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

CASE NO: 2022/517

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED WITH SUMMARY

26/4/2022
DATE

J Moorcroft
SIGNATURE

In the matter between:

SIYAKHULA SONKE EMPOWERMENT CORPORATION (PTY) LTD	First Applicant
and	
REDPATH MINING (SOUTH AFRICA) (PTY) LTD	First Respondent
REDPATH AFRICA LIMITED	Second Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Third Respondent

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JUDGMENT

MOORCROFT AJ:

Summary

Urgent applications – Rule 6 (12) – Urgency is dependent on facts justifying (1) truncation of time periods, (2) service by agent other than Sheriff, and (3) allocation of preferential hearing date in Urgent Court rather than on ordinary roll – There are degrees of urgency

Business rescue applications – Companies Act, 71 of 2008 – section 131 - often by their very nature urgent – must be dealt with expeditiously – Applicant must make out a case for invoking Rule 6 (12) and for the degree of urgency relied upon

Order

[1] In this matter I handed down the following order on 20 April 2021:

"1. The application is struck from the roll;

2. The costs are reserved."

[2] This matter was argued together with the application under case number 2022/650.[1] The application under case number 2022/650 is referred to as the *"interdict application"* while this application under case number 2022/517 is referred to as the *"business rescue application."*

[3] For taxation purposes I noted that approximately 50% of the time was spent on each of the matters.

[4] The reasons for the order are set out below.

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1 *Siyakhula Sonke Empowerment Corporation (Pty) Ltd & Arendse v Redpath Mining (South Africa) (Pty) Ltd & Redpath Africa Limited*.

Introduction

[5] The applicants sought an order that the first respondent be placed under supervision and that business rescue proceedings[2] be commenced with in terms of section 131(4) of the Companies Act, 71 of 2008. The relief is sought as final relief or alternatively in the form of a rule *nisi*.

[6] At the commencement of argument and after debating the matter with counsel, I ruled that the interdict application and the business rescue application be argued together and that the question of urgency in both matters be dealt with first, together with the respondents' *in limine* argument on joinder in the interdict application. The joinder point is not relevant to the business rescue application.

Urgency

[7] Rule 6 (12) (b) requires an applicant to set forth explicitly *"the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."*

[8] In *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd,* Notshe AJ referred to this requirement and said:[3]

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2 See *Oakdene Square Properties (Pty) Ltd & Others v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others* 2013 (4) SA 539 (SCA).

3 *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [2012] JOL 28244 (GSJ), [2011] ZAGPJHC 196 paragraphs [6] and [7]. See also *Export Development Canada & Another v Westdawn Investments Proprietary Limited & Others* [2018] JOL 39819 (GJ) paragraph [8] and *In re Several Matters on the Urgent Court Roll*) 2013 (1) SA 549 (GSJ) paragraphs [6] and [7].

> *"[6] The import thereof is that the procedure set out in rule 6(12) is not there for the 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.*
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> *[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."*

[9] The application now before Court was served on Sunday, 10 April 2022 by email on all three respondents and on the first respondent's Board of Directors and on affected parties. The notice of motion required notification of an intention to oppose the application by noon on Monday, 11 April 2022 and the filing of answering affidavits by noon on Wednesday, 13 April 2022.

[10] The answering affidavits were filed on 14 April 2022 in unsigned form and on the 15th signed copies were filed. The applicant filed a replying affidavit on the 15th.

[11] Business rescue proceedings often are inherently urgent, but this is not a rule of law. The urgency invariably arises from the facts. Urgency is therefore fact – dependent and there are degrees of urgency.

11.1 When rule 6 (12) is not invoked, the application should be served by the Sheriff, and a respondent should have five court days to enter appearance to oppose and a further fifteen court days to file opposing papers. These time periods give effect to the *audi alteram partem*

principle. When the opposing affidavits have been filed the applicant may reply and the matter may then be enrolled.

11.2 Service by the Sheriff may be dispensed with in terms of Rule 6 (12) when circumstances require. The application should then be served by electronic means or delivery, service affidavits must be filed, and a case must be made out for condonation.

11.3 When rolls are very congested a hearing date on the normal roll may only be available long after the filing of the replying affidavits; when rolls are not congested it may be possible in terms of Rule 6 (12) to enrol a matter by Thursday for the following Tuesday. It may happen therefore that an applicant has to respect the prescribed time periods of five and fifteen court days, but then reply immediately and enrol the matter in the Urgent Court for hearing the following Tuesday without having to wait its turn on the normal motion court roll.

