DISPUTE RESOLUTION
ALERT

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INCORPORATING
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Unpacking the urgency of urgent applications: Not just for the taking

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Agreement 'in principle'? Unpacking the enforceability of agreements to agree

An agreement only gives rise to legally enforceable and reciprocal rights when certain requirements are met; certainty being one such important requirement. For an agreement to be certain, the material terms of the agreement have to be clear, defined and unambiguous.

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Unpacking the urgency of urgent applications: Not just for the taking

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Urgent applications are brought when an applicant cannot wait for a matter to be dealt with in the ordinary course, where time is of the essence and urgent relief is required. Bringing an urgent application is an extraordinary measure, which is why there are stringent conditions that must be met in order to bring one successfully.

The High Court, Pretoria, in *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited (081473/2023)* [2023] ZAGPPHC 709 (21 August 2023) recently stressed the importance of providing viable reasons for dispensing with the formalities of application proceedings when instituting an urgent application, as set out in Rule 6(12) of the Uniform Court Rules. The emphasis on explicitly providing reasons for urgency is duly welcomed and serves as a warning to parties seeking to institute urgent applications without valid substantiation.

Rule 6(12) of the Uniform Court Rules deals with urgent applications, and speaks to when the outlined formalities and procedures may be dispensed with due to urgency. A court may do so as and when it deems fit, but the rule requires that the applicant must explicitly set forth the circumstances which render the matter urgent and the reasons why it could not be done in the ordinary course.

In the *Dynamic Sisters* case, Nedbank, the respondent, obtained summary judgment against the first and second applicants in January 2023. The immovable property of the first applicant was declared specially executable, and pursuant to the judgment, Nedbank caused a warrant to be issued against the immovable property with a view to having it sold at a public auction. The sale in execution was scheduled for 22 August 2023.

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The applicants launched an urgent application to stay the sale in execution of the property, pending the finalisation of an application for the rescission of the summary judgment. The urgent application was heard on 21 August 2023. Nedbank opposed the urgent application, *inter alia*, on the grounds that there was no reason for urgency.

Nedbank argued that the urgency of the application was entirely self-created by the applicants. It argued that the applicants had been aware of the judgement against them since 14 April 2023, and that the property would be sold to satisfy the judgment. Despite this knowledge, the applicants only launched the urgent application four months later. The applicants contended that they were endeavouring to resolve the dispute with Nedbank amicably, hence the delay in bringing the urgent application.

The court agreed with Nedbank, and stated that the applicants should have launched the *"urgent"* application as soon as Nedbank made it clear to the applicants that it would be proceeding with the sale in execution.

The court held that it is important to consistently refuse urgent applications in cases where the urgency relied upon is self-created. *"Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives (such as the actual need for urgency as prescribed by rule 6(12)) should never be ignored."* The court concluded that the matter was not urgent and struck it from the roll.

This judgment serves as a reminder that urgency will always be viewed objectively, and that self-created urgency falls way short of satisfying the requirements of Rule 6(12). Rule 6(12), in essence, ensures that justice is not delayed in situations where waiting for the regular legal process could lead to dire consequences. It allows the court to act swiftly and flexibly to protect parties' rights. It is very important to launch applications only in the event of undoubted urgency. This judgment reiterates the need for litigants not to wait but to seek legal advice on their rights and remedies as soon as possible, in order not to lose any grounds of urgency.

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Agreement ‘in principle’? Unpacking the enforceability of agreements to agree

An agreement only gives rise to legally enforceable and reciprocal rights when certain requirements are met; certainty being one such important requirement. For an agreement to be certain, the material terms of the agreement have to be clear, defined and unambiguous.

In many instances, entities and individuals enter into agreements to agree in the form of memoranda of understanding. The intent of these agreements is to pave the way for the conclusion of a further agreement, being the main agreement between the parties (whose essential terms are still to be negotiated). The question arises as to whether a party can enforce any rights in the event that the main agreement does not come into existence – placing reliance on the agreement to agree.

In the context of an agreement to agree, most of the essential terms of the main agreement are still subject to negotiation between the parties, and as such, this form of agreement is vague and uncertain. As a result, it is important for potential contracting parties to be aware of the moment an enforceable agreement (with enforceable rights) comes into existence.

In the case of *Seale v Minister of Public Works* [2020] JDR 2131 (SCA), the Supreme Court of Appeal (SCA) found *inter alia* that although an implicit obligation to negotiate in good faith is created in instances of an agreement to agree, this does not create an enforceable agreement to the extent that a deadlock mechanism is not catered for. In Seale, the SCA highlighted the principle in *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* [2000] (4) SA 413 (SCA) that: *"an agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree"*.

It is therefore essential for an agreement to agree to include a deadlock mechanism prescribing further steps to be followed in circumstances where the parties

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cannot agree to essential terms of the main agreement. An example of a deadlock mechanism is seen in *Letaba Sawmills (Edms) Bpk. v Majovi (Edms) Bpk*. 1993 (1) SA 768 (AD); [1993] 1 All SA 359 (A) where a lease agreement specifically provided for a deadlock mechanism (being a determination by appointed arbitrators of a market related rental) in instances where the parties could not agree on the rental in the main agreement. This deadlock mechanism rendered the agreement to agreement valid and enforceable.

As such, while an agreement to agree may create a legal relationship between prospective contracting parties, the extent to which it creates any enforceable rights will depend on the inclusion of a deadlock mechanism that caters for an impasse arising between the negotiating parties.

While an agreement to agree (without a deadlock mechanism) may be unenforceable in respect of its terms, it is possible for such an agreement to be useful in litigation as documentary evidence proving the parties’ intentions when concluding the agreement (should a dispute arise regarding the main agreement or a related matter).

Agreements to agree may prove practical to guide parties in their negotiations of a main agreement, however it is an accepted principle that an agreement to agree is unenforceable for reasons of vagueness and uncertainty unless a deadlock mechanism is included. As such a *“promise to contract”* is merely that: a promise and not an enforceable right.

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