

REPUBLIC OF SOUTH AFRICA


 IN THE HIGH COURT OF SOUTH AFRICA
 LIMPOPO DIVISION, POLOKWANE

CASE NO: 7134/2017

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE: 02 JULY 2021	SIGNATURE:  ADJP/SEMENYA

In the matter between:

GAYLORD TAPIWA MADAVANHU

: 1ST APPLICANT

ABIGAIL PHELADI MOKABA

: 2ND APPLICANT

THOKOZILE PINKIE MOHLARI

: 3RD APPLICANT

ORACLE FINANCIAL SERVICES (PTY) LTD

: 4TH APPLICANT

And

1ST INSURANCE BROKERS (PTY) LTD: 1ST RESPONDENT

KERSTEL FINANCIAL SERVICES (PTY) LTD

: 2ND RESPONDENT

JUDGMENT

SEMENYA ADJP:

[1] The applicants, who were the respondents in the main application, have applied to this court for the reconsideration of the orders granted in the main application by M G Phatudi J on the **31 October 2017**. The respondents in this application were the applicants in the main application. The main application was launched in two parts. Part A was heard as a matter of urgency and the order was granted in the interim pending the hearing of Part B. There is a dispute between the parties with regard to the issue whether the application was heard *ex parte* or with notice. I shall deal with this issue later in this judgment.

[2] Paragraphs 2 and 3 of the Part A order are relevant to the determination of the issues in this application. These paragraphs are worded as follows:

“2. Pending an application for final relief in the ordinary course (Part B), alternatively the determination (by arbitration or otherwise) of any material substantive disputes between the parties, the respondents are interdicted and restrained from:

..., and

3. The respondents are directed to pay the costs of the application jointly and severally on the scale as between attorney and own client.”

[3] The final relief that was sought in Part B reads as follows:

“Interdicting and restraining the respondents for a period of 24 (twenty-four months from date of the interim order in part A hereof either alone or jointly whether as proprietor, partner, director, shareholder, employee, member, consultant, contractor, financier, agent, representative, assistant or otherwise and whether for reward or not directly or indirectly...”

[4] Rule 6(12) (c) permits any person against whom an order was granted in his/her absence in an urgent application to set down the matter by notice for reconsideration of the order.

Farber AJ in **ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others**¹ as follows:

"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."

[5] The respondents contended that the order was not granted in the absence of the applicants in as they were in court on the date of the hearing of the urgent application. It was submitted that Rule 6 (12) (c) is not applicable in that the absence of the party is a determining factor in this sub-Rule. The applicants conceded during argument that they were indeed in Court but seated in the gallery and did not take part in the proceedings. It is further not denied that the applicants had not yet filed their answering affidavits at that stage. The issue whether a party can be regarded as being present and properly before court where opposing papers have not been filed has been decided with as follows in **Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017)**:

¹ 1996(4) SA 484 (WLD)

[2] The question to be decided is twofold, namely:

2.1. Whether the Appellant was in default despite the attendance of its Counsel in Court when judgment was granted; and

2.2. Whether the Appellant whose application for rescission of judgment was dismissed by single Judge of this Division had made out a case for the relief sought.

[3] The judgment sought to be rescinded was granted on 2 August 2016 when M G Phatudi J refused an adjournment sought by the Appellant's Counsel and granted judgment in the absence of any answering affidavits by the Appellant and on the Respondent's version alone.

[4] . . .

[10] The Court a quo decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant's Counsel was present in Court when the Order was made. The Court a quo erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and / or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.

[11] In my view where opposing papers have not been filed there is a "default" even if the Respondent in the matter or his legal representative is present in Court. See: **Morris v Autoquip (Pty) Ltd 1985 (4) SA 398 (WLD)**; **First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (CPD)**.

[12] The question of what is meant by "default" was considered in **Katritsis v De Macedo 1966 (1) SA 613 (A)**. In this matter the Appellate Division (as it then was) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. In casu the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a "default judgment" even if it was not a default in the sense of the absence of the party.

[13] . . ."

I am in agreement with the applicants' contention that it cannot be said that the order was granted in their presence simply because they were physically present in court. It is in any event not in dispute that the Court did not hear their version for did not get the opportunity to present their case. The Rule 6(12) (c) finds application in this matter.

