

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

13/7/2016
CASE NO: 54312/16

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	13/07/16
	DATE
	SIGNATURE

DR PENUELL MPAPA MADUNA & ANOTHER

APPLICANT

And

NOMPUMELELO MADUNA & OTHERS

RESPONDENT

JUDGEMENT

This was an urgent application heard by me on 12 July 2016. The first and second applicants sought an urgent interim interdict against the first, fifth and seventh respondents. The applicants sought an order restraining the adoption of a resolution by the majority directors of the fifth respondent and the declaration and distribution of a dividend in regard to shareholding of the fifth respondent to which the applicants are rightful/beneficial owners. The matter was brought as one of urgency as it was submitted on behalf of the applicants that the first and seventh

respondents threatened adoption of the Resolution on 14 July 2016. This will result in the declaration and distribution of a dividend to the Nompumelelo Maduna Family Trust in an amount of R10 837 500.00 and to the eighth respondent in an amount of R7 000 000.00 on 14 July 2016, unless an interim interdict is granted. No relief is sought against the fourth, sixth and ninth to eleventh respondents as they had been cited purely as interested parties. The interim interdict being sought would have the effect that the first and seventh respondents would be interdicted from withdrawing money from the fifth respondents bank account held with the twelfth respondent. The application is opposed.

Urgent applications must be brought in accordance with Rule 6 and the guidelines in cases such as **Republikeinse Publikasies v Afrikaanse Pers Publikasies_1972 (1) SA 773 (A) at 782 A-G**, **Luna Meubel Vervaardigers v Makin & another 1977 (4) SA 135 (W)** and **Sikwe v SA Mutual Fire & General Insurance 1977 (3) SA 438 (W) at 440 G- 441 A**. The requirements for urgent applications are dealt with in Chapter 13.24 of this court's Practice Manual. Section 3.4 require the applicant to set out explicitly the circumstances which render the matter urgent. Section 5.2 require that deviation from the time period prescribed by the Rules of Court must be strictly commensurate with the urgency of the matter as set out in the founding papers. Section 6 provide as follows:

6.1 *If the facts and circumstances set out in the Applicant's affidavits do not:*

6.1.1 *constitute sufficient urgency for the application to be brought as an urgent application; and/or*

6.1.2 justify the abrogation or curtailment of the time periods referred to in Rule 6(5); and/or

6.1.3 justify the failure to serve the application as required in Rule 4,

the Court will decline to grant an order for the enrollment of the application as an urgent application and/or for the dispensing of the forms and services provided for in the Rules. Save for a possible adverse costs order against the Applicant, the Court will make no order on the application.

6.2 The aforesaid requirements will be strictly enforced by the presiding Judge.

Annexure "A" to Chapter 13.24, being the "Memorandum to Practitioners Re: Procedure in the Pretoria Urgent Motion Court" clearly stipulate the practice directive in the Court, governing urgent court matters. The specific purpose of the Memorandum was to inform practitioners how Rule 6 (12) must be applied and the manner in which the urgent court was managed to ensure an orderly and dignified adjudication of applications in this court. Papers must be filed by 12:00 the previous Thursday, ready for roll call at 10:00 the following Tuesday, unless the matter is so urgent that relief must be granted sooner. Paragraph [4] (8) of the Memorandum specifically directs that:

If an applicant anticipates that the application will be opposed it is essential that the respondent and the applicant be allowed reasonable times for the

filing of answering and replying affidavits before the roll call closes at 12:00 on Thursday. If these affidavits are not able to be filed in time and the matter cannot be heard at the time indicated in the notice of motion the procedure is abused.....

Paragraph [4](10) of the Memorandum stipulates as follows:

No matter involving more than 500 pages will be considered by the judge in the urgent court (subject to the remaining three degrees of ascending urgency) unless the papers are delivered to the judge who will hear the matter at least 48 hours before the time of the hearing in the notice of motion.

Papers in this matter were filed with the Registrar on Friday, 8 July 2016, not before 12:00 on Thursday, 7 July 2016. Over-and-above this, the papers filed consist of 533 pages, apart from an additional bundle of documents consisting of a further 157 pages. This voluminous bundle of documents were brought to my attention on Monday, 11 July 2016. Counsel for the applicants in addition thereto, at approximately 16:00 on Monday, 11 July 2016, forwarded to my Registrar, via email, written heads of argument consisting of 84 pages.

At the hearing of the application, Mr Nigrini who appeared for the applicants handed up an affidavit deposed to by the applicant's attorney, one Mr. Andries Johannes Hansen, dated 11 July 2016, which purports to explain the exceptional circumstances for the non-compliance with the Rules, Practice Directives and Memorandum of this court, saying amongst others, as follows:

Thousands of documents had to be trawled through in preparation of the founding papers which were limited to the bare minimum considering the ambit and documentation involved in the entire Sasol BEE transaction.

