IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 22589/2020

DELETE WHICHEVER IS NOT APPLICABLE

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

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DATE SIGNATURE

In the matter between:

NONGOGO GUZANA INC Applicant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

BAQWA J

INTRODUCTION

1 This is an urgent application in which the applicant seeks an order for payment of an amount of R7,942,172.83 being an amount due and payable for professional services rendered.

BACKGROUND

2 The applicant is a firm of attorneys which was until recently a member of a panel that rendered services to the respondent.

3 The applicant withdrew as a panellist on 11 December 2019 because of delayed payments and other unresolved disputes between the parties.

4 The applicant rendered litigation services and the relationships was regulated in terms of service level agreements in terms of which the respondent would pay according to a set process and timetable.

5 The respondent consistently ignored both the process and timetable and unilaterally imposed a different process and timetable on the applicant.

6 The situation gradually deteriorated in recent months subsequent to the withdrawal of the applicant from respondent's panel.

7 The applicant states the respondent's failure to pay poses a serious and immediate threat to applicant's ability to trade as applicant has gradually become unable to meet many of its obligations thereby endangering its very existence.

8 In these circumstances the applicant has applied on an urgent basis for the relief sought in the notice of motion.

9 The respondent is the *Road Accident Fund*, a juristic entity established in terms of Section 2 of the *Road Accident Fund Act* 56 of 1996 with its principal place of business in 420 Witch Hazel Avenue, Centurion, Gauteng.

URGENCY

10 At the commencement of the hearing of this application I requested Counsel to address me regarding why the application was brought on an urgent basis in terms of the *Uniform Rules of Court*.

11 Rule 6 (12) (b) provides as follows:

> *"(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."*

12 In the case of ***East Rock Trading 7 (Pty) and Another v Eagle Valley Granite (Pty) Ltd and Others*** that procedures set out in rule 6(12) is not there for taking. The question whether the question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. Whether an applicant will not be able to obtain substantial redress from an application in due

course will be determined by the facts of each case and the applicant must make out his case in that regard.

13 In response to the invitation to address me regarding urgency applicant's counsel made the following submissions:

13.1 The business operations of the applicant are threatened and under so much pressure that applicant is on the verge of not being able to conduct business as an ongoing concern any longer.

13.2 The last payment the applicant received from the respondent was on 9 March 2020 and that since the end of the "hard" lockdown, respondent showed no willingness to make any further payments towards the applicant.

13.3 An undertaking given by the respondent, that further payment would be made by 30 April 2020 was not honoured.

13.4 Applicant had at all relevant times acted in the *bona fide* belief that the respondent would pay and tried to engage in expensive litigation.

13.5 Despite this approach by applicant, it had been met with an obstructive attitude by the respondent which was further manifest by non-payment.

14 For the about reasons counsel submit that applicant had runout of suitable alternative remedies but to approach this court.

15 It is common cause that the indebtedness is undisputed and this is manifest not only in the documentary proof furnished by the applicant in the papers before me

but also in the fact that the respondent has not even bothered to oppose this application.

DISCUSSION

16 It is notable that the applicant performs a wide range of work for *inter alia* government entities such as Transnet, Eskom, SanParks, the HBRC, Robbert Island Museum and the City of Cape Town.

17 It is also common cause that in order to tender these legal services the applicant need to be in possession of a valid tax clearance certificate, which would be issued by the South African Revenue Services (SARS).

18 In this regard applicant reached a settlement with SARS regarding the payment of the arrear amount for which the applicant is liable.

19 It has been submitted that further urgency lies in the fact that without a valid tax clearance certificate without which it cannot receive instructions from government clients for new work. This put applicant in a position where without payment by respondent it might have to close its doors without being able to pay SARS and other creditors.

20 Whilst nit being oblivious to the dire straits which applicant faces, it bears noting that the current situation is not new to the applicant.

21 On 24 October 2019 the applicant found itself in exactly the same situation when it was owed a sum of R2,03850.16 by the respondent under similar circumstances.

22 On that occasion applicant brought a similar application before my brother, Mabuse J in this division who accepted that this matter was urgent and granted an order for the payment of the said amount.

23 Counsel for the applicant suggests that I ought to be guided by that decision and grant a similar order. I do not agree.

24 My disagreement is best explained by reference to a direct extract from paragraphs 19 to 27 of the applicant's affidavit which narrates more accurately the relationship between applicant and the respondent for approximately the last three years:

