IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED8f37

2014.07.07
DATE

SIGNATURE

CASE NUMBER: 36535/14

DATE: 25 July 2014

WESLEY JABULANI RADEBE	First Applicant
GAGENI TRADE AND INVEST 111 (PTY) LTD	Second Applicant
V	
APPLE PLASTIC (SA) (PTY) LTD t/a APPLE-TEC	First Respondent
MUTETO MABASA	Second Respondent
FIBRE GLASS MOULDING CC t/a FIBRE GLASS SHOP	Third Respondent
ESKOM HOLDINGS SOC LIMITED	Fourth Respondent
GERHARDT VAN DEVENTER	Fifth Respondent

JUDGMENT

MABUSE J:

1. This is an application for a reconsideration of an order granted in an urgent court.

It was brought in terms of Rule 6(12) (c) of the Uniform Rules of Court on the

bases that when such an order was granted neither the first applicant nor the second applicant was present in court and furthermore on the ground that neither the first applicant nor the second applicant was aware of the application. The application is opposed by the first respondent.

2. The first applicant, apart from stating in the founding affidavit that he is the first applicant and that the facts stated in the said affidavit are, save where stated to the contrary, within his personal knowledge, does not state where he resides nor does he state his occupation. The second applicant is a company duly registered as such in terms of the company statutes of this country with its principal place of business at Unit 1, Washington Business Park, 7 Palm Drive, Midrand, Gauteng.

3. The first applicant brings this application for reconsideration on his behalf and also on behalf of the second applicant as its sole director. The respondent is a company registered in terms of the company statutes of this country. It conducts its business at Factory No. 6, 7 Piet Pretorius Street, Rosslyn, Pretoria, Gauteng. The first respondent was the applicant in the urgent application that served before De Vries AJ on 10 June 2014. The first and second applicants were the second and third respondents respectively in the said urgent application.

4. The crisp issue in this matter at this stage is whether or not the applicants were properly served with the copies of the urgent application. Without much ado,

counsel for the first respondent conceded that a copy of the urgent application was not served on the first applicant. This was not in dispute. The dispute in the matter refers to service of the urgent application or of a copy of the urgent application on the second applicant. With regard to the First Applicant, the battlefield between the parties is whether he was not aware of the urgent application, and not whether or not he had been served with a copy of the urgent application, and whether it can be said that the order granted against him on 10 July 2014 was can be said to have been granted in his absence.

5. According to the sheriff's return of service dated 3 June 2014 entitled Service of Notice of Motion with Founding Affidavit and Annexures annexed to the papers, a copy of the urgent application was served on the second applicant in the following manner:

"*On 28 May 2014 at 17:30 at 2577 Protea Mews, 14th Road, Noordwyk, Midrand, being the registered address of the 3rd respondent Gageni Trade And Invest 111 (Pty) Ltd. I duly served a copy of the Notice of Motion with Founding Affidavit and Annexures by affixing copies of the abovementioned documents to the outer and principal door of the said premises. No other services possible after diligent search at the given address. Rule 4(1) (a) (v).*"

6. Counsel for the first respondent submitted, on the strength of the said report, that there was proper service of a copy of the urgent application on the second applicant. He argued furthermore that the averment by the first respondent that

neither he nor the second applicant was aware of the application was not correct. He submitted furthermore that in terms of the Certificate of Confirmation ("CoC"), a copy of the official document from the office of the Companies and Intellectual Property Commission ("CIPRO"), the second applicant's registered office was 2577 Protea Mews, 14th Road, Noordwyk, Midrand, 1685. As this was the registered office of the second respondent and as a copy of the urgent application was served at that place, according to the sheriff's return of service, he submitted that there was therefore proper service of the urgent application on the second applicant.

7. According to the said Certificate of Confirmation, the registered office of the second applicant at CIPRO at the material time of service of a copy of the said application on 28 May 2014 was 2577 Protea Mews, 14th Road, Noordwyk, Midrand 1685. Section 23(3) of the Companies Act No. 71 of 2008 provides as follows:

"*Each company or external company must –*

(a) continuously maintain at least one office in the Republic; and

(b) register the address of each office or its principle office if it has more than one office -

(i) initially in the case of –

(aa) a company, by providing the required information on its Notice of Incorporation; or

(bb) ...

