REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 26912/2017

In the matter between:

W: E M **Applicant**

and

W: S **Respondent**

JUDGEMENT

NDLOKOVANE AJ

INTRODUCTION:

[1] This is an opposed urgent application in terms of which the applicant seeks an interim relief in the following terms:

" 1.1. That, pending finalisation of the proceedings under case number: 26912/2017 in the above Honourable Court ("the divorce action"), the Respondent be interdicted and/or restrained from selling, encumbering or in any other manner alienating *the immovable property situated at 5[....], KwaZulu Natal (,"the immovable property").*

1.2 Alternatively, that pending finalisation of the divorce action, the Respondent be interdicted and/or restrained from selling, encumbering or in any other manner alienating the immovable property without first obtaining the written consent of the Applicant thereto, which consent shall not be withheld unreasonably.

1.3 Further alternatively, that, pending finalisation of the divorce action, the Respondent be interdicted and/or restrained from selling, encumbering or in any other manner alienating the immovable property for a price other than a market-related price.

1.4 That it be ordered that in the event of the sale of the immovable property, the entire net proceeds, alternatively such portion thereof as the Honourable Court may determine, derived from such sale shall be held in an interest-bearing trust account of attorneys agreed upon between the parties or, failing such agreement, nominated by the Legal Practice Council, pending finalisation of the divorce action.

1.5 That costs hereof be costs in the divorce action, save and in the event of opposition, in which event the Respondent be ordered to pay the costs hereof on the scale as between attorney and client".

[2] The Respondent opposes the application and seeks a dismissal thereof with costs on an attorney and own client scale. In addition thereto, the Respondent has raised certain points *in limine*, namely: lack of urgency and second point *in limine* to the effect that the applicant is not entitled to the relief she is seeking.

[3] When the matter was called, I heard arguments from the parties on the issue of urgency only. Thereafter, I reserved judgment in order to deal with urgency and, depending on my decision thereon, the issue of merit would be determined at a later stage.

Time periods provided for in the notice of motion

[4] The applicant required the respondent to file a notice of intention to oppose at 12h00 on 25 May 2023 accompanied by its answering affidavit by 10h00 on Monday the 05 June 2023,

[5] The notice of motion is dated 23 May 2023 and the founding affidavits commissioned on 22 May 2023. A return of service situated at caselines master bundle 01-65 purports to indicate that the notice of motion and annexures thereto were electronically served on the respondent on 24 May 2023 at 11h39.

[6] The respondent's notice to oppose is dated 25 May 2023 and was also electronically served at 11h06 on that date. The answering affidavit was signed and commissioned on 05 June 2023 and on the same day delivered at 17h03 by e-mail to the applicant and filed on caselines at master bundle situated at 014-295.

[7] The applicant filed its replying affidavit thereafter electronically on 09 June 2023, followed by its heads of arguments on 12 June 2023 and those of the respondent handed from the bar on the hearing date,13 June 2023. This application was thus launched on an semi - urgent basis.

[8] A brief material factual background of the matter will be relevant to understand the relief sought and has been succinctly summarised in the applicant's practice note as followed:

"The parties were married to each other at Krugersdorp on 24 October 2015, out of community of property and they are still married to each other. There are no children born from the marriage. The marriage relationship between the parties has broken down irretrievably. The applicant instituted divorce proceedings under the above case number in July 2017. In terms of the amended particulars of claim, the applicant referred to the provisions of the ante nuptial contract between the parties when claiming her relief.

The respondent raised certain defences in which inter alia the enforceability of the ante nuptial contracts was disputed.

I pause to mention that it is evident from the papers before me that the parties has a history of litigation before this court including two rule 43 applications.

Likewise, it is also evident the papers before me that from the a foregoing there are written agreements between the parties relating to the immovable property under review which is contained in the ante-nuptial contract as well as in the Deed of Donation. Chief amongst all, the respondent remains the registered owner of the immovable property as it appears from the Deed Office's printout forming part of this application(my emphasis),until February 2023 and/or early March 2023,when the applicant first became aware of the enlisting to the market of the immovable property without her consent or knowledge".

URGENCY

[9] Before a court makes a finding on the merits of an urgent application, the court must first consider whether the application is indeed so urgent that it must be dealt with on the urgent court roll. Where an applicant does not succeed in convincing the court that he will not be afforded substantial redress at a hearing in due course, the matter will be struck from the roll. This will enable the applicant to set the matter down again, on proper notice and compliance – ***SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA)**.

Likewise, where the facts indicate that the urgency is self-created, an applicant will not be entertained and the application will be struck from the roll –

[10] Uniform Rule 6(12) affords an applicant to create its own rules within which a respondent must file a notice to oppose and an answering affidavit. This is why condonation must be sought when the court is approached. A respondent who ignores the timeline so set by an applicant does it at his own peril and runs the risk of an order been granted against him by default. However, an applicant who cannot convince the court of the rationality and necessity for the timeline devised by it, should expect its application to be struck from the roll with costs.

[11] It is trite that the correct and the crucial test to be applied in urgent applications and confirmed that it is the true test is whether or not an applicant will be afforded substantial redress in due course.(See the matter of E***ast Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others***(11/33767) [2011] ZAGPJHC 196 (23 September 2011).This in a nutshell means, 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. 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.

