

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Division)**

**HELD AT MASERU**

**CCT/0241/22**

In the matter between –

**PLATINUM CREDIT LIMITED**

**APPLICANT**

**And**

**FIRST NATIONAL BANK OF LESOTHO LTD**

**1<sup>ST</sup> RESPONDENT**

**PLATCORP HOLDING LIMITED**

**2<sup>ND</sup> RESPONDENT**

**THE COMMISSIONER**

**CENTRAL BANK OF LESOTHO**

**3<sup>RD</sup> RESPONDENT**

**Neutral Citation: Platinum Credit Limited v First National Bank of Lesotho Ltd and 3 Others [2022] LSHC 180 Comm. (5 August 2022)**

**CORAM: M. S. KOPO, J**

**HEARD: 27<sup>th</sup> July 2022**

**RULING: 05<sup>th</sup> August 2022**

## SUMMARY

*Urgent application – Practice - Is there urgency? – Abuse of Court process, what constitutes.*

## ANNOTATION

### Books

**Herbstein & Van Winsen. 2009. *The Civil Practice of the High Courts of South Africa.***

**Bishop J M, Brickhill J R, Farlam P B J, Van Loggerenberg D E, 1994. *Erasmus Superior Courts Practice. Main Volume.* Juta and Co. Ltd**

### Cases

#### Lesotho

**In Tholo Energy (PTY) LTD v Letšeng Diamonds (PTY) LTD and 1 Other (CCA/0013/2022) [2022] LSHC 28 (29 April 2022)**

#### **South Africa**

**Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others [2014] 4 All SA 67 (GP)**

**Re: Several Matters On Urgent Roll 18 September 2012 (2012) 4 All SA 570 (GSJ)**

### Statutes

**High Court Rules No. 9 of 1980**

# RULING

## [A] INTRODUCTION

### [A] (a) Background

[1] The background on this matter is cleaned from the Founding Affidavit of one *Motena Lishea*, 1<sup>st</sup> Respondent Answering Affidavit of one *Thapelo Mohami* and the Opposing Affidavit of one David De La Harpe. The facts that are herein portrayed as the background to this matter are common cause to a large extent. Where such are contested, the analogy will clarify.

[2] Applicant in this matter instituted a case in this court and it was registered as **CCA/0057/2022**. In this case, Applicant moved the court to declare its relationship with 2<sup>nd</sup> Respondent as that of borrower and lender. On the other hand, 2<sup>nd</sup> Respondent herein entered a counterclaim in the same matter (**CCA/0057/2022**) for a spoliation order to restore the *status quo ante*. The *status quo ante* according to 2<sup>nd</sup> Respondent herein was that since 1<sup>st</sup> day of June 2020, both parties (Applicant and 2<sup>nd</sup> Respondent) exercised joined control over the Applicant's daily operations, management and finances. 2<sup>nd</sup> Respondent, through its representatives and other representatives of its business partners had mandates on the Online Banking Profile of the banking accounts held by 1<sup>st</sup> Respondent since the year 2020. This was as a result of some business relationship between the parties.

[3] According to Applicant (and as it is, what animated its application in **CCA/0057/2022**), its relationship with 2<sup>nd</sup> Respondent was just that of a borrower and lender. On the hand, 2<sup>nd</sup> Respondent says that the relationship was

much more. There was a loan that 2<sup>nd</sup> Respondent advanced to applicant and moreover, 2<sup>nd</sup> Respondent bought 100% shares of Applicant. As at the time of the hearing of this application, the *status quo ante* as ordered by my brother Mokhesi J in **CCA/0057/2022** had not been restored.

**[4]** Applicant paid or attempted to pay out “golden parachute” to the members of its board sometime in June 2022 from the mentioned bank accounts held with 1<sup>st</sup> Respondent. The amount involved in that transaction was about **M9 million**. This caused the 2<sup>nd</sup> Respondent to institute an urgent application for the preservation of the said **M9 million** per **CCA/0063/2022**. An interim order was granted by my brother Mokhesi J that 1<sup>st</sup> Respondent herein preserve the said funds, repayment of the moneys already paid out or reversal of the said transaction.

**[5]** 2<sup>nd</sup> Respondent further instituted another urgent application in **CCA/0066/2022** wherein it moved the court for, inter alia, reversal of about **M2, 805, 493.23** paid out further from the mentioned bank accounts held with 1<sup>st</sup> Respondent and contempt of court for the previously mentioned orders. The 1<sup>st</sup> Applicant was ordered to reverse the said amount by brother Mokhesi J in the interim. The contempt application was yet to be adjudicated upon during the time of the hearing of this matter.

