REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 41905/2020

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

24 May 2021
Date **Signature**

In the matter between:

PROCESS DESIGN & AUTOMATION (PTY) LTD	**First Applicant**
BESISONKE NDABA	**Second Applicant**
DAVE BULLER	**Third Applicant**
JACOBUS SUTHERLAND	**Fourth Applicant**
PAUL BARNARD	**Fifth Applicant**
FRANCOIS VAN HUYSSTEEN	**Sixth Applicant**
HENDRIK VENTER	**Seventh Applicant**

and

BONGANI CYPREAN GAMEDE	**Respondent**

in re:

the *ex parte* application brought by:

BONGANI CYPREAN GAMEDE

Heard: 26 January 2021
Judgment: 24 May 2021

JUDGMENT

MOVSHOVICH AJ:

Introduction

1. This is an application for the reconsideration and setting aside of an order granted by this Court (per McLean AJ) on 10 December 2020 ("**the 10 December order**"), pursuant to an urgent *ex parte* application instituted on 4 December 2020 ("**the *ex parte* application**") by the respondent ("**Mr Gamede**"). The 10 December order is in the following terms:

1.1 that Ms Besisonke Ndaba is interdicted from authorising the transfer, in part or in whole, to any party the 25% shareholding of Process Design and Automation (Pty) Ltd ("**Process Design**") until the finalisation of court proceedings to be instituted by Mr Gamede by no later than 15 December 2020;

1.2 that Ms Ndaba is interdicted from signing any share transfer documents relating to the 25% shareholding of Process Design, in part or in whole, until the finalisation of court proceedings to be instituted by Mr Gamede by no later than 15 December 2020;

1.3 that Ms Ndaba is interdicted from ceding to any other party, in part or whole, ant of the 25% shareholding in Process Design until the finalisation of court proceedings to be instituted by Mr Gamede by no later than 15 December 2020;

1.4 that Ms Ndaba is interdicted from selling and/or offering to sell a part or in whole the 25% shareholding of Process Design until the finalisation of court proceedings to be instituted by Mr Gamede by no later than 15 December 2020;

1.5 that all directors and shareholders of Process Design (being Mr Jacobus Johannes Sutherland, Mr Dave Maclean Buller, Mr Paul Stephanus Barnard, Mr Hendrik Gideon Francois van Huyssteen, Mr Hendrik Petrus Venter) are interdicted from ceding, selling, buying and transferring, in part or whole, the 25% shareholding of Process Design currently registered under Ms Ndaba's name until the finalisation of court proceedings to be instituted by Mr Gamede by no later than 15 December 2020.

2. As will be apparent, the 10 December order is a broad-ranging interim interdict against the disposal (in whatever form) of the second applicant's ("**Ms Ndaba's**") shareholding in the first applicant ("**Process Design**"), pending the finalisation of court proceedings (presumably for final relief) ("**the main proceedings**") to be instituted by Mr Gamede by 15 December 2020.

3. Uniform Rule 6(12)(c) specifically contemplates that a person whose rights have been adversely affected by an order granted in its absence may set down the matter for reconsideration. Mr Gamede opposes the reconsideration application.

4. The second to seventh applicants are the current and former directors of Process Design.

The applicants' principal contentions

5. The applicants raise several grounds to support the reconsideration application, including the following:

5.1 Mr Gamede did not make a full and frank disclosure to this Court in obtaining the 10 December order, in that he did not disclose:

5.1.1 the existence and content of an earlier urgent application which he brought in the Gauteng Division of the High Court, Pretoria (GP case no 59836/2020) on or about 12 November 2020 ("**the Pretoria application**") seeking declaratory relief on a final basis in relation to the same issues he raised in the e*x parte* application on an interim basis;

5.1.2 that on 24 November 2020 Basson J granted an order dismissing the Pretoria application with a punitive costs order ("**the Basson order**").

