REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

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

01 AUGUST 2022 .....

DATE SIGNATURE

CASE NO: 58803/21

In the matter between:

MOTHUSI LUKHELE	**APPLICANT**
AND	
COLLINS LETSOALO	**FIRST RESPONDENT**
THE ROAD ACCIDENT FUND	**SECOND RESPONDENT**

JUDGMENT

CEYLON , AJ

A. INTRODUCTION:

[1] This is an opposed application in terms of Rule 6 (12) (c) for the reconsideration and setting aside of the order granted by this Court (per Sardiwalla J) on 23 November 2021 ("the Order") in the main application. The Order was granted in Part A of the main application pending the determination of the review application in Part B thereof.

[2] The Order reads as follows:

"*1. Dispensing with the forms and service provided for in the Rules of this Honourable Court and allowing the matter to proceed as one of urgency, in terms of the provisions of Uniform Rule 6 (12).*

2. Ordering that the termination of the Applicant's contract of employment by the First Respondent be suspended pending the proceedings referred to in Part B of the Notice of Motion.

3. Ordering those among the Respondents who oppose the applications to pay the costs of this application jointly and severally, on an attorney and own client scale, such costs to include any costs relating to the employment of counsel.

4. That the Applicant be entitled to supplement the papers in the application to the extent necessary."

[3] The Order was granted in the absence of the Respondents after they (Respondents) failed to enter their notice of opposition and failed to appear in Court on said 23 November 2021.

[4] The Respondents now seek that the Order be reconsidered and set aside on the basis that it was granted in urgent *ex parte* proceedings in their absence.

B. BACKGROUND:

[5] The broad background to this application is as follows:

(a) The Applicant was employed as a senior IT advisor in the ICT Department of the 2nd Respondent ("the RAF") in terms of a written employment contract concluded between the RAF and the Applicant at Pretoria on 03 August 2021.

(b) The Applicant commenced service in terms of the said agreement on 04 August 2021. According to the Applicant he spent his first ten (10) days in orientation process at the offices of the RAF whilst awaiting his work tools and official brief from the RAF's Chief Executive Officer ("CEO"), Mr Letsoalo, the 1st Respondent in this matter.

(c) The Applicant states that on the 13th August 2021, he received an urgent telephone call from the CEO to immediately report for duty as the RAF was under a cyber-attack. This attack was apparently so urgent that it required immediate action, as a result of which the CEO appointed the Applicant as acting Chief Information Officer ("CIO"). The Applicant was apparently instructed to dismiss the then CIO and his leadership team from their employment with the RAF on the basis thereof that the CEO has lost confidence in said CIO and his team due to their incompetence after the RAF having suffered two successive cyber-attacks with similar modalities.

(d) Whilst still in the process to attend to the instructions of the CEO, the employment contract between the Applicant and the RAF was terminated. The grounds advanced for the termination was the fact that the Applicant did not comply with certain of the suspensive conditions of the contract (i.e, he did not submit proof of submission of application for a police clearance certificate timeously to the RAF or its CEO).

(e) According to the Respondents, the Applicant did not satisfy the condition imposed on him by the provisions of the contract (resolutive conditions), despite his undertaking to do so. On 05 November 2021 the RAF forwarded a letter to the Applicant terminating the employment contract for failure to comply with said resolutive conditions.

(f) The Applicant then approach this Honourable Court on 23 November 2021 on an urgent basis and the Order by Sardiwalla J was granted. It is against this Order that the Respondents now seek the reconsideration and setting aside.

(g) On the 06th December 2021, the Respondents proceeded to invoke their rights in terms of Rule 6 (12)(c) seeking the reconsideration and setting aside of the impugned Order on grounds of it being granted in *ex parte* proceedings in their absence. The Respondents sought that the reconsideration be set down on the urgent Roll of 14 December 2021 given that the said Order was granted urgent in *ex parte* proceedings and that the Applicant had brought contempt proceedings against the Respondents, seeking the immediate imprisonment of the CEO.

(h) On 07 December 2021, the urgent contempt application was struck from the Roll by my Learned Colleague (Van der Westhuizen J) due to a lack of urgency and lack of personal service of the contempt application on the Respondents.

(i) On 15 December 2021, the reconsideration application came before Fourie J and was struck off the urgent Court Roll due to a lack of ripeness for hearing, as it was not properly enrolled in that the Applicant did not file his replying papers by the time the urgent Roll closed on 10 December 2021. The matter was therefore set down before this Court, on the normal Roll of 14 March 2022.

C. THE ISSUES FOR DETERMINATION:

[6] The issues for determination in this matter are the following:

(a) if this Court has the necessary jurisdiction to adjudicate this application.

(b) the Applicant's application for condonation for the late filing of his replying papers.

(c) the reconsideration and setting aside of the order on an urgent basis by this Court (per Sardiwalla J) on 23 November 2021.

D. TECHNICAL POINTS:

[7] The technical points considered are the following:

(I) Jurisdiction:

(a) The Respondents raised the issue of the jurisdiction of this Court to adjudicate the matter [refer to the heading "Jurisdiction" on pg 043-20 and further, Respondent's Supplementary Heads of Argument ("HOA")].

(b) The main argument of the Respondents is that, because the Applicant contends that his dismissal by the CEO of the RAF was unlawful, he so invoked the provisions of the Labour Relations Act 66 of 1995 (the "LRA"). Accordingly, the Labour Court has exclusive jurisdiction to hear the main application and that this Court is therefore not competent to do so.

(c) The Respondents contended that there are instances where the Labour Court and the High Court has concurrent jurisdiction to hear a particular matter, but that this current matter is not a case where concurrent jurisdiction applies [relying on Baloyi v Public Protector of SA and Others (2021) 42 ILJ 961 (CC) at para 27.

