REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: **018324/2022**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

2022 NOVEMBER 16

In the matters between: -

ZAHEER CASSIM NO First Applicant

THEA CHRISTINA LOURENS NO Second Applicant

And

COETZEE First Respondent

AF VAN HEERDEN NO Second Respondent

JH VAN HEERDEN NO Third Respondent

AF VAN HEERDEN NO Fourth Respondent

KM GOVENDA NO C/O T GOVENDA Fifth Respondent

P GOVENDA NO	Sixth Respondent
T GOVENDA NO	Seventh Respondent
T GOVENDA NO	Eighth Respondent
SK PILAY NO	Ninth Respondent
THE MASTER OF THE HIGH COURT, PRETORIA	Tenth Respondent
THE SHERIFF OF THE HIGH COURT, GERMISTON SOUTH	Eleventh Respondent

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JUDGMENT

BALOYI-MERE AJ

Introduction

1. This is the anticipated return day of a *rule nisi* granted *ex parte* in terms of rule 6(8) alternatively the set down for reconsideration of an order granted in absence of the respondents in an urgent application in terms of rule 6(12)(c).

2. The Applicants (in the first/main application) brought an *ex parte* application interdicting the First, Second and Third Respondents ("Collectively referred to as S & M Trust") from disposing of a certain helicopter ("the Huey"), the attachment and return of the helicopter to the Applicants and for the helicopter to be declared an asset of the Applicants, the preservation of the assets of S

& M Trust pending the finalisation of an enquiry in terms of section 417 of the old Companies Act, alternatively pending the finalisation of any steps to be taken subsequent to the said enquiry.

3. Collis J granted the order on the 30th August 2022 with a return date of the 08th November 2022. The order granted by Collis J reads as follows:

"1) That the matter is enrolled and heard as one of urgency as contemplated in uniform rule 612 of the Uniform Rules of the above Honourable Court.

2) That a rule nisi issued calling upon the First to Ninth Respondent to show cause, if any, on the 08th November 2022 at 10h00 or so soon thereafter as counsel may be heard, as to why an order in the following terms should not be made final:

2.1 That the First to Third Respondent are interdicted and restrained from deposing of the 1969 Bell 204 HP helicopter ("Huey helicopter") with tail number: ZU-RXX and serial number: 1104 (herein after referred to as the "Huey helicopter");

2.2 That the collusive disposition of the Huey helicopter is set aside in terms of the provisions of section 31 read together with section 32 of the Insolvency Act 24 of 1936 (herein after referred to as the "Insolvency Act");

2.3 That in terms of the provisions of section 32 of the Insolvency Act, the Huey helicopter be returned to the Applicants and be declared an assets of the insolvent estate of Ipower Services (Pty) Ltd (in liquidation) (herein after referred to as "Ipower"), to be administered by the Applicants in the insolvent estate of Ipower;

2.4 That the Sheriff of the above Honourable Court be and is hereby authorised upon the granting of this order to give effect to paragraph 2.3 above and in so doing take all steps as may be necessary to attach, cease and take into his/her possession the Huey helicopter and all/any books, registers of title, flight registers and any other documents in relation to ownership and return same to the Applicants;

2.5 That pending the finalisation and outcome of commission of enquiry into the trade, dealings, affairs and property of Ipower in terms of the provisions of 416, read with section 418 of the Companies Act 61 of 1973 (herein after referred to as "the enquiry") alternatively, any proceeding to be instituted in due course by the Applicants against such respondents pursuant to the information obtained during the enquiry;

2.5.1 That the First to Ninth Respondents be and are hereby interdicted and restrained from deposing of all and/or any of the their assets of whatsoever nature, which includes but is not limited to the right to sell, alienate, destroy, encumber or in any other way deal with these assets, pending the outcome and finalisation of the enquiry alternatively, any proceedings to be instituted in due course by the Applicants against such Respondents pursuant to the information obtained during the enquiry;