5.2 The Basson order renders the issues in the *ex parte* application *res judicata*.

5.3 There was no basis for instituting the *ex parte* application without notice to the applicants, as the Pretoria application was dealt with, a few weeks earlier, in compliance with all notice requirements.

5.4 The 10 December order, in any event, lapsed in its terms given that Mr Gamede failed to institute the main proceedings by 15 December 2020.

6. It is unnecessary for the purposes of this judgment to rehearse each of the above grounds in detail.

7. For completeness, Mr Gamede's notice of motion in the Pretoria application sought the following relief:

7.1 that the matter be heard as one of urgency, and that the prescribed forms and periods be dispensed with;

7.2 that Mr Gamede be declared as the rightful owner of 25% of shares of Process Design;

7.3 that Mr Gamede be recorded as a 25% shareholder in Process Design's share register;

7.4 that Mr Gamede be recorded as a 25% shareholder of Process Design in the records at the Companies & Intellectual Property Commission;

7.5 That Mr Gamede be recorded as a 25% shareholder in Process Design's Memorandum of Incorporation;

7.6 that Mr Gamede be issued with the share certificate confirming his 25% share ownership of Process Design; and

7.7 that the applicants, jointly and severally, pay Mr Gamede's costs of suit in the Pretoria application.

Mr Gamede's responses

8. Mr Gamede avers that while his founding papers in the *ex parte* application did not disclose the Pretoria application or its outcome, he did orally inform McLean AJ of the existence of the Pretoria application and that he served a notice to remove that application from the roll.

9. Mr Gamede denies that the Basson order renders the issues *res judicata*, as Basson J merely struck the matter from the roll or dismissed it for lack of urgency, and that to the extent that the Basson order is unclear in this regard, he has instituted an application to vary such order. He asks that this be taken into account and that this reconsideration application be held in abeyance pending the variation application. He

states that, in any event, the *ex parte* application was based on "new different facts" and the Basson order should thus not stand in the way of the *ex parte* application being instituted or decided.

10. Mr Gamede also states that there was every reason to institute the *ex parte* application without notice to the applicants as he came across information shortly before launching such application to the effect that Ms Ndaba was negotiating a disposal of her shares in Process Design: hence the urgency and the need to prevent Ms Ndaba taking steps to defeat the purposes of any order which this Court would make in the *ex parte* application.

11. Mr Gamede avers that he instituted the main proceedings by 15 December 2020, but it took time for the papers to be served as Ms Ndaba was uncooperative in various respects.

Reasons for the Basson order

12. Following the hearing of the reconsideration application, Basson J handed down her reasons for the Basson order. Those reasons are dated 9 January 2021, but this seems to be a typographical error as the reasons only became available on or about 9 February 2021. The date is of no material consequence for present purposes.

13. The reasons make clear that Basson J dismissed Mr Gamede's application on numerous procedural and substantive grounds, including:

13.1 lack of urgency and non-compliance with practice directives;

13.2 lack of *locus standi*;

13.3 absence of a cause of action for the relief sought;

13.4 fatal defects in the Pretoria application;

13.5 genuine disputes of fact which cannot be resolved on paper; and

13.6 non-joinder of the Companies and Intellectual Property Commission.

14. Basson J mulcted Mr Gamede in punitive costs as a result of abuse of court process.

Legal principles related to *ex parte* orders

15. The Supreme Court of Appeal recently summarised the applicable principles and I can do no better than to quote the relevant paragraphs in full given their direct relevance to the present case (all emphases are added; footnotes omitted):[1]

> "*[45] The principle of disclosure in ex parte proceedings is clear. In* NDPP v Basson *this court said:*
>
> > *'Where an order is sought* ex parte *it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide (*Schlesinger v Schlesinger *1979 (4) SA 342 (W) at 348E–349B).'*
>
> *[46] The duty of the utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely,* audi alteram partem*. The law sometimes allows a departure*

[1] *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA), paras [45] to [52].

from this principle in the interests of justice but in those exceptional circumstances the ex parte *applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.*

