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AN ANALYSIS OF THE REQUIREMENTS OF URGENT APPLICATIONS AND COST CONSEQUENCES

Analiza zahteva hitnih aplikacija i troškovne konsekvence[▽]

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Abstract

When an applicant requires urgent relief then they instruct an advocate/attorney to lodge an urgent application in court. The onus to justify the urgency of the application lies with the applicant and the requirements of this onus is clearly established in case law, practice directives and the rules of court. This paper makes a recommendation of punitive costs if an application is not ripe enough for urgency before the court. The results of numerous applications before the court that are not ripe enough hinder access to justice and efficacy of the court and escalate costs for the respective parties.

Keywords: *urgent applications, costs, case, law*

1. Introduction

Urgent applications are sought when an applicant requires urgent relief of a particular nature. An attorney/advocate will lodge the urgent application at court. The legal practitioner would be guided by court rules and practice directives (Erasmus, 2013) when drafting the urgent application. Urgent applications are brought before the court in terms of a notice of motion accompanied with a founding affidavit and supporting affidavits if necessary by the applicant.

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Rule 6(4) (a) of Superior Courts Act 10 of 2013: "Every application brought ex parte (whether by way of petition or upon notice to the registrar supported by an affidavit as aforesaid) shall be filed with the registrar and set down, before noon on the court day but one preceding the day upon which it is to be heard. If brought upon notice to the registrar shall set forth the form of order sought, specify the affidavit filed in support thereof, request him to place the matter on the roll for hearing, and be as near as may be in accordance with Form 2 of the First Schedule"

Thereafter the respondent files an answering/opposing affidavit and the applicant may file a replying affidavit if there are allegations to reply to. Prima facie there must be a case made out in relation to sufficient urgency of the matter.

If an urgent application is not sufficiently ripe to be heard, then practitioners are subject to a punitive costs order. The view of Southwood J was that urgent applications are abused by practitioners by just merely attaching 'urgency' to an application without setting out a proper case by fulfilling all the requirements as set out by the rules of the court. (Judge Southwood, 2007) Rule 6(12)(b) of Superior Courts Act provides "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" that the applicant must set out reasons and circumstances in the urgent application, and should the applicant require the rules to be relaxed then the affidavit must thoroughly explain this aspect. However in certain cases of urgency, the written formalities may be disposed and the affidavit may be disposed and oral evidence may be sworn into court by the applicant, because the circumstances of urgency justify same. (Hay v Brown and Others 2003 JOL)

In the circumstances legal practitioners are required to take the utmost care and diligence when taking instructions for an urgent application, as judges do not show mercy when an application does not completely satisfy the requirements of urgency. Non-compliance with the rules can be construed as a wilful disregard shown to the courts and as a result the application may be struck off the roll with a punitive costs order against the applicant. (Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W) (referred to as the 'Luna case') and Theophilopoulos, van Heerden & Boraine (2012) 140-142)

2. Cases that establish the consequences of failure to thoroughly comply with urgency requirements

The court has established the consequences of the failure to comply with the rules of court required by urgent applications. A good example of where the court exercised no leniency towards a frivolous urgent application was in the Luna case, Coetzee J pronounced that the rule regarding urgency is "[u]ndoubtedly the most abused Rule in this Division is Rule 6 (12)." (pp. 136) Judge Coetzee emphasised two elements that justify urgency first the deviation from the motion court roll and secondly the reasons why the matter should be heard a week before the motion court roll. (pp. 137) However in these particular facts there was a failure to provide a justification for urgency in the affidavit. (pp. 137-139) It was apparent that there was no proper communication between the attorneys to ensure compliance with the rules in respect of urgency. Counsel for the applicant also failed to answer to why the matter could not be heard on the normal motion court roll. Upon Coetzee J conducting a comparison of urgent matters on the motion court roll illustrated that matters on the motion court roll

were more urgent and made out a proper case for urgency. (pp139) Accordingly the matter was struck from the roll as a warning to practitioners that their papers must fully comply with the requirements of the High Court Rules. Coetzee J cautioned practitioners in his judgment regarding urgent applications as follows:

> '[m]ere lip service to the requirements of Rule 6 (12) *(b)* will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.'(pp. 137)

The founding affidavit to the notice of motion should succinctly record the facts of the particular case to justify the circumstances leading to an application before the court and until the matter is heard. Most importantly, a paragraph in the affidavit accompanying the application, should be entitled 'urgency' is recommended to 'explicitly' explain the reason for the urgency and to substantiate the reasons for the matter to be heard as a matter of preference and escalated above other matters. The applicant must also address the court in the founding affidavit motivating that if the matter is not heard immediately, then a significant delay will cause such severe prejudice that it defeats the ends of justice. The blatant ignorance of the rules or partial disregard for the rules will not suffice for urgency.

