Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates:	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No:	2080/2015 &1749/2017
Heard on:	16/02/2018
Delivered:	03/08/2018

In the matter between

DUNDI LODGE (PTY) LTD	**1st Applicant**
SOUTHERN CROSS MARKETING AND	
MANAGEMENT SERVICES (PTY) LTD	**2nd Applicant**
KALAHARI ADVENTURES (PTY) LTD	**3rd Applicant**
TRAWAL FRESH FRUIT COMPANY (PTY)	**4th Applicant**
SOUTHERN CROSS GAME RESEVE (PTY) LTD	**5th Applicant**
SOUTHERN FARMS (PTY) LTD	**6th Applicant**
THE STEENKAMP FAMILY TRUST t/a ORANGE FALLS	**7th Applicant**

and

COMPENSATION INSURE INTERNATIONAL	
CONSULTANTS (PTY) LTD	**1st Respondent**
THE STANDARD BANK OF SOUTH AFRICA LTD	**2nd Respondent**
GERALD CUPIDO	**3rd Respondent**
MONICA CUPIDO	**4th Respondent**
CYRIL TEE	**5th Respondent**
NEDBANK LTD	**6th Respondent**

JUDGMENT

PAKATI ADJP

[1] This matter consists of two applications, firstly an application for reconsideration of the *rule nisi* granted by Lever AJ on 31 July 2017 which I confirmed on 22 September 2017 against the respondents under Case Number 1749/2017 and secondly, a summary judgment application under Case Number 2080/2017 against the third to fifth respondents. On 31 July 2017 the applicants, Dundee Lodge (Pty) Ltd ('Dundee Lodge'), Southern Cross Marketing and Management Services (Pty) Ltd, Kalahari Adventures (Pty) Ltd, Trawal Fresh Fruit Company (Pty) Ltd), Southern Cross Game Reserve (Pty) Ltd, Southern Farms (Pty) Ltd and the Steenkamp Family Trust t/a Orange Falls, first to seventh applicants respectively, approached court on urgent basis seeking an order freezing the bank accounts of the first respondent, Compensation Insure International Consultants (Pty) Ltd ('CIIC'), pending the outcome of an action to be instituted against the respondents claiming amounts of monies allegedly obtained and/or stolen from the applicants by fraudulent means. The applicants apply for summary judgment for payment of various amounts of monies allegedly stolen from each of the applicants as part of a fraudulent scheme conducted by the respondents.

[2] The Standard Bank of South Africa Ltd, Mr Gerald Cupido, the deponent to the reconsideration application and director of CIIC, Ms Monica Cupido, Mr Cyril Tee, and Nedbank Ltd, are second to sixth respondents respectively. For convenience, I will refer to the parties as cited herein.

[3] CIIC now seeks to have the order granted on 31 July 2017 and confirmed on 22 September 2017 reconsidered in terms of Rule 6 (12) (c)[1] after the Workmen's Compensation Commissioner of the Department of Labour ('the Commissioner') has been joined in these proceedings and further papers have been filed. It also applies for condonation of the late filing of the reconsideration application whose notice of set down is dated 01 November 2017.

[4] Both parties oppose the respective applications. Ms Cupido, the fourth respondent, does not oppose the application for summary judgment.

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[1] Uniform Rules of Court which provide that 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.

BACKGROUND FACTS

[5] The applicants are entities that carry on business as fruit farm-exporters and are in the business of tourism and hospitality, thus they employ various employees. In terms of section 82 of the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ('the Act'), the applicants are obliged to furnish the commissioner with a return showing the amount of earnings in respect of each employee and in terms of section 83 read with section 85 of the Act they ought to make contributions to the Compensation Fund based on an assessment calculated on the basis of such percentage of the annual earnings of its employees.

