IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 61907/09

4/10/2010

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
4/10/10
DATE
SIGNATURE

CORNELIA MARIA CLOETE N.O.	First Applicant
HARRY KAPLAN N.O.	Second Applicant
ANNA PAULA DE OLIVEIRA N.O.	Third Applicant
SOPHIE MMAPULA POOPEDI N.O.	Fourth Applicant
And	
MICHAEL MATTHEUS BASSON	First Respondent
VANESSA MARIA JULIA BASSON	Second Respondent
IAN BRUCE LOCKYER	Third Respondent

JUDGMENT

GOODEY AJ

[1] INTRODUCTION

(1.1) This matter involves an urgent application for reconsideration in terms of Rule 6(12)(c) of the Rules of Court pertaining to the fact that the applicants brought a substantive application for relief, pursuant to which

an order was granted against the respondents, *ex parte* and on an urgent basis, by Kruger AJ on or about 30 August 2010 ("the order").

(1.2) The matter came before me on Thursday the 30th September 2010 in the urgent court.

(1.3) I indicated that I have not been persuaded that he matter is urgent enough to be heard during the course of the week of the 28th September 2010, but in the interests of justice and the fact that certain concessions were made by the applicants, I exercised my discretion to hear the matter and to render some assistance to the respondents.

(1.4) Due to the time constraints, this is a brief judgment and of necessity, I will refer somewhat extensively to the heads prepared by Counsel.

(1.5) I also wish to extend a word of gratitude to Counsel for their heads of argument and assistance rendered to the Court.

(1.6) Both Counsel prepared draft orders as to how the order should be amended.

(1.7) In short:

1.7.1 The order was already granted on the 30th August 2010;

1.7.2 The return day is the 9th November 2010 – less than 5 weeks away;

1.7.3 The applicants conceded that the order of the 30th August 2010 may be too strict in the sense that it impacts too much on the rights / freedom of the respondents;

1.7.4 Justice however calls for some assistance that should be rendered to the respondent.

[2] BACKGROUND / URGENCY

(2.1) As stated above, the applicants brought a substantive application for relief, pursuant to which an order was granted against the respondents, *ex parte* and on an urgent basis, by Kruger AJ on or about 30 August 2010.

(2.2) The respondents chose not to anticipate the return day but to ask for reconsideration.

(2.3) Fact is however, if the order is so totally unbearable to endure, the question arises why did the respondents wait almost a month to approach the court?

(2.4) However, in view of:

2.4.1 What I have said in paragraph 1.7 above;

2.4.2 The fact that the onus in a rule *nisi* – and this principle is applicable by analogy to a reconsideration – remains as it did in the initial application, and does not cast any onus on the respondent that it would not have existed in the initial application. (The onus as to urgency, however, is on the respondents);

2.4.3 Our Constitution. In this regard the following passage from Kahn v Kahn 2005(2) SA272T is to be kept in mind:

> "The Act invokes the Constitution in its preamble. With regard to interpreting statutes in light of the Constitution, cognisance ought to be taken of the words of Langa DP as stated in the decision of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (10) BCLR 1079) in paras [21] and [22]:
>
> 'This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. The spirit of transition and transformation characterises the constitutional enterprise as a whole. . . . The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, insofar as is possible, in conformity with the Constitution.'
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> In the *Daniels* decision, Ngcobo J made the following comment with regard to the proper approach to legislative interpretation: 'Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation "to promote the spirit, purport and objects of the Bill of Rights". Consistent with this interpretative injunction, where possible, legislation must be read in a manner that gives effect to the values of our Constitution"
>
> (my underlining);

And

MAJAKE v Commissioner for Gender Equality and Others 2010(1)SA87(GSJ) where the possible violation of a constitutionally

guaranteed right was an important consideration in the court finding that a matter was urgent;

I have heard the matter.

[3] THE LAW

(3.1) Rule 6(12)(c) allows for the reconsideration of urgent applications granted in the absence of a cited party.

(3.2) The purpose of Rule 6(12)(c) is to afford an aggrieved party a mechanism to re-visit and redress imbalances and the injustices flowing from an urgent application that has been granted in his absence.
(See: Oosthuizen v Mijs 2009(6)SA266(W) at 267)

(3.3) The purpose has also been described as follows: "The dominant purpose of Rule 6(12)(c) of the Uniform Rules of Court (which provides that a 'person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order') is to F afford 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. 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 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 a deletion of the order, either in whole or in part, or the engraftment of additions thereto. (At 486I-487A/B.)

The framers of Rule 6(12)(c) 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 a wide discretion is intended. Factors relating to the reasons for the absence of the aggrieved party, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in H 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 can be attained 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. (At 487A/B-D.)

Although no hard and fast rule need be laid down, it seems desirable that a party seeking to invoke Rule 6(12)(c) ought in an affidavit to detail the form of I reconsideration required and the circumstances upon which it is based. (At 487D-D/E.)"

