REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 5081/12

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

25/4/13
DATE

SIGNATURE

In the matter between:

FARHAN MOHAMED CASSIM	Applicant
and	
UNIVERSITY OF JOHANNESBURG	First Respondent
PROFESSOR O'BRIEN	Second Respondent
I.A. KLEYNHANS	Third Respondent
MINISTER OF HIGHER EDUCATION	Fourth Respondent

J U D G M E N T

WEINER J:

[1] In this matter, the applicant applied as a matter of urgency for an order

that the 1st, 2nd and/or 3rd respondents, jointly and severally, register the applicant as a student in the 1st respondent's law faculty. He also asked for an order that the respondents permit the applicant to study law at the 1st respondent's faculty of law and interdicting them from committing any acts that would curtail or frustrate the applicant's studies.

[2] The notice of motion was served on Tuesday 14 February 2012 at 14:15 and was set down for 16 February at 10:00. In the notice of motion, the applicant called upon the respondents to despatch, by no later than 14 February, the record of the proceedings and the reasons for the decision, and to file its answering affidavits by 14 February.

[3] The issue of urgent applications in this Court was extensively dealt with by Coetzee J in ***Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers)***[1] (hereinafter referred to as *"Luna Meubels")* in which the learned Judge set out the rules that are applicable to urgent applications. The learned Judge referred to rule 6 (12) as the most abused rule in this division and, in citing such rule, stated that far too many attorneys and advocates treat the phrase, "*which shall as far as practical be in terms of these rules*" in sub-rule (a) as *pro non scripto*[2] He further stated:

> *"Once an application is believed to contain some element of urgency, they seem to ignore, firstly, the general scheme for presentation of applications as provided for in rule 6; Secondly, the fact that the Motion Court sits on Tuesdays through to Fridays and thirdly; that, for matters to be on this roll on any particular Tuesday, the papers must be filed with the Registrar by 12:00 noon*

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[1] *1977 (4) SA 135 (W).*
[2] *Ibid at page 136.*

on the preceding Thursday and finally; that the time of day at which the Court commences its daily sittings is 10:00 a.m. and that, when it is adjourned for the day, the next sitting commences on the next day at 10:00 a.m".[3]

[4] Coetzee J set out when there can be a departure from the established filing and sitting times of the Court. He stated in ascending order of urgency:

1. *"The question is whether there must be a departure at all from the times prescribed in rule 6 (5) (b). Usually this involves a departure from the time of seven days which must elapse from the date of service of papers until the stated date of hearing. Once that is so, this requirement may be ignored and the application may be set down for the hearing on the first available motion day. But regard must still be had to the necessity of filing papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge.*
2. *Only if the matter is so urgent that the applicant cannot wait for the next motion day from the point of view of his obligations to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed his papers by the previous Thursday.*
3. *Only if the urgency is such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing on the next Court day at the normal time at 10:00 a.m. or for the same day if the Court has not yet adjourned.*
4. *Once the Court has dealt with the causes for that day and has adjourned, only if the applicant cannot possibly wait for the hearing until the next Court day at the normal time that the Court sits, may he set the matter down forthwith for hearing at any reasonably convenient time in consultation with the Registrar, even at that night or on a weekend."*[4]

[5] In addition to that *dictum*, the South Gauteng Practice Manual, in section 9.24., deals with urgent applications and sets out that:

2. *"...The normal time for bringing of an urgent application is 10:00 on the Tuesday of the Motion Court week.*

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[3] *Ibid.*
[4] *Ibid page 137.*

3.1. If the urgent application cannot be brought at 10:00 on a Tuesday of the motion court week, it may be brought on any other day of the motion court week at 10:00. The applicant in the founding affidavit must set out the facts which justify the bringing of the application at a time other than 10h00 on the Tuesday.

3.2. If the urgent application cannot be brought at 10:00 on any day during the motion court week, it may be brought at 11:30 or 14:00 on any day during the motion court week. The applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10h00 on the Tuesday and other than 10h00 of the relevant court day.