11.4 Rule 6 (12) may be invoked to shorten the term period permitted to the respondent to file opposing affidavits.

[12] The words of Coetzee J in *Luna Meubelvervaardigers (Edms) Bpk v Makin & Another t/a Makins Furniture Manufacturers*[4] are still apposite:

> *"Urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court. The following factors must be borne in mind. They are stated thus, in ascending order of urgency:*

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4 *Luna Meubelvervaardigers (Edms) Bpk v Makin & Another t/a Makins Furniture Manufacturers* 1977 (4) SA 135 (W) 136H – 137F. See also the comments made by Sutherland J *South African Airways SOC v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ).

> 1. *The question is whether there must be a departure at all from the times prescribed in Rule 6 (5) (b). Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge on duty for that week.*
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> 2. *Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed his papers by the previous Thursday.*
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> 3. *Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing in the next Court day at the normal time of 10.00 a.m. or for the same day if the Court has not yet adjourned.*
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> 4. *Once the Court has dealt with the causes for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next Court day at the normal time that the Court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even if that be at night or during a weekend.*
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> *Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith."*

[13] Business rescue proceedings "*must be conducted with the maximum possible expedition*"[5] but this does not mean that an applicant can throw caution to the wind and approach the Court on very short notice for relief, without making out a case for urgent relief tailored to and justified by the specific facts of the case.

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5 *Koen & Another v Wedgewood Village Golf & Country Estate (Pty) Ltd & Others* 2012 (2) SA 378 (WCC) paragraph [10]. The judgment by Binns-Ward J is not authority for the proposition that business rescue applications are always urgent – the Court was not seized with an urgent application – but it is authority for the proposition that business rescue procedures must be implemented and carried to a conclusion expeditiously.

[14] The applicant deals with urgency by saying that the Directors of the first respondent had admitted that it was in financial distress in an affidavit in the interdict application. That affidavit stated that in the absence of additional funding in the amount of R75 million in terms of a proposed rights offer approved by the Directors subject to the passing of certain special resolutions by the shareholders of the first respondent, the first respondent would not be able to continue trading.

14.1 In the interdict application the applicants sought to interdict a shareholders meeting called to consider a resolution that the first respondent's Memorandum of Incorporation be amended, that a conversion of shares be adopted, that the share capital be increased, and that a rights offer to acquire the new shares be made to all shareholders pro rata their existing shareholding, and related relief.

14.2 There is a pending dispute and pending litigation between the parties under case number 2021/55896 relating to the shareholding of the first applicant and the second respondent in the first respondent. In the pending litigation the present applicant seeks to set aside a previous rights offer in the first respondent implemented during November 2021. This offer raised R40 million equity and the application seeks to set aside all steps taken pursuant thereto and to undo them. In that application founding and answering affidavits have been filed but a replying affidavit is due.

[15] The applicant therefore brought the business rescue application while the first applicant was already engaged in the interdict application that was intended to prevent a meeting of shareholders that, if successful, might improve the financial position of the first respondent.

[16] It cannot be argued that the scheduling of the shareholders' meeting rendered the business rescue application urgent. The fallacy in the argument is that applicants cannot obtain urgent relief by establishing their case for urgency on the supposition that the first respondent is in financial distress now, but may possibly no longer be distressed should the shareholders' meeting be concluded successfully and should funding become available. Indeed, in a notional case, the fact that a meeting is scheduled that may lead to ending a company's financial distress may merit the postponement of a business rescue application, or in and of itself render the application not urgent.

[17] Evidence that an applicant became aware of a company's financial distress on a certain date explains why a business rescue application was launched on a particular date, but of itself the evidence does not justify shortening of time periods or preferential enrolment in the Urgent court rather than on the normal roll.

[18] There is nothing in the founding papers that justify such a drastic shortening of time periods.

[19] For the above reasons I held that the application was not urgent.

Costs

[20] I granted an order that the costs be reserved. In my view costs would be more appropriately dealt with in the pending application and in the normal course.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **26 April 2022**

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DATE OF THE HEARING:	20 April 2022
DATE OF ORDER:	20 April 2022
DATE OF JUDGMENT:	26 April 2022