

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO. EL39/11

ECD 139/11

In the matter between

LAND LORD PROPERTIES (PTY) LTD
MASIBULELE DONALD STURU PASIYA

First Applicant
Second Applicant

and

NEDBANK LIMITED
ALLEN FEW N.O.

First Respondent
Second Respondent

JUDGMENT

HARTLE, J:

1. The first applicant is the registered owner of certain immovable property described as Erf 6487 East London, situate at 30 Beatty

Road, Selborne, East London (“**the property**”). The first respondent - having obtained a judgment against both applicants in this court under case number EL 30/10 – ECD 130/10 (“**the bond action**”) arising from the first applicant’s indebtedness under a bond, and against the second applicant in his capacity as surety on behalf of the first applicant - advised by notice in the local Daily Dispatch newspaper of its intention to sell the property in execution at a sale which was scheduled to be held on 14 January 2011.

2. On the morning of the sale in execution the applicants approached this court on an urgent basis, without notice to the respondents, for an order interdicting and restraining the first respondent from proceeding with the sale which was due to take place that morning. The last-minute intervention was motivated on the basis that if the sale were to proceed, not only would the second applicant - who had only learned of the sale on 5 January 2011 while he was away on holiday from a friend who saw it in the newspaper – be prejudiced, but so too the second respondent, appointed as curator *bonis* pursuant to a restraint order issued out of the Eastern Cape division of the High Court under case number 2079/2008 on 30 October 2008 (“**the restraint order**”) in terms of the provisions of section 26 of the Prevention of Organised Crime Act, No. 121 of 1998 (“**POCA**”), who had not been cited as a party in the bond action despite having a “*substantial interest*” in the subject matter of that litigation.
3. The impression was created that this event - the sale - had come upon the applicants by sheer surprise. It was alleged in this regard that the

second applicant had never received the summons which led to the sale in execution under the bond action. As a result he was never given the opportunity to defend the first applicant - whom he represents as its “*sole director*” - or himself in the action.

4. With regard to the second respondent’s alleged interest in the bond action, the second applicant explained in the founding affidavit that the first applicant’s property, although not specifically mentioned in the annexure to the restraint order granted in favour of the National Prosecuting Authority against, *inter alia*, the second applicant (cited in his personal capacity as the second defendant in that litigation), was covered by a paragraph therein which provided that the realisable property envisaged therein included “(a)ll other property held by the Defendants and Respondents at any time before or after the granting of this order whether in their respective names or not, including all property held for or on behalf of the Defendants by any person or entity of the Defendants in any other company, ...”.
5. Without explaining any connection between himself and the property of the first applicant, the second applicant contented himself with the allegation that it was “*evident*” from this provision that the property was covered by the terms of the order.
6. Adverting to paragraph 1.4 of the restraint order, which provides that “... *the Defendants, Respondents and any other person with knowledge of this Order are hereby prohibited from dealing in any manner with the property, except as required or permitted by this*

Order", it was contended that, since in the second applicant's "*understanding*" the first respondent was "*aware of the existence of this order,*" it was precluded from proceeding with the sale in execution. It was further submitted - it being raised as a "*in limine*" argument - that the second respondent ought to have been joined "*in these proceedings*" (presumably a reference to the bond action) by virtue of his substantial interest therein.

7. The certificate of urgency which was filed together with the founding affidavit by Mr *Kubukeli*, counsel for the applicants, suggested that if the sale of the property were to proceed it would have "*far reaching negative consequences for the administration of justice*". This theme was confirmed in the founding affidavit in which the second applicant alleged that the failure to join the second respondent would "*defeat the order of Justice Pickering and bring the justice system into disrepute*."
8. The second applicant alleged that upon learning of the impending sale in execution, he had put his "*best efforts*" forward to stop matters from getting to that point but was compelled to approach the court for urgent relief. These efforts, according to him, involved the making of "*several calls*" to the offices of the first respondent (after he learned that Mr *Petrie Burger* of the first respondent's offices had tried to contact him), and included a proposal made to it "*around the proceeds from an imminent sale of shares which are held by my wife in Lithemba Wonderfontein Coal (Pty) Ltd*". He attached a copy of a letter evidencing such offer. This notwithstanding, the first respondent had remained steadfast in its determination to sell the

property "*in total disregard of all the foregoing points which militate against such a sale going forward*" (sic).

