Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 18979/2013

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

ARVUM EXPORTS (PTY) LTD (formerly Unlimited Fruit (Pty) Ltd) Reg. No: 2000/013357/07	First Applicant
UNLIMITED FRUIT (PTY) LTD (formerly Arvum Exports (Pty) Ltd) Reg. No: 2008/028031/07	Second Applicant
ARVUM FINANCE (PTY) LTD	Third Applicant
and	
ZELDA MARGARETHA COSTA N.O.	First Respondent
DANIEL COETZEE N.O.	Second Respondent
JOHANNES NICOLAAS JACOBUS VAN DER WESTHUIZEN N.O.	Third Respondent
(In their capacity as trustees for the time being of the Klein Botrivier Trust, No: IT 852/2007 and the Alberto Costa Trust No. IT 806/1998)	
ZELDA MARGARETHA COSTA N.O. (In her capacity as executrix of the Estate Late Alberto Costa)	Fourth Respondent

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JUDGMENT: 20 NOVEMBER 2013

BINNS-WARD J:

The issue that I am called upon to decide at this stage of the application demonstrates that while the rule *nisi* is a well-established and sometimes useful procedural device it should,

save where its use is prescribed by statute, be employed judiciously, mindful that in motion proceedings its use as an alternative to Forms 2 and 2(a) in the First Schedule to the Uniform Rules of Court for the initiation of proceedings is not ordinarily appropriate.

The applicants and the first to third respondents are parties to a principal case (under case no. 19206/2012)concerning contracts bearing on the production and marketing of fruit and a loan associated therewith.The principal case is currently pending before Cloete J consequent upon an order made by me on 23 November 2012 referring certain issues in that case for the hearing of oral evidence.Cloete J has reportedly heard several days' of oral evidence and is due to hear argument on 21 and 22 November 2013.

Paragraph 8 of the order made on 23 November 2012 afforded interim relief to the applicants in the following terms:

> Pending the determination of the application after the hearing [on the issues referred for oral evidence], and without prejudice to any claim for damages against the applicants they might have in consequence of compliance with this order, whether in their capacity as trustees of the Klein Botrivier Trust or of the Alberto Costa Trust, the first, second and third respondents are directed to deliver, or procure the delivery of, all fruit of the Flavor Fall varietal and all nectarines produced on the farm Botterkloof (comprising the farms currently held under Deeds of Transfer T036273/2002 and T000041238) to the first applicant, to be marketed and accounted for by the latter and the third applicant in accordance with the loan and supply agreements executed on 12 July 2009 referred to and defined in paragraphs 1 and 2 of the judgment.

The applicants allege that the first, second and third respondents are refusing to comply with the interim order and have made application for them to be sanctioned for contempt of court. The contempt of court application came before me. The respondents delivered a preliminary answering affidavit raising procedural objections to the manner in which the application had been brought.

In essence the respondents' position was that the application lacks urgency, that proper notice of it was not given and that they were afforded an inadequate opportunity to prepare answering papers on the merits of the matter. The respondents did, however, treat sufficiently of the merits in their preliminary answer for it to be apparent that they will deny being in contempt of the interim order. It appears in that regard that they allege that they have been willing to deliver or procure the delivery of the fruit in question in terms of the loan and supply agreements mentioned in the interim order, but that the first and third applicants are reneging on the payment obligations under the agreements. It thus appears unlikely that the contempt application will be capable of determination on paper. Whether

that is indeed the case or not will only be confirmed, of course, when the papers in the application are complete.

It is necessary for the purposes of dealing with the respondents' procedural objections to set out the applicants' notice of motion in full. It read as follows:

'**BE PLEASED TO TAKE NOTICE** that the abovementioned Applicants intend applying to the "fast lane" of this Honourable Court on **Monday, 18 November 2013 at 10h00** or as soon thereafter as the matter may be heard for an Order in the following terms:

