IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: 533/2024

In the matter between:

JOINT VENTURE (NTEMA INVESTMENTS CC / SEDTRADE (PTY) LTD)	First Applicant
NTEMA INVESTMENTS CC (Reg no: 2002[…])	Second Applicant
and	
DEPARTMENT OF HUMAN SETTLEMENTS FREE STATE PROVINCE	First Respondent
SEDTRADE (PTY) LTD	Second Respondent

CORAM: VAN ZYL, J

HEARD ON: 8 FEBRUARY 2024

DELIVERED ON: 18 JUNE 2024

[1] This matter served before me as a fully opposed urgent application in which the applicants are seeking the following relief:

"1. That the Applicant`s non-compliance with the rules of this Honourable Court regarding service be condoned and the matter be heard on an urgent basis in terms of Rule 6(12).

2. That the 1st Respondent be ordered to comply with the appointed (sic) letter dated 21 August 2017 regarding the construction of houses: REFENGKGOTSO 2614 HOUSES, as well as the contents of the Approved Bid No: **RFH-HS-B01/2016/2017**.

3. That the 1st Respondent be ordered to include the Applicant back to the project and that the 1st Respondent liaise with the Applicant in all matters regarding the site known as REFENGKGOTSO 2614 HOUSES in writing.

4. That the 1st Respondent be ordered to comply with order number 2 & 3 above.

5. That the time lost due to the 1st Respondent`s failure to appoint project engineers; covid-19; inability to have project plans approved by the municipality and non-payment of the contractors, be factored back into the project.

6. That the present quantum approved by the National Department of Human Settlements be applied on the project.

7. Alternatively, should the 1st Respondent wish to terminate the Applicants` appointment on the project, then they be ordered to pay 30% of the remaining amount of the project on present rate/quantum of the Department of Human Settlements which would have been the applicants` profit on the project.

8. The costs of this Application be paid by any party who opposes same on an attorney and own client scale."

Succinct background according to the applicants:

[2] The deponent to the founding affidavit, Ms Ramusi, stated that she is duly authorised on behalf of the second respondent of which she is the sole

director and that she has been authorised to act and depose to the affidavit on behalf of the first applicant.

[3] On or about 21 August 2017 the second applicant and the second respondent were awarded the tender referred to in the Notice of Motion ("the tender") by the first respondent.

[4] The second applicant and the second respondent entered into a joint venture agreement to work together in constructing the immovable properties in terms of the tender. They therefore formed the first applicant ("the joint venture").

[5] Some disputes developed between the parties, the details of which are not all relevant for present purposes.

[6] There were certain circumstances that led to delays and stoppages in performing and finalising the tender work.

[7] I deem it necessary to quote certain extracts from the founding affidavit:

> "8.10 On or about 15 November 2023, the 2nd applicant visited the site and discovered that there is a new unknown contractor working on site without the applicant`s knowledge and the 1st respondent never informed the applicants about returning back to site. On or about 23 November 2023, upon the 2nd applicant's enquiry, the 1st respondent confirmed that the new contractor will work with the 2nd applicant. That the 1st respondent's official confirmed that the 2nd respondent has been replaced by the new contractor. Kindly find the attached hereto WhatsApp communication between the 1st respondent and the 2nd applicant as annexure "NT5".
>
> 8.11 On the very same month of November 2023, the 2nd applicant has approached her legal representatives to seek an advice, the 2nd applicant`s lawyers have drafted a letter of demand to the 1st respondent, but the 1st respondent dismally failed to comply.

8.12 Failure to adhere with the 2nd applicant`s demand, an urgent application of interdict was initiated before this honourable court, wherein an order concerning payment of outstanding balance was granted in favour of the 1st applicant. Surprisingly, the 1st respondent have relied on a letter composed by the 2nd respondent, and same entailed the content that it is not economically viable to complete the project with the current quantum and also seeking termination of the project without having consulted with the 2nd applicant. The 2nd applicant became aware of the above letter on or about 18 January 2024/court date and such letter was drafted 14th day of November 2023. Kindly find the attached hereto letter as annexure "NIT6".

8.13 It is submitted that the 2nd respondent has no *locus standi* / power to have composed this letter and that the content/supplication therein has no legal effect. …Kindly find the attached hereto letter to the 2nd respondent as annexure "NIT7"."

