IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO.: UM39/2019

In the matter between:

NELIA'S LIQUOR STORE CC
t/a SAFARI LIQUOR CITY Applicant
(Registration number: 2006/168824/23)

and

VRESTHENA (PROPRIETARY) LIMITED 1st Respondent
MELISANDRE TRADING (PROPRIETARY) LIMITED 2nd Respondent

JUDGMENT

LAUBSCHER AJ

INTRODUCTION & RELEVANT BACKGROUND

[1] This matter came before this Court as an urgent application in terms of which the Applicant requests the relief as set out in the notice of motion. The relief which the Applicant is seeking comprises of the following:

"1. That this application be heard as a matter of urgency and that the Rules pertaining to forms and service the dispensed with pursuant to the provisions of Rule 6(12) of the Uniform Rules of Court.

2. Pending the final determination of the arbitration referral in respect of the enforceability of the trade exclusivity provisions of the lease agreement between the Applicant and the First Respondent and pending further the final determination of the review application to be

instituted by the Applicant against the decision of the Liquor Board whereby a liquor licence was granted to the Second Respondent, the Respondent's, alternatively the First Respondent, further alternatively the Second Respondent be is hereby interdicted from:-

2.1 Opening and operating or causing to be opened and operated the Tops Liquor store at the premises known as Shop Number 2, Safari Gardens shopping centre situated at Section 9 of Erf 652 Safari Gardens, Arend Road, Safari Gardens, Rustenburg, North West Province (hereinafter referred to as "the property").

2.2 Allowing any other entity to operate a liquor store from the property.

2.3 Infringing in any manner whatsoever on the lawful trade or goodwill of the Applicant.

2.4 In the alternative to prayers 2.1 and 2.2 above, and in the event of the Tops liquor store opening before hearing of this Application: the First and Second Respondents are hereby Ordered to take all such steps necessary to close down the liquor store and refrain from further trading from the premises.

3. That in the event the First and/or Second Respondent(s) failing to prevent the opening and trading of a Tops liquor store on the property, alternatively the First and Second Respondents failing to close down the Tops store in the event of same having been opened prior to the hearing of this Application, the Sherriff of the above Honourable Court (or his/her deputy) be and is hereby authorised to take such steps necessary to prevent the Tops liquor store from opening and trading, alternatively to close down the Tops Liquor Store pending the final determination of the proceedings referred to in prayer 2 above and until a Court Orders otherwise.

4. *That the First and Second Respondents, jointly and severally, the one paying the other to be absolved, pay the costs of this Application on the scale as between Attorney and Client."*

[2] The Applicant is Nelia's Liquor Store CC t/a Safari Liquor City. The First Respondent is Vresthena (Proprietary) Limited and the Second Respondent is Melisandre Trading (Proprietary) Limited. The Applicant, on its version of events, leases a shop (Shop No. 19) from the First Respondent in a shopping centre which belongs to the First Respondent. The Applicant conducts the business of a liquor store in the leased premises located in the shopping centre. As will be more fully referred to below, the Applicant avers that it has an exclusive right to conduct the business of a liquor store in the shopping centre. The Second Respondent has applied and has obtained a liquor licence to also conduct a liquor store business in the shopping centre. The deponent of the answering affidavits filed by the First Respondent and the Second Respondent, one Christos Giannacopoulous is a director of both the First Respondent and the Second Respondent.

[3] The First Respondent and the Second Respondent opposed the relief requested by the Applicant in this application. More pertinently and *in limine*, both respondents took issue with the Applicant's contention that the application was one of urgency and that the relief requested in prayer 1 of the notice of motion should be extended to the Applicant. The respondents aver that the urgency in this matter is *"self-created"* on the part of the Applicant.

[4] Accordingly, the Court firstly proceeded to deal with the issue of urgency and the parties address the Court on this issue at the hearing of the matter extensively. Mr Van Rooyen appeared on behalf of the Applicant and Mr Rood and Mr Bester on behalf of the First and the Second Respondent, respectively.

[5] As alluded to above, the Applicant premised the relief which it requested

from the Court in terms of prayers 2 and 3 of the notice of motion, and accordingly the Applicant's clear right and the remainder of the requirements for interim relief for the purposes of founding the interim relief, upon the averment that the Applicant has an exclusive right in terms of a lease agreement which it concluded with the First Respondent to conduct the business of a liquor store in the shopping centre of which the First Respondent is the owner. Accordingly, so the argument goes, the First Respondent may not allow the Second Respondent to also conduct a liquor store business in the said shopping centre.

