IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

20/4/16.

CASE NO: A1044/13

In the matter between:

TRYPHENA MOLETE	First Applicant
TRYPHENA MOLETE NO	Second Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

08/03/16
DATE

SIGNATURE

DANIEL MOLETE	First Respondent
DANIEL MOLETE NO	Second respondent
JOSEPH MOLETE	Third Respondent
MOHAYABO MOSES MOLETE	Fourth Respondent
WILLIAM MOLETE	Fifth Respondent
JOY MPHELE RAPHESU	Sixth Respondent
EVA MOLETE	Seventh Respondent
AGNES MOLETE	Eighth Respondent

JUDGMENT

Tuchten J:

1 This is an appeal from an order made by Preller J in the court below discharging a rule *nisi* granted by Mabena AJ upon an *ex parte* application made by the present appellant in the unopposed motion court of this Division. The appellant approached the court below both in her personal capacity and as executrix in the estate of her late husband, Mabolo Silas Molete (the deceased).

2 When the appeal was called before us, it emerged that the respondents' attorney had neglected to brief counsel to resist the appeal even though the respondents had put him in funds in this regard. At a late stage, this attorney telephoned Adv Saaiman, who had appeared for the respondents in the court below, and asked him to accept the brief. However, Adv Saaiman had already taken a brief for the day of the appeal and declined the brief offered to him by the respondents' attorney. Fortunately, the case for which Adv Saaiman had been briefed settled before the present appeal was called before us and Adv Saaiman appeared, without papers and with only his recollection of the matter, to help the respondents and the court. We are indebted to Adv Saaiman for his assistance. The attorney has of course, if what I have described above is factually correct, been guilty of a serious dereliction of duty and we shall reflect our disapproval of the attorney's conduct in a special order for costs, in regard to which we invited Adv Saaiman to make submissions. Counsel was unable

to submit that costs order against the attorney which I shall propose would be inappropriate. I shall however provide in the order that this aspect of the costs order will be provisional, so that the attorney can have it reconsidered it if he or she so wishes.

3 The appellant approached the court below on a notice of motion dated July 2012 (the date was otherwise left blank). The relief sought was divided into interim relief (Part A) and final relief (Part B). The claims related to 11 motor vehicles, said by the appellant to belong to the estate of the deceased.

4 The interim relief claimed in Part A of the notice of motion was brought *ex parte* and directed at preserving the vehicles and certain documents pending the determination of Part B. The basis for the Part B relief was the allegation that the estate was the owner of the motor vehicles. This allegation had been the subject of dispute between the appellant and several other members of the Molete family since 2011. These family members, among whom are the respondents in the present proceedings, maintained that the motor vehicles had been bought by and used in the family business, in which during his lifetime the deceased seems to have been a partner or employee. For licensing purposes, however, the respondents claimed, the vehicles

had been registered in the name of the deceased, who in life was the brother of the fourth respondent.

5 The appellant disclosed that these vehicles had been the subject of dispute in two previous court proceedings in the Bochum magistrate's court under case no. 74/2011, the first on 24 August 2011 and the second on 6 October 2011, in both of which the appellant had been unsuccessful. All the appellant disclosed about these proceedings in her founding affidavit was that, according to her, she had lost the first case for lack of urgency and the second because the monetary value of the assets she claimed exceeded the monetary limit of the jurisdiction of the magistrate's court.

6 The justification for proceeding without notice to the respondents in relation to the Part A relief was set out in paragraph 25 of the founding affidavit. The grounds were in summary said to be a fear that the respondents would damage the vehicles themselves or "replace the vehicles' parts from those cars in order to frustrate my rights" or might damage the vehicles deliberately or subject them to theft and other damage. While conceding that she was "not sure of the extent of the respondents' reliable assets", the appellant asserted that the respondents would not be able to satisfy their indebtedness to her if they should destroy the vehicles and would not make a reasonable

payment to her while the matter was in progress. The appellant asserted that there would be no prejudice to the respondents if the vehicles were placed in her possession. The respondents, she said, would be able to state their case at a later date.

7 The appellant added that she would suffer personal loss if the vehicles were not preserved as the respondents did not have assets to satisfy any claim she might have and asserted that the vehicles were subject to risk of further damage "as there was a likelihood that the respondents have not insured ... or regularly serviced" the vehicles.