3. That the order set out in paragraph 2 above, shall operate as interim orders with immediate effect, pending the return date of this matter;

4. That the First to Ninth Respondents are order to, within 10 (ten) days after services upon them of this order, under oath to state and list all assets

belonging to and/or in their possession or under their control and/or list any assets they have any direct or indirect interest in;

5. That upon the granting of this order a copy of this application together with this order be served on the Respondents and that the First to Ninth Respondents be granted leave to anticipate the return date following the granting of this order, upon no less than 24 hours' notice to the Applicants;

That the First to Ninth Respondents are ordered to pay the costs of this application, jointly and severally on the attorney and client scale."

4. The helicopter was attached on the 01st September 2022. This was the same date that S & M Trust became aware of the *ex parte* order.

5. A company called Money Global ("MG") brought an urgent application on 19th September 2022 for the reconsideration of the order granted by Collis J. A copy of this application was served on all the parties.

6. Van Der Westhuizen J reconsidered the order granted by Collis J and granted an order on the 30th September 2022 in the following terms:

"1. The matter is urgent;

2. Money Global (Pty) Ltd t/a aviation sales international is granted leave to intervene as a further respondent in the ex parte application under case number 2022/018324;

3. The joinder of the Sheriff of the High Court, Germiston South as the Eleventh Respondent in the application is authorised and ratified;

4. Prayers 2.1, 2.2, 2.3, and 2.4 of the ex parte order granted by this court on 31st August 2022 in the ex parte application that was before it, are set aside and deleted therefrom;

5. The Eleventh Respondent, the Sheriff of the High Court, Germiston South, is directed to forthwith uplift his attachment pursuant to the ex parte order of the 31st August 2022 of the 1969 Bel 204 HP Helicopter (the Huey helicopter) bearing the manufacture's serial number 1104 and registration ZU-RXX (the Huey);

6. The Eleventh Respondent, the Sheriff of the High Court, Germiston South is directed to forthwith uplift his attachment pursuant to the ex parte order of 31st August 2022 of all the log books and documentation relating to the Huey being:

(a) One x engine log book

(b) One x air frame log book;

(c) One x flight folio;

(d) One x red file with accepted maintenance schedules;

€ One x black file containing all log cards and records;

(f) One x REF File – Sw04 GP flight manual;

(g) One x orange file containing a certificate of registration, and authority to fly certificate (expired), a certificate to release , to service, and inspection reminder and radio station license;

7. The Sheriff of the High Court, Germiston South, is directed to return to Money Global (Pty) Ltd t/a as Aviation Sales International the Huey and documents listed in prayer 6 above;

8. The attorneys of record of Money Global (Pty) Ltd t/a Aviation Sales International, messers. Ulrich Roux and Associates of Ground Floor, 15 Chaplin road, Illovo, Sandton are directed to retain in trust the purchase price of R4 million paid by Money Global (Pty) Ltd t/a Aviation Sales International for the Huey for the benefit of the party held by a competent court, or by written agreement amongst the applicants and the trustees of the SMN Trust, those being the First, Second and Third Respondents to be entitled thereto;

9. The First and Second Applicants in the ex parte application were ordered to pay the costs of this application for reconsideration jointly and severally, the one paying the other to be absolved, in the scale as between attorney and client, such cost to include the cost consequent of the employ of two counsel."

7. The Applicants brought an application for leave to appeal the order of Van Der Westhuizen J, which application was dismissed with costs on a punitive scale.

8. The S & M Trust brought an application for the reconsideration or the anticipation of the order granted by Collis J. The S & M application is brought in terms of rule 6(8) which provides as follows:

"6(8) any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than 24 hours' notice."

And in the alternative the application is brought in terms of rule 6(12)(c) which provides as follows:

"6(12)(c) a person against whom an order was granted in such person's absence in an urgent application made by notice set down the matter for reconsideration of the order."