(ii) subsequently, by filing a notice of change of registered office together with the prescribed fee."

Accordingly, in terms of Rule 4(1)(a)(v) of the Uniform Rules of Court, service of any process on a company may be effected at the registered office or its principle place of business by delivering the copy to a responsible employee thereof at its registered office. If there is no such employee willing or present to accept service of such process, service of such process may be served by affixing a copy thereof to the main door of such office or place of business of such company. Accordingly service of the process by affixing it to the door of the registered office of a company as it has happened in this case will be effective.

"*Rule of Court 4(1)(a)(V) can only be made workable if the term "registered office" is interpreted as the Courts in practice do interpret it, namely the office properly notified to the Registrar of Companies as the registered office."*

See ***Hardroad (Pty) Ltd v Moribi Motors (Pty) Ltd 1977(2) SA 576 (W).***

8. On behalf of the second respondent it was argued that service of the address as reflected in the sheriff's return of service was not proper service; that the said address was not the registered office of the second applicant and that the second applicant's principal place of business was Unit 1, Washington Business Park, 7 Palm Drive, Midrand, Gauteng. This address, in my view, is not the registered address of the second applicant. Section 1 of the Companies Act defines the registered office as:

"*The office of a company or an external company that is registered as required by section 23.*"

The address which the applicants refer to as the second applicant's principal place of business was not the registered office of the second applicant as envisaged by the provision of section 23(3) of the Companies Act.

9. Counsel for the applicants referred me to **Kubyana v Standard Bank 2014(3) SA 56 (CC)** and argued, in favour of the second applicant, that it was not sufficient for the first respondent to rely on the sheriff's return of service. He developed his argument and contended furthermore that there was still a duty on the first respondent to make sure that a copy of the urgent application had come to the knowledge of the second applicant. With respect to him I do not agree with him. Quite clearly he has misunderstood the law as it is set out in the said authority. The first respondent need not do more than have a copy of the urgent application, as it happened in this case, served on the second applicant in accordance with the provisions of Rule 4(1)(a)(V) of the Uniform Rules of Court. Accordingly I find that there was proper service of a copy of the urgent application on the second applicant.

9. I now turn to the situation of the first applicant which appears to be convoluted. At the pain of repetition counsel for the first respondent conceded that there was no service at all of a copy of the urgent application on the first applicant. In his affidavit for his application for the reconsideration of the order of De Vries AJ, the

First Applicant stated that when the impugned order was granted he was neither present in court nor was he aware that an application was brought against him. It is for these two reasons that he brings this application in terms of the provisions of Rule 6(12) (c) of the Uniform Rules of Court. The said rule 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.*"

10. The word "*absence*" means, according to the South African Concise Oxford Dictionary, "*the state of being away from a place or person*". Rule 6 (12) (c) does not state that an application to reconsider an order granted in an urgent application may be brought by a person who has not been served with a copy of the process by which an urgent application was initiated. The touchstone is not whether or not a person who brings such an application has been served with a copy of the process but firstly, whether such order was made in his absence and secondly whether he was aware that an application whose results would, one way or the other, affect his rights has been brought. In **ISDN (Pty) Ltd v. CSDN Solutions CC And Others 1996(4) SA 484 (WLD)**, the Court per Farber AJ, stated that:

"Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence."

Therefore this rule does, and will, not assist a person who has not been served with a copy of the application but who is aware of that such an application has been launched against him or her and who was present during all the hearing of such an application when an order is made, even if he walks out of the Court room before the pronouncement of the actual order.

11. Now the question is, was the first applicant aware that an urgent application has been brought against him? The answer to this question lies on circumstantial evidence. There are circumstances, in my view, which showed quite convincingly that the first applicant was aware or at least should have been aware of the application against him personally. I now turn to such circumstances.

    11.1 According to the Certificate of Confirmation attached to the papers and referred to herein earlier, the registered office of the second applicant was at the same time the first applicant's residential address. Once a copy of the application was served on the second applicant in terms of Rule 4(1)(a)(V) the first applicant should have become aware of the application in that he was also a party to it.