(d) The Respondents went on to argue that even the contention that a resolutive condition was unlawful or improperly applied and amounted to an unfair labour practice as contemplated in sections 185 and 188 of the LRA it is a matter that falls exclusively in the domain of the Labour Court.

(e) The Applicant contended that their case is based on a contractual dispute in a labour matter and that this Court has jurisdiction to hear the matter.

(f) The Applicant referred this Court to the decisions of Dennis v Kouga Municipality (644/2011) [2011] ZAECPEHC 61 (30 September 2011) and contended that even in matters relating to unfair dismissals, the Labour Court does not enjoy exclusive jurisdiction and the High Court may hear such matters as well [refer also to Fakude and Others; In re: Public Servants Association of South Africa and Others v MEC: Health, Gauteng Provincial Government (JS589/15) [2019] ZALCJHB 151 (19 June 2019)].

(g) In the Dennis decision, *supra*, the Court stated that the mere fact that there is a designated specialist Court to deal with employment matters does not necessarily mean that where an unfair dismissal is alleged, the employee concerned only has recourse to the LRA remedies.

(h) In Fedlife Assurance Ltd v Wolfaadt 2002 (1) SA 49, the Respondent instituted action for alleged breach of contract in the High Court. The Applicant filed a special plea on grounds that the Labour Court had exclusive jurisdiction in terms of section 157 (1) of the LRA. The Respondent's exception to the special plea was upheld on the ground that the Labour Court did not enjoy exclusive jurisdiction over the simple matter of enforcing an employment contract.

(i) In Makhanya v University of Zululand 2010 (1) SA 62 (SCA) at para 18, the Court held that (a) labour forums have the exclusive powers to enforce LRA rights, (b) the High and Labour Courts both have powers to enforce common-law contractual rights, and (c) High and Labour Courts both have powers to enforce constitutional rights so far their infringement arise from employment. The Applicant in *casu* contended that his dismissal constitutes a breach of contract.

(j) The Applicant's case was pleaded in a way that his cause of action enables him to proceed in both the High and Labour Courts in view of this Court. The breach of contract entitles him to litigate in the High Court. The fact that the Respondent's conduct also may have breached his rights to unfair labour practices or that his dismissal was fair or unfair, or procedurally fair or unfair, does not impact on his position.

(k) In the opinion of this Court, it is clear that there existed an employment contract between the Applicant and the RAF, before it was terminated. The evidence in this matter suggests this. The Applicant wish to enforce the provisions of the said contract.

Therefore, the High Court has the necessary jurisdiction. [Manana v King Sabata Dalindyebo Municipality (345/09) [2010] ZASCA 144].

(I) In the view of this Court, after a consideration of the papers arguments made at the hearing and the case law cited by the parties and consulted by the Court, this matter does not fall within the exclusive jurisdiction of the Labour Court and may also be adjudicated by the High Court. Accordingly, the contentions to the contrary by the Respondents cannot be sustained.

(II) Condonation Application:

(a) The Applicant seeks condonation for the late filing of his replying papers and for any other non-compliance with the Court rules and directives.

(b) The Applicant submitted that due to the Respondents' failure to comply with the impugned Order he was compelled to prosecute urgent contempt proceedings against them. The Applicant further aver that due thereto that the Respondents' failure to comply with the terms of the employment contract to pay his salary he did not have the financial means to fund his legal costs to prosecute the replying papers. This has led to delays that caused the non-compliance, for which he now request this Court's pardon and condonation.

(c) The Applicant submitted that legal team needed time to reply to the lengthy answering papers, which raised difficult and constitutional issues, and further caused the delay in filing the reply timeously.

(d) The Applicant further submitted that his attorney and counsel also suffered from the Covid-19 virus and had to quarantine and this caused further delay in the filing of his reply.

(e) Further, the Applicant submitted that this Court, in considering the condonation application, should take the provisions of section 34, 36, 39, his fair trial rights (section 35) and the Bill of Rights in the Constitution 1996, into consideration.

(f) The Applicant argued that there is no prejudice to the Respondents and it would be in the interest of justice that condonation be granted.

(g) The Respondents took issue with the Applicant's condonation application. They argued that in the first place, the Applicant seeks the indulgence of Court and yet he fails to tender the RAF's costs. The Respondents went on to suggest that the Applicant must still make out a case for such indulgence by providing a full and reasonable explanation for his delay, which explanation should cover the full period of the delay and compliance to these requirements must be met. According to the Respondents these requirements as set out in the Douglas Green and Grootboom decisions, *supra*, as well as High School

Ermelo and Another v Head of Department and Others [2008] 1 All SA 139 (T) at para 9 decision, has not been satisfied by the Applicant.

(h) This Court have considered the submissions made by the parties regarding the condonation application, the case authorities cited, and the circumstances of this matter. Whilst the Court is of the view that the Applicant's filing of the replying papers is late, no costs were tendered and the Applicant's conduct in properly managing his case leaves much to be desired, the explanation, specifically that regarding the illness of his lawyers and his financial means to fund his case is reasonable. This Court is therefore of the view that it would be in the interest of justice that condonation be granted in the circumstances.

(III) The Contempt Application:

The Applicant contended that the Contempt Application should also be ventilated by this Court. The Respondents submitted that the Order granted by Judge Van der Wetshuizen on 07 December 2021 required personal service on the CEO, which has not been complied with. Accordingly, the Respondents submitted, that application is not before this Court. This Court aligns itself with the argument of the Respondents that the Contempt Application is not properly before it and will therefore not be entertained.

