IN SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 8283/12

DATE: 13/04/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

DATE 14th MAY 2012 SIGNATURE

In the matter between

BASIL READ (PTY) LTD APPLICANT

and

NEDBANK LIMITED 1st RESPONDENT

AFRICAN MINERALS ENGINEERING LIMITED 2nd RESPONDENTS

(the opposing party)

JUDGMENT

SALDULKER J:

1) This is an application in terms of Rule 6(12)(c) for the reconsideration of an order granted in terms of Rule 6(12) of the Uniform Rules of Court on 30 March 2012 in the Urgent Court, where the applicant sought and was granted an urgent Interim interdict.

2) The terms of the urgent interim order *inter alia* were as follows: Interdicting and prohibiting the first respondent from making payment to

the second respondent, the opposing party, of any sum or sums which are referred to in the following advance payment guarantees until 31 May 2012 viz: [1] 30657105 in the sum of USD 7 800,000. 00 and [2] 30361818 in the sum of USD 5,000,000.00

3) The opposing party has not filed any affidavits in this application and contends that this court must reconsider the application on its own on the basis of the original application before Monama J. However, at the outset of this reconsideration application, the applicant lodged a substantive interlocutory application in terms of which it sought *inter alia* the following relief:

3.1 Condoning the failure of the applicant to cite the second respondent, the opposing party in the urgent application, and joining the second respondent to this application with leave to sue it by edictal citation and

3.2 permitting the applicant to supplement its founding affidavit by the averments contained in the affidavit in support of the substantive application.

4) In its founding papers, the applicant averred that an associated company of the applicant, Basil Read Construction (SL) Limited (BRC), incorporated in Sierra Leone, was contracted to construct a railway line in Sierra Leone on behalf of African Minerals Limited (AML), the opposing party. Pursuant to the contract between BRC and the opposing party, the applicant

provided two advance payment guarantees to the opposing party.

5) These advance payment guarantees were issued by the first respondent. In terms of the guarantees, the relevant employer is African Minerals Limited, the opposing party in this matter and the applicant is the contractor. According to the applicant, the Basil Read Group which incorporates the applicant and BRC have been involved in negotiations with the opposing party over a long period of time to resolve moneys owing to the Basil Read Group, pursuant to work performed by them for and on behalf of the opposing party. As a result of these negotiations, the advance payment guarantees have been extended on many occasions, the last period was when the opposing party requested the first respondent to extend it to 31 May 2012.

6) However on the morning of the 30 March 2012, the applicant was informed by the first respondent that a representative of the opposing party had purported to present the advance payment guarantees to the first respondent for payment. By presenting the advance payment guarantees for payment knowing 'full well that it owes far in excess of these amounts to BRC', the applicant states that the opposing party was 'devious'. It was this 'devious' conduct, that the applicant sought to interdict in the urgent application. The applicant averred that it would suffer irreparable harm if the first respondent paid the opposing party pursuant to the advance payment guarantees.

7) In the urgent application the opposing party was not joined as a respondent, nor was the application served on it. No provision was made for the order to be served on the opposing party, despite the fact that the opposing party contends that its rights to payment in terms of the guarantees was directly affected by the order that was granted. Although the order is not directed against the opposing party, in form and in substance, clearly it is an order that was granted against it as is evidenced from its terms. It's the applicant's case that the guarantees were issued pursuant to an agreement between Basil Read Construction (SL) (not the applicant) and the opposing party.

8) In terms of Rule 6(12)(c):

> *"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."*

9) In this application the opposing party requests this court in terms of Rule 6(12)(c), to reconsider and set aside the urgent interim order that was granted by Monama J on 30 March 2012. According to the opposing party the effect of the order is to prohibit the respondent from paying the guaranteed amounts to the opposing party until after the guarantees have expired.

10) In essence the opposing party's contentions are that the

applicant's failure to join the opposing party and to provide for service of the application and the order on it, renders the application that was granted fatally defective. Furthermore that the application to supplement the founding affidavit must also be refused, as it is clear that the supplementary affidavit is being used by the applicant to bolster the facts in the founding affidavit used in support of the original application. This application must be reconsidered on the papers filed in the original application before Monama J.