    11.2 On 1 June 2014 one Muteto Mabasa, now the second respondent in the urgent application, wrote a letter to Mr. Jabulani Radebe. Jabulani Radebe is the first applicant in this matter. The said letter or part of it reads as follows:

    "*Dear Mr. JW Radebe*

I am shocked that your company continued to use my name in its dealings with its client when you knew that I sold my 50% shares back to you on 17 July 2013 at a nominal fee of R1000,00 (one thousand rand).

I became aware that your company in its correspondence and documents is still using my name as a shareholder when I received the court papers on 30/5/2013."

Clearly the date 30/5/2013 constitutes an error and should actually read 30/5/2014. This is so because the letter itself was dated 1 June 2014. The applicant received the above letter on 1 June 2014. The court papers could not have referred to any other urgent application. The first applicant could and should have investigated the complaint by Mr. Mabasa and in particular the court papers he had received on 30/5/2013 (sic). He was consequently aware of the urgent application.

11.2.1 The first applicant submitted in paragraph 75.4 of his founding affidavit that he received the said letter from the said Mr. Muteto Mabasa. For inexplicable reasons in his affidavit he incorrectly referred to Mr. Muteto Mabasa as the first respondent. Mr. Mabasa was instead the second respondent in the urgent application. It is nevertheless clear that he acknowledged receipt of the letter from Mr Mabasa and not from the first respondent.

11.2.2 Notwithstanding the clear and unambiguous words of the said letter, the first applicant tries to pull wool down the court's face by stating in paragraph 75.5 of his affidavit that:

"*What the first respondent is referring to is when I made enquiries at Escom in May 2014 for the purpose of securing work and when I submitted the CK1 form to Escom my name appeared on the company profile of Umgeni Trade.*"

11.2.3 In the first place, this statement is clearly misleading. The first respondent simply buries his head in the sand and pretends that he did not read the words "the court papers received on 30/5/2013".

11.3 He was at court on 10 June 2014. He knew why he was at court. In a letter dated 10 July 2014 written by Mr. CN Groenewald of the first respondent's attorneys and addressed to Phungula Incorporated, the applicants' attorneys, it was drawn to the attention of the applicants' attorneys that it is not correct that the first applicant was not at court on 10 June 2014 when the urgent application was heard. Furthermore it was pointed out that Mr. Mike Potgieter, who knew the first applicant, saw the first applicant at court during the hearing of the urgent application. This is no longer in dispute. In paragraph 6 of the letter dated 15 July 2014 from the applicant's attorneys to the first respondent's attorneys it is recorded as follows:

"*Mr Radebe and his wife attended court on 10 July 2014 for about 20 minutes to lend Mr. Mabasa moral support as their friends.*"

This constitutes and admission that, contrary to what is stated in his founding affidavit for the reconsideration application that the First Applicant was present at court during the hearing of the application. He failed while he was at court to try and find out why his name was in the papers when he had not been served with a copy of same. He failed to establish from the first respondent's attorneys why he had been cited as a party in the papers. He also failed to take the matter up himself with Mr Mabasa's attorneys. He failed to do all these because he relied wrongly on the fact that he had not been served with a copy of the application. That the first applicant was aware of the urgent application was clearly demonstrated by the following paragraph 6 of the said attorney's letter:

"*Mr. Radebe was telephoned by the first respondent, Mr. Mabasa, who conveyed to Mr. Radebe that he was in receipt of an application to interdict him and told Mr. Radebe when the matter was set down.*"

Accordingly, the first applicant knew about the application, not only through the letter that Mr Mabasa had written and delivered to him but also through the telephone conversation of 1 June 2014. A person who has full knowledge of an application being brought against him but remains supine to such application or indifferent to the consequences that may follow runs the risk the court may not come to

his assistance if he complains that he was absent when of an order being was against him.

Accordingly I make the following order:

The application is hereby dismissed with costs, the one paying the other to be absolved.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants:	*Adv. SS Cohen*
Instructed by:	*Phungula Inc.*
Counsel for the respondents:	*Adv. DA Preis (SC)*
Instructed by:	*Mac Robert Inc.*
Date Heard:	*22 July 2014*
Date of Judgment:	*25 July 2014*