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

CASE NO: 2024-093389

(1) REPORTABLE: **No**
(2) OF INTEREST TO OTHER JUDGES: **No**
(3) REVISED.

04/09/2024

DATE SIGNATURE

In the matter between:

FBK FINANCIAL SERVICES INC Applicant

And

MAIN STREET 1052 (PTY) LTD T/A NASHUA CENTRAL First Respondent

SHERIFF RANDBURG SOUTH WEST Second Respondent

JUDGMENT

MAHOMED AJ

[1] This matter was brought on an urgent basis, the applicant's banking account was frozen, pursuant to a judgment and writ which was authorised. Mr Baloyi for the applicant submitted that the applicant suffers a substantial injustice in that it is unable to trade, nor pay any of its service providers, including its employees.

[2] He argued that the court must weigh the prejudice suffered, his client has a business to run, and the respondent conceded in its answering papers that it does not suffer prejudice. Counsel argued that the judgment was granted by default and the applicant has launched an application for rescission of the judgment, on 14 August 2024, the grounds are valid, that the claim has prescribed and that there was no breach of the contract. It is noteworthy that the papers in the rescission application are not on file.

[3] Advocate L Cooke appeared for the respondent and submitted that a court must be afforded an opportunity to assess if the underlying causa is disputed. It was argued that the applicant on the papers fails to make any averments on urgency, on the prejudice suffered, and offers no explanation as to why it would not obtain substantial relief at a hearing in due course. Counsel submitted that the urgency was self-created, on its version the applicant was aware of the order in April 2024 but did nothing until August 2024. Furthermore, it flouted all established rules on approaching the urgent court.

[4] The respondent was placed under unreasonable timelines to comply with,[1] when it was afforded only a few hours to file its notice and a day thereafter to file its answering papers. Counsel argued that the applicant has failed to set out the

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[1] **Luna Meubels Vervaardigers (Edms) Bpk v Makin and Another t/a Makins Furniture Manufacturers** 1977 (4) SA 135 W at 137 E and 2013 (1) SA 549 (GSJ)

facts and circumstances that render the matter urgent. The jurisdictional requirements for the urgent application cannot be found on its papers and the respondent and the court is entitled to know, to respond effectively. Mr Cooke argued further that the applicant has known of the judgment in July and the hold on the account since 13 August 2024, it has operated its business in that period, the matter cannot be urgent for the reasons advanced by counsel for the applicant. The respondent fears that if the hold is removed, the funds in the account will be whittled away.

[5] Mr Baloyi proffered that the applicants were of the belief that their contractual relationship with the first respondent had ended when it uplifted office equipment from it premises and after it settled a debt of R100 000 in 2019. The first respondent has claimed the balance of the contract price and were granted a judgment by default. Counsel submitted that the applicant must be allowed an opportunity to defend itself, it has good prospects of success, however it is unable to operate its business as its bank account has been frozen. It was submitted that if the applicant must wait for a hearing in due course, it will face ruin, as it is unable to pay its staff and service providers, without access to its bank account. On 13 August 2024, the applicant launched a rescission application when it realised that the bank account cannot be operated, the evidence is that on 22 July 2024, the first respondent instructed the bank to place a hold on its account, the applicant learnt of this hold only on 14 August 2024.

URGENCY

[6] Following this, the applicants were in discussions with the respondent, when it requested the first respondent to instruct for a release of the hold, but to no avail,

there was no undue delay the applicant approached the urgent court immediately upon noting the respondent's stance. Mr Baloyi referred the court to the judgment in **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite Pty Ltd and Others**[2], where the court stated that the *main inquiry is if the applicant will obtain substantial redress at a hearing in due course.* Counsel reiterated that this applicant will have to close business if it must wait for a hearing in due course.

[7] Mr Cooke submitted that the applicant has flouted all the established rules in an urgent application and the application must be dismissed with costs. It afforded the respondent a few hours to file a notice to oppose and only a day for the filing of its answering papers, this was not according to the exigencies of the case as contemplated in the Rule. Furthermore, the applicant's reliance on R45 A, the timing of the service and filing of its rescission application, suggest that the rescission is brought to simply frustrate the execution of the judgment, it had known of the order since April 2024, the Rule provides that a court may suspend the execution of an order as it deems fit, the Rule does not extend the court's powers to set aside a writ, the applicant's papers do not set out the source of the court's power to do so.

[8] Mr Cooke argued that the applicant seeks and order against the First National Bank but has failed to join it in the proceedings, it is a material defect as only FNB has the power to release the hold on the account. Counsel submitted this point alone renders the application "still born." The respondent's reliance on R45A, which provides for a suspension of an order, is of no assistance and will

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[2] 2011 ZAGPJHC 196

not undo the fact that the attachment has been effected. The rule properly construed, empowers a court to suspend execution "going forward," it does not provide for a retrospective, undoing of the hold, to set aside the writ. It was argued that if any order is to be made for a release of the hold, it would be against FNB and the bank is not before this court, the respondent failed to join the bank, the relief it seeks in its notice of motion, cannot be effected except by the bank. Mr Cooke submitted that the application must be struck with costs.