8 The order of Mabena AJ made on 17 August 2012 directed the respondents to hand over the vehicles and documents relevant to the sheriff for preservation pending the adjudication of the Part B relief.

9 The order was executed on 29 August 2012. Five of the vehicles were removed by the acting sheriff for the district of Bochum and stored. In the sheriff's return, the sheriff informed the appellant and the court that he intended to charge R100 per day per vehicle plus VAT for the storage and would not release the vehicles unless payment was forthcoming. The remaining four vehicles were for various reasons not removed.

10 The respondents then brought an urgent application for the reconsideration of the order of Mabena AJ. In their answering affidavit, deposed to by the fourth respondent and presented for the reconsideration, the respondents made the case that the vehicles were used in the family business and had been bought and paid for by the business. The second respondent, who had been cited as the executor of the deceased estate of the family matriarch, the late Selina Makgasa Molete, denied that he was the executor in her estate. Besides that, the other respondents merely confirmed what the fourth respondent said. The appellant admitted that a family business existed but otherwise responded with bare denials to these allegations and gave no basis for her denials. On the appellant's own version, she played no part in the management of the family business. So her denials can carry no weight.

11 Although these matters were not traversed in the papers before this court, it can be gleaned from the papers in the magistrate's court proceedings attached as annexures that the family business, or a division of the family business, is the Komang Kanna Café, which was said to have been owned by the late Selina Makgasa Molete's late husband. The late Selina Makgasa Molete was at that stage in possession of the business and the vehicles as the executrix of her late husband's estate and his heir. The appellant apparently asserted

in the magistrate's court that this business had been given by the late Selina Makgasa Molete's late husband to the deceased, an allegation denied by the late Selina Makgasa Molete in an affidavit in the magistrate's court proceedings, as was also the allegation that the vehicles belonged to the deceased.

12 The respondents further made the case in the answering affidavit, correctly, that the grounds upon which the appellant sought relief *ex parte* were speculative and that no evidence as such was presented by her in support of her assertions. No actual evidence was presented by the appellant in reply in response to that challenge.

13 The reconsideration application came before Preller J. The learned judge concluded that it was impossible to come to any conclusion on the opposing contentions regarding the ownership of the vehicles. It was implicit in this finding that the court below concluded that the appellant had made out no more than a weak *prima facie* case, if even that, on the central question in the dispute, ie who owned the vehicles.

14 Counsel for the appellant in heads of argument criticised this finding, submitting that the incidence of ownership was irrelevant. This, argued counsel, was only relevant when Part B came to be considered and

it was only Part A that was before the court. As I shall show, counsel's submission was incorrect.

15 Preller J proceeded to conclude that the appellant had moved the court below *ex parte* because she knew that the respondents had a defence to her claim which had already in substance been raised in the magistrate's court and that the reason the appellant moved this court *ex parte* was probably to avoid having to deal with the, to her, inconvenient fact that a defence to her claim *on its merits* had been raised on a previous occasion.

16 I agree with this conclusion. The appellant has produced no evidence in support of her ultimate claim except for the fact of registration. This registration, it need hardly be said, is merely an administrative procedure and cannot be compared with the registration of immovable property in the name of a particular person. It is highly probable that the true motive of the appellant, and those who were advising her, in coming *ex parte* was to fortify her negotiating position against the respondents by depriving the business of the use of the vehicles. This was in my view entirely improper.

17 Section 11 of the Administration of Estates Act, 66 of 1965 confers a statutory right on the executor of a deceased state to take temporary custody any "... property ... which belonged to ..." a deceased person. The proviso to s 11(3) however provides that the provisions of s 11(3) which oblige a person in possession of property of a deceased person to surrender such property to the executor "... shall not affect the right of any person to remain in possession of such property ... under any contract, right or (*sic* of?) retention or attachment".

18 Section 11 of the Administration of Estates Act was not relied upon by the appellant either in her papers before the court below or in argument. Her case was based on ownership and an assertion that the balance of convenience favoured a preservation order under which, the appellant submitted temporary custody of the vehicles should In the circumstances be given to the sheriff. It remained for the appellant to show that she had prospects of success in proving that the vehicles belonged to the estate and that the vehicles should be taken off the road and held by the sheriff until the dispute was resolved. I do not think, for the reasons given below, that s 11 advances the appellant's case.

