REPUBLIC C CSOUTH AFRICACA

SCSCTH GAUTENG E-EH COURT, JOFDHNESBURG

1) REPORTABAB YES /
2) OF INTERERESO OTHER JUDGESE'ES
3) REVISED.

19/2/2/23

CASE NCNC2013/21466

INDUSTRIAL DEVEVLOPMENT CICRPORATION O OSOUTH AFRICIC	APPLICANT
AIAD	
SCSOLIMAN, MOHHMED	FIRST RERPONDENT
ASAS AFRICA TRAIAING 501 CC	SECOND RERPONDENT
AIABAR, KHADIJAIA	THIRD RESPONDENT
STSTNDARD BANKKF SOUTH AFRIRCA LTD	FOURTH RERPONDENT

JUDGGENT

HeHenote:

RuRu6(12) (c) applicacan by a respondenenor a reconsideratiati of an order takenergently anancithout notice to to t respondent – hishisy of the controvovey about whether ir ither

affidavits may be filed by the aggrieved respondent and/or the applicant traversers – purpose of a reconsideration is a full ventilation of the dispute as if the initial hearing had complied with the audi alterem partem principle and must be distinguished from a mere 'review' of the final decision.

An aggrieved respondent had filed an answer and had objected to the applicant filing a reply to the answer.

He held:

(a) a respondent who invokes Rule 6(12)(c) chooses not to put up an answering affidavit, the respondent likewise has no need for an opportunity to put up a reply.

(b) a respondent who invokes Rule 6(12)(c) chooses to file an answer, then the applicant may file a reply, which is, obviously, subject to the general rules and practice about not introducing new matter illegitimately.

Per Sutherland J:

Introduction

1. On 19 June 2013, the applicant procured an interdict against the first, second and third respondents, freezing their bank accounts with the fourth respondent and attaching certain movable equipment. The order was taken urgently and ex parte. This was the second such order taken, the first having been on 4 June 2020, in respect of two trucks.

2. The order of 4 June has not been challenged. The first respondent, Sooliman, and the third respondent, Akbar, who is the wife of the first respondent, seek a 'reconsideration' of the order of 19 June, as contemplated by Rule 6 (12)(c) which expressly provides for it in the case if an urgent order taken against a person without notice. The two applicants for

reconsideration sh sll be referred to as asooliman and Akkkt, the applicant as as)C. The second respondenem close corporaticticof which both otbth respondents are re mbers has not sought a recororderation.

3. 3. An affidavit was fs fd by Sooliman in inpport of the recocoideration.

May a replying aflaflavit be admitted ld lthe IDC ?

4. 4. . preliminary conpniversy was ventilailad about the proprpry of an applicant nt a rule (12)(c) applicatiolioiling a replying ag adavit, which wasashat IDC had donon An terlocutory applioliion to strike out ut t replying affidavavvas made. It was as ntended at no replying affaflavit was permississie. Reliance was ns nle on the decisiorion **Basil** ead **(Pty) Ltd v v edbank Ltd & A A 2012 (6) SA 5151 GSJ).**

5. . here have been se seral Judicial prononocements on the re r regarding the filfilg of idavits in rule 6(6( ) (c) applicationsns **n Rhino Hotel & &esort (Pty) Ltd ld Forbes Others 2000 (1) 1) A 1180 (W)** at 1 12B – D, Joffe J h h that the ambit of otule (2)(c) was such th tt the papers initiatia filed were alonenermissible for thehe consideration'. H Hvever, in **Reclam m on Group (Pty) y) d v Smit 2004 (4 SA 215** (ECLD) at 218D -D -, Froneman J allalled affidavits, ostststsibly, from both h rties, to l ladmitted. The rat atiale was that the e cision at reconsidiidation stage had to toke stock c che reality that cirpirmstances may haha evolved since th th rder had been gr gred. The j jgment did not adadess the question o ovhether there ougug to be a qualitativiv d dinction to be dravav between an answswing affidavit fronone aggrieved respspdent a a a replying affidada from the successssl applicant.