[6] The First Respondent disputes that the lease agreement, which contains the exclusive right provision, are valid and binding between the Applicant and the First Respondent. This issue, for the purpose of establishing whether this application is of an urgent nature, is peripheral and as such there is no need to venture into the merits of the contentions raised in this regard by both the Applicant and the First Respondent.

CHRONOLOGY

[7] For the purposes of dealing with the issue of urgency, the relevant chronology of the events which has transpired in this matter are of importance. Mr Rood and Mr Bester recited the relevant chronology of the matter, in as far as same is relevant to the issue of urgency, in their respective heads of argument. They have directed the attention of the Court to the following events which have transpired in this matter:

7.1 During June 2018 the deponent to the Applicant's founding affidavit and the sole member of the Applicant, Mr Francesco Pedro (hereafter "Pedro"), became aware, from the contents of a notice published in the Government Gazette on 1 June 2018, that the Second Respondent applied for a "*Liquor Store Liquor Licence*" in respect of Shop No. 2 in the shopping centre. This publication of the licence application informed the public (and the Applicant *in casu*) that the Second Respondent intends applying for a licence in the

following terms:

"(1) ***Melisandre Trading (Pty) Ltd****, (2016/022159/07), 295 Florida Road, Morningside, Durban, Kwa-Zulu Natal, 4001, c/o P. O. Box 32106, GLENSTANTIA, 0010.*

(2) ***Liquor Store Liquor Licence.***

(3) All kinds of liquor.

(4) Tops @ Safari, Shop No 2, Safari Gardens Centre, Arend Road, Rustenburg, 0299." (Court's emphasis)

7.2 This notice clearly conveyed the intentions of the Second Respondent and despite Pedro being "…*concerned about*…" the contents of this notice, the only step taken by Pedro was to request Wessels Attorneys, the Applicant's attorney of record herein, to oppose the liquor licence application.

7.3 On 31 July 2018 Wessels Attorneys (the Applicant's attorneys) addressed a letter to NCS Attorneys Incorporated (the respondents' attorneys at the time), contending that in terms of a trade exclusivity clause contained in the Applicant's lease agreement, the Applicant had the exclusive right to conduct a liquor store business in the shopping centre, and demanding that the liquor licence application be withdrawn.

7.4 On 31 July 2018 Wessels Attorneys lodged an objection to the liquor licence application. On the Applicant's own version this objection was not lodged within the prescribed time to do so.

7.5 On 31 July 2018 NCS Incorporated addressed an email to Wessels Attorneys advising that the liquor licence application was being dealt with by Attorney Marius Blom.

7.6 On 1 August 2018 Wessels Attorneys responded to NCS Incorporated advising that the letter that had been sent by Wessels

Attorneys to NCS Incorporated "…*served as a warning that our clients will approach Court in the event that their rights are infringed…".*

7.7 On 1 August 2018 Attorney Marius Blom addressed an email to Wessels Attorneys advising that he shall deal with the essence of the letter of Wessels Attorney when he responded to the Applicant's defective objection to the liquor licence application.

7.8 The Applicant then took no further steps to follow up on the application launched by the Second Respondent and objected to by the Applicant. According to the Applicant, "…*silence ensued…*", and Wessels Attorneys received no further correspondence from the attorney of the respondents.

7.9 The Applicant did not afford an explanation as to why, despite the demand in the letter of Wessels Attorneys dated 31 July 2018 that the liquor licence application be withdrawn not having been complied with, and despite the threat in the email of Wessels Attorneys dated 1 August 2018 that the Applicant "…*will approach Court…*", the Applicant waited some eight and a half months, until 22 March 2019, before launching this application.

7.10 Shop No. 2, i.e. the premises wherein the Second Respondent's liquor store was to be operated according to the notice which published in the Government Gazette became vacant during early 2019. The Applicant did nothing.

7.11 During February 2019 Pedro noticed renovations being done to Shop No. 2. On enquiring from one of the construction workers involved in the renovations, Pedro was told that the renovations were being undertaken for a *"Tops"* liquor store.

