




**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case Number:** 23467/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
<b>E.M. KUBUSHI</b>	
<b>DATE: 10 MAY 2022</b>	

In the matter between:

**DEVCO AUCTIONEERS & SALES (PTY) LTD** **1<sup>st</sup> APPLICANT**

**WIEHANN FORMWORKS & HIRE (PTY)LTD** **2<sup>nd</sup> APPLICANT**

and

**EJ NAUDE** **1<sup>st</sup> RESPONDENT**

(In his capacity as appointed business rescue  
Practitioner of GD Irons Construction (Pty) Ltd)

**GD IRONS CONSTRUCTION (PTY) LTD** **2<sup>nd</sup> RESPONDENT**

**GUARDRISK INSURANCE COMPANY LIMITED** **3<sup>rd</sup> RESPONDENT**

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**JUDGMENT**

**KUBUSHI J**

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 10 May 2022.

[1] On 30 April 2022 the first and second applicants approached this court, on an urgent basis, seeking an interdictory order against the first and second respondents ("the main application").

[2] The court granted the said interdictory order which prohibited the first and second respondents from removing any movable property listed in an invoice attached to the order as annexure "A". The first and second respondents were also interdicted and restrained from interfering with and/or obstructing the applicants accessing the properties referred to in the order, in an attempt to collect the movable property listed in the said Annexure "A". The order was to operate as an interim interdict with the return date of 19 July 2022. The order was, therefore, in essence a rule *nisi*.

[3] The first and second respondents (as applicants) are now before this court having anticipated the rule *nisi* and enrolled the matter for hearing in the urgent court on 5 May 2022 for the reconsideration of the order granted on 30 April 2022.

[4] Appearing in this court is Mr Basson, counsel for the first and second applicants; Mr Du Plessis (SC), counsel for the first and second respondents and Mr Van der Merwe, counsel for the third respondent.

[5] The relief sought by the first and second respondents, is set out in the following terms:

**"NOTICE IN TERMS OF RULE 6(12)(C) AND NOTICE OF  
ANTICIPATION OF THE RULE *NISI*"**

**PLEASE TAKE NOTICE** that First and Second respondents in this matter apply for the application to be reconsidered in terms of rule 6(12)(c) of the rules of the above Honourable Court, after the rule *nisi* in this matter was granted in the absence of the First and Second respondents, and that First and Second respondents also give notice of anticipation of the return date of the rule *nisi*, to **Thursday, the 5<sup>th</sup> of May 2022 at 14h00.**

An order will also be sought for the return of any assets that have been removed by applicants. A draft order in this regard will be presented to the court.

**PLEASE TAKE NOTICE** that the answering affidavit of (?) filed in answer to the application of the applicants will be used in support of this application.

**KINDLY** enrol this application to be heard on an opposed urgent basis in the urgent court on **5 May 2022**"

[6] Two main questions that ought to be determined is whether the provisions of Uniform Rules 8 and 6 (12) (c) find application in the circumstances of this case. That is, whether the return date of the rule *nisi* can be anticipated and whether the order granted can be reconsidered by this court.

[7] It is this court's view that in the order of things, the anticipation application ought to be considered before the reconsideration application.

[8] The first and second respondents' case in the relief they seek for the anticipation of the rule *nisi* is couched as follows in their affidavit:

- "4. The first respondent herewith seeks to anticipate the rule *nisi* order granted on 30 April 2022 under case number 23467/22 – attached hereto for ease of reference as annexure "A".
5. As appears from the answering affidavit that has been filed in this matter, the first and second respondents are entitled at this point in time to be in possession and control of the movable property, because of the fact that the agreement between second respondent and Guardrisk has been suspended in terms of section 136(2) of the Companies Act, and because of a moratorium against any legal proceedings or enforcement actions against the second respondent in terms of section 133(1) of the Companies Act. The second respondent is the common

law owner of movable property, and the assets therefore have to be returned to the second respondent. The second respondent requires the assets for purposes of continuing with a construction contract, in the process of being rescued. If the assets cannot be used by the second respondent for purposes of this project, the second respondent will have to be liquidated, and a huge number of jobs will have to be lost.

6. The applicants have begun on 3 May 2022 to remove the movable property from the above properties, and it is therefore urgent that the applicants be stopped from removing the movable property from the properties where they are, so as to enable the second respondent to take possession of the movable property for use at its construction site in Middleburg.

7. It is for this reason that the anticipation of the return day is sought"

[9] In terms of Uniform Rule 8 any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty-four hours' notice. The provisions of this sub-rule are said to apply only where an order has been granted against a person *ex parte* and where a return day has been fixed. The sub-rule is said to come to the aid of a person who has been taken by surprise by an order granted *ex parte*.<sup>1</sup>

[10] Nowhere in the affidavit of the anticipation application is it contended by the first and second respondents that the application was granted *ex parte*. From the reading of their case referred to above, it is evident that the grounds and/or circumstances provided by the first and second respondents in support of the anticipation application, before this court, do not meet the requirements of Uniform Rule 6(8).

