

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 036642/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
22/7/2024	[REDACTED]
DATE	SIGNATURE

In the matter between:

BRIDGE TAXI FINANCE GJ (PTY) LTD

Applicant

And

JACOB MQOSHWA SHABANGU

Respondent

JUDGMENT

SENYATSI, J

Introduction

- [1] This is an application to confirm an interim court order which was granted following an application brought *ex parte* for the attachment of a minibus combi financed by the applicant. The minibus combi has been attached and the applicant is in possession thereof. The application is for confirmation of a rule *nisi* which was granted on an interim basis. The respondent opposes the confirmation of rule *nisi*.

Background

- [2] The applicant brought an *ex parte* application and rule *nisi* which was issued on 14 June 2023 the returnable on 31 July 2023, in terms of which the respondent was called upon to show cause why he should not be ordered to return to the applicant's possession a 2016 King Long Ibubhezi 2.2litre petrol minibus vehicle ("the vehicle").
- [3] The order, application and the summons were served by the sheriff on 27 June 2023. The Rule *nisi* was extended to 19 September 2023. The respondent filed an answering affidavit on 14 September 2023. The applicant served its replying affidavit on 2 October 2023 and the rule *nisi* was extended to 24 February 2024 for argument.
- [4] The parties concluded a developmental credit agreement ("the agreement") in respect of the vehicle which is the subject of this litigation on 23 February 2017 and the agreement was to endure until 24 July 2020, the latter date being the date of the last instalment. Clause 2 of the agreement

reserves ownership of the vehicle until the instalments have been repaid in full.

The legal framework on interdict

- [5] An *ex parte* application by its very nature places only one side of a case before the court and requires the utmost good faith on the part of the applicant.¹ Failure to make full disclosure of all known material facts(that is, facts that might reasonably influence a court to come to a decision) may lead the court to refuse the application or to set aside the ruling on that ground alone, quite apart from considerations of wilfulness or mala fides.² The court in the exercise of its discretion, need not necessarily refuse relief or set the order aside.³ If the order is set aside, the applicant may launch another application for the same relief because the setting aside does not dispose of the applicants claim but only of that particular application.⁴
- [6] In considering on a return date whether to discharge or confirm rule nisi, the court is required to consider the matter *de novo*.⁵ In *Polyoak (Pty) Ltd v Chemical Workers Union and Others* ⁶ the Court held as follows: -

“By the time the return day arrives, however, the dust has settled, and then it becomes necessary for a court to consider whether a case has been made out for the relief sought. That an interim order has been granted in no way

¹ See Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA) para 45; Trakman v Livishirtz 1995 (1) SA 282 (A) 288

² See Estate Lodge v Priest 1926 AD 312 at 323; De Jager v Heilbron 1947 (2) SA 415 (W); Cometal-Mometal SARL v Corlana Enterprises (Pty)Ltd – 1981(2) SA 412 (W); Schlesinger v Schlesinger 1979 (4) SA 342 (W); Cooper v First National Bank of SA Ltd 2001 (3) SA 705 (SCA) at 717; Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC).

³ See Reilly v Benigno 1982 (4) SA 365 (C).

⁴ See National Director of Public Prosecutions v Braun 2007 (4) SA 72 (C).

⁵ Delta Motor Corporation (Pty) Ltd v Van der Merwe 2002 JDR 0893(T)

⁶ (1999) 20 ILJ 392 (LC) at 394

prevents this process, for, being interlocutory, it serves to dispose of none of the issues that arise in the case. On the return day, in short, the court must be satisfied that a proper case has been made out for each facet of the relief sought”.

[7] In considering whether the rule *nisi* ought to be confirmed, it is necessary to examine whether the applicant satisfied the requirements for the granting of an interim interdict.⁷ Given the interdictory nature of the relief claimed, the element of irreparable harm is presumed.⁸

[8] The proper manner of approach to a temporary interdict was formulated as follows in *Webster v Mitchell* ⁹ :-

“The use of the phrase ‘prima facie established though open to some doubt’ indicates I think that more is required than merely to look at the application of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner I consider is to take the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant could on those facts obtain the final relief at trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining the temporary relief for his right *prima facie* established, may only be opened to ‘some doubt.’ But if there is a mere contradiction, or unconvincing explanation, the matter should be left to trial and the right to be protected in the meanwhile, subject of course to the respective prejudice in the granting or refusal of interim relief.”

⁷ SA Taxi Securitisation (Pty) Ltd v Chesane 2010(6) SA 557 (GSJ) at para 11.