9. With regard to the requirements for the grant of an "*interim interdict*", the second applicant alleged, *inter alia*, that if the property were to be sold in execution and he thereupon succeeded in proving that the first respondent had "*no cause to (sell) the property*", irreparable harm would have been caused. To this was added the caution that "*(c)onsideration has also to be given to the fact that there is another party who will potentially be (caused) irreparable harm by the sale of the property without its knowledge, the second respondent. Specifically there is the harm that will be occasioned by the undermining of a Court Order and the administration of justice*".

10. On the strength of the second applicant's averments taken at face value, and since the sale was due to commence within 30 minutes of the issue of the application, a Rule *Nisi* was granted in the following terms:

- "1. The Rules relating to forms and service are dispensed with and the application is heard as one of urgency in terms of rule 6(12) of the uniform rules of court;
2. A rule *nisi* is hereby issued calling upon the Respondents to show cause, if any, to this court on (Tuesday, 8 February 2011) at 10H00 or soon thereafter as the matter may be heard, as to why the following order may not be made final:

- 2.1 The First Respondent is interdicted and restrained from

proceeding with the sale in execution of the property described as ERF 6487 East London commonly known as 30 Beatty Road, Selborne, East London as per its advertisement in the Daily Dispatch newspaper of 31 December 2010;

- 2.2 The Applicant is directed to serve the order at the site of the sale in execution upon whosoever will be the person in charge of conducting the Sale and upon the registered offices of the first and Second Respondent;
- 2.3 Whosoever opposes this application shall bear the costs thereof;
- 2.4 The Applicant is allowed to supplement these papers, if necessary, before the return date of the Rule *Nisi*.”

11.I interpose to mention that, although the case file reflects informal service of the applicant’s founding papers and the rule *nisi* dated 14 January 2011 on the second respondent - albeit only on 10 February 2011 after the initial return date - he declined to oppose the application.

12.On the extended return date the applicants sought confirmation of the rule on the basis solely of the “*non-joinder argument*”, seemingly abandoning the other “*in limine*” submission in the founding papers relating to “*non service of processes*” (sic). Adverting to this last issue first, the first respondent attached copies of the sheriff’s returns of service which confirm that summons was served on the *domicilium* address chosen by the applicants in terms of the covering mortgage bond number B3549/2008, as well as at the physical address of the property. There the summons was served on the second applicant’s

personal assistant, one *N Sidinana*. The warrant of execution pertaining to the sale was similarly served on both applicants by registered post to their chosen *domicilium* and the physical address of the property. In addition thereto, the sale was advertised in the Daily Dispatch newspaper of 31 December 2010, and in the Government Gazette of even date. The applicants were constrained to concede service.

13. It appeared further from the first respondent's answering affidavit (which allegations were not disputed by the applicants) that prior negotiations had been held between the first respondent and the second applicant, representing both his own interests and that of the first applicant, and that a meeting had been held with messrs *Kevin Kaschula* and *Johan Morgenthal* of the first respondent on 8 June 2010, *inter alia* to discuss the arrears which had accumulated on the bond account pertaining to the property. It was also evident from correspondence put up by the first respondent, *inter alia* reflecting on this meeting, that the second applicant was aware that a judgment had been obtained against the first applicant and was in fact making attempts to raise funds to avert the then sale in execution. Any mention of this at the outset would have instantly dispelled the notion that the applicants were in the dark as to either the litigation (the bond action) or the inevitability that the first respondent intended executing against the property.

14. In my view the second applicant deliberately concealed the true circumstances concerning both service of the process as well as his

prior dealings with the first respondent. A full disclosure in this regard would also have revealed that the first respondent had been more than reasonable in giving the first applicant time to raise the arrears and that the sale of the second applicant's wife's shares was a tired refrain, yielding no positive outcome. It also unfolded that the second applicant, ironically without the second respondent's knowledge or consent, had purported to sell this very property which he now sought to preserve on the latter's behalf, but nothing had come of the alleged sale.

