IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

30 APRIL 2024

DATE **SIGNATURE**

CASE NUMBER: 56730/2012

In the matter between: -

BASE MAJOR CONSTRUCTION (PTY)LTD Applicant

And

ESORFRAKI PIPELIES (PTY)LTD First Respondent

MACHOBANE KRIEL INC Second Respondent

SHERIFF, PRETORIA EAST Third Respondent

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Senior Judge's secretary. The date of this judgment is deemed to be 30 April 2024

JUDGMENT

COLLIS J

1] In the present urgent application, the applicant seeks the following relief as per its Notice of Motion:[1]

[1] Caselines 000-1

"1. Declaring that this application is urgent and dispensing with the rules of this Court with regard to service, time limits and/or form and that this application be heard as an urgent application in accordance with the provisions of Uniform Rule 6(12);

2. Declare the warrant of execution issued in favour of the First Respondent on the 6 February 2024 and served by the Third Respondent on the Second Respondent on the 14 February 2024 null and void;

3. The execution of the order of the DJP Ledwaba granted in favour of the First Respondent by default for payment of an amount of R10 284 387.10 be stayed pending the finalization of the rescission on common law grounds;

4. Directing the Second Respondent to pay the amount of R5 000 000.00 plus accrued interest into the interest bearing account of Mosomane Incorporated, which details would be made available within 5 days of this Court order, and the amount be kept in the interest bearing account as a security pending finalisation of the recission application on common law;

5. The Applicant be directed to file its supplementary affidavit, if any, within 15 days of the Court order in pursuit of its application in terms of common law;

6. The First Respondent be directed to file its further supplementary affidavit, if any, within 15 days from the date of the Applicant's supplementary affidavit;

7. The Applicant be directed to file its replying supplementary affidavit, if any, within 10 days from the date of receipt of the First Respondent's further supplementary answering affidavit;

8. Should the Applicant fail to file its supplementary affidavit as directed above, its right to proceed with common law rescission application shall lapse unless such an application is set down by the Applicants within 15 days from the date of the Court order;

9. Ordering the First Respondent, together with any Respondents who oppose this application, to pay costs of attorney ad client scale alternatively this costs to be argues with the rescission application; and

10. That such further and/or alternative relief be granted to the Applicant as the Honourable Court may deem fit."

BACKGROUND

2] On the 6th February 2024 and at the instance of the first respondent a warrant the execution was executed. The instruction so given, was for the sheriff to attach the amount of R5 million held in the Trust account of the second respondent in terms of an order of Kollapen J dated 5 October 2015.

3] It is the applicants' contention that the warrant of execution so issued is in clear and deliberate violation of the order of Kollapen J dated 5 October 2015. This order expressly prohibited the execution of the default judgment made by Ledwaba DJP on 29 April 2015. On this basis the applicant argues that the warrant of execution is in violation of an existing court order and is therefore *null and void*.

4] The catalyst in these proceedings was a warrant of execution which was served on the applicant and its erstwhile attorneys on 14 February 2024. On the same day communication and correspondence commenced between the applicant's current attorneys and the first respondent's attorneys for an undertaking not to proceed with the execution pending the finalization of the rescission application.

5] As mentioned, on 5 October 2015 Kollapen J [2] suspended the writ of execution issued on 15 September 2015 pending the outcome of the rescission application that had been instituted by the applicant before this court.

6] At the hearing the applicant informed the Court that it will not persist with seeking prayers 3 and 4 of the Notice of Motion but proceeded with the following relief namely:

6.1 Declaring that this application is urgent and dispensing with the rules of this Court with regard to service, time limits and/or form and that this application be heard as an urgent application in accordance with the provisions of Uniform Rule 6(12);

[2] Founding Affidavit, Annexure FA 4, page 0001 – 37 to 001 – 38.

6.2 Declaring the warrant of execution served by the Third Respondent on the Second Respondent on the 14 February 2024 to be *null and void*;

6.3 Costs on an attorney and client scale inclusive of costs of employment of two counsel.

7] The first respondent opposes the application on several grounds which can be listed as follows:

7.1 Lack of urgency of the application;

7.2 Whether this Court can grant the relief sought in the absence of Tlong Re Yeng Trading CC and the other parties against which the Ledwaba DJP Order was also granted; and

7.3 Whether the court can and ought to declare the writ *null and void* and suspend the operation and execution of the Ledwaba DJP Order.