1. Dispensing with the forms and requirements of the rules of this Honourable Court and permitting the matter to be heard as one of urgency in terms of Rule 6(12)(a) of the aforesaid rules.
2. Authorising the manner in which the Applicants effected service of this application on the Respondents.
3. Directing that a rule *nisi* do issue, calling upon the Respondents to show cause on **Thursday, 21 November 2013 at 10h00** or as soon thereafter as the parties may be heard why an order should not be made in the following terms:
   3.1 That the First, Second and Third Respondents are in contempt of the order of court of Mr Justice Binns-Ward dated 23 November 2012 under case reference no. 19206/12 ("the Order");
   3.2 That a period of imprisonment, such as is deemed appropriate by this Honourable Court, be imposed on the First, Second and Third Respondents by this court, such period itself being subject to any conditions this Honourable Court may deem appropriate;
   3.3 That a fine, such as is deemed appropriate by this court, be imposed upon the First, Second and Third Respondents in regard to their contempt;
   3.4 That, in the event this application is not finalised on 21 November 2013, this Honourable Court should issue directions regarding compliance with the Order as it may deem meet.
   3.5 That the First, Second and Third Respondents should pay the costs of this application *de bonispropris*(sic), such costs to be on the scale as between attorney and client and to be payable by First, Second and Third Respondents jointly and severally, the one paying the others to be absolved; and
   3.6 that the Applicants be granted such further and/or alternate relief as this Honourable Court may deem fit.
4. The matter is postponed to Thursday 21 November 2013.
5. The Applicants are to serve this Order forthwith, in the manner the application was served.
6. The Respondent are directed to file their answering papers, if any, by not later than noon on Tuesday 19 November 2013.
7. The Applicants are directed to file their replying papers, if any, by no later than noon on Wednesday 20 November 2013.
8. All questions of costs are to stand over for later determination.

BE PLEASED TO TAKE NOTICE FURTHER that the annexed affidavits of …..will be used in support of the application.

BE PLEASED TO TAKE NOTICE FURTHER that the applicants have appointed the offices of …., at which they will accept notice and service of all process in these proceedings.

BE PLEASED TO TAKE NOTICE FURTHER that if you intend opposing this application you are required to appear at this Honourable Court at 10h00 on Monday 18 November 2013, and that if you fail to appear the Applicant's will seek the relief set out above in your absence.

KINDLY ENROL THE MATTER FOR HEARING ACCORDINGLY'

It is apparent from the notice of motion that the application was structured so as to come before court on Monday, 18 November 2013 only for the purpose of obtaining the court's imprimatur on the method of service of the application and for the issue of a rule *nisi* setting the matter down for hearing on 21 November 2013 with directions to the parties on the exchange of further papers so that the matter would be ripe for hearing on that date.

The matter was first brought before Van Staden AJ, who was doing duty as the duty judge in the 'fast lane', on the morning of 18 November 2013. (The 'fast lane' is the branch of the Third Division motion court in this Division of the High Court that deals with applications requiring to be heard as a matter of extreme urgency. Applications which are urgent, but do not need to be heard immediately or on a significantly curtailed timetable are heard on the semi-urgent roll of the Fourth Division in this court. Opposed motions which are to be heard in the ordinary course are enlisted by the registrar on the ordinary Fourth Division roll.) Van Staden AJ was conflicted and thus unable to deal with the matter. It was then referred to Cloete J because of her familiarity with the background to the case on the assumption that if the application were to be heard on 21 November 2013 it would be convenient for it to be argued together with the principal case. Cloete J, however, considered that it would be inappropriate for the current application to be dealt with by her together with the principal case. The matter was then allocated to me in the early afternoon of 18 November. At a meeting with counsel in my chambers it became apparent that the respondents were in the process of preparing answering papers on the preliminary issue of urgency. In the circumstances the hearing of the matter was stood down until the morning of 19 November. The respondents' preliminary answering affidavit was delivered very shortly before the court went into session and a short adjournment was necessary to allow me to apprise myself of its content. The applicants elected not to seek the opportunity to reply to the answering affidavit.

At the outset I enquired of counsel for the applicants as to the appropriateness in the circumstances of the structure of the application. Why was a rule *nisi* necessary? And why was a directions hearing necessary? The questions were directed because it was evident that

nothing more was sought from me than the issue of a rule to facilitate the hearing of the matter on certain directions. It seemed to me that the involvement of the court for this purpose was an unnecessary imposition on judicial resources and on the respondents in the circumstances.

Counsel explained that the procedure adopted had been based on the guidance provided in a passage from Herbstein& Van Winsen*The Civil Practice of the High Courts of South Africa* Fifth Edition at 1102-1103:

> Contempt procedure is summary in nature, and the usual method of initiating such proceedings is by way of an application for the issue of a rule *nisi*. It has also been held that ongoingcontempt of a court order, by its very nature, introduces an element of urgency in the proceedings. In *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) it was stated that, particularly in matters of urgency, the utilisation of the rule *nisi* procedure is to be encouraged. (footnotes omitted)

Reliance was also placed on the following passage in the judgment of Plasket AJ in *Victoria Park Ratepayers' Association v Greyvenouw CC* [2004] 3 All SA 623 (SE) at para 5-8:

