IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO: EL660/2023

In the matter between:

ROAD ACCIDENT FUND	APPLICANT
And	
SANDISIWE SOGONI	FIRST RESPONDENT
THE LEGAL PRACTICE COUNCIL	SECOND RESPONDENT

JUDGMENT

COLLETT AJ:

INTRODUCTION

[1] This application was brought on notice of motion accompanied by a certificate of urgency and enrolled on the motion court roll of 18 July 2023.

[2] The applicant in the application seeks an order condoning its non-compliance, forms, time limits and service period in terms of *Uniform Rules of Court 6(12)* (hereinafter referred to as 'the Rules') and a *rule nisi* suspending the operation, execution or enforcement of the judgment granted by default against the applicant on 23 May 2023 under case number: EL660/2023 (hereinafter referred to as 'the Order') pending the finalization of a current application for the recission of judgment.

[3] Essentially, the relief sought is premised upon *Rule 45A* of the Rules seeking the suspension of the operation and execution of the Order for a period determined appropriate by this Court.

[4] The papers were delivered to the attorneys of record of the first respondent on 17 July 2023 at 14h15 and upon the second respondent on 17 July 2023. Furthermore, the papers were emailed to both respondents at 12h56 on 17 July 2023 .

[5] In terms of the Notice of Motion, the respondents were required to advise the applicant's attorneys on or before17h00 on 17 July 2023 whether they intended to oppose the application failing which, it would proceed on an unopposed basis on 18 July 2023.

[6] When the matter was initially brought to me, counsel for the applicant indicated that there was no opposition as provided for in terms of the Notice of Motion. The matter was to be called at the end of the normal motion court roll.

[7] Due to the protracted nature of the motion court roll, I called for counsel to advise that the matter would be rolled over to 18 July 2023 at 10h30 and at that stage it became apparent that first respondent was opposing the relief.

[8] The legal representative for the first respondent indicated that they did not intend to file any opposing affidavits and would argue and premise the opposition on the applicant's papers.

[9] The application was called on 19 July 2023 and argued by counsel both on the urgency as contained in the certificate of urgency and the contents of the applicant's affidavit

filed in support of the relief sought by the applicant. Consequently, the two issues to be decided were:

9.1 whether the matter was sufficiently urgent to warrant being heard in terms of the truncated timeline and date unilaterally selected by the applicant; and

9.2 whether the applicant had, on the merits of the application, made out a case for the interim relief sought in terms of *Rule 45A.*

BACKGROUND

[10] On 23 May 2023, a judgment by default in the absence of the applicant was granted at the instance of the first respondent.

[11] Pursuant hereto, a recission application was issued on 28 June 2023 by the applicant and the first respondent, whilst having filed a notice to oppose, has yet to file an answering affidavit.

[12] The recission application seeks to rely on two main grounds, namely that the judgment was granted in error and that the applicant was in *bona fide* default being able to demonstrate the required '*good cause*.'

[13] The merits of the recission application are not of consequence to the determination of the relief sought in the present matter as it is the fact that the recission application is presently pending that is invoked to seek the suspension of the Order in terms of *Rule 45A.*

[14] The applicant indicated in its founding affidavit that whilst the first respondent had opposed the recission application, there was no unequivocal threat by the first respondent regarding contempt of the enforcement of the Order necessitating the seeking of an order suspending the operation or enforcement of thereof.

[15] Unfortunately, the stance of the first respondent in not enforcing the Order to date had not been shared by many claimants in other Divisions despite the pending recission application.

[16] The applicant has received sanctioning orders and the employees and staff employed by the applicant have found themselves in the unwarranted and precarious position at the risk of imprisonment.

[17] Furthermore, non-compliant lodgements have been '*served*' on the applicant by the sheriff by simply affixing same to the front door of the head office of the applicant.

[18] In view of the actions by third party claimants despite the pending review, the applicant considered it necessary to approach this Court urgently for relief in terms of *Rule 45A* in the form of a *rule nisi.*

RULE 45A APPLICATION

[19] The applicant's case is that despite the pending recission application, the operation and execution of the Order granted in favour of the first respondent on 23 May 2023 is not suspended.

[20] *Rule 45A* requires the applicant to proceed by way of application to seek the suspension of the order for such period as this Court deems fit.