[12] I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. Therefore, whether a matter is urgent depends on the relief sought seen in context with the facts of a case. As a result, urgency is determined on a case-by-case, context specific basis.

[13] On a proper analysis of the applicant's founding papers, the applicant was aware from as far back as late February 2023 to early March 2023 of the sale of the property and she then sought information through her attorneys to secure a proper undertaking which will secure her claims, by so doing she was so trying to avoid litigation which she alleges cannot afford.

[14] Adv Haskins SC during the hearing of the matter submitted that the applicant was reasonable in acting in the matter she had acted as the law called upon her to first attempt to resolve matters of this nature amicably before 'rushing' to court and therefore, the courts must be sympathetic to an applicant who finds herself under such circumstances because such delays are procedural in nature, so his submissions goes.

[15] In contrast, Adv Ohannisian SC for the respondent submitted that the applicant's urgency if present is self -created as the Applicant created her own urgency and refers to correspondence, including in regard to a written undertaking (which it is not certain still exists and that more than one month lapsed after the last correspondence between the respective attorneys before the Applicant launched the present application. The Applicant in reply states, *inter alia:* The matter of the divorce has a long history and her present attorney had to obtain the files relating to the matter. Even after the present attorney of record came on record, he exchanged correspondence with the Respondent's attorneys.

[16] Further, the respondent in his opposing papers contends that the applicant despite securing of the proceeds of 40% of the property by way of the draft written undertaking as contained in the letter dated April 2023 as per annexure AA4 and AA5 of her founding papers, the applicant sought to make further demands, which has thereby resulted in her application being launched on 24 May 2023.

[17] Based solely on the facts provided by the applicant in its founding papers as the grounds for urgency, and accepting such as the sole version before the court for purposes of determining whether the matter should be heard on an urgent basis, these facts are the rights in question which are of an obviously substantial value and the circumstances of the case justifying the Honourable Court enrolling and hearing the matter as one of urgency.

[18] The applicant further contend that It is rare that an application for an interlocutory interdict is brought other than as an urgent application. While the immovable property is on the market to be sold, then absent an interdict, the Respondent could alone enter into a sale agreement which would create rights for a third party and a binding contract of sale, whether it prejudiced the Applicant or not. It is to be borne in mind what the Applicant contends her rights are in respect of the immovable property.

[19] If the Respondent were to receive the proceeds from the sale of the immovable property, in an amount unilaterally determined by him, this would also prejudice the Applicant in her claims. The Respondent could do with the proceeds of the sale as he wishes if there were no interdict and this could include the transfer by him of the entire proceeds into a living annuity policy, thereby placing the funds outside of his estate, so does that applicant contentions goes. I hold a different view to this approach as it shall become evident hereunder.

[20] There is one difficulty which the applicant is facing relative to the issue of urgency. It relates to the fact that as early as February to early March 2023, the applicant through her google search learnt of the enlisting of the property on the market. If she was aggrieved by the conduct of the respondent in this regard, she should have the court believe taken action then. Instead, the applicant approached two estate agents to establish the market value of the property and whether or not they have sole mandate to sell it.

Thereafter, she proceeded through her erstwhile attorneys of record to secure what she calls “a proper” undertaking or concession from the respondent which would protect her claims. The correspondence in this regard forms part of the application before me and is evident that the correspondence entered over a period time which was clear from the outset that the respondent would not be changing his mind. By then, it should have been clear to the applicant that she needed to take action in order to protect her alleged claim as she was legally represented as well. Instead, the applicant engaged further in addressing further demands to the respondent, when it would have been clear that legal action ought to commence sooner than later.

[21] In my view, there has been non-compliance with the rules relating to urgency as set out above. I therefore do not accept the applicant’s contention as set out above.

[22] This court has consistently refused urgent applications in cases when urgency relied upon was clearly self-created. Consistency is important in this context as it informs the public and legal practitioners that rules of court and practice directives can only be ignored at a litigant’s peril. Legal certainty is one of the cornerstone of a legal system on the rule of law.

[23] For all these reasons, I am not convinced that the applicant has passed the threshold prescribed in uniform rule 6(12)(b) and I am of the view that the application ought to be struck off the roll for lack of urgency. This brings me to the next issue relating to costs.

[24] The respondent’s senior counsel submitted that the conduct of the applicant as set out above in my judgement necessitate a punitive costs order against it. The general rule in matters of costs is that the successful party should be awarded costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party, or other exceptional circumstances. I am of the view that the interest of justice and facts of the present matter justifies a deviation from the normal rule of costs being awarded

in favour of the party who is successful. The present facts warrant that each party pays its own costs.

[25] Accordingly, I am of the view that the relief sought by applicant does not necessitates this court's urgent attention. Therefore, for this reason, I need not proceed to determine the issue of merits.

ORDER:

Accordingly, I make the following order:

1. The applicant's urgent application is hereby struck off the roll for lack of urgency.

2. Each party pays his or her own costs.

N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 15 JUNE 2023.

APPEARANCES

For the Applicant:	Adv. M. Haskins SC
For the Respondent:	Adv T. Ohannessian SC

Heard on: 13 June 2023

Date of judgment: 19 June 2023