I confirm that we worked in excess of 18 hours a day since Monday 4 July 2016 to finalize the founding papers.

I confirm that we were only able to consult with the Second Applicant on Thursday evening, the 5th of July 2016.

I confirm that the Founding Affidavit and the Annexures thereto were served as soon as practically possible after finalization thereof.

All available time was used in an attempt to file the founding papers by Thursday at 12:00 in accordance with the practice directives but the task was so huge that it proved impossible to achieve with our best endeavors. Therefore exceptional circumstances exist as the divided (sic) will be declared before the applicant could comply with the practice directive.

There was a delay in obtaining documents, some of which are outstanding to date hereof and the papers had to be finalized without reference thereto, among others the documents relating to the DBJ Trust.

The route cause of the urgency in this matter is caused by the first and seventh respondents instance (sic) to declare and distribute a dividend this week which allowed insufficient time from the date on which the Notice was filed to comply fully with the practice directives and therefore exceptional circumstances exist (sic).

It appears to me that this further affidavit was filed because the paragraphs dealing with urgency in the Founding Affidavit of the first applicant explains very little. In the Founding Affidavit of Dr Penuell Mpapa Maduna, paragraphs 80 to 149 deal with the issue of urgency.

These paragraphs fail to disclose why the matter has now become so urgent; that the matter is so urgent that it could be served on Friday, 8 July 2016, for hearing on 12 July, especially having regard to the sheer volume of papers. At paragraph 93 of his affidavit, he says that on 30 June 2016 he received Notice by directors to consider and pass a resolution, to approve payment of a dividend to shareholders. According to him the urgency was created by the sending of the Notice. At paragraph 94 he says, *Further, by refusing to agree to time limits for the filing of affidavits so that the application could be brought within a reasonable period of time and that the normal time limits for the filing of affidavits be applied the First and Seventh Respondents acted unreasonable, created urgency by leaving the Applicants with no alternative but to approach the Above Honourable Court on an urgent basis.* He then explains in great detail that the Share Register is wrong and stands to be rectified. Further detail is set out about the second applicant having been deceived into the business relationship and her having been involved in an abusive marriage relationship. Reference is also made to WhatsApp messages exchanged between the first applicant and one Mr. Peter Wingrove as from 24 March 2016, onwards. All these paragraphs relating to urgency fails to explain sufficiently why the matter is so urgent and in particular, why the papers had not been served in time. In my view, the further affidavit by Hansen, discussed above, is an attempt to explain the required exceptional circumstances. It is evident that the urgency, if any, was self-created. There is no explanation why the application was

not brought at an earlier stage. The first respondent was aware of the fact that the fifth respondent would receive funds for distribution to its shareholders at least by 24 March 2016, when regard is had to the WhatsApp exchanges; his contention to being the owner of 51% shares in the fifth respondent as early as October 2015 and his threat to launch an urgent application by 13 June 2016.

Having regard to all of the above, I am in agreement with the submissions of counsel who appeared for the respondents, Mr. Basslian SC, that the applicants had more than sufficient time to bring the application in the normal course, alternatively, within a time period allowing the respondents' legal representatives sufficient time to digest the 690 pages and file answering affidavits. The applicants simply disregard Rule 6 (12) and the Court's requirements in relation to urgent applications. This is an abuse of the Court process. Also the second applicant simply has not shown any urgency at all.

I am not persuaded by the argument that exceptional circumstances exist which allows the applicants to abuse the processes of this Court. The applicants knew or ought to have known that the application would be opposed. The respondents have not been afforded an opportunity to file answering affidavits. The Memorandum to Practitioners in no uncertain terms spells out that if an application is not filed by 12:00 on the previous Thursday (subject to the remaining degree of ascending urgency in **Luna Meubels Vervaardigers**) the application will not be heard and will be struck off the roll. The object of timeous filing of the papers is to enable the Court to prepare and adjudicate upon the matter expeditiously. It cannot

be said that the papers had been filed timeously "to enable the court to prepare and adjudicate upon the matter timeously". The matter is accordingly struck off the roll.

The respondents' counsel argued for costs on the attorney and client scale including the costs of Senior Counsel. I expressed my displeasure at the manner in which this matter was being dealt with by the applicants and the punitive costs order is justified.

ORDER:

1. The matter is struck off the roll;
2. The first and second applicants are ordered to pay the respondents' costs on the attorney and client scale, including the costs of Senior Counsel.

A handwritten signature in black ink, consisting of a large, stylized 'S' and 'J' intertwined, written over a horizontal line.

HONOURABLE JUSTICE SWARTZ (AJ)