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11) The applicant contends that the order was sought as a result of the opposing party's conduct, namely that the opposing party sought an extension of the guarantees on the one hand while negotiating disputes on the other hand. Such conduct so contends the applicant, was devious, surreptitious and fraudulent. The urgent application was launched by the applicant on an 'extremely' urgent basis by virtue of the following situation which presented itself on 30 March 2012, which was that as a result of the protracted negotiations in terms of which a final account to
20 BRC was being debated from September 2011, the opposing party in whose favour the advance payment guarantees were issued, addressed a letter dated 27 February 2012 to Nedbank in terms of which it recorded the following:

> *"Please note African Minerals Limited would like to extend the Bank Guarantees to 31 May 2012. Can you please*

make the necessary arrangements and let me know if you need anything further from us."

12) Pursuant thereto and on 28 March 2012 the applicant also addressed a letter to the first respondent instructing it to extend the advance bank guarantees to 31 May 2012. Although the applicant had no contractual duty to accept the extension of the advance payment guarantees, it agreed to do so on the strict understanding that the final account would be finalised before the presentation of the advance payment guarantees.

13) The applicant contends that it was as a result of the first respondent's letter as aforestated that the applicant was "lulled into a sense of comfort" and had valid reason to believe that, until the issues relating to the final account were finalised, (which was at least by 31 May 2012) that guarantees would not be presented by the second respondent for payment. Despite this, however, during the course of the morning of 30 March 2012 the first respondent advised the applicant that certain representatives of the opposing party had presented the advance payment guarantees for payment. This conduct of the opposing party was according to the applicant surreptitious. In addition, Nedbank advised the applicant that it intended giving effect to the advance payment guarantees by close of business on 30 March.

14) Given the urgency of the matter it was obliged to bring an urgent application to interdict the payment and it did so with the limited

information available. The applicant therefore contends that it was faced with an iniquitous situation where it had to react immediately to ensure that its rights were protected, specifically having regard to the opposing party's conduct prior to 31 March 2012. It states that it acted responsibly given the limited time available.

15) The applicant's case is that at all times, the opposing party was acting unconscionably, its conduct evidencing a fraud perpetrated by the opposing party on the applicant. In the interlocutory application the applicant seeks to adduce further facts in the form of a supplementary affidavit which are, it contends, relevant for the purposes of the reconsideration application. It says that it does so on the following basis: The first that the applicant heard that the opposing party had presented the guarantee for payment was on 30th March 2012. The application was thus of such an urgent nature, solely created by the conduct of the opposing party, which is a peregrine, that there was no time to obtain leave to sue by way of edictal citation and that the motion papers had to be drafted within a brief period on limited information.

16) The opposing party contends that in the proposed supplementary founding affidavit the applicant seeks to bolster facts already advanced in its main application, which is *inter alia* that the conduct of the opposing party's conduct is surreptitious that the guarantees issued have lapsed and the demand is defective and the applicant is not bound thereby. Furthermore, the applicant contends that the guarantees issued by the

first respondent are unenforceable in that it seeks to guarantee payments in respect of a party, which is not a party to the contract concluded.

17) The opposing party contends that this court should have no regard to the proposed supplementary affidavit because it should not be considered for the purposes of a reconsideration application. In support for this contention the opposing party seeks to rely on a dictum by Joffe J in the decision of *Rhino Hotel and Resort Pty Ltd v Forbes and Others* 2000 (1) SA 1180 (W) at 1182 B -E where he stated as follows:

> *"In terms of Rule 6(12)(c) the uniform rules of court a party against whom an order was granted in his absence in an urgent application made by a notice set the matter down for reconsideration of the order the rule envisages a re-determination of the matter. The court that entertained the application in the absence of the respondent does not have the benefit and advantage of argument from the respondent. Accordingly when the applicant is re-enrolled by the respondent for consideration it is a re-determination with the benefit of argument from the respondent ... where rule 6(12)(c) is utilised the original application is reconsidered on its own and without reference to anything else."*

18) The applicant's riposte to this, is that in *Oosthuizen v Mijs* 2009 (6) SA 266 (W) Wepener AJ adopted a different view and after expressly dealing

with Joffe's views he held that:

> *"To hold that the court is confined only to the original application without reference to anything else is in conflict with various decisions on this point."*See in this regard *ISDN Solutions v CSDN Solutions* CC & Others 1996 (4) SA 484 (W) at 486H - 487D, see also *National Director of Public Prosecution v Braun and Another* 2007 (1) SA 189 (C). Wepener J went on to state in the Oosthuizen case at pages 269-270 that:
>
> *"I am of the view that a court that reconsiders any order should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order, but also with the benefit of the facts contained in affidavits filed in the matter.....*

