REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 484/2022

REPORTABLE: YES/NO
OF INTEREST TO THE JUDGES: YES/NO
REVISED.

In the matter between:

SANDRIVIER HELIKOPTERS (PTY) LTD **APPLICANT**
(Registration No: 2019/119785/07)

and

MINNAAR, GERHARD CORNELIUS **FIRST RESPONDENT**
(Identity No:[….])

MINNAAR, LAURETTE **SECOND RESPONDENT**
(Identity No:[….])

CLEMENTS, ESTELLE **THIRD RESPONDENT**
(Identity No: [….])

SHELDRAKE GAME RANCH CC **FOURTH RESPONDENT**

(Registration No: 2005/166145/23)
***In Re*:**

MINNAAR, GERHARD CORNELIUS **FIRST APPLICANT**
(Identity No:[….])

MINNAAR, LAURETTE **SECOND APPLICANT**
(Identity No:[….])

CLEMENTS, ESTELLE **THIRD APPLICANT**
(Identity No:[….])

SHELDRAKE GAME RANCH CC **FOURTH APPLICANT**
(Registration No: 2005/166145/23)

and

MINNAAR, JACOBUS CORNELIUS **FIRST RESPONDENT**
(Identity No:[….])

MINNAAR, JACOBUS PETRUS **SECOND RESPONDENT**
(Identity No:[….])

THE TRUSTEES OF THE KOOS MINNAAR TRUST **THIRD RESPONDENT**
(IT: 1859/1985)

CJ MINNAAR BEHEREND (PTY) LTD **FOURTH RESPONDENT**
(Registration No: 1985/002461/07)

INDIGO HELICOPTERS CC **FIFTH RESPONDENT**

(Registration No: 2008/255319/23)

SANDRIVIER HELIKOPTERS (PTY) LTD **SIXTH RESPONDENT**
(Registration No: 2019/119785/07)

VOORBURG SAFARIS AND GAME BREEDERS (PTY) LTD **SEVENTH RESPONDENT**
(Registration No: 2018/584965/07)

ESMELAU EIENDOMME (PTY) LTD **EIGHTH RESPONDENT**
(Registration No: 1981/010520/07)

FONTAINEBLEAU LANDGOED (PTY) LTD **NINTH RESPONDENT**
(Registration No: 1989/000895/07)

ZWARTRAND GAME RANCH (PTY) LTD **TENTH RESPONDENT**
(Registration No: 1985/001655/07)

KLEYNHANS, VEROESCHKA **ELEVENTH RESPONDENT**
(Identity No:[….])

KLEYNHANS, GERT PETRUS **TWELFTH RESPONDENT**
(Identity No:[….])

THE MASTER OF THE HIGH COURT, PRETORIA **THIRTEENTH RESPONDENT**

THE MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM (LIMPOPO PROVINCIAL GOVERNMENT) **FOURTEENTH RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] The Applicant in this matter, Sandrivier Helicopters (Pty) Ltd ("Sandrivier") launched the present urgent application for the rescission of the *ex parte* order obtained against it and others on the 15 March 2022.

The essence of the relief sought in the *ex parte* application launched by the present respondents was "authorising the Sheriff of the High Court to attach and place under his/her control two helicopters belonging respectively to Sandrivier and Indingo Helicopters CC ("Indingo")".

In terms of the relief sought in the notice of motion the helicopters would remain attached under the control of the Sheriff pending the final determination of various possible actions and/or applications to be instituted by the present respondents. This is in essence an anti-dissipation type of interdict.

[2] The applicants in the *ex parte* application sought and obtained an order on 15 March 2022 attaching two helicopters belonging to the fifth respondent in the main application ("Indingo") and the sixth respondent in the main application ("Sandrivier"). The *ex parte* order that was granted on 15 March 2022 was only executed on 14 April 2022, that is almost a month later.

