

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 58879/2021

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/ NO	
(3) REVISED.	
_____	_____/_____/_____
SIGNATURE	DATE

In the matter between:

FARADAY TAXI ASSOCIATION

Applicant

And

DIRECTOR REGISTRATION AND MONITORING

First Respondent

**MEC FOR ROADS AND TRANSPORT
GAUTENG PROVINCIAL GOVERNMENT**

Second Respondent

GAUTENG PROVINCIAL REGULATORY ENTITY

Third respondent

ORANGE FARM UNITED TAXI ASSOCIATION

Fourth Respondent

MEYERTON TAXI ASSOCIATION

Fifth Respondent

VAAL WITS TAXI ASSOCIATION

Sixth Respondent

MINISTER OF POLICE

Seventh Respondent

CITY OF JOHANNESBURG

Eighth Respondent

SEDIBENG DISTRICT MUNICIPALITY

Ninth Respondent

J U D G M E N T

KEIGHTLEY, J:

1. On 24 December 2021 the Faraday Taxi Association (FTA) obtained an order in the urgent court before the learned Crutchfield AJ (as she then was). It is common cause that order was obtained without service on certain of the respondents. One of those respondents was the Orange Farm United Taxi Association (OFUTA), which was cited as the fourth respondent. It has applied for a reconsideration of the order under Rule 6(12) (c), which provides that: '*A person against whom an order was granted in his absence in an urgent application may be notice set down the matter for reconsideration of the order.*'
2. OFUTA set the matter down on the urgent court roll on 10 March 2022 for hearing in the week of 15 March. However, it then removed the matter and re-enrolled it for hearing the following week. Only FTA opposes the relief sought. When the matter came before me I directed that I would only consider OFUTA's *in limine* point based on FTA's alleged non-disclosure before Crutchfield AJ. If OFUTA failed to succeed on that point before me in the urgent court, I directed that a full reconsideration of the merits of the original application and OFUTA's counter-application could be dealt with on the extended return day of the rule that was granted by Crutchfield AJ, being 25 April 2022.
3. Despite the earlier decision of this Division in *Rhino Hotel & Resort (Pty) Ltd v Forbes and Others*¹ that where Rule 6(12)(c) is used '*the original application is reconsider on its own without reference to anything else*', the correct view has subsequently been held to be that a party relying on the Rule may file an affidavit

in support of its application for reconsideration.² OFUTA filed an affidavit in support of its reconsideration application. In *Industrial Development Corporation of South Africa v Sooliman*³ it was held that in such circumstances the other party has an opportunity to file a replying affidavit. FTA originally elected not to do so. However, when it became apparent that the issue of non-disclosure was pivotal to the reconsideration, I stood the matter down to enable FTA to prepare and file a replying affidavit.

4. In *ISDN Solutions*⁴ it was held that:

‘The framers of the Rule have not sought to delineate the factors which might legitimately be taken into. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress is open to attainment by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein.’

5. The purpose of the Rule is to afford an aggrieved party a mechanism designed to redress imbalances and injustices associated with the order having been granted in her absence.⁵ It has also been held that the discretion of the Court under the

² *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 269I. See also the earlier decision of *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA (W)

³ 2013 (5) SA 603 (GSJ) at para 9

⁴ Above n2, at 486H-487D

⁵ *ISDN Solutions*, above n2

Rule is a wide one. The only jurisdictional facts the Court is required to consider are whether the order was granted in the absence of the aggrieved party, and whether this was by way of urgent proceedings. Once this is established, the Court is free to reconsider the order initially given in the widest sense of the word.⁶

6. Much was made by FTA about the alleged deficiencies in OFUTA's Notice of Motion in that the short form of Notice was used rather than the long form. It thus did not specify that FTA could file an affidavit in answer to the application, nor specify a date by which it had to be filed. The reconsideration procedure under the Rule is, as the cases cited above demonstrate, a *sui generis* procedure. The Rule itself does not specify that an application need be made on Notice of Motion, nor does it specify that it must be accompanied by a supporting affidavit. In the circumstances, OFUTA cannot be criticised for electing to proceed on the form of Notice that it adopted. In any event, there was no material prejudice to FTA. It was notified of the application, and it elected to oppose. Furthermore, it was given and acted on the opportunity to file a replying affidavit.