(IV) *Locus standi*:

(a) The Applicant disputed the *locus standi* and the authority of the CEO to act on behalf of the RAF. In his replying affidavit (para 55-62, at pg 034-14 of Caselines) the Applicant takes issue with the CEO's power to defend proceedings, lack of *locus standi*, *ultra vires* and contends that the Respondents are not properly before Court [relying on section 11 (1)(c), 11 (2)(b) and 12 (2) of the RAF Act]. He argues that the counter application of the Respondents must fail as the CEO lacks statutory power to depose towards the matters he has in so far as they are intended to or purport to seek the dismissal or termination of the employment agreement of the Applicant. He further contended that the Respondents lack *locus standi* since the CEO failed to furnish proof that the termination of the employment contract complied with section 11 (1)(c) and section 12 (2)(b) of the RAF Act in so doing. The conduct of the CEO, the Applicant contends, is accordingly in contravention of the said sections.

(b) The Respondents contended that the CEO was appointed in terms of section 12 of the RAF Act and by virtue of his position, he is duly authorised to depose to the founding affidavit in respect of the application in his personal capacity as the 1st Respondent and also on behalf of the RAF.

(c) This Court could not locate any resolution of the RAF confirming the authority of the CEO to depose to court papers on behalf of the RAF in the application or elsewhere on

Caselines. The delegation of authority at pgs 024-66 and 024-67 are not relevant to the issue under consideration.

(d) In Gross and Others v Pentz (1996) ZASCA 78; 1996 (4) SA 617 (A) at 632 C-F it was held, in order to determine whether a party has standing in a matter, it is to be considered whether the party is enforcing a legal right and has sufficient interest to do so [Main SU (Pty) Ltd v Wessels and Another (93905/19) [2020] ZAGPPHC 489 (28 August 2020) at para 22-27].

(e) It is trite law that the following are the general requirements for *locus standi*:

- a party for relief must have sufficient interest in the matter;
- the interest must be actual, not abstract or academic;
- the interest must not be too removed;
- the interest must be a current one and not hypothetical [see the Main SU (Pty) Ltd decision, *supra*, at para 23].

(f) In Scott v Hanekom 1980 (3) SA 00182 (C) at 1188 H the Court indicated that:

"... *in the circumstances, the implied allegation which the applicant have made in their locus standi are sufficient, in my judgment, to entitle the Court to conclude that they do in fact have locus standi to bring this proceedings*".

(g) In view of this Court, the Respondent has sufficient interest in the matter to enforce the legal rights of the RAF in the circumstances. The CEO clearly complies with the general requirements for *locus standi* set out above and the Gross and Scott decisions, *supra*. The fact that resolution is not attached to the application does not negate his interest or that on behalf of the RAF. In view of this Court, the CEO was duly authorised to represent the Respondent. Accordingly, the Applicant's contention on this aspect cannot be sustained.

E. THE RESPONDENT'S CONTENTIONS:

[8] The following are the main points of the Respondent's case:

(a) The Applicant applied for and was interviewed in July 2021 by the RAF for the position of Senior IT Advisor. At the interview, the Applicant was required to declare if he had any criminal convictions or adverse listing against his name and to which the Applicant confirmed that he had no such criminal convictions.

(b) Around 14 July 2021 the RAF conducted a background check on the Applicant and found that there were two pending cases of theft against him, the first of which were reported at the Johannesburg Central Police Station in 2020 and the second at the Sandton Police Station in 2021.

(c) When confronted about the said two criminal cases, the Applicant denied awareness of their existence and undertook to furnish the RAF with a police clearance certificate indicating that there are no pending criminal cases against him.

(d) In light of the fact that the pending criminal cases were not convictions, and following the Applicant's express denial of the pending cases as well as the assurances that he would acquire the necessary police clearances, the RAF offered the Applicant the position. The latter was done on condition that the Applicant would obtain a clearance certificate from the South African Police Services ("SAPS") indicating that he does not have pending criminal cases against him, to which the Applicant agreed.

(e) The RAF employed the Applicant on 04 August 2021 and the offer of employment contained the following resolutive conditions, that:

(i) that the Applicant provide the RAF with proof that he applied for a police clearance certificate within thirty (30) days of commencing employment.

(ii) that the Applicant provide the RAF with a clearance certificate regarding the pending criminal cases within ninety (90) days of commencing employment.

(f) It was contemplated between the RAF and the Applicant that should the latter party fail to comply with the said resolutive conditions, that the employment contract would be terminated automatically. According to the Respondents, this was the sole purpose of the resolutive conditions being expressly incorporated into the said contract. The contract did not make any provision for any condonation in the event that the Applicant did not fulfil these conditions. The other resolutive conditions contained in clause 12 of the contract require an employee to obtain and maintain security clearance from the State Security Agency. All these measures taken by the RAF demonstrates that it is adverse to employing personnel with pending criminal cases and criminal convictions against their names.

(g) After the expiry of the thirty (30) day period imposed by the RAF for the Applicant to provide proof of application for a police clearance certificate, he failed to furnish with it by 03 September 2021 and the RAF forwarded an email to the Applicant on 11 October 2021 to inform him of his failure to do so. The Applicant was further advised to provide the clearance certificate by no later than 04 November 2021, being the ninety (90) days from date of commencement of employment with the RAF.

(h) On 21 October 2021, the Applicant replied to the email of 11 October 2021 in which he undertook to provide the RAF with the relevant documents. On 26 October 2021, the Applicant submitted proof of application for the clearance certificate, but did not provide the actual clearance certificate. The Applicant therefore submitted the proof of application for a clearance certificate more than two (2) months after the due date.

(i) On 04 November 2021, the Applicant failed to provide the RAF with the actual clearance certificate, and as a result of which the RAF furnished the Applicant on 05 November 2021 with a letter of termination of the employment contract. This letter expressly referred to clause 12 of the contract and informed the Applicant that he had breached the terms of the contract and the RAF automatically terminated the contract as a result of such breach.

(j) According to the Respondents, this aforementioned information was withheld from Justice Sardiwalla and not disclosed in the Applicant's founding papers. The Respondents contend that Justice Sardiwalla was thus misled with regards to material facts.

