REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2020/44362

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.~~REVISED~~

25 January 2021

JUDGE DIPPENAAR

In the matter between:-

PILLAY, DEON	First Applicant
HOME TO EARTH SOLUTIONS (PTY) LTD	Second Applicant
and	
HAMMOND, ERROL	First Respondent
THE STANDARD BANK OF SOUTH AFRICA LTD	Second Respondent

JUDGMENT

DIPPENAAR J:

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 25th January 2021.

[1] This is an urgent reconsideration under r6(12)(c) of an *ex parte* order granted in the urgent court on 22 December 2020 at the instance of the first respondent ("Mr Pillay"). In terms of that order a rule nisi was granted, returnable on 15 February 2021, granting Mr Pillay leave to institute the proceedings on behalf of the second applicant ("the company") and granting interdictory relief prohibiting the first respondent, ("Mr Hammond") from transacting on the company's banking account without his written authorisation and ancillary relief. The second respondent played no role in these proceedings.

[2] Mr Hammond seeks the setting aside of the *ex parte* order. He further seeks dismissal of the application or, in the alternative, the postponement of the application to be heard in the normal course. Costs are sought on the attorney client scale. Mr Pillay on the other hand seeks confirmation of the *rule nisi* granted on 22 December 2020.

[3] The purpose of a reconsideration under r6(12)(c) is to offer an aggrieved party a mechanism to redress imbalances in and injustices and oppression from the granting of an urgent order in his absence.[1] A court has wide discretionary powers and reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto[2]. Relevant factors requiring consideration include whether an imbalance, injustice or oppression has resulted, whether alternative remedies

[1] ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others 1996 (4) SA 484 W
[2] ISDN supra 486I-487A/B ; Rhino Hotel & Resort (Pty) Ltd v Forbes & Others 2000 (1) SA 1180 (W) 1182 B-E; Steeldale Ore at Rebar (Pty) Ltd v Ore at Rebar (Pty) Ltd & Others unreported judgment of Mudau under case number 2018/61795 dated 4 September 2018, para [13] –[14]

are available, the nature of the order and the reasons for the order being sought ex parte. These factors are not a *numerus clausus*.

[4] Mr Hammond contends that the *ex parte* application falls foul of the principles enunciated in *Schlesinger v Schlesinger*[3] (*"Schlesinger"*) as Mr Pllay's version did not disclose all the true and relevant facts and his affidavit substantially misled the court. These principles are set out in *Schlesinger*[4] as follows:

> *"Although on the one hand the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts which might affect the granting or otherwise of an ex parte order. The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether willfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the grounds of non-disclosure. It should however be noted that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or set aside the proceedings…..*
>
> *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".*

[5] This approach was endorsed by the Supreme Court of Appeal in *Powell NO and Others v Van der Merwe and Others*[5], which commented that the approach would apply equally to relief obtained on facts which are incorrect because they are misstated or inaccurately set out in the application and should be rigorously applied where a right in the Bill of Rights has been violated.

---

[3] 1979 (4) SA 342 (W)
[4] 348E-349B, 350 B-C
[5] 2005 (7) BCLR 675 (SCA) par [73]-[75]

[6] In *Thint (Pty) Ltd v NDPP and Others; Zuma and Another v NDPP & Others* [6], the Constitutional Court confirmed the principle that an applicant in *ex parte* applications bears a duty of utmost good faith in disclosing all material facts in his/her knowledge.

[7] In considering the issue, the first enquiry is whether material facts were undisclosed or material facts were misstated. The second enquiry is whether a court should exercise its discretion in favour of the applicant and set the order aside.

[8] It is trite that a party must make out its case in its founding papers. It was common cause that Messrs Pillay and Hammond are the directors of the company. Mr Pillay holds a 49% shareholding in the company whereas Mr Hammond holds a 51% shareholding. In his founding papers, Mr Pillay's case was that Mr Hammond was a rogue director who constantly dissipated the company's funds by transferring large amounts to himself without authority, misused the company's funds and circumvented the agreed banking mandates and protocols of the company. His application was framed at preventing Mr Hammond from perpetuating prejudicial conduct towards Mr Pillay as minority shareholder of the company. His affidavit did not deal with how he became involved in the company. Reference was made to various substantial cash withdrawals and an amount of R510 000 paid to conveyancing attorneys pertaining to a property acquisition by Mr Hammond. Mr Pillay alleged that he was the only person entitled to load and authorise payments from the company's bank account held with the second respondent and that he had not authorised any of the withdrawals made from the company's account by Mr Hammond.

[9] There are presently many factual disputes on the papers pertaining to, *inter alia*, the central issue whether the withdrawals made by Mr Hammond were unauthorised. These disputes include whether the withdrawal of the funds pertaining to the property transaction was objected to by Mr Pillay and whether many of the company's creditors and employees of the company were paid in cash, necessitating cash withdrawals from

[6] [2008] JOL 22119 (CC) para 102

the business. Mr Hammond also disputed Mr Pillay's version regarding the daily limits on the company's banking accounts being increased by him on 14 December 2020 to R1 million and provided documentary evidence that by arrangement with the second respondent, the limit was R2 million since 27 May 2020 and payments to be released by both Messrs Hammond and Pillay. There are also disputes regarding Mr Pillay's ongoing knowledge of payments being made from the company's account. Mr Hammond averred that Mr Pillay was aware of and agreed to Mr Hammond being authorised to do telephone/internet banking and to make withdrawals as it was essential to obtain cash as many of the service providers of the company and some labourers demanded to be paid in cash.