CLAIM A

[6] CIIC, a private company and an agent assisting in the submission of returns of earnings to the Department of Labour ('the department'), administers payments made to it on behalf of its clients. It was appointed to act on behalf of Dundi Lodge, a company duly incorporated in terms of the South African Company Law, for the 2016 and 2017 years of assessment. During 2016 the respondents were provided with the return of earnings in respect of Dundi Lodge indicating a total amount of R1 025 873-59 as earnings. The applicants state that the respondents fraudulently alternatively negligently and unlawfully represented that; (a) they submitted the returns to the Department of Labour in accordance with Dundi Lodge's instructions; (b) a reduction of 20% was awarded by the department in terms of s 85 of the Act; (c) an amount of R 18 875-34 was assessed as payable to the department and (d) fees to the amount of R 707-83 was payable to CIIC. According to the applicants the representation was false in that the return submitted was less than that provided by Dundi Lodge, no reduction was awarded by the department and no fees were due to CIIC and the amount assessed as payable to the department was less than R18 875-34.

[7] Dundi Lodge, labouring under the impression that the said amounts were due and payable to the department and CIIC, paid an amount of R18 875-34 to the department on 31 May 2016 and a sum of R707-83 as fees earned into an account specified by CIIC, the Cupido's and Cyril Tee. It later transpired that only an amount of R 2 083-94 was paid by the respondents to the department in respect of 2016 tax year on behalf of Dundi Lodge. The applicants allege that the Cupido's as well as Mr Tee misappropriated the difference between the amount paid to the department and the

amount actually paid namely, R19 583-17 and therefore suffered damages to the amount of R17 499-23. They allege further that the respondents are jointly and severally liable for the said amount plus interest at the *mora* rate as well as costs from date of service of summons.

[8] The applicants allege that the same *modus operandi* as mentioned in Claim "A" was used by the respondents. The following table indicates the amounts alleged to have been misappropriated with regards to each applicant:

CLAIM	APPLICANT	TAX YEAR	AMOUNT INVOLVED
B	First Applicant	2017	R 6 138-19
C	Second Applicant	2016-2017	R 66 114-63
D	Second Applicant	2017	R 95 173-11
E	Third Applicant	2016-2017	R 6 699-73
F	Fourth Applicant	2016-2017	R 14 629-64
G	Fourth Applicant	2017	R180 081-87
H	Fifth Applicant	2016	R 6 868-98
I	Fifth Applicant	2017	R 3 278-38
J	Sixth Applicant	2017	R858 253-24
K	Sixth Applicant	2016	R491 586-46
L	Seventh Applicant	2016-2017	R222 359-22

[9] As a result of the alleged misappropriation of funds mentioned *supra* the applicants approached this court on an urgent basis seeking an interim order against the respondents on 31 July 2017 as alluded to earlier.

[10] On 01 August 2017 the Sheriff served the interim order granted on 31 July 2017 upon Standard Bank Ltd and Nedbank Ltd. On 12 September 2017 the notice of motion and the interim order which was on 01 September 2017 extended to 22 September 2017 were served upon Mrs Stander on behalf of Ms Cupido and Mr Tee. The Sheriff's return indicates that Ms Stander is a niece but does not mention whose niece she is. Importantly is the fact that the address of Ms Cupido is different from that of Mr Tee. On 20 September 2017 the said notice and the interim order were also served by the Sheriff upon Mr Cupido who also accepted service on behalf of CIIC. The respondents

had an option to anticipate the return date of 01 September 2017 in 48 hours' written notice to the applicants' attorneys of record.

[11] As a result of non-service of the interim order the respondents neither filed a notice of intention to oppose the urgent application nor did they file an answering affidavit. The interim order was served upon Mr Cupido on 20 September 2017, two days before 22 September 2017 when the interim order was confirmed as alluded to earlier. The respondents submit that at all relevant times they intended to oppose the urgent application.