3.3. If the application cannot be brought at 10:00 on Tuesday or on any other day or at 11:30 or 14:00 on any court day, it may be brought at any time during the court day. The applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10h00 on the Tuesday and other than at 10h00, 11h30 or 14h00 on any other court day.

3.4. The aforementioned requirements are in addition to the applicant's obligation to set out explicitly the circumstances which render the matter urgent. In this regard, it is emphasised that while the application may be urgent, it may not be sufficiently urgent to be heard at the time selected by the applicant…

5.1. …the notice of motion must follow the format of form 2 (a) of the First Schedule to the rules of court and therefore must provide a reasonable time, place and method for the respondent to give notice of intention to oppose the application and must further provide a reasonable time within which the respondent may file an answering affidavit. The date and time selected by the applicant for the enrolment of the application must enable the applicant to file a replying affidavit if necessary"

[6] It is stated in 6.2 that these requirements will be strictly enforced by the presiding Judge.

[7] This application, as I have stated above, was launched on Tuesday 14 February and set down for Thursday 16 February. There was no explanation in the papers why a Thursday was chosen (as opposed to the following Tuesday). Furthermore, the time periods granted are totally

inadequate. The respondents were required to, not only serve and file a notice to oppose but also, serve and file its answering affidavit on 14 February when the papers were only served at 14:15 on that day.

[8] The fact that the applicant emailed to the respondent a copy of the unsigned papers does not detract from the fact that the notice of motion is clearly not in accordance with the practice manual, the rules of this Court, or the dicta in the *Luna Meub*els case.

[9] The applicant has referred to the case of *Federated Trust v Botha*.[5] Van Vincent AJA, dealt with the case where the opponent who was given short notice decided to take no steps to have the notice set aside, or correct it. It was held that such opponent cannot, at later stage, in the proceedings have the subsequent proceedings declared a nullity.[6] The Court was referred to rule 30 of the Uniform Rules of Court which states that a party complaining of an irregularity, in relation to any step taken by his opponent, is required to apply to Court to have it set aside. If he takes any further step with knowledge of the irregularity, he may no longer move to this end.

[10] The applicant says that this statement is equally applicable in an urgent application and that the respondent should have argued the question of urgency on the 16 February despite the fact that it had not yet filed any

[5] 1978 (3) SA 645 (A) at 651.

affidavits.

[11] In my view, the paragraph referred to in the *Federated Trust* case does not assist the applicant in the present matter as there was correspondence between the parties. In particular, the respondent's attorneys addressed a letter to the applicant's attorneys dealing with the time periods that had been given. In a letter dated 14 February, the respondents suggested that they would serve their answering affidavit on Thursday 16 February, that the applicant's replying affidavit be served on 20 February and that the application be argued on 21 February. It was also stated that:

> *"We do not, by agreeing to the aforegoing arrangement, concede that the application is urgent. To the contrary we shall argue that it is not urgent."*

[13] The respondent filed its papers on 17 February and the applicant only filed its replying affidavit this morning. Although Mr Omar for the applicant has assured me that the papers that were put into the Court file were indexed and paginated, unfortunately, my set of papers has not been indexed and paginated at all. What is, however, evident is whether or not the respondents had filed their papers by the 16 February, the applicant could never have filed a replying affidavit and indexed and paginated the papers by Thursday 16 February to enable the matter to be properly enrolled for this week's Court roll.

[14] This problem was dealt with in a later letter from the respondents attorneys. They suggested that, because the papers had not all been filed timeously, and that the matter had been irregularly enrolled, the matter be removed from the roll and set down by notice for hearing on 28 February. The applicant did not concede that this was necessary and proceeded with the application.

[15] Besides the fact that this application has been brought in a manner which is totally contrary to the practice manual, the rules set out above and in *Luna Meubels*, the facts relating to the urgency in this case must also be dealt with briefly. It is common cause that by 5 October 2011, the applicant was aware that his application to the university had been declined. He stated that he, thereafter, made certain representations to try and get this overturned and also received a letter stating that he might be admitted depending on certain issues which might arise.

