IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 2023-077999

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED: **NO**
(4)	DATE: **25 AUGUST 2023**
(5)	SIGNATURE: ***ML SENYATSI***

In the matter between:

EMERALD CAPITAL (PTY) LTD Applicant

and

ACE AUTO SALVAGE CC Respondent

JUDGMENT

(RECONSIDERATION IN TERMS OF RULE 6(12)(C)

SENYATSI J

[1] This is an application brought on an urgent basis for reconsideration of the order granted by Jacoob J on 15 August 2023; granting an interim attachment order to perfect a general covering notarial bond (number BN306/2023) registered by the respondent in favour of the applicant in the matter. The interim attachment order has been executed and the return date of the *rule nisi* is 25 October 2023.

[2] The applicant in this case is the respondent in terms of the interim order . For convenience sake; the parties will be referred to as in the main application. The respondent contends that it ought to have been served with the application which was brought on *ex parte* basis in violation of the *audi artem partem* principle and the violation of Rule 6 of the Uniform Rules because it was not urgent and no exceptional circumstances were put before Jacoob J on why the respondent did not need to be served with the application.

[3] The applicant argues that there is no merit in the reconsideration of the application because whatever issues the respondent has with the interim order, it can provide an answer for the reasons why the interim order should not be made final on 25 October 2023. It contends furthermore that the respondent does not deny its indebtedness to the applicant in terms of which the general material covering bond was registered.

[4] The applicant provided trade finance to the respondent in terms of which it had exposure of R4 million. The loan was secured by, *inter alia*, the registration of the general notarial covering bond number BN306/2023 over all movable property of the respondent both corporeal and incorporeal. The relationship between the parties spans for a period of three years. It is evident from the papers that this is the third facility that the applicant has approved in favour of the respondent. The current facility was approved during November 2022 and drawn down by the respondent and the current balance thereof is R2 193 444.15. The last payment by the respondent was in July 2023.

[5] In support of its application to be heard on an urgent basis for an interim relief and non-service of the application to the respondent, the applicant through the mouth of Mr Leon Herholdt ("Herholdt") states as follows in paragraphs 30 and 31 of its founding affidavit :-

"30. I am advised, and argument will be addressed at the hearing hereof, that applications of this nature are inherently urgent.

31. Such inherent urgency is exacerbated by:

31.1. The respondent's ability to thwart the applicant's rights in terms of the bond by, without notice to the to the applicant, simply filing with the CIPC a resolution to voluntarily liquidate the respondent;

31.2 the fact that the respondent is presently trading on a cash basis, the applicant having suspended its credit facility until payment of the arrears- this means that the respondent will likely retain further income received either in anticipation of liquidation or try and purchase stock-but in any event the prospect of further voluntary payment to the applicant is exceedingly remote;

31.3. the nature of the respondent's business being the trade in and salvage of vehicles in the purchase and sale of accident damaged vehicles-which assets can be easily carted off and hidden from the applicant when the shoe pinches; and

31.4 it stands to reason that that as the respondent is not paying the applicant- which provides to it critical finance to operate-the respondent is likely also not paying all manner of other creditors (suppliers, landlord(s), employees, trade creditors and the like). Even if the respondent does not itself liquidate, anyone outside creditors in areas might at any time apply for the respondent's liquidation. The mere evidence of such application will make undone the applicants rights in terms of the bond.

32. Accordingly, the applicant contends that:

32.1. The applicant took significant risk by providing trade credit to the respondent when they responded needed it. The applicant did so

on the security of a general no to real bond only (and not a special note Oriel bond which would have provided to the applicant real rise of security) because of the nature of the respondent's business: it could not encumber its stock -in- trade specifically, is it needed to be able to sell and supplement (trade with) those assets daily;

32.2. granting the respondent that leniency to facilitate the conduct of its business, necessitates that the applicant must approach the court(urgently under the circumstances) to allow it to perfect its security by attachment and possession.

32.3 refusing to recognise the urgency of such relief would detract from the attractiveness of this form of ubiquitous trade security, could jeopardise general notarial bonds as instruments of security, and will self-evidently detrimentally affect trade and other finance in the South African market;

32.4. it is critical that the applicant be permitted to urgently, and therefore the respondent (or others) protect its rights of pledge embodied in the notarial bond, and to perfect those rights; and

32.5. the application is of sufficient urgency to warrant the ground of prayer 1of the notice of motion".

[6] Those were the grounds, on the basis of which the applicant felt it was not necessary for the respondent to be notified or served with the

application. In its heads of arguments, the applicant contended before Jacoob J that it is customary in perfection applications, that it sought an order permitting an interim attachment prior to giving the respondent notice of the application.

