

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: 2024/141745; 2024/137423; 2024/139338; 2024/139331;
2024/139330; 2024/141807; 2024/141815; 2024/141799

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
03/05/24	
DATE	SIGNATURE

In the matter between:

2024/141745

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

Applicant

and

MULEBA, PHALANNDWA

Respondent

In the matter between:

2024/137423

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

Applicant

and

MZOLO QALOKWAKHE, SHADRACK

Respondent

In the matter between:

2024/139338

SA TAXI IMPACT FUND (RF) (PTY) LTD

Applicant

and

NELUSHI TENDANI

Respondent

In the matter between:

2024/139331

SA TAXI IMPACT FUND (RF) (PTY) LTD

Applicant

and

SITHOLE JOHN PHILLIP

Respondent

In the matter between:

2024/139330

SA TAXI IMPACT FUND (RF) (PTY) LTD

Applicant

and

XABA MANDLA

Respondent

In the matter between:

2024/141807

TRANSFLOW (RF) (PTY) LIMITED

Applicant

and

MINI ALEC

Respondent

In the matter between:

2024/141815

TRANSFLOW (RF) (PTY) LIMITED

Applicant

and

MTHETHWA NKOSIPHENDU GOODMAN

Respondent

2024/141799

In the matter between:

TRANSFLOW (RF) (PTY) LIMITED

Applicant

and

NXUMALO THOKOZANI LAWRENCE

Respondent

JUDGMENT

MNYATHELI, AJ

Introduction

- [1] In the unopposed roll sitting on 18 March 2025, among other matters, the above matters came before me as *ex parte* applications, each seeking substantially the same relief, namely to attach and remove taxi minibus vehicles ("the taxis") from the Respondents, or whosoever may be in possession of, and, by way of a rule *nisi*, to require the Respondents to show cause on a specified future date as to why such an order should not be made final.
- [2] In all these matters, it appears that the Respondents had entered into credit agreements alternatively described as developmental credit, with the Applicants for the purchase of the taxis and had then fallen behind in repayment of their accounts with the Applicants. The Applicants contend that the taxis will likely depreciate in value owing to the nature of their business, and, more importantly, that they seek to proceed by way of *ex parte* applications because, in the Applicants' experience, people in the position of the Respondents will likely either strip the vehicles—rendering them worthless

shells by the time any matter is finalised if summons were issued and served in the ordinary course. The Applicants further assert that the *ex parte* process and the rule *nisi* are intended to prevent such dissipation of the vehicles' value and to protect the interests of the credit providers.

- [3] At the core of all these unopposed applications are essentially applications seeking interim interdicts for the attachment of the taxis pending the issue of summons to either confirm cancellation of the installment sale agreements; confirm the rules *nisi* and make the interim orders final; and to address possible damages arising from the cancellations. Naturally, these interim interdicts are sought to take effect forthwith and immediately, without the Respondents being served or aware that civil process is afoot against them.
- [4] Counsel for the Applicants confirmed that the matters may be dealt with together because the applicable issues of law and the factual circumstances are the same or similar. Accordingly, this judgment consolidates and encompasses all the matters.
- [5] After engaging counsel and debating the issues and procedures involved in these matters, I stood the matter down in order to fully consider the propriety of proceeding in the manner in which the applications were brought, and the law applicable in those circumstances.
- [6] Upon resumption, counsel referred me to the matter of *SA Taxi Securitisation (Pty) Ltd v Chesane*,¹ decided by the Honourable Boruchowitz J, in which, counsel argued, the same issue was decided in favour of permitting the applications to be brought on an *ex parte* basis, and submitted that the decision is therefore binding upon me.
- [7] Having consulted the above-quoted case, I came to the conclusion that it is distinguishable from the present matters, in that the application in that case was not brought on an *ex parte* basis, but was a normal interim application for

¹ 2010 (6) SA 557 (GSJ).

the attachment of motor vehicles for safekeeping pending the finalisation of a trial. In that matter, summons had already been issued and served on the Respondents. The issue of attaching the taxis was purely interlocutory, as the summons had already been issued and the matter was *in medio*. In the present cases, no summons has been issued and served, and the Respondents are unaware that there is any legal process against them. That case is therefore distinguishable from the instant case on the facts, and, therefore, the applicable law.