> *"19. In mid-2017, the situation became untenable. The Respondent was indebted to the Applicant in the sum of R3,260,586.89 which was overdue for payment. Under pressure to make payment to SARS (more of which later) and having made extensive efforts to engage with the Respondent on various levels, the Applicant brought an urgent application against the Respondent for payment of what was then owing. The application was issued out of this Court on 28 June 2017. I do not annex the founding papers. Their relevance is tangential. The papers are available on request.*
>
> *20. On receipt of the founding papers, the Respondent made certain undertakings which sought to address what had become systemic payment delays. The Applicant was satisfied not to proceed with the application on this basis.*
>
> *21. At that stage (and prior thereto) I explained to the Respondent the difficulties the Applicant had experienced in extracting payment from the Respondent. I explained to the Respondent the Applicant's strained financial circumstances and the effect the Respondent's conduct was having on the Applicant's ability to keep its doors open.*
>
> *22. The delegation of the Respondent with whom I met was receptive and understanding. The tone of the engagement was supportive. The agreed solution was for the Respondent (at a national level) to make payment immediately on being notified by its regional offices that a payment was due (i.e. to no longer*

subject the Applicant to the (theoretical) 30-day delay between payment instruction and payment). Although not an ideal solution, as it still involved lengthy delays from the date an invoice was rendered to the date of payment, this arrangement represented an improvement.

23. This arrangement did not last long. By late June 2018, the Applicant found itself waiting as long for payments as it had prior to the (first) urgent application. When I took this up with the Respondent's "Specialist Client Liaison: Treasury", I was met with a denial that the Respondent had agreed to make payments otherwise than in terms of the Payment Protocol.

24. Thereafter, and for a period, the Applicant made do as best it could.

25. Matters came to a head again in late 2019 when the Respondent's lackadaisical attitude towards paying the Applicant began threatening the Applicant's ability to meet its current liabilities and remain a going-concern. When all else failed, the Applicant instituted urgent proceedings against the Respondent out of this Court in which the Applicant sought payment of what was indisputably overdue for payment (at that stage) for legal services rendered. This application, issued under case number 76763/2019 for payment of the sum of R2,031,850.16, succeeded before Justice Mabuse on 24 October 2019. The Respondent did not oppose the application. I annex a copy of the Order granted by Justice Mabuse marked "FA6".

26. Matters did not improve thereafter. The difficulty was (and is) that the Applicant was required to dedicate a major proportion of available time to servicing the Respondent to the point that the Applicant was unable to sustain itself on what remained of its practice. This rendered an on-going relationship between the Applicant and the Respondent unsustainable.

27. As such on 11 December 2019, the Applicant withdrew as a panellist in respect of all of the regions in which it serviced the Respondent. The Respondent accepted the Applicant's withdrawal. I annex the Applicant's notice of withdrawal as annexure "FA7"."

25 It is quite evident from the above extract that the applicant was acquainted with respondent's dilatory tactics when it came to payments. Not once during that period did the applicant utilise the usual procedural machinery to claim monies own to it such as an application for summary judgment. Applicant would merely

threaten respondent with an urgent court application. As already mentioned that threat was carried out in October 2019.

26 Counsel for the Applicant indicates that the applicant was reluctant to seek redress in the usual manner so as not to asset the business relationship they had at the time.

27 What this means is that the applicant on its own, decided to assume the risk of its business being put into a precarious financial position without protecting its rights without protecting its rights by suing the respondent when the need arose.

28 As a result, the inevitable happened when the applicant found itself in its current dire straits. It is quite clear that the applicant, as narrated in the founding affidavit, could see the danger coming, especially when the SARS began knocking at the door for monies owing to it. The applicant still failed to see the proverbial “red flag” and did nothing.

29 It was only when the applicant was faced with the possibility of being unable to make ends meet that it resorted to bringing the present application.

30 As the court found in East Rock Trading case *(supra)* the urgent court procedure is not there for the taking an applicant must satisfy the court that he/she will not obtain redress from an application in due court and this must be determined by the facts of each case. In other words, the urgency is self-created.

31 The facts of this case demonstrate that the applicant was the author of its own misfortune by failing to obtaining substantial redress at an opportune time. It therefore not turns its own omission or negligence into an urgent situation which

merits the attention of the urgent court. In my view that hold the promise of turning the urgent court. In my view that would hold the promise of turning. The urgent court into a debt collection agency. That is not what Rule 6 (12) was intended to achieve.

(The following paragraphs are added in terms of Rule 42 (1) (b) of the *Uniform Rules of Court*.)

32 As indicated in paragraph 10 above, and even though I invited Counsel to address me on urgency, that issue was so intertwined with the merits that in the address by Counsel and in the ensuing debate regarding the issues with the Court, the merits were fully traversed. Questions posed by the Court to Counsel covered the nature of the applicant as an entity, its clientele and the manner in which it conducted its business. The facts traversed were essentially those deposed to in the applicant's affidavit.

33 What occurred therefore was that this Court traversed the ambit of the merits of the relief that was sought and far from striking the matter from the roll for want of urgency, the matter is concluded as follows. See ***Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 at 300** Para 11.

THE ORDER

34 The application fails for want of urgency and on the merits and I make the following order:

32.1 The application is dismissed with no order as to costs.

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S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on	: 17 June 2020
Judgment delivered	: 22 June 2020

Appearances:

For the Applicant	: Adv. JH Lerm
Instructed by	: Nongogo Guzana Inc. Attorneys
	: c/o Cilliers & Gildenhuys Inc. Attorneys