[6] It appears from the papers that the crux of the application for reconsideration is based on the fact that the order of the **31 October 2017** has lapsed. The applicants argued that a proper reading of both Parts A and B of the application clearly shows that the intended lifespan of 24 months. Their interpretation of the order was made known to the respondents through a letter addressed to their attorney, by the applicants' attorney dated the **11 November 2019**. On paragraph 2.1-2.2 of the attorney for the respondents' response it is stated that:

"2.1 The twenty-four (24) months period claimed for by our client in the Notice of Motion has now, as you have correctly point out, lapsed.

2.2 Our client however does not agree that the Interdict was granted for the twenty- four months' period was not valid and enforceable during that period..."

[7] It is common cause that Part B was never heard to this day. The fact of the matter is, had it been timeously heard, and the interim order confirmed, it would have already lapsed by now. The intention of the respondents as stated in Part B of the Notice of Motion is that the effectiveness of the interdict was limited to a period of 24 months only. I therefore agree with the applicants that the interdict can no longer be of force and effect. My understanding of the respondents' letter referred to in paragraph [6] above that they agree with this view.

[8] The main dispute between the parties relates to the question whether the respondents are entitled to tax the costs of the interim order (Part A) despite their failure to proceed to Part B within 24 months. It is stated in Paragraph 2 of Part A of the Notice of Motion in the main application that the relief in Part A is sought "pending an application for a final relief in the ordinary course (Part B)". As already stated

elsewhere above, the respondents stated in paragraph 1 of Part B that they were praying for the court to interdict or restrain the applicants from conducting themselves in certain specified ways for a period of 24 months. The applicants contend that the orders granted on the **31 October 2017**, inclusive of the cost order, were meant to be of interim force and effect. The applicants state that the respondents cannot tax the costs of an interim order that was granted in their absence and which was never confirmed. It was further stated that the interim order has become moot due to effluxion of time.

[9] In **Apleni v Minister of Law and Order and Others Vivier**² JA stated:

"The interim interdicts sought would have been operative for the duration of the appellants' detention. In this sense it would have had final effect in that nothing which may subsequently have been decided could detract from the efficacy which the orders enjoyed while they were in force. However, on the facts of the present applications the grant of interim interdicts did not involve a final determination of the rights of the parties and did not affect such determination...although final in effect, the interdicts sought were thus certainly not final in substance. The fact that the determination of the issues would only have taken place after the risk of injury had passed was obviously no bar to the granting of the orders..."

The applicants stated that the order in Part A, though final in nature, did not, as in Apleni above, involve a final determination of the rights of the parties and did not affect such determination. It is my view that the respondents were fully aware of this fact and have for that reason, set the matter down twice for the hearing of Part B, which could not proceed at the instance of the applicants. The applicants were ordered to pay the costs of the postponement and the removal of the matter from the roll. The respondents are of the view that they are entitled to the costs of Part A on that basis.

[10] The circumstances under which Part B was postponed are not clear. That is, it is not clear as to whether the respondents opposed the application or not. The

² (436/86) [1987] ZASCA 135 (26 November 1987)

respondents stated in the answering affidavit that nothing prevented the applicants in this application from enrolling Part B. The respondents further stated that it is clear that the applicants failed to do so because they once found by this Court to be in contempt of the interim order. It is my view that in the absence of a final determination of the rights of the parties which was supposed to be dealt with in the hearing of Part B, the entire interim order, including the costs order, lapsed after the expiration of a period of 24 months. The respondents are not permitted to tax in terms of the said court order. This Court has the power to reconsider the matter and to set the interim order aside on the basis that it has lapsed.

[11] In the result I make the following order:

- i. The interim order granted in Part A by M G Phaduti J on the **31 October 2017** has lapsed and is consequently set aside;
- ii. The respondents are ordered to pay the costs of this application.


M.V SEMENYA

ACTING DEPUTY JUDGE PRESIDENT OF
THE HIGH COURT; LIMPOPO DIVISION.

APPEARANCES

ATTORNEYS FOR THE APPLICANT	: BOSMAN ATTORNEYS
COUNSEL FOR THE APPLICANT	: MR. BOSMAN
ATTORNEY FOR THE RESPONDANT	: OTTO KRAUSE INC.
COUNSEL FOR THE RESPONDENT	: ADV. CB GARVEY
RESERVED ON	: 10 JUNE 2021
JUDGMENT DELIVERED ON	: 02 JULY 2021

This Judgment was delivered electronically through the parties legal representatives' email addresses.