



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

Case no: 2025-015339

1.	REPORTABLE:	No
2.	OF INTEREST TO OTHER JUDGES:	No
3.	REVISED:	No
DATE:		
SIGNATURE OF ACTING JUDGE: [REDACTED]		

In the matter between:

**CATERPILLAR FINANCIAL SERVICES
SOUTH AFRICA (PTY) LTD**

Applicant

and

KHONGO INVESTMENTS (PTY) LTD

Respondent

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date and time for hand-down is deemed to be 30 June 2025 at 14h00. The order was granted on 28 March 2025.

PRETORIUS AJ:

A. Introduction

1. The applicant (“*Catfin*”) obtained an order *ex parte* on 11 February 2025 (“*the ex parte order*”) pursuant to an urgent application brought by it on 6 February 2025 (“*the ex parte application*”). The order was granted by Adams J pursuant to part A of the notice of motion in the *ex parte* application. In terms of the order “*any person, in possession of the CAT equipment*”, being ten Caterpillar construction vehicles (“*the CAT equipment*”), was ordered to “*forthwith upon receipt of this order, deliver / make available for collection / permit the collection / repossession by the applicant, of the equipment which is / are in the possession of such person*”. Once so repossessed, Catfin would keep the vehicles in its possession pending the finalisation of part B of the application. In part B of the *ex parte* application, Catfin claims payment of an amount of R13 112 179.46 from the respondent (“*Khongo*”), which amount was alleged to be the full outstanding amount due under a Master Instalment Sale Agreement concluded between the parties.
2. The application before me was an urgent application which was brought by Khongo for a reconsideration of the *ex parte* order in terms of rule 6(12)(c) (“*the reconsideration application*”). In terms of rule 6(12)(c):

“A person against whom an order was granted in such person’s absence in an urgent application may by notice set down the matter for reconsideration of the order.”
3. In the reconsideration application, Khongo sought the reconsideration and setting aside of the *ex parte* order on the grounds set out in its affidavit in support of the reconsideration application. In its replying affidavit, Catfin sought, in addition, a determination of the relief sought by it in part B of the *ex parte* application. In support of the additional relief sought by Catfin, it contended that, if the court hears the reconsideration application on an urgent basis, and it is dismissed, Catfin intends seeking leave to dispose of the CAT equipment, to enable the determination of part B of the main application.
4. During the hearing of the matter, Catfin, correctly in my view, abandoned the additional relief. Not only is the additional relief fundamentally inconsistent with the nature and

purpose of the procedure provided for in terms of rule 6(12)(c),¹ it is also inappropriate in circumstances where Khongo is not yet called upon to meet the case made in respect of the relief in part B of the main application.

5. The matter came before me on 27 March 2025 and on 28 March 2025 I made the following order:

- “1. The non-compliance by the respondent (Khongo Investments (Pty) Ltd) with the Uniform Rules of Court relating to forms, service and time periods is condoned.
2. The *ex parte* order granted on 11 February 2025 is set aside in its entirety.
3. The applicant (Caterpillar Financial Services South Africa (Pty) Ltd) shall bear the costs of the respondent’s reconsideration application, including the costs consequent upon the employment of two counsel, on scale C.”

6. On 1 April 2025, Catfin informally requested reasons for the order. These are the reasons.

B. The *ex parte* application

“In our law, there is a fundamental norm that no decision adverse to a person ought to be made without giving that person an opportunity to be heard. In a court of law this norm is scrupulously observed. However, in the real world, prudence dictates that sometimes pragmatism must be applied and, in exceptional circumstances, that the sacred right of audi alteram partem may be relaxed, but, when it is appropriate to do so, such a decision is hedged with safeguards. The principle which governs whether to grant an order against a person without their prior knowledge is straightforward: only when the giving of notice that a particular order is sought would defeat the legitimate object of the order.”²

¹ Mazetti at para 14 where Sutherland DJP held: “To belabour the point – an applicant cannot make out a better case for the *ex parte* order than the case it put before the court when the order was granted. It was for this reason that an attempt by the applicants to bring a counterclaim to seek further relief was dismissed by me out of hand. It was irregular and yet another abuse of the process.”

