pending rescission application had to be considered by the Municipality and its staff as well as outside legal representatives."

[14] It was only by about 8 January 2024 that the Municipality retained outside legal representatives to investigate the facts to assist with the filing of this application.

[15] According to the applicant unlawful execution, not in conformity with the present court orders, is urgent.

[16] Several averments are made about to the effect that municipal funds should be employed for constitutional and statutory purposes of the Municipality to execute the Municipality's service delivery mandate and financial commitments to its community and to its employees.

[17] According to the applicant, the urgency is not self-created, since it is a consequence of the unlawful execution process with no service of any writ or notice of attachment in conformity with statutory prescripts.

[18] The applicant avers that should an urgent order not be granted, the Municipality will suffer prejudice in that its public funds risk being dissipated by the first respondent.

[19] The applicant further avers that it will not be afforded substantial redress at a hearing of the application in due course.

The first respondent's case:

[20] In the answering affidavit the first respondent sets out the history of the process which followed upon the default judgments which were issued in the present matter. From that it is apparent that a warrant of execution was previously issued pursuant to the default judgments and executed against the movables of the applicant on 7 September 2023 and 18 September 2023 respectively. Garnishee orders were subsequently issued and on 15 November 2023 fourth respondent adhered to the garnishee order and the said funds were paid over to the first respondent. During those processes the attorneys acting for both parties attempted to finalize, *inter alia*, the present claim by way of settlement and on 9 May 2023 a list of all outstanding judgments, which included the interest component of the present judgment, was sent to the attorneys of record of the applicant.

[21] Thereafter a re-issue of the writs of execution in respect of the outstanding interest component of the judgments were issued and executed on 7 December 2023. This money had in the meantime also been paid to the first respondent on 18 and 20 December 2023 respectively.

[22] The first respondent furthermore avers as follows in its answering affidavit:

> "4.3 On its own version the Applicant explains that it had already obtained knowledge of the new writ on 12 December 2023, yet dragged its feet and only approached Court on 24 January 2024. The only explanation offered for the inordinate delay between having knowledge of the attachment and this current application, is the alleged absence of role players within the internal structure of the Applicant during the festive period.
>
> 4.4 The Applicant does not mention names of these employees, he does not mention why these employees would have in any event caused it to act more swiftly nor does it explain at all how its Municipal Manager went about to take the necessary pro-active steps to attack the attachment in December 2023.
>
> 4.5 Over and above the lack in explanation for the inordinate delays in pursuing this application, the Applicant also fails to disclose that it had throughout these proceedings been duly represented by its current attorneys. Its attorneys are tasked with providing it with legal advice, not its internal employees.
>
> 4.6 The Applicant created its own urgency through the lackadaisical manner in which it dealt with the attachment whilst having full knowledge of the consequences thereof."

Averments in the replying affidavit:

[23] The first respondent denies that the urgency is self-created. It points out that the urgency, in the context of the relief sought, arose

because new warrants of execution and new garnishee orders against salaries in the municipal account had been issued.

[24] The first respondent again points out that the execution and attachment concerned in this matter pertains to the second order of the respective court orders, being the interest order, which is a new claim. He repeats that this new claim, new warrant and new garnishee order are not authorized by the court order. The urgency consequently follows upon the unlawful and unconstitutional actions by the first respondent and the sheriff.

[25] With regard to the re-issue of the writs of execution, the applicant further states as follows in its replying affidavit:

> "26.1 I note that the re-issued writs of execution were issued and executed on 7 December 2023.
>
> 26.2 I note that the First Respondent, Baile, was paid on 18 December and 20 December 2023.
>
> 26.3 These payments are a source of the urgency of this matter.
>
> 26.4 The funds paid to Baile are at risk of dissipation, and an order to repay is urgently prayed for."

[26] According to the applicant the first respondent purposely executed against the municipal bank accounts during the period of annual leave of most of the municipal staff, between the second week of December and the second week of January. The timing of this

execution process was deliberate, to avoid the Municipality properly defending itself.

[27] The applicant further avers that a rescission application was pending and that the applicant nevertheless persisted with this unlawful execution and attachment.

[28] The applicant avers that as soon as the financial and legal staff who have knowledge of the facts, and himself, as well as outside legal representatives, were available in January 2024, the matter was brought to the ordinary urgent court and set down accordingly.

[29] According to the applicant the merits of the application in itself constitute urgent relief, in that the first respondent possesses municipal funds obtained by unlawful means.

Legal principles:

[30] Rule 6(12) determines as follows:

> "6(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.
>
> (b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is [*sic*] averred render [*sic*]

> the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

[31] It is consequently peremptory that an applicant sets out explicitly the circumstances on which he relies to render the matter urgent and the reason why he claims that he cannot be afforded substantial relief at the hearing in due course.