9. Both these provisions, that is, rule 6(8) and rule 6(12)(c) have the same jurisdictional requirements which are:

   9.1 Was granted *ex parte*;

   9.2 Was granted in the absence of the applicants; and

   9.3 Was granted in an urgent application.

10. The provisions of the sub rule only apply where an order has been granted against a person *ex parte* and where a return day has been fixed. And that is the situation in this matter. The sub rule comes to the aid of a person who has been taken by surprise by an order granted *ex parte*. The sub rule does not apply where the return date of the *rule nisi* obtained ex parte has been extended with the knowledge or in the presence of the persons affected thereby. In this case there was never an extension of the *rule nisi*. This sub rule deals with a somewhat different situation and allows a person against whom an order was granted in his absence in an urgent application to set the matter down on notice for reconsideration of the order. In ***Competition Commission v Wilmar Continental Edible Oils and Fats (Pty) Ltd and Others***[1] the court held as follows:

    "In terms of rule 6(12)(c) the respondents are entitled to have an order reconsidered on the presence of two jurisdictional facts"

[1] 2020 (4) SA 527 (KZP) at paragraph 17.

That the main application was heard as a matter of urgency; and

That the first order was granted in their absence.

The dominant purpose of the Uniform Rule is to afford to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his absence. I find that the required jurisdictional facts exist in this matter"

11. I also need to pause here and indicate that because the Applicants had anticipated the return date of the 08th November 2022, therefore the hearing of this application is dealt with as if it is on the return date as it has been anticipated. It is therefore trite that there is no need for the parties to go back to court on the 08th November 2022 as the matter has now served before court on the anticipated return date.

Urgency

12. The Applicants in the interim interdict argue that the Respondents did not make out a case for urgency. The Applicants further argued that this matter is complex and there would be no prejudice if the matter is dealt with on the return date or at a hearing in due course. I have already dealt with the issue of the return date in the preceding paragraph. I will only deal now with the issue of urgency.

13. In ***United Medical Devices LLC v Blue Rock Capital Limited***[2] the court held as follows:

[2] 2016 JDR 0570 (KZD).

"The same applies in respect of argument of lack of urgency. As stated, the purpose of rule 6(12)(c) is to allow parties who were not present when an urgent ex parte order is made, to approach the court for reconsideration of the order and place facts before the court. To permit the respondents to themselves now claim lack of urgency on the part of the applicants would undermine audi alterem partem which rule 6(12)(c) gives effect to".

14. In ***Faraday Taxi Association v Director Registration and Monitoring and Others***[3] the court held as follows:

"For similar reasons, FTA's complaints about the absence of any urgency in the matter do not find favour in 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 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 enrol a rule 6(12)(c) 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-disclosers by FTA when it approached Crutchfiled AJ urgently. If this averment is found to be

[3] (58879/2021) [2022] ZAGPJHC 213 (5 April 2022)

meritorious, then there should be no delay in the order obtained in such circumstances being set aside."

15. I will deal with the issue of material non-disclosure in the next few paragraphs.

16. Van Der Westhuizen in his judgment dated the 30 September 2022 stated the following:

"Rule 6(12)(c)of the Uniform Rules of Court provides that a person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order. Furthermore, rule 6(8) provides that any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than 24 hours' notice. From the aforementioned two rules it is clear that such set down, or anticipation of the return day, are inherently urgent. There is accordingly no merit in the first point in limine. It is ruled that the matter is urgent."

17. Similarly, I find that the matter is urgent and should be enrolled as such.

Material Non-Disclosure

18. The Respondents argue that the Applicants did not disclose all the information that they had at their disposal when Collis J heard the matter and granted the order *ex parte*. The Respondents submitted that the Applicants made a fleeting reference to the affidavit filed by the Fourth Respondent in the liquidation matter but did not divulge the details in order for the Honourable

Judge to make an informed decision. The Applicants only divulge some of the allegations in their answering affidavit resisting this reconsideration application. Those averments were not before Collis J when she granted the *ex parte* order.