[3] The present application for the rescission of the aforesaid *ex parte* order is brought in terms of Rule 42(1) of the Uniform Rules of Court and/or on the common law. This

is so on the basis that the *ex parte* order was sought and erroneously granted in that:

3.1. Not a single reason was advanced in the founding affidavit why it was necessary to launch the application on an *ex parte* basis.

3.2. Not a single fact allegation was made in the founding affidavit regarding any specific claim against Sandrivier or Indingo.

3.3. There was no legal basis to ask for the relief in the notice of motion. Not even one of the four requirements for an anti-dissipation type of interdict was addressed in the founding affidavit.

3.4. A full disclosure of all the relevant facts were not made in the *ex parte* application.

3.5. There was no legal basis and no factual basis to justify the granting of the *ex parte* order against Sandrivier and Indingo.

[4] The present Applicant's (Sandrivier) case is that if the existing *ex parte* order is not rescinded, then the helicopter belonging to Sandrivier will remain under attachment for as long as it takes to finalise numerous far-fetched actions and applications against unrelated parties.

The *ex parte* order will effectively completely destroy the business of Sandrivier.

If the order is allowed to remain in place, then Sandrivier will not be able to utilize the helicopter for many years to come. The helicopter will no doubt deteriorate and will eventually have very little value.

The Order granted

[5] The ex parte order sought and granted in favour of the Respondents herein is quite broad and far-reaching. It reads as follows:

PART A:

***EX PARTE* RELIEF**

1. The Sheriff of the High Court is authorised to attach and place under his/her control a Robinson R44 helicopter registration ZS-RYN and a Robinson R22 helicopter

registration ZS-RIJ ("the helicopters") situate at the Baobab Nature Reserve or such other place where they may be located.

2. The Sheriff of the High Court is authorised to attach and place under his/her control the Twelfth Respondent's securities and loan claims in the Fifth and Sixth Respondents or any securities held by his nominee/s.

3. The orders in paragraphs 1 and 2 above remain in force pending the outcome of an action or actions or review proceedings to be instituted by the Koos Minnaar Trust; *alternatively*, by the First and Second Applicants on behalf of the Koos Minnaar Trust; *further alternatively*, by any of its beneficiaries or Trustees including but not limited to:

   3.1. the unlawful actions of the First, Second, Seventh, Eleventh and Twelfth Respondents, jointly and severally in dealing with and dissipating or misappropriating the assets of the Koos Minnaar Trust;

   3.2. the illegal actions of the First, Second, Seventh, Eleventh and Twelfth Respondents, jointly and severally in relation to all and any activities in respect of game species on the Baobab Nature Reserve and conducted pursuant to the P3 Wildlife Trade and Regulation (Exemption) Permit dated 22 November 2019 allegedly issued by the Fourteenth Respondent or otherwise, in favour of the Eleventh and/or Seventh Respondents;

   3.3. the removal of Cornelius Jacobus Minnaar (First Respondent) and Jacobus Petrus Minnaar (Second Respondent) as Trustees of the Koos Minnaar Trust and directors of the relevant subsidiary corporate entities;

   3.4. declaratory relief declaring Cornelius Jacobus Minnaar (First Respondent) and Jacobus Petrus Minnaar (Second Respondent) as being delinquent directors;

   3.5. setting aside the purported and unlawful subdivision of the immovable properties of the Koos Minnaar Trust to wit the separation from the Baobab Nature Reserve of the farms Voorbug 503 MS and Zwartrand 506 MS;

   3.6. setting aside the unlawful conclusion of lease agreements between Voorbug Safaris and Game Breeders (Pty) Ltd (the Seventh Respondent) and/or unknown third parties and the Koos Minnaar Trust in relation to the farms Voorbug 503 MS and Zwartrand 506 MS, being immovable properties of the Koos Minnaar Trust;