> [5] It appears to me that the main purpose of the practice of seeking a rule *nisi* in cases such as this is to regulate how the matter is to proceed. Contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has wilfully and in bad faith ignored or otherwise failed to comply with a court order. This added element provides to every such case an element of urgency.
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> [6] It has been held that, particularly in matters of urgency, the utilisation of the rule *nisi* procedure is to be encouraged. In *SAFCOR Forwarding* (*Johannesburg*) (*Pty*) *Ltd v National Transport Commission* Corbett JA stated:
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> > "The Uniform Rules of Court do not provide substantively for the granting of a rule *nisi* by the Court. Nevertheless, the practice, **in certain circumstances**, of doing so is firmly embedded in our procedural law. This is recognised by implication in the Rules (see, eg, Rule 6(8) and Rule 6(13)). The procedure of a rule *nisi* is usually resorted to **in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests**. It is a useful procedure and one to be encouraged rather than disparaged **in circumstances where the applicant can show, *prima facie*, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons**. The rule *nisi* procedure **must be considered in conjunction with the provisions of Rule 6(12)** which, in the case of urgent applications, permits the Court to:

> ‘dispense with the forms and service provided for in these Rules and (to) dispose of such matter at such time and place and in such manner and in accordance with such procedure (**which shall as far as practicable be in terms of these Rules**) as to it seems meet’.
>
> (And see in this connection *RepublikeinsePublikasies*(*Edms*) *Bpk v AfrikaansePersPublikasies*(*Edms*) *Bpk*1972 (1) SA 773 (A) at 781H–782G.) In fact, the rule *nisi* procedure does make it possible for the application to come before the Court for adjudication more speedily than the usual procedures for the set down of applications or trials, and it does, **in a proper case, permit of the granting of interim relief**.”
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> (emphasisin the passage quoted from the judgment in *SAFCOR Forwarding*supplied by me)

[7] There is authority for the proposition that, in contempt of court cases, the party alleged to be in contempt because he or she has failed or refused to obey an order is not automatically entitled to be heard while he or she remains in default. While courts will obviously be loath to refuse to hear a party’s defence, and it will only be in the most exceptional of cases that a party may be barred in this way from defending himself or herself, the rule *nisi* procedure allows the court to regulate the respondent’s access to court, set the bounds of the dispute in the rule so that the respondent is in no doubt as to the case he or she must meet, and set the procedural rules for the further conduct of the matter.

[8] Flowing from the above, I am of the view that, from a procedural point of view, the application for a rule *nisi* as a first step in the committal application was a sensible expedient, especially when it is borne in mind that the matter was an urgent application. In these circumstances, and on the basis of the applicant’s papers only, the applicant established a *prima facie* case of contempt of court. As a result, it was entitled to the rule *nisi* that it sought: that relief, it seems to me, was the minimum needed to protect its interests and, at the same time, give recognition and protection to the rights of the respondents, who, after all, had not been heard on the merits at that stage.

The passage from Herbstein&Van Winsen does not state the position entirely accurately in my view. Whereas the contempt proceedings do indeed ordinarily bear an element of urgency and may well have taken a particular form traditionally, the rules of procedure of have evolved over time and what might have been done historically does not necessarily hold goodin the current age. As Corbett JA described in *Safcor Forwarding,* our courts devised their own procedures in the absence of specific rules. Regulating their own procedures has always been part of the superior courts’ inherent jurisdiction. It is a jurisdiction expressly recognised in s 173 of the Constitution. The various divisions of the late Supreme Court each had their own rules of procedure; which were later in large measure standardised and replaced by the currently applicable Uniform Rules. Even in the context of the application of the Uniform Rules of Court, the various divisions of the High Court have maintained some of

their own rules of practice and procedure tailored to fit the peculiar requirements of each court. In this Division these are contained principally in 'The Consolidated Practice Notes'; see van Loggerenberg et al, *Erasmus, Superior Court Practice* at D-3-1 – D3-24. The judgment in *SAFCOR Forwarding* was not concerned with proceedings in contempt proceedings; in the relevant part it was concerned with the question whether rule 53 of the Uniform Rules (which regulates procedure in judicial review applications) excludes the use in any circumstances of the rule *nisi* procedure. In simplified terms, in *SAFCOR Forwarding* the applicant for judicial review commenced proceedings using a composite notice of motion in terms of which a rule *nisi* was sought calling upon the respondent to show cause why its decision should not be reviewed and set aside, and,in addition, calling upon it to show cause why certain interim relief should not apply pending the determination of the review. The notice of motion also sought an order directing that the interim relief sought should apply pending the determination of the prayer for interim relief on the return day of the rule. It was in that context that Corbett JAmade the observations(at 674H-675B of the judgment) quoted by Plasket AJ at para 6 of his judgment in *Victoria Park Ratepayers' Association* set out earlier. An appreciation of the context gives particular meaning to the parts of the extract from Corbett JA's judgment in *SAFCOR Forwarding* quoted by Plasket AJ, which I have emphasised in bold font.