**[6]** The very transactions mentioned in [4] above caused 1<sup>st</sup> Respondent herein to take a further step and froze the bank accounts previously mentioned. This act of freezing of the accounts is the one, according to Applicant, that prompted the present application.

## **[A] (b)The Present Application**

[7] In brief, Applicant is a company duly registered under the laws of this country. It brought this Application on an urgent basis for an order in the following terms:

- 1) Dispensing with the normal rules of this honourable court pertaining to periods and modes of service due to urgency of this matter
- 2) A rule be issued, returnable on the date and time to be determined by this honourable court, calling upon the Respondent to show cause if any, why:
  - a) The first respondent shall not be ordered to unfreeze Applicant's business account no, **62789893130**, **62806618396** and **62867249750** pending finalisation hereof;
- 3) The 1st Respondent unilateral decision of freezing the above-mentioned business bank accounts since the 6<sup>th</sup> July 2022 to date shall not be declared wrongful and unlawful.
- 4) The 1<sup>st</sup> Respondent's action to disclose confidential information of the Applicant to the 2<sup>nd</sup> Respondent shall not be declared wrongful and unlawful.
- 5) The 2<sup>nd</sup> Respondent's action to use Applicant's confidential information to build and file a case against the Applicant shall not be declared wrongful and unlawful
- 6) Costs of suit on attorney and client scale
- 7) Further and/alternative relief.

8) That prayer 1 and 2 (a) and (b) operate with immediate effect as interim court order.

[8] 1<sup>st</sup> and 2<sup>nd</sup> Respondents have opposed this application. 1<sup>st</sup> Respondent, briefly, oppose the application on the ground that the account was frozen due to the suspicious transactions apparent therein.

[9] On the other hand, 2<sup>nd</sup> Respondent attacked the application firstly on the points *in limine* as such;

- a) Abuse of court process on the ground that Applicant has devised a stratagem to outmanoeuvre the 2<sup>nd</sup> Respondent by putting it (2<sup>nd</sup> Respondent) under extreme time restraints and causing 2<sup>nd</sup> respondent to deal with four (4) matters
- b) No-urgency of the matter
- c) Applicant coming to court with dirty hands in the sense that Applicant and its representatives have not complied with a court order granted by this court.

[10] The present ruling deals only of the preliminary points

## **[B] ANALYSIS OF THE ARGUMENTS AND FACTS**

### **[B] (a) Urgency**

[11] Per the deposition of *Motena Lishea*, the urgency of the matter is premised on the reasoning that Applicant has to pay the salaries of its employees and other overheads. Due to the freezing of Applicant's bank

accounts, the employees cannot be paid. Standing alone, this is a trigger for urgency.

**[12]** It has been argued for 2<sup>nd</sup> Respondent that there is no urgency for the following reasons:

- 1) The urgency is self-created because Applicant has failed to restore the *status quo ante*, has not heeded to advice of 2<sup>nd</sup> Applicant to provide the overheads that need to be paid, is seeking through these proceeding to circumvent this court previous orders, it is a ploy to obtain payments of the so called “golden parachute”, it is an abuse of court process and finally, there are funds in other bank accounts held with different banks from which Applicant can effect the payments.

**[13]** Urgent applications in our jurisdiction are governed by Rule 8(22). Rule (22)b) thereof reads thus:

*“In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in an(y) hearing in due course if the periods presented by this Rule were followed.”<sup>1</sup>*

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<sup>1</sup> High Court Rules No. 9 1980

[14] In dealing with a similar rule in South Africa, Tuchten J, in Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others put it thus:

*“It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency”<sup>2</sup>*

[15] In Tholo Energy (PTY) LTD v Letšeng Diamonds (PTY) LTD and 1 Other<sup>3</sup>, Mathaba J put it thus:

*“The question whether the matter has to be enrolled and heard as an urgent application is underpinned by two considerations, (a) a factual finding that the*

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<sup>2</sup> [2014] 4 All SA 67 (GP)

<sup>3</sup> (CCA/0013/2022) [2022]LSHC 28 (29 April 2022)