3.7. setting aside the unlawful transfer to the Second Respondent of the Koos Minnaar Trust's 30% shareholding in Kobus Minnaar Vervoer (Pty) Ltd held by the Koos Minnaar Trust by virtue of its interest in the Fourth Respondent; alternatively, paying to the Koos Minnaar Trust the reasonable market value of the shares together with interest thereon;

3.8. setting aside the unlawful transfer from the Koos Minnaar Trust to the Second Respondent of Erf [….], Duivelskloof (Modjadjiskloof), Extension 5, Limpopo Province previously held by the Koos Minnaar Trust by virtue of its interest in the Eighth Respondent;

3.9. setting aside the purported notice of 2 August 2021 calling a meeting of directors of the Fourth Respondent;

3.10. setting aside the purported shareholders' meetings of the Fourth, Eighth, Ninth and Tenth Respondents for the purposes of removing the First Applicant as a director of the Fourth, Eighth, Ninth and Tenth Respondents and declaring them null and void;

3.11. setting aside any purported resolution of the Fourth, Eighth, Ninth and Tenth Respondents removing the First Applicant as a director of such Respondents;

3.12. interdicting and restraining the First and Second Respondents from convening and holding any meetings on 29 October 2021, or on any as yet undetermined dates thereafter, that may purport to have the effect of amending managerial control of the Koos Minnaar Trust and/or subsidiary corporate entities and/or dealing in any manner with the assets owned by the Koos Minnaar Trust and/or or the subsidiary corporate entities;

3.13. condoning the First Applicant's failure to seek a review of the determination by the First and Second Respondents to remove him as a director of the Fourth, Eighth, Ninth and Tenth Respondents as contemplated in Section 71(5) of the Companies Act, 71 of 2008, in the event of this Court finding that this application falls outside of the prescribed timeframe in this respect;

3.14. restoring managerial control over the Baobab Nature Reserve in accordance with a draft Management Agreement submitted to the Fourteenth Respondent;

3.15. claims for damages, *alternatively*, claims for the restitution of property against the First, Second, Seventh, Eleventh and Twelfth Respondents, jointly and

severally arising from the receipt of proceeds of unlawful trading and/or hunting activities of game species conducted on the Baobab Nature Reserve under a P3 Wildlife Trade and Regulation (Exemption) Permit dated 22 November 2019;

3.16. claims for damages, *alternatively*, claims for the restitution of property against the First, Second, Seventh, Eleventh and Twelfth Respondents, jointly and severally arising from the unaccounted for loss of game species of the Koos Minnaar Trust pursuant to unlawful trading and/or hunting activities conducted on the Baobab Nature Reserve;

3.17. directing that the First, Second, Seventh, Eleventh and Twelfth Respondents/Defendants submit to a statement and debatement of account in respect of their individual/collective dealings with movable and immovable property of the Koos Minnaar Trust and the subsidiary corporate entities;

3.18. ejecting the Second, Seventh, Eleventh and Twelfth Respondents from the property of the Koos Minnaar Trust to wit the Baobab Nature Reserve.

4. The action or actions or review proceedings contemplated in paragraphs 1 and 2 above are to be instituted within 30 days from the date of this order.

5. *Alternatively*, the order in paragraphs 1 and 2 above is to remain in place until the delivery to the Applicants by any or all of the First, Second, Fifth, Sixth, Seventh, Eighth and Twelfth Respondents of a written bank guarantee or other guarantee or collateral security acceptable to the Applicants equivalent to the reasonable combined market value of the helicopters.

6. *Further alternatively*, that the order in paragraphs 1 and 2 above is issued by way of a *rule nisi* with return date 19 January 2023 on which date the First, Second, Fifth, Sixth, Seventh, Eleventh and Twelfth Respondents, or any party who can show an interest in the subject matter of the order under paragraphs 1 and 2, may show cause why the *rule nisi* should not be confirmed.

7. This order is to be served on the respondents forthwith by Deputy Sheriff.

8. The costs of **PART A** of these proceedings are to stand over for adjudication in the course of **PART B** of the proceedings as set out in the notice of motion.

