IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 56029/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

24/10/2019
DATE

SIGNATURE

In the matter between:

ERNST AND YOUNG ADVISORY SERVICE (PTY) LTD	Applicant
And	
RABIE, VIRGIL HUMPHREY	First Respondent
RABIE, ANTHEA BERENICE	Second Respondent
THE PUBLIC PROTECTOR: ADVOCATE B MKWHEBANE	Third Respondent
ESKOM HOLDINGS (SOC) LTD	Fourth Respondent
CLIFF DEKKER HOFMEYR INC	Fifth Respondent

In Re:

RABIE, VIRGIL HUMPHREY — First Applicant

RABIE, ANTHEA BERENICE — Second Applicant

And

THE PUBLIC PROTECTOR:

ADVOCATE B MKWHEBANE — Respondent

J U D G M E N T (EX TEMPORE)

COLLIS J

INTRODUCTION

[1] On 23 October 2019, the opposed urgent application was argued where after this Court reserved its judgment. The following day, an Ex Tempore judgment was delivered.

[2] In the urgent application, the relief sought by the applicant is in the nature of an interlocutory interdict, prohibiting the carrying into effect of a Court Order granted on 22 January 2019.

[3] In terms of the court order obtained in the absence of the

Applicant, and at the instance of the First and Second Respondents, the Public Protector was ordered to investigate the alleged maladministration of Eskom and its two appointed agents; Ernst & Young and Cliffe Dekker Hofmeyr, within two months of the date of the granting of the court order and thereafter, to file the report within one month on the First and Second Respondents.

[4] The applicant first obtained knowledge of the court order granted on 22 January 2019, on the 11th June 2019 and thereafter, took the necessary steps to apply for the rescission of this order granted on 22 January 2019.

[5] The said rescission application was launched on 17 July 2019 and during argument, this court was informed that the application is being opposed and that, indeed, it is ripe for hearing.

[6] The launching of the rescission application, however, did not result in a halting of the Public Protector's investigation against the applicant and this stance of the Public Protector was communicated to the applicant by the offices of the Public Protector on 2 October 2019.

[7] It is this communication which triggered the launching of

the present urgent application.

[8] Now, upon service of the urgent application on the Public Protector, cited as the third respondent in these proceedings before the Court, the Public Protector filed a Notice to Abide on 7 October 2019 and by so-doing, it follows that the third respondent has no desire nor intention to oppose the relief sought in this urgent application.

[9] At this juncture it is apposite to mention that, the only relief sought is directed against the Public Protector cited as the third respondent, in relation to her investigation in terms of the Court Order dated 22 January 2019.

GROUNDS IN OPPOSITION

[10] Opposition, however, is on the part of the first respondent. In essence, the first respondent contends that this application is not urgent. The first respondent attacks the *locus standi* of the applicant to bring the urgent application. The first respondent further contends, that the issue which the applicant wishes to challenges is *res judicata* and that attempts to canvass such issues on the part of the applicant, points to the fact that the applicant is being destructive and defeating the ends of justice.

URGENCY

[11] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Rule 6(12) of the Uniform Rules of Court.

[12] In terms of the rule and in terms of the practice directive of this Court, the applicant, in an urgent application, shall set forth explicitly the circumstances which he avers renders the matter urgent and the reasons why he claims that he could not be afforded substantial redress at the hearing in due course. In this regard, the parties are referred to the decision of *Luna Meubels Vervaardigers (Edms) Bpk v Markin Trading as Markin Furnitures Manufactures* 1977 (4) 135(W) @ 137F.

[13] If the facts and circumstances set out in the applicant's affidavit do not constitute sufficient urgency for the application to be brought as an urgent application and do not justify the abrogation of the time-period set out in Rule 6(5) of the Court, the Court will not grant an order for the enrolment of the application as an urgent application.

[14] Now, what are the facts set out in the founding affidavit in relation to urgency by the applicant?

14.1. Firstly, the applicant first became aware of the

order dated 22 January 2019 on the 11th June 2019.

14.2. On 13 June 2019, a candidate attorney attended Court on two occasions to uplift the court order, but was unsuccessful in obtaining same.

14.3. On 18 June 2019, a letter was addressed to the first respondent, requesting a full copy of the application. To this letter, the first respondent replied, conceding that he was not aware that the application ought to have been served on the applicant before court; nor that the applicant before court ought to have been cited in the proceedings, resulting in the court order of 22 January 2019, being taken.

14.4. On the same day correspondence was also directed to the office of the Public Protector, seeking a full copy of the application.

14.5. This letter was followed up with a further correspondence to her office dated 1 July 2019, wherein it was recorded that the Public Protector had no jurisdiction to investigate the applicant, given that it was already attended to.

[15] As the applicant received no response from the Public Protector's office to this correspondence, the application for rescission was then launched during July 2019.

[16] Further correspondence was thereafter exchanged which resulted in the correspondence from the Public Protector's office dated 2 October 2019, wherein it was conveyed that the 22 January 2019 court order will be carried out unless an interdict is obtained prohibiting the office of the Public Protector to carry out the court order.

[17] Counsel for the applicant had further argued that, if this urgent application is not granted prior to the hearing of the rescission application, it would make such hearing academic.

