

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case Number: 4003/2013

In the application of:-

COALITION TRADING 1130 CC (2008/154841/23)
t/a BROTHER ACCOMMODATION

Applicant

and

MOTHEO FET COLLEGE, BLOEMFONTEIN
NATIONAL STUDENT FINANCIAL AID SCHEME

1st Respondent

2nd Respondent

HEARD ON: 21 OCTOBER 2013

DELIVERED ON: 22 OCTOBER 2013

MOLEMELA, J

[1] This is an application in terms of Rule 6(12)(c) of the Uniform Rules of Court for reconsideration of an order granted on an urgent basis on 8 October 2013.

[2] In the original application the applicant approached the court for a rule *nisi* on the basis that the first respondent was breaching the oral agreement that the parties had entered into. According to the applicant, the terms of the agreement were that the applicant would provide accommodation to students who had been awarded bursaries by the second respondent. The first respondent would then, on behalf of those students, claim the bursary funds from second respondent and then pay the accommodation portion of the bursary over to the applicant once the applicant had provided the first

respondent with a payment authorisation signed by the students in question. The applicant averred that whereas the first respondent had, in the past complied with that agreement, the first respondent was refusing to pay over the accommodation portion of the student bursaries to it notwithstanding that it had already provided it (first respondent) with payment authorisations signed by 420 students.

[3] Having heard the application in the absence of the respondents, the court granted the following order:

- “1. Condonation is granted to the applicant for the non-compliance with the rules pertaining to form, service and notice.
2. A rule *nisi* is granted whereby the first respondent is called upon to advance reasons (if any) in the above honourable Court on **31 October 2013 at 09:30**, or as soon thereafter as the matter may be heard, why the following should not be ordered:
 - 2.1 that the first respondent be interdicted from paying out any bursary funds with regards to student housing to the students listed in Annexure ‘A’ to the notice of motion, pending the finalisation of an action for damages to be instituted within one month of the date of this order against the first respondent by the applicant;
 - 2.3 that the first respondent is ordered to pay the costs of this application;
3. Prayer 2.1 serves as an interim interdict with immediate effect.
4. This order, the notice of motion, the founding affidavit and annexure A thereto shall be served on the affected students as more fully described in annexure A by affixing to the main notice board at the student accommodation known as brother accommodation or by displaying it at the main entrance thereof.”

[4] The applicant in this application for a reconsideration of the order is the first respondent in the urgent application heard on the 8th October 2013 (“the original application). The party opposing this application for reconsideration is the applicant in the original application. For purposes of convenience the parties are still referred to as in the original application. The applicant filed an affidavit with the heading “answering affidavit to the notice in terms of uniform

Rule 6(12)(c)” (hereafter referred to as “the supplementary affidavit). The applicant further raised a point *in limine* in terms of which it claimed that the application for reconsideration ought to be struck off the roll on the basis that the first respondent had failed to make out a case for urgency of its application. The applicant also asserted that the respondent had given it short notice of its (first respondent’s) application for reconsideration of the order.

[5] Given the point *in limine* that has been raised, it is prudent to refer to Rule 6(12)(c) *verbatim*. It simply provides as follows:

“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.”

[6] In the case of **ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others** 1996 (4) SA 484 (W) at 487B the court aptly stated as follows:

“The framers of Rule 6(12)(c) 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 of the aggrieved party, 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 can be attained 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.”

I echo the sentiments expressed in this case.

[7] I am of the view that unlike Rule 6(8), Rule 6(12)(c) does not prescribe the period of notice that the applicant for a reconsideration of the order must give its opponent. The applicant’s complaint about short service thus has no merit. I am also of the view that since the Rule is aimed at orders granted on

an urgent basis, an application for reconsideration is by its nature urgent. In any event, the first respondent has addressed the requirement of urgency, as it averred in a paragraph with the heading “Urgency”, that even though the rule *nisi* was served on it on the 9th October 2013” its repercussions had only recently filtered through”. The first respondent *inter alia* made reference to a group of about 40 students who had allegedly made an attendance at its administration offices to protest. I am thus satisfied that the point *in limine* raised by the applicant cannot be upheld.

[8] In trying to persuade me not to take the applicant’s supplementary affidavit into consideration (in so far as the contents thereof were intended to bolster the facts in the applicant’s founding affidavit in the original application) Counsel for the first respondent referred me to the following remarks made by the court in the case of **Basil Read (Pty) Ltd v Nedbank Ltd and Another** 2012 (6) SA 514 (GSJ) at par 520 par 22:

“It appears that the authorities and the additional judgments referred to by Wepener, J in the Oosthuizen case [**Oosthuizen v Mijs 2009(6) SA 266 (W)**], all support the view that proposition that a party that seeks reconsideration of an urgent order made in his absence, if it wishes to, may present facts on affidavit which a court may take into account in reconsidering the order. However, none of these judgments provide authority for the contention that an applicant for an urgent order may supplement its original founding affidavit with additional matter when faced with an application for reconsideration under rule 6(12)(c). The Rhino in my view case remains authority for the proposition that a party in the position of the opposing party is entitled to seek reconsideration on the original application without reference to anything else.”

