REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 6175/2023

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE..... SIGNATURE:.....

In the matter between:

FETAKGOMO TUBATSE LOCAL MUNICIPALITY **APPLICANT**

And

MAPALE DISTRIBUTORS AND ENTERPRISE CC **FIRST RESPONDENT**

STANDARD BANK OF SOUTH AFRICA
LIMITED (BURGERSFORT BRANCH) **SECOND RESPONDENT**

THE TAXING MASTER, PRAKTISEER **THIRD RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] On 18th August 2022 the first respondent obtained a summary judgment in the magistrate court Praktiseer against the applicant for R175 392.80. Thereafter the first respondent presented two bills of costs for taxation before the third respondent which were taxed in the absence of the applicant's legal representative. The first bill of costs was for condonation application and was taxed and allowed in the amount of R242 518.00. The second bill of costs which was for the main proceedings was taxed and allowed in the amount of R1 417 829.44.

[2] On 12th December 2022 the first respondent issued two writs of execution against the applicant's property. That led to the applicant instituting the first urgent application in this court. On 20th December 2022 Makgoba JP granted the applicant an order suspending the two writs of execution pending the determination of the proceedings to be instituted by the applicant within 45 days for an order setting aside the two allocations of the third respondent.

[3] On 27th February 2023 the applicant launched a rescission application in the magistrate court Praktiseer seeking to rescind the two *allocaturs* of the third respondent. The first respondent opposed the applicant's application for rescission and had raised several points *in limine*. The first respondent's points *in limine* were argued on 10th May 2023 and judgment was delivered on 28th June 2023. In terms of the judgment of the magistrate court Praktiseer, the first respondent's points *in limine* were upheld and the applicant's rescission application was dismissed.

[4] On 3rd July 2023 the first respondent brought an *ex parte* application in terms of section 72 of the Magistrate Court Act read together with rule 47 of the

Magistrate Court Rules in terms of which the first respondent was seeking a garnishee order against the applicant's primary bank account held by the second respondent. The order which the first respondent had obtained on *ex parte* basis was served on the applicant on 3rd July 2023. The rule nisi has been issued and the return date was the 1st August 2023. On 4th July 2023 the applicant filed its notice of appeal against the judgment and order of the magistrate court.

[5] On 7th July 2023 the applicant issued the second urgent application in this court seeking orders (i) declaring that by virtue of the order dated 20th December 2022 under case number 13545/2022, the writs of execution issued in the magistrate court on 12th December 2022 under case number 1465/2018 was stayed, pending the finalisation of the appeal lodged against the judgment and orders of the learned magistrate Thuyani of 28th June 2023, dismissing the applicant's application for rescission of judgment of the *allocaturs* issued on 9th December 2022; (ii) the garnishee order granted by the magistrate court for the district of Tubatse, held at Praktiseer, on 3rd July 2023 under magistrates' court case number 1465/2018 is finally set aside; (iii) alternatively, an order suspending the two writs of execution, and the garnishee order issued by the magistrates court Praktiseer, respectively on 12th December 2022 and 3rd July 2023 pending finalisation of the appeal that is pending against the judgment and orders granted by the learned magistrate Thuyani of 28th June 2023, dismissing the applicant's application for rescission of the *allocaturs* issued by the Taxing Master, Praktiseer, on 9th December 2022.

[6] The first respondent has opposed the applicant's second urgent application and had raised several points *in limine*. The second urgent application came before

Semenya AJA on 25th July 2023, and was removed from the roll as it was found that the applicant has prematurely instituted the urgent application before the proceedings in Praktiseer magistrate court were finalised. On 1st August 2023 the applicant attended court in Praktiseer magistrate court for the return date of rule nisi in the garnishee order application. The interim order of the garnishee was confirmed and made final on 23rd August 2023. The applicant alleges that thereafter the first respondent instructed the second respondent to effect payment in terms of the garnishee order. Attorneys for the applicant unsuccessfully tried to negotiate with the second respondent not to immediately effect payment in terms of the garnishee order.

[7] On 24th August 2023 the applicant re-enrolled the second urgent application that was previously removed from the roll on very extreme urgency. The application was re-enrolled to be heard on the 24th August 2023 at 14h00, and was served on the first respondent's attorneys at 10h48. In re-enrolling the second urgent application, the applicant has amended its notice of motion and also filed a supplementary affidavit. In the supplementary affidavit the applicant has stated that it was seeking the court's leave to admit the supplementary affidavit, and further seeking condonation for non-adherence to the procedural imperatives of rule 28 pursuant to the amendment of the original notice of motion as the circumstances do not permit compliance with the provisions of rule 28.

