FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES**:**

2 Case Number: **2178/2009**

3 High Court: **Port Elizabeth**

4 DATE HEARD: **27 August 2009**

DATE DELIVERED: **4 September 2009**

JUDGE(S): **Chetty J**

LEGAL REPRESENTATIVES –

Appearances:

1. for the Applicant(s): **Adv Wickens**
2. for the Respondent(s): **Adv Mullins**

Instructing attorneys:

2 Applicant(s):

3 Respondent(s):

CASE INFORMATION -

1. *Nature of proceedings*: **Application**
2. ***Topic:***

Key Words: Practice – Rule 6 (12) (c) Uniform Rules of Court – Rule *nisi* granted *ex parte* on urgent basis – Material facts not disclosed – Reconsideration of orders granted - Factors governing – Requirements for interdict not met – Grounds of urgency wholly deficient – Order set aside with costs

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

Case No: 2178/09

In the matter between:

COLIN STUART BLACHER	**First Applicant**
THE BLACHER FAMILY TRUST	**Second Applicant**
GLYDEN PROP 20 (PTY) LTD	**Third Applicant**

and

FRIEDA BRITZ	**First Respondent**
WALFRIE TRUST (IT 471/2000)	**Second Respondent**

Represented here and by its trustees for the first time

Being FRIEDA BRITZ and QUITA JURGENS

In re:

FRIEDA BRITZ	**First Applicant**
WALFRIE TRUST (IT 471/2000)	**Second Applicant**

Represented herein by its trustees for the time being

FRIEDA BRITZ and QUINTA JURGENS

and

COLIN STUART BLACHER	**First Respondent**
THE BLACHER FAMILY TRUST	**Second Respondent**
GLYNDEN PROPR 20 (PTY) LTD	**Third Respondent**
INVESTEC BANK LTD	**Fourth Respondent**
ABSA BANK LTD	**Fifth Respondent**
THE REGISTRAR OF DEEDS, CAPE TOWN	**Sixth Respondent**

Coram: **Chetty, J**

Date Heard: **27 August 2009**

Date Delivered: **4 September 2009**

Summary: Practice – Rule 6 (12) (c) Uniform Rules of Court – Rule *nisi* granted *ex parte* on urgent basis – Material facts not disclosed – Reconsideration of orders granted - Factors governing – Requirements for interdict not met – Grounds of urgency wholly deficient – Order set aside with costs

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JUDGMENT

CHETTY, J

[1] This is an application for the reconsideration of an order granted as a matter of urgency by Dhlodhlo ADJP on 6 August 2009 in the absence of the applicants. For the sake of clarity and to avoid confusion I shall refer to the applicants as the respondents in conformity with the citation of the parties in the proceedings before the learned judge (the main application). The first respondent is the sole trustee of the second respondent which owns sixty seven percent (67%) of the shareholding in the third respondent, the remaining shares (33%) initially being owned by the second applicant, its trustees being the first applicant and her now deceased husband. Since his demise he has been substituted by one *Quinta Jurgens*.

[2] In order to place this application in proper perspective it is apposite to chart the events which preceded it. On 6 August 2009, the applicants sought relief framed in the notice of motion as follows –

"1. That the matter be heard as one of urgency and that this Honourable Court condone the non-compliance with the Rules relating to time limits and service of process.

2. That a Rule nisi do hereby issue calling upon the Respondents to show cause at 09h30 on the 17th day of September 2009 why the following Order should not issue: -

3.1 That the Third Respondent's bank account with the Fourth Respondent, Investec Bank Ltd, account number 228602002, be and is hereby frozen;

3.2 That the Third Respondent's bank account with the Fifth Respondent, Absa Bank Ltd, account number 40-5664-2622 be and is hereby frozen;

3.3 That the Fourth and Fifth Respondents permit no withdrawals from the said bank accounts, save as is specifically provided for herein;

3.4 That paragraphs 2.1, 2.2 and 2.3 shall not apply to:-

2.4.1 The transfer of sufficient funds from the Fifth Respondent to the Fourth Respondent in order to cover the monthly bond payment;