[12] The respondents also apply for condonation of the late filing of the reconsideration application. Mr Cupido's explanation for the delay is that on 19 September 2017 he returned from Durban and had attended a long meeting with business partners from Cape Town. He found the notice of motion, the interim court order dated 31 July 2017 and the one extending it to 01 September 2017 with annexures on top of his desk on 20 September 2017. He instructed Mr Groenewaldt of Towell & Groenewaldt Attorneys to act on behalf of the respondents and oppose the urgent application as per CIIC's resolution dated 20 September 2017. He alleges further that at his request, his office made numerous telephonic follow-ups and sent emails to Towell & Groenewaldt Attorneys regarding the progress of the case without success. Despite numerous telephone calls and correspondences regarding the progress of the matter no response was forthcoming.

[13] Consequently, Mr Cupido terminated the mandate of Towell & Groenewaldt Attorneys regarding Case Number 2080/2017 as per email dated 31 October 2017. The same day he instructed Sharuh Attorneys wherein CIIC sought the applicants' consent regarding the reconsideration application and a response to be furnished on or before 10h30 a.m. on 01 November 2017. He further requested the applicants to withdraw the summary judgment application, which was not done.

[14] Rule 27 (3) of the Uniform Rules of Court provide that the court may, on good cause shown, condone any non-compliance with these rules. The application must be *bona fide* and should not be made with the intention of delaying the other party's claim.[2] The

[2] Smith NO v Brummer NO 1954 (3) SA 352 (O) at 358A

Constitutional Court in **VAN WYK v UNITAS HOSPITAL**[3] had this to say regarding condonation:

"[20] This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and the cause of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."

[15] The applicants neither opposed nor argued the condonation application. Be that as it may condonation should be granted in the interest of justice taking into account that CIIC was only served with the interim order and the one extending it two days before the hearing on 22 September 2017.

URGENCY

[16] CIIC contends that the applicants have failed to describe the circumstances which rendered the main application urgent as urgency was self-created. For this contention it relies on **LUNA MEUBEL VERVAARDIGERS (EDMS) BPK v MAKIN (t/a MAKIN'S FURNITURE MANUFACTURERS)**[4] where Coetzee J held that:

"Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter may be set down."

[17] The applicants submit that they first learned of the alleged fraud during the first part of July 2017. At the time investigations were conducted and enquiries to CIIC regarding the outstanding payments were delayed. They could not give notice to the respondents; hence they brought the matter *ex parte* and on urgent basis to prevent the withdrawal of the funds held in the two abovementioned bank accounts to their prejudice. Therefore

[3] 2008 (2) SA 472 (CC) at 477 para [20] and [22]
[4] 1977 (4) SA 135 (W) at 137E-F

notifying the respondents of the intended litigation would have served no purpose instead they would have suffered irreparable harm, the argument goes.

[18] Rule 6 (12) (b) of the Uniform Rules of Court provide that in every application or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at the hearing in the ordinary course. According to CIIC the applicants have other remedies available to them.

[19] In my view the applicants' concern that if the matter was not brought *ex parte* and on urgent basis the monies held in the banks would have been withdrawn to their disadvantage is unreasonable in the circumstances. This is so because such allegation is unsubstantiated. The 48 hours' notice given to the respondents to file opposing papers was too short a notice taking into account that the matter was brought to court without notice. Notably, the urgent application was launched on 31 July 2017 and granted the same day and yet the applicants did not set out explicitly the circumstances that rendered the matter so urgent such that no notice was given. An applicant should make out a case in the founding affidavit to justify the particular extent of the departure from the norm as required in the Luna Meubel's case *supra*, which is not the case *in casu*. For the reasons stated above it is my view that urgency was indeed self-created. This is confirmed by Ms Labuschagne's averment in paragraph 208 of the founding affidavit where she states that once the interim order is granted it would be possible to set the urgent application down in the normal course. This clearly shows abuse of the court process.

[20] Regarding the reconsideration application the respondents recorded the following grounds summarised thus:

20.1 Ms Cupido has no direct and substantial interest in these proceedings and ought not to have been cited;

20.2 The order was sought and granted *ex parte* in the absence of the respondents. CIIC became aware of the urgent application and the order for the first time on 20 September 2017.