(k) On 18 November 2021 the Applicant launched the main application, seeking that the RAF's decision to terminate the employment contract be suspended pending the adjudication of Part B thereof.

(l) The Applicant deposed to his founding affidavit on 22 November 2021 one day before the hearing of his application on 23 November 2021.

(m) The Applicant served the main application on at 15h09 on the Respondents and Part A thereof was set down for hearing in the urgent Court for 23 November 2021. Part A did not make provision for the Respondents to file opposing papers and was accordingly brought on an *ex parte* basis. An Order was granted in favour of the Applicant in relation to Part A of the main application on 23 November 2021, in the absence of the Respondents.

(n) On 06 December 2021, the Respondents applied to Court for an order in terms of Rule 6 (12)(c) for the reconsideration and setting aside of the impugned Order but on 15 December 2021 Justice Fourie struck the application off the urgent Roll on the basis that it was not ripe for hearing due thereto that the Applicant had not filed his replying papers timeously when the Roll closed on 10 December 2021, costs was reserved.

(o) The Applicant filed his replying papers on 14 December 2021 and the matter was enrolled for hearing for 14 December 2021.

(p) According to the Respondents, they seek the reconsideration and setting aside on the following grounds:

(i) the applicant did not disclose material facts and circumstances to Court in the main application relating to the true reasons why the RAF terminated the employment contract with the Applicant. The non-disclosure resulted in the Court granting the impugned Order without the benefit of the full and complete picture of the relevant material facts. The Applicant had a duty of the utmost good faith to disclose all material facts to Court in view thereof that Part A of the main application was brought and heard *ex parte*, which, in turn, resulted in the said Order being granted without the Respondents being heard.

(ii) the Respondents has a valid and *bona fida* defence against the Applicant's claim in the main application, namely that the contract was unlawfully terminated, or that the termination is reviewable under the Promotion of Administration Justice Act 3 of 2000 ("PAJA"), which is the basis of the application under Part B.

(q) The Respondents went on to explain their contentions mentioned above as follows:

(i) they contend that the Applicant failed to afford them an opportunity to be heard at the hearing before Justice Sardiwalla on 23 November 2021 when the Order was granted. The Applicant's Notice of Motion in Part A did not allow for the Respondents to oppose the application and file answering papers. In light of this, the impugned Order was granted in their absence.

(ii) Further, where an order is granted in the Respondent's absence (especially where they are not in wilful disregard of the Court rules and where material facts are withheld by the Applicant), the Order ought to be reconsidered and set aside to cure any prejudice suffered by the Respondents. The Rule 6 (12)(c) procedure is aimed at curing the prejudice by way of a reconsideration and setting aside order.

(r) The Respondents also contended that the Applicant did not observe the *audi alteram partem* rule when he sought and was granted the impugned Order. In order for justice to be done to the Respondents and to remedy the prejudice suffered by them flowing from the Order, the said Order ought to be reconsidered and set aside.

(s) The Respondents rely on the Rule itself, the *audi alteram* doctrine and the Competition Commission v Wilmar Continental Edible Oils & Fats (Pty) Ltd and Others 2020 (4) SA 527 (KZP) and the Industrial Development Corporation of SA v Sooliman and Others 2013 (5) SA 603 (GSJ) decisions.

(t) These authorities will be discussed herein-below with regards to the non-disclosure of material facts, the Respondents submitted it is trite that in cases where an Order is sought *ex parte*, it is well established that the utmost good faith must be observed and 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*, [relying on,

inter alia, the Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E-349B and National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) at 389H-J decisions].

(u) The Respondents contended further in this latter regard that an Applicant in an *ex parte* matter, which is determined on a one-sided version of events, has a duty to disclose each and every fact and circumstance which might influence the Court in deciding to grant or refuse the relief sought and referred this Court to the National Director of Public Prosecutions v Braun and Another 2007 (1) SA 189 (C) at para 22 decision.

(v) The Respondents contended that the following material facts were not disclosed to Court by the Applicant in the main application:

(i) that he had criminal conviction and/or pending criminal cases against him.

(ii) when confronted by the RAF regarding the pending cases discovered, the Applicant denied any knowledge of its existence and provided assurance that he would provide the necessary clearance certificate to proof it does not exist.

(iii) that, as part of his employment contract, he was required to comply with the resolutive conditions to provide proof of the application for a police clearance and the actual certificate within thirty (30) and ninety (90) days of commencement of employment respectively, which he failed to do after the lapse of the stipulated time periods.

(iv) that the letter notifying him of the reason of termination mentions expressly his failure to comply with clause 12 of the contract as the sole reason for the termination of the contract.

(w) The Respondents submit that the Applicant deliberately withheld the said information from Court and denied them the opportunity to place this material information before Court. Accordingly, the Applicant did not fulfil his duty of utmost good faith in the matter and as a result of which the Court granted the impugned Order. With regards to this duty or obligation to disclose material facts and acting in the utmost good faith, the Respondents rely on the Recycling and Economic Development Initiative of SA NPC v Minister of Environmental Affairs 2019 (3) SA 251 (SCA) ("Redisa") decision, at paras 46-47. The Respondents contended that the Applicant's application did not comply with the stringent standard that has been set in the Redisa case, *supra*, by the SCA. Accordingly, the impugned Order ought not to have been granted and if the Court before Sardiwalla J had been aware of these material facts it would have acted differently.

(x) The Respondents submitted further that they are not sure if the Applicant's non-disclosure referred to above was *mala fide* or not. They contend that it would not make any difference in law anyway as the penalty for such conduct should be the setting aside of the impugned Order. The Respondents cited the decisions of Mostert and Others v

Nash and Others 2018 (4) All SA 267 (GJ) and Phillips and Others v National Director of Public Prosecutions 2003 (6) SA 447 (SCA) to substantiate their submissions.