Vagueness of Ex Parte Order

[6] It is appropriate to point out from the onset that the aforesaid *ex parte* order is vague. The orders in paragraphs 3, 5 and 6 are mutually contradictory and make no sense.

In paragraph 3 of the *ex parte* order it is stated that the attachment orders remain in force "pending the outcome of an action or actions or review proceedings to be instituted by the Koos Minnaar Trust" alternatively by other parties.

Paragraph 5 of the *ex parte* order was granted as an alternative to paragraph 3, namely that the attachment orders remain in place until delivery of a "written bank guarantee or other guarantee or collateral security acceptable to the applicants equivalent to the reasonable combined market value of the helicopters".

In paragraph 6 of the *ex parte* order an order was granted in the further alternative by way of a *rule nisi* with the return date 19 January 2023.

[7] The ex parte order is so vague that it is unenforceable and therefore invalid. I am of the view that by reason of its vagueness alone, the *ex parte* order should be set aside. Although the relief can be sought in Court proceedings in the alternative, a Court order cannot be granted in the alternative.

Factual Background

[8] The factual background relating to the bringing of the application and obtaining the impugned *ex parte* order are common cause.

[9] The Respondents initially launched an ex parte application under case number 7763/2021 which application served before Muller J on 02 December 2021. The learned Judge refused to grant the order sought by the Respondents. The matter was then removed from the roll. The learned Judge Muller had indicated to Counsel who appeared before him, one Advocate Green that the Court did not believe that the Applicants at the time made out a case for the relief sought.

[10] On 18 January 2022 the present Respondents launched another *ex parte* application under case number 484/2022 (the present case number) seeking the same legal remedy as before but now under a different case number. The application was heard by Makweya AJ on the 15 March 2022 and the Order was granted. This time a different Counsel, namely Advocate Smit appeared on behalf of the Respondents. The instructing attorney remained the same, namely Mr. Christo Reeders.

[11] The application under case number 484/2022 makes no mention and did not disclose to the Court the application and the content thereof under case number 7763/2021 that was dealt with on 02 December 2021.

[12] The present application for rescission of the *ex parte* order under case number 484/2022 was set down for hearing on the urgent court roll on 03 May 2022.
Coincidentally the matter came before Muller J. It was Muller J who became aware of the duplication of applications and drew the attention of the parties to the application that was heard on 02 December 2021.

[13] It is evident that the present Respondents, represented by Christo Reeders Attorneys at all material times, have launched the initial *ex parte* application with which they did not succeed before Muller J. The same parties and same attorney then proceeded to launch another *ex parte* application under a different case number, seeking the same legal remedy and presenting the same evidence to this Court.
What is most disturbing is that the applicants (present Respondents) their attorneys and Counsel did not take the Court into their confidence by disclosing the existence of the first application under case number 7763/2021 and the content thereof during the proceedings of 15 March 2022 before Makweya AJ or at any other time thereafter.
This aspect will be relevant when I consider the issue of costs at the end of this judgment.

The conduct sought to be interdicted

[14] The Respondents case is that:

(1) they had a well-founded claim for damages against the Applicant arising out of the misuse of the assets of the Koos Minnaar Trust;

(2) the Applicant was dissipating his assets, in particular the helicopter with intention of frustrating that claim.

Contrary to the usual case where the purpose of the interdict is to preserve an asset in issue between the parties, in this instance the Respondents are not claiming a proprietary right to the Applicant's assets; they are merely alleging a general right to damages and seeking to prevent the Applicant from dissipating its assets.

I am of the view that although there might be exceptional circumstances in which even a *bona fide* disposition of assets can be interdicted, in the present case and on the papers the Respondents' claim for damages is insubstantial and they failed to show conduct on the part of the Applicant which would warrant the grant of an interdict of the kind sought, let alone on an *ex parte* basis.