[32] As correctly submitted by Mr Snijders, the urgency of commercial interests may justify the invocation of the subrule no less than any other interests. See **Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd** 1982(3) SA 582 (W) at 586 G. See also **Bandle Investments (Pty) Ltd v Registrar of Deeds** 2001 (2) SA 203 (SE) at 213 E – F.

[33] In the unreported judgment of **East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd** (11/33767) [2011] ZAGPJHC 196 (23 September 2011) the following principles were eloquently set out in respect of Rule 6(12) at paras [6] to [9]:

> "[6] The import thereof is that the procedure set out in rule 6(12) is not there for 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 he claims that he 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 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 the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an 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 obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.

[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.

[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid

> down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application."

[34] It is trite that the aforesaid requirements must be set out in an applicant's founding affidavit, which constitutes the pleadings and the evidence.

[35] In **Arcfyre International (Pty) Ltd v Govender** (2023-098452) [2023] ZAGPJHC 1243 (31 October 2023) the following principles are set out at para [24]:

> "... The applicant must fully set out the facts supporting the conclusion advanced; mere lip service will not do. If there is some delay in instituting the proceedings an applicant has to explain the reasons for the delay and must also explain why, despite the delay, it claims that it cannot be afforded substantial redress at the hearing in due course. This however does not mean that an applicant can create its own urgency by simply waiting until the normal rules of court can no longer be applied and the delay in bringing the application, or self-created urgency, is the basis for a court to refuse to hear a matter on an urgent basis."

[36] The application must be brought as soon as possible; cogent reasons must be advanced to the court for any delay in bringing the

application. In the judgment of **Dladla v Ethekwini Municipality** (2799/2023) [2023] ZAKZDHC 15 (4 April 2023) the court summarized the applicable principles as follows at para [37] of the judgment:

> "Considering the observations in *East Rock Trading*, *Jiba* and *Maqubela*, it is apparent that, in order for a litigant to be successful in an urgent application, three conditions must be met:
>
> (a) The application must be brought as soon as possible; accordingly cogent reasons must be advanced to the court for any delay in bringing the application;
>
> (b) The Applicant must provide a detailed account of why they believe that they will not receive substantial redress if the matter is heard in the ordinary cause; and
>
> (c) The realization of the *dies* will depend on the degree of urgency."

[37] An applicant cannot create its own urgency by simply waiting until the normal rules can no longer be applied. In the unreported judgment of **Van Der Merwe v Nel N.O.** (2483/2023) [2023] ZAECMKHC 86 (11 August 2023) this principle was stated as follows at paras [30] to [32]:

> "[30] Pertinent to questions of urgency, it is trite that a party is not entitled to rely on urgency that is self-created when seeking a deviation from the rules of court. The rationale is that the more immediate the reaction by the litigant to remedy the situation by way of instituting proceedings the better it is for establishing urgency.

[31] The consideration of urgency requires a court to be placed in a position where it must appreciate that if it does not grant immediate relief, something unlawful is likely to happen at a particular point in time.

[32] Urgency is diminished where the litigant takes longer to act from the date of the event giving rise to the proceedings. In short, a party seeking relief must come to court immediately or risk failing on urgency. The latitude extended to dispense with the rules of court in circumstances of urgency is not available to a party who is dilatory to the point where its very own activity is the cause of the harm on which it relies to seek relief."

[38] In **Chung-Fung (Pty) Ltd v Mayfair Residents Association** (2023/080436) [2023] ZAGPJHC 1167 (13 October 2023) the court referred to the judgment of **Roets N.O. v SB Guarantee Company (RF) (Pty) Ltd** [2022] JOL 55628 (GJ) at [26] and stated as follows at para [27] of the judgment:

"[27] In Roets N.O. for example, this court found that the applicant had sat "on its laurels" and had unduly taken its time to approach the urgent court claiming irreparable harm. This led to the application being struck from the roll on account of 'self-created urgency'. But I think this decision properly understood, demonstrates that 'self-created' urgency involves a degree of contrivance to jump the que of hearings in the ordinary course. ..."

Consideration of urgency:

[39] On the applicant's own version the Municipal Manager was informed by Absa on 12 December 2023 that a writ had been

received in case number 3787/2023. It subsequently transpired that a writ had also been issued in respect of case number 3498/2023 on behalf of the first respondent.

[40] What is of paramount importance is that, on the applicant's own version, it was at that stage under the impression that the money had been paid over to the sheriff and was in the hands of the sheriff, which indeed it was at that stage. At the time of the filing of the present application, the applicant was still under the same impression. However, after receipt of the answering affidavit, the applicant became aware that the money had been paid over to the first respondent on 18 and 20 December 2023, respectively.

[41] Had the applicant brought an urgent application to stay the further execution process at the stage when the re-issue of the writs came to its attention on 12 December 2024 in order to prevent that the money be paid over to the first respondent, it would, in all probably, have been able to make out a proper case for urgency.