[47] The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte *relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the* ex parte *applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.*

[48] As Waller J said in Arab Business Consortium*, points in favour of the absent party should not only be drawn to the Judge's attention, but must be done clearly:*

> *'There should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough.'*

[49] The ex parte litigant should not be guided by any notion of doing the bare minimum. She should not make disclosure in a way calculated to deflect the Judge's attention from the force and substance of the absent respondent's known or likely stance on the matters in issue. Generally this will require disclosure in the body of the affidavit. The Judge, who hears an ex parte *application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.*

[50] In regard to the court's discretion as to whether to set aside an ex parte *order because of non-disclosure, Le Roux J said in* Schlesinger v Schlesinger

> *'. . . [U]nless 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.'*

[51] This is consistent with the approach in English law, that if material non-disclosure is established a court will be 'astute to ensure that a plaintiff who obtains [an ex parte *order] without full disclosure, is deprived of any advantage he may have derived by that breach of duty'.*

[52] As to the factors that are relevant in the court's exercise of its discretion whether or not to set aside an ex parte *order on grounds of non-disclosure, in* NDPP v Phillips *this court said that regard must be had to the extent of the non-disclosure, the question whether the Judge hearing the* ex parte *application might have been influenced by proper disclosure, the reasons for non-disclosure and the consequences of setting the provisional order aside.*"

Assessment

16. In my view, Mr Gamede's founding papers in the *ex parte* application fall far short of the standards required of applicants who choose to approach the Court without notice to their opponents. His papers did not even mention the Pretoria application, and did not attempt to set forth what defences the applicants may have to the *ex parte* application. Yet, the applicants, on or about 18 November 2020, filed a 32 page answering affidavit, dealing with various procedural issues and substantive matters, many of which went to the heart of the rights on which Mr Gamede relied for the interdictory relief sought in the *ex parte* application.

17. It is not acceptable for an applicant in Mr Gamede's position, seeking far-reaching interdictory relief, simply to refer to the Pretoria application from the Bar in oral argument in the *ex parte* application. These matters must be traversed in full on oath in his application: there is no reason why he could not do so. In any event, there is no suggestion in his papers in the reconsideration application that he informed McLean AJ that answering papers were filed in the Pretoria application, what defences had been raised in that application or the detailed substance of any of the pleadings.

18. The high-water mark of Mr Gamede's case is that he informed the Court orally of the existence of the Pretoria application, that such application sought a declaratory order that he was the rightful owner of 25% of the shares in Process Design and that he had served a notice to remove that application from the urgent roll. This is patently inadequate. The full remit of the Pretoria application and the detailed content of any defences were clearly relevant to, or at the very least could have materially influenced, the determination of the *ex parte* application.

19. Moreover, Mr Gamede does not suggest that he informed McLean AJ of the hearing before Basson J or the existence of the Basson order. Irrespective of whether that order struck the matter from the roll or dismissed the application altogether, McLean AJ should have been informed of the hearing of the Pretoria application and its outcome.

20. Mr Gamede does not proffer any substantive reasons for failing to inform McLean AJ of the full facts as set forth above. He merely states that he was under the impression that the matter was struck from the urgent roll and was unsure what precise order had been given as his electronic connection on 24 November 2020 was faulty. If Mr Gamede was unsure about what actually transpired on 24 November 2020, then it was incumbent on him to make the relevant enquiries before launching the *ex parte* application. He had a full ten day period to do so before 4 December 2020. In any event, none of the above explains why Mr Gamede did not disclose in his founding papers in the *ex parte* application the substance of the applicants' defences and answering affidavit in the Pretoria application, *jurat* 18 November 2020.

21. The extent of the non-disclosure was substantial and no adequate explanation has been advanced for the default. So lacking in disclosure of relevant information was the *ex parte* application (information of which Mr Gamede was or ought to have been aware), that it constituted an abuse of court process.