7. For similar reasons, FTA's complaints about the absence of any urgency in the matter do not find favour with me. OFUTA did not seek to make out a case on urgency. Its contention was that being *sui generis*, as a matter of practice such matters may be enrolled in the urgent court without the usual constraints of the applicant for Rule 6(12)(c) relief having to show that the application is urgent. In this regard, I agree with the views expressed by the learned Modiba J in *LA v LW* to the extent that when applications under Rule 6 (12)(c) are enrolled in the urgent court: '*The circumstances of each case and considerations of convenience and fairness are private when the court exercises its discretion to enroll a rule 6(12)(c)*

⁶ *ISDN Solutions*, above n2, cited in *Sheriff Pretoria North-East v Flink and Another* [2005] 3 All SA 492 (T) and *Oosthuizen*, above n2.

application.' There may well be cases where resort to the urgent court is not justified. What renders this case suitable for consideration in the urgent court is the complaint that there were material non-disclosures by FTA when it approached Crutchfield AJ urgently. If this averment is found to be meritorious, then there should be no delay in the order obtained in such circumstances being set aside.

8. As to the merits of the complaint, many of the facts are common cause, despite FTA filing a replying affidavit:

8.1. The application before Crutchfield AJ was the second urgent application that FTA had sought against substantially the same respondents on substantially the same facts contained in the founding papers.

8.2. The first urgent application was instituted on 22 November 2021 under case number 54425/2021. It was set down for 30 November 2021, and scheduled for hearing on 3 December 2021.

8.3. OFUTA was the fourth respondent in the initial urgent application as well. It filed a Notice of Intention to Oppose. In the Notice of Intention to Oppose it identified the attorneys whom it had appointed to represent it and to receive service of all process in the matter. What is more, the Notice gave the full contact details of the attorneys including their email addresses, fax numbers and cellular phone numbers.

8.4. In the week preceding the set down of the first urgent matter, attorneys for the first to third respondent and the fourth respondent wrote to FTA raising concerns about alleged flaws in that application, but FTA persisted with it.

8.5. OFUTA's attorney drew attention to the fact that OFUTA had only received service of the application on the 29 November 2021, which was four days

after the date on which it was required to file an answering affidavit. The attorneys expressed the view that the matter was not ripe for hearing as OFUTA intended to finalise answering affidavits and would only be able to do so after the 30 November 2021. They requested FTA to remove the matter from the roll for that week in order for both answering and replying affidavits to be filed.

- 8.6. FTA's attorney's response was to indicate that it had been instructed to proceed with the matter on 30 November. It also placed on record that OFTA had been served on 26 November 2021.
- 8.7. Despite this, FTA filed a Notice of Withdrawal on 2 December 2021 with a tender of wasted costs.
- 8.8. The urgent application before Crutchfield AJ was issued on 14 December 2021 under a new case number, being 58879/2021. It was set down for 21 December.
- 8.9. The order was granted in circumstances where the learned Acting Judge was advised that there had not been service on the respondents. FTA's attorney filed an affidavit of non-service, which was part of the file that served before the learned Judge.
- 8.10. In that affidavit, Mr Munyai, the instructing attorney advised the Court that he had instructed the Sheriff to serve the urgent application under case number 58879 on, among others, the fourth, fifth, sixth and ninth respondents on an urgent basis. He attended the Sheriff's office on 17 December to collect the returns. However, the Sheriff had informed him that their offices would be closing on that date. He then simply stated that:

'I attempted to serve the urgent application to the above mentioned Respondents but the principal place of businesses was closed.'

9. What is crucially also common cause is that FTA made no mention in its founding affidavit or affidavit of non-service:

9.1. The fact that it had previously sought substantially the same relief against substantially the same parties in a recent urgent application which it had withdrawn on 2 December 2021.