*matter is indeed urgent, not only because the applicant says so, and (b) the issue of absence of substantial relief in a hearing in due course. The import therefore is that the procedure set out in Rule 8(22)(b) is not there for the taking. The applicant must provide details of the circumstances which he avers render the application urgent as well as demonstrating the absence of a substantial relief in a hearing in due course”.*<sup>4</sup>

**[16]** I agree of the approach enunciate by the learned judges above. The question is, factually, are there grounds laid down by Applicant showing urgency? As I have mentioned earlier, on the face of it, the application seems urgent. Applicant alleges that the salaries of two hundred (200) of its employees were due on the 25<sup>th</sup> day of July 2022. The matter was filed with court on the 22<sup>nd</sup> day of the same month. Applicant further alleges that without access to the funds in the mentioned bank accounts, there is no way to pay the employees’ salaries and other overheads and it is at the risk of collapse. If therefore the normal modes of service were to be followed, substantial relief would not be open to the Applicant. However, as shown above, other factors come into play (and the list is not exhaustive).

**[17]** In this matter, the entire chronology of events concerning the dispute between Applicant and 2<sup>nd</sup> Respondent must be viewed in totality. The freezing of the relevant accounts occurred in the beginning of July. This is common cause. It is further common cause that a plethora of litigation ensued between the parties since June instant. One of the applications gave birth to an order that

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<sup>4</sup> [2022] LSHC 92 COM (29<sup>th</sup> April, 2022)

the *status quo ante* be restored. The said *status quo*, is one in which 2<sup>nd</sup> Respondent was to have access to the online banking profile of the Applicant through its representatives. 1<sup>st</sup> Respondent has shown that it is unable as a bank to restore those who had access to the said Online Banking profile since they were created by Applicant's managing director (Deponent in the Founding Affidavit) and the said deponent is the only one who can. To this Applicant has adopted a rather technical and evasive approach.

**[18]** In state of just doing as directed or assisting by seeing to it that the *status quo ante* is restored, Applicant is saying that the order of the court was not directed to it but rather to the 1<sup>st</sup> Respondent. This gives an impression that Applicant mala fide in the entire process. Would we be in a situation in which Applicant is alleging that it is in a risk of collapsing and not being able to pay its employees if it had cooperated and assisted in seeing to it that 2<sup>nd</sup> Respondent is given access as ordered? The answer is in the negative.

**[19]** It has been argued on behalf of 2<sup>nd</sup> Respondent that giving an order to unfreeze the accounts in question will be tantamount to circumventing the previous orders of this court. In one of those orders, 1<sup>st</sup> Respondent was given an order to preserve the funds in the mentioned bank accounts. An order to unfreeze those accounts, even in the interim, would be tantamount to undermining the said order especially when the *status quo* has not been restored.

**[20]** Applicant learnt of the frozen bank account on the 07<sup>th</sup> day of July 2022. When the only two (2) days are left to pay its employees, and after the events tabulated above, Applicant approached this court on an urgent basis. This urgency seems to be self created.

[21] One of the grounds put forward for consideration of urgency in Mogalakwena mentioned above is “other prejudice to respondents and administration of justice”. One believes this is a classical case in which prejudice to respondent and the administration of justice has to be looked into. Looking into the history of the litigation between the parties, it would be prejudicial to the 2<sup>nd</sup> Respondent and the entire administration of justice if the order to unfreeze the accounts in the interim were to be given. That order would undermine the orders given by my brother Mokhesi and frustrated the proceedings pending before his court. It would not augur well to the administration of justice.

**[B] (b) Abuse of Court Process**

[22] It has been argued on behalf of the 2<sup>nd</sup> Respondent that the hastiness that Applicant has undertaken this application, even if moved on an urgent basis, is abuse of court process. The argument is premised on the fact that the Application was issued on the 22<sup>nd</sup> day of July 2022 and set down for hearing on the 26<sup>th</sup> day of July. It was served on the 2<sup>nd</sup> Respondent on at 1348hrs on the day it was issued. The 22<sup>nd</sup> day of July 2022 was on a Friday. This means that Respondents had to hastily prepare the opposing papers throughout the weekend to be ready to argue on the 26<sup>th</sup>, which was on a Tuesday.

[23] Over and above the ground that this was hasty notice, 2<sup>nd</sup> Respondent argues that the Notice of motion required of them to file the opposing papers 14 days after it was filed. The net effect of this argument is that this was calculated to frustrate the 2<sup>nd</sup> Respondent.