[7] It must be stated clearly that this application for reconsideration is not about the merits of the of the perfection application, but rather, whether on the evidence before Jacoob J, the application met the requirements of Rule 6(12) which required exceptional circumstances to be shown for an *ex parte* application on urgent basis and whether on facts, the applicant had made out a case for urgency.

[8] The fundamental feature of our justice is the *audi alteram partem* rule which is trite in our law. This maxim is derived from Latin and it means let the other side be heard as well. That said, however, our legal system provides for occasions when this principle may, in the interests of justice, be overlooked temporarily. It is for this reason that Rule 6 (12) (a) was invoked in our Uniform Rules with respect to abridgment of time limits prescribed by the rules.

[9] Rule (12)(a) provides as follows:- “In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such

manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit."

[10] In urgent applications the applicant must show that he will not otherwise be afforded the substantial redress at the hearing in due course.[1] The degree of the relaxation of the rules and of the ordinary practice of the court depends upon the degree of urgency of a case.[2]

[11] In South African Airways Soc v BDFM Publishers (Pty) Ltd[3], Sutherland J (as he was then) expressed strong views on the ineffective service of an urgent application and laid down the procedure to be followed by an attorney in an urgent application on less than 24 hours' notice. He held that:

"[22] the principle of Audi alteram partem rule is sacrosanct in the South African legal system. Although, like all other constitutional values, it is not absolute and must be flexible enough to prevent in advertent harm, the only time that a court will consider a matter behind a litigant speck are in exceptional circumstances. The phrase exceptional circumstances had she credibly, through overuse and habits of hyperbole, last match of its impact. To do that phrase justice it must mean 'very rarely'-only if a

[1] See Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W) at 137F; AG v DG 2017 (2) SA 409 (GJ) at 412A
[2] See Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd 2006 (5)SA 333(W).
[3] 2016 (2) SA 561 (GJ)

countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established.

[23] In this case the purported savings was, *de facto*, no service at all. The order was taken *ex parte*, and the service was a farce. The single paragraph in the founding affidavit which stated that the service had been performed by e-mail was true only in the meanest possible way."

[12] Furthermore, Rule 5 governs applications and states that:

"(5)(a) Every application other than one brought *ex parte* must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto must be served upon every party to whom notice thereof is to be given.

(b) In a notice of motion the applicant must-

(i) appoint an address within 15 kilometres of the office of the registrar, at which applicant will accept notice and service of all documents in such proceedings;

(ii) state the applicant's postal, facsimile, or electronic mail addresses where available; and

(iii) set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and must further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice.

(c) If the respondent does not, on or before the day mentioned for that purpose in such notice, notify the applicant of an intention to oppose, the applicant may place the matter on the roll for hearing by giving the registrar notice of set down before noon on the court day but one preceding the day upon which the same is to be heard". The idea behind the rule is to afford another party a chance to be heard unless there are exceptional circumstances why interim relief should be obtained before another party is served with the application.

[13] An *ex parte* application by its very nature places only one side of a case before the court and requires the utmost good faith on the part of the applicant.[4] Failure to make full disclosure of all known material facts (that is, facts that might reasonably influence a court to come to a decision) may

[4] See Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA) para 45; Trakman v Livishirtz 1995 (1) SA 282 (A) 288

lead the court to refuse the application or to set aside the ruling easily on that ground alone, quite apart from considerations of wilfulness or mala fides.[5] The court in its discretion need not necessarily refuse relief or set the order aside.[6] If the order is set aside, the applicant may launch another application for the same relief because the setting aside does not dispose of the applicants claim but only of that particular application.[7]

[14] In Safcor Forwarding (Pty) Ltd v National Transport Commission[8] Corbett JA (as he then was) held as follows:

"Normally, I agree, an applicant should adhere to the procedure laid down by Rule 53. But the Rule does not preclude a departure from those procedures in cases of urgency and /or where the interim relief is necessary. Naturally, it is for Court to decide whether the matter **is really one of urgency and whether the circumstances** *(my own emphasis)* warrant a departure from the normal procedures. To hold otherwise would, in my view, make the Court the captive of the Rules. I prefer the view that rules exist for the Court, rather than the court for the Rules."