2.4.2 The payment from the Fifth Respondent's account of the monthly rates and taxes;

2.4.3 Any reasonable and necessary expenses, provide it is approved by the First Applicant in writing;

2.5 That the First Respondent be and is hereby interdicted from alienating or encumbering the Third Respondent in any manner;

2.6 That the Sixth Respondent enter a caveat against the records in the Deeds Registry against the property in question in accordance with prayer 2.5 above;

4.7 That the Second Respondent be and is hereby interdicted from alienating its shares in the Third Respondent;

4.8 That the First Respondent pay the costs of this application.

3. That prayers 2.1 to 2.7 act as an interim interdict pending the return day.

4. That the Applicants institute an action against the First and/or Second Respondents and such entities as have received monies from the Third Respondent within thirty (30) days of the finalisation of this application."

[3] An order was issued in conformity with the relief sought. It is common cause that no notice of the application was given to the respondents. The reasons advanced which she contended justified the hearing of the matter clandestinely were that the third respondent would suffer irreparable harm if the first respondent was given advance notice of the application. In amplification of her contentions she annexed copies of the third respondent's bond and current account ostensibly to show that there were monies available

which could be misappropriated. No other reasons were advanced to justify the matter being heard *ex parte*.

[4] The grounds of urgency relied upon by the first applicant which she averred warranted an abridgement of the normal time limits were – the discovery that a substantial sum of money had been withdrawn from the third respondent’s banking account over a period of time without any resolution to that effect by its board of directors; the absence of any financial statements and books of account and the notification that the third respondent’s lease with its lessee, the Nelson Mandela Metropolitan University, would expire at the end of the current year.

[5] The reasons advanced for both the failure to give notice and proceeding on an urgent basis are in my view entirely unconvincing but appears to have persuaded the learned judge to indulge the applicants and grant the relief sought.

[6] The reconsideration of an order granted as one of urgency and in the absence of a party is governed by the provisions of Rule 6 (12) (c) of the **Uniform Rules of Court** which reads -

> "*(c)* A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

The rationale for and dominant purpose of the rule was articulated by Farber AJ in **ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others**[1] as follows[2] –

> "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 granted 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 from, 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 or 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 framers of the Rule have not 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 the 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 redress is open to attainment by virtue C of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein.
>
> Something need be said about procedure. Although no hard and fast rule need be laid down, it seems desirable that a party seeking to invoke the Rule ought in an affidavit to detail the form of reconsideration required and the circumstances upon which it is based."

[1] 1996 (4) SA 484 (W)
[2] At 486H-487D

[7] This exposition of the Rule has been judicially considered and approved in various matters. In **Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)**[3] Southwood J, in emphasizing that the term reconsideration must bear the widest possible meaning, said[4] -

> "In terms of Rule 6(12) *(c)* a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order. This Rule is very widely framed and I have no doubt that the word `reconsideration' must bear its widest meaning. *The Shorter Oxford English Dictionary* gives the following three meanings for the word `reconsider':
> `1. To consider (a matter or thing) again; *(b)* to consider (a decision, etc) a second time with a view to changing or amending it; to rescind, alter.
> 2. To reflect on one's conduct with a view to . . . amendment.'"

[8] The effect of the order is manifest and its ramifications may properly be characterised as oppressive – the third respondent's banking accounts are frozen and payments therefrom delineated and made subject to the first applicant's sole approval; the second respondent is unable to deal with its shares in the third respondent notwithstanding offers having been made to it for their acquisition; the first respondent is effectively divested of control over the third respondent of which he is a director and majority shareholder, and the order vests the minority shareholder with control over the third respondent.

[9] The principal submissions advanced on behalf of the respondents for the setting aside of the order granted in the main application was that the

[3] 1998 (3) SA 281 (T)
[4] At 290D

applicants had failed to make full and proper disclosure and moreover had not satisfied the requirements for the grant of an interim interdict.