[24] Applicant on the other hand argues that the time lines are set by the court and not the Applicant. Mr. *Tšenase* argues that when one institutes an urgent application in this division of the High Court, the registrar gives the date. For that reason, therefore, the argument says the date was set by the court and not the Applicant.

[25] On the 26<sup>th</sup> when the matter was called, Applicant showed that they were served with the answering papers the previous day and therefore had not filed their replies. Moreover, the 2<sup>nd</sup> Respondent had filed the heads but they had not. For that reason, therefore, they left in the hand of the court on whether they could file their heads. I postponed the matter to the 27<sup>th</sup> day of July to allow parties to file their replies and the relevant heads.

[26] The practice in this court is to give parties who institute urgent application a minimum of 48hrs for the matter to be heard. While this will be guided by the support staff in the court's registry, it will no doubt be initiated by the litigant, and in that regard, the Applicant who is the *dominis litis*.

[27] The present case is indeed one in which the 48hrs was effected. As to whether the Applicant pushed for it or the court staff gave it as a matter of course, is something that has to be deduced from the facts. As has been shown, the *dominis litis* is the one who drives the litigation. One cannot fathom a situation in which the court staff will only impose a date without first enquiring from the Applicant if the said date will be appropriate. One can therefore safely conclude that Applicant is the one who went for that date despite what Advocate *Tšenase* argues.

[28] The question, therefore, still remains on whether the time was enough to allow the Respondents to properly and efficiently prepare for the defence of this matter or that the hastiness is tantamount to abuse of court process. Indeed, the hastiness can be tantamount to denying the other side justice if the time given could not be enough to allow for sufficient preparation.

[29] The present application is very involving. The history of the dispute between the parties spans about three (3) previous applications within a space of just over a month. To be able to make head of tail of the matter, I also had to dedicate a substantial amount of time so that I could be in a position to follow the arguments. The voluminous nature of the matter has been said to be one of the reasons why a matter can be struck off the urgent roll. In re: Several Matters On Urgent Roll 18 September 2012<sup>5</sup>, it was held that:

*“Further, if a matter becomes opposed in the urgent motion court and the papers become voluminous there must be exceptional reasons why the matter is not to be removed to the ordinary motion roll. The urgent court is not geared to dealing with a matter which is not only voluminous but clearly includes some complexity and even some novel points of law”.*

[30] In Urban Genesis Management (Pty) Ltd and Another v Jooste and Another Vally J, on a South African rule in *pari materia* to our Rule 8 (22), said

*“It is trite that while rule 6(12) allows for the court to entertain a matter on an urgent basis. It is not open to an applicant who so seeks the assistance of the court*

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<sup>5</sup> (2012) 4 All SA 570 (GSJ) at paragraph 15

*to choose when s/he wishes to approach a court. The applicant must justify a departure from the rules regarding normal time periods as such allows for a respondent to appropriately address the case s/he is asked to answer to. It also allows the court to give careful consideration to the issues raised by the parties before pronouncing on them.”<sup>6</sup>*

[31] It is clear therefore that while urgent matters must be disposed of expeditiously, and dispensing with the normal modes of time and service, the other party still has to be given enough time to efficiently prepare for the matter. Moreover, too much haste also denies the court an opportunity to adjudicate diligently and dispense justice. I must agree with Advocate Jaco Roux SC that such hastiness may even derail the confidence in the courts both locally and internationally. It can cause the court to return judgments that are not well reasoned and as a result undermine the competence of the court.

[32] The seriousness of the abuse of court process or none observance of the rules of court has been demonstrated by the courts awarding attracted punitive costs. One sees the possibility of this case being treated in a similar manner

## **[C] CONCLUSION**

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<sup>6</sup> [2014] ZAGPJHC 380 (7 March 2014)

[33] The reasons advanced above clearly show that the matter is not urgent. Moreover, Applicant is abusing the court process. These are enough grounds to have this matter through out for lack of urgency.

[34] The application is dismissed with costs.

[35] The argument has been advanced that this is a matter fit for punitive costs. However, Advocate Roux SC argued that Applicant, as a company, should not be the one to pay the cost but the directors pay the cost directly. The technical nature of the procedure followed makes one to wonder if it such should not be asked of the legal representative. For that reason, therefore, while the order as to cost is not made now, counsel for Applicant is to address the court on a date to be determined why the court cannot grant costs *de bonis propriis*.

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**M.S. KOPO J**

Judge of the High Court

**For Applicant: Adv. Tšenase**

**For Respondent: Adv. J. Roux SC**