THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: A267/2016

CHRISTIAAN JACOBUS VAN ZYL **APPELLANT**

and

SIYAYA ENGINE REBUILDERS CC **FIRST RESPONDENT**

ELNA BOTHA **SECOND RESPONDENT**

Coram: ROGERS J

Heard: **14 OCTOBER 2016**

Delivered: **19 OCTOBER 2016**

JUDGMENT

ROGERS J (MAGONA AJ concurring):

[1] On 13 October 2015, and by way of an application issued on the previous day, the appellant obtained an ex parte order in the court a quo against the respondents interdicting them from selling two vehicles and directing the sheriff to take them into possession. This was pending the outcome of a vindicatory action to be instituted by the appellant. The respondents were called upon to show cause on 3 November 2015 why the order should not be made final.

[2] The ex parte order was executed on the day of its issue and the vehicles removed. One of the vehicles had to be towed away. The respondents opposed the confirmation of the order. The return day was extended. On 24 March 2016 the court a quo discharged the ex parte order with costs, essentially on the basis that the appellant had failed to disclose material facts. Pursuant to such discharge, the vehicles were returned to the respondents and remain in their possession. The appellant's vindicatory action is pending in the court quo.

[3] The appellant now appeals to this court. Mr TD Potgieter SC appeared for him and Mr Coston for the respondents.

[4] Rule 55(1)(c) of the Magistrate's Court Rules provides that where it is necessary or proper to give a person notice of relief sought on application, the notice of motion must be addressed to and served on such person. Rule 55(3)(a) provides that no application in which relief is claimed against another person shall be considered ex parte unless the court is satisfied that the giving of notice would defeat the purpose of the application or that the degree of urgency is so great that it justifies dispensing with notice. In terms of rule 55(3)(g) the court on the return day of an ex parte order may confirm, discharge or vary the order on cause shown by any affected person.

[5] It is well established that a person who seeks relief ex parte has a duty of good faith to disclose all facts which might, not necessarily would, affect the court's decision to grant or withhold the relief (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B). This principle applies as much in the lower courts as in the high courts. Non-compliance is one basis on which a presiding officer could exercise the

power conferred by rule 55(3)(g) to discharge an ex parte order, even in a case where the merits favoured the applicant.

[6] Another circumstance in which an ex parte order might be discharged is where, on a consideration of the additional facts disclosed by opposing and replying papers, the court concludes that the relief claimed by the applicant is not justified on the merits.

[7] Mr Potgieter submitted that these were effectively the only two bases on which a court on the return day could discharge an ex parte order. I disagree. Rule 55(3)(g) does not limit the grounds on which a court may exercise the power conferred. Provided cause is shown, the order may be discharged.

[8] It seems to me that, in addition to the two grounds for discharge which I have already mentioned, another ground would be that the case was simply not one in which recourse to ex parte procedure was justified. The general principle, recognised in rule 55(1)(c), is that an affected person must be given notice of an application. Apart from special types of applications dealt with elsewhere, the only circumstances in which a court may grant relief ex parte are those mentioned in rule 55(3)(a).

[9] If an applicant for ex parte relief has made full and fair disclosure, and if on the facts thus disclosed an ex parte application is not justified, one would not expect a presiding officer to grant an order. However due to inexperience or the press of work judicial officers do sometimes grant ex parte orders which are not justified by the founding papers. If the respondent shows on the return day that the applicant was not justified in proceeding ex parte, I have no doubt that this would constitute cause for discharging the order.

[10] As in the case of non-disclosure, the court would not be obliged to discharge the order. The court has a discretion to be judicially exercised. In the exercise of its discretion the court can properly take into account that notice to affected persons is a fundamental principle of fairness in the administration of justice and that litigants should be discouraged from attempting to bypass it. In *Republic Motors (Pvt) Ltd v*

Lytton Road Service Station (Pvt) Ltd 1971 (2) SA 516 (R), a case not dissimilar to the present one, Beck J said the following (518F-H):

'The procedure of approaching the Court ex parte for relief that affects the rights of other persons is one which, in my opinion, is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of audi alteram partem. It is accordingly a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of the respondent who is informed beforehand that resort will be had to the assistance of the Court, that the course of justice stands in danger of frustration unless temporary curial intervention can be unilaterally obtained.'

To similar effect see the full bench judgment in *Byway Projects 10 CC v Masingita Autobody CC* [2011] ZAGPJHC 54 paras 11-17.