15. This notwithstanding, the applicants persisted that, on a proper interpretation of the restraint order, this property was “*under administration*” and the first respondent thereby precluded from selling it by auction. The gist of the argument on the extended return date - if I understood it correctly - was that, since the applicants were justified in contending that the second respondent ought to have been joined in the bond action on the basis that he had a direct and substantial interest in any order that the court might make, they were entitled to confirmation of the Rule.

16. The first respondent denied, however, that there was merit in the first place to stay the execution or that the applicants had established the requirements for the grant of a final interdict, which it in effect was. It furthermore denied that the applicants were justified in approaching this court on an urgent basis. It was submitted that, since the second applicant was aware of the first respondent's intention to proceed with the sale of the property in June 2010 already, the urgency was “*self-created*”. Further, with regard to the last sale sought to be averted by

the rule *nisi*, the second applicant had known since 5 January 2011 already of its intention to proceed in this regard, but had delayed to the last minute when, and without the benefit of any input from either respondent as to the true situation, they were almost guaranteed to obtain a stay of the execution.

17. Pursuant to the filing of the first respondents answering affidavit, the applicants delivered a notice in terms of “*rule 6 (11)*” (sic) advising of their intention to apply at the hearing of the main application for an order that paragraph 2 of the first respondent’s answering affidavit be struck out in its entirety “*in terms of rule 6 (15) for non-compliance with uniform rule 6 (1) and 62 (3)*”. In this regard the applicants filed an affidavit in support of both the “*interlocutory application*” and in reply. Their complaint was that the first respondent had disregarded the provisions of rules 6(1) and 62(3) because it had, under a single numbered paragraph 2, purported to reply to every allegation in the founding affidavit, whereas the latter rule provides that an affidavit shall be divided into concise paragraphs with consecutively numbered paragraphs setting out the facts upon which the deponent relies. The first respondent’s paragraph 2 runs almost the length of the answering affidavit, 13 pages to be exact. The subdivisions falling under paragraph 2 are further not numbered as paragraphs or sub-paragraphs. The applicants claimed prejudice by virtue of the first respondent’s non-compliance with the relevant rule in that “*they are unable to identify and isolate paragraphs by the specific numbers and to deal with the allegations contained therein.*”

18.Despite the alleged prejudice adverted to, the applicants yet managed to deal comprehensively with the first respondent's answering affidavit in reply. On the return date the interlocutory application was abandoned, but the applicants persisted that there should be some costs comfort for them by virtue of the prejudice occasioned to them aforesaid.

19.It is not clear to me, however, on what basis the applicants would have been entitled to seek an order striking out paragraph 2 in terms of the provisions of Rule 6(15), which sub-rule is directed at matter in an affidavit which is objectionable on the basis of it being "*scandalous, vexatious or irrelevant*". None of the three scenarios apply. In my view the applicants' complaint – if it was of any gravity at all since the answers to each individual paragraph in the founding affidavit were clearly indicated by an appropriate heading: "*Ad paragraphs 1, 2, and 3*" etc – should have been addressed through an appropriate notice in terms of Rule 30(2)(b), followed by an application in terms of Rule 30(1), if so advised, to strike out the offending paragraph on the basis of it constituting an "*irregular step*" in the proceedings. The applicants waited a whole month after delivery of the first respondent's answering affidavit to file the interlocutory application which was, at the same time, accompanied by the reply itself. If they considered themselves to be prejudiced, there was further still plenty time before the then extended return date (which was on 19 April 2011) to file a notice in terms of rule 30(2) (b). Logic dictates, however, that if they were not precluded from filing the reply, that they could not have been prejudiced in this regard. They had, in effect, taken a further step in the cause with

knowledge of the alleged irregularity.