7.12 On 18 February 2019 the Applicant's attorneys addressed a letter to

NCS Incorporated again averring that the Applicant had an exclusive right to conduct a liquor store in the shopping centre and that the intended opening of a liquor store by the Second Respondent would constitute a "…*serious infringement upon the rights of our client as well as constitute a severe breach…"* of the alleged lease agreement between the Applicant and the First Respondent, and that in the absence of compliance with its demands, the Applicant would approach this Court on an urgent basis.

7.13 Fluxmans Incorporated, the First Respondent and Second Respondent's current attorneys, responded to this letter on 25 February 2019 and expressly took issue with the Applicant's contention that an urgent application is opportune under the prevailing circumstances. In fact, this letter expressly conveys the stance of the First Respondent and the Second Respondent as advanced by their counsels in Court to the effect that the matter is not urgent and that any perceived urgency was self-created.

7.14 Wessels Attorneys responded to the above referred to letter in a letter dated 27 February 2019 in which the Applicant again threatened to launch an urgent application. Yet again, in another letter dated 7 March 2019 addressed by Wessels Attorney to Fluxmans Incorporated, an urgent application was threatened.

7.15 The Applicant consulted with counsel on 15 March 2019 and a week later this application was issued on 22 March 2019.

[8] What is evident from the afore recited chronology is that the Applicant already as early as 31 July 2018 informed the First Respondent's attorney, that: *"Should your client fail to do so and should it be established that your client disregards the rights of our client as set out above, we will have no alternative but to approach the relevant forum for relief"*. This threat escalated, and on 18 February 2018 the Applicant's attorney again stated that: *"Should it be the case that either the Landlord, Melisandre or any other*

party intends to or is in the process of conducting business as a Liquor Store, same shall constitute a serious infringement upon the rights of our client as well as to constitute a severe breach of the terms of the lease agreement between our client and the Landlord and shall our client have no choice but to approach the High Court on an urgent basis for relief". On 27 February 2019 Wessels Attorneys on behalf of the Applicant again recorded that: *"Upon receipt of the aforementioned, safe in the event that your client would like to reconsider its position, we will proceed to instruct council to file the urgent applicant"*.

[9] Notwithstanding the above referred to threats, the Applicant procrastinated to launch this application until 22 March 2019.

[10] The main thrust of the Applicant's argument to provide a rational for why the application was not launched earlier boils down to the fact that the First Respondent frustrated the Applicant's efforts to obtain the information which the Applicant requested from the First Respondent.

[11] In argument Mr Van Rooyen also advanced and emphasised the aforementioned contention. What is peculiar about the contention is that, according to the Applicant, the First Respondent persisted in its obstructive behaviour up to the date of the hearing of this application. In fact, a copy of the liquor licence obtained by the Second Respondent was only provided by the Second Respondent to the Applicant in response to a notice in terms of Rule 35(12) at the date of the hearing of this application.

[12] It must be noted that the contents of the liquor licence granted to the Second Respondent accords with the contents of the advertisement which appeared in the Government Gazette on 1 June 2018. There is no doubt that the Applicant was aware as early as June 2018 that the Second Respondent was of the intention to apply for a liquor licence for the operating of a liquor store at Shop No. 2 of the shopping centre wherein the Applicant avers it has an exclusive right to operate a liquor store, as referred to above.

[13] The Applicant proceeded to object to the granting of the liquor licence to the Second Respondent but did not take any action to follow up on the progress of the liquor licence application process until the 18 February 2019, when the Applicant was informed that the renovations being conducted at Shop No. 2 was to accommodate a *"Tops"* liquor store.

[14] The clear imminent threat of the infringement, or potential infringement upon the right which the Applicant avers it has herein which came to the knowledge of the Applicant during the first part of February 2019 and which prompted the letter by the Applicant's attorneys to the First Respondent's attorney, dated 18 February 2019 should, in the view of the Court have jolted the Applicant into taking the action which it has threatened with, as referred to above.