[11] Mr Potgieter cited *Contract Forwarding Pty Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) at 260B-C as authority for the proposition that on the return day of an ex parte order for taking movable assets into possession the rule can be discharged only on grounds that go to the root of the creditor's entitlement to possession. In my view the passage in question does not support Mr Potgieter's submission that the court on the return day cannot discharge the rule on the basis that recourse to ex parte procedure was unjustified. *Contract Forwarding* concerned the perfection of a notarial bond. The debtor was not opposing confirmation; the dispute was between the applicant and another bondholder. Harms JA was considering the character of the possession obtained by the applicant at the provisional stage. There was no suggestion in the case that the applicant had not been justified in proceeding ex parte or that it had been guilty of non-disclosure. Harms JA's remarks were not directed at the considerations which would arise in the latter circumstances.

[12] In the present case I consider that the discharge of the ex parte order was justified even if the appellant was not guilty of non-disclosure in his founding papers. The following relevant assertions appear from the founding affidavit:

- The appellant is the owner of the two vehicles.

- After he bought the vehicles, he lent them to C van der Merwe. He trusted Van der Merwe to keep him informed about the whereabouts of the vehicles. When he tried to get hold of Van der Merwe he could not find him/her (the affidavit did not say) or the vehicles.
- On 16 September 2015 the appellant learnt that the vehicles were in the possession of the first respondent ('Siyaya').
- The appellant's attorney, Ms C Esterhuizen ('Esterhuizen'), spoke with the second respondent ('Botha'), a person actively involved in Siyaya's business. Botha told Esterhuizen that Van der Merwe had failed to collect the vehicles, that Siyaya had not undertaken repairs but that storage costs amounting to R320 000 (at R450 p/d) were payable. Esterhuizen informed Botha that the appellant was the owner. Botha said that she would not release the vehicles to the appellant but was willing to negotiate on the amount of the storage costs.
- Botha furnished Esterhuizen with the quotations Siyaya had given to Van der Merwe in March and November 2014 for the repair of the vehicles. These quotations make reference to storage fees of R450 p/d if the customer 'holds up the job'.
- On 22 September 2015 Botha informed Esterhuizen that the vehicles were no longer at Siyaya's premises but were being kept at her home.
- On Thursday 8 October 2015 Botha informed Esterhuizen that she had placed a notice in *Die Burger* to the effect that Siyaya intended to sell the vehicles to recover the arrear storage fees.
- Attached to the founding affidavit was a copy of the notice dated 8 October 2015. The notice was addressed to the appellant and Van der Merwe as co-owners, informing them that if they did not collect the vehicles within seven days they would be sold to cover arrear storage fees. One can accept, in the light of the respondents' attitude, that this did not mean that they would release the vehicle to the appellant or to Van der Merwe in the absence of payment of a satisfactory amount for storage costs

- The appellant alleged that it was clear from the advertisement that the respondents were not pursuing his disputed claim in a bona fide manner but intended to take the law into their own hands to deprive him of his opportunity of vindicating the vehicles. Mala fides on their part was alleged.
- The ex parte application was issued on 12 October 2015 and granted the following day.

[13] I leave aside for the moment the very sparse allegations concerning ownership and the circumstances in which Van der Merwe came into possession of the vehicles. The appellant through his attorney had been in contact with the respondent since about 16 September 2015. Botha had informed Esterhuizen that the respondents would not release the vehicles but were willing to negotiate about storage costs. When the vehicles were moved to Botha's home, the latter informed Esterhuizen. And importantly, on the very day the notice was published in *Die Burger*, 8 October 2015, Botha informed Esterhuizen thereof. Although the founding affidavit did not highlight this point, the attached notice afforded a seven-day period and specifically identified the appellant as a co-owner.

[14] It is clear from the founding papers that Siyaya was asserting a right to retain possession of the vehicles until its storage costs were paid. The respondents were quite open about this. By 8 October 2015 the appellant himself had taken no legal action to establish his right to the vehicles. The respondents brought this to a head by publishing the notice. They did not do this behind the appellant's back.

[15] The appellant and his attorney offered no explanation in the founding papers for why they did not contact the respondents, on receipt of the notice of 8 October 2015, to seek an undertaking that the vehicles would not be sold pending the outcome of an action or pending the determination of an application for an interim interdict. If this had been done, the respondents would almost certainly have provided an undertaking. In any event, in terms of the notice the respondents would not have begun the sale process before, at the earliest, 15 October 2015. This provided sufficient time for an urgent application to be brought on notice to the respondents.