[9] In reply Mr Baloyi, argued that the papers were drafted in haste and that the applicants have averred that it will not achieve substantial redress at a hearing in due course, it is a business entity and requires access to its bank account, all of its payments are made from this account, including its internet services and payment of salaries. The balance of convenience favours the applicants, the respondent does not suffer prejudice, it can oppose the rescission application in due course. Counsel argued that FNB acted on the instructions from the first respondent to place the hold, it can instruct FNB to release the hold. The respondent suffers prejudice even if it were to procure new business. Mr Baloyi argued that R45A is applicable, as execution of a judgment is in two stages, first is the attachment and then the removal, the applicant prays for suspension of the order at its attachment stage and the papers do make the necessary averments for the relief.

JUDGMENT

[10] The applicant prays for an indulgence and a departure for the times set out in Rule 6(5) (b) of the Uniform Rules. It is up to a practitioner to assess whether a greater or lesser degree of relaxation of the Rules must apply, the relaxation of

the rules must be "according to the exigencies of the matter." On the evidence, the applicant has not observed the rules and practices of this Division, when it placed the respondent under very restricted timelines, to respond, however Advocate Cooke has eloquently raised very pertinent questions particularly in regard to the power of the court to order the removal of the hold on the account, in the absence of any submissions from the First National Bank, whom he submitted has a direct and substantial interest and must have been cited on the papers.

[11] The applicant stated it has filed an application for rescission of the judgment, and it will require access to its bank account so that it may continue to trade and meet its obligations to staff, service providers and to procure more work. It requires the funds it holds in the account to make payments; it will not achieve substantial redress at a hearing in due course, there is a reasonable apprehension of harm as of the applicant being sued for unpaid salaries, overdue accounts, and its main line of communication via internet services will not be available for its business.

[12] In **Avis Southern Africa Pty Ltd and Others v David Porteous and Belinda Porteous**[3], Bester AJ, stated, "commercial interests are equally worthy of protection to justify reliance on Rule 6(12) as are matters that concern a threat to liberty, life or some other basic essential of everyday life. Whether commercial interests justify an urgent hearing will depend on the facts of each case with reference to whether substantial redress can be secure at a hearing in due course. Courts should not decline to hear matters that implicate commercial

[3] Case no 0817898/2023, 17 October 2023, headnote

interests simply because judicial resources may be strained in a particular week in the urgent court.

[13] Although the respondent fears that the funds will be whittled away, if the court grants the order, the respondent does have other remedies in law. I note that the respondent has not filed a counterapplication in these proceedings and there nothing before this court that demonstrates that the FNB has a direct and substantial interest in this matter, they acted on the respondent's instructions through the sheriff.

REQUIREMENTS FOR AN INTERIM INTERDICT

[14] I noted Mr Cooke's submissions on the state of the applicant's papers. In directives issued by the DJP of this division, 2020, at para [7], provides: "*argument on urgency must be succinct. Too often a flaccid and lengthy grandstanding performance is presented. This must stop. If the matter is truly urgent an argument in support of it must be prepared before the hearing and quickly and clinically articulated.*" Of significance is that the application for rescission of the judgment is not before the court. This court has not had the benefit of considering and assessing whether the applicant has a real dispute with the underlying causa, as it should. Mr Baloyi proffered only that the respondent's claim had prescribed, and the applicants deny a breach of the agreement between the parties. This is of no value to the respondent or this court for any assessment or response.

[15] In **National Treasury and Others v Opposition to Urban Tolling Alliance** [4], the court set out, the requirements to prove an interim interdict, namely

"*the test requires that an applicant that claims an interim interdict must establish, (a) a prima facie right even if open to some doubt, (b) a reasonable apprehension of irreparable and imminent harm if an interdict is not granted (c) the balance of convenience favours the grant of the interdict, and (d) the applicant must have no other remedy.*

[16] The applicant has demonstrated at least a prima facie right in that the banking account, which is frozen, was used to operate the core functions of its business.

[17] The court must weigh the degree of prejudice that the applicant suffers against that suffered by the first respondent. The harm it suffers, includes a threat of being sued by employees for salaries, the opportunity to procure more work and even closure of its business, if the order is not granted. It is noteworthy that the respondent agreed it does not suffer prejudice, it can oppose the rescission application and has other legal recourse to recover its debt.

[18] There is no alternative remedy available to the applicant, which relies on this the only banking account it holds and from the facts the balance of convenience favours the applicant, in casu. I agree with Mr Baloyi, the removal of the attachment is only one part of the execution process.

[19] I am of the view that the matter is urgent, our law recognises commercial urgency as I referred to earlier. The applicant has, albeit, in poor fashion, met the

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[4] 2012 (6) SA 223 (CC)

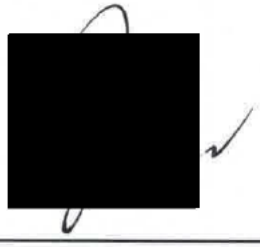
requirements of the interim interdict and it should not be stymied any longer in the running of its business, therefor the application must succeed.

[20] Regarding costs in this matter, I have noted Mr Cooke's submissions on the applicant's failure to plead its case clearly in the founding papers, its approach to the timelines allowed and its failure to annex supporting documents to its papers. I think it prudent to reserve the issue of costs.

ORDER

[21] Accordingly, I make the following order:

1. The forms of service provided for in the rules of court are dispensed with and the matter is heard as an urgent application in terms of Rule 6(12) of the Rules of Court.
2. The first respondent is ordered to instruct for the removal of the hold on the applicant's bank account.
3. The costs are reserved.



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ACTING JUDGE OF THE HIGH COURT

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 04 September 2024.*

APPEARANCES

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Date of hearing:	30 August 2024
Date of Judgment:	4 September 2024