19 Preller J concluded that on the evidence before him, he would not have granted the *ex parte* order. Because the learned judge was sitting in the urgent court, full reasons for this conclusion were not given. I however agree with the conclusion and I shall say below why I do so.

20 The starting point is the nature of the reconsideration proceedings which served before Preller J. Their dominant purpose is to permit an aggrieved person against whom an order was granted in her absence to have that order reconsidered. It provides a mechanism to redress the imbalance inevitably present when both parties to a dispute are not before the court. Rule 6(12), under which a reconsideration takes place, affords a wide discretion both as to procedure and to remedy.

21 An order granted *ex parte* is by its nature provisional, irrespective of the form which it takes. Once it is contested and the matter is reconsidered by a court, an applicant is in no better position than he or she was when the order was first sought and there is no reason why he or she should be in a better position in this respect merely because the respondent was unaware of the proceedings.[1]

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[1] Compare *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 2 SA 385 SCA para 45, quoting with approval from *Ghomeshi-Bozorg v Yousefi* 1998 1 SA 692 W at 696D-E

22 An order granted in the absence of a party to whom notice should have been given should, at the instance of the aggrieved party, be set aside as one erroneously granted as contemplated by rule 42 (1)(a), unless, possibly, there are weighty considerations such as the interests of any parties other than the litigants which may be affected by the rescission.[2]

23 A litigant who proceeds *ex parte* assumes very significant burdens and runs very significant risks. In particular the *ex parte* applicant must go further than merely setting out his or her case as he or she would if his or her application were brought on notice. He or she owes a duty of good faith which requires the disclosure of all facts and circumstances, however unpalatable to the applicant, which *might* influence a court to decline to hear the application *ex parte*. If in subsequent proceedings it appears that there has been such a non-disclosure, the court hearing those subsequent proceedings may on that ground alone set side the original *ex parte* order, regardless of the strength of the case put up by the errant applicant.[3]

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2 *Clegg v Priestley* 1885 3 SA 950 W 954I. Compare *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 6 SA 87 SCA para 24.

3 *Schlesinger v Schlesinger* 1979 4 SA 342 W as repeatedly affirmed. See eg *Hassan and Another V Berrange NO* 2012 6 SA 329 SCA para 14

24 I do not think that the appellant justified the approach to the court *ex parte*. I agree with the submission made on behalf of the respondents that the case made by the appellant in this regard was mere assertion. The right to be heard before *any* relief is granted against one is not only a most valuable procedural right but is embedded in the notion of a *fair* hearing in s 34 of the Constitution. The argument one frequently hears in cases in which orders are sought *ex parte* and which was made by the appellant in her papers and advanced by her counsel before us, that all that is being asked is interim relief which can be reconsidered at a later stage. There is no merit whatsoever in the argument. It takes no account of the harm, particularly but by no means only commercial harm, which such an order can cause. In the present case, the respondents' capacity to conduct the family business must manifestly have been seriously prejudiced by the execution of the *ex parte* order. The fact that eleven vehicles were involved, some of which were designed for the transport of goods, ought to have alerted Mabena AJ to the risks attendant upon the grant of an order without first hearing the other side.

25 It is clear then there was a material non-disclosure. If Mabena AJ had been told that the ownership of the vehicles had been in dispute since at the latest 2011 and that the respondents claimed to be using the

vehicles in the family business, it is highly doubtful, to say the least, that the *ex parte* order would have issued.

26 I have no hesitation in affirming the decision of Preller J on the basis that the appellant ought never to have been allowed to proceed *ex parte* on the strength of the case made out by her and that the order ought to be set aside for material non-disclosure. No interests of third parties are affected by the order. There further is an element of legal policy that must be taken into account. The abuse of the *ex parte* procedure is a prevalent mischief in this Division.[4] A court should not lightly allow a litigant who is guilty of seeking *ex parte* relief without justification for the failure to serve or who is guilty of a non-disclosure to escape the most condign consequences of his or her actions.

27 I think I should also consider the merits of the application for Part A relief, as identified in the affidavits which ultimately served before Preller J. The Part A relief was in essence an application for an interim mandatory interdict. What an applicant must show in this regard is well known.

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[4] Our roll which included the present appeal demonstrates this point. Two out of the three appeals on our roll arose from the grant of orders *ex parte*.