9.2. That OFATU had opposed that application, as had other respondents.

9.3. That it had full details of OFATU's attorneys of record at its disposal and had in fact corresponded with them in the run-up to the first urgent application.

10. It is trite that:

'in an *ex parte* application the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him (or her) may lead, in the exercise of the court's discretion, to the dismissal of the application on that ground alone.'⁷

11. Regardless of whether the material non-disclosure is willful, *mala fides* or as a result of negligence, the court still has a discretion to set aside an order granted on the ground of non-disclosure.⁸ The duty is one that extends to the legal representative for a party proceeding *ex parte*:

'It is trite that it is the duty of a litigating party's legal representative to inform the court of any matter which is material to the issues before court and of which he is aware ... This Court should always be able to accept

⁷ *Logic v Priest* 1926 AD 312 at 323

⁸ *Power NO v Bieber and Others* 1955 (1) SA 490 (W) at 503-4

and act on the assurance of a legal representative in any matter it hears and, in order to deserve this trust, legal representatives must act with the utmost good faith towards the Court ... A legal representative who appears in court is not a mere agent or his client but has a duty towards the Judiciary to ensure the efficient and fair administration of justice... the proper administration of justice could not easily survive if the professions were not scrupulous of their dealings with the Court.⁹

12. The duty on legal representatives includes the duty to ensure in urgent applications that all reasonable steps are taken to alert opponents of the intended application. In *South African Airways Soc v BDFM Publishers (Pty) Ltd*, the learned Sutherland J (as he was then) explained this duty as follows:

'The principle of *audi alteram partem* is sacrosanct in the South African legal system. When a litigant contemplates any application in which it is thought necessary to truncate the times for service in the rules of court, care must be taken to use all reasonable steps to mitigate such truncation. In a matter in which less than a day's notice is thought to be justifiable, the would-be applicant's attorney must take all reasonable steps to ameliorate the effect thereof on the would-be respondent. The taking of all reasonable steps is not a collegial courtesy, it is a mandatory professional responsibility ...In my view it is incumbent on the attorney of any person who contemplates an urgent application on less than 24 hours' notice, to undertake the following default actions in fulfilment of the duty to ensure effective service: ...Once the respondents are properly identified, the names and contact details, ie phone, cell, email, fax and physical addresses of persons who have the authority to address the application must be ascertained. Obviously if the issue has already been the subject of debate between the parties and an attorney has already been retained by a respondent such attorney 's contact details will top the list.'¹⁰

13. While Sutherland J singled out the duty in the context of urgent applications on less than 24-hours' notice, the underlying general principle undoubtedly extends to any urgent application in which there is a prospect that an order may be granted without appearance by an affected party. In other words, it covers to situation that prevailed before Crutchfield AJ.
14. Taking all of these principles into account, there was in my view, clear and egregious non-disclosure on the part of FTA and of its legal representatives. They

⁹ *Toto v Special Investigating Unit and Others* 2001 (1) SA 673 (E) at 683A-I
¹⁰ 2016 (2) SA 561 (GJ) at 571C-573B

do not dispute that FTA had recently withdrawn an urgent application on substantially the same basis as that it sought before Crutchfield AJ. They do not dispute that they did not refer to the previous application in their founding affidavit. The learned Crutchfield AJ had no inkling that FTA had previously sought the same order, on urgency, and had abandoned that attempt. The only explanation FTA offered before me was that the November urgent application had been fatally flawed and so it had withdrawn it. This does not explain why FTA did not tell the Court in its second urgent application that this was the case.

