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

CASE NO: 048154/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

15th December 2022

In the matter between:

TFM CUSTOMISING CENTRE (PTY) LTD

APPLICANT

And

FIRSTRAND BANK LTD t/a FIRST

NATIONAL BAND

FIRST RESPONDENT

SPECIALIZED VEHICLE MANUFACTURERS

(PTY) LTD

SECOND RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 15th of December 2022

TWALA J

[1] On the 24th of November 2022 the applicant came before Court on urgent basis with an ex parte application seeking and was granted a provisional order pending litigation, against the first respondent to retain and not pay out or alienate in any way (and put a hold on) any and all funds received in the bank account of the second respondent with account number [...], to the maximum amount of R4 518 318.66 plus any interest earned on the said amount.

[2] The order provided further that, should there be insufficient funds in the above account at the time of service of the order on the first respondent to put a hold on the sum of R4 518 318.66 plus interest earned, the first respondent is ordered to put a hold on all funds remaining in the account and, in addition to provide the applicant with a full statement of all amounts paid from the account with particulars of the payees (including account numbers) of any of such amounts. The order is effective from the date it is issued provided the proceedings are instituted against the second respondent within thirty (30) days of this order until the finalization of such proceedings with the costs to be costs in the action to be instituted.

[3] In anticipation and reconsideration of the order of the 24th November 2022, the second respondent has approached this Court on urgent basis. It is convenient to refer to the parties as they are referred to in the main application, the applicant as the applicant and the second respondent as the respondent.

[4] The genesis of this case is the agreement of purchase and sale of businesses that was concluded between the applicant and the respondent on the 31st of August 2022. The applicant sold its businesses operated from Durban and East London as a going concern to the respondent for the sum of R5 million. The respondent effectively took control of the business from the 1st of September 2022. A dispute arose between the parties which culminated in an application for a spoliation order brought by the respondent in the High Court Local Division KwaZulu –Natal held in Durban. On the 15th of November 2022 the High Court in Durban granted an order in favour of the respondent regarding the Durban business. However, the applicant has taken this order on appeal.

[5] It is trite that the purpose for the reconsideration of an order under Rule 6(12) (c) is to provide an aggrieved party with a mechanism to redress the injustices and oppression resulting from the granting of an urgent order in the absence of that party. It is further settled that an applicant in ex parte applications bears a duty of utmost good faith in disclosing all material facts within his knowledge which may influence the Court in making its decision.

[6] In *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) the Court quoted a paragraph from the work of Herbstein and Van Winsen on 'The Civil Practice of the Superior Courts in South Africa 2nd Edition to the following effect:

“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 wilfully 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 ground of non-disclosure. It should, however, be noted that the court has a discretion and it is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings.”

[7] The same principle was adopted by the Constitutional Court per Langa CJ in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v NDPP and Others* [2009] (1) SA 1 (CC) the Constitutional Court per Langa CJ stated the following:

“Paragraph 102: It is our law that an applicant in ex parte applications bears a duty of utmost good faith in placing all the relevant material facts before the court. The duty of good faith requires a disclosure of all material facts within the applicant’s knowledge. The Supreme Court of Appeal

reiterated in Powell that an applicant for a search warrant is 'under a duty to be ultra-scrupulous in disclosing any material facts that might inference the Court in coming to its decision.' However, an investigator cannot be expected to disclose facts of which he or she is not aware. The duty is also limited to the disclosure of facts that are material. In a complex and vast case such as the present, there can be no crystal-clear distinction between facts which are material and those which are not. There will always be room for debate. It follows that, in cases such as the present, an applicant for a search and seizure warrant will inevitably have to make a judgment as to which facts might influence the judicial officer in reaching its decision and which, although connected to the application, are not sufficiently relevant to justify inclusion. The test of materiality should not be set at a level that renders it practically impossible for the state to comply with its duty of disclosure, or that will result in applications so large that they might swamp ex parte judges."