Response of the first respondent:

[8] In its answering affidavit the first respondent raises three points in opposition to the application, namely:

1. The lack of urgency, alternatively reliance on self-created urgency;

2. The question whether the first applicant is properly before court and whether the deponent was authorised to have instituted the proceedings in the name of the first respondent; and

3. The lack of merits of the application.

Applicable legal principles regarding urgency:

[9] Rule 6(12) determines as follows:

"6(12)*(a)* In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit filed in support of any application under paragraph *(a)* of this subrule, the applicant must set forth explicitly the circumstances which is [*sic*] averred render [*sic*] the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

[10] In **Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others** 2004 (2) SA 81 (SE) the court referred to the judgment which is considered to be the *locus classicus* on self-created urgency, namely **Schweizer Reneke Vleis (Mkpy) (Edms) Bpk v Minister van Landbou & Andere** 1971 (1) PH F11 (T) where the following was stated at F11 – 12:

"Volgens die gegewens voor die Hof wil dit vir my voorkom dat die applikant alreeds vir meer as 'n maand weet van die toedrag van sake waarteen daar nou beswaar gemaak word. Die aangeleentheid het slegs dringend geword omdat die applikant getalm het en omdat die tweede respondent, soos die applikant lankal geweet het, of moes geweet het, van die besigheid in Schweizer-Reneke geopen het. Die applikant mag gewag het vir inligting van die eerste respondent soos in die skrywe aangevra maar dit was geensins nodig vir die doeleindes van hierdie aansoek, wat op die nie-nakoming van die *audi alteram partem*-reël gebaseer is, om so lank te wag om die Hof te nader nie. Al hierdie omstandighede inaggenome is ek nie tevrede dat die applikant voldoende gronde aangevoer het waarom die Hof op hierdie stadium as a saak van dringendheid moet ingryp nie. Ek is dus, in omstandighede, nie bereid om af te sien van die gewone voorskrifte van Reël 6."

[11] In **Tukela v Minister of Public Works** (P578/17) [2017] ZALCPE 29 (19 December 2017) the Court referred to the aforesaid **Schweizer Reneke Vleis**-judgment and held as follows at paras [14] – [15]:

"[14] It is trite that an Applicant cannot create his or her own urgency by delaying bringing an application. This Court will not come to the assistance of an applicant who has delayed approaching the Court. See *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 ILJ 1081 (LC) at 1092 paragraph [39] where Van Niekerk, AJ (as he then was) stated the following:

> 'The latitude extended to parties to dispense with the rules of this court in circumstances of urgency is an integral part of a balance that the rules attempt to strike between time-limits that afford parties a considered opportunity to place their respective cases before the court and a recognition that in some instances, the application of the prescribed time-limits or any time-limits at all, might occasion injustice. For that reason, rule 8 permits a departure from the provisions of rule 7, which would otherwise govern an application such as this. But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief in this court. For these reasons, I find that the union has failed to satisfy the requirements relating to urgency.'

[15] I am in light of the afore-going of the view that the Applicant has created her own urgency by the substantial delay. I am of the view that the application falls to be struck of the role."

[12] In **Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E TV** 2006 (3) SA 92 (C) the aforesaid principle was stated as follows at para [47]:

"[47] The next question to determine is whether the matter was urgent or that an urgency was self-created. It is correct that an applicant cannot create its

own urgency by delaying bringing the application until the normal rules can no longer be applied."

[13] Arising from and connected to the aforesaid principle, is the consequent obligation on an applicant in an urgent application to explain all periods of delay for purposes of making out its case for urgency. The relevant principle applicable to condonation applications in this regard is consequently *mutatis mutandis* applicable to an urgent application. In **High Tech Transformers (Pty) Ltd v Lombard** (2012) 33 ILJ 919 (LC) the importance of a reasonable and acceptable explanation for a delay was accentuated at para [25] of the judgment:

"[25] … Condonation is not merely for the asking as was duly pointed out by the court in *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC):

> '[12] Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. … Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process.'" (My emphasis)

Consideration of factual circumstances in the present matter:

[14] The application referred to above in which payment of an alleged outstanding balance was granted in favour of the first applicant, also served before me ("the first application"). It served before me on 18 January 2024. The relief which was sought in the first application, were in some instances identical to that of the present application, specifically also prayer 3. In the first application the following relief was sought in the Notice of Motion:

"1. That the Applicant`s non-compliance with the rules of this Honourable Court regarding service be condoned and the matter be heard on an urgent basis in terms of Rule 6(12).

2. That the 1st Respondent be ordered to comply with the appointed (sic) letter dated 21 August 2017 regarding the construction of houses: REFENGKGOTSO 2614 HOUSES, as well as the contents of the Approved Bid No: **RFH-HS-B01/2016/2017**.

3. That the 1st Respondent be ordered to include the Applicant back to the project and that the 1st Respondent liaise with the Applicant in all matters regarding the site known as REFENGKGOTSO 2614 HOUSES in writing.

4. That the 1st Respondent be ordered to pay an outstanding invoice in the amount of R585 43330 to the Applicant within seven working days (7) as from the date of court order.

5. That the 1st Respondent be ordered to make payment of the work performed by the Applicant through a cession or joint venture account.

6. That the project of constructions be stayed for seven (7) days pending the compliance of order number 4 *supra* by the 1st Respondent.