[8] In the amended notice of motion the applicant was seeking orders (i) declaring that the garnishee order issued in the magistrates' court for the district of Tubatse, held at Praktiseer on 23rd August 2023 under magistrates' court case number 1465/2018 has been suspended pending finalisation of the appeal that has been lodged on 23rd August 2023, against the granting of the final

garnishee order; (ii) in the alternative, and in the event of a finding that the appeal lodged on 23rd August 2023 did not have the effect of automatically suspending the garnishee order aforesaid, that an order be granted suspending the garnishee order, pending finalisation of the appeal lodged on 4th July 2023 against the judgment and orders of the learned magistrate Thuyani of 28 June 2023, dismissing the applicant's application for rescission of the *allocaturs* issued by the third respondent on 9th December 2022, and any subsequent appeal; (iii) suspending the operation and execution of the *allocaturs* issued by the Taxing Master of the magistrates' court for the district of Tubatse, held at Praktiseer, on 9th December 2022 under magistrates' court case number 1465/2018, pending finalisation of the appeal that has been lodged on 4th July 2023 against the judgment and orders of the learned magistrate Thuyani of 28th June 2023, dismissing the applicant's application for rescission of the *allocaturs* issued by the third respondent on 9th December 2022, and any subsequent appeal.

[9] The respondents were given until 12h00 to file notice of intention to oppose and supplementary answering affidavit should they wish to oppose. None of the respondents have filed any opposing papers. The matter came before Muller J who granted the applicant the orders as prayed for. A rule nisi was issued with the return date being the 6th February 2024. The rule nisi was also to operate as an interim interdict with immediate effect, pending confirmation on the return date.

[10] The first respondent has brought a notice in terms of rule 6(12)(c) of the Uniform Rules of Court (Rules) seeking for reconsideration of the order granted on 24th August 2023 in their absence. The first respondent did not file a supplementary

answering affidavit but has filed a notice in terms rule 6(5)(d)(iii) raising questions of law. The first respondent had raised four points of law which are *pro non scripto* supplementary founding affidavit; non-compliance with rule 28; lack of urgency and lack of jurisdiction.

[11] With regard to the point *in limine* of the alleged *pro non scripto* of the applicant's supplementary founding affidavit, the first respondent has submitted that on 7th July 2023 the applicant had instituted an urgent application under the same case number which the first respondent had filed its answering affidavit, and the applicant has also filed its replying affidavit. On 24th August 2023 the applicant had filed a supplementary founding affidavit without the leave of the court, and that resulted in the court granting an order on a *pro non scripto* supplementary founding affidavit, and as such the court lacked the necessary competence to grant such orders.

[12] With regard to the non-compliance with rule 28, the first respondent has submitted that the applicant on 28th August 2023 had filed an amended notice of motion under the same case number which materially altered the first notice of motion filed on 7th July 2023, and effectively introducing a new application. That the amended notice of motion was filed without compliance with the procedural requirements of rule 28 as no prior notice of the intended amendment of notice of motion was given.

[13] With regard to lack of urgency, the first respondent has submitted that the applicant had obtained an order on extremely urgent basis to suspend operation of the allocators certified on the 9th December 2022 under case number 1465/2018 without demonstrating reasons why it took the applicant a period of over 7 months to institute the application on extremely urgent basis

on a notice of less than 2 hours. That it is clear from the face of the order granted, that no order was granted to the effect that the matter was treated as one of urgency, and further that the matter lacked the necessary urgency warranting the orders to be granted.

[14] With regard to lack of jurisdiction, the first respondent had submitted that at the time the interim order was granted, there had been a pending section 78 of the Magistrates' Court Act application having been instituted by the applicant intended to suspend operation of the final garnishee order granted on 23rd August 2023 in Praktiseer Magistrates' court. That this court lacked the competence to grant the orders sought and granted on 24th August 2023 while section 78 application was still pending in the magistrate court.

[15] Rule 6(12)(c) provides that a person whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order. The order of the 24th August 2023 was obtained on urgent basis in the absence of the first respondent. The first respondent has served the applicant with the set down for reconsideration, and the applicant is opposing the first respondent's reconsideration application. It is trite that the court that reconsiders the order, must not only determine that on the arguments presented by the absent party, but also must consider the affidavits filed by both parties. In determining an application of this nature, the court must consider the reasons for the absence, the nature of the order granted and the period during which it has to remain operative, whether an imbalance, oppression or injustice has resulted, and if so the nature and extend, and whether alternative remedies are available[1]. The first respondent has only raised points *in limine* without

[1] Erasmus Superior Court Practice discussion on rule 6(12)(c)

addressing any of the issues which the court had to consider in determining whether to grant the reconsideration application.