- [8] I offered Counsel the choice of removing the matters from the roll and bringing them afresh using an altered approach, indicating that, since the issue is controversial, I intended to pen a **substantive** judgment in which my views would be clearly set out. Counsel requested an opportunity to file heads of argument, and I acceded to the request. The matter then stood down once more on that basis, until the following day.
- [9] Subsequently, I was informed by my clerk that correspondence had been addressed to her by the instructing attorneys of the Applicant, requesting a meeting the following morning with the main counsel (as the counsel who had appeared previously merely stood in for another one), in order to clarify certain issues and to request that I await heads of argument from the main counsel before making any decision.
- [10] Indeed, the main counsel, Mr Aucump attended at chambers in the morning, apologising for not having personally appeared the previous day due to a prior engagement in Cape Town. Mr Aucump requested that the matter be stood down further to enable him to file heads of argument prior to the delivery of any judgment or order. I agreed, and the heads were subsequently filed during the following week. I am indebted to counsel for the heads, and I will definitely take them into account in rendering this judgment.

Salient Facts and Background

[11] In all the matters, it is contended on behalf of the Applicants—and this does not appear to admit of any gainsaying, save that the Respondents have not been served—that:

- a. The Applicant is a credit provider, as that term is used in the National Credit Act;²
- b. The Applicant and the Respondents entered into installment sale (hirepurchase) agreements, whereby the Applicant advanced money to the Respondents for the purchase of taxis, to be repaid by way of monthly installments;
- c. The Respondents defaulted on the payments;
- d. The Applicants sought to cancel the agreements;
- e. The Applicants now seek to recover the outstanding amounts in respect of the taxis;
- f. The Applicants brought the *ex parte* applications in order to attach the vehicles to preserve their value and protect them from being stripped or otherwise misused, pending the issuing of summons;
- g. The Applicants seek interim relief by way of a rule *nisi* against the Respondents;
- h. The rule *nisi* is sought to operate forthwith and with immediate effect;
- i. Although the Applicants have evinced an intention to issue summons—and in some instances, draft summons have been prepared and uploaded on CaseLines—such summons have not been issued in any of these matters;
- j. The Applicants contend that the issuing of summons would alert the Respondents and may cause them to misuse or strip the vehicles, thereby diminishing or destroying their value, based on previous experiences.

[12] The reason advanced for not issuing summons, so it is argued on behalf of the Applicants, is that the taxis are usually stripped in such circumstances if summons are first issued against the defaulting debtor Respondents, and by the time the matter finds its way to court, they are reduced to shells of no

² 34 of 2005.

value. This allegation is supported by photographic evidence of other taxis that appear to have been stripped, some of which display high mileage readings, which, it is alleged, have ostensibly contributed to the drastic reduction in their value.

- [13] The Applicant further argues that it resorts to this manner of collecting outstanding debts by way of an interim order to protect the interests of the creditor financial institution, and that Respondent has an option of anticipating the order within twenty-four (24) hours, in terms of the Uniform Rules.
- [14] A number of bothersome questions arose when I apprehended the application—both in terms of substantive law and the applicable legislation on the one hand, and procedural (adjective) law on the other. Several issues emerged that pertain to the ultimate question: whether the applications, brought as they were, without notice or service to the Respondents in these circumstances, would pass constitutional muster within our democratic dispensation.
- [15] Insofar as substantive law is concerned, I questioned whether this is one of those cases in which a departure from one of the salutary rules and tenets of natural justice—most notably, the *audi alteram partem* (hear the other side or party) rule—may be justified; whether the use of the *ex parte* procedure is warranted in the circumstances of these matters; whether a rule *nisi*, which has the effect of granting an applicant interim relief without prior notice to the affected Respondent, is the correct procedure for safeguarding an applicant's interests or rights in the circumstances; whether there are any credible exceptional circumstances justifying a departure from the normal requirement of issuing summons in a summons-commencing action; and whether the reconsideration or anticipation process is a legitimate cure for an otherwise improper use of the *ex parte* procedure. I also questioned whether any matter of urgency existed in these circumstances such as to justify a "Nicodemus" approach to the court, in the absence of the Respondents, and to what extent, if at all, the constitutional provisions under section 34 are implicated in these matters.