20. In any event the applicants elected not to pursue the application at the hearing of the main application and the ordinary consequences attendant upon such abandonment should in my mind follow thereupon. In the circumstances I am not inclined to make any special costs order against the first respondent. On the contrary the applicants should be mulcted with the costs of the application given the ill-conceived attempt to oust the first respondent's opposition by nitpicking when, not only had they obtained the Rule on an *ex parte* basis, but in my opinion deliberately misled the court on the basis of which they secured the relief.

21. I turn now to deal with the question whether there is any merit in the applicants' *in limine* objection that the first respondent failed to join the second respondent in the bond action. It is not understood what purpose would be served by the joinder contended for. Even assuming for a moment that the property is covered by the terms of the restraint order, the impediment posed thereby (insofar as it concerns the first respondent at least) is that it may not, without the consent of the Eastern Cape Division of this court, "*be attached or sold in execution*". The curator's "*interest*" in the property would presumably therefore only arise post-judgment, if at all, and thereupon be limited to being joined in a separate application to the relevant court for the requisite consent if such proves necessary. I accept that the curator would be cited in such an application, but there would be no point in admitting him to an action where a judgment has

long since been taken. His concern with the property would further – assuming a proper implementation of the restraint order where the property of a third party is involved (if it really was)– have been adequately safeguarded by the relevant terms thereof without a need to formally involve him in any litigation concerning it. (As an aside one is sorely tempted to ask why, if the applicants were so concerned for the alleged interest of the second respondent, they did not simply request him to take up the matter with the first respondent and call its attention to the possibility that the first applicant’s property was (on their version) overlooked by him before. Indeed they could have done so when the issue of the initial sale in execution was troubling everyone’s mind several months before. I have no doubt that if confronted with a belated formal intervention by the second respondent on the basis that the first applicant’s property was property which fell to be dealt with by the restraint order, but had been overlooked before, the first respondent would not have resisted a request to stay the execution. A simple phone call would have sufficed.)

22. Be that as it may though I assume that what the applicants meant to say, under the guise of the non-joinder objection, is that, because of the impediment, the sale was precluded, but that is a different issue.

23. In that regard, it is common cause that the first applicant was not a party to the litigation which culminated in the issue of the restraint order and that the property does not feature in the schedule of known assets attached to the order. Still the applicants persisted that the first

applicant's private property is included having regard to the extended meaning referred to in clause 1.1.2 of the order. Assuming for a moment in the second applicant's favour that the thought had not crossed his mind to mention the property to the second respondent before, the question which arises is what meaning is to be attached to the provisions of this clause concerning "*all other property*" not listed in the schedule of assets annexed to the restraint order.

24. The provision is not clearly framed, but if regard is had to the objects of the POCA, what is intended to be targeted thereby in my view is property of the second applicant which is due, or likely to be, confiscated in terms of an order issued, or likely to be issued, pursuant to his own criminal prosecution (See section 25 of POCA). It cannot relate to the first applicant's property held by the second defendant as director because it is not the first applicant that stands to be visited with a confiscation order. The second part of the clause envisages a financial interest of the second applicant held by someone or an entity on his behalf, one which in my view redounds to his personal benefit or estate. Notionally as far as a company goes this might relate to his shareholding, or perhaps a loan account in his name. He has, however, simply pleaded that he is the sole director of the first applicant without disclosing any personal financial interest in the company. Even the fact that he is the *only* director of the first applicant does not make its property that of the second applicant. It is an entirely separate entity.

25. In my view therefore the property of the first applicant is not hit by

the terms of the restraint order and it could never have availed the applicants to claim a real and substantial basis thereby to preclude the sale from proceeding.

26. I am inclined to agree with the submission by Mr *Brooks*, who appeared for the first respondent that, properly analysed, the relief which the applicants sought and the manner in which the subsequent relief was framed in the Rule *nisi*, was a final interdict in form. (The applicants did not seek to interdict future sales, but were only concerned with the sale of 14 January 2011). Therefore the pre-requisites which the applicants were obliged to establish before the grant thereof are those pertaining to the issue of a final interdict.