28 The applicant must establish a *prima facie* right, a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted, an absence of any other satisfactory remedy and a balance of convenience in favour of the grant of interim relief. Where there are factual disputes, the facts set out by the applicant must be taken together with any facts as set out by the respondent which the applicant cannot dispute and the court must consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief. The facts set up in contradiction by the respondent then fall to be considered. An applicant upon whose case serious doubt is thrown cannot succeed in obtaining temporary relief.

29 Once a well grounded apprehension of irreparable harm and the absence of an adequate ordinary remedy are established , the court is vested with a discretion, which will usually resolve into a consideration of prospects of success and the balance of convenience. The stronger the prospects of success, the less need for such balance to favour the applicant. Conversely, the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.[5]

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[5] See, eg, *Cipla Medipro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 4 SA 579 SCA para 40.

30 I think that serious doubt has been thrown on the appellant's case. I have shown how her case for ownership on the part of the deceased rests on no more than the fact of registration. Against that, there is the evidence that the vehicles were not bought by the deceased and that the vehicles were not in his possession or used by him personally at the time of his death. Nor is there any evidence that the deceased was remunerated for "allowing" (as the appellant's case would imply) the vehicles to be in the possession of and used by someone other than the deceased.

31 But as with most interim interdict cases, the balance of convenience is decisive. The vehicles are said by the respondents to be used in the family business. The prejudice to the business if it were to be deprived of the use of the vehicles is obvious. Indeed counsel for the appellant conceded that it was not in the interests of the estate of the deceased that the family business should be prejudiced. It is significant in this context that the appellant does not identify any particular individual as using and possessing any particular vehicle. The probabilities that the vehicles were indeed used by the business favour the respondents' version. As the appellant has at best a weak case on the merits and the balance of convenience favours the respondents. I would on the merits have refused the Part A relief.

32 There is a further matter with which I must deal. I have mentioned that the sheriff declared in his return that he would not release the vehicles unless his self-assessed storage fees were paid. I do not think that he has any rights in this regard against the respondents. His duly assessed fees must be paid by the attorney who instructed him. Because the attorney is liable to the sheriff, I cannot see that the sheriff has any claim for enrichment against the respondents. It therefore follows, as I see it, that the sheriff has no storage lien enforceable against the respondents. I shall therefore propose an order that the sheriff must return the attached vehicles to respondents and may not withhold them on the ground that his fees have not been paid. As the sheriff has not been heard on this point, I shall frame this part of the order too as provisional, with a right on the part of the sheriff to approach the motion court of this Division for a reconsideration.

33 It follows accordingly, in my view, that the appeal cannot succeed. The appropriate costs order in such a case would usually be that costs follow the result. However, because of the dereliction of duty by the respondents' attorney, I propose that these costs be disallowed. To ensure that the respondents themselves are not prejudiced, I propose that their attorney be barred from claiming any fees or disbursements

from the respondents and that any money paid by the respondents to their attorney on account of the appeal must be refunded.

34 I propose that the following order issue:

1 The appeal is dismissed.

2 The sheriff who has custody of the motor vehicles described in the return of service dated 6 September 2012 at pp69-70 of the present appeal ("the vehicles") must immediately restore all the vehicles by delivering them to the respondents at Milton Duff Farm, 26 Ga-Molete, or such other address the respondents may notify to the sheriff in writing.

3 The sheriff shall not be entitled to withhold the restoration of any of the vehicles as ordered in 2 above on the ground that the sheriff's fees or other costs in relation to the storage of the vehicles have not been paid.

4 There will be no order as to the costs of the appeal.

5 The attorney for the respondents may recover no fees or disbursements from the respondents in relation to this appeal and must forthwith refund to the respondents all money paid by the respondents to their attorney on account of this appeal.

6 The orders in 2, 3 and 5 above will be provisional as against the sheriff and the respondents' attorney respectively for a

period of 10 days. The period of 10 days will run in the case of the sheriff from the date upon which the sheriff acquires notice of the contents of this order and in the case of the respondents' attorney from the date upon which this judgment is handed down. The sheriff and the respondents' attorney respectively may, during such period, approach the motion court of this Division on notice to all the parties for a reconsideration of the orders in 2, 3 and 5 above. Failing any such approach, the orders in 2, 3 and 5 above will become final.

NB Tuchten
Judge of the High Court
8 March 2016

I agree. It is so ordered.

RG Tolmay
Judge of the High Court
March 2016

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