[8] Before this Court the respondent contended that, when approaching the court on ex parte basis, the applicant has failed to disclose to the Court that as a consequent of the agreement of purchase of the business as a going concern concluded between the parties the respondent was entitled to the control of the applicant's customers account including the funds deposited in the account. Furthermore, there was no reason, so the argument went, for the applicant to approach the Court ex parte for it knew before the 10th of November 2022 when it filed its answering affidavit to the spoliation application in the Durban High Court that a sum of about R4.5 million had been transferred from its bank account to that of the respondent and had no fear of the respondent dissipating those funds.

[9] The applicant submitted that the memorandum of agreement was void ab initio for it did not have the essentials of the sale of business agreement and therefore no rights arose from it nor were transferred to the respondent. Moreover, even if it is accepted to be a valid agreement, so it was contended, the memorandum of agreement was cancelled on the 26th of October 2022. The respondent was not entitled to the money deposited in the account of the applicant nor was it entitled to transfer the money into its own account. Furthermore, there was no cause for the

respondent to transfer this money into its account. It was pure theft or fraud or negligence on the part of the respondent.

[10] It is apposite at this stage to restate the clause of the Memorandum of Agreement that is relevant to these proceedings which provides as follows:

“1. Interpretation and Definitions

1.2.9 Implementation Date – means earlier of –

1.2.9.1 the date in which the Sale of Business Agreement is implemented; or

1.2.9.2 if the sale of business is not implemented, the Signature Date.

[11] I do not understand the applicant to be disputing that a memorandum of agreement was concluded between the parties which agreement placed the respondent in control of the Durban business of the applicant from the 1st of September 2022. The applicant is challenging the validity of the agreement and this issue was not placed before the Court hearing the ex parte application. Furthermore, the applicant contends that the agreement was cancelled on the 26th of October 2022. But that does not mean that the respondent did not take control of the business and more specifically the Durban business effectively from the 1st of September 2022 because of the agreement concluded between the parties on the 31st of August 2022. The applicant failed to disclose this fact to the Court hearing the ex parte application. I therefore hold the view that the respondent was entitled to receive and dispense these moneys as it was in charge and control of the business.

[12] It should be recalled that the transactions which caused discomfort to the applicant occurred more than a month before the launch of these proceedings. The applicant was fully aware of the transfer of the R4.5 million by the 10th of November 2022 when it filed its answering affidavit in the spoliation application and still did not disclose this fact to the Court. Instead, the applicant stated that the money was stolen from its account or was fraudulently or negligently transferred by the

respondent and that it was going to lay criminal charges against the perpetrators thereof. The applicant went on to misstate the facts and misled the Court in stating as a fact that nothing has changed during the negotiations and after the signing of the agreement when in actual fact there was significant change in the management and running of the Durban business in that the respondent took control and paid salaries of its staff and other business expenses including creditors from its own account.

[13] Furthermore, it should be recalled that the applicant was prevented from wresting control of the Durban business premises from the respondent by refusing it access to the premises when the High Court in Durban granted the spoliation order on the 15th of November 2022. Three days later, on the 18th of November 2022 the applicant sought and was granted an ex parte order without disclosing all these material facts to enable the Court to decide whether to grant the ex parte order or not. This clearly demonstrates the extent to which the applicant is prepared to go to frustrate the respondent. The unavoidable conclusion is that the applicant has failed to place material facts which are known to it and which would have influenced the Court hearing the ex parte application in making a decision. This failure demonstrates the mala fides on the part of the applicant and is fatal to its application.

[14] In the circumstances, the following order is made:

1. The ex parte order granted by the above Honourable Court on 18 November 2022 under the above case number, is hereby reconsidered and set aside.
2. The first respondent is directed not to retain and not to refuse to pay out or to prevent the alienation in any way of any and all funds received in the bank account of the second respondent with account number[....] , and to release the funds from attachment.
3. The applicant is to pay the costs of this application.

TWALA M L

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION**

Date of Hearing: 29th November 2022

Date of Judgment: 15th December 2022

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