Urgency

8] In respect of urgency, the applicant had advanced the following arguments namely that the first respondent has intimidated its desire to execute on an unlawfully issued warrant of execution attaching the R5 000 000.00 put up as

security in compliance with the Kollapen J order and has refused to desist from such conduct.

9] Further that the first respondent is in contempt of the Kollapen J order which had the effect of suspending the execution of Ledwaba DJP's order which granted default judgment in favour of the first respondent.

10] On the same day that the applicant was served with the warrant of execution it directed correspondence to the first respondent calling on it to cease and desist from relying on the warrant of execution[3] but the first respondent insists on relying on the warrant and as such is in contempt of the Kollapen J order.[4]

11] It is on this basis that the applicant had argued that the Kollapen J order suspended the writ of execution issued by the Registrar of this Court on 15 September 2015 pending the finalization of the rescission application. It is

[3] Founding Affidavit, page 0001 – 15 para 35.1 to 35.3 and Annexure FA6 page 0001 – 55
[4] Annexure FA 7 page 0001 - 56

common cause between the parties that the rescission application remains pending.[5]

12] It is on this basis that counsel appearing for the applicant had argued that the first respondent's contentions that the Kollapen J order did not suspend the Ledwaba DJP order are spurious and without merit.

13] As it is common cause that the rescission application is still pending counsel had submitted, that the warrant of execution was issued in bad faith and the granting of a punitive costs order would therefore be justified.

14] On the same day that the warrant was executed, the applicant immediately engaged the first respondent's attorneys in order to resolve the issue amicably with the first respondent without success. Further that there has been no delay at all on the part of the applicant in bringing the urgent application. It acted immediately upon receipt of the warrant of execution and instructed the attorneys to handle the matter and protect its interest. As mentioned, the applicant's attorneys on the same day engaged the first respondent's attorneys which detailed explanation is provided in the founding

[5] Founding Affidavit page 0001 – 10 para 13 and Answering Affidavit, page 0001 – 127 para 89

affidavit. This explanation has further not been rebutted by the first respondent.

15] As it is common cause that the common law rescission is still pending counsel had therefore argued, that it was always open to the first respondent to set down the common law rescission application and have it finalized. It did not do so by invoking the provisions of Uniform Rule 6(5)(f). In the absence of an explanation by them as to the steps which it has taken to enroll the rescission application since 2017, when the order of Holland-Muter AJ was handed down, it cannot be argued by them that the applicants' application is not urgent, as its urgency arose from the date when the applicant became aware of the warrant of execution on 14 February and it launched the present application on 27 February 2024.

16] For the above reasons the applicant had argued that its application should be enrolled and heard in the urgent court.

17] On urgency on behalf of the first respondent it was argued, that it is common cause that the applicant has done nothing to advance its rescission

application since Holland-Muter J, dismissed the application in terms of rule 42 of the Uniform Rules of court on 14 June 2017.[6]

18] Further, that from June to October 2023, the applicant's attorney received letters from the first respondent's attorneys informing it that the first respondent intended issuing a writ of execution based on Ledwaba DJP order.[7]

19] Despite being forewarned, the applicant failed to take any steps to enroll or advance its rescission application to finality in that time or institute an application to suspend the Ledwaba DJP order.

20] It was only until the first respondent followed through and delivered the February 2024 writ which triggered the applicant approaching this court on an urgent basis demanding that the court set aside the writ and suspend the Ledwaba DJP order and on this basis counsel for the respondent had argued, that the urgency is as a result self-created.

[6] FA, Annexure FA5, at pp. 0001-53, par [24].
[7] AA, paras 21 to 31, pp. 0001-107 to 0001-110.

21] In support for this argument the first respondent relied on the decision of Roets NO and Another v SB Guarantee (RF) (Pty) Ltd and Others ("Roets NO"),[8] where the Court struck a matter from the urgent roll based on a finding of self-created urgency for a delay of some six weeks.

22] In support of the order striking the matter from the roll, the Court held:

> [26] In my view, urgency which is self-created in a sense that an applicant sits on its laurels or take its time to bring an urgent application can on its own lead to a decision that a matter is struck off the roll……."