[18] In opposition, the first respondent contends that this application should have been launched much earlier, as the applicant first had knowledge of the January court order on 11 June 2019.

[19] Having regard to what has been postulated in the respective affidavits, this Court is persuaded that the matter is indeed urgent and that, the application should be enrolled as such, as the applicant would not be afforded sufficient redress in due course.

MERITS

[20] Now, in order for the applicant to succeed in being granted an interdict, it seeks the following requirements must

be met.

20.1. Firstly, the applicant must have a clear right.

20.2. Secondly, the applicant must prove irreparable harm.

20.3. Thirdly, the balance of convenience must favour the granting of the application; and

20.4. fourthly there must be an absence of any other satisfactory remedy available in the applicant.

In this regard, these requirements were set out in the decision of *Setlogelo v Setlogelo* 1914 (AD) 221.

[21] Now, what is meant by a clear right is a right clearly established?

CLEAR RIGHT

[22] Whether the applicant has a right, is a matter of substantial law in order to establish a clear right. In this regard, the applicant carries the *onus* to prove same on a balance of probability; the right which the applicant seeks to protect.

[23] In the present instance, it is clear that the applicant is a party with a material interest in the review application. This is more apparent, given the fact that the order of 22 January 2019 that was so given, was made by the Court, directing the Public Protector to investigate the Applicant. On

this basis alone, the court is satisfied that the applicant has established its clear right.

IRREPARABLE HARM

[24] In turning then to irreparable harm. If the interim relief sought in this present urgent application is not granted, it is likely to render the rescission application academic, as the investigation which the Public Protector order requires her to undertake, will likely be completed and the time and cost required to deal with that application would already have been expanded.

BALANCE OF CONVENIENCE

[25] What then about the balance of convenience? If the relief is granted and the applicant is unsuccessful with the rescission application, no prejudice would have been suffered by the Public Protector. In this instance, the first respondent had made submissions that he will suffer prejudice if this interdict is granted by the Court today. This Court is not persuaded that this, indeed, will be the case. The first respondent is opposing the rescission and by his own admission during argument, he confirmed that the office of the Public Protector had advised him *via* email that it would require no further documentation nor will it consult with any other person in order to finalise its report.

ABSENCE OF ANY ALTERNATIVE REMEDY

[26] Is there then an absence of alternative remedy available to the applicant? Clearly there is no alternative remedy available to the applicant. The office of the Public Protector was approached not to investigate the applicant further and was advised by the Public Protector that, only upon receipt of a Court Order, would she desist from pursuing with her investigation.

[27] The purpose of an interdict is to put an end to conduct in breach of the applicant's rights.

[28] As a consequence, I am satisfied that the applicant has established on the evidence presented, the requirements to be granted the relief it seeks. The application as mentioned, is not opposed by the third respondent, but only by the first respondent.

[29] As the First Respondent has been the unsuccessful party in his opposition, he would be ordered to pay the costs of the urgent application.

[30] Consequently, the draft order handed into Court is marked X and it is dated and signed by me and it is hereby made an

order of court.

COLLIS J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances as follows:

Counsel for the Applicant	: Adv. A Govender SC & Adv M Clark
Attorney for the Applicant	: Webber Wentzel Attorneys
Counsel for the Respondent	: *In Persona*
Attorney for the Respondent	: *In Persona*
Date of Hearing	: 23 October 2019
Date of Judgement	: 24 October 2019

"X" 24/10/19. "X"

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

C.J.C **Before the Honourable Madam Justice Collis** Case no: **56029/2018**
Heard on 22 October 2019
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ERNST AND YOUNG ADVISORY SERVICES (PTY) LTD	Applicant
and	
RABIE, VIRGIL HUMPHERY	First Respondent
RABIE, ANTHEA BERENICE	Second Respondent
THE PUBLIC PROTECTOR: ADV B MKWHEBANE	Third Respondent
ESKOM HOLDINGS (SOC) LTD	Fourth Respondent
CLIFFE DEKKER HOFMEYR INC	Fifth Respondent
In re:	
RABIE, VIRGIL HUMPHERY	First Applicant
RABIE, ANTHEA BERENICE	Second Applicant
and	
THE PUBLIC PROTECTOR: ADV B MKWHEBANE	Respondent

C.J.C **~~DRAFT~~ ORDER**

Having heard counsel and having read the papers filed, it is ordered that:

1. The forms and service provided for in the Uniform Rules of Court are, to the extent necessary, dispensed with, and the matter is heard as one of urgency in terms of rule 6(12) of the Uniform Rules of Court.

Counsel for the applicant: Anban Govender & Matthew Clark, 011 290 4000, anbang@law.co.za & clark@counsel.co.za

"X" 24/10/19.

"X"

2. The third respondent is interdicted and restrained from conducting any investigation pursuant to paragraph 2 of the order of His Lordship Mr Acting Justice Millar handed down on 22 January 2019 under the above case number, pending the final determination of the application for rescission which was issued by the applicant under the above case number on about 12 July 2019.

3. The first respondent pay the costs of this application ~~on the attorney and client scale~~, including the costs consequent on the employment of two counsel.

By order of the court

The Registrar

Counsel for the applicant: Anban Govender & Matthew Clark, 011 290 4000, anbang@law.co.za & clark@counsel.co.za