15. A recent urgent application that has been abandoned is always of material interest to a subsequent urgent court when the relief sought is the same. Of critical importance to that urgent court is the fact that there was opposition to the previous urgent application. This is particularly so when the new urgent application is presented to the Court on the basis that there has been non-service. For any Judge in that position, when made aware that an applicant effectively is resurrecting an abandoned urgent application against many of the same parties, service of the urgent application will be essential. It does not lie at the election of the applicant to keep this information from the urgent Judge as it is obviously of pivotal importance to whether and on what basis the matter will be entertained in the urgent court. A failure to provide this information to the Court is without any shadow of a doubt a very material non-disclosure. It goes to the heart of the principle of *audi alteram partem* and undermines its very core.
16. What is more egregious in this case is that there was double non-disclosure on the part of FTA and its legal representatives. Not only was the existence of the previous urgent application and opposition thereto kept from the urgent Court, but so was the fact that they knew, at least in the case of OFUTA, the full details of its appointed attorneys, including their email addresses and cellular numbers. They

made no attempt to give them notice by any of these means. Instead, they misled the urgent Court by intimating, through their non-disclosure, that this was the first urgent application in which the parties were involved.

17. On this basis, they represented to the Court that service by Sheriff was the appropriate method of service, thus providing what appeared on the face of it to be an acceptable explanation for non-service. In the circumstances of this case, FTA's submission that it was doing no more than attempting service in a manner prescribed by the Rules must be rejected as being no more than a hopeless attempt to explain what looks very much to have been a deliberate strategy to avoid alerting OFUTA that the earlier urgent application had been brought to life again. There can be no doubt that had FTA or its legal representatives played open cards with the urgent Court as they were obliged to do and disclosed that they had the names and contact details of OFUTA's appointed attorneys, the Court would have insisted that attempts be made to alert them of the application and provide them with an opportunity to be heard.

18. The egregious nature of the non-disclosure and the fact that it had the effect of fundamentally undermining the principle of *audi alteram partem* leads to the ineluctable conclusion that the appropriate relief in this case is to set aside the rule *nisi* that was granted on the back of the non-disclosures. The fact that OFUTA and other respondents will be entitled on the return day to challenge the merits of the dispute does not warrant keeping the rule alive. In this case, it is not only the interests of all the respondents that will be served by discharging the rule nisi, but also the due and proper administration of justice. This is because the Court itself was misled by the conduct of FTA and its legal representatives. The non-disclosure in this case falls at the very high end of the spectrum of materiality and

seriousness, and the only suitable remedy is to set aside the rule *nisi ab initio* in respect of all respondents. This means that the return day for the rule falls away.

19. In my view, the application by OFUTA for a punitive order of costs on the scale of attorney and client is appropriate in this case for all the reasons cited above.
20. As to the legal representatives of FTA, I believe that the same attorneys and counsel were involved in both urgent applications. They have failed in my view to discharge their ethical and professional duties as officers of the Court. It is difficult to understand their conduct in any light other than it being a deliberate attempt to obtain an urgent application through the back door and without the intervention at least of OFUTA, in respect of whose service and contact details they were fully aware. Furthermore, I direct that both Mr Munyai, who deposed to the affidavit of non-service, and Mr Mashavha, who acted as Counsel for FTA report themselves to the Legal Practice Council.
21. I make the following order:
 - 21.1. The application for reconsideration of the order granted by Crutchfield AJ on 24 December 2021 is granted.
 - 21.2. The rule nisi granted by Crutchfield AJ on 24 December 2021 is set aside in its totality.
 - 21.3. The return date for the aforesaid rule nisi is removed from the Roll.
 - 21.4. The applicant in the main application, Faraday Taxi Association, is directed to pay the costs of this application on an attorney and client scale.
 - 21.5. Mr Munyai and Mr Mashavha, the attorney and advocate for the Faraday Taxi Association respectively, are directed to:

- (a) provide the Legal Practice Counsel (LPC) with a copy of this judgment;
- (b) report their potential breach of any professional or ethical rules arising from this judgment to the LPC; and
- (c) upload onto Caselines proof of their compliance with this directive by 11 April 2022.

R M KEIGHTLEY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 March 2022.

Date Heard (Microsoft Teams): 25 March 2022

Date of Judgment: 30 March 2022

On behalf of the Applicant: MR HR MUNYAI

Instructed by: HR MUNYAI ATTORNEYS

On behalf of the First Respondent: MR NS SEKHU

Instructed by: SAM SEKHU ATTORNEYS