Neither of thesesvo decisions refe:fe:d to the earlier d:dsion by Farber A An **ASDN Solutions (Pty) y) d v CSDN Sololions CC & Othene 1996(4) SA 48484W) at 487D,** where it was stastal that:

> " Althonon no hard and fas:asule need to be laicaicown, it seems dedeable that a party seseeng to invoke the ie :e ought in an affiffivit to detail the fe fm of reconsidddition required anonce circumstances es on which it is babal."

Plainly, Farber A: Aencouraged the fi fig of an affidavit, it,e better to inform me court.

7 7Then Wepener A: Aas he then was) i) i**Oosthuizen v M M: 2009 (6) SA 2626W)** addressed the ississ: The judgment u: u:ully and lucidly cv dects the relevantunselaw on the subject, and I d I) not again traverserthe ground thus ps psented. At 270C C **Oosthuizen**, Wep/eper J categoricallyllyiffered from The he**hino Hotel** doctr:tr: of 'no affidavits at all, a, a at 269H – 270B,B,e endorses the appappach of Farber AJAJ **ASDN Solutions**, cited ad ave. Wepener J he he:

> "I am of the viewthat a court that re reasiders any order sr sould do so with I th thenefit not only of argumeneon behalf of the papa absent during the ie inting of the originginorder but also with the be befit of the facts conoined in affidavits fil fil in the matter. The he plicant filed an affidavit in sn sport of its 'set dowow for a reconsideratictic The respondent fil fil an answering affidfidit and a reply was as sved and filed. If a ca ort had to reconsidddhe order granted on an ui uint basis in the absbsee of a party, by linlinng the hearing to po pmitting a party to supply ly ditional argument at a utilising the recor:onf the original applpltion only, a court would be oe sing its eyes to thehects placed before ie itat could have led td t completely different result vlt ven the order was os oinally granted in th thbsence of the one ie ty. B I am consequently of ofe view that a court urtould consider all tll tbermissible facts ds dlosed in the affidavits beforore"

8. 3. aldulker J in **BasiasRead** was called id on to decide whetnetr to allow a hithehe uccessful applicararo file another affiffivit which was dedgned, on her findnds, to

'bolster' the inititicase made out w wn the aggrieved rd roondent had not ft f an answer. She refused to p(poit that outcome :e d rightly so. At [1 [1 – [21] the case le l; was traversed and at at 2] and at [37] shehe:ld as follows:

> "[22] It appepes that the authoritris and the additiononjudgments referrrn to by Wepener J in ine *Oosthuizen* casasall support the prprosition that a partarthat seeks a reconsideratiatiof an urgent ordedenade in his absenen if it wishes to, m m present facts on affidfidit which a court nt ny take into accounuin reconsidering tg t order. However, nonoiof these judgmenenprovide the authchcy for the contentnti that an applicant for or urgent order mayayupplement its origrial founding affidfidit with additional manar when faced witvitn application foorconsideration unun rule 6(12)(c). The he*rino* case, in my y w, remains the at atority for the propopition that a party in the p(ption of the opposos party is entitledd seek a reconsidedeion on the original applioliion without refer erce to anything elsels

> "[37] To permrma litigant who hahaought an order, w wout notice in terren of rule 6(12), againstist party whose rightshtvere affected by ty t order granted in ine urgent court, to file *a applementary fououing affidavit* in a a :onsideration appppation by the aggrieved :d rty, is to afford h h another opportuntuy to bolster the oi oinal application, es escially where the :e grieved party has as t filed any affidadas. Furthermore, t, tllow a litigant to to so would be to co :ate an untenable le ecedent contrary to thehenction and the pi puose of rule 12(6)6). It would not recress the imbalances, th thnjustice and the re judice resulting fi fn the order soughgland granted in his is sence." (Emphasassupplied)

9.). :s expressly pointint out in the dictununt [22], none of thdhrecisions pointedhddress hether or not an an olicant can or canant file a reply whehem answer has becedfiled by e aggrieved respopdent, save only fo foRhino Hotel caseisehich denies spacacor any fidavits, an approrch which is out of ofep with the authohoies both before ai aafter it as decided in 20000In **Basil Read**, w wt Sadulker J did d s to refuse to let et applicant ake out a better c: ca in a further afficficit than in the fououing affidavit. In m r view that as far as that decicion went. It is axioicatic, on well estaltashed principles, ts, tt a reply not a place to amimfy the applicant's'ase, its function in imited to refutatiatiof the pondent's answeve See: **Standard d nk of SA v Sewpwrsadh & Anothene005 (4)** –