19. A party bringing an ex parte application should act in the utmost good faith and disclose all the relevant information, including those averments that are not favourable to that party's application.

20. In ***Estate Logi v Priest***[4] it was held as follows:

"In an ex parte application the utmost good faith must be observed by an applicant. A failure to disclosure 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."

21. Regardless of whether or not the material non-disclosure is willfull, mala fides or as a result of negligence, the court still has the discretion to set aside an order granted on the ground of non-disclosure. The duty is one that extends to the legal representative for a party proceeding on ex parte basis as it was held in **Toto v Special Investigation Unit and Others**[5] as follows:

"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 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

[4] 1926 AD 312.
[5] 2001(1) SA 673 (E).

towards the court… A legal representative who appears in court is not a mere agent of 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."

22. The Applicants disclosed to the court that urgent sequestration proceedings were instituted against the Fourth Respondent under case number 48817/21 which application is currently pending before court. They also disclosed that the sequestration application is opposed by the Fourth Respondent. They however did not attach the answering affidavit of the Fourth Respondent as an annexure but merely referred to an extract therefrom, merely dealing with the helicopter being registered in the name of the trust.

23. The Applicants only attached the Fourth Respondent's detailed answering affidavit in this proceedings but failed to attach it in the proceedings before Collis J.

24. The Applicants failed to refer to the defence of the Fourth Respondent in the sequestration application or the exonerating version presented by the Eighth Respondent under oath in support of the Fourth Respondent's opposition in their founding affidavit in this application. The Respondents in this application content that the detailed defence of the Fourth Respondent might have influenced the court in coming to a decision in the ex parte application had it been disclosed. Several other averments are made by the Respondents that they allege that the Applicants failed to disclose in the ex parte application that was heard by Collis J. Amongst those averments are that the Applicants

had failed to deliver any replying affidavit in the sequestration application and thus the Fourth Respondent's contention stands uncontested and also that the Fourth Respondent eventually delivered its heads of argument in order to advance the application to finality. The other averments that were made by the Applicants is that the Applicants instituted both criminal and other civil proceedings in an attempt to secure certain assets as well as obtain redress against the Respondents and these averments were made in the founding affidavit in the sequestration application which was deposed to on the 28th September 2021. To date no such proceedings have been instituted against the Fourth respondent.

25. The Respondents, in their heads of argument, quoted extensively from the case from the Supreme Court of Appeal, **Recycling and *Economic Development Initiative of SA NPC v Minister of Environmental Affairs*[6]** from paragraph 45 to paragraph 52. This case captures the effects of material non-disclosure aptly that it deserves to be repeated in this judgment. The court in the **Recycling and Economic Development Initiative of SA NPC** held as follows:

"[45] The principle of disclosure in ex parte proceedings is clear. In NDPP v Basson the court said:

"Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and withholding or suppression of

[6] 2019(3) SA 251 (SCA).

material facts, by itself, entitles a court to set aside an order, even if the non-discloser or suppression was not willfull or mala fide.

See also ***Schlesinger v Schlesinger*** *1979 (4) SA 342 (W) at 348 E – 349 B*

[46] The duty of the utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, audi alteram partem. The law sometimes allows a departure from this principle in the interest of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.

[47] The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte relief. She may not refrain from disclosing matters asserted by the absent party because she believes it to be untrue. And even where the ex parte applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that a matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.

[48] S Waller J said, in Arab Business Consortium, points in favour of the absent party should not only be drawn to the Judge's attention but must be done clearly:

"There should be no thought in the minds of those preparing affidavits that provided that somewhere in the exhibits or in the affidavits the point of materiality can be discerned, that is good enough."

[49] The ex parte litigant should not be guided by any notion of doing the bare minimum. She should not make disclosure in a way calculated to deflect the Judge's attention from the force and substance of the absent respondent's known or likely stance on the matter in issue. Generally this will require disclosure in the body of the affidavit. The Judge, who hears an ex parte application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.