23] In addition the first respondent also relied on the decision in Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others ("Chung-Fung"), this Court, with reference to Roets NO, stated that:

> "[27] In Roets N.O. for example, this court found that the applicant had sat "on its laurels" and had unduly taken its time to approach the urgent court claiming irreparable harm. This led to the application being struck from the roll on account of "self-created urgency". But I think this decision properly understood, demonstrates that "self-created" urgency

[8] Unreported judgment: (36515/2021) [2022] ZAGPJHC 754 (6 October 2022). Available on SAFLII at https://www.saflii.org/za/cases/ZAGPJHC/2022/754.html

involves a degree of contrivance to jump the queue of hearings in the ordinary course. The contrivance in Roets N.O. was to wait until the eve of a sale in execution to bring an urgent application seeking a stay of the sale pending, inter alia, a rescission application when the fact of a sale in execution had been long known to the applicant. The effect of, as the learned judge phrased it, "sitting on one's laurels" was, in that case, designed to prevent a sale in execution from being held in order to defeat the rights of the judgment creditor. Had the rescission application been brought timeously, there would have been no need to approach the urgent court at the last moment."

24] Employing the above reasoning, counsel had argued that it is undeniable that the 'contrivance to jump the queue' is clearly established by the fact that applicant waited until the first respondent had issued and delivered the writ to approach the court for relief. The present matter is not one where there has been a delay for a few weeks – the delay in the present matter has been for months and years and there is no explanation whatsoever for the delay.

25] It is for this reason that counsel had argued that had the applicant not 'sat on its laurels' then the applicant would have either launched an application to suspend the operation of the Ledwaba DJP order or have its rescission

application set down for hearing. Neither of these actions have been taken since 2017 when Holland-Muter J dismissed the rescission application based on rule 42.[9] By now both of these would have been heard in the ordinary course and there would be no need to bring this urgent application.

26] In addition, the applicant has made no attempt to explain its delay in approaching this court for relief more than six months after it was made aware of the applicant's intentions to execute on the judgment granted in favour of the first respondent and against the applicant almost a decade ago, when the rescission application in terms of rule 42 was refused.

27] It is for these reasons that counsel had argued that the urgency is self-created.

28] In East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others,[10] the Court held that:

[9] FA, Annexure FA5, at pp. 0001-53, par [24].
[10] 2011 JDR 1832 (GSJ).

[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. 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. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard."

29] The applicant before Court has failed to state any reasons why, if the order sought is not granted now, it will not be afforded substantial redress at a

hearing in due course. This explanation the applicant should have set out in its founding affidavit, which the applicant before Court has failed to do.

30] In addition, the applicant has further failed to explain the inordinate delay in prosecuting its rescission application in terms of the common law. The dismissal of its rescission application in terms of rule 42 was made in 2017 almost seven years to date and this delay is wholly unexplained and no reasonable ground has been advanced to explain the delay. The applicant ought to have acted with alacrity and it has failed to do so.

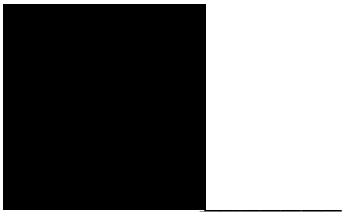
31] The applicant further advanced the argument that the first responded should have invoked the provisions of Rule 6(5)(f) and enrolled its rescission application. This argument so advanced, is with respect without merit. Why would a litigant which has a judgment in its favour enroll a rescission application of its opponent? This argument is simply devoid of any merit and is rejected by this Court.

32] The applicant before Court has also been coy to explain why when it was forewarned by the first respondents attorneys some six months prior that it would proceed with execution, it folded its arms and did nothing until the sheriff proceeded to execute the warrant in February 2024. This omission to

explain its delay result in this Court concluding that the urgency is indeed self-created.

ORDER

33] Consequently the inescapable conclusion to be drawn, is that the application falls to be struck from the roll for want of urgency with costs on an attorney and client scale, including the costs of two counsel.



C. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES

Counsel for the Applicant: Adv. W Mokhare SC

Adv. M Msomi

Instructed By:	MOSOMANE INCORPORATED ATTORNEYS
	c/o MONYAI INC.
Counsel for the Respondent:	Adv. C Woodrow SC
	Adv. J L Verwey
Instructed By:	THOMSON WILKS INCORPORATED
Date of Hearing:	14 MARCH 2024
Date of Judgment:	30 APRIL 2024