27. These pre-requisites - which are trite - are the establishment of a clear right, an act of interference and no other remedy (*Setlogelo v Setlogelo* 1914 AD 221 at 227). The applicants had sought to assert that the first respondent had no cause to sell, but the evidence failed to establish this. Indeed they never sought an order rescinding the bond judgment, neither was any defence to the action suggested. Ultimately, the clear right which they held out for was the contrived interest of the second respondent, based at best only on an “*interpretation*” of the terms of a provisional restraint order granted some three years before. In the result the Rule cannot be confirmed.

28. Lastly, I deal with the issue of urgency. The applicants, rather short-sightedly, suggested that this was a dead issue already determined when the application was brought since the order granted by this court

directed that the matter “*be heard as one of urgency*”. However, they overlook the purpose of Rule 6(12)(c), which - exactly in circumstances like these - permits a party aggrieved by the issue of an order granted in his absence in an urgent application to have it reconsidered, including even the question of urgency. (See in this regard the approach adopted by *Kroon J* in *Caledon Street Restaurants C v D’Aviera* [1998] JOL 1832 (SE) where, although not presented as a “*reconsideration*” *per se*, the respondent in that matter argued as a defence that the applicant was not entitled to have brought the application as one of urgency. The court found that although the matter was ripe for hearing, the manner in which the applicant had breached the rules to secure a swift hearing of the matter in the first place could not at the hearing stage, even though the question of urgency had seemingly become moot, conveniently be swept under the mat. As a mark of its disapproval of the unnecessary invocation of the provisions of Rule 6(12), it dismissed the application without regard even to the merits of the matter and ordered the applicant to pay the costs).

29. Reconsideration takes place on the basis of a set of circumstances quite different from that under which the original *ex parte* order was issued. In this regard, I have already alluded above to the basis upon which the applicants misled this court. With hindsight, and the benefit of now having both sides of the story, there was no merit whatsoever in the applicants furtively approaching this court, moments before the sale was due to take place, to avert it. Even if they believed in the merits of their submission that the property was covered by the restraint order, however, they had known of the

judgment in the bond action for a lengthy period, yet had taken no steps before to involve the second respondent or seek relief predicated on an assertion that a sale was precluded. Similarly they had known for a while of the attachment, evidently sometime in May 2010, and of the earlier sale in execution. The second applicant also knew about the 14 January sale, on his own admission since 5 January 2011, but waited until the eleventh hour to launch the present application. He failed to convincingly explain why he could not bring the application any earlier on proper notice to the respondents. In my view there was no basis to warrant a departure from the requirement at least that prior notice be given to them. The applicants patently abused the urgent proceedings for optimum personal effect without any regard whatsoever for their rights. There can be no question in this instance that the first respondent particularly was prejudiced by the late approach to court without any prior notice to it.

30. The dominant purpose of Rule 6(12)(c) is to afford an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from the grant of (usually an interim) order. Whereas a reconsideration may involve deletion of the order, either in whole or in part, or amendment of the order or additions thereto, it may also, in appropriate circumstances, result in the applicant having to pay the costs of the application on an attorney and own client scale. In this instance, since the sale has come and gone, redress is not available to the first respondent by ameliorating the terms of the order granted. (It is I have found above, the order was final in effect.) A punitive costs order warranted by the peculiar facts of the matter would, however, be a basis on which to do justice to the situation. In

my view the brazen abuse by the applicants of the urgent procedure demands such censure.

31. In the result the rule is discharged, with costs, on the scale as between attorney and own client.

BC HARTLE

JUDGE OF THE HIGH COURT

Date of application: 26 July 2011

Date of judgment: 15 November 2011

Appearance for the Applicant: Adv L Kubukeli

Instructed by : BJ Jekubeni Attorneys

NBS Building

3rd Floor, Office 309

15 Terminus Street

EAST LONDON

REF. BJ/M2011/08/08

Appearance for the First

Respondent:

Adv R Brooks

Instructed by :

Bate Chubb & Dickson Inc.

Suite 3, Norvia House

34 Western Avenue

Vincent

EAST LONDON

REF. MR CHAMBERS/W72868

Appearance for the Second

Respondent:

Nil