[21] It is this application that is presently before the Court as a matter of urgency.

URGENCY

[22] The urgency of an application must be judged in terms of *Rule 6(12)* of the Rules in conjunction with Rule 12(d) the Eastern Cape Practice Directions (hereinafter referred to as 'the Directions').[1]

[23] Applicants in urgent applications are required to advance such facts as to satisfy the court that the non-compliance with the Rules is justified on the grounds of urgency.

[1] Rule 12(d); Bobotyana & Others v Dyantyi & Others (ECD 1198/2020, 21 August 2020)

[24] It is imperative that the applicant demonstrate that should the normal procedures be followed, it will suffer real loss and damage and set out explicitly the circumstances that render the matter urgent such that substantial relief cannot be afforded at a hearing in due course.[2]

[25] It is expected that respondents will adhere to such truncated periods as may be unilaterally imposed with the right to voice objections, such that there may be thereto, at the hearing of the matter. A deviation from the normal rules as embodied in the Notice of Motion must be addressed by the degree of urgency.[3]

[26] Each urgent application depends on the inherent merits and special circumstances that arise in respect thereof. The applicant is required to set forth explicitly the circumstances which render the matter sufficiently urgent to justify a departure from the rules, procedures and time periods.

[27] Self-created urgency will not pass muster where an applicant delays in approaching court until such stage that the prescribed rules can no longer be applicable.

SUBMISSIONS ON URGENCY

[28] The applicant detailed the grounds for urgency in the Certificate of Urgency founded on the facts contained in the affidavit and can best be summarised as follows:

28.1 Since the granting of the Order by default in favour of the first respondent on 23 May 2023, third party claimants' attorneys have instituted and are in the process of instituting or have threatened to institute contempt of court proceedings against the applicant and its employees on the strength of the Order.

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[2] Heathrow Property Holdings No 3 CC v Manhattan Place Body Corporate 2022 (1) SA 211 (WCC) at para [20] – [27]

[3] Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004(2) SA 81 (SE) at para [37], [38] and [40].

28.2 The lodgement of non-compliant claims that were refused by the employees of the applicant are being affixed by the sheriff to the door of the applicant's head office.

28.3 Lodgement as aforementioned not only thwarts the applicant in its assessment of the claims but potentially exposes the applicant to costly litigation which is prejudicial to the applicant considering its current dire financial circumstances.

28.4 The threatened and looming contempt proceedings will result in further unnecessary additional legal costs.

28.5 The Order granted on 23 May 2023 is of national importance because of the large number of interested parties and for this reason the applicant seeks urgent interim relief.

[29] The first respondent detailed the following opposition to the applicant's urgency:

29.1 The first respondent submitted that the applicant's urgency is self-created as it effectively did nothing from the date of the Order until 29 June 2023 when it launched a recission application.

29.2 The first respondent further submitted that the applicant's contention that the first respondent had not or would not seek to implement the Order is speculative.

29.3 In addition, the first respondent submitted that the urgent proceedings would not cure the contempt faced by the applicant.

29.4 Furthermore, it was submitted that first respondent was given less than 24-hours-notice to oppose the application.

29.5 In response, the applicant's counsel referred to an email sent to the first respondent at 15h17 on 14 July 2023 indicating the applicant's intention to

bring an urgent *Rule 45A* application, which email was acknowledged by the first respondent's attorney.[4]

29.6 It was further submitted that the first respondent had the entire day of 18 July 2023 to file an affidavit if she so desired as the application was only heard on 19 July 2023.

[30] I find no merit in the submissions made by the first respondent regarding the lack of urgency. The applicant has made it abundantly clear that the urgency only arose when third party claimants were acting upon the Order granted on 23 May 2023. The facts outlined in the applicant's founding affidavit are self-explanatory on this issue.

[31] The first respondent's submission that the applicant's assumption is '*speculative*' that she will not act on the Order is not supported by fact or evidence and is of no consequence. The only affidavits and factual allegations before the Court are those of the applicant considering that the first respondent chose not to file an answering affidavit.

[32] Furthermore, the veiled attempt to allege prejudice by the short notice is similarly not supported by any facts or evidence whereas the applicant has demonstrated that not only was the first respondent aware of the impending application but her prior conduct certainly was not indicative of any opposition to the proposed relief to be sought.