The reference to rule 6(12) in the passage from *SAFCOR Forwarding* quotedin *Victoria Park Ratepayers' Association*underlines the learned judge of appeal's intention to recognise the role of the rule *nisi* procedure as one that might, depending on the circumstances of a given case, serve a useful role in cases of urgency where interim relief is required to protect an applicant's immediate interests. In the immediately succeeding passage of the judgment Corbett JA also illustrated the flexibility of rule 6(12) with reference to *RepublikeinsePublikasies (Edms) Bpk v AfrikaansePersPublikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 781H - 782G. The latter judgment confirmed the ability of an applicant in urgent proceedings to frame its own rules, which, if reasonably formulated, a respondent will ignore at its peril. The subsequent judgment of Flemming DJP in *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) was to a material extent predicated on *RepublikeinsePublikasies*.

Practice Note 34 in this court's Consolidated Practice Notes provides:

Urgent Applications.—

(1) When an application is alleged to be of extreme urgency, the applicant's legal representative shall approach the Registrar to arrange a hearing as soon as possible in consultation with the duty judge.

(2) Practitioners are expected to adhere as far as possible to the basic requirement of Rule 6 (5) (*a*) that Form 2 (*a*) be used in applications, including applications with an element of urgency. (In this regard, the attention of practitioners is drawn to the judgment in *Gallagher v Norman's Transport Lines* 1992 (3) SA 500 (W) at 502D — 504C.)

(3) Opposed matters which are not of extreme urgency but which are nevertheless too urgent to await a hearing in the ordinary course on the continuous roll will be granted some preference. For convenience these matters are called '*semi-urgent*' matters.

Reference to the specified passage in *Gallagher* establishes the following requirements:

(a) applications in which relief is sought against other parties should be brought on notice of motion in accordance with Form 2(a) in the First Schedule to the Uniform Rules read with rule 6(5);

(b) even when the application is urgent, the notice of motion should as far as possible be compliant with the form of Form 2(a), and only in exceptional cases should the exigencies of the case justify a complete departure from Form 2(a);

(c) the court 'is enjoined by Rule 6(12) to dispose of an urgent matter by procedures "which shall as far as practicable be in terms of these Rules". That obligation must of necessity be reflected in the attitude of the Court about which deviations it will tolerate in a specific case';

(d) 'the mere existence of some urgency cannot therefore justify an applicant not using Form 2(a). The rules do not tolerate the illogical knee-jerk reaction that, once there is any amount of urgency, that form of notice of motion may be jettisoned - and often that a rule *nisi* may be sought';

(e) 'the applicant must, in all respects, responsibly strike a balance between the duty to obey rule 6(5) and the entitlement to deviate, remembering that that entitlement is dependent upon and is thus limited according to the urgency which prevails';

(f) 'on the practical level it will follow that there must be a marked degree of urgency before it is justifiable not to use Form 2(a)';

(g) 'almost all requirements of urgency can be managed by using Form 2(a) with shortened time periods, or by mere adaptation of an aspect of the form, for example advance nomination of a date for hearing or omitting notice to the Registrar, accompanied by changed wording when necessary'.

The application in the current matter was required to comply with the aforegoing prescripts arising from the judgment in *Gallagher*. It did not. Instead it proceeded on an *ad hoc* basis which contemplated that the court should be approached to endorse the time timetable selected by the applicant for the exchange of papers. Had an adaptation of Form 2(a) been used this would have been quite unnecessary as the applicants could have determined the timetable themselves. The only constraint on them in this regard would have been that they would have been enjoined to devise a timetable that allowed the respondents a reasonable opportunity to answer the application. Reasonableness in this context will be directly related to the degree of urgency that the application objectively commends. The procedure adopted by the applicants provided for a rule *nisi* to issue when none of the relief sought by the applicants was directed at securing their immediate interests on an interim basis. No interdictory relief is sought by the applicants. The application is cast purely as contempt proceedings.