[42] Instead the applicant sat idly by, or, as described in the judgment I referred to, "sat on its laurels", and it was decided to rather continue with the role players' respective holiday plans, than to take immediate steps to safeguard the money which was at that stage still in the hands of the sheriff. It appears that the applicant had an attitude that it will deal with this problem once the Municipal Manager returns from holiday.

[43] The applicant did not even attempt to write a letter of demand to the first respondent at that stage, requesting that the further execution

process be stayed pending the finalization of the rescission application. Instead, the applicant did absolutely nothing.

[44] Further, on the applicant's version, it retained the services of outside legal representatives to investigate the facts and assist with the filing of this application "by about 8 January 2024". The first respondent pointed out in its answering affidavit that the applicant has been using the same set of legal representatives for all the matters between the parties, including in the procedures and applications which preceded the present application. It was therefore not a matter of new legal representatives having to come into the picture who knew nothing about the background of the present disputes.

[45] In addition, the application was only launched on 24 January 2024. No explanation has been provided for the lapse of time between 8 January 2024 and 24 January 2024.

[46] In the founding affidavit, as previously indicated, the applicant made the following averment:

> "64. Should an urgent order not be granted, the Municipality will suffer the prejudice that its public funds risk being dissipated by the first respondent".

[47] No reasons have been advanced for this alleged fear of the applicant. In addition, this might have been a valid reason for urgency had the money still been in the hands of the sheriff and not yet been paid to the first respondent. At this stage, however, the

money has already been paid over to the first respondent and this alleged ground of urgency fell away the moment it came to the applicant's knowledge by means of the answering affidavit that the money had been paid over to the first respondent. Despite this knowledge, the applicant simply persisted with the application.

[48] At paragraph 67 of the founding affidavit the applicant made the mere allegation by stating the following:

> "67. Accordingly, the applicant will not be afforded substantial redress at the hearing of the application in due course."

[49] This is a bold statement without any substance or justification, especially considering that the factual position presently is that the money has already been paid over to the first respondent more than a month before the launching of this application.

[50] The application was consequently launched at a stage when the repayment of the money was requested in order to prevent that it be paid to the first respondent pending the rescission application. However, considering that the money has now already been paid to the first respondent, it is the issue of the repayment of the money from the first respondent to the applicant which I need to consider whether the requested relief is (still) urgent or not.

[51] Now that the money had already been paid over to the first respondent, due to the applicant having dragged its feet to approach court immediately after they became aware of the writs which were served on Absa, the money is that of the first

respondent to deal with as it wishes. An attempt by the applicant to "safeguard" the money now that it is already in the hands of the first respondent, will **in substance** constitute an anti-dissipation interdict, also known as a Mareva injunction. The requirements for such an anti-dissipation interdict have not been met.

[52] In his heads of argument Mr Snijders submitted as follows at paragraph 68:

> "68. Public funds have been unlawfully removed from the municipal bank account and paid to a private company, the first respondent. The municipality's funds paid to Baile as admitted by the first respondent, risk dissipation, the same reasons supporting the stay of execution ordered by the full bench in *Ikamva*."

The judgment which Mr Snijders refers to is the one of **MEC, Department of Public Works v Ikamva Architects** 2022 (6) SA 275 (ECB) at para [93], which judgment was also upheld on appeal, reported as 2023(2) SA 514 (SCA). However, from a reading of the said judgment, it is clearly distinguishable from the present matter. In that matter the application was brought before the execution process had come to the point where the money had been paid over to the creditor and it was therefore safeguarded by staying the further process of execution pending an application for rescission.

[53] In the circumstances, where the money has already been paid over to the first respondent more than a month ago before the launching the present application, an urgent order will not be able to safeguard the money anymore. The horse has bolted. No greater (if any)

protection will be granted by such an order should it be granted now than it would should it be granted in due course.

[54] Mr Grobler, on behalf of the first respondent, referred to the respective judgments in which it has been determined that Rule 6(12) is the most abused rule. See, *inter alia*, **Luna Meubelvervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers** 1977 (4) SA 135 (W) at 136 B. See also **Beeslaar v Mokone** 2023 JDR 1574 (GP) at para [7]. The present matter constitutes, in my view, such an instance of abuse of Rule 6(12).

[55] In my view the applicant subsequently failed to make out a proper case for urgency and the matter therefore stands to be struck from the roll.

Costs:

[56] There is no reason why costs should not follow the outcome.

Order:

[57] The following order is made:

1. The application is struck from the roll.
2. The applicant is ordered to pay the costs of the application.

C. VAN ZYL, J

On behalf of Applicant:	Adv JP Snijders Instructed by: Botes Mahlobogoane Van Heerden Inc. Attorneys C/o Pieter Skein Attorneys BLOEMFONTEIN E-mail: cassie@bmhatt.co.za
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