RULE 6(12) AND ITS APPLICATION IN THIS MATTER

[15] In order to advance this application on an urgent basis the Applicant must be granted the condonation (the rule refers to "dispense with" as is evident from the quote below) as envisaged in terms of rule 6(12)(a). Rule 6(12)(a) and (b) reads as follows:

> "(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 or petition filed in support of any application under paragraph (a) of this sub-rule, the Applicant* ***must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the Applicant claims that the Applicant could not be afforded substantial redress at a hearing in due course.****"* (Court's emphasis)

[16] The manner in which the courts have interpreted the provisions of Rule 6(12)(a) and (b) in the past is trite. [1]

[17] The effect of Rule 6(12)(a) "…*is that in urgent applications an Applicant is allowed, depending on the circumstances of the matter, to make his own rules, which should as far as practicable accord with the normal rule of Court.*" [2]. Such an applicant must however at the hearing of the matter request and obtain the relief as provided for in this rule from the Court.[3] This does not occur as a mere formally and the discretion to extent the relief provided for in the rule rests with the presiding judge. Hence, the use of the word *"may"* as emphasise in the above quoted extract from Rule 6(12).

[18] In the exercise of its discretion the Court should apply the requirements set by Rule 6(12)(a) and (b) and apply same to the facts before it.[4]

[19] In the often quoted and referred to case of Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk[5] the Appellate Division (as it then was) stated the following: *"In my view, in order to persuade the Court that the matter is urgent the Applicant must in the founding affidavit set out sufficient facts to enable the Court to decide whether urgent relief should be granted, in addition to making averments on*

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1 See Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 782 A – G, Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers) 1977 4 SA 135 (W) at 137 F – G, Galiagher Estate v Norman's Transport Lines (Pty) Ltd 1992 (3) SA 500 (WLD) at 502, Sikwe v SA Mutual Fire & General Insurance 1977 3 SA 438 (W) at 440 – 441 and Mangala v Mangala 1967 2 SA 415 (E).

2 Cilliers et al Herbstein & van Winsen The Civil Practice of the Superior Courts of South Africa, Juta 5th ed at p 431-432.

3 See Kayamandi Town Committee v Mkhwaso 1991 (2) SA 630 (C).

4 Van Winsen, The Civil Practice of the Superior Courts of South Africa, 3rd ed, page 73, Van Loggerenberg Erasmus Superior Court Practice Vol 2 Juta at D1-87 and Harms Civil Procedure in the Supreme Court, LexisNexis, at B-74.

5 1972 (1) SA 773 (AD) at 782 A – G.

the urgency the Applicant must set out facts that would support those averments. In dealing with this issue, the Court will, of course, consider the substance of the affidavit and not the technical requirements. In other words the Court will look at the totality of the evidence set out in the founding affidavit and then from there deduct from a reasonable inference that those facts support the case for urgency."

[20] In Eniram (Pty) Ltd v New Woodhome Hotel (Pty) Ltd[6] the following was said in this regard: *"I regard it as desirable that an Applicant seeking to dispense with the ordinary procedure should set out in his affidavit that he regards the matter as one of urgency, and should refer* ***explicitly to the circumstances on which he bases this allegation and the reasons why he claims that he could not be afforded substantial relief at the hearing in due course****."*[7] (Court's emphasis)

[21] In the matter of Caledon Street Restaurants CC v D'Aviera[8] the Court gave a detailed analysed of what was expected from an Applicant who is contending that the relief which it is seeking should be extended on an urgent basis. This exposé by the Court are opposite in this matter as well and in fact, in all matters where urgency is claimed by an applicant. The following was stated: *"In the assessment of the validity of a respondent's objection to the procedure adopted by the Applicant the following principles are applicable.* ***It is incumbent on the Applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency.*** *The intent of the rules is that a modification thereof by the Applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The Applicant will have to demonstrate sufficient real loss or damage were he to be compelled to rely solely or substantially on the normal procedure. The court is enjoined by rule 6(12) to dispose of an urgent matter by procedures 'which*

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6 1967 (2) SA 491 (E) at 493 F- G

7 Also see Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 2 SA 81 (SECLD) at 95 A – B.

8 1998 JOL 1832 (SE) at pages 7 – 9.