Legal practitioners must satisfy the requirements of an urgent application to show compliance with the rules and directives of the court to ensure that judges may deliver efficient and expedient justice. Instead of presiding officers striking matters off the court roll because they are not urgent matters, which causes wastage of time and costs. Perhaps a deterrent would be for the court to impose fines on legal practitioners whom illustrate deliberate non-compliance with the court rules, which actively contribute to 'clogged' court rolls. Coetzee J stated that "[a]lthough it happens far too frequently that urgent applications are set down on the simple basis that just any element of urgency justified them being set down at any time without any consideration of these simple and logical factors which I have canvassed, I nevertheless believe that this is not a general practice which is so deeply ingrained that a warning to desist should first be given. I have personally in the past (and I know that many of my Colleagues have) frequently expressed similar views, when striking "urgent" applications off the roll on the grounds of lack of urgency. However, I have after preparing today's motion roll looked at some of the matters to see how similar cases were treated and have counted no fewer than five applications (I have since come across others) which will be heard this morning, which were set down on short notice, because of considerations of urgency set forth in the founding affidavits, but which were filed by last Thursday. They certainly seem at least as urgent (probably more than) the present application. These papers were lodged, as I have said, during the course of last week before noon on Thursday. This made it possible to prepare them together with all the others and this will contribute to the orderly dispatch of the Motion Court business this week, which is in the public interest and for which all should strive. It is demonstrated that this, indeed, is the general practice and not that which has been put up as being such by the applicant." (pp. 139)

Perhaps one of the quintessential principles of civil litigation is to curb costs and expenditure. The dictum in the case of Federated Trust Ltd v Botha, (1978, SA) This case was cited in Cassim v University of Johannesburg (2014, JOL). Federated Trust Ltd v Botha stated that the aim of the rules are to allow for cost effective litigation and

balance the prejudice that is caused to any parties when interpreting the rules of court and that the intention of the rules must always be born in mind:

> "[t]he rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious litigation before the courts."

And the court went on to further state that when:

> "Parties have (sic) failed to comply with requirements of the Rules or an order made in terms thereof and prejudice has thereby been caused to his opponent, it should be the court's endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the object for which the Rules were designed."

It is apparent from the facts that relate to Cassim v University of Johannesburg, the applicant failed to justify his case for urgency in the founding affidavit. Hence the first hurdle of non-compliance with the Rules was extremely detrimental to the case, that it hindered the application defective ab initio. The applicant brought an urgent application before the court on 24 January 2012 in order to compel the respondent to register him as a student. However the applicant had the knowledge on 5 October 2011 that he was excluded from the University. In the circumstances the applicant had this knowledge the previous year, but failed to address the court regarding the time lapse of three months without lodgement of an application through the University's internal processes. The applicant was a master of his own misfortune in that he left it until the last minute and placed undue pressure on the University, to lodge an urgent application that could have been brought before the court three months prior or even followed the internal process of the University. (pp. 8-9) to add further injury to applicant's case was that he was afforded an opportunity within three months to follow through with the internal procedures of exclusion at University of Johannesburg, but refrained from doing so. If he had followed the internal mechanisms he would have allowed the University sufficient time to respond, instead of bringing an application that was treated with laxity by the applicant, which severely prejudiced applicant's case and the delay could not be substantiated in the founding affidavit. Accordingly the urgent application was struck off from the roll. (pp. 10)

In Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd (pp. 473-474) Eksteen J set aside the respondent's application as it was fatally defective, because there was no case made out for urgency, which same application was brought on an ex parte basis.

