FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3452/2012

In the *ex parte* application of:-

CAMPANELLA VESTA Applicant

In the action between:

CAMPANELLA VESTA Plaintiff

and

IAN FRANCIS McDONALD 1st Defendant
(UK Identity number:)

MARGARET PHILOMENA McDONALD 2nd Defendant
(UK Identity number:)

CORAM: DAFFUE, J

HEARD ON: 6 SEPTEMBER 2012

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 10 SEPTEMBER 2012

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[1] The applicant is Me Vesta Campanella, a business woman of Sandton, Gauteng. The respondent, Mr & Me Mc Donald are UK citizens. Residing in the United Kingdom.

[2] The parties are in dispute about the sale of immovable

properties, being 6 erven situated in Fouriesburg, Free State Province. Applicant sold these properties to respondents in terms of a written Deed of Sale signed by applicant as seller on 23 February 2011 at Sandton and by respondents as purchasers on 2 March 2011 at Fouriesburg.

[3] On 20 August 2012 applicant brought an urgent *ex parte* application whereupon Hancke, AJP issued a *rule nisi* which reads as follows:

> "2. *A rule nisi* is issued calling upon **IAN FRANCIS McDONALD** (UK Identity number:) and **MARGARET PHILOMENA MCDONALD** (UK Identity number:) (hereinafter referred to as "*the Respondents"*) to show case, if any, on the **6th** day of **September 2012**, why the following order should not be made final:
>
> 2.1 The Sheriff of the Court, Bethlehem is hereby authorised and directed to attach, in order to found and/or confirm jurisdiction, the Respondent's right, title and interest in and to the monies held in trust by Breytenbach Mavuso Inc., a firm of attorneys and conveyancers of Bethlehem, on account of the sale and

transfer of Erven 303-308 Fouriesburg from **V. Campanella** to **I.F.** and **M.P. McDonald:**

2.2 The Sheriff of the Court, Bethlehem is hereby authorised and directed to serve this order on the offices of Breytenbach Mavuso Inc. At 12 Union Street, Bethlehem, Province of the Free State, Republic of South Africa (Ref: Michal Muller/CAM18/0003);

2.3 That the Respondents be ordered to pay the costs of this application.

3. The relief asked for in 2.2.1 and 2.2 above apply with immediate effect pending the finalisation of this application."

Leave was also granted to effect service of the application papers and order on respondent's attorney of record, Mr Andrew, whose full particulars were well known to applicant's attorney of first instance. I pause to mention that although reference is made in the notice of motion and the order issued of an order to found and/or confirm jurisdiction, no mention is made in the founding affidavit of an intention to confirm jurisdiction.

[4] Applicant relied on respondent's alleged breach of contact and gave notice of her cancellation of the Deed of Sale

prior to institution of the application. Applicant knew that following her cancellation of the Deed of Sale, the full purchase price of R535 000,00 which was kept in trust by the Bethlehem attorneys, Breytenbach Mavuso Inc pending registration of transfer, which have to be paid over to respondents as purchasers at their request. She intended to prevent that by launching the aforesaid application.

[5] Nothwithstanding several clauses of the Deed of Sale being referred to in much detail in her founding affidavit, applicant failed to refer to the most important clause 19 at all. This clause reads as follows:

> "19. **JURISDICTION:**
>
> The Seller and the Purchaser hereby consent to the jurisdiction of the Magistrates Court in respect of any action that may arise from this agreement. Each party however reserves the right, if he so chooses, to institute in the Supreme Court and to recover the costs hereof according to the Supreme Court scale."

It should be common cause that for many decades the High Court was known as the Supreme Court.

[6] In correspondence after the relief was granted *ex parte*, respondent's attorney requested applicant's attorney to confirm that clause 19 was brought to the attention of the presiding judge who granted the order. Applicant's attorney responded dismissively that "The application speaks for itself."

[7] On 31 August 2012 notice was given by the respondents of an application in terms of rule 6(12)(c) to be brought on the aforesaid return date, to wit 7 September 2012. Respondents intended to apply for the reconsideration of the order of 20 August 2012. The following allegations were made in the affidavit accompanying the notice:

(a) respondents consented in writing to the jurisdiction of the magistrate's court and/or the Supreme (High) Court in clause 19 of the Deed of Sale;

(b) all contractual obligations of the Deed of Sale had to be effected by the parties within the area of jurisdiction if this court: this would include the fact that payment had to be made to applicant's conveyances in Bethlehem, occupation of the properties had to be given in Fouriesburg and registration of transfer would have to be effected in Bloemfontein;

(c) There was no reason to obtain an order to found jurisdiction;

(d) Applicant deceived the court into granting what is effectively an anti-dissipatery order without disclosing a cause of action in that regard.

[8] Respondents not only asked that the *rule nisi* be discharged, but also that punitive costs on an attorney and own client scale, including the costs of two counsel, where applicable, be paid.

[9] *Ex facie* the papers before me there was no response from applicant's attorney pertaining to the rule 6(12)(c) application prior to the 5th September 2012, the day preceding the return day of the application and I will deal with this later.

[10] On 4 September 2012 the Heads of Argument, prepared by Adv Pillay of the Durban Bar on behalf of the respondents, were duly served and filed. It was *inter alia* submitted that applicant's application was instituted in bad faith and that applicant could not in the circumstances obtain an order to

found or confirm jurisdiction.