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<sup>1</sup> See Erasmus: Superior Court Practice 2<sup>nd</sup> edition Volume 2 pD1-81 and the cases quoted thereat.

[11] In an attempt to bolster the first and second respondents' case that Uniform Rule 6(8) was applicable in this matter, their counsel contended that the order in the main application was granted *ex parte* on the basis that it was not properly served on the first and second respondents, that is, the first and second respondents were not notified about the application before it was heard.

[12] In this regard, counsel sought to rely on the contents of the answering affidavit which is attached to the reconsideration application and appears to have been set down for hearing on 3 May 2022. Of concern is that the relief sought in this reconsideration application, save for the date of hearing, is similar to that sought by the first and second respondents in the anticipation application. Both applications are in terms of section 6(12)(c), both seek the reconsideration of the order granted on 30 April 2022 both also seek the anticipation of the rule *nisi* of 30 April 2022.

[13] The deponent in the anticipation application in some parts refers to the evidence in the reconsideration application. But, it is not clear how the two affidavits in the respective applications support each other. Besides, even the evidence referred to, does not assist the first and second respondents in their case to have the rule *nisi* anticipated by this court because that evidence does not satisfy the requirements in Uniform Rule 6(8) that that application was granted *ex parte*.

[14] This court was further informed during argument that the reconsideration application served before Khumalo J on 3 May 2022 and was struck from the roll due to lack of urgency. There is, however, a dispute as to what was actually argued and sought as a relief before Khumalo J. The first and second applicants and the third respondent's counsel's proposition being that the reconsideration application was heard and struck from the roll whilst the first and second respondents' counsel argued that only an interdictory order to stop the first and second applicants from removing the movable assets from the premises, was sought. None of the parties provided me with a transcript of the record as proof of what transpired before Khumalo J.

[15] Be as it may, this court, on this point alone, has to conclude that the application must fail. The relief sought in terms of Uniform Rule 6(8) is in the circumstances of this matter incompetent, and the application falls to be dismissed.

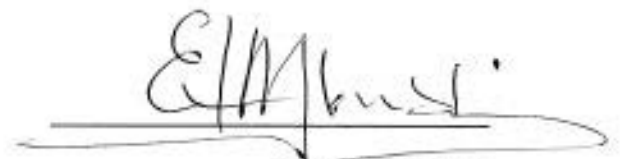
[16] Even though this court would have been inclined to grant the anticipation application, it would still not have granted the reconsideration application as that application is not before it. Like it was said earlier, the relief the first and second respondents seek in the application before this court is for both the reconsideration of the order and the anticipation of the rule *nisi* that were granted on 30 April 2022. However, the affidavit attached to the application that is before this court pertains only to the anticipation of the rule *nisi*. The affidavit and evidence that pertains to the reconsideration of the order is attached to the notice of motion that was allegedly heard by Khumalo J on 3 May 2022. The affidavit that is before this court does not incorporate the evidence that is in the affidavit pertaining to the reconsideration application. As it was stated earlier, the affidavit before this court refers in some parts to the affidavit in the reconsideration application but does not explain on what basis that evidence is referred to, even then, the evidence that is referred to, does not have any bearing whatsoever on the anticipation of the rule *nisi*. As such, this court does not have to consider that evidence. There is thus no evidence before this court in support of the reconsideration application.

[17] The first and second applicants' counsel applied for a punitive cost order against the first respondent personally raising various grounds for such application. I am however not of the view that the circumstances of this case calls for a cost order to be awarded against the first respondent personally. As argued by his counsel, the first respondent is obligated in terms of the Companies Act to protect the second respondent.

[18] In the circumstances the following order is made:



1. The anticipation application and the reconsideration application are dismissed.
2. The first and second respondents are ordered to pay, jointly and severally, the costs of the first and second applicants and the third respondent in both applications.



**E.M KUBUSHI**

**JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**APPEARANCE:**

FIRST & SECOND APPLICANTS COUNSEL:           ADV BASSON

APPLICANT'S ATTORNEYS:                       GERHARD WAGENAAR ATTORNEYS

FIRST AND SECOND REPENDENTS COUNSEL:   ADV DU PLESSIS(SC)

FIRST AND SECOND REPENDENTS' ATTORNEYS: THE STATE  
ATTORNEY

THIRD RESPONDENT COUNSEL:           ADV VAN DER MERWE

THIRD RESPONDENT:                       A KOCK & ASSOCIATES INC.