[15] While it is not correct to say that an application of this nature should never be brought *ex parte* and without notice to the respondent, an *ex parte* application should be heard *in camera* only in exceptional instances where, clearly, justice could not be served otherwise than by depriving a respondent of the right to be heard.

The powers of the Court are to be exercised with due caution, with all practical safeguards against abuse, and keeping the oppressiveness of the order and its interference with the rights and obligations of third parties to a minimum.

[16] In his reasons for discharging an interim interdict in the case of ***Knox D'Arcy and Others v Jamieson and Others***[1] Stegmann J said:

> *"The making of an order which affects an intended defendant's rights, in secret, in haste, and without the intended defendant having had any opportunity to being heard, is grossly undesirable and contrary to fundamental principles of justice. It can lead to serious abuses and oppressive orders which may*

[1] 1995 (2) SA 579 (W).

prejudice an intended defendant in various ways, including some ways that may not be foresseable".

[17] The Appellate Division (as it then was) agreed with the above comments by Stegmann J in ***Knox D'Arcy and Others v Jamieson and Others*** **1996 (4) SA 348 (AD)** when E M Grosskopf JA said:

"I agree entirely with these comments, and would add that the procedure adopted is even more objectionable if the applicant's case rests largely on untested hearsay. While it is probably not correct to say that an application of this sort should never be heard in camera and without notice to the respondent,… I consider that this should happen only in very clear cases where justice cannot be served otherwise than by depriving the respondent of his right to be heard. In the nature of things such cases would be exceptional. Where, exceptionally, the powers to issue an order in this way are exercised, the following warning by Stegmann J is apposite (1994 (3) SA at 708 B-D):

"The exercise of such powers must be attended with due caution, with all practical safeguards against abuse; and with careful attempt to visualize the ways in which the order may prove to be needlessly oppressive to the intended defendant. Consideration must also be given to the manner in which the order may interfere with the rights and obligations of third parties, such as banks or other debtors of the intended defendant, or other custodians of the intended defendant's assets. Both the oppressiveness of the order to the intended defendant and its interference with the rights and obligations of third parties must be kept to the minimum…"."

[18] In the present case the Respondents' claim for the attachment of the helicopter is neither vindicatory nor quasi-vindicatory and therefore the Respondents cannot obtain an interdict unless they prove that in addition to a *prima facie* case an actual or well grounded apprehension of irreparable loss if no interdict is granted. This must

be established by the Respondents as an objective fact. It is not sufficient to say that the Respondents themselves *bona fide* fears such loss.
See ***Stern and Ruskin v Appleson*** **1951 (3) SA 800 (WLD) at 813**.

[19] What the Respondents herein have to establish is that the Applicant has no *bona fide* defence to the action they contemplate instituting and that, objectively considered, there are good grounds for fearing that the Applicant intends to make away with his assets in order to defeat the Respondents' claims.
In my view, the Respondents have dismally failed to establish that the Applicant intends to dissipate its assets, in particular the helicopter in question.

[20] The above notwithstanding, the Respondents sneaked an order *ex parte* (without any notice at all to the Applicant) that the Applicant's property be attached and preserved pending numerous proceedings to be instituted that only concern disputes in juristic entities that bear no relation at all to the Applicant save for the far-fetched alleged claim by the Koos Minnaar Trust that is not even party to the proceedings.

Locus Standi **of the Respondents**

[21] The general rule of our law is that the proper person to act in legal proceedings on behalf of a trust is the trustee. A beneficiary in a trust does not have *locus standi* to do so.[2]
A distinction must be drawn between actions brought on behalf of a trust to, for instance, recover trust assets or nullify transactions entered into by the trust or to recover damages from a third party (like in the present case), on the one hand, and on the other hand, actions brought by trust beneficiaries in their own right against the trustee for maladministration of the trust estate, or for failing to pay or transfer to beneficiaries what is due to them under the trust.
For convenience of reference I shall call the former type of action the "representative action" and the latter "the direct action". The general rule applies only to the representative action.