[10] Mr Hammond's version regarding Mr Pillay's involvement in the company was by and large undisputed. According to Mr Hammond, he was the driving force behind the company who solely operated its business, whereas Mr Pillay had no involvement therein. It was not disputed that Mr Hammond had approached Mr Pillay for a loan pursuant to financial constraints suffered during the lockdown period in March 2020 under the Disaster Management Act. Mr Pillay became involved in the company during May 2020 and acquired a 49% shareholding and directorship therein as security for a loan of R3 million advanced to the company. This loan was repaid by November 2020 and negotiations were underway to procure Mr Pillay's exit from the company. This resulted in the relationship between the directors becoming strained during November 2020 as Mr Pillay was reluctant to do so.

[11] It was not disputed that no demand was made of Mr Hammond prior to the launching of the *ex parte* application, nor was he forewarned of Mr Pillay's intentions. The *ex parte* application was launched after the second respondent refused to accede to Mr Pillay's demands in a letter dated 14 December 2020, absent a court order. There is merit in Mr Hammond's contention that the *audi alteram partem* principle has been violated and thus his constitutionally protected right to be heard before an order was made.

[12] It was not expressly disputed that the *ex parte* relief which prohibited Mr Hammond from transacting on the company's business account, has effectively brought the company's business to a standstill and creditors and employees could not be paid, although Mr Pillay in reply averred that no payments had been loaded and that he would have authorised payment if this had been done. Mr Pillay did not however aver that any discussions on this issue took place.

[13] There is merit in Mr Hammond's contention that in his founding papers Mr Pillay sought to create a certain atmosphere at variance with the true facts. The information provided by Mr Pillay in the *ex parte* application was scant and selective and although technically not incorrect regarding his involvement in the company, created a distorted picture of the parties' relationship and the nature of his involvement in the business of the company. His version of the unauthorised nature of the payments is a hotly contested issue.

[14] I conclude that there was a material non-disclosure of relevant facts in the *ex parte* application which might have influenced the decision of the court whether to make an order or not. It matters not whether Mr Pillay was willful or merely negligent in not disclosing all the material facts. Had all the facts been presented, the application would not have been entertained on an *ex parte* basis.

[15] I turn to consider how the discretion afforded should be exercised. Mr Pillay's argument that the affidavit of Mr Hammond raised irrelevant and immaterial facts which did not contribute to the determination of the application does not pass muster. There are material disputes of fact on central issues as alluded to above, striking at the heart of Mr Pillay's entitlement to the relief sought. I am not persuaded that Mr Pillay has met the requirements for interdictory relief.

[16] The reasons presented for why the order was sought in the absence of Mr Hammond were not convincing, considering all the evidence. In my view there has been an imbalance considering the nature of the order granted. The nature of the order is also

oppressive considering all the facts. Moreover, various alternative remedies are available to Mr Pillay to protect his interests, inter alia the protection afforded to minority shareholders under s163 (3) of the Companies Act.[7] The authorities relied on by Mr Pillay illustrates the existence of these remedies.[8]

[17] Mr Pillay's argument that the relief obtained was sustainable on the facts and the reconsideration should be dismissed with costs, thus lacks merit.

[18] For these reasons the discretion afforded must be exercised against Mr Pillay. It follows that the *ex parte order* falls to be set aside and the application dismissed.

[19] The normal principle is that costs follow the result. There is no reason to deviate from this principle. Mr Hammond sought costs on a punitive scale. I decline to accede to this request. It would not be appropriate to grant any costs order against the second applicant as the application was clearly launched at the instance of Mr Pillay or to hold the second applicant liable for any costs in relation to the proceedings.

[20] I grant the following order:

[1] The ex parte order granted on 22 December 2020 is set aside.

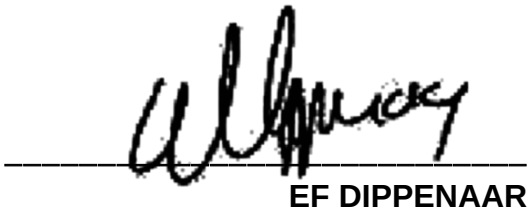
[2] The application is dismissed.

[3] The first applicant, Mr Pillay, is directed to pay the costs of the application, including the costs of the ex parte application and its reconsideration.

---

[7] 71 of 2008

[8] De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others 2017 (5) SA 577 (GJ); City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others 2018 (4) SA 71 (SCA); Grancy Property Ltd v Manala and Others 2015 (3) SA 313 (SCA)



EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 19 January 2021
DATE OF JUDGMENT	: 25 January 2021
APPLICANT'S COUNSEL	: Adv HP van Nieuwenhuizen
APPLICANTS' ATTORNEYS:	: Marques Soares Fontes Attorneys Mr Fontes
1st RESPONDENT'S COUNSEL	: Adv. JC Klopper
1st RESPONDENT'S ATTORNEYS	: IRS Attorneys Mr Steenkamp