In Mangala v Mangala (1976, SA, pp. 360) the applicant brought a spoliation order on an urgent basis. The applicant had made an arrangement to stay at another residence while he was locked out of the matrimonial home that he occupied for years. The court held that due to an alternate arrangement being made that there was no urgency and that the matter could be re-enrolled on the motion court roll in order for all the formalities to be complied with.

In re: Several matters on the urgent roll 18 September 2012 (SA, pp. 571), Wepener J commented that when there was non-compliance with the rules of court and practice directives by practitioners that this conduct is deemed to be discourteous towards the judges, as the rules are there to assist the judges to deal with matters expeditiously. (pp. 571) The judge alerted practitioners to the South Gauteng practice

directive, which allows for punitive costs to be awarded against practitioners as a result of non-compliance with the rules and practice directives. Wepener J stated that 'The Practice Manual in 9.24 paragraph 3.5 provides: "The aforementioned practices will be strictly enforced by the presiding judge. If an application is enrolled on a day or at a time that is not justified, the application will not be enrolled and an appropriate punitive cost order may be made." [paragraph 5] (pp. 571)

Wepener J remarked that practitioners that suffer at the court's helm in relation to a punitive costs order are blameworthy for their laxity.

> "If litigants would suffer as a result of the practitioners' laxity to comply with the clear directives, they have only themselves to blame for not complying with a set of simple and clear Rules and directives that exist regarding the hearing of urgent applications in the Division." (2012 pp. 571)

It is apparent from this remark the judges do not heed sympathy for practitioners that fail to comply with the rules and directives for an urgent matter.

In Greenberg v Khumalo and another; Greenberg v Du Preez and another, (2012, JOL, pp. 2) the applicant brought two urgent applications, which were struck from the court roll because counsel was not present. Thereafter the matter was once again placed on the court roll and was once again struck because of the non-compliance with the practice directive to file supplementary affidavits. The matters were set down again for the third occasion and the court noted that the failure to file explanatory affidavits did not bar the matter to be heard and that the applicant gave a reasonable explanation for counsel's absence on the first occasion at court. (pp. 2-3) The court held that:

> "[n]on-compliance cannot legally constitute a bar to re-enrolment and lead to a refusal by a court to hear the matter. This would be tantamount to denying litigants the procedural rights they derive" (pp.12)

Greenberg case cited the dictum of the case of Khunou and others v M Fihrer & Son (Pty) Ltd and other (1982, SA, pp. 355G-H) in emphasising the positive impact of rules of court in order to ensure effective justice is upheld in the courts, as follows:

> "[t]hey are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner."

The court further stated that:

> "I do not see where the power to impose a requirement in addition to and inconsistent with that contained in rule 6(5)(f) of the Rules of Court derives from, unless it has to do with the prevention of the abuse of this rule. However, non-appearance when a matter allocated for hearing is called does not to my mind without more constitute an abuse of process which requires or justifies the inherent powers of the high court to be harnessed to supplement the requirements of rule 6(5)(f) on a blanket basis. On my analysis the practice directive "9.22 is striking from

> the roll…4. If a matter has been struck from the roll, counsel in the course of the week in which the matter was struck from the roll, may seek the matter to be re-enrolled. The matter will only be re-enrolled if a proper explanation for non-appearance is given. In appropriate circumstances, the explanation must be on oath." (pp. 5) under discussion is procedurally incompetent, has no legal force or effect, and should not be applied by either the registrar or a court to constitute a bar to (or additional requirement for) the allocation of a date (enrolment) for the hearing of an application."(pp. 23-24)

The court accordingly dismissed the argument posed by the respondent regarding that the applicant did not duly comply with the practice directive and if the argument was to be upheld it would cause the applicant undue prejudice.