[50] In regard to the court's discretion as to whether to set aside an ex parte order because of non-disclosure, Le Roux J said in Schlesinger v Schlesinger:

"… unless there are very cogent practical reasons why an order should not be rescinded, the court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant."

[51] This is consistent with the approach in English Law, that if material non-disclosure is established a court will be astute to ensure that a plaintiff who

obtains an ex parte order without full disclosure, is deprived of any advantage he may have derived by that bridge of duty.

[52] As to the factors that are relevant in the court's exercise of its discretion whether or not to set aside an ex parte order on grounds of non-disclosure, in NDPP v Phillips this court said that regard must be had to the extent of the non-disclosure, the question whether the Judge hearing the ex parte application might have been influenced by proper disclosure, the reasons for non-disclosure and the consequences of setting the provisional order aside.

26. I find that there was material non-disclosure by the Applicants when they dealt with the *ex parte* application that served before Collis J.

27. The Applicants rely on the **Peacock Television (Pty) Ltd v Transkei Development Corporation**[7] where Madlanga J (as he was then) dealt with the issue of anticipation of a return date. I find that this case is not applicable in the present case as the Peacock Television case dealt with a situation where the *rule nisi* was extended with the knowledge of the Respondent and therefore the Respondent no longer had a right to anticipate or reconsider the order.

The Order Granted by Collis J

28. Apart from order number 2 (quoted above at paragraph 4 above), including the sub paragraphs 2.1 to 2.4 which have now been set aside by Van Der Westhuizen in the judgment of the 30th September 2022, Collis J gave two

[7] 1998 (2) SA 259 (Tk).

further final orders on an ex parte basis. These are orders number 4 and the cost order at number 6.

29. The applicant, during argument, conceded that these two orders should not have been granted on *ex parte* basis. In Engen Petrolium Ltd v Multiwaste (Pty) Ltd and Others[8] the court held as follows:

"An ex parte application, or an application using the short form notice of motion (Form 2) is used either because it is not necessary to give notice to the respondent, or the relief claimed is not final in nature … Rule 6(5)(a) provides that every application other than one brought ex parte shall be brought in accordance with Form 2(a) of the first Schedule to the Uniform Rules."

30. I find that the orders in paragraphs 4 and 6 as granted by Collis J should be set aside.

31. I also find that the Thirteenth Respondent should be joined in this proceedings in her official and authorised capacity as a trustee of S & M Trust.

32. In the premises I make the following order:

1. That this matter is urgent;

2. Directing and ordering that Mariette Van Heerden in her official and authorised capacity as a trustee of the S & M Trust, be joined to the application as the Thirteenth Respondent and that such joinder be ratified;

[8] 2012 (5) SA 596 (GSJ)

3. That the *ex parte* order dated 22nd August 2022 be discharged and set aside in its entity, alternatively discharging, deleting or setting aside the inclusion of the First to Fourth Respondent in paragraphs 2.5.1, 4 and 6 of the ex parte order granted by the above Honourable Court on the 30th August 2022, in the *ex parte* application that was before it;

4. That the amount of R4 000 000.00 held in trust by the attorneys of the Twelfth Respondent immediately be paid over to the trustees of the S & M Trust or its nominated beneficiary and that the order of this court dated 30th August 2022 in so far as it may be necessary, be amended accordingly;

5. That the attorneys of the Twelfth Respondent Ulrich Roux and Associate be authorised in terms of this order to pay the said amount of R4 000 000.00 to the attorneys of record of the S & M Trust;

6. That the Applicants and the Applicant's attorneys be ordered to pay the cost of this application on an attorney and client scale, jointly and severally, the one paying the other to be absolved, such costs to include the cost of two counsel.

Counsel for the Applicant
AB Rossouw SC

Counsel for the Respondent
MA Badenhorst SC with R Grundlingh