SA 148 (C) at [t []) What is not dede with in **Basil ReRe** is the question ci *cm appropriate repep*ie a reply to chaliallge the answeringngffidavit when it rt res material matter not addrelreed in the foundinginffidavit and not ct cpably omitted froro the founding affidavit. If the ie tum in **Basil Reaea** was intended to lo l down a hard andndst rule, which would inhnhit that, then I mususespectfully disagagi that such an appppach is appropriate to ru ru6(12) (c) applicatatns.

1 1 The critical phraraain the Rule is "reoreonsideration of theheder". The rationana is to address the poteneni or actual prejudude because of an al abnce of audi alteneri partem when the ex parterterder was granted.ed.he rule is not a 'n 'riew' of the grantinti of the order. A 'reconsiusiration' is, as has bs bn often said, of vf ve import. It is rorood in doing ustice in a particticir respect; ie to al alv the full ventilatlati of the controveiver. In my riew it would be ie retence at justicece craft a mechanicicapproach which ih allowed a ull ventilation wlwlh would be the oi otome, if a relevananeply, if any, was as be revented. The obobt of the rule shouoi be, ex post factotoo afford an opporority for a earing afresh as is here had been nonorlier non-observevee of the audi altelten partem octrine. To disallally a reply, on prinindle, serves no soupui principle or poliolithat is onsistent with thethim of full and prorer ventilation of df dutes, which is wlwl a econsideration' c' ght to be about.

1 1 1 1. is true, that if a ra pondent chooses es t to put up an affiffivit and to confindnue counter tack to purely wlwl was before the cc ert when it initiallyll granted the ex pararorder, ere is no room fo fohe respondent to to t up a further affiffivit (still less a sosolled upplementary fofouling affidavit'; anard-titled crafty manaulation of the coco process at should be stammd out ruthlessly).y).ich was the case se **Basil Read.** In st sn a case,

the stance of the re rties on reconsidddction would be iddddical to that had th th come ... before a court ononotice in the ordinana way. The norm m application prococlings is achieved..

1. 1Accordingly, in m n view:

12.1. If a rerespondent who invokok Rule 6(12)(c) chchses not to put up ap answering affidavit, thenethe respondent liklikwise has no need id r an opportunity ty tput up a reply.

2.2. If a resesndent who invokokRule 6(12)(c) chchses to file an answsv, then the applicant mayayle a reply, which ch obviously, subjejethe general rules es d practice about not intratrucing new matter eregitimately.

13.13.or these reasons, s, llowed the applicict's replying affididit.

ne reconsideratioioi

14. 4. ie purpose of a ru ru6(12)(c) reconsicsication was capturcdby Farber AJ in **In DN -- lutions (Supra)** a) **486H – 487D** whwhe he stated:

"The Rule readads follows:

> 'A persosoagainst whom an on der was granted in inis absence in an n urgent ap aplication may by n nce set down the re ritter for reconsidedeion of the orderler

It came into opepeion on 29 Novemmr 1991. Counsel vl ve unable to referere to precedent dealinlinwith the constructich thereof. Nor wewa able to find anyny.

The Rule has beeewidely formulateate It permits an aggggved person againair whom an order was gragraed in an urgent ap aplication to have th thorder reconsiderere

provided onbnlhat it was granteeten his absence. ThThunderlying pivot ot which the exercise of tlf tlpower is coupleded the absence of tf tlaggrieved party ay ahe time of the grant of tf t order.

Given this, tl, tldominant purposos f the Rule seemsnslatively plain. It lt ords to an I aggrieved papa a mechanism dedeined to redress in imlances in, and in intices and oppression fl flving from, an ordrdgranted as a mattattof urgency in hisisssence. In circumstanceceof urgency where re affected party is ist present, factorsrshich might conceivably iy pact on the conteiteand form of an oi ozr may not be knonon to either the applicant ntr urgent relief or or Judge required id determine it. Theheder in question mayaye either interim o: oinal in its operatiotic Reconsiderationonay involve a deletion of th thorder, either in wlwle or in part, or th thengraftment of adadions thereto.