[11] On 5 September 2012, a day before the hearing, applicant's attorney wrote to respondent's attorney and conveyed the following:

> "2. I request, in place of paragraph 3.2 of my earlier letter, that you furnish an undertaking on behalf of your clients that the sum of R250 000 be held in trust in the Republic of South Africa pending the institution of an application by my client against your clients for an anti-dissipation interdict in appropriate terms, which application will be served on your offices by no later that Thursday, 13 September 2012.
>
> 3. In order for my client to agree to the discharge of the *rule nisi* granted in her favour, I require that the aforesaid undertaking be furnished in writing on behalf of your clients prior to the hearing in Court tomorrow morning.
>
> 4. Should the undertaking not be received timeously, my client's further instructions are to apply for an order interdicting and restraining Breytenbach Mavuso from releasing funds to your clients pending the outcome of the anti-dissipation interdict application.

This letter was handed in from the Bar during argument by agreement.

This is quite astonishing behaviour of someone who is confronted with a rule 6(12)(c) application apparently based on solid foundation.

[12] On the return date, 6 September 2012, the application was heard by me in the unopposed motion court. Mr Pillay appeared for respondents, having flown in from Durban early that morning. Mr Olivier appeared for the applicant. Mr Pillay handed in a letter from applicant's local attorney, dated 6 September 2012, and apparently faxed at 08h52 only to his Durban attorney and thus a mere 40 minutes before the start of the motion court proceedings which reads as follows:

> "Kindly take note that we have instructions to inform you that we hold instructions from our correspondent to discharge the rule *nisi* this morning and tender cost for the application.
>
> We further confirm that our instructions from our correspondent to the effect that he gave you notice yesterday that it will not be necessary to attend the proceedings in this

regard, seeing that it is on the unopposed roll."

When this letter was received in Durban, Ms Pillay was already at court in Bloemfontein.

[13] There was thus no further dispute as to whether or not the rule *nisi* should be discharge. The only issue open for debate was the scale of costs to be awarded. Consequently I allowed counsel to address me in this regard.

[14] Mr Pillay submitted that applicant suppressed material facts in launching the application and on that basis alone the rule *nisi* should be discharged. He referred to the well-known *sine qua non in ex parte* applications, i.e. good faith, and submitted that applicant did not show that in launching the application. The effect of his argument is that the court should have been informed that respondents consented the jurisdiction which he failed to do. See the **LOCUS CLASSICUS, SCHLESINGER v SCHLESINGER** 1979 (4) SA 342 WLD at 352 and further and pertaining to costs order in such instances, p 354A – F.

Mr Pillay went further and submitted that applicant's attorney's attitude in respect of the proposal that the rule *nisi* be discharged must be seen in proper context. Also, he submitted, that there was no legal basis for the relief claimed, once it was clear that respondent consented jurisdiction.

[15] Mr Olivier argued that applicant and/or her legal representatives did not show a flagrant, wilful and reckless disregard for the rules of court of the legal position. At best for respondents, he submitted, applicant and/or the legal team acted negligently and therefore there is no room for a punitive costs order.

[16] On receipt of the rule 6(12)(c) application, or at best for applicant when the Heads of Argument of Mr Pillay was served, applicant and her legal team should have realised that respondents intended to pursue the matter applying for *inter alia* a punitive costs order. They should have realised that respondents arguments were based on a solid legal foundation. As late as 5 September 2012, a day before the

return date, there was still no chance of a settlement or concession. Respondents were entitled to instruct Durban counsel and to brief him to appear on the return date.

[17] Applicant's attorney should not now complain about respondent's attitude, as he was the one that threatened with a punitive costs order, should respondents dare to apply for a discharge of the rule *nisi*. This is apparent from his letter dated 27 August 2012 and annexed as annexure "PA5" in the rule 6(12)(c) application:

> "3. Your suggestion that your clients will seek to discharge the rule without proper grounds is noted with concern. Any attempt by your clients to discharge the rule will be opposed and a copy of this letter will be placed before the court in support of a request that your clients be ordered to pay all the further costs unnecessarily incurred, as between attorney and own client."

[18] The legal position in this country is clear relating to submission to jurisdiction by peregrine. A judgment given on the strength thereof is internationally enforceable. There is no right to an attachment of the property of a peregrines who has submitted to jurisdiction. See

JAMIESON v SABINGO 2002 (4) SA 49 SCA at 58H – 59A, para [26].

[19] Furthermore, and insofar as applicant intended to apply for anti-dissipatery relief under the guise of an application to found or confirm jurisdiction, that would also be a hopeless case as the requirements for the Marevo injunction have not been met.

[20] In my view the applicant should be penalised with a punitive costs order on the scale as between attorney and client – not own client – for one or more of the following reasons:

(a) applicant suppressed the fact that respondent's consented to jurisdiction;

(b) applicant suppressed the fact that other grounds for jurisdiction existed and that it was not necessary to found jurisdiction by order of court;

(c) the application was brought well-knowing that a dispute existed as to who of the parties was in breach of contract;

(d) even accepting that applicant was negligently advised as to the correct legal position prior to the launching, the legal position should have been ascertained on receipt of the rule 6(12) see notice or at best on receipt of the Heads of Argument.

Contrary as could be expected, and bearing in mind the threats referred to above, did not take any positive action to prevent respondents from incurring further costs, such as the fees of counsel for preparing the Heads of Argument and his fees and expenses pertaining to the appearance in Bloemfontein on the return date.

[21] The following orders are granted:

1. At the request of applicant the rule *nisi* issued on 20 August 2012 is set aside;
2. Applicant is ordered to pay the costs of the application, including the costs of the application in terms of rule 6(12)(c), and the appearance of respondent's counsel on the scale as between attorney and client.

J.P. DAFFUE, J

On behalf of applicant:	Adv. J Olivier Instructed by: O'Donovan Attorney, Johannesburg c/o Graham Attorneys BLOEMFONTEIN
On behalf of respondents:	Adv. I Pillay Instructed by: Andrew & Associates Durban c/o Honey Attorneys BLOEMFONTEIN

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