[15] Recently, our division was confronted with the reconsideration of an interim order obtained *ex parte* in Industrial Development Corporation of

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[5] See Estate Lodgie v Priest 1926 AD 312 at 323; De Jager v Heilbron 1947 (2) SA 415 (W); Cometal-Mometal SARL v Corlana Enterprises (Pty)Ltd – 1981(2) SA 412 (W); Schlesinger v Schlesinger 1979 (4) SA 342 (W); Cooper v First National Bank of SA Ltd 2001 (3) SA 705 (SCA) at 717; Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC).
[6] See Reilly v Benigno 1982 (4) SA 365 (C).
[7] See National Director of Public Prosecutions v Braun 2007 (4) SA 72 (C).
[8] 1982 (3) SA 654 (A) at 675

South Africa Limited v Bakone Group of Companies[9] (unreported) in similar circumstances. The court held that :-

"[56] where an order has been granted in the absence of a party, as in the instant case, rule 6(12)(c) provide a mechanism through which the imbalance of hearing only one side of the case can be corrected. It follows that the *Audi alteram partem* principle and the provisions of section 34 of the Constitution form the bedrock of rule 6(12) (c).

[57] In ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others[10] , the court elaborated and interpreted the rule as follows:

"The rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to reconsider that order, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the granting of the order.

Given this, the dominant purpose of the Rules seems relatively plain. It affords an aggrieved party a mechanism designed to redress imbalance in, and injustices and operation flowing from, an order granted in his absence . In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to

[9] 2023 JDR 2707 (GJ) Cases Nos: 2023/2701
[10] [1996] 4 All SA 58 (W) at 60-61; 1996(4) SA484 (W) at 484H-I

either the applicant for urgent relief or the Judge required to determine it.

The order in question may be either interim or final in its operation. Reconsideration may involve the dilution of the order, either in whole or part or the engraftment of additions.

The framers of the rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that the wide discretion is intended. Each case will turn on its facts and the peculiarities inherent therein."

[16] In the instant case, as already stated, the applicant obtained the interim perfection order in the absence of the respondent. It did so in the urgent court. It based its application on the grounds already set out above which will not be repeated. I have considered the evidence adduced on paper before Jacoob J and find no existence of exceptional circumstances to justify not serving the application to the respondent. The averments made are not supported by facts that led to the belief that the respondent is likely either to voluntarily liquidate itself or hide assets to frustrate the perfection efforts of the applicant.

[17] The submission by Mr Bresler that the respondent does not deny its indebtedness to the applicant and is silent on the provisions of the general notarial covering bond find no application in the reconsideration of the

interim order. This is so because this is an issue to be canvassed as part of the merits if the respondent had been properly served with the urgent application. I have also considered the fact that the last payment made by the respondent was in July 2023 based on the applicant's own papers. During July 2023, a total of R200,000.00 was paid to the applicant. I have also considered that over 305 damaged cars and office equipment were attached in terms of the interim perfection order obtained in the absence of the respondent . I am of the view that the reconsideration of the interim order on an urgent basis is justified under the circumstances. There is no basis that liquidation was looming and the averment that the respondent will hide assets if it were to be served with the application was not supported by any evidence.

[18] Mr Bresler implored me to reject the reconsideration because doing so would be undermining the general notarial covering bond as a form of security in the capital market in our country. This submission misses the point. The merits have not and will not at this stage be dealt with. As indicated the reconsideration application is about the procedure and not any other issue. The reconsideration if upheld, does not bring an end to the matter.

[19] The existing interim order has created an injustice to the respondent because it was obtained in its absence on an urgent basis. The application ought to have been served on the respondent because on facts of the

matter, the applicant had failed to establish not only the urgency but also why the order had to be granted *ex parte*. It follows that the reconsideration application must succeed.

ORDER

[20] Having considered the papers and the submissions made before me, the following order is made:

(a) The requirements of form and service as provided for in the rules, insofar as necessary, are dispensed with and the application for reconsideration of an *ex parte* order is heard as one of urgency in terms of the Uniform Rules of Court;

(b) The order granted *ex parte* against the respondent on 15 August 2023 in its absence by Jacoob J is hereby reconsidered;

(c) The order granted by Jacoob J is amended as follows:

"The application is struck from the roll for lack of urgency."

(d) The applicant is ordered to pay the costs of the reconsideration including the costs of two counsel.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 24 August 2023.

APPEARANCES

Counsel for the Applicant: Adv CJ Bresler
Adv MT Bouwer
Instructed by: Bouwer & Olivier Inc

Counsel for the Respondent: Adv N Strathern
Adv L Nigrini

Instructed by: Ismail & Dahya Attorneys Inc

DATE APPLICATION HEARD: 23 August 2023

DATE JUDGMENT HANDED DOWN: 25 August 2023