Ex Parte Application Procedure

[16] An *ex parte* application in South African practice has been described as “simply an application of which notice was, as a fact, not given to the person against whom some relief is claimed in his absence”, despite the wording of Rule 6 (2).³ It is used:

- a. When the applicant is the only person interested in the relief being claimed;
- b. When the relief sought is a preliminary step in the proceedings—for example, an application to sue by edictal citation or to attach property *ad fundandam jurisdictionem*;
- c. When, though other persons may be affected by the court's order, immediate relief (even though it be temporary in nature) is essential—either because of the danger in delay or because notice may precipitate the very harm the applicant is seeking to forestall. Examples include an application for an interdict or an arrest *tamquam suspectus de fuga* under the common law.⁴

[17] Ordinarily where the rights of other persons are involved, notice should, wherever possible, be given to all such persons who may be affected.⁵

[18] If the court concludes that service ought to be afforded to other persons whose rights might be affected by its order, it may refuse to make any order on an *ex parte* basis.⁶

³ *Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation Credit Corporation (Pty) Ltd v Van Der Westhuizen* 1978 (1) SA 779 (T) at 783A-B.

⁴ *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed (2009) (“Herbstein”) at p290. See also *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 458H-J.

⁵ See Rule 6(2) of the Uniform Rules of Court. See also *Republic Motors (Pty) Ltd v Lytton Road Services Station (Pty) Ltd* 1971 (2) SA 516 (R) and *Coetzee v Coetzee* 1982 (1) SA 933 (C).

⁶ *Herbstein* n 4 above at p290-1.

- [19] There may be instances in which the court, despite service not having been effected on other parties who may or will be affected by its order, may grant a temporary or interim order by issuing a rule *nisi*, in order to enable such persons to have their views placed before court. This may occur where the applicant provides *prima facie* evidence of imminent harm and where the balance of convenience favours the granting of the interim order.⁷
- [20] It is trite that a court should, ordinarily, not make an order which may prejudice the rights of parties who are not before it.⁸
- [21] It is clear from the above that the *ex parte* procedure, while providing for swift interim relief and being useful to applicants in certain cases, remains an extraordinary remedy. In such instances, the procedural rights of litigants must be carefully balanced and proper guidance should be sought from judicial authority and, ultimately, from the Constitution.
- [22] The question that arises is whether the grant of a rule *nisi* in these matters is justifiable or defensible in law, given the absence of notice to the Respondents and the extraordinary nature of the relief sought.
- [23] Is there sufficient admissible evidence before the court to justify the conclusion that the scales ought to tilt in favour of granting the interim relief sought—namely, the attachment of the taxis in these matters—without notice to the Respondents, in accordance with the principles set out in paragraph 16 above?
- [24] The court must consider where the balance of convenience lies: between the interests of the credit provider seeking to preserve the value of its security, and those of the credit receivers whose property rights and right to procedural fairness are implicated.

⁷ *Webster v Mitchell* 1948 (1) SA 1186 (W).

⁸ See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[25] Heads of argument ("the heads") were filed on behalf of the Applicants. I am grateful to counsel, and in particular to Mr Aucump, for the comprehensive and apposite submissions. Indeed, most—if not all—of the pertinent issues have been addressed therein. It remains for me to apply the facts emerging from these cases to those issues, as well as the legal principles enunciated in the decisions of the courts, and to arrive at a determination.