(y) The Respondents also submitted that they have a valid and *bona fide* defence against the Applicant's allegations, which they contended will be fully ventilated under Part B of the main application.

(z) They submit that their defence is based on the breach of the employment contract due to the Applicant's failure to provide the police clearance certificate timeously as agreed. Accordingly, the contract was lawfully so terminated by the CEO. Therefore, so the Respondents argue, on the merits, the Respondents has a *bona fide* defence which carries prospects of success. In the latter regard the Respondents relies on, for instance, the Chetty v Law Society of Transvaal 1985 (2) SA 756 (A) at 756A-C and Mutebwa v Mutebwa and Another 2001 (2) SA 193 (TKH) at para 8, decisions.

(aa) The Respondents further raised jurisdictional issues regarding the main application. They contended that since the Applicant submitted that his dismissal was unlawful (in that the RAF's decision to institute a background check against him was not authorised by *inter alia*, the Labour Relations Act 66 of 1995 ("the LRA").

(bb) The Respondents averred that by invoking the provisions of the LRA the Applicant ought to have brought the application in the Labour Court instead of this Court because in this case, the said two Courts do not enjoy concurrent jurisdiction. Accordingly, if the Applicant pursue an unfair dismissal claim against the Respondents, the Labour Court has exclusive jurisdiction over such claims [relying on the Baloyi, *supra*, at para 27 decision].

(cc) The Respondents submitted that even in the event that the Applicant would pursue the claim in the Labour Court he would not succeed in that Court also on the basis of the fact that the contract was lawfully terminated due to a failure to comply with the resolutive/suspensive conditions of the contract and the subsequent breach thereof, relying on the decision of Nogcantsi v Mnquma Local Municipality and Others (2017) 4 BLLR 358 (LAC) at pg 368.

(dd) With regards to costs and reserved costs, the Respondent's contentions will be dealt with herein-below.

(ee) In light of the above, the Respondents prayed for the Order of 23 November 2021 to be reconsidered and set aside, and for costs and reserved costs (of the hearing of 15 December 2021), to be awarded on an attorney and client scale, including costs of two counsel.

F. THE APPLICANT'S CONTENIONS:

[9] The broad contentions of the Applicant are as follows:

(a) In terms of the Applicant's HOA, it is contended hat the parties are embroiled in a contractual dispute which emanated from the dismissal of the Applicant by the Respondents. The Applicant was disgruntled by the conduct of the Respondents and obtained the impugned Order of 23 November 2021 on the basis that the CEO unlawfully and without notice terminated the employment contract between the parties.

(b) When the Respondents apparently failed to adhere to the provisions of the impugned Order, the Applicant firstly notified them of the said Order by email instituted contempt proceedings against the Respondents. The Order was also served on the CEO and the RAF's company secretary.

(c) The Respondents then caused a notice of intention to oppose and a notice of appointment as Attorneys of Record (the Contempt Application) to be served by their attorneys on 24 November 2021.

(d) The attorneys of the parties exchanged correspondence pertaining to issues the enforcement of the Order and settlement of their disputes following the service of the Order. Material to the said correspondence was to obtain clarity regarding the legal representation of the Respondents, considering that there was no Order form this Court against the RAF and the fact that the CEO unlawfully usurped the power and authority of the RAF's board in the dismissal of the Applicant.

(e) The Applicant went on to explain the requirements for an interim interdict and contended that it met these requirements when the Court granted the impugned Order on 23 November 2021, relying on the well-known case of Setlogelo v Setlogelo and the National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) decision. The Applicant stated that the Respondents unlawfully and without due process and notice dismissed and/or terminated the employment contract and that the Court correctly suspended the dismissal.

(f) The Applicant, relying on the Dennis and Public Servants Association decisions, *supra*, contended that the Court, in granting the Order of 23 November 2021, was competent to do so and that the current matter does not fall within the exclusive jurisdiction of the Labour Court.

(g) With regards to the police clearance certificate, the Applicant contended that due to pure administrative problems of the police station at which he applied for the certificate, and not due to his own fault, he only received the certificate on 22 November 2021. When the certificate was provided to the Respondents on 24 November 2021, it was rejected.

(h)The certificate was provided within the ninety (90) day period in terms of the agreement between the parties and therefore the dismissal/termination was unlawful and unwarranted. There was therefore a just cause for the Applicant to approach the Court for the interdict and the Court rightfully granted the impugned Order.

(i) The Applicant contended that the CEO lacks power to defend legal proceedings as he (the CEO) cannot by virtue of the position he occupy represent the RAF in proceedings of a dismissal of a person in a management position in the RAF without the approval of the Board of directors of the RAF. Such approval was not obtained and the CEO is not legally entitled to such authority and power vicariously simply by virtue of his position [relying on sections 11 (1)(c) and 11 (2)(b) of the Road Accident Fund Act 5 of 1996]. The CEO therefore lacks authority to depose towards matters relating to the dismissal of the Applicant. Accordingly, the Respondents are not properly before Court and in breach of sections 11 and 12 of said RAF Act and therefore their counter-application must be dismissed with punitive costs.

(j) The Applicant submitted that the continued prosecution of this matter without the approval of the RAF board is contrary to the enabling legislation and renders his conduct *ultra vires* and therefore liable for dismissal by this Court.

(k) The Applicant noted the following arising from the Respondent's counter-application:

- nothing in the Respondent's application denies that the Applicant is a manager in terms of the RAF Act.
- nothing in the application supports the allegation that the Respondents are able (authorised) to dismiss the Applicant without board approval.
- the continued prosecution without board approval is contrary to the enabling legislation and makes the conduct *ultra vires*.
- the application only refers to criminal convictions as the criteria for disqualification and not pending cases.

(l) With regards to the alleged prejudice of the Respondents, the Applicant submitted that they (Respondents) were not prejudiced by his conduct in the matter and the Respondents have not demonstrated that any prejudice was suffered.