The framers cs che Rule have nonobught to delineateatee factors which rh rght legitimately by taken into reckonon; in determining g ether any particucu order falls to be reconsicsiced. What is plainin that a wide discneron is intended. Fa Faors relating to the reasonsnsr the absence, ththature of the ordederanted and the pepe d during which it has rs rained operative ve vl invariably fall tl be considered in cn cermining whether a discisction should be exercised in favour of ohe aggrieved partyrtSo, too, will questions relalag to whether an in balance, oppressissi or injustice has rs rulted and, if so, the nature re d extent thereof, f, d whether redressess open to attainmeme by virtue of the ee estence of other or orternative remedieIThe convenienceee the protagonists ns nst inevitably enteiche equation. Thesesactors are by no io ians exhaustive. EaEa case will turn or ors facts and the pepeliarities inherent nt erein."

(see too: Fronoman J in **Reclamanan Group (Suprarat 218G – 219A)A)**

1515he thrust of the ae alication was that at oliman was a fra a and a thief. It wawalleged that i his capacity as as enior employee o: oDC he was in conorol of various commnies who ere indebted to th tlDC. His role wawo disgorge from m ch companies, rejeyment of ie sums owed to to t IDC. This involvold managing them m d disposing of th th assets to ay these debts. HiHiole was one of ut ubst good faith. HeHevas in charge of tf t mpanies pertinenero the applicationon ans Merensky Pr Pructs (HMP) and d bra Pellets ebra), for the purposes of extracting ig ayments.

16. 6. ie allegations in ta t Founding Affidada are that Soolimanain course of dispsping of the sets of HMP, disposed of them for le lethan fair value ur unr circumstances as it warrant inference that ir irgularities were coconitted by him in n process. Seconone, whilst

in control of ZeZet, he caused manynyayments over a pc pod of about a yeaeao be made from Zebra to th thecond respondenenor fictitious transnsrt services suppopolly rendered. Further, using th the ill gotten gains,as, acquired two iteites of heavy machihiry used in the timber indusust, a Chipper and al aebarker.

1 1 The order coverserse equipment andndnk accounts of th thsecond responderenn. Sooliman's persersal bank account. A. Abar is a member er second responderenn is interdicted from m erating its bank ac apunt. Further, theheuse and the bononccount in respect of which h oliman and Akbabeach have a 50% % erest is covered, d, d thus, Akbar, who it is cs mmon cause, mususe regarded as an an nocent party, is is ilicated and inconvenienced bl bhe interdict, the le C not persisting vg vh its initial contenteon that she be regarded as a ja jit wrongdoer by y tue of her membabdhip of the secondndspondent.

The challenges

1818 he overall contenteon is that the IDOOncealed facts relelant to the applicacan. Indoubtedly, a mmarial non-disclosusuin this sort of appppcation would be fe ful to its rospects for it wowcd amount to a frafra on the ourt. DeDeite this overarchihi remark, ne contention wasasot seriously pressess, rather a critiqueue supposed deficiciies was ne hall mark of th thespondent's case.sehe overall suppopol weakness was ts tuggest iat one Naidoo wlwse ferreting was as aged to be the fouou of the data upon nich the auds were unmasasd had not said wlwl credentials he pc pcessed to embark k on a rensic exercise. I. I character of thehects relied upon hc hcever call for no fo fensic pertise and seemm my view to be q qe within the capapacities of a literate te rson with mmon sense. Thc hoint cannot assissiste respondents.

The HMP Assetsets

1 1 The challenges bs bSooliman to the le IIP allegations arearevofold. First, thatate IDC has no locus standi tq tcomplain of a fraudain respect any irrirrularity in dealingngith HMP's assets, assumingngat there were theheland frauds. Secocoly, the facts set oi oin the Founding Affidada do not demonstrstr any prima facie ie ongdoing by Sodoman.