In the Khunou (pp. 416-418) case the applicant's attorney and the respondent's attorney had a break-down of their professional relationship, because of a dispute in the Industrial Court. The dispute was in relation to a disagreement to an 'alleged' agreed postponement in the Industrial Court. The respondent's attorney became petty and unnecessarily vindictive and refused to provide documents for discovery, which caused an undue delay for the applicant's counsel to prepare an advice on evidence in heed of the fast approaching trial date. As a result of the abovementioned facts, Slomowitz AJ accurately reflects upon the futility of the matter and the fact that the respondent's attorney created the urgency and the judge warned against such belligerent attitude between fellows of the legal profession that caused unnecessary prejudice to their clients by fuelling such petty litigation. (pp. 4, pp. 16-420) In the circumstances costs de bonis propriis was awarded against the respondent's attorney intransigence. (pp. 425)

In the case of *Gallagher v Norman's Transport Lines (Pty) Ltd*, (1992, SA) the applicant sought relief to reinstate his position of employment after his dismissal. The decision of dismissal was beyond the jurisdiction of the court and as such could only be reviewed by an Industrial Court. The court remarked that when there are deviations from the scope of the form 2(a) this is a proforma that is attached to the rules to illustrate ex facie the appearance of an application in the High Court for legal practitioners.

> "The Court is enjoined by Rule 6(12) to dispose of an urgent matter by procedures which shall as far as practicable be in terms of these Rules. That obligation must of necessity be reflected in the attitude of the Court about which deviations it will tolerate in a specific case." (pp. 329)

In Lubambo v Presbyterian Church of Africa (1994, SA) the issue was whether urgency was appealable and it was held not to be appealable, as there are different forms of urgency and the nature of deciding whether a matter should be appealable is a once off instance. (pp. 262-267)

In Adv Hamutenya v Gameb (2013 JDR) the facts related to the applicant placing an applicantion on an urgent basis and failed to appear, three days later the same application was before the court without substantiation of urgency. (pp. 2-3) The court remarked that:

> "The rule on urgent applications plays a useful role in the administration of justice, and it must not be prostituted or stultified to such an extent that it loses its usefulness and efficacy."(pp. 3)

In André v André (2014 JOL) the parties were involved in an acrimonious divorce proceedings, the parties applicant alleged that the wife spoliated 41 items that belonged to him. (pp. 1) The founding affidavit to the notice of motion omitted to address the grounds of urgency and the matter was accordingly struck from the roll. (pp. 7-8)

It is apparent from the abovementioned cases that the consequences of defective alleged urgent applications before the court results in punitive costs order and the applications struck off the court roll.

3. Cases that illustrate the facts that justify urgency

In contrast to the abovementioned cases illustrate, which matters have been successfully heard on an urgent basis. An example of such an urgent matter is in the instance of life and death. When a minor/infant child is born into a particular faith/religion that prohibits blood transfusions and it is a matter of life and death, in this situation the State adopts the role as the guardian/custodian of the child. The State brings an urgent application outside court hours to obtain an order for the child's life to be saved by the blood transfusion, which is administered within a specific time frame due to the medical urgency.

In Hay v Brown and Others (2003, JOL) the applicant sought an urgent order and the formal application was dispensed with due to the urgency of the matter. The application was brought by way of notice of motion without a founding affidavit and oral evidence was heard by the applicant at court. The applicant's testimony to the court was that the blood transfusion needed to be administered within 3-4 hours in order to ensure that baby Reuben would survive, and without the transfusion there was no possibility that he would survive and the court stepped into the role as the custodian of the child and granted the order in the 'best interest' (s28(2)Constitution) of the child, which weighed in the State's favour compared to the religious beliefs of the parents that made the child vulnerable to losing his life without the blood transfusion.

In expanding the principle of the paramount right of a child in the dictum of Foxcroft J in V v V the facts related to a custody dispute in that the father sought sole custody against his spouse that was lesbian, but the court did not grant sole custody (1998, SA)

> "Part of the difficulty in dealing with this question is that, in a custody case, one is only indirectly dealing with the parents' rights. The child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights. Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents' rights. To my mind, the right which a child has to have access to its parents is complemented by the right of the parents to have access to the child. It is essential that a proper two-way process occurs so that the child may fully benefit from its relationship with each parent in the future. Access is therefore not a

> unilateral exercise of a right by a child, but part of a continuing relationship between parent and child. The more extensive relationship with both parents, the greater the benefit to children is likely to be.' (Bonthuys pp. 620 in Currie & de Waal).