(m) The Applicant submitted, with regards to the reconsideration, that where an order was granted in a person's wilful absence, then an order cannot be reconsidered and the Respondents recourse is a recission of judgment application in the ordinary course and not urgently. It is the applicant's contention that the impugned Order was not sought *ex parte*, as the Respondents simply chose not to attend Court for no reason whatsoever. They could have attended at Court and sought a postponement of the matter or even a dismissal thereof, but they chose not to do so, and now attempt to get a second bite in terms of what they term these irregular proceedings set out in their answering papers.

(n) The Applicant denies any non-disclosure of material facts to the Court before Sardiwalla J. He contends that all material facts were disclosed and that he acted in utmost good faith in the proceedings.

(o) With regards to the timeous submission of the clearance certificate, the Applicant contended that it was submitted within the stipulated time period and the resolutive condition was fulfilled completely. There was therefore no failure to comply with the provisions of the conditions of the employment contract and the dismissal was unlawful. In any event, the duty to finalise the security clearance process (including the police clearance) lies with the Respondents (as the employer) and this is an express term of the employment contract.

(p) In addition, so the Applicant argues, the dismissal did not comply with the clear provisions of the contract regarding the processes to be followed to terminate the employment contract. The Respondent's contention that the agreement would simply terminate or lapse automatically is incorrect as the termination would also be subject to compliance with the provisions of the LRA. Accordingly, an automatic termination would not be possible.

(q)In light of the above, the Applicant prayed that the Respondent's Rule 6 (12)(c) application be dismissed with costs on an attorney and client scale, including costs of two counsel. The issue of costs will be discussed under "Costs", herein-below.

G. LEGAL PRINCIPLES:

[10] The following principles have been consulted:

(a) *Rule 6 (12)(c) of the Uniform Rules of Court:*

This Rule provides that:

"*A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order*"

(b) In Competition Commission v Wilmar Continental Oils & Fats (Pty) Ltd & Others 2020 (4) SA 527 (KZP) at para 17 it was held that:

"*In terms of rule 6 (12)(c) the respondents are entitled to have an order reconsidered on the presence of two jurisdictional facts: that the main application was heard as a matter of urgency; and that the first order was granted in their absence. The dominant purpose of the Uniform Rule is to afford 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*"

(c) In the Industrial Development Corporation of SA v Sooliman decision, *supra*, the Court held that:

"*The critical phrase in the rule is reconsideration of the order? The rationale is to address the potential or actual prejudice because of an absence of an audi alteram partem when the ex parte order was granted... A reconsideration is, as has been often said, of wide import. It is rooted in doing justice in a particular respect, ie to allow the full ventilation of the controversy... The object of the rule should be, ex post facto, to afford an opportunity for a hearing afresh – as if there had been no earlier non-observance of the audi alteram partem doctrine [at para 10]*"

(d) The duty of a Court in the consideration of a reconsideration application was explained as follows in ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others 1996 (4) SA 484 (W) at 486H-487C:

"*The rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was given in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order.*

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 form, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim of final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto.

The frames of the Rule have no sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of an aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and if so, the nature and extent thereof, and whether redness is open to attainment by virtue of the existence of other or alternative remedies. The convenience of the protagonist must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its own facts and the peculiarities inherent therein". [see also: Dibakoane NO v Van Den Bos and Others; Van den Bos and Others v Gugulethu and Others (2021/2054; 2020/28772) [2021] ZAGPJHC 652 (17 August 2021) at para 42].

(e) Further legal principles considered will be apparent from the evaluation of the matter herein-below.

H. EVALUATION:

[11] In order for the Respondents to succeed under Rule 6 (12)(c) an urgent *ex parte* application in terms of which the Order was granted in their absence is required [see Wilmar Continental, *supra*].

[12] It is common cause that the impugned Order was granted on an urgent basis and that the Respondents were not present in Court o the hearing date. The Applicant, however, dispute that the application was brought *ex parte*. He further contended that the Respondents were wilfully absent from the Court proceedings. The Applicant further submitted that the Respondents were well aware of the hearing date and the details thereof but chose not to oppose the application or attend at Court to seek a postponement or even a dismissal of the application on the hearing date. According to the Applicant, the Respondents decided to do nothing and decided not to come to Court despite the knowledge they had about the hearing date and the nature of the application before Court.

[13] In the opinion of the Applicant the absence of the Respondent was wilful and this conduct did not constitute the absence as envisaged in the said Rule. According to the Applicant, the Respondents confirmed that they were served with Part A of the application at 15h09 on 22 November 2021 of the hearing of 23 November 2021 and was therefore fully aware of the application, the hearing date and that it was set down on the urgent Roll. The fact that Part A of the application did not make provision for the opposition thereof, does not affect their knowledge of the application and the hearing date thereof.

[14] As previously indicated, the Respondents contended that Part A did not allow for them to oppose the application and was in effect brought on an *ex parte* basis in their absence. They argue that they are accordingly entitled to a reconsideration and setting aside of the Order.

[15] There can be no doubt that the Respondents did receive notice, albeit short notice, of the urgent application and hearing date. The fact that the Respondents did not file any papers (eg a notice to oppose) in relation to the application (Part A) before the hearing can also not be disputed.

[16] From the Wilmar Continental and ISDN Solutions decisions, *supra*, it is clear that a reconsideration under Rule 6 (12)(c) hinge on two jurisdictional facts: that the main application was heard as a matter of urgency and that the first Order was granted in the absence of the Respondents.

[17] As indicated above, there is no dispute between the parties that the matter was heard on an urgent basis. This is also apparent from the impugned Order itself. The latter therefore settles the first jurisdictional fact.

[18] The presence of the second jurisdictional fact is disputed by the Applicant. Even though the Applicant disputes the impugned Order was granted in the absence of the Respondents, it is clear that the Respondents were physically absent and were not legally represented at Court on the hearing date when the Order was granted.