2 2 The premise of tf thotion that the IL IL has no standing ig ates to the natureire the relationship betwtwn IDC and HMP. P ssentially, IDC le lemoney to HMP. P. e Founding Affidavit alleges es oint venture but tt tt relationship is rs rvhere substantiat at and the allegation can be oe nored. HMP defafaed on the loan. T T two shareholdererSingisi Forest Products (\$ (J) Ltd (SFP) and d nanciera Maderer er\$A (FINSA), in a agreement with IDC, underterto to pay the wholohf HMP's debt to to C. Hence, so it vt v argued, if HMP's assets weverriddled, it was upup them to cry frauauthe IDC has no in irrest in the ssets of HMP.

212 This perspective ie incorrect. First, th thgreements in terrerr of which the twownareholders ssumed a liabilitylitor HMP's debts vs ve guarantees of tf t debt not a transfsfof liablity. IMP remained thth ebtor. Moreover,er,)C had notarial bl bds both general al a special ver the assets of bf MP. This was IDDC security for the ce ot. FINSA had papaits half hare of the IDC's" stitlement. SFP h/ h agreed to pay its ts are off in instalmlmts over a eriod enduring in in 2017. Plainly, ththeed for security iy ihe form of the bc bds was still ecessary and funcnonal. The interestst the IDC in the as asts has been demcnctrated.

. Moreover, the aaged fraudulent dedding with the assetsof HMP by Sooliplin, was carried out whilnilSooliman was an an nployee of IDC a' a its agent in dispsping of the assets. The two /o areholders were ee.ctled to the benefiefif the value derivviv from such disposals in rededung their own liababy. If the IDC's a; ant defrauded theneme IDC would be at risk sk a diminished payayent from each, be beuse they would bi bentitled to a credit for value ee on an honest dispspal of the assets.

2 2 The second leg ce che challenge wasasat no irregularityityid been shown. T Ts took the form of a critiququf the averments is ihe Founding Affiffivit. A degree of of.ticism was appropriate, but tit tre was not enougugo unsuit the IDCOC he facts adducededow that on 15 February 201 01 valuation of all tll t assets of HMP r² rected a value of sf sne R5million. On 10 10une 2011, a sale ce certain assets toobollace under the m magement of Sooliman to 'Indndry International' d' r R1million. The ne C alleges a R4m.mon discrepancy expliplible as a fraud.

2⁴ 24That contention is exaggerated, but nt nincorrect. Howevev, even on the monogenerous nalysis, a signifiifint evaporation ofof lue occurred. Thchst of assets, sold ldr R1milion, vere valued at R2R2million in Februaru 2011. Soolimaname man in chargeeoes not xplain why they y re sold for less th th half the valuaticticafter only four m mths. Reliance is placedeolely on a letter o 07 June 2011 in w wch Sooliman put at Coetzee, an mployee of HMFMn effect an ultimaman to take the deaeanless he, Coetzeecould better . From the bar it it is argued that theheirly achieved pricrids not necessarilyilye valuation gure. It is a pity ty it assertion was n nin the affidavit w w, an explanation w w y it was so n these circumstantaes.

2 2 Moreover, proceeding on the premise that the unexplained discrepancy can be overlooked, the value of the other R2,2 million of assets is not explained by the man who was in charge at the time. Even assuming the value was again halved, where and where did the things go? There is reference to stock being taken by the shareholders, but this component of the assets, on the valuation of 15 February is only amounts to some 20,000 of the R5 million. The discrepancy is manifest, and if theoretically, this defence could been available to the court on 19 June, it would not have prevailed. More importantly, there is no cogent flaw in the basis alleged to refer the suspicion of fraud regardless of the magnitude of the discrepancy.

2 2 There was an ancillary allegation that Sooliman had cancelled the auction of the goods by saying that the IDC executive wished to utilise the assets to some well meaning but implausible social responsibility scheme. Sooliman's principle was that the scheme was indeed authorised by the credit committee. In one of the new pertinent contentions of the replying affidavit it was alleged that the minutes of the credit committee reflect no such decision. This dispute of fact, if it is indeed one, is about a peripheral aspect which can be ignored.

