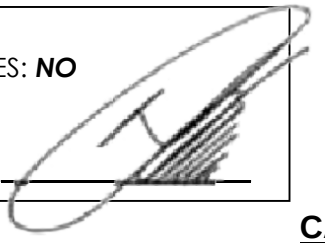
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***19th January 2021*** Signature: _____



CASE NO: 44594/2020

DATE: 19TH JANUARY 2021

In the matter between:

STEPHANE TRADING IMPORT (PTY) LIMITED Applicant

and

MANICA SOUTH AFRICA (PTY) LIMITED First Respondent

REDDY CARGO SERVICES Second Respondent

Coram: Adams J

Heard: 15 January 2021 – The 'virtual hearing' of this urgent application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 19 January 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 19 January 2021.

Summary: Urgent application – reconsideration application in terms of rule 6 (12) (c) – factual dispute – respondent's version cannot and should not be rejected on the papers – order set aside –

ORDER

---

(1) The Order of this Court of the 30 December 2020 by Makume J be and is hereby reconsidered in terms of Uniform Rule of Court 6 (12) (c), set aside and replaced with the following order: -

'1. The applicant's urgent application be and is hereby dismissed, with costs.

2. The applicant shall pay the first respondent's costs of this *ex parte* urgent application, including the costs consequent upon the employment of a Senior Counsel.'

(2) The applicant shall pay the first respondent's costs of this application in terms of rule 6 (12) (c), including the costs consequent upon the employment of a Senior Counsel.

JUDGMENT

Adams J:

[1]. As its name suggests, the applicant, Stephane Trading Import (Pty) Limited ('Stephan Trading Import'), carries on business as an importer and exporter of goods, in which it also trades. The first respondent, Manica South Africa (Pty) Limited ('Manica SA'), is a provider of transportation and warehousing services and conducts business as a clearing and forwarding agent and as a warehouseman. The business and contractual relationship between Stephane Trading Import and Manica SA was at the relevant time governed by the Standard Trading Conditions of Manica, to which I shall revert later on in this judgment.

[2]. On 2 April 2019 Stephane Trading Import instructed Manica SA to custom clear at the Zambian border and to import to South Africa a consignment of about

266.6 metric tonnes of Zinc Ore Fines and then to store it in a special customs and excise warehouse referred to as an 'SOS Bond Store'. Manica SA was therefore required to import from Zambia into South Africa the Zinc and to warehouse and store the goods on its arrival in South Africa, as well as attend to the related logistics and other administrative and regulatory requirements.

[3]. Whilst so stored Stephane Trading Import would then have had access to its goods and would have started the process of marketing and selling the wares. Whilst this process was ongoing the goods of Stephane Trading Import was stored by Manica – initially at its own SOS Bond Store at Freightnamics and later transferred to the SOS Bond Store of the second respondent, still by Manica on behalf of Stephane Trading. By the 8 November 2019 an account had been run up for an amount of R94 691.10 payable by Stephane Trading Import to Manica in respect of storage and other related charges and this sum remained outstanding notwithstanding numerous demands for payment by Manica. By 15 November 2019 this amount had grown to R153 216, with still no payments forthcoming from the applicant. By July 2020 the applicant's admitted indebtedness to the first respondent was standing at R303 182.60.

[4]. Despite numerous demands and requests by Manica SA for payment of these amounts due, Stephane Trading Import, whose goods remained in storage and under the control of Manica, failed to effect payment of its admitted indebtedness to Manica. Instead of paying the amount claimed, Stephane Trading Import, when faced with threats by Manica that it would proceed to sell the goods to defray its expenses and recover its charges, during December 2020, after its goods had been stored by Manica SA for a period of about twenty months, stole a yard on Manica and obtained an *ex parte* order in terms of which it (Manica) was interdicted from disposing of the Zinc.

[5]. What is presently before me is an urgent application by Manica in terms of the provisions of Uniform Rule 6 (12) (c) for reconsideration of the order granted *ex parte* on an urgent basis by this Court (Makume J) on the 30 December 2020. In terms of Makume J's order a *rule nisi* was issued, returnable on 28 January 2021, in terms of which the first and second respondents were interdicted from

moving or transporting the applicant's goods in their storage facilities without the applicant's permission. The respondents were also ordered to grant the applicant access to the storage facilities to assess and sample the goods.