[19] At the hearing, the Respondents submitted that they were not in attendance and that is sufficient to comply with the requirement of absence as envisaged in the said Rule. The reasons advanced by the Respondents for this contention appears to be the following:

- the main application (Part A) was served on the Respondents at 15h09 on 22 November 2021 and service was effected in terms of Rule 4 (a)(v)(v) which provides that service on a company or corporation may be effected by way of delivery of a copy on a responsible employee thereof on the registered address.
- The RAF's legal department only became aware of the application on the day of the hearing when the Order was already granted by Court. The matter was therefore, for all intends and purposes an *ex parte* application.
- the application was set down for hearing at 10h00 on 23 November and the Notice of Motion did not make provision for the opposition thereof by the Respondents or to file opposing papers.
- the Respondents did not have sufficient time to consider the application, consult with their attorneys, brief counsel and to instruct counsel to attend at Court on their behalf, etc.
- the application should have been served by email but the Applicant's legal team elected not to do so.
- the application was issued on 18 November 2021 by the founding affidavit was signed/commissioned only on 22 February 2021.

[20] The Applicant submitted that the Respondents were served and notified in good time and they could have made arrangements to oppose the application and have representation at Court on the day of the hearing. He contended that the Respondents have a good legal budget and could attended to the matter. They now make inexplicable excuses for their failure to justify the improbable. They Respondents further argued that the absence was wilful, therefore the remedy of reconsideration is not available to them and they should have applied for the recission of the impugned Order instead.

[21] In Freedom Stationery (Pty) Ltd and Others v Hassam and Others 2019 (4) SA 459 (SCA) at paras 25 and 29 it was held that a party who is aware of proceedings in which

an order may be taken against them and do not enter the fray may not come at a later stage and seek a recission of the order on the basis that it was taken in their absence even if it is not expressly stated as long as it can be anticipated in light of the nature of the proceedings, the relevant disputed issues and the facts of the matter [also refer to Chess South Africa and Others v Chess South Africa and Others (A5067/19) [2022] ZAGPJHC 317 (10 May 22) at paras 31 and 32; Zuma v Secretary of the Judicial Commission into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others (CCT52/21) [2021] ZACC 28; 2021 (11) CLR 1263 (CC) (17 September 2021) at paras 61 and 63].

[22] In the said Zuma decision, *supra*, it was held that "*... our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunity to participate, elects to be absent, this absence does not fall within the scope of the requirement of Rule 42 (1)(a)...*" This Court is of the view that this latter principle set out in the aforementioned decision applies equally to the provisions of Rule 6 (12)(c).

[23] This Court is further confident and convinced that the issues surrounding the manner of service of the main application has been fully considered by Sardiwalla J before the application was heard even though he may have dispensed with the applicable rules due to the urgency of the application. This Court would therefore not be inclined to agree with the contentions of the Respondents in this regard.

[24] In the view of this Court, the reasons furnished by the Respondents for their absence at the hearing are not reasonable in light of the principles detailed in the Chess South Africa, Freedom Stationery and Zuma decisions, *supra*. There was nothing precluding the Respondents and/or their legal representatives to serve a Notice to oppose by email on the Applicant's attorneys (particularly given that the application was urgent) or to call the Applicant's attorneys to seek a postponement or to file an application for a postponement or to attend at Court or instruct their counsel to attend the proceedings or to seek the court's indulgence. This failure and conduct on the part of the Respondents were not reasonable.

[25] This Court is therefore inclined to agree with the contentions of the Applicant that the Respondents absence was wilful and does not comply with the concept of absence as envisaged in the Rule or the Chess South Africa and Zuma decisions, *supra*. Accordingly, it cannot be said that the Respondents were absent at Court. Therefore, the Respondents did not satisfy the second jurisdictional fact required by the Rule and the Wilmar Continental and ISDN Solutions decisions, *supra*. This Court is therefore of the opinion that the Respondents' contentions that the application was heard *ex parte* cannot be sustained.

[26] In light of the aforegoing, it is the view of this Court that the Respondents are accordingly not entitled to the relief sought under Rule 6 (12)(c) and that this application thereunder stand to fail. This finding by this Court is accordingly dispositive of the application in terms of the latter rule and this Court is therefore not required to adjudicate on the merits of the application in this circumstances.

I. COSTS:

[27] The general rule is that costs follow the result unless there are good grounds to deviate from this rule [Ferreira v Levin NO and Others (1996) ZACC 27; 1996 (2) SA 621 (CC) at 624B-C (para [3]; Myers v Abramson 1951 (3) SA 348 (C) at 455].

[28] The Respondents seek and contend that a punitive order is warranted in this matter, for the following reasons:

(a) the Applicant's failure to disclose material facts to the Court in the main application.

(b) the Applicant, in his non-disclosure of material facts, has been less than honest. His deliberate withholding of such material facts form Court resulted in the impugned Order being granted.

(c) the Applicant brought the application with reckless disregard by failing to afford the Respondents sufficient time to oppose the main application and the application was brought with reckless disregard for the full and true facts in an effort to gain a tactical advantage over the Respondents [relying on the Schlesinger decision, *supra*].

(d) costs on an attorney and client scale are to be awarded where there is dishonest conduct and is justified where the conduct concerned is extraordinary and worthy of the Court's rebuke [relying on the Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) para 8 [minority judgment of Moegeng CJ and para 266 (minority judgment of Theron and Khampempe JJ)]. Costs on an attorney and client scale is a sanction usually reserved for cases where it is found that a litigant conducted himself reprehensibly.

[29] The Respondent, in view of the aforementioned submissions, contended that the bar for awarding punitive costs has been met for the Applicant's failure to disclose material facts to Court.