In East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others, (2012 JOL) the applicants sought a two pronged relief in an urgent application. Part A of the application sought an interim interdict and Part B was the main application, which was finalised before the Court. The interim relief aimed to interdict the Board of Directors from having a meeting of the Board of Directors to table resolutions. The respondents opposed the application on several reasons namely that the requirements for the granting an interim interdict were not satisfied and that the matter did not constitute as urgent because it failed to satisfy the rules of court. It was held that the crucial test to establish urgency was whether the applicant claims that he cannot be afforded substantial redress at a hearing in due course. (paragraph 9) In this case Notshe AJ was satisfied that all the requirements for urgency had been met and appropriately explained the crucial test for urgency and remarked as follows:

> "[i]t is clear that if the applicants were to wait and bring the matter in the normal course they will not be able to be afforded substantial redress at a hearing in due course. The horse would have bolted out of the stable by then." (paragraph 11)

In the case of UDM of the Republic of SA and Others (2012, BCLR) it was held that the judiciary has the discretion to relax the rules in order to accommodate the urgent application before the court. (pp. 1087-1090)

In IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another (1981, SA, pp. 381) Fagan J remarked on a three tier approach to prejudice when addressing a court on urgency. The first type of prejudice is whether the applicant suffers prejudice to wait for a matter because he/she cannot redress the court. The second whether the respondent suffers prejudice due to not having sufficient time to put a proper case before the court. The third prejudice that other litigants suffer by allowing the urgent application. (pp. 381)

In the Memorandum of Practitioners for the practitioners of the South Gauteng High Court crafted by Southwood J, he highlighted the case of Repblikeinse Publikasies (Edms) v Afrikaanse Pers Publikasies (Edms) Bpk (1972 SA) the court held that the deviation from the rules is permitted on the provision that it is substantiated in the application before the judge. (pp. 415H-416A)

In Sikwe v SA Mutual Fire & General Insurance Co Ltd (1977 SA pp. 233-234) this urgent application failed to make out a case of urgency, however from the facts of the matter it could be inferred that the matter was indeed urgent as the application could not be heard at a later stage.

In Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism: Eastern Cape and others, (2015, SA) the facts dealt with the application to declare the Liquor Act unconstitutional, one of the points in limine was that the application was 'self-created urgency.' Judge Smith addressed the urgency as follows:

> "[t]here can be little doubt that the matter was indeed urgent as the applicant's right to sell wine from its grocer's stores would have come to an

automatic and permanent end on 14 May 2014. As Mr Smuts SC, who appeared for the applicant, has correctly argued, a retrospective order of constitutionality would have been cold comfort for the applicant, as it would not have served to compensate it for financial losses consequent upon the closure of its table wine sections. In the event, the consideration of legality, weighs heavily with me in this regard. In my view, it would be undesirable to non-suit an applicant, who seeks to enforce its constitutional rights, on the basis of inconsequential procedural and technical difficulties, such as perceived lack of urgency, in particular where the respondent had been allowed reasonable opportunity to file opposing papers. This point in limine can, in my view, therefore not be upheld." (paragraph 10-11)

Hence the matter was dealt with as a matter of urgency and the point *in limine* was accordingly dismissed.

In the case of PFE International Inc (BVI) and others v Industrial Development Corporation of South Africa Limited (2013, BCLR) the relevant dictum of Judge stated that: "[i]t is therefore necessary for courts to have the power to adjust the application of rules to avoid injustices" (paragraph 31) The facts of the case are irrelevant as it did not deal with urgency however the dictum may be applied verbatim.

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Apstrakt

Kada podnosilac zahteva hitnu pomoć upućuje advokatu/punomoćniku zahtev za podnošenje hitne aplikacije sudu. Zadatak opravdanja hitnosti prijave leži na podnosiocu zahteva i teret ovog zahteva je jasno utvrđen u sudskoj praksi, direktivama i pravilima suda. Ovaj rad se bavi kaznenim troškovima ako zahtev nije dovoljno opravdan da bi se smatrao hitnim pred sudom. Rezultati zahteva koji nisu dovoljno opravdani da bi se smatrali hitnim ometaju pristup rešavanju dovoljno hitnih zahteva i efikasnost suda te su iz tog razloga predviđeni kazneni troškovi za takve podnosioce zahteva.

Ključne reči: *hitni zahtevi, troškovi, slučaj, pravo*

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