22. In respect of the consequences of reconsidering and setting aside the 10 December order, Mr Gamede states that the order should not be set aside as the applicants will not suffer any prejudice if the interdict remains in place. To support this, Mr Gamede states that Process Design "*does not trade in its shares as part of its day to day operations and thus will suffer no harm or prejudice due to the interdict*". While it may well be that Process Design's operations will not be adversely affected, Ms Ndaba is

prevented from disposing of the shares currently registered in her name. At least one of the applicants is clearly prejudiced by the interdictory relief granted in the 10 December order. Similarly, the other directors and shareholders have some restraints placed on them under the 10 December order.

23. On the other hand, if Mr Gamede is, in fact, the owner of the 25% shareholding currently registered in Ms Ndaba's name, then he may, in due course, have a vindicatory claim against any possessor of his shares or a claim in damages for any harm he suffers as a result of being divested of his shareholding or its fruits. The interdict granted under the 10 December order, in any event, does not entitle Mr Gamede to exercise any rights flowing from such shareholding during the interim period.

24. It is also not without significance that, as appears from the reasons handed down by Basson J, she dismissed the Pretoria application not only on procedural, but also substantive grounds. Mr Gamede's attempt to obtain final relief declaring himself to be the rightful owner of the shares registered in Ms Ndaba's name was dismissed as, *inter alia*, lacking a cause of action. For the purposes of this reconsideration application, I need not reach a final determination as to whether that ruling gives rise to *res judicata* precluding all further claims being made by Mr Gamede, but it is certainly a factor which may be weighed in balance in determining whether the 10 December order should be reconsidered and set aside.

25. Taking into account all the circumstances, I am of the view that the 10 December order was granted on the basis of materially incomplete information and there is every reason why it should be reconsidered and set aside. I point out, for completeness, I would have reached this conclusion even without the considerations set forth in paragraph 24 above.

26. In light of the above findings, I do not need to deal substantively with the balance of the grounds and contentions advanced by the applicants.

Costs

27. This brings me to the issue of costs.

28. There is no reason to deviate from the general principle that costs follow the result. The applicants have been substantially successful and are entitled to their costs.

29. The next question is on what scale costs should be ordered against Mr Gamede. The applicants pray for a punitive costs order. I agree that a punitive order is warranted in this case.

30. I have found above that the *ex parte* application was materially deficient and an abuse of process. The authorities on punitive costs orders make clear, however, that the court need not even find that there was abuse or that there was dishonesty to impose an adverse costs award on a punitive scale. It is sufficient if the party in question was vexatious in the sense that it put his opponent to "*unnecessary trouble and expense, which it ought not to bear*".[2]

31. In my view, Mr Gamede's conduct in opposing the reconsideration application was, in all the circumstances, at least vexatious. The very need to pursue the reconsideration application was occasioned by Mr Gamede's abuse of court processes in procuring the 10 December order. The unnecessary trouble and expense were compounded by his opposition when the reconsideration application was ultimately brought.

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[2] *Venmop 275 (Pty) Ltd and another v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ), para [33].

Order

32. I thus make the following order:

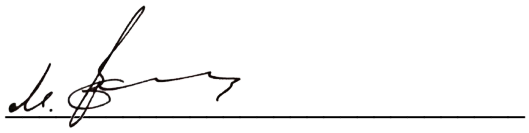
32.1 the 10 December order is reconsidered and set aside;

32.2 the *ex parte* application is dismissed;

32.3 Mr Gamede is ordered to pay the costs of this reconsideration application on the scale as between attorney and client.

Hand-down and date of judgment

33. This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand-down of the judgment is deemed to be 17:30 on 24 May 2021.



VM MOVSHOVICH
ACTING JUDGE OF THE HIGH COURT

Applicants' Counsel:	J de Beer
Applicants' Attorneys:	GP van der Merwe Attorneys
Respondent:	In person
Date of Hearing:	26 January 2021
Date of Judgment:	24 May 2021