[30] Regarding the reserved costs of the urgent hearing, the Respondents submitted argument as follows:

(a) the matter enrolled for the urgent Roll of 15 December 2021 was struck off due to a lack of ripeness when the Roll closed on 10 December 2021 because the Applicant did not file his replying papers timeously. The replying papers were filed on 14 December

2021, a day before the urgent hearing. The Court reserved the costs for later determination.

(b) the Applicant should be liable for said reserved costs on the basis that he failed to file his replying papers timeously despite being given sufficient time to do so, given the urgency of the matter at the time. The Applicant was well aware of the aforementioned but elected to file his replying papers way out of time.

(c) the Applicant seeks condonation for the late filing of his replying papers but do not tender the RAF's costs for the indulgence sought and merely seek the condonation as a formality, which is not proper in terms of our law [relying on, *inter alia*, the Douglas Green Bellingham v Green t/d Green Bottle Recycler 1998 (1) SA 367 (SCA) at 369H-I and Grootboom v National Prosecuting Authority and Another 2012 (2) SA 68 (CC) at para 23 decisions respectively]. The Respondents concluded that the Applicant has not met the requirements in order to succeed on an application for condonation in relation to the replying papers as well as a tender of the RAF's costs for the indulgence of this Court.

[31] The Respondents submitted that the Applicant's conduct mentioned above should not be tolerated and the Court should show its displeasure at such conduct by granting punitive reserved costs order in relation to the costs of 15 December 2021, including costs of two counsel.

[32] The Applicant initially sought that costs be reserved to Part B [refer to his draft order in respect of the Rule 6 (12)(c) application]. He now seeks an order for costs on an attorney and client scale, including costs of two counsel [refer to paragraph 139, replying papers, pg 034-28 of Caselines]. The Applicant did not discuss the issue of costs in his HOA.

[33] At the hearing it was contended by the Applicant that it would be detrimental and prejudicial to the Applicant if costs were to be awarded against him as he is a lay person without the necessary funding to pay the cost. It is for these reasons that he requested the Court to deviate from the general rule regarding costs referred to above.

[34] The applicant argued that this case involves public interest and requested that if costs is to be awarded against him, the Court has to take into account the principles set out in the Biowatch Trust v Registrar of Generic Resources and Others (CCT 80/28) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (03 June 2009) decision. The Applicant went on to request that costs be in the cause and that the Court exercise its discretion and not award punitive costs – relying on the Ferreira v Levin NO and Others (CCT 5/95) [1995] ZACC 13 (06 December 1995) decision.

[35] The Respondents contended that the Biowatch principle only applies to litigation regarding constitutional issues/principles. The Applicant himself stated that this matter is

a contractual matter based on an employment contract. The Applicant can therefore not rely on the Biowatch decision, *supra.*

[36] In considering an appropriate cost order, a court must exercise its discretion judicially in order to bring about a fair result. Punitive costs serve as a mark of a court's displeasure with one or more facts of the conduct of the unsuccessful litigants [Mukanda v SA Legal Practice Council and Another (79398/2018) [2020] ZAGPPHC 809 at para 13].

[37] In Geerdts v Multichoice Africa (Pty) Ltd (JA 88/97) [1998] ZACAC 10 (29 June 1998) at para [48] it was held as follows:

"*Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client cost*".

[38] In Du Toit NO v Thomas NO and Others (635/15) [2016] ZASCA 94 (01 June 2016) the Court stated that a punitive cost order is also justified where an applicant displayed an "unconscionable stance".

[39] It is trite that the awarding of costs is in the discretion of the Court [Ferreira v Levin NO and Others (1996) ZACC 27; 1996 (2) SA 621 (CC) at 624B-C (para [3])].

[40] With regards to the costs in relation to the condonation application, this Court considered the contentions of the parties and the case authorities cited and concluded that a reasonable explanation have been furnished by the Applicant and that it was in the interest of justice that the application be granted. However, a cost order would not be justified in the circumstances. Accordingly, no cost order is awarded.

[41] With regards to the costs of the Rule 6 (12)(c) application, this Court finds no grounds to deviate from the general principle mentioned above. The Applicant is therefore entitled to his costs in the circumstances. This Court finds no malice or improper conduct on the part of the Respondents in bringing the application. Accordingly, there is no reason for this Court to award punitive costs against the Respondents.

[42] As far as the reserved costs is concerned, it is clear that the striking of the Roll of the application on 15 December 2021 was occasioned by the conduct of the Applicant and through no fault of the Respondents. There is therefore no reason why the Applicant should not carry the costs in respect thereof on a punitive basis due to their indifference towards the Court Rules and the waste of the time of the Court and the Respondents on that instance.

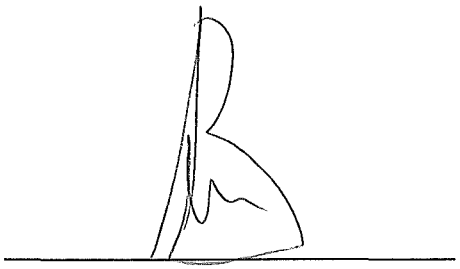
J. ORDER:

[43] In the result, the following order is made:

(a) the condonation application is granted, no order as to costs.

(b) the application in terms of Rule 6 (12)(c) is dismissed and the Respondents are ordered to pay the costs including costs of counsel in relation thereto.

(c) the Applicant is ordered to pay the reserved costs in relation to the 15 December 2021 on an attorney and client scale including the costs of counsel.



B CEYLON

Acting Judge of the High Court of South Africa

Gauteng Division

Pretoria

Hearing date:	15 March 2022
Judgment date:	01 August 2022
Appearances:	
For the Applicant:	Adv M Masebalanga
Instructed by:	Mokgehle NC Attorneys
	Pretoria
For the Respondents:	Adv S Khumalo SC
	Malatji & Co Inc.
	Sandton