[9] I have taken into consideration that in the Oosthuizen case (and some of the judgments referred to in that case), full sets of affidavits were filed by both parties in the application for reconsideration. I am of the view that when Wepener J stated that

“I am of the view that the court that reconsiders any order should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in **affidavits** filed in the matter”

referred to affidavits by both parties and thus recognised that the respondent in an application for reconsideration was also entitled to make averments in addition to those set out in the original application. Relying on the aforementioned dicta (in the Oosthuizen case) I have therefore taken the averments made in the applicant’s supplementary affidavit into account.

[10] Counsel for the first respondent contended that failure to join the 420 students in question as respondents in the original application rendered that application fatally defective and that on that ground alone the order granted ought to be reconsidered and set aside. Counsel for the applicant argued that the very bringing of the application for reconsideration robbed the applicant of an opportunity of filing supplementary papers and/or bringing the relevant interlocutory applications. In considering this aspect, I have taken into account that part of the order granted made provision for service of that order on the students concerned by way of posting of a copy of the application at the notice-board or at the main entrance. I have also taken into account that just a day after the granting of the rule nisi the first respondent made payment of a large amount to the applicant. Under such circumstances, the applicant’s argument pertaining to its entitlement to supplement its papers prior to the return date is not misplaced.

[11] Having considered all the circumstances of this case, I am not inclined to exercise my discretion in favour of the first respondent for the following reasons:

1. The first respondent’s absence on 8 October 2013 has not been explained despite service of the notice of motion and again of a letter confirming the time at which the application would be brought. The failure to explain the absence is one of the factors taken by the court

into account in a similar application in the case of **ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others**, (*supra*).

2. Two days after the order was granted, the first respondent paid the applicant an amount of R1 584 800.00. The payment in question was described as being in respect of “service rendered as per your invoice...”. The heading of the explanatory letter described the payment as relating to accommodation for students residing at one of the buildings rented out by the applicant. The letter in question was not written on a “without prejudice” basis as claimed by the first respondent in its affidavit. This payment thus tended to recognise the agreement that the applicant relies upon.
3. The order granted on the 8th October 2013 is of interim operation and the return day is only 10 days away.
4. Although the first respondent was aware of the order, it did nothing about the matter for the ensuing ten days.
5. Oppression, injustice or imbalance of the order has not been demonstrated due to the following factors:
 - 5.1 The first respondent has not denied the existence of the oral agreement and its terms as stipulated by the applicant in its founding affidavit. On the first respondent’s own version, it has previously honoured the arrangement. Significantly, the first respondent has not denied that the applicant has furnished it with signed payment authorities. The first respondent merely seems to be pointing out that “a great many of the students” are “disgruntled” and want the bursary amount to be paid directly to them. Such students have not been named and, needless to say, they did not depose to any confirmatory affidavits.
 - 5.2 The first respondent has previously not denied that it paid the funds in respect of accommodation to the applicant on the strength of the payment instructions or authorities signed by students. The first respondent merely states that the first applicant “seeks to broad brush facts and conclusions arising from such facts which are not supported by the supporting documentation” but does not deny the averment that such

documents do exist and were in fact submitted to it in September 2013.

- 5.3 Notwithstanding the first respondent's averment that many students have demanded that their monies be paid directly to them, subsequent to the issuance of the rule *nisi*, the first respondent paid an additional amount to the applicant.
- 5.4 On the first respondent's version, not all the students have instructed it to pay the bursary funds to them directly. Clearly, there are those that have not issued such an instruction. The first respondent has not disclosed why the accommodation portion of such bursaries should not be paid to the applicant.
- 5.5 There is no inconvenience to the students who have signed the payment authorisation as the order granted relates only to the accommodation portion of the bursary and not to tuition, meals and transport. The students are currently being accommodated by the applicant.

[12] For the reasons already expressed above, I am of the view that the first respondent's affidavit lacks sufficient particularity regarding its defence. In the result, the application for the reconsideration of the order must fail. Given the view I have taken on this matter, I need not deal with the other arguments raised by the first respondent and same may be presented on the return day. I am furthermore of the view that the court dealing with the matter on the return day will be best-placed to deal with the proposed amendment of the order by the applicant to accommodate a claim for specific performance as an alternative to damages, should the applicant pursue the amendment.

[13] Counsel for the first respondent proposed that if the application for reconsideration of the order is not granted, costs should stand over for adjudication on the return day of the rule *nisi*. Counsel for the applicant was not averse to that proposition.

[14] I accordingly grant the following order:

1. The first respondent's application for reconsideration of the order of the 8th October 2013 is dismissed.
2. Costs are reserved for later adjudication.

M.B. MOLEMELA, J

On behalf of applicant:

Adv J L Olivier
Instructed by:
Botha & De Jager
BLOEMFONTEIN

On behalf of respondents:

Adv M H Wessel SC
With him:
Adv S Tsangarakis
Instructed by:
Honey Inc
BLOEMFONTEIN

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