In Reclamation Group (PTY) Ltd v Smit and Others 2004 (1)SA 215 (SE), full sets of affidavits were delivered dealing with the facts upon which the reconsideration of the matter was done. Froneman J stated at 218D-F as follows:

The result of all of this is that the reconsideration of the matter needs to be done on the basis of a set of circumstances quite different to that under which the original ex parte order was obtained. Reconsideration need not always take this form but Rule 6(12)(c) is widely formulated and in my view permits a reconsideration in this manner."

19) The opposing party contends that there is no authority in support of

the applicant's contention that an applicant should be entitled to place before the court re-considering an order granted in the absence of a party affected thereby additional facts and matter which ought properly to have been placed before the court when the matter was originally presented.

20) The applicant contends that the presentation of the supplementary affidavit is relevant to the issues in the application for reconsideration, especially in the light of the fact that the urgent application was launched in the manner that it was. Serious allegations of fraud have been levelled against the opposing party by the applicant which call for an answer in the circumstances which prevail. The contents of the supplementary affidavit can and should be considered.

21) The opposing party states that the aforegoing authorities including the *Oosthuizen* case *supra* expressly support the function and the purpose of Rule 6(12)(c) which is the fundamental principle of natural justice "*audi alteram partem*". However, reliance on such authorities would only be anticipated, where a respondent who was absent when an urgent order was granted, wishes to place relevant factual matter on affidavit before a court reconsidering an order granted in such circumstances. In this matter the second respondent has not filed any affidavits. It is the applicant who wishes to bolster its original application by applying to file a supplementary founding affidavit. In my view, the authorities relied upon the applicant are distinguishable from the facts at hand. In both *Oosthuizen* and *Reclamation Group* (*supra*), full sets of affidavits were

filed by both the parties dealing with the facts in the reconsideration application.

22) It appears that the authorities and the additional judgments referred to by Wepener J in the *Oothuizen* case, all support the proposition that a party that seeks a reconsideration of an urgent order made in his absence if it wishes to, may present facts on affidavit which a court may take into account in reconsidering the order. However none of these judgments provide the authority for the contention that an applicant for an urgent order may supplement its original founding affidavit with additional matter when faced with an application for reconsideration under rule 6(12)(c). The *Rhino* case in my view, remains the authority for the proposition that a party in the position of the opposing party is entitled to seek a reconsideration on the original application without reference to anything else.

23) The applicant contends that the guarantees are unenforceable and should not be paid. The applicant states that there are issues raised in the supplementary affidavit that clearly indicate that it is not liable to make payments as demanded by the opposing party, which is *inter alia* that the opposing party seeks to obtain payment in terms of advance payment guarantees as a result of fraud perpetrated by the opposing party on the applicant; and the demand in terms of the advance payments guaranteed was defective; and that importantly the applicant did not contract with the opposing party nor did it receive any payment from the opposing party. As

a result the applicant contends that it is not liable to make payment as demanded by the opposing party.

24) However, a perusal of the original application and the intended supplementary founding affidavit, which was disclosed to the court and allowed only on the basis to reconsider this application, does not raise any allegations of fraud by the opposing party. What the applicant has alleged and has raised, is, that the opposing party was devious, acted surreptitiously, and in bad faith in presenting the guarantees for payment in circumstances in which it was engaged in settlement negotiations with the applicant and had requested an extension of the expiry date stipulated in the guarantees, which had already been extended from time to time.

25) It is trite law that in a founding affidavit an applicant must set out the relevant and material facts it relies on. It was on the facts that were averred in the founding affidavit of the original application that the interim order was granted. The opposing party contends that the applicant has applied to file a supplementary founding affidavit in an attempt to bolster its original application, which has a paucity of information and that no new grounds for the order originally sought are set out. Furthermore despite the applicant's contentions, significantly, no grounds of fraud are alleged against the opposing party in the supplementary founding affidavit nor proved by the applicant on the part of the opposing party. The applicant is not permitted in this reconsideration application to file a supplementary affidavit to bolster its original application.