[26] It is submitted on behalf of the Applicants⁹ that the process adopted in these unopposed applications has previously been considered and sanctioned by various courts; that the cases do not raise any reportable issues, or, alternatively none of these matters raises any issue of interest to other judges; and that, as a result, it is unnecessary to hand down a written judgment. It is further submitted that the grant of the proposed draft orders provided in each case would suffice. I remain of the view that it is important to pen a judgment on the issue.

[27] It is stated in the heads that the Applicants are, respectively, registered developmental credit providers engaged in the business of financing minibuses for consumers who utilize them as income-generating taxis. In the course of their business, the Applicant advances credit to entities such as the Respondents, in circumstances where traditional financial institutions would ordinarily be unwilling to do so. These include situations where:

- a. a customer's credit profile does not support any form of financing;
- b. the customer is unable to provide security

[28] It is further submitted that the taxi industry itself remains largely unregulated, which creates an additional layer of risk that conventional financiers are often unwilling to assume.

[29] Reference is had to the remarks of Gauntlet AJ in *SA Taxi Securitisation (Pty) Ltd v Yuong*,¹⁰ where the learned acting Judge respectfully stated:

⁹ Mr Aucump has also confirmed that his heads of argument apply to all of the matters listed in this judgment. I note, however, that while eight (8) matters appear in the citation, his heads reference only five (5). This is brought to attention merely for completeness, as it is accepted that the submissions are intended to apply uniformly across all eight matters.

"...[W]hat is in issue in this matter is a taxi, a piece of working machinery to be maximally used. It is a matter of notoriety that great mileages are clocked up and considerable wear and tear endured by such vehicles, more particularly as I have indicated, when the period at issue is a considerable one."

These remarks support the argument that the Applicant's risk is significant if the minibus taxis are not attached before the issuing and serving of summons on the respective Respondents.

- [30] I would respectfully interpret the above *dicta* from Gauntlett AJ to mean that the court ought to take judicial notice of the fact that the taxi industry is fraught with risk, volatility, and uncertainty, resulting in undue exposure for the credit grantor. Therefore, the court should not hesitate in coming to the aid of litigants such as the Applicants in the present case.
- [31] On behalf of the Applicants, it is further submitted that it should be borne in mind that, in terms of Uniform Rule 6(8), the Respondents are not compelled to wait until the matter is dealt with on the return day. Instead, the Respondents are procedurally entitled to anticipate the rule *nisi* on no less than 24 hours' notice, where such an option is provided. There is considerable merit in this submission.
- [32] Essentially, the Applicants seek interdictory relief against the Respondents on an interim basis, without the service of any process on them, thereby inviting them to present their defence, if any, in court, that is, on an *ex parte* basis. In these matters, this is referred to as a vindicatory interdict, and it is contended, with authority, that in such cases, a *prima facie* right is presumed. More on this later herein.
- [33] Whether the thresholds and requirements for the granting of the order are met will ultimately depend on the evidence presented in support of the applications. The salient issues to determine in these matters are contained in

¹⁰ [2008] ZAWCHC 292 at p16 (line 9-15).

the averments set out in the founding affidavits deposed to by the officers of the Applicants.

- [34] In concert, if I may say, the deponents to the affidavits aver that the Applicants, based on their experience with other credit recipients, *suspect* (own emphasis) that, given previous instances of conduct inimical to their interests by other such recipients, the respective Respondents might act similarly by stripping, destroying, or otherwise rendering the minibus taxis unserviceable, to the Applicants' detriment. They provide evidence of conduct involving other minibus taxis unrelated to the present Respondents.
- [35] The court is enjoined, on the other hand, to consider the specific circumstances and merits of each matter before it, without relying on material facts or circumstances from other cases—unless such reliance is justified in law. It must not generalise or make gratuitous findings that may prejudice an absent defendant or Respondent. This appears to lie at the heart of the debate in these matters.
- [36] In most *ex parte* applications falling under the third category mentioned above, urgency would typically be present.
- [37] *In casu*, urgency may be regarded as implicit, based on the suspicion—impelled by previous experience—that the articles in question may be misused, stripped, or even destroyed. Viewed against the background of a specialised industry servicing clients (the Respondents) who would otherwise not qualify for credit, it is likely that Applicants will suffer irreparable harm or loss.
- [38] The evidence provided is in the nature of similar fact evidence, which, in terms of the principles of the law of evidence, is admissible only if its probative value outweighs its prejudicial effect. The ultimate test, therefore, is whether the Applicants have surmounted that threshold in these matters.