7. The costs of this Application be paid by any party who opposes same on an attorney and own client scale." (My emphasis)

[15] The first application was also opposed by the first respondent and an opposing affidavit was due to be filed on the day of the hearing of the application. However, instead of persisting with the first urgent application, the parties settled the matter and I was requested to make an order by agreement between the parties for payment to the joint venture of the money claimed on or before 31 January 2024, each party to pay its own costs, which I duly did.

[16] The allegations relied upon for the requested relief in the first application is also almost identical to the allegations relied upon in the present application. In support of the present application the applicants (or second applicant) again refer to and rely on the fact that on 15 November 2023 the second applicant visited the site and discovered that there is a new contractor working on site without the applicant`s knowledge and the first respondent never informed the applicants about returning back to site. That is why the applicants sought an order in the first application that the first defendant be ordered to allow the applicant back to the project, the very same relief she is currently seeking. However, the applicant did not persist with this relief in the first application. The applicant is now suddenly again seeking the said relief on an urgent basis in the present application, although it has been to her knowledge since 15 November 2023.

[17] Because the parties settled the first application, I did not determine the urgency of the first application. However, I need to point out that in the first application the second applicant relied on a letter of demand which was attached to the first application as annexure “NIT4”, which specifically stated that it was addressed on behalf of “Ntema Investments CC”. On face value thereof, it was dated 30 November 2023; however, despite the fact that the second applicant became aware of the new contractor on site on 15 November 2023 already, the said letter of demand was only handed to the first respondent on 30 November 2023. No explanation was provided for that time delay. In addition, the said letter of demand provided for seven working days for the parties to endeavour to resolve the issues amicably, but the first application was only filed on 10 January 2024, again without any explanation for the delay. The reason I am referring to these circumstances of the first application, is that the very same allegations, circumstances and letter of demand are repeated in the present application, again without any explanation for the said delays.

[18] It is necessary to point out that in the aforesaid first letter of demand the second applicant already knew about and bemoaned the fact of another/new contractor on the site by having stated the following:

"Lastly, it is our instruction to beseech your office to create a working environment for the purposes of work to be completed, as it is apparent that there is another/new contractor who occupied the site."

[19] In the present application a second letter of demand is dealt with, annexure "NIT7" dated 19 January 2024, again addressed to the first respondent, in which*, inter alia,* the following is again stated:

"3. Accordingly, it is our instruction to beseech your office to reinstate the joint venture on site within seven (7) working days of receipt of this letter, failing which legal steps shall be taken against your office without further notice. Alternatively, our client is amicable for negotiation within the above time prescripts."

[20] This time the second respondent is attempting to rely on a letter dated 14 November 2023 which she allegedly only became aware of on 18 January 2024 at the the previous High Court Hearing. The letter is attached to the founding affidavit as annexure "NIT6".

[21] What the second applicant is not mentioning is that the letter, "NIT6", was attached to the answering affidavit filed in the first application. Instead of having then dealt with the letter in the replying affidavit, the applicants preferred to opt for the settlement of the payment of the money and only now attempts to rely on the said letter for the relief the first applicant is seeking. This, in my view, constitutes self- created urgency.

[22] More importantly, the second applicant is attempting to now rely on an issue which had come to her knowledge on 15 November 2023 already and which has been continuing throughout to date. As correctly stated by Ms Tlelai, on behalf of the first respondent, this is a classic example of self-created urgency, which is not to be allowed for purposes of Rule 6(12).

[23] The application consequently stands to be struck from the roll.

Clarification:

[24] At the commencement of the hearing, I indicated that I wanted to hear submissions from both parties on the points *in liminé,* including the issue of urgency, and on the merits. I specifically explained that it should not be seen as that I am satisfied with the urgency of the matter. It is merely a practical approach so that should I find that I am satisfied with the issue of urgency, I can continue to consider the further issues without having to hear the parties again.

[25] Because of my findings in respect of the lack of urgency for purposes of Rule 6(12), it serves no purpose and is unnecessary to deal with the other disputes between the parties. Suffice it to say that proper consideration will have to be given to the question whether a court will be able to adjudicate the disputes between the parties on application procedure.

Costs:

[26] With regard to costs, it is in my view fair and reasonable that the second applicant be ordered to pay the costs, not jointly and separately with the joint venture. It is evident from the totality of the papers before me that the second applicant is the actual party on whose behalf the litigation was and is driven and not so much on behalf of the joint venture. This is probably also the reason that there are inconsistencies in the papers in distinguishing between the first applicant, the second applicant and both applicants together.

Order:

[27] I consequently make the following order:

1. The application is struck from the roll.

2. The second applicant is ordered to pay the costs of the application.

C. VAN ZYL, J

On behalf of the applicants:	Adv. Thidi Instructed by: Ramusi Attorneys Polokwane C/O Moroka Attorneys Bloemfontein admin@ramusiattorneys.co.za
On behalf of the first respondent:	Adv. L. Tlelai Instructed by: Office of the State Attorney BLOEMFONTEIN rumukatuni@justice.gov.za