The Zebra Transactions

2727 The Founding Affidavit sets out, with documentary corroboration, a long series of transactions in which Sooliman, as IDC's agent, caused payments to be made by Zebra to the second respondent. It is alleged that Zebra and the second respondent had no relationship and that no cause existed for services to have been rendered by the second respondent to Zebra. These allegations are baldly denied and no attempt is made to rebut

or deny the factscts alleged. Insteadadie challenge of S Sliman is to pick as ay at the affidavit to impupt deficiencies in th thase made out.

2 2 It was argued thithno-one from Zebrbdeposed to a confirmatory affidavit, it, audacious assertion when in is common cause te tt Sooliman was ts tman in control at ane very time, and his signaturecreppears on dozensns documents prococsing the very payayents. A similar remark is isainly made aboutute absence of an an adavit from someoee in the IDC's financial al inagement departurunt or the person w vo had formal autlutlity to sign off on the paymenes from Zebra, onencambane. Criticiscisis also advanced at certain documents attachcll do not tie up wiwiothers and with th tallegations relatiati to a purchase made se sposedly by him fu fin Zebra or IDC in respect of the equipment attached under th thrder. In this respspt the allegations es the IDC are vagugund supported by supupsition, but are alsalsimportantly, basaston a document gi gin to the IDC by Soolimanan purported proofof payment for thehe uipment. Its ambnbalence does not in those circucustances attract cocont criticism.

2' 2In my view, the ce ctention that the a: agations are withoho substantiation is is exaggeration.

The impact of thehe der on Soolimanan

3(3The second respopoent is the alter egegof Sooliman for ar apractical purposesThe fficiacy of the or orr on the second rd roondent will be la laely nugatory, if nf nalso pplicable to Soobolan. No grounds es est to vary the ordrdin respect of the se cond espondent. Morereer, given the absesee of a full disclosiose by Sooliman of ofis other

personal assets, s, d his complete fi financial position, thdhe are no facts to co cqider in the context of a posossle variation to ananiorate some genunue hardship from vi vich he may suffer. The allegegons of prejudice ce ; bald and devoidid substantiation in ine absence of such disclosure. e.

3 e Impact of the or orr on Akbar

3 3The personal rigligl of Akbar are serierisly affected onlyaly respect of the hc hse and the bond account. HiHmembership of th thecond responderlers relevant only in iro far as she is inhibited from m ting in her capaciaci as an authorised ed gnatory on the acacount. The assets are not henerealthough she selfelfvidently, as a meneger, has an interesresHer interests as a meneier however mustist subordinated to to e fate of the secoroorespondent.

3. 3Undoubtedly, heneights and interest st her half share of of e property and itsitsnd account are intrusive. WhWhever a legitimate te achment is madeder property jointly lyeld that is a nevitable result. t. owever, that affececan be ameliorateteef a proper case is isade out why the inhibitioioought to be variededring the interim m riod before finalialiiion of the nain proceedingsgslo attempt to set et e such case has be be made, which wowd have equired full disclsclure of her financinciposition to assessese cogency if the ie seition.

The overall balananof convenience e

3333Inder this rubric ic ivas contended thathe IDC had quiteitenough security fo fot to be atisfied pending tg t outcome of the ae aon. Thus, it was as gued that the IDCOid not eally need to tie ue the bank accountntnd make the secoco respondent's effffts to trade

either impossible or very difficult at a intrude so deeply into the personal affairs of Sooliman and A Aar. This is certainly a factor to weigh. However, given the estimated quantum of the claim, running into millions, and the risk of dissipation, mentioned in the context of allegedly criminal conduct, theft and fraud, the balance in my view does not swing in their favour.

Conclusions

33 In my view no justifiable grounds exist to alter the order.

34 Accordingly, it is ordered that:

35.1. The application in terms of Rule 6(12)(c) is dismissed.

35.2. The first and third respondents shall pay the applicant's costs of opposition, including the costs of two counsel.

ROLAND SUTHERLAND
Judge of the South Gauteng High Court
Johannesburg
7 July 2013

Hearing: 7 July 2013-07-17
Delivered orally: 8 July 2013
Edited: 9 July 2013

For Applicant: t:
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For First and TiTH Respondents
Adv N. Alli,
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