- [39] In some of the cases cited above, draft summonses have ostensibly been prepared. However, before being issued or served, these *ex parte* applications were brought—not as interlocutory proceedings, but as applications for interim, temporary, or provisional relief. Whether this is sufficient to demonstrate a serious intention to pursue action proceedings against the Respondents is not immediately clear.
- [40] Unfortunately, there is no direct evidence of any misconduct on the part of the Respondents, save for their failure to respond to or follow up on telephone calls, and the possibility that the vehicles have accumulated high mileage—as is often the case in the ordinary course of their business. Regrettably, all of this remains speculative.
- [41] I have considered the implications of the *audi alteram partem* rule of natural justice, which underpins our jurisprudence and is integral to our principles of legality under the rule of law—particularly its significance in *ex parte* applications. I have also considered the sentiments expressed by the Constitutional Court, per Ackermann J, regarding the utility of the *ex parte* procedure and the rule *nisi* in deserving cases, as articulated in *National Director of Public Prosecutions and Another v Mohamed NO and Others*,¹¹ and pertinently referred to by Mr Aucamp.
- [42] This common law principle must be enunciated, viewed, and interpreted with sensitivity, particularly in light of constitutional provisions—especially in cases where the rights of third parties, as stakeholders in the taxi industry, are implicated. Section 34 of the Constitution does not automatically or unconditionally make the application of *ex parte* principles a given, as it was prior to its enactment. I leave this question open and consider myself bound by the prevailing legal authorities, without further elaboration.
- [43] In practice, it appears that the rule could lead to finality if the Respondents are unable to rebut or raise the required amounts of money, as it is difficult to

¹¹ [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476.

foresee how they would ultimately be able to ventilate their position—whatever it may be—in court.

- [44] My hesitation in readily issuing the orders was informed by the sentiments expressed above and may yet be revisited in light of classical cases involving *ex parte* applications. There is considerable merit in the view that the issuance of summons provides an alternative remedy, thereby precluding the Applicants from obtaining an interim interdict in these circumstances.
- [45] It has been challenging for me to imagine the execution of an *ex parte* order on an unsuspecting taxi driver, with a full load of, say, fifteen passengers, who is accosted and served with the order, only for the passengers to be told to disembark unceremoniously due to an order obtained *ex parte*.
- [46] On an overall consideration of the attendant issues in this matter, the weight of the circumstantial (uncontested) evidence in the affidavits, in line with the approach set out in *Webster v Mitchell*,¹² a decision of this Division that has stood the test of time, compels me to grant the orders.

Order

- [47] On a limb note, one might consider that, given the nature of this interim relief, which affords the Respondents an opportunity to challenge the order on the return day, the orders are granted in the following terms:
1. The applications are granted.
 2. Rules *nisi* (“the rules”) are hereby issued, calling upon the Respondents in each case to show cause, if not anticipated, why the rules in these matters should not be made final.

¹² 1948 (1) SA 1186 (W).

3. The Sheriff or his Deputy is authorised to serve the rules and, in each case, ensure that no prejudice, inconvenience, or suffering is caused to any passengers in transit, or who may be conveyed on such minibus taxi.
4. Costs are reserved for the return day



M MNYATHELI
Acting Judge of the High Court
Johannesburg

Date of Hearing: 24 April 2025

Date of Judgment: 02 May 2025

For the Applicants: *Adv Schalk Aucump*