[16] The obtaining of an ex parte order was thus wholly unjustified as was the allegation of mala fides. With reference to the requirements of rule 55(3)(a), this was not a case where the giving of notice would have defeated the purpose of the interim relief or where there was such urgency that the court could altogether dispense with notice. At best for the appellant some abridgement of the ordinary time limits would have been needed, depending on whether or not the respondents were willing to give a temporary undertaking.

[17] The facts which emerged from the further affidavits do not put a different complexion on matters. Relevant facts alleged by the respondents were the following:

- Botha told Esterhuizen, when the latter first contacted her in September 2015, that she was holding the vehicles as security for work done and that she would be starting the process of selling the vehicles to recover costs and damages. She invited Esterhuizen to come and inspect the vehicles.
- Because of the continued inconvenience of having the vehicles at Siyaya's workshop, Botha moved the vehicles to her residence to limit damages and costs and so that the appellant/Esterhuizen could inspect the vehicles after hours if they preferred. At her home the vehicles were stored behind security walls and 24-hour camera surveillance.
- The appellant/Esterhuizen never took up the opportunity to inspect the vehicles.
- At no stage did the appellant/Esterhuizen ask for an undertaking from the respondents not to sell the vehicles.
- Since the vehicles were not registered in Siyaya's name, the respondents could not have sold the vehicles without following the procedures required by the City of Cape Town's Abandoned Vehicle Division. The publication of the notice, which Botha sent to Esterhuizen, was the first step in this procedure. If there was no reaction from the owner, the respondents would have been required to provide the City with an affidavit, whereafter City officials would usually attempt to contact interested parties.

[18] In the replying affidavit the appellant, as confirmed by his attorney, said the following:

- The first contact between Esterhuizen and Botha was on 20 September 2015. Botha said that the vehicles were being held for storage costs, not work done.
- By this stage the vehicles, according to what Botha told Esterhuizen, were already at her residence. She informed Esterhuizen that they should inspect the vehicles.
- Esterhuizen in fact visited Botha's residential address and could see both vehicles. (The appellant does not say when this happened.) She saw six vehicles in all. One of the appellant's vehicles was parked in a corner with other vehicles fully surrounding it.
- Esterhuizen was absent from the Western Cape for a short period and returned on 10 October 2015, by which date the respondents had already placed the notice in the newspaper.
- There was still no explanation as to why Esterhuizen had not sought an undertaking from the respondents.

[19] The fact that the respondents invited the appellant and his attorney to inspect the vehicles and that Esterhuizen in fact did so (or at least saw that they were at Botha's premises) fortify the view that the respondents were not acting in an underhand way. Yet the vehicles were seized by the sheriff on the strength of an ex parte order. Botha says that during the execution of the order she was made to feel like a thief.

[20] I also think that the court a quo was entitled to find that there were facts known to the appellant which were not disclosed in the founding papers and which might have influenced a court in assessing the ex parte relief. I have already mentioned the respondents' invitation to the appellant/Esterhuizen to inspect the vehicles and that Esterhuizen in fact did so. This was one of the matters on which the court a quo commented adversely.

[21] Another circumstance, though not relied upon by the court a quo, was that the body of the affidavit did not fully describe the terms of the notice published in the newspaper. Although a copy of the notice was attached to the founding affidavit, the print was small and a busy presiding officer may not have checked the terms of the notice. The appellant should have said in his affidavit that the notice was addressed to him and Ms van der Merwe and that seven days were afforded to them to collect the vehicles. This would have alerted the presiding officer to the fact that there was no immediate danger of the vehicles being sold.

[22] The court a quo considered that the appellant had failed to disclose material facts as to the circumstances in which Van der Merwe came to be in possession of the vehicles. Mr Potgieter argued that these circumstances were irrelevant. I disagree. So little is said in the founding papers about the appellant's acquisition of ownership and the loan of the vehicles to Van der Merwe that a reader might be excused for thinking that the vehicles had been lent to Van der Merwe relatively recently and that she had then evaded the appellant. The appellant did not say when or for what purpose he lent the vehicles to Van der Merwe.

[23] In her opposing affidavit Botha relayed what she had been told by Van der Merwe. The latter signed a confirmatory affidavit. This version was that Van der Merwe, her husband and the appellant had conducted business together as Groceries Express. During June 2010 the business closed down because according to the appellant it was no longer profitable and there was no longer any trust between the parties. The two vehicles in question were previously used in this business. When the business closed down the appellant proposed that the Van der Merwes take over the vehicles for use in their new business. The appellant gave them the keys and license discs. There were many discussions to formulate an agreement regarding ownership but nothing was ever signed. The Van der Merwes nevertheless made payments to the appellant totalling R117 910. There had been no discussions between the parties about the vehicles since 2011.

