

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 16463/2008

DATE: 31 OCTOBER 2008

5 In the matter between:

INDAWO (CAPE) (PTY) LTD

and

SANRAL

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JUDGMENT

FOURIE, J:

15 This matter was brought as one of urgency and heard by
Gamble, A J, on 10 October 2008. After hearing argument,
the learned judge made the following order:-

20 "The application is struck from the roll and the
applicant is ordered to pay the respondent's costs
of today."

The matter came before me again during the course of this
week in Third Division pursuant to a notice of set-down filed by
25 applicant on 23 October 2008. The notice of set-down was

accompanied by a supplementary affidavit of applicant dealing with the aspect of urgency, as well as applicant's heads of argument.

5 Respondent filed what was termed a preliminary answering affidavit in which the history of the matter is set out and in which it is contended that the latest set-down of the application is a nullity, with the request that the application be dismissed with costs on the attorney and client scale.

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As this judgment is given on a Friday, the last day of this week's Third Division roll, I will only furnish brief reasons for the order which I intend to make.

15 It is clear from the judgment of Gamble, A J that he struck the matter from the roll due to a lack of urgency. In fact applicant made no allegation at all in compliance with the requirements of rule 6(12).

20 It is common cause that applicant did not, during the proceedings before Gamble, A J, or at any stage thereafter, apply for leave to renew its application on an urgent basis as provided in rule 6(6). In fact, as I have mentioned, applicant has merely, of its own accord, re-enrolled the application which had been struck from the roll due to a lack of urgency.

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Where no order is made on an application, as in the instant case where it has been struck from the roll due to a lack of urgency, the order is the equivalent of an order of absolution from the instance, see Erasmus, Superior Court Practice B152
5 - 53 and the authorities there cited.

It is probably for this reason that Cape Court Notice 11.4 provides as follows:-

10 "The judge who deals with the matter which is alleged to be urgent or semi-urgent to some degree will decide whether it is urgent at all, and if it is urgent, whether it is urgent or semi-urgent. If it is held not to be urgent at all, the matter will have to
15 be set down on the continuous roll in the usual way."

The order of Gamble, A J amounts to a finding that the matter is not urgent at all, for had the learned judge found that it was
20 urgent, he would have dealt with it as an urgent application, or have referred it to the semi-urgent roll if he was of the view that it was only semi-urgent. By striking it from the roll, the learned judge, in my view, of necessity held the matter not to be urgent at all. It then follows that in terms of Court Notice
25 11.4, the matter has to be set down on the continuous roll in

the usual way.

As I have mentioned previously, the only other route available for applicant in the circumstances would have been to utilise rule 6(6) by applying for leave to renew the application on an urgent basis, i.e. on the same papers supplemented by such further affidavits as the case may require.

Applicant did not follow any one of the two routes available to it, but, as I have already indicated, has re-enrolled the matter for further argument on the issue of urgency, which issue Gamble, A J had already disposed of.

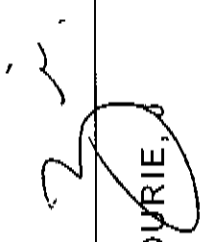
It follows in my view that the application which applicant has re-enrolled before me this week, is fatally defective and cannot be entertained.

In the circumstances, respondent is the successful party and has asked me to order applicant to pay its costs on the punitive scale of attorney and client. Having regard to the flawed process followed by applicant, I can see no reason why respondent should, in the prevailing circumstances, be out of pocket with regard to its wasted costs.

In the result the following order is made:-

1. The application is DISMISSED.
2. Applicant is to PAY RESPONDENT'S COSTS OF
5 OPPOSITION, INCLUDING THE COSTS OCCASIONED
BY THE APPEARANCES ON 29 OCTOBER 2008 AND
31 OCTOBER 2008, ON THE SCALE AS BETWEEN
ATTORNEY AND CLIENT.

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FOURIE, J.