shall as far as practicable be in terms of these rules'. ***That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case. Practitioners must accordingly again be reminded that the phrase 'which shall as far as practicable be in terms of these rules' must not be treated as pro non scripto.*** *The mere existence of some urgency cannot therefore necessarily justify an Applicant not using Form 2 (a) of the First Schedule to the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the Applicant is seeking in the first instance, is merely a rule nisi without interim relief. A respondent is entitled to resist even the grant of such relief.* ***The Applicant, or more accurately, his legal advisors must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey*** *rule 6(5)(a)* ***and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies of the case demand (and it need hardly be added these exigencies must appear from the papers).*** *On the practical level it will follow that there must be a marked degree of urgency before it is justifiable not to use Form 2(a). It may be that the time elements involved or other circumstances justify dispensing with all prior notice to the respondent. In such a case Form 2 will suffice. Subject to that exception it appears that all requirements of urgency can be met by using Form 2(a) with shortened time periods or by another adaptation of the form, e.g. advanced nomination of a date for the hearing of the matter, or omitting notice to the registrar accompanied by changed wording where necessary. Adjustment, not abandonment of Form 2(a) is the method."* (Court's emphasis)

[22] In paragraphs 22 to 24 of the founding affidavit the Applicant addresses the issue of urgency and the arguments advanced on the Applicant's

behalf at the hearing of this matter followed suit. Mr Van Rooyen motivated the urgency of the application by arguing that the matter is urgent because the effectiveness of the relief which the Applicant is requesting will dissipate, if the Applicant needs to wait for same to be adjudicated by means of a hearing in the normal and due course. The Respondents did not take issue with this particular contention raised on behalf of the Applicant.

[23] However, the enquiry regarding the issue of urgency does not end there. To this end, more was required from the Applicant in view of the respondents' contention that the urgency was *"self-created"*. The manner with which the Applicant deals with the issue of urgency in the founding affidavit is cursory at best when it comes to explaining its procrastination since June 2018. It should also be kept in mind that the Applicant was informed in no uncertain terms by the First Respondent and Second Respondent's attorneys that, in their view, there is no merits for an application to be launched on an urgent basis. On 25 February 2019 the First Respondent and the Second Respondent attorney wrote a letter addressed to the Applicant's attorney stating *inter alia* that the matter is not urgent and that any perceived urgency was *"self-created"*.

[24] The Court in the matter of Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others[9] described what follows upon an Applicant having established that it will not be able to *"…be afforded substantial redress at a hearing in due course."* by stating the following: "*It seems to me that when urgency is in issue the primary investigation should be to determine whether the Applicant will be afforded substantial redress at a hearing in due course. If the Applicant cannot establish prejudice in this sense, the application cannot be urgent.* ***Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing,***

[9] [2014] 4 All SA 67 (GP) at paragraph [64] and also see Harms supra, at B-72.

other prejudice to the respondents and the administration of justice, the strength of the case made by the Applicant and any delay by the Applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency." (Court's emphasis)

[25] Both the First Respondent and the Second Respondent argued that urgency in this matter was *"self-created"* by the Applicant. It is trite that "... *an Applicant cannot create his own urgency by simply waiting until the normal rules can no longer be applied."*[10] In this regard, appositely Mr Bester referred to the matter of Schweizer-Reneke Vleismaatskappy (Edms) Bpk v Minster van Landbou & Andere[11] wherein the following was held by the Court: *"Volgens die gegewens voor die hof wil dit vir my voorkom dat die applikant alreeds meer as a maand weet van die toedrag van sake waarteen nou beswaar gemaak word. Die geleentheid het slegs dringend geword omdat die applikant getalm het ... maar dit was geensins nodig vir doeleindes van hierdie aansoek ... om so lank te wag om die hof te nader nie. Al hierdie omstandighere in aggenome, is ek nie tevrede dat die applikant voldoende gronde aangevoer het waarom die hof op hierdie stadium as 'n saak van dringendheid moet ingryp nie. Ek is dus, in die omstandigheid, nie bereid om af te sien van die gewone voorsdrifte van reël 6"*.

[26] The arguments advanced by the Respondents, in unison, were to the effect that the Applicant should have acted reasonably to protect its perceived interest (i.e. its averred exclusive right to conduct a liquor store in the shopping complex). In the matter of Quick Drink Co (Pty) Ltd & Another v Medicines Control Council & Others[12] it was stated that: *"When*

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10 See Twentieth Century Fox Film Corp v Anthony Black Films (Pty) Ltd 1982 3 SA 582 (W) at 586 A to D and Bandle Investments (Pty) Ltd v Registrar of Deeds 2001 2 SA 203 (SE) 213 at 213 E.