⁸ SA Taxi Securitisation (Pty) Ltd v Chesane supra at para 30 approving Stern and Ruskin N.O. v Appleson 1951(3) SA 800 (W) at 813

⁹ 1948(1) SA 1186(W) at 1189

Respondent's Case

[9] Mr Lekalakala submitted on behalf of the respondent that a *rule nisi* should not be confirmed based on the following grounds:-

(a) The applicant failed in its duty of utmost good faith and to fully and fairly disclose all the material facts in the case including those facts which are adverse to its case and which would have influenced the Court in deciding whether to grant *rule nisi* or not.

(b) One of the material facts the applicant failed to disclose is that the applicant previously financed and entered into similar lease arrangements in respect of two minibus vehicles and the minibus which is the subject of this case is the third one.

(c) Of significance, so the argument goes, is that two of the minibus vehicles have been repossessed.

[10] The respondent also disputes the right to attach the vehicle for safe keeping until the determination of the main action based on the following grounds:-

(a) He made an informal arrangement with the officials of the applicant, namely Mr. Eugene Ndlovu and later Mr. Ndumiso Ncube during July 2021 to pay R2000 per week. He contends that two more vehicles were funded by the applicant together with the one forming the subject of this litigation and that the payment terms were extended by an agreement.

(b) He paid in accordance with the arrangements although he missed some of the payments and that he paid more than the alleged arrear instalments but that the applicant has failed to provide the statement of account to the respondent.

- [11] Mr Lekalakala referred this Court to the matter of *Estate Lorgi v Priest*¹⁰ where the court stated that in *ex parte* applications the utmost good faith must be observed by the an applicant. The court in that matter held failure to disclose fully and fairly all the material facts known to him may lead in the exercise of the court's discretion, dismissal of the application on that ground alone. The statement by the court in this case represents the trite legal principle in our law concerning the approach on *ex parte* applications. Each case depends on its own facts.
- [12] The court was also referred to the case of *Toto v Special Investigative Unit and Others*¹¹ on which Mr Lekalakala relies for the submission that the *rule nisi* should be discharged because of the alleged failure to disclose fully and fairly the material facts. Reliance on this case is misplaced because unlike in the instant case in which the respondent does not allege that the applicant's counsel failed to bring to the attention of this court a decided case which is against the case of the applicant, in *Toto's* case, the court laid down the principles regarding the interpretation of an enabling legislation which led to the formation of the Special Investigative Unit (SIU) after the creation of the Heath Unit was declared unconstitutional and the applicant sought to hold the SIU liable for the alleged damages allegedly sustained as a result of the defunct Heath Unit. In *Toto's* case, the Court emphasized the need by the legal practitioner to bring to the attention of court any case which has come to his/her attention even if the case goes against his /her client's case and that failure to disclose such case constitutes a serious breach of duty by the practitioner to the court. The facts of the present case are distinguishable from those in *Toto*.

¹⁰ 1926 AD 312

¹¹ 2001(1) SA 673(E)

Analysis and Reasons

- [13] The basis of opposition to the application is that the applicant failed to disclose that it had concluded similar and separate lease agreements with the respondent in respect of two other minibuss vehicles which were leased during 2015 and 2016. He contends that following the lease agreement which was concluded during 2017, it became difficult for him to repay the instalments because of the 34 % interest rate and that he negotiated with certain individuals of the applicant to repay at a reduced instalment of R2000 per week per minibus. He states that he does not have legible receipts and that in any event, the applicant has failed to provide him with the statement of accounts.
- [14] The contention that failure by the applicant to state that it funded three minibus vehicles for the respondent is a material non-disclosure in terms of which the court may exercise its discretion by refusing to confirm the rule nisi is without legal merit. This is so because of the concession by the respondent that he leased three minibus vehicles in terms of separate agreements. The non-disclosure of the other two agreements pertaining to the other minibus vehicles is irrelevant for the purposes of this application. There is no denial that there is breach of the repayment obligations but rather that the repayment obligations were renegotiated but the allegation has not been substantiated by any evidence.
- [15] The repossession process has been completed pending the hearing of the main action. It will serve no purpose not to confirm the rule nisi. Consequently, I am of the view that the applicant has made out a case for confirmation of *rule nisi*.

Order

[16] Consequently, the following order is made: -

- (a) The *rule nisi* which was issued on 14 June 2023 is hereby confirmed.
- (b) The respondent is ordered to pay the costs of the application.




ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Electronically submitted.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be **22 July 2024**.

Appearances:

COUNSEL FOR THE APPLICANT: Adv JG Botha
INSTRUCTED BY: Oosthuizen Du Toit Berg and
Boon Attorneys

COUNSEL FOR THE RESPONDENT: Adv LH Lekalakala
INSTRUCTED BY: MP Mpapele Attorneys

DATE OF REASONS FOR ORDER: 22 July 2024