[2] ***Gross and Others v Penz*** 1996 (4) SA 617 (AD) at 624 – 625.

[22] In the present case we have to do with the representative action wherein the general rule is applicable.

The present trustees of the Koos Minnaar Trust are:

(1) Gerhard Cornelius Minnaar (First Respondent in this application);

(2) Laurette Minnaar (Second Respondent in this application);

(3) Cornelius Jacobus Minnaar (First Respondent in the main application);

(4) Jacobus Petrus Minnaar (Second Respondent in the main application).

In all legal actions and/or transactions involving the affairs of the Trust the aforementioned trustees must act jointly.

The question arises as to whether the two trustees, being the First and Second Respondents in this matter have the powers to institute a legal action against a third party without the consent of the other two co-trustees, namely Cornelius Jacobus Minnaar and Jacobus Petrus Minnaar. The general rule is that joint trustees of a trust must act jointly.

[23] The Respondents in the present application state that they contemplate instituting an action on behalf of the Koos Minnaar Trust against the Applicant and other respondents in the main application in order to recover damages or losses the Koos Minnaar Trust has suffered consequent upon the Applicant's unlawful activities, namely illegal hunting, capturing, selling, relocation and trade in game species to the detriment of the Trust.

It is for those reasons that the Respondents obtained the impugned *ex parte* order on 15 March 2022 for the attachment and removal for the purpose of preservation and security of two helicopters owned by the Applicant and Indingo Helicopters CC (the Fifth Respondent in the main application).

[24] In ***Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd***[3] the applicant, a trust, applied for an interdict against the respondent on the ground of passing off. The respondent contended *in limine* that there were two trustees and that there was no proper proof that both

[3] 1989 (4) SA 985 (CPD).

trustees had authorised the bringing of the application. The trust deed provides that the trustees had to act jointly in all matters affecting the trust. There was no provision in the trust deed for the appointment of a managing trustee and there was no allegation, express or implied that the co-trustee had delegated her duties or powers to the alleged managing trustee. The Court held that the alleged managing trustee was not authorised to bring the application on behalf of the trust. The point *in limine* was upheld and the application dismissed.

[25] I make a finding that the whole application brought by the Respondents was a nullity in that the two trustees did not have the authority to institute the proceedings on behalf of the Koos Minnaar Trust, to the exclusion of the other two trustees.
On this ground alone, the *ex parte* order granted on the 15 March 2022 should not have been granted, had the learned acting Judge been alerted to the correct state of affairs.
See also ***Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA)**.

No grounds advanced for launching the Application on an *Ex Parte* basis

[26] To justify an *ex parte* order an applicant in such proceedings is required to set out full reasons to justify such an order. In the present application the Respondents did not make a single allegation dealing with this requirement in their founding affidavit. There was also material non-disclosure in their founding affidavit. It is trite that the most invasive inroads to a litigant's right to a fair trial is to obtain an order, without affording the other party an opportunity to have its say, that is, to give effect to the *audi alteram partem* principle.

[27] Southwood J in ***Naidoo and Another v Matlala NO and Others***[4] had to consider the rescission of a sequestration order that was granted on an *ex parte* basis. In dealing in particular with Rule 42(1) the learned Judge said the following at paragraph 6:

[4] 2012 (1) SA 143 (GNP).

"In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment – see Naingwa v Moolman NO 1993 (2) SA 508 (Tk) at 510D-G; Herbstein and Van Winsen Vol 1 at 931. It follows that is material facts are not disclosed in an ex parte application: see Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348C - 349E; National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA)…para 21; United Diamond Watch and Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another 1972 (4) SA 409 (C) at 414F – 415C – or if a fraud is committed (i.e. the facts are deliberately misrepresented to the court) the order will be erroneously granted. It has been held that an order granted in an application brought ex parte without notice to a party who has a direct and substantial interest in the matter is an order erroneously granted – see Clegg v Priestley 1985 (3) SA 950 (W) at 953I – 954I."