While allegations of contempt of the court's orders ordinarily fall to be determined with a degree of urgency, there will, save in the most exceptional cases, be no reason to deal with them in the 'fast track'court, rather than on the semi-urgent roll. In the current matter therefore the applicant should have set their own timetable in the manner contemplated in *Gallagher* and *RepublikeinsePublikasies*. The involvement of a judge and the appearances of counsel on Monday 18 November and Tuesday 19 November should have been quite unnecessary.

The approach endorsed by Plasket AJ in *Victoria Park Ratepayers' Association* was on the face of the passage from the judgment which I have quoted influenced by the peculiar character of the case that the learned judge was dealing with. The approach also falls to be assessed in the context of the practice of the Division of the High Court in which he was sitting. To the best of my knowledge the South Eastern Local Division does not have a 'fast track'court or a semi-urgent roll, nor does it have a practice requirement closely equivalent to that set out in PN 34(2) of the Western Cape Consolidated Practice Notes.

It was also misdirected of the applicants to assume that they might reasonably presume to secure the hearing of the contempt application before Cloete J on 21 November. They were aware that Cloete J had set aside that and the following day to hear argument in the principal case. The alleged contempt of the interim order by the respondents has no bearing on the determination of the principal case. The timetable that the applicants sought to have

endorsed for the exchange of papers in the contempt application would be sustainable only in respect of a case of extreme urgency. It was formulated, however, not with regard to the urgency of the case assessed objectively, but entirely with the misdirected view of trying to make the matter ripe for hearing before Cloete J together with the principal case.

The only matter justifying exceptional urgency in the matter is the allegation by the applicants that the nectarines that the respondents are obliged, in terms of the interim order, to supply to the applicants are currently being harvested; and it would appear that, if nothing is done to stop it happening, they are likely to have been disposed of to third parties in the very near future. That, however, is not something to which contempt proceedings are directly related. The proper course to protect the interest that the applicants apparently wish to secure by the current litigation would have been to seek urgent interim relief prohibiting the disposal of the nectarines by the respondents pending the determination of the contempt proceedings or the principal case, whichever comes first. Had the application included such urgent interim relief, which presumably would have been required with immediate effect, a composite notice of motion including a rule *nisi* in respect of at least the interim relief might have been appropriate. As counsel for the respondents correctly emphasised in his submissions, in the absence of any prayer for such interdictory relief the bases for the degree of urgency with which the applicants seek to bring the application and the appropriate use of the rule *nisi* procedure are lacking.

In the circumstances the proper course would be either to strike the contempt application from the roll or to send it, with directions, for hearing on the semi-urgent roll. Owing to the public interest in ensuring proper respect for and due compliance with court orders it seems to me that the latter course would be the more appropriate. An order to that effect will therefore issue. I am advised by the Registrar that the first available date on the semi-urgent roll is 13 February 2014. It seems to me that the wasted costs occasioned by the engagement of counsel to appear on 18 and 19 November should be borne by the applicants. I should perhaps make it clear that nothing in this judgment or the order to be made should be construed as prohibiting or preventing the applicants in further proceedings, if so advised, from urgently seeking interdictory relief to protect their interests pending the determination of the contempt proceedings or the principal proceedings, as the case may be.

In view of the conclusion to which I have come and the fact that whatever its formal defects might arguably have been the service effected on the respondents has been sufficiently effective to have brought them all before the court - the fourth respondent has indicated that

she does not wish to participate in the proceedings as no relief is sought against her - I find it unnecessary to deal with the complaints about irregular service.

The following order is made:

1. The application is postponed for hearing on the semi-urgent roll on 13 February 2014;
2. The respondents are directed to deliver their additional answering affidavits, if any, within 10 days of the date of this order
3. The applicants are directed to deliver their replying affidavits, if any, within 5 days of the delivery of the respondents' additional answering affidavits.
4. Heads of argument must be filed in compliance with the applicable Practice Note.
5. The applicants shall be liable, jointly and severally, the one paying the others being absolved, to pay the costs incurred by the respondents in respect of the engagement of senior counsel to appear on 18 and 19 November 2013.

A.G. BINNS-WARD
Judge of the High Court

Before:	**Mr Justice Binns-Ward**
Date of hearing:	**19 November 2013**
Judgment delivered:	**20 November 2013**
Applicants' counsel:	**A.H. Morrissey**
Applicants' attorneys:	**Basson Blackburn Inc.** **Paarl** **De Klerk and Van Gend** **Cape Town**
First, Second and Third Respondents' counsel:	**W.R.E.Duminy S.C.**
Respondents' attorneys:	**SpamerTriebel Attorneys** **Bellville**