[16] Despite this, the applicant did nothing further in this regard until 24 January 2012, when his attorney wrote a letter to the respondents calling upon them to give reasons for the decision. He stated that they had received notice that the application for him to study had been rejected on 23 January 2012. On the same day,Patrick O'Brien of the respondent sent a letter to the applicant's attorney setting out the reasons for the refusal to admit the applicant. This, according to the applicant, led to this application being launched.

[17] On 1 February, the applicant went with his father to the respondent's faculty of law. He returned on 3 February where he spoke to O'Brien. He was again informed that he would not be admitted to the faculty of law. The applicant states that that the real reason for the refusal to permit him to study was that O'Brien was annoyed at receiving a lawyer's letter. This cannot possibly be true as the applicant had been refused entry on two prior occasions which were both prior to the lawyer's letter being sent.

[18] The applicant's grounds for urgency are that lectures commence on 6 February and if this matter is brought in the normal course it will only be heard in late March. In addition, the first semester tests also commence in early March 2012. If he does not write and pass these tests he risks not being admitted to write the June exam.

[19] As I have stated earlier, it was clear that the applicant knew from 5 October 2011, or at the very latest 23 January 2012, that he had been refused entry. However, he did nothing until early February when this application was prepared. What is also evident from the application is that the affidavit appears to have been signed on 8 February 2012. Despite that, it was only served on 14 February and the respondents were given a few hours in which to file their papers. The applicant does not say what happened between 8 February and 14 February resulting in the papers being filed six days after signing but with such urgency that there was no time for the respondents to file their papers.

[20] In addition, although the respondents' attorneys had stated that they would accept service, the applicant chose to serve the application on O'Brien at 10:40 on 14 February. In a fax dated 14 February, the applicant's attorney confirmed that a copy of the application was served on the client on the previous day (13 February). This appears incorrect as it was only served on 14 February. It was then agreed between the parties that the matter would be rescheduled for 21 February, with certain times for filing being agreed upon. This agreement failed to take into account that such agreed times did not afford the parties sufficient time to file, index and paginate by last Thursday in time to be placed on the roll for 21 February.

[21] To make matters worse, the applicant has today launched an application to amend its notice of motion by adding a prayer reviewing and setting aside the decision of the 2nd respondent, alternatively the 1st, 2nd and 3rd respondents, in terms of which decision, the said respondents refused the applicant admission into the faculty of law at the University of Johannesburg.

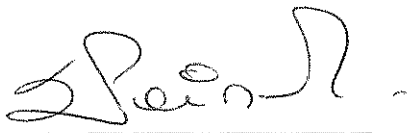
[22] This application now appears to be a review, although the notice of motion in the original application did not state that it was a review. It erroneously referred to the despatching of the record, which appeared to be an invalid prayer having regard to the relief sought at that stage. The record has not been filed. The applicant has sought to amend its notice of motion to bring the application within the purview of a review. In order for that to happen, it

is necessary that the procedures applicable to the filing of the record be followed.

[23] For all of the above reasons, this matter is not ripe for hearing, nor properly before this Court.

[24] The applicant has asked that the costs of this matter be reserved because the merits may prove to be in the applicant's favour and then he will have been prejudiced. The costs that are involved in this matter are wasted costs, occasioned by the bringing of the urgent application and do not relate to the merits at all. The merits can be argued on a separate occasion and the costs will follow that result.

[25] In the result, the application is struck off the roll with costs.



SE WEINER

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:	*Mr Z. Omar*
Applicant's Attorneys:	*Zehir Omar Attorneys*
Counsel for the Defendant:	*Mr D. Turner*
Defendant's Attorneys:	*Cliffe Dekker Hofmeyr Inc.*
Date of Hearing:	*21 February 2012*
Date of Judgment:	*21 February 2012*