

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 16463/2008

DATE: 10 OCTOBER 2008

5 In the matter between:

INDAWO CAPE (PTY) LIMITED Applicant

and

SOUTH AFRICAN NATIONAL ROADS AGENCY
LIMITED Respondent

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JUDGMENT

GAMBLE, AJ

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This matter came before me this morning, at the end of a long week of motion court duty and on a day on which as the fast track judge I was required to attend to several matters of urgency. The alleged urgency in this matter concerns a signboard which was erected alongside the N2 Highway, between Caledon and Riviersonderend, proclaiming the applicant's wares as it were and advertising the applicant's services.

It appears as if the signboard was removed by the respondent, which is the Roads Agency, sometime in June, was re-erected by the applicant, or somebody acting on the applicant's behalf thereafter, and was then removed again on 8 September.

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Mr Louw when he moved the application this morning on behalf of the applicant contended that the spoliation of 8 September was the spoliation upon which the applicant relied. I am at great pains to understand what the pressing urgency in this matter is that requires a set down of approximately 24 hours notice on the respondent for a road sign proclaiming somebody's business acumen, when there are women and children who are being beaten up and removed to other jurisdictions, whose cases are genuinely urgent.

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When Mr Louw was asked to deal with the provisions of Rule 6(12)(b) and the apparent non-compliance there with in the founding affidavit his somewhat bold retort was to suggest that no allegation in this regard was necessary because, as he put it, all spoliation matters are urgent, entitle one to come before the Court on an urgent basis, and that *ipso facto* no allegation of urgency is necessary in the papers.

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For this bold statement Mr Louw relied upon a judgment of Mr Justice Neppgen in the Eastern Cape in a decision called Office Automaton and Specialist CC v Lotter 1997(3) SA443(e). I have had a look at the passage that he relies upon and in my view that passage is distinguishable and applicable to a different statutory regime. In particular, that matter was an appeal from the Magistrate's Court and the Rule in question that was considered was the relevant rule in the Magistrate's Court Rules.

10 Of more application to this particular matter is the judgment of Mr Justice Munnik with whom Mr Justice Addleson concurred, (also in the Eastern Cape) in the matter of Mangala v Mangala 1967(2) SA 415(E) where His Lordship dealt with exactly the problem that confronts the applicant in the matter before me. In that matter the application was represented by Mr Mullins SC and the relevant passage at 415(H) reads as follows;

"Mr Mullins has urged upon us that because this is an application for a spoliation order the matter should automatically be treated as one of urgency. We are unable to agree with this view. The rules make provision for the procedures to be followed in all applications. There is one rule

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which provides a saving clause as it were and that is rule 6(12) in terms whereof the Court may, in certain circumstances, dispense with notice in certain formalities in urgent applications, but the rule states that the applicant must in his affidavit or petition "*set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded substantial address at a hearing in due course.*"

These Rules have been devised for the smoother working of litigation, and at the same time for the protection of litigants on both sides. Normally, therefore compliance with the Rules means that the respondent in an application such as this would have a certain fixed period within which she would be entitled to signify her intention of defending the proceedings and of filing her affidavits and doing the things necessary for conducting a defence of the application. This is a right which she is given in terms of the Rules. Now as I have said provision is made for the curtailment of this right but only when the

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provisions of Rule 6(12)(b) (quoted above) have in fact complied with."

At page 416 (D) His Lordship continues thus:

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"...(I)n the circumstances I am of the opinion that he has not complied with the provisions of Rule 6(12)(b) in the manner which would entitle him to cut across the whole procedure governing applications to Court. It is true that a spoliation order is a remedy which in the nature of things should be a speedy one, but the fact that there has to be restitution before all else simply means that once an applicant has proved that he was in peaceful possession and his possession was disturbed the respondent must restore that position before entering into the merits of the ownership, or otherwise of the subject matter. It does not follow that because an application is one for a spoliation order the matter automatically becomes one of urgency. The applicant must either comply with the rules in the

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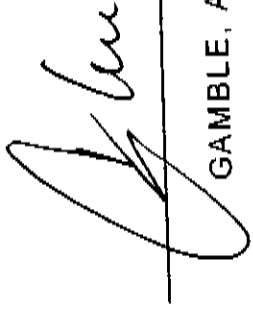
normal way or make out a case for urgency in accordance with the provision of Rule 6(12)(b).”

5 The papers before me manifestly do not comply with these requirements and in the circumstances the matter is not properly before me. Recently in the Supreme Court of Appeal in the matter of Hawker Air Services (2006 (4) SA292 (SCA)) Justice Cameron held that the correct way in which to treat such an application is to strike it from the roll. I am of the view that that is the
10 appropriate order to make in these circumstances.

Mr Whitehead asked that the application be dismissed with costs. Surprisingly he asked only for party and party costs (he does not request a higher level of punitive costs) and I shall accede to his
15 request in that regard.

Finally, practitioners are to be reminded that the fast track in this division is there for genuinely urgent matters and that practitioners who continue to abuse the process and waste the
20 Court's time with matters which are on the face of it trivial and less than urgent, may in future find themselves to be the recipients of appropriate cost orders.

In this matter then the APPLICATION IS STRUCK FROM THE ROLL and the applicant is ordered to pay the respondent's costs of today.



GAMBLE, AJ