[33] It deserves mention that upon enquiring from the first respondent's legal representative as to whether they required time to file answering affidavits, the Court was informed that it would not be necessary as the first respondent intended to argue on the applicant's papers.

[34] I am satisfied that the applicant has presented sufficient facts to justify the present application being enrolled and heard urgently in accordance with *Rule 6(12)*.

[4] Applicant's founding affidavit page 43

RULE 45A SUBMISSIONS

[35] It was submitted that the applicant would suffer extreme prejudice should the operation and execution of the order not be suspended as there are large amounts of claims lodged with the applicant on a daily basis.

[36] Furthermore, not only was the applicant deprived of *audi alteram partem* relating to the default judgment but effectively they were being found in contempt of such Order by third party claimants.

[37] It was submitted that there can be no prejudice by suspending the order in terms of *Rule 42A* pending the outcome of the recission application.

[38] It was submitted on behalf of the first respondent that the latter was being prejudiced, robbed of her rights to relief and that the first respondent is suffering injustice. There is no evidence hereof before this court.

[39] Furthermore, it was submitted and other claimants should be permitted to lodge claims as this does not equate to an admission of liability.

[40] Lastly, it was submitted that the deponent is not authorised to bring this application of behalf of the applicant.

[41] It is re-iterated that not only did the first respondent elect not to file an answering affidavit to either place facts or evidence before the Court or to dispute the facts presented by the applicant, but she also failed to deliver a notice in terms *Rule 6 (5)(d)(iii)* if she intended to raise any questions of law.

[42] These submissions made on behalf of the first respondent are in the circumstances not properly before the Court in terms of the Rules. Accordingly, the relief sought must be adjudicated on the strength of the applicant's affidavit alone.

[43] I am satisfied that the applicant has made out a case on the papers for the relief sought.

COSTS

[44] The applicant submitted that it was never envisaged that either the first respondent or second respondent would oppose the interim relief.

[45] This was premised, *inter alia*, on the lack of concern displayed by the respondents to the communication of 14 July 2023 and the fact that opposition was not forthcoming on 17 July 2023 in terms of the Notice of Motion.

[46] The applicant submitted that the first respondent's opposition on 18 July 2023 necessitated the application to be rolled over for hearing on an opposed basis on 19 July 2023.

[47] Accordingly, the applicant had incurred additional costs and should this Court grant interim relief, the applicant would seek costs of the opposition to be awarded against the first respondent.

[48] I consider there to be merit in the submissions of the applicant's counsel and the curious nature and reason for the first respondent's opposition to the application for urgent interim relief cannot be gainsaid.

[49] In the circumstances, the following order is issued:

1. The applicant's non-compliance with the *Uniform Rules of Court* is condoned and the matter is enrolled and heard as one of urgency in accordance with the provisions of *Uniform Rule 6(12).*

2. A *rule nisi* is hereby issued, calling upon the respondents and any interested party to show cause, if any, on or before 15 August 2023 at 09h30 why an order in the following terms should not be made final:

    2.1 The operation, execution or enforcement of the judgment granted by default against the applicant on 23 May 2023 under case number EL660/2023, or

any part thereof, be suspended pending the finalization of the current application for the rescission of the judgment.

2.2 Any respondent, interested or intervening party who opposes this application pay the costs thereof.

3. That paragraph 2.1 above operate as an interim order with immediate effect pending the confirmation or discharge of the *rule nisi*.

4. The second respondent circulate to all its members by email a copy of the *rule nisi* and interim order within three (3) days of receipt thereof.

5. The applicants publish a copy of the *rule nisi* and interim order once in a newspaper published in English and circulated nationally.

6. The first respondent pay the costs of the application occasioned by the opposition of the interim relief.

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ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Mr. D Kotze
Instructed by	:	Malatji & Co Attorneys Inc. c/o Drake Flemmer & Orsmond Inc. East London Ref. Mr. Pringle
Counsel for the Respondent	:	Mr Conjwa
Instructed by	:	Mgcotyelwa Krewu Inc c/o M S Ginya Inc. East London Ref. Mr Krewu
Date heard	:	19 July 2023
Date judgment delivered	:	21 July 2023