20.3 The Commissioner, a party with direct and substantial interest in the proceedings, has not been cited.

[21] The respondents state that on 01 September 2017, the return date, the notice and/or the interim order was still not served upon it for a period of more than thirty days. CIIC submits that the applicants misled the court and made inaccurate, fallacious and unfounded allegations of fraud in order to obtain the interim order. It seeks an opportunity to file supplementary affidavits in terms of Rule 6 (6) of the Uniform Rules of Court in order to deal comprehensively with all the material issues which could not be dealt with due to time constraints. It submits further that interests of justice would be better served if it is allowed to set out substantial facts in response to the applicants' allegations.

[22] The respondents claim further that their long-earned goodwill, freedom of trade and fame has been threatened and negatively affected by the order of 22 September 2018 resulting in the loss of their current and potential clients including a monthly income of R 5million. Therefore the balance of convenience favours the granting of the reconsideration application and that no alternative relief is available.

[23] The respondents deny committing fraud and/or theft. They contend that the Commissioner ought to be joined as a party for the direct and substantial interest that it has in the matter and that Ms Cupido, who is no longer a director of CIIC since 18 August 2017, lacks direct and/or substantial interest in the proceedings. In paragraphs 33.1 to 33.3 of its founding affidavit the respondents state that the Commissioner should explain the following:

"33.1 its automatic system generated certificate with last five digitally unique number: 044984 validly issued by the Commission to second applicant on 10 June 2016, the same certificate 044984 was issued to Neo Solutions (Pty) Ltd allegedly on 02 June 2017;

33.2 its automatic system generated certificate with last five digitally unique number: 044976 validly issued by the Commissioner to [the] third applicant on 10 June 2016, same certificate 044976 was issued to Mphe E Ya Lapisa (Pty) Ltd allegedly on 02 June 2017; and

33.3 its automatic system generated certificate with last five digitally unique number: 082452 validly issued by the Commissioner to [the] fourth applicant on 14

November 2016, same certificate 082452 was issued to Jacker Sound & Lighting CC allegedly on 14 September 2017 as evinced from the relevant print out attached herewith marked cumulatively "GC6A-C"."

[24] Mr Cupido denies that Ms Lizette Labuschagne, the deponent to the founding affidavit in the urgent application on behalf of the applicants and an employee of the second applicant (Southern Cross) the Risk Implementation and Secretarial Manager, has knowledge regarding the service engagement between the applicants and CIIC. The respondents argue that the urgent application is fatally flawed. They argue further that the applicants have failed to comply with Rules of Court and their application constitutes an abuse of court process.

[25] According to the applicants CIIC has failed to make out a case for the reconsideration application and it should be dismissed with costs. They deny CIIC's allegations as set out in its affidavit in support of the application. The applicants submit further that the respondents failed to oppose the urgent application taking into account that they were aware of the return day before 22 September 2017. They state that the respondents should show; (a) returns of earnings received from the applicants and the amounts they paid to the Commissioner in respect of each applicant; (b) documents received from the Commissioner; and (c) assessments received from the Commissioner in respect of each applicant.

[26] In my view, the information from the office of the Commissioner is of vital importance. There is no reason why the it should not be joined under the circumstances to show the amounts paid, documents sent to the respondents and the assessments received in respect of each applicant. This kind of information is relevant and confidential. It is in the knowledge of the Commissioner only. It can only be divulged if the Commissioner is a party to the proceedings. It therefore cannot be said that the Commissioner has no direct and substantial interest in these proceedings. There is therefore no reason why the Commissioner should not provide and explain all relevant documents at its disposal. On the other hand this cannot be said of Ms Cupido. She was a director of CIIC and that makes her a party having direct and substantial interest in this matter. She is therefore not wrongly cited in these proceedings.

[27] Rule 6 (12) (c) of the Uniform Rules of Court provides that

"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."