[24] The replying affidavit contained a good deal of argumentative matter regarding the respondents' papers but very little regarding the history between the appellant and the Van der Merwes. The appellant denied that the Van der Merwes

had made any payment towards the vehicles or that he gave them the vehicles to start a new business. He denied having handed them the keys in 2011, asserting that they had had the keys since 2009. He claims that their possession subsequently became unlawful (presumably, on his version, when the business closed down) and that despite numerous demands they had failed to return the vehicles. He says his calls went unanswered and they failed to arrive for meetings.

[25] On the appellant's own version, the respondents have been in possession of the vehicles (he says unlawfully) since 2010 when the business closed down. He did not disclose this fact in his founding papers and did not provide information as to the steps he took to try to recover the vehicles. Even now the evidence of these steps is practically non-existent. These facts may have influenced a court at the ex parte stage. The appellant's case in the founding papers was a simple assertion of ownership. He had, however, allowed someone else (the Van der Merwes) to be in possession of the vehicles for four to five years without taking legal action against them. He must have realised that during this period the vehicles would require servicing and possible repair.

[26] A presiding officer might, in the circumstances, have required more information before concluding prima facie that the appellant had retained ownership. The presiding officer might also have wished to probe whether the appellant's conduct had not negligently created the impression that the Van der Merwes were entitled to possession of the vehicles and to have them repaired. Although the onus in the main proceedings would be on the respondents to allege and prove an estoppel against the owner (for estoppel in this context, see for example *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Limited* 1994 (3) SA 188 (A)), I do not think a presiding officer would have been precluded from refraining to act ex parte in view of circumstances indicating that a defence of estoppel might succeed.

[27] I do not know whether the respondents in the pending action have pleaded estoppel and I certainly do not say that on the limited facts known to this court a defence of estoppel would succeed. However it was not for the appellant to prejudge these matters. It clearly could not have assisted his case in the ex parte proceedings, and might have harmed it, if he had frankly stated that the Van der

Merwes had been in possession of the vehicles for four to five years and that he had done nothing to stop them behaving as if they were the owners.

[28] Another matter which the court a quo held against the appellant was that he had failed, in support of his assertion of ownership, to attach the registration documents for the vehicles. The court a quo accepted that at the hearing of the ex parte proceedings the appellant's attorney had handed copies of the registration documents to the presiding officer. She considered, however, that the material in question should have been included as part of the founding papers. Insofar as this was held against the appellant as a non-disclosure, I think the court a quo erred. The duty of disclosure arises from the overriding obligation of good faith. If due to an oversight something of importance is omitted from the founding papers, a litigant in the discharge of his duty of good faith can and should (through his legal representative) disclose it at the hearing. That is what happened here.

[29] How far the registration documents advanced the appellant's case is another question. The registration of vehicles does not determine their ownership. Furthermore the two registration documents handed to the presiding officer, and annexed to the replying papers, were issued on 12 October 2015, the very day on which the ex parte application was issued. The registration documents are described as duplicate registrations. One can accept that the licensing authorities would not have issued these documents if the vehicles had not previously been registered in the appellant's name. But the date of issue may suggest that the appellant only procured current registration documents when he wanted to obtain relief against the respondents.

[30] After concluding that the ex parte order should be discharged because of non-disclosure, the court a quo made an obiter observation that the order could in any event not be sustained given the disputes of fact. This is incorrect. Disputes of fact do not preclude the granting of an interim interdict. The question is whether the applicant has established a prima facie right though open to some doubt.

[31] Nevertheless I am satisfied that the court a quo was entitled to discharge the order for non-disclosure. And I think the discharge was in any event correct in view of the fact that the circumstance simply did not justify proceeding ex parte.

[32] For the record Mr Coston confirmed at the hearing of the appeal that his clients undertook not to dispose of the vehicles pending the outcome of the action. It may, however, be sensible if the parties were to agree that the vehicles could be sold and the money held in trust.

[33] The appeal is dismissed with costs.

_____

ROGERS J

_____

MAGONA AJ

APPEARANCES

For Applicant	TD Potgieter SC
	Instructed by
	Esterhuizen Attorneys
	1st Floor, Willowbridge Centre
	Tygervalley

For Respondents

Mr AP Coston

Instructed by

Marais Muller Hendricks

58 Van Riebeeck Road

Kuilsriver