[6]. When the matter came before me on the 13 January 2021, Manica SA had by then filed its answering affidavit, which also doubled as its founding affidavit in support of this Rule 6 (12) (c) application for reconsideration of the Court Order of the 30 of December 2020. I am therefore required to adjudicate this application in terms of Rule 6 (12) (c) on the basis of all of the affidavits filed off record on behalf of the parties.

[7]. Uniform Rule 6 (12) (c) provides as follows:

'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.'

[8]. In relation to Rule 6 (12) (c) the Court (Farber AJ) in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*, 1996 (4) SA 484 (W) at 487B, had this to say:

'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 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.'

[9]. In my assessment of the facts in this matter I have had regard to all of the affidavits filed by all of the parties involved in this matter. In that regard, I am guided by the dictum in *Oosthuizen v Mijs* 2009 (6) SA 266 (W) in which Wepener J adopted the view (at 267E) that '(t)o 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 (Pty) Ltd v*

CSDN Solutions CC and Others, 1996 (4) SA 484 (W) ([1996] 4 All SA 58) at 486H – 487D); see also *National Director of Public Prosecutions v Braun and Another,* 2007 (1) SA 189 (C) (2007 (1) SACR 326; [2007] 1 All SA 211). Wepener J went on to state in the Oosthuizen case at 269I – J, 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.'

[10]. In *The 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. . . .'

[11]. I am in agreement with the views expressed by Wepener J and I interpret his comments as authority for the proposition that the applicants are entitled to place additional facts and matter before the Court in the reconsideration application, which ought properly to have been placed before the court when the matter was originally presented. The Oosthuizen case *supra*, with which I agree, expressly supports the function and the purpose of rule 6 (12) (c), which is the fundamental principle of natural justice — *'audi alteram partem'*. I place reliance on the *Oosthuizen* case as authority especially in view of the fact that the respondents, who were absent when an urgent order was granted, placed relevant factual matter on affidavit before the court reconsidering the previous order.

[12]. Also, when dealing with factual allegations which are not common cause between the parties I will follow the well – known approach to be taken in opposed motion proceedings where factual disputes arise as set out in *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,* 1984 (3) SA 623 (A) at 634. The question in that context is whether the facts averred in the respondents' affidavits which have been admitted by the applicants, together with the facts alleged by

the applicants, justify the order sought. In other words, the court is bound by the facts in the respondents' affidavit that the applicants admit, and the facts deposed to by applicants, unless they are so far – fetched or clearly untenable that the court is justified in rejecting them on the papers.

[13]. Manica SA contends that the order granted by this Court on the 30 December 2020 stands to be set aside on procedural grounds in that Stephane Trading Import improperly obtained the *ex parte* order. Secondly, Manica SA contends that the order should be reconsidered and set aside on the merits of the application.

[14]. In light of my findings relating to the merits of the application brought by Stephane Trading Import, it is not necessary for me to deal with the procedural defects in the said application. Suffice to say that, in my view, there is merit in the contention by Manica SA that there was no basis in fact or law for the applicant to have proceeded against it *ex parte* and without notice. I agree that the applicant abused the *ex parte* procedure by failing to make full disclosure of all the relevant facts. Importantly, the applicant conveniently omitted to apprise the court of the substantial dealings and disputes that the parties had engaged in over an extended period of almost two years during their contractual relationship. So, for example, the applicant failed to mention in its founding papers that it had on a number of occasions acknowledged that it owed substantial amounts to the first respondent and that it had failed to settle its debt to the first respondents notwithstanding undertakings on many occasions to do so. Crucially, the applicant failed to draw to the attention of the court the fact that the first respondent had claimed that it had a contractual right to dispose of the goods to recoup its charges and related expenses.

[15]. However, the main dispute in this matter between the parties relates to the Standard Trading Conditions, which govern the relationship between Stephane Trading Import and Manica SA. I say that this is a dispute, although I should hasten to add that, if regard is had to the evidence before me, it may very well be that the dispute exists only in the mind of the applicant.

[16]. The standard terms and conditions that governed the relationship between the parties – at the very least on the first respondent's version – contained provisions which permitted the first respondent to sell the goods in the event of the applicant being in default of its obligations.

[17]. It therefore follows that the applicant has not made out a case entitling it in law to an interdict to stop the first respondent from dealing with the goods. There can be no doubt that the first respondent has an enforceable right to deal with the applicant's property in a manner as contemplated by the written contract between them.

[18]. The current state of our law is clear. In the case of movables, the real right of pledge, while entitling the pledgee to look to the encumbered asset for the satisfaction of his or her claim, does not automatically enable him or her to achieve this end by selling the pledged object out of hand and applying the proceeds towards the extinction of the principal obligation. In principle, the pledgee may realise his or her security only through the medium of officers of the court pursuant to a court order.