11 1971 (1) (PHF11) (T).

12 2015 (5) SA 358 (GP) at paragraph [12].

one has regard to the time-line of events to which reference has already been made, then the Applicant from the time the consignment was seized, ***acted reasonably and prudently in pursuing its rights*** *and trying to resolve the matter. This included correspondence and meetings with the respondents as well as its own enquiries with regard to the manner in which the Act has been applied and enforced. I am accordingly satisfied that the matter is urgent, regard being had both to the nature of the relief claimed as well as the manner in which the Applicant* ***acted to assert and protect*** *what it regarded as an infringement of its proprietary rights."*[13]

[27] In as far as the issue of urgency is concerned the question then becomes whether the Applicant "…*acted reasonably and prudently in pursuing its rights* …" and "…*acted to assert and protect…"* the interests which it now seeks to protect in terms of this application.

[28] Mr Rood submitted, with some circumspection, during argument that if one has regard to the chronology of the matter (as referred to in detail above) the actions of the Applicant in bringing this application on an urgent basis, in effect amount to an *"abuse of the court process"*.

[29] This contention raised on behalf of the First Respondent was not inapt if one has regard to the facts of the matter as borne out by the chronology. The inappropriate application and use of the provisions of Rule 6(12) has in the past been labelled as an abuse of the court process. In the matter of Vena and Another v Vena and Others[14] Jones J stated the following: *"My finding was that the Applicant's allegations did not comply with rule 6(12)(b) which requires him to set out explicitly the circumstances rendering the matter urgent and also the reasons why he will not be afforded substantial redress at a hearing in the ordinary course. He gave no reasons at all why he could not get substantial redress at a hearing in due course. The circumstances allegedly giving rise to the commercial urgency upon which he relied were the reverse of being explicit. Instead, they were set out in*

13 Also see Harms *supra* at B-73.

14 2010 (2) SA 248 (ECP) at par [5].

vague, incomplete, and insubstantial terms and did not seem to me to have bearing on the relief sought in the notice of motion or the issues in dispute, other than that the divorce between the parties was disruptive of the business of the service station. The grounds of urgency alleged certainly did not justify giving the respondents two court days within which to give notice of an intention to oppose and to file opposing affidavits. A postponement was inevitable and was granted. The 1st respondent filed her opposition as soon as reasonably possible, on 12 December 2008. The Applicant's replying affidavit was not filed until 8 January 2009. He gave no explanation for his delay and one is therefore left in doubt about the bona fides of his case for urgency. ***The urgency appears to have completely disappeared. In consequence, I find myself echoing the remarks of Kroon J at page 21 of the judgment in Caledon Street Restaurants CC that 'in my judgment, therefore, the use that the Applicant made of the procedure relating to matters of urgency was a misuse, indeed an abuse, of the process of the court. On that ground alone I find that the Applicant should be non-suited'.*** *"* (Court's emphasis)

[30] In practise the *"abuse"* of the court process by an inappropriate application and use of the provisions of Rule 6(12) not only has an effect on the parties to the litigation and the Court concerned, but also the other litigants. This fact was alluded to in the matter of National Ship Chandlers (Natal) 1989 (Pty) Ltd v Ellis and Another[15] wherein the Court stated the following: *"When an Applicant insists on dealing with a matter on an urgent basis there is not only inconvenience to the respondent, but to the court as well as litigants and practitioners making demands on its time and resources. Other litigants (and their representatives) waiting for their matters to receive attention are also compromised by the queue being jumped as it were by a litigant making their subjective emergency everyone else's concern."* The effect referred to in this matter, resulting from an abuse of the court process is also referred to as *"jumping the "litigation queue"*.

[31] The same sentiment was expressed in the matter of IL & B Marcow

15 (542/2018) [2018] ZAECELLC 6 (6 April 2018) at paragraph [35].

Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another[16] wherein it was held at 113 E – 114 B that: **"*Other litigants waiting for their matters to be heard would be prejudiced if priority were afforded to these applications as they would have to wait longer. And what distinguishes these two applications from other matters? Applications for review such as these occur commonly and are not given priority.*** *The prejudice that Applicants are complaining about is the possibility that they may suffer losses of profits – the losses, if any, sound in money. Assuming that such losses are irrecoverable, that still does not distinguish these matters from many others awaiting their turn on the ordinary roll. Take for example all the cases wherein general damages are claimed in delict including actins instituted under the Compulsory Motor Vehicle Insurance Act 56 of 1972. Interest is not claimable on the amount awarded and litigants suffer financially by delay in the adjudication of their matters.* ***Moreover, the fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment.*** *On the other hand, where a person's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, the Court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants. The reason for this differential treatment is that the Courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those advanced by the Applicants in these two matters were allowed to dictate the priority they should receive on the roll. It is, in the nature of things, impossible for all matters to be dealt with as soon as they are ripe for hearing.* ***Considerations of fairness require litigants to wait their turn for the hearing of their matters. To interpose at the top of the queue a matter which does not warrant such treatment automatically results in an additional delay in the hearing of others awaiting their turn, which is both prejudicial and unfair to them. The loss that Applicants might suffer by not being afforded an immediate hearing is not the kind of***

16 1981 (4) SA 108 (C).

loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public. (Court's emphasis)

[32] The question of whether sufficient grounds exist for a matter qualifying to be considered as urgent and that condonation, as envisaged in terms of rule 6(12)(a), should be extended to an applicant must be considered with due and judicial regard to the following:

32.1 the relief requested by an applicant;

32.2 the facts of the matter, with specific reference to the chronology of events leading up to and culminating in the launching of the application on an urgent basis;

32.3 any other extraordinary factors factor(s) which may be present in the particular circumstances of the case which may render it necessary and in the interest of justice to extend the relief contemplated in Rule 6(12) to an applicant, notwithstanding the fact that considerations emanating from the above referred to two subparagraphs may militate against the granting of the relief set out in rule 6(12).

[33] An applicant must not only set forth sufficient grounds as referred to in the preceding paragraph but must also explain any dilatory behaviour on its part. The onus to do so, rests squarely on an applicant.

[34] As to the relief which the Applicant is requesting *in casu* as set out in the notice of motion, as quoted above:

34.1 currently, there are no review proceedings (as referred to in prayer 2 of the notice of motion) launched by the Applicant pending against the Liquor Board, nor did the Applicant advance any facts as to when and how same will be launched, or the grounds upon which same will be premised; and

34.2 the arbitration proceedings (also referred to in prayer 2 of the notice of motion) have also not commenced, nor did the Applicant proceed to nominate an arbitrator to commence such proceedings as requested by the First Respondent.

[35] The above referred to omissions by the Applicant were also alluded to by the Second Respondent in its answering affidavit.

[36] Under the circumstances and having regard to the proverbial red lights which came on during June 2018, one would have expected the Applicant to follow up, make enquiries and take action to ensure and safeguards the rights which it perceives it has in terms of the lease agreement with the First Respondent.

[37] The Applicant's actions herein are evident of the proverbial *"frog in hot water"* syndrome. The waters around the Applicant kept on getting warmer since June 2018 to where it reached, in the view of the Court, boiling point on 18 February 2019. Yet, the Applicant procrastinated for more than a month to make good on threat that it already made on 31 July 2018 to approach this Court for relief.

[38] The urgency in this application is indeed *"self-created"* by the Applicant as contended by the First Respondent and the Second Respondent.

ORDER

[39] Therefore and having considered the facts in this matter, the submissions made on behalf of the parties and the prevailing and applicable legal framework, the following order is made:

"The relief requested in prayer 1 of the notice of motion is not granted. The application is struck from the roll with costs, which costs in respect of the First Respondent includes the costs of senior counsel."

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N. G. LAUBSCHER

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

APPEARANCES:

DATE OF HEARING	:	04 APRIL 2019
DATE OF JUDGMENT	:	02 MAY 2019
COUNSEL FOR APPLICANT	:	ADV J VAN ROOYEN
COUNSEL FOR FIRST RESPONDENT	:	ADV ROOD SC
COUNSEL FOR SECOND RESPONDENT	:	ADV C BESTER
ATTORNEYS FOR APPLICANT	:	NIENABER & WISSING ATT
ATTORNEYS FOR FIRST RESPONDENT	:	SMIT & STANTON INC.