26) In my view, the opposing party's contention that in seeking to interdict payment on the guarantee, the applicant sought and continues to seek to avoid the consequences which it voluntarily assumed, and has repeatedly confirmed through its agreement to the irregular extension of the expiry date for the relevant guarantees, has merit. The advance payment guarantees creates contractual obligations on the part of the first respondent to pay the opposing party under the guarantees. The obligation concerned is wholly independent of the underlying contract between the applicant's subsidiary and the opposing party.

27) The applicant alleges that the opposing party is not entitled to call upon the first respondent to pay the amounts claimed under the guarantees because of some dispute between the applicant's subsidiary and the opposing party. The applicant relies on the decision of *Lombard Insurance Company Ltd v City of Cape Town* 2008 (2) SA 423 (SCA) as authority for the proposition that because a contract was entered into between a subsidiary or associated company of the applicant and the opposing party and not the applicant itself, that the guarantee is invalid. In my view the judgment is distinguishable from the case at hand. The judgment in the *Lombard Insurance Company* was concerned with the plain wording of a guarantee and a situation in which the appellant guaranteed performance of a contractor defined as company L. Company L was the only company envisaged in the guarantee to be responsible for the completion of the works. The guarantee did not contemplate that

another unnamed person would complete the works. The guarantee was presented purportedly as payment for the obligations of a joint venture of which the company L was a partner. It was held that the obligations of the joint venture was distinct from those of the company and thus could not found a claim under the guarantee. In my view the *Lombard* case is of no assistance to the court in dealing with a reconsideration of the order of 30 March 2012.

28) In *Loomcraft Fabrics CC v Nedbank* Limited 1996 (1) SA, 812, at 815 G-J, Scott JA stated as follows:

> *"The system of irrevocable documentary credit is widely used for international trade, both in this country and abroad. Its essential feature is an establishment of contractual obligation on the part of the bank to pay the beneficiary under the credit which is wholly independent of the underlying contract..... The unique value of a documentary credit is that whatever dispute may subsequently arise between the issuing bank's customer and the beneficiary under the credit in relation to the performance..... the bank undertakes to pay the beneficiary, provided only that the conditions specified in the credit are met".*

Scott JA went on to say that:

> *"The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the*

document specified in the credit. In the event of the document specified in the credit being so presented the bank would only escape liability upon proof of fraud on the part of the beneficiary."

29) Clearly, the existence of an alleged dispute between the applicant's subsidiary and the opposing party is no bar to the first respondent paying the guarantee upon proper demand being made by the opposing party, nor can it provide a basis upon which an interdict can be granted restraining the first respondent from paying in terms of the guarantee. In my view, the contractual dispute between the opposing party and the applicant's subsidiary, which is not a party to the guarantee is wholly irrelevant to the first respondent's obligation to make payment to the opposing party in terms of the guarantees. Furthermore the dispute between the applicant's subsidiary and the opposing party do not appear to relate to the advance payments that are the subject matter of the guarantees.

30) There is also no suggestion in the founding affidavit that the conditions in the guarantee have not been met. It is clear that whereas the effect of an extension of the expiry date of the guarantees will afford the opposing party the right to demand payment in terms thereof from the first respondent until the extended expiry date but not thereafter, the interdict sought and temporarily granted, if not reconsidered and set aside or

discharged, will indisputably prevent the opposing party from being paid by the first respondent.

31) An interdict restraining the first respondent from paying in terms of the guarantee cannot be granted at the instance of the applicant except on proof of fraud on the part of the opposing party in relation to the demand made on the first respondent for payment. Scott JA stated as follows in *Loomcraft* at p 816 D-F:

> *"Except possibly in clear cases of fraud of which banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims, these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and the commitment of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise trust in international commerce could be irreparably damaged".*

32) The applicant contended in the urgent application that the conduct of the opposing party in attempting to obtain payment on the guarantees was devious, and now seeks to contend in the reconsideration application, that

the conduct was also fraudulent. However, what the actual fraud, is not referred to in the supplementary affidavit it proposes to file. Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. This was clearly not proved.