Southwood J proceeded to set aside the *ex parte* order and ordered the respondents to pay costs on the scale between attorney and client.

[28] The heavy duties of an applicant in an *ex parte* application were emphasized by Cachalia JA in ***Redisa v Minister of Environmental Affairs***[5].

At paragraphs 46 and 47 the following was said:

"46. The duty of utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely audi alteram partem. The law sometimes allows a departure from this principle in the interests of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.

[5] 2019 (3) SA 251 (SCA) at para 45 – 52.

47. The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the Court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order…"

[29] When Counsel for the Respondents appeared before Makweya AJ on 15 March 2022 for the *ex parte* order it was not disclosed to the Court that the matter previously served before Muller J and that the matter was removed from the roll because Muller J had some reservations regarding the propriety of the *ex parte* application.

[30] I need to emphasise that the Judge in Motion Court relies on Counsel, especially in *ex parte* applications and in those cases where there is no appearance for the respondent, to inform the Court of any cases of which the effect may be that they are not entitled to the orders that they seek.
It is not only in contested cases that Counsel has a duty to direct the Court's attention to any relevant authority, but also in uncontested cases.
See ***Ex Parte Hay Management Consultations (Pty) Ltd* 2000 (3) SA 501 (WLD) at 506 – 507*.***

[31] It is trite that an *ex parte* applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion the latter Court will have regard to the extent of the non-disclosure; the question whether the first Court might

have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside.[6]

Conclusion

[32] On the conspectus of evidence before me and the authorities referred to hereinabove, I am satisfied that the Applicant has made out a case for the setting aside of the *ex parte* order.
The Applicant has asked for a punitive costs order against the Respondents based on the extreme *mala fides* and abuse nature of the main application.
The launching of the *ex parte* application constituted an incredible abuse of the Court process. The manner in which the present Respondents implemented the *ex parte* order only served to exacerbate the abuse.

[33] The Applicant has requested this Court to show its displeasure with the *mala fide* conduct of the present Respondents and grant an order for costs on a punitive scale and *de bonis propriis*.

I oblige. The conduct of the Respondent's attorney of record in instituting the same proceedings under two different case numbers leaves much to be desired.

[34] In the result the following order is granted:

1. The application is heard as an urgent application in terms of the provisions of Rule 6(12) of the Uniform Rules of Court and condonation is granted to the applicant in respect of the non-compliance with the prescribed time limits, forms and service.

2. The Order granted by Makweya AJ on 15 March 2022 is hereby rescinded and set aside.

[6] See ***Phillips and Others v National Director of Public Prosecutions*** 2003 (6) SA 447 (SCA) at para 29.

3. The Helicopter, being a Robinson R44 with registration number ZS-RYM, being the attached helicopter, is released from attachment and be returned to the Applicant (Sandrivier Helikopters (Pty) Ltd) immediately.

4. The Respondents' counter-application is dismissed.

5. The Respondents are ordered to pay, jointly and severally, the Applicant's costs on an attorney and client scale, including the costs of two Counsel. Furthermore the Respondents' attorney of record, Mr. Christo Reeders is ordered to pay the Applicant's costs, *de bonis propriis* on an attorney and clients scale, jointly and severally with the Respondents, the one paying the other to be absolved, including the costs of two Counsel.

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E M MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION

APPEARANCES

Heard on	**:**	**05 May 2022**
Order granted on	**:**	**05 May 2022**
Judgment delivered on	**:**	**17 May 2022**
For the Applicant	**:**	**Adv PG Cilliers SC**
	:	**Adv APJ Els**

Instructed by	:	**Krone & Associates Attorneys** **c/o Niland & Pretorius**
For the Respondents	:	**Adv JG Smit**
Instructed by	:	**Christo Reeders Attorneys** **c/o Kampherbeek & Pogrund Attorneys**