[16] In urgent applications, the first prayer is for the party to ask for dispensing with the uniform rules of court pertaining to prescribed time limits, forms and service, and determining the application on urgent basis. It is the applicant who prescribe the time period as to when notice of intention to oppose and answering affidavit had to be filed. The opposing party is compelled to comply with the fixed time period even if they might appear to be unreasonable. If the affected party is unable to comply due to time constraints, that party must appear in court on the scheduled time and ask the court for an adjournment to enable him/her to file a proper answering affidavit, and not just ignore the date with the hope of bringing a reconsideration application.

[17] In terms of the practice directive of this division, urgent applications are heard on Tuesdays at 10h00. However, there are exceptions to that if the matter is so urgent that it could not wait for the next Tuesday. For those matters that are extremely urgent, they may be set down on any day of the week at 11h30, 14h00, or at any time of the day provided the founding affidavit set out facts which justify the bringing of the application at a time other 10h00 on Tuesday. Clause 13.15.5.3 of the practice directive provides that in very extreme urgency, the reasonable time afforded to the respondent to give notice of intention to oppose is usually no less two hours, excluding the hour 13h00 and 14h00.

[18] The first respondent was served with the amended notice of motion at 10h48 and required to file its notice of intention to oppose and answering affidavit by 12h00. Even though the time period of 12h00 was less than two hours, the application was set down for 14h00 which was more than two hours still

excluding the time period 13h00 to 14h00. The first respondent had argued that it was difficult to comply with the time frames fixed by the applicant because the first respondent's representatives and its attorneys are based in Burgersfort, some 150 km away from the sitting of the court.

[19] What the first respondent has failed to consider is that it had a correspondent in Polokwane who is 15 km within the court house. Technology is so advanced that you can sent any document from anywhere in the world and the recipient will receive it within some few minutes if not seconds. The first respondent could have emailed or faxed their notice of intention to oppose within the prescribed two hours period. If they were unable to settle the answering affidavit within the fixed time, and it was impossible for them to also arrive at court in time, they could have sent their correspondent to appear in court and stand the matter down for them arrive, or they could have briefed any available counsel who is next to the court house as there are several bar associations nearer to the court house. No reasons were given as to why any of the abovementioned options were not used. Even counsel for the first respondent was unable to give a single reason why the abovementioned options were not used.

[20] On receipt of the applicant's application which was set down for 14h00, on the same date at 12h51, the first respondent's attorneys wrote an email to the second respondent informing the second respondent that applicant's application was the same application that was struck off the roll on 25th July 2023 and that the bank must proceed to make payment as ordered by the magistrate court. It was not correct that the matter was struck off the roll but has been removed. This is a clear indication that the first respondent was aware of the applicant's application and when it was going to be heard, but deliberately

ignored it with the hope that by the time it was heard, the second respondent would have effected payment. When their plan has failed, they resorted to the reconsideration application. Therefore, being based in Burgersfort in my view is not a plausible excuse for their failure to attend court at 14h00 on 24th August 2023.

[21] The first respondent has failed to show in what way had the order of 24th August 2023 caused an imbalance, oppression or injustice to it. In fact, an injustice will occur to the applicant if payment is effected and the applicant went on to be successful with its appeal. There is no guarantee that it will recover what has been paid to the first respondent. What counsel for the first respondent did was to present a bizarre argument that the applicant's representatives have already been paid about R1 100 000.00 for their legal fees, but the applicant does not want to settle their fees in the amount of R1 600 000.00. This raises some concerning issues which this court is bound to comment. Summary judgment was granted for the capital amount of R175 392.00. Before the current applicant's attorneys, the applicant was represented by another firm of attorneys. If in deed currently the applicant's attorneys were already paid R1 100 000.00 for their legal fees, the question is whether there was any value for money for defending a debt of R175 392.00 with such a huge legal fee taking into consideration that this matter is not nearer to an end.

