

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO:57946/2014

DATE: 23 SEPTEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

R[...] M[...]

APPLICANT

and

M[....] M[...]

RESPONDENT

JUDGMENT

KUBUSHI, J

[1] The background leading to the institution of this application is that the applicant and the respondent were living together. The applicant alleges that he is married to the respondent in customary law and that such marriage took place during 2007. The respondent denies the existence of such a marriage.

[2] The applicant further alleges that they had conducted business together under a business registered in the name of the respondent. According to appellant, at all material times he had access to the bank account of the business and in particular was in possession of the business credit card which he used. Now that their relationship has soured the respondent is refusing him access to the business bank account and has taken the business credit card and refuses to give it back to him. The respondent is denying that the business belongs to them together and that the respondent has access to its banking account and credit card.

[3] In the application before me, the applicant seeks, on an urgent basis, the following relief:

3.1 That the respondent be ordered to give the applicant access to the business account held by FNB bank;

3.2 That the family of the respondent be ordered not to live in the matrimonial home of the parties;

3.3 That the respondent not withdraw money from the business account without the knowledge of the applicant; and

3.4 That the respondent be ordered to pay the costs of the urgent application on attorney and client scale in the event that the respondent opposes the application.

[4] The respondent opposes the relief sought by the applicant on the following grounds:

4.1 The application was not served by the sheriff of the court on the respondent. Service is therefore defective, rendering the application null and void.

4.2 The parties are not married in terms of customary law and the respondent has no marital obligations towards the applicant.

4.3 The applicant has not shown any grounds for urgency.

4.4 The applicant has not established the existence of a clear right to the banking facilities of the business of the respondent.

4.5 The applicant has not established injury actually committed or reasonably apprehended.

4.6 The applicant has not exhausted all other remedies available to him.

[5] During the hearing of the application, the applicant, correctly so, abandoned the relief sought that the family of the respondent be ordered not to live in the matrimonial home of the parties. Besides the fact that, as appears from the respondent's answering affidavit, the family member had already left the common home, I do not see how an order like this would be granted. The family member was not cited in the papers and as a result an order granted in such circumstances would have been *brutum fulmen*.

[6] The respondent's counsel conceded in argument before me that since the respondent is now in court it does not assist to pursue her submission that the application is null and void due to a defective service.

[7] One of the grounds on which the respondent is opposing the application is that the applicant has not

shown any grounds for urgency. It is, therefore, important to first decide whether the applicant is entitled to bring this application on an urgent basis.

[8] The respondent's contention is that this matter is not urgent and should not have been placed on the urgent roll. It appears that the matter was originally placed on the urgent roll for allocation on 19 August 2014 but was struck off the roll due to non-appearance of the applicant. The respondent's contention is that if the matter was really urgent the applicant would have made his appearance in court on that day.

[9] In terms of the uniform rule 6 (12) (b), the applicant must in his or her founding affidavit set out explicitly the circumstances on which he or she relies to render the matter urgent and the reason why he or she claims that he or she cannot be afforded substantial relief at a hearing in due course.

[10] In his founding affidavit, the applicant avers the following in respect of his application to be heard on an urgent basis:

“ **AD URGENCY**

7.1

The respondent took away the bank card from me while I was in possession of it and enjoying the use of it.

7.2

The respondent invited her sister to stay with us in our matrimonial house without my consent and now I don't have freedom in my house and further she has already once made accusations against me that I'm proposing her.

7.3

The respondent is now denying me access to enjoy the use of our other movable properties such as motor vehicles.

7.4

I'm now suffering financially because I don't have access to the business account which is our only source of income.”

[11] In his replying affidavit, the applicant in answer to a submission by the respondent that his (the

applicant's) failure to appear in court on 19 August is a sign that the matter is not urgent, state that 'the urgency of this matter speak for itself as the applicant and the respondent are married in terms of customary marriage and both parties are entitled to the use and benefit of proceeds of the joint estate and the applicant is being deprived such rights.'

[12] The above facts do not set out explicitly the circumstances on which the applicant relies to render the matter urgent and does not state the reason why he claims that he cannot be afforded substantial relief at a hearing in due course. The application, in my view, does not comply with the provisions of the rule and can therefore not be heard on an urgent basis. As it is said, the provisions of uniform rule 6 (12) (b) are imperative and failure to comply therewith is fatal to an application. See *Salt and Another u Smith* 1991 (2) SA 186 (Nm) at 187F - G.

[13] In the circumstances the application is struck from the roll with costs.

EM KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE: 05 SEPTEMBER 2014

DATE OF JUDGMENT: 23 SEPTEMBER 2014

FOR APPLICANT: ADV M MOSOPA, instructed by LOUIS LOURENS ATTORNEYS

c/o MALAN & HITCE ATTORNEYS

FOR RESPONDENT: ADV M MYBURCH, instructed by MKHABELA ATTORNEYS