[See: The head note to ISDN SOLUTIONS (PTY) LTD v CSDN SOLUTIONS CC AND OTHERS 1996 (4) SA 484 (W)]

[4] THE GIST OF RESPONDENTS' ARGUMENT

(4.1) Paragraph 9 of the heads of argument reads as follows:

"9. There are three principal problems with the order:

9.1 First, the activities of a company known as "Brusson Finance (Pty) Ltd (in liquidation)" were declared unlawful, so detrimentally affecting the rights of other parties, in an *ex parte* application, when the proper course should have been a hearing in due course with adequate *audi alteram partem.* Simply put, there was no basis for the Court to have considered and ordered this relief without notice to the respondents.

9.2 Second, the balance of convenience did not favour the granting of a *Mareva* injunction, the wording of which is, moreover, unduly harsh in its ambit, and incompetent in its lack of precision;

9.3 Third, the affidavits filed in support of the application did not contain the facts and evidence necessary to support the orders sought, and, moreover, contained hearsay and opinion evidence – which is inadmissible."

[5] THE GIST OF THE APPLICANTS' ARGUMENT

(5.1) Paragraph 6 of the applicants' heads reads as follows:

"Under the circumstances the pretences of urgency and the lack of factual allegations contained in paragraph 6 supporting what are no more than conclusions are indicative hereof. This is furthermore illustrated by the fact that notwithstanding this having been pointed out in the answering affidavit the Respondents have to date hereof not revealed one single bank account or one single amount of money which has been "frozen"."

(5.2) Paragraph 7 reads as follows:

"The Respondents have furthermore decided not to deal with any of the factual allegations contained in the founding papers nor is there any indication as to why they have not done so. This is clearly a stratagem in an attempt to avoid dealing with the merits of the matter. Under the circumstances the allegations contained in the founding affidavits must be accepted as correct for purposes hereof. In this regard *inter alia* the following must be accepted :-

7.1 the activities of the insolvent company Brusson became a pyramid scheme for the reasons set out in paragraph 44 of the affidavit namely that payments made by certain people were used to make payment of debts of other people;

7.2 that payments made to Brusson were then diverted to a separate account in the name of another close corporation controlled by the Respondents being Storm Fire Trading CC;

7.3 these funds were used for various other matters by the Respondents which had nothing to do with payment of the debts of the investors or the mortgage bonds;

7.4 the activities of Brusson were a harmful business practice;

7.5 Brusson was, as already found in the Bloemfontein High Court, carrying on the business of a credit supplier and was not registered as same, as a result of which *inter alia* all the transactions entered into were void;

7.6 Brusson was furthermore providing financial products while it was not registered as a financial advisor or intermediary in terms of Act 37 of 2002;

7.7 properties to which Brusson had become entitled in terms of the agreements and which should have been transferred to Brusson were in fact transferred to the personal estates of the two Respondents;

7.8 Brusson had acted as a bank contrary to the Banks Act, 94 of 1990;

7.9 all income which Brusson had earned (and which had thus been paid to its shareholders, the Respondents or to any other persons) had to be recovered for the estate;

7.10 in the light of the illegality of the scheme all the properties which had formed part of the Brusson scheme had to be recovered for the *concursus creditorum*;

7.11 numerous luxury vehicles worth millions of Rands had been purchased in the name of Brusson and these have not be returned by the directors."

[6] CONCLUTION

(6.1) I have already indicated that the respondents need assistance.

(6.2) After careful consideration and having taken all the factors and arguments by Counsel into account, I make the following order: (The order is in Afrikaans as the Order of the 30th August 2010 is also in Afrikaans)

"1. Die bevel op 30 Augustus 2010 word soos volg gewysig :-

1.1 Paragrawe 3.2.1 en 3.2.2 daarvan word met die volgende vervang :-

"*3.2.1* *Die Respondente word verbied om enige van hulle noemenswaardige bates (synde die bates waarop beslag gelê is en enige ander bate met 'n waarde van meer as R80 000,00) wat aan hulle behoort te verkoop, vervreem of beswaar sonder die vooraf-verkryde skriftelike toestemming van die Applikante, welke toestemming nie onredelik weerhou sal word nie."*

"*3.2.2* *Die Respondente sal geregtig wees om uit bates wat aan hulle behoort hulle redelike :-*

3.2.2.1 *lewens- (wat insluit kos, klere, vervoer, onthaal, ens);*

3.2.2.2 regs-; en

3.2.2.3 besigheidsuitgawes in die gewone loop van besigheid aangegaan, te betaal."

1.2 Die verwysing in paragraaf 10 tot "die bevel in 11 hierbo" gewysig word na "die bevel in 9 hierbo".

2. **Dat die koste van die heroorweging** van die bevel gereserveer word. "

GOODEY AJ

Applicants' Attorneys

CROUSE INCORPORATED

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D M LEATHERN SC

Respondents' Attorneys

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