[28] Southwood J in **LOURENCO AND OTHERS v FERELA (PTY) LTD AND OTHERS**[5] defined the term 'reconsideration' thus:

"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.'"

[29] In **ISDN SOLUTIONS (PTY) LTD v CSDN SOLUTIONS CC AND OTHERS**[6] Farber AJ held:

"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 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.

[5] 1998 (3) SA 298 (T) at 290C-E

[6] 1996 (4) SA 484 (W)

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.”

[30] The court has a wide discretion to exercise in a reconsideration application and the factors which may determine whether an order falls to be reconsidered include the reasons for the absence, the nature of the order granted and the period during which it has remained operative. Other factors to be considered would be whether an imbalance, oppression or injustice has resulted, and if so, the nature and extent thereof, and whether alternative remedies are available.[7]

[31] It is common cause that the interim order was granted in the absence of the respondents on an urgent basis. It is also common cause that the orders were not served upon the respondents timeously. Their reasons for their absence on 22 September 2017 when the order was confirmed are, in my view, reasonable. They had insufficient time to comprehensively deal with the allegations two days before the hearing.

[32] There is a factual dispute regarding the fraud allegations which is impossible to resolve on paper without referring the matter for oral evidence. The balance of convenience also favours the respondents and it is also in the interests of justice that the reconsideration application be granted with costs.

APPLICATION FOR SUMMARY JUDGMENT

[33] On 07 September 2017 the applicants issued summons against the respondents, the Cupido’s and Cyril Tee, the third to fifth respondents for monies allegedly obtained by fraud or stolen from the applicants as alluded to earlier.

[34] The summons was served by the Sheriff on 12 September 2017 upon the niece of the Cupido’s, Ms Stander, and Ms Tee, the wife of Mr Tee. On 28 September 2017 Mr Cupido and Mr Tee filed a notice of intention to defend. The applicants filed an application for summary judgment in terms of Rule 32 (3) of the Uniform Rules of Court on 16 October 2017 which was set down for 03 November 2017. It was then postponed to 16 February 2017 when it was argued. Ms Lizette Labuschagne deposed to the affidavit verifying the cause of action and the amount claimed. She averred that

[7] Rule 6 (12) (c) of the Uniform Rules of Court at B1-56C

the respondents have no *bona fide* defence to the applicants' claim and have entered an appearance to defend solely for the purpose of delay.

[35] Summary judgment application is regarded as extraordinary and a very stringent remedy in that it closes the door of the court to a defendant in that a judgment is given without a trial. Navsa JA in **JOOB JOOB INVESTMENTS (PTY) LTD v STOCKS MAVUNDLA ZEK JOINT VENTURE**[8] had this to say about summary judgment:

"[31] The rational for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G – 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. *Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G – 426E."*

[36] Taking into account my earlier finding that there is a dispute of fact in this matter, it is therefore unnecessary for me to entertain the summary judgment application as it is, in my view, pre-mature to do so. In the circumstances the application ought to be dismissed with costs.

In the circumstances I grant the following order:

1. The order granted by this Court on 22 September 2017 is reconsidered and set aside with costs.

[8] 2009 (5) SA 1 (SCA) at para 31

2. **The applicants are directed to join the Workmen's Compensation Commissioner of the Department of Labour as a party in these proceedings and serve all copies of the relevant notices and processes on or before 17 August 2018.**

3. **The applicants are ordered to set the matter down as a matter of semi-urgency for a date to be allocated in consultation with the Judge President of this Division.**

4. **The application for summary judgment is dismissed with costs.**

5. **The respondents are granted leave to defend the action.**

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BM PAKATI
JUDGE- NORTHERN CAPE DIVISION, KIMBERLEY

For the Applicant: ADV LN WESSELS
Instructed by: VAN DE WAAL & PARTNERS

For the Respondents: ADV DL PETERSEN
Instructed by: ENGELSMAN MAGABANE INC.