[22] For the first respondent, the question is whether it would be prepared to pay for such a huge legal bill which it wants to execute from the applicant for collecting a debt of R175 392.00 had it lost its case. I doubt whether it would have done so. This matter was finalised at summary judgment stage and the bill of costs was taxed in the absence of the applicant. We are dealing with public funds and

there are more reasons for the court to carefully scrutinize that and not just rubber stamp. The applicant is not refusing to pay the first respondent, but it also wants to be involved in the taxation of the bill which was taxed in their absence and ensure that the first respondent is paid what is correctly due to it. If the first respondent's bill is genuine, there is no reason to worry as the fresh taxation will still come to the same amount and it will also be able to recover that with interest. In my view, the first respondent had alternative remedy of re-submitting its bill for taxation if it wants a speedy resolution of this matter. By arguing that the applicant's legal representatives have been paid R1 100 000.00 but the applicant is refusing to pay it R1 600 000.00 makes look like there is a competition of who will be paid the highest, and that does not paint them in a good picture, but more reasons why their bill should be scrutinized.

[23] The point *in limine* of the *pro non scripto* supplementary affidavit and non-compliance with rule 28 will be dealt with at the same time. In the first prayer of the applicant's notice of motion, it is seeking an order dispensing with the uniform rules of court pertaining to prescribed time limits, forms and service. Paragraph 8 of the applicant's supplementary affidavit read as follows:

> "The applicant seeks the court's leave to admit this supplementary affidavit against the aforesaid background. Naturally the applicant could similarly not comply with the provisions of rule 28 under the circumstances, and also seeks condonation for non-adherence to the procedural imperatives of rule 28 pursuant to the amendment of the original notice of motion".

[24] This paragraph shows that the applicant is alive of the procedure to follow if it wishes to file a supplementary affidavit and amendment. Because the applicant will not be able to follow the prescribed procedure in terms of the Rules it had prayed for condonation for non-adherence to the prescribed procedure. The mere fact that the order for that condonation does not appear on the order

granted on 24th August 2023 does not mean that it was not considered since the applicant had laid the basis for that order in the supplementary affidavit. In my view, there is no merit in the two points *in limine.*

[25] Turning to the point *in limine* of lack of urgency, the first respondent in the email of 24th August 2023 directed to the second respondent, has stated in that email that the second respondent has been notified of the outcome of the proceedings of the 23rd August 2023 which had made the order of the 3rd July 2023 final. This email is confirmation that the second respondent had already been given the order of the 23rd August 2023 by the first respondent. In the email of the 23rd August 2023, the first respondent is confirming that they have received the applicant's notice to appeal, and the first respondent is further notifying the second respondent that the appeal noted against the judgment by the applicant has no automatic effect of suspending the court order of the 23rd August 2023. What this entails is that the second respondent must continue effecting payment despite the appeal noted by the applicant. The applicant is disputing the first respondent's bills which were taxed in their absentia. Once the second respondent had effected payment, that would render all the applicant's pending applications to be moot. Taking into consideration the conduct of the first respondent of ignoring the applicant's notice of appeal and their urgent application, but only been interested in the second respondent effecting payment, this had rendered the applicant's application to be extreme urgent if it was serious about protecting the public funds.

[26] With regard to the last point *in limine* of lack of jurisdiction, section 45A of the Rules provides that the court may suspend any order for such period as it may deem fit. The wording of the rule is wide enough to give the court discretion to

suspend any order brought before it for consideration. The circumstances of this case shows that the substantial justice requires the intervention of the court and grant an interim order. Once the second respondent had effected payment of the disputed bills, it is highly unlikely that the applicant will be able to recover all the money paid which are public funds. The applicant has no guarantee that it will recover the money that would have been paid to the first respondent. The first respondent will not suffer any prejudice if the interim order was granted, as the only dispute before court is about the two bills of costs and not the capital amount. The first respondent's capital amount looks to be secured. Even the two writs of execution which had been issued by the first respondent, are for the bills of costs only.

[27] Taking into consideration the facts of this case in its totality, the first respondent has failed to satisfy the requirements for the reconsideration of an order granted in the absence of a party. This matter was disposed off on the questions of law raised by the first respondent, and the first respondent is therefore not precluded from still pursuing the matter on the return date should they so wish.

[28] In the result the following order is made:

28.1 The first respondent's reconsideration application is dismissed with costs on party and party scale.

28.2 Copy of this judgment be brought to the attention MEC of Cooperative Governance, Human Settlement and Traditional Affairs, Limpopo.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicant	**: Adv SG Gouws**
Instructed by	**: Mmakola Matsimela attorneys**
Counsel for the respondent	**: Adv K Mokwena**
Instructed by	**: Gilbert Motedi attorneys INC**
Date heard	**: 26th September 2023**
Electronically circulated on	**: 2nd October 2023**