33) In *Phillips and Another v Standard Bank of South Africa Limited and Others* 1985 (3) SA 301 (W) at 302 to 304, Goldstone J (as he then was) stated *inter alia*:

> *"That the applicants realized and appreciated the irrevocable nature of the documentary credit and that it constitutes a contract independent of the purchase and sale agreement between them and the third respondent ..."*

The fundamental nature of a documentary credit was clearly set out as long ago as 1941 by the New-York Supreme Court in Sztejn v Henry Schroder Banking Corporation (1941) 31 NYS 2d 631 at 633 4 in the following terms:

> *"It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller...*
>
> *The Courts should recognise and give effect to the commercial purpose for which the system of irrevocable documentary credits has been devised, viz to facilitate the international trade by giving to the seller before he parts*

with his goods the assurance that he will be paid and that no dispute as to the performance by him of the contract with the purchaser will constitute a ground for non payment or delayed payment. Accordingly, where an irrevocable documentary credit constitutes an independent contract between the issuing bank and the seller, the purchaser may not go behind the documents and cause payment to be stopped or suspended because of complaints concerning the quality of the goods or other alleged breaches of contract by the seller".

34) Where an applicant seeks to interdict the performance of an established contractual obligation as the applicant does *in casu*, it must allege and prove that it has such a right, at least on a *prima facie* basis at the interim relief stage, or at least when seeking final relief. This the applicant failed to establish on a prima facie basis. The payment of a demand on guarantee in the absence of fraud, is valid, enforceable and most importantly lawful. The opposing party's conduct appears to have been lawful. The applicant has clearly not made out a case of fraud on the part of the opposing party on the papers before me.

35) On many occasions, commercial cases involving millions of rands are brought to the Urgent Court on a hurried basis and *ex parte* without knowledge of the parties whose rights are affected. The Urgent Court sometimes makes decisions on these matters on the basis of commercial

urgency, being deprived of the benefit and advantage of argument on behalf of all the interested parties. Had there been service of the urgent application on the opposing party whose rights were affected by the order sought, and had the opposing party been given an opportunity to answer to the allegations in the applicant's founding papers, the urgent court would have been better placed to arrive at a decision *au fait* with all the facts. It is doubtful whether the court would have made an order in the terms that it did. The latter view is strengthened by the fact that the applicant itself has sought to apply to supplement its founding papers, the very papers it relied on to justify the order it sought and was granted in the urgent court against the opposing party.

36) In my view, having considered all of the aforegoing, the fact that the opposing party was not joined in the application and that service on the opposing party was not even provided for in the order sought and granted, where such an order affected the rights of the opposing party, the order must be set aside. The opposing party's rights to the payment were clearly affected by the order that was sought. The applicant's interlocutory application to file a supplementary affidavit is a belated attempt in my view, to justify an order that should clearly not have been sought or granted without notice. In such circumstances, this court does not permit the filing of the supplementary affidavit.

37) To permit a litigant, who has sought an order, without notice in terms of Rule 6(12), against a party whose rights were affected by the order

granted in the urgent court, to file a supplementary founding affidavit in a reconsideration application by the aggrieved party, is to afford him another opportunity to bolster the original application, especially where the aggrieved party has not filed any affidavits. Furthermore to allow a litigant to do so would be creating an untenable precedent contrary to the function and the purpose of Rule 12(6)(c). It would not redress the imbalances in, the injustice and the prejudice resulting from the order sought and granted in his absence.

38) Finally I must thank counsel on both sides in this matter. I have borrowed substantially from their heads of argument and the authorities they have referred me to, for the preparation of this judgment in a short period of time.

39) Having considered all of the aforegoing I am of the view that the urgent interim order granted by Monama J on 30 March 2012, must be reconsidered, and the Rule Nisi is discharged. The order is set aside. There is also no merit in the orders sought by the applicant in its interlocutory application and in the result all the orders sought therein are refused. The applicant is ordered to pay the costs of the opposing party, such costs to include the costs of two counsel.

40) The following order is made:

1. The orders sought by the applicant in its interlocutory application are refused.

2. The Rule Nisi granted on 30 March 2012 by Monama J is reconsidered and discharged. The order is set aside.

3. The applicant is ordered to pay the costs of the opposing party in regard to (1) and (2) above, such costs to include the costs of two counsel.

ATTORNEY FOR THE APPLICANT: RAMSAY WEBBER ATTORNEYS

ATTORNEY FOR THE OPPOSING PARTY: WEBBER WENTZEL

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DATE OF HEARING: 9 APRIL 2012

DATE OF JUDGMENT: 13 APRIL 2012