[19]. However, that general position does not apply where the pledge contains a provision which sanctions *parate executie*, that is the right to execute against the pledged property without recourse to the mechanism of the court. Such a provision is valid and enforceable in law, and entitles the pledgee to sell the movable property without recourse to the court in the event that the pledgor is in default. In that regard, see *Bock v Duburoro Investments Pty) Ltd* 2004 (2) SA 242 (SCA) at para [15]. The decision in *Bock* was applied to materially identical contractual provisions in the unreported decision of this Court (per Molahlehi J) in *C Steinweg Logistics (Pty) Ltd v Darier Alloy CC* (2019/14315) [2020] ZAGPJHC8 (17 January 2020).

[20]. Clause 38 of the Standard Trading Conditions (STC's) which are applicable between the parties contains a provision that expressly sanctions *parate executie*. That provision permits the first respondent to sell the goods by private treaty, without recourse to the court, in circumstances where the applicant

has been in default for fourteen days, and the first respondent has given notice to the applicant that the goods ‘are being detained’.

[21]. The applicant acknowledged that it was indebted to the first respondent, and that it had been in default for well over fourteen days – in fact it was more than fourteen months. The first respondent had on a number of occasions given the applicant notice that it was exercising its *lien* over the goods and would sell them if the applicant did not discharge its obligations to the first respondent.

[22]. The first respondent then duly exercised its contractual rights, and sold the goods to a third party on or about 19 December 2020. It was entitled to do so, and the contractual provisions entitling it to do so are valid and enforceable in law.

[23]. Mr McNally SC, Counsel for the first respondent, submitted that the applicant is wrong in law when it takes the position in its founding papers that, since it was the owner of the goods, the first respondent was not entitled to sell them without its permission. The first respondent was in fact permitted to exercise its rights of *parate executie,* and the applicant was not entitled to an order preventing it from doing so. I agree. From a factual point of view – applying *Plascon Evans* – the applicant’s relationship with the first respondent was governed by the STCs which incorporated a *parate executie*. That, in my judgment, is the end of the applicant’s case.

[24]. Those STCs, duly signed on behalf of the applicants, were sent by it to the first respondent on 20 September 2018 as being the applicable STCs. Those facts are not denied by the applicant, save to the extent that the deponent to the applicant's replying affidavit says that he does not know what happened at the relevant time.

[25]. Therefore, the *ex parte* order falls to be set aside or discharged on the merits.

[26]. Accordingly, the urgent interim order granted by Makume J on the 30 December 2020 should be reconsidered and replaced with an order dismissing the applicant’s urgent application.

Costs

[27]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[28]. I can think of no reason why I should deviate from this general rule.

[29]. Mr McNally has also urged me to grant a punitive costs order on the scale as between attorney and client to show the court's displeasure with the conduct on the part of the applicant. I am not persuaded that in this matter a case has been made out for punitive costs.

[30]. I therefore intend awarding cost against the applicant in favour of the respondent.

Order

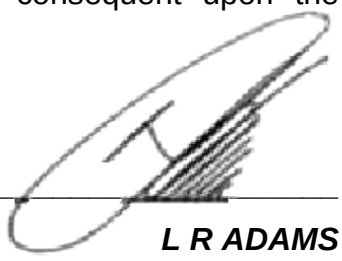
Accordingly, I make the following order: -

(1) The Order of this Court of the 30 December 2020 by Makume J be and is hereby reconsidered in terms of Uniform Rule of Court 6 (12) (c), set aside and replaced with the following order: -

'1. The applicant's urgent application be and is hereby dismissed, with costs.

2. The applicant shall pay the first respondent's costs of this *ex parte* urgent application, including the costs consequent upon the employment of a Senior Counsel.'

(2) The applicant shall pay the first respondent's costs of this application in terms of rule 6 (12) (c), including the costs consequent upon the employment of a Senior Counsel.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	15 January 2020 – in a 'virtual hearing' during a videoconference on the *Microsoft Teams* digital platform
JUDGMENT DATE:	19th January 2021 – judgment handed down electronically
FOR THE APPLICANT:	Adv L Moela
INSTRUCTED BY:	FH Munyai Incorporated, Johannesburg
FOR THE FIRST RESPONDENT:	Advocate J P V McNally SC
INSTRUCTED BY:	Prinsloo Incorporated, Johannesburg