<u>Failure to disclose</u>

[10] The nature and extent of the duty resting upon an applicant to make full disclosure of all material facts which might affect the granting of an order *ex parte* has repeatedly been emphasized in our jurisprudence. Extrapolated from the authorities[5] the principles applicable to the *uberrima* fides rule are –

> "(1) In *ex parte* applications all material facts must be disclosed which *might* influence a Court in coming to a decision;
> (2) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission and
> (3) the Court, apprised of the true facts, has a discretion to set aside the order obtained on material facts not disclosed or to preserve it."

[11] In similar vein, Howie, P, pointed out in **<u>Phillips and Others v National Director of Public Prosecutions</u>**[6] that -

> "[29] It is trite that an *ex parte* applicant must disclose all material facts which 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 later 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."

[5] Schlesinger v Schlesinger 1979 (4) SA 342 at 349A-B; See also Rizcum Trader (4), MV: MV Rizcum Trader v Manley Appledore Shipping Ltd 200 (3) SA 776 (C) at 794A-D
[6] 2003 (6) SA 447 (SCA) at para [29]

[12] Counsel for the respondents submitted that the extent of the applicant's non-disclosure was clearly established by the failure to advert to the protracted dispute regarding her directorship of the third respondent and the fact that the second applicant had ceded its shares in the third respondent to the first respondent and that such omission warranted the setting aside of the order. It is not in issue that in her founding affidavit the applicant described herself as a director of the third respondent and a trustee of the second applicant which she averred held a thirty three percent (33%) shareholding in the third respondent. What she omitted to disclose was that as far back as September 2007 her directorship of the third respondent was disputed and has remained disputed ever since. Mr *Wickens* has correctly pointed out that the issue of directorship was material and had a significant impact on the relief granted in paragraphs 1.1 to 1.4 of the order which froze the third respondent's banking accounts and made its contractual and legal obligations subject to the unilateral approval of a person who may not be a director of the third applicant and who, furthermore, on her own admission, had no knowledge of the management and affairs of the third respondent. The order elevated the first applicant to a position effectively in control of the third respondent.

[13] As regards the cession of the second applicant 's shares in the third respondent to the first respondent, the first applicant's laconic excuse that she somehow forgot to mention this fact to her instructing attorneys is unconvincing to say the least. The applicants' attorneys were placed in possession of the share transfer form signed by the first applicant's late

husband in July 2006. Correspondence relating to the cession was exchanged between the first applicant's erstwhile attorneys and the respondents' attorneys and the legality of the cession strenuously contested by her. The cession of the shares was a material issue and, so too, her directorship in the third respondent. It is inconceivable that if full disclosure of these material issues was made, the applicants would have obtained the order which eventuated.

[14] This conclusion renders it unnecessary to embark upon an in depth consideration of Mr *Wickens'* further submissions that although the applicants may, at the very least, have established a *prima facie* right, none of the remaining requirements for the granting of an interdict had been established. Suffice it to say that the requirement of a well grounded apprehension of irreparable harm was cursorily dealt with in the founding papers. The balance of convenience was moreover neither addressed nor was the existence of a suitable alternative remedy. In short the requirements for the grant of an interdict were never met.

[15] Harms JA's trenchant statement in **Memory Institute SA CC t/a SA Memory Institute v Hausen**[7] that –

> ". . . interim orders and rules *nisi* are not to be had simply for the asking. Courts should satisfy themselves that a proper case has been made out . . ."

[7] 2004 (2) SA 630 (SCA) at p 636G

illustrates the point that where the requirements for the grant of an interdict have not been met, the party responsible for pursuing an application, where its deficiencies are manifest, deserves to bear the consequences of having the application dismissed.

[16] The following orders will issue –

3. The application for a reconsideration of the order granted by Dhlodhlo ADJP on 6 August 2009 under case number 2178/09 is allowed and the order is set aside in its entirety.

4. The first and second applicants are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

D. CHETTY
JUDGE OF THE HIGH COURT

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