² Sutherland DJP in *Mazetti Management Services (Pty) Ltd and another v Amabhungane Centre for Investigative Journalism NPC and others* 2023 (6) SA 578 (GJ) at para 1 referring to *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another*; *Maphanga v Officer Commanding,*

7. The facts leading up to the *ex parte* application are mostly common cause between the parties. However, not all the facts were disclosed by Catfin in its founding affidavit. They were raised by Khongo in its affidavit in support of the reconsideration application.
- 7.1. Catfin provides finance to prospective purchasers of Caterpillar machines and equipment. Catfin financed Khongo's purchase of several heavy Caterpillar equipment under a Master Instalment Sale Agreement ("*the MISA*"). In terms of the MISA, Catfin retained ownership of the equipment until all payments due for the particular equipment were settled by Khongo. Catfin is entitled to inspect the CAT equipment and to monitor the usage, maintenance, service and other data of the CAT equipment through a unit monitoring system known as the Cat® Product Link SITECH unit ("*UMS*"). In the event of default by Khongo, Catfin would become entitled to certain remedies, including specific performance, cancellation, payment of all amounts due or future debts, damages, repossession and shutting off and/or de-rating the CAT equipment.
- 7.2. On 18 December 2023, Catfin informed Khongo of the arrears of R1 574 731.89. They met on 16 May 2024 at Catfin's offices. Catfin agreed to waive a portion of the penalty fee if Khongo provided copies of new client contracts. Following the meeting, Catfin updated the arrears to R1 534 079.69, including a late fee of R250 966.61. Khongo paid R783 113.08 on 3 June 2024. Catfin requested payment of the outstanding balance and stated that the late fee waiver discussion would be with management once all invoices were up to date.
- 7.3. On 5 August 2024, Catfin informed Khongo that the arrears were R678 529.38. Khongo disputed the amount and sought a breakdown thereof. On 7 August 2024, Catfin informed Khongo that the said amount was inclusive of late fee charges. Khongo nevertheless made payment of an amount of R500 000.00, being the

South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (A) at 15H-I and *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ) at para 22: 'The principle of *audi alteram partem* is sacrosanct in the South African legal system. Although, like all other constitutional values, it is not absolute and must be flexible enough to prevent inadvertent harm, the only times that a court will consider a matter behind a litigant's back are in exceptional circumstances. The phrase "exceptional circumstances" has regrettably, through overuse and the habits of hyperbole, lost much of its impact. To do that phrase justice it must mean "very rarely" 'only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established.'

amount it contended to be the outstanding balance without the late fee charges. Catfin provided Khongo with a report showing an outstanding R231 627.34 late fee charge. Management refused to waive the charges, so Khongo expressed its disapproval during a telephonic discussion on 23 September 2024. On 10 October 2024, Catfin requested a written request for a final settlement amount from Khongo. Khongo complied and proposed R150 000.00 in full and final settlement. On 11 November 2024, Catfin confirmed the total late fee charge was R178 529.38 and agreed to waive R28 529.38 if payment of R150 000 was made before 15 November 2024.

- 7.4. The events regarding the period December 2023 to November 2024 were not disclosed by Catfin in its founding affidavit. In reply to Khongo's affidavit setting out these facts, Catfin do not specifically deny the correctness thereof but alleged that those facts are not relevant to the application.
- 7.5. On 20 December 2024, Catfin's attorneys informed Khongo that it would terminate the MISA due to Khongo's arrears of R984 606.01. They demanded payment on or before 24 December 2024 to avoid legal consequences. On 28 December 2024, Khongo informed Catfin's attorneys that some members were away for the festive season and would contact them in January 2025. In January 2025, Khongo contacted Catfin to settle the outstanding MISA balance. Catfin provided a settlement letter on 16 January 2025, showing the total outstanding balance as R13 360 130.05. On 21 January 2025, Catfin reminded Khongo to provide proof of payment once processed, but Khongo failed to do so.
- 7.6. Catfin alleged, on 29 January 2025, that Khongo breached the MISA and was in arrears of R984 606.01. Catfin accordingly cancelled the MISA. The breaches relied upon by Catfin included a breach of the preservation clause in that Khongo moved the equipment to unknown sites, not owned by Khongo, without notice to Catfin; failure to disclose the whereabouts of the CAT equipment; and a breach of the insurance clause. As a consequence of the cancellation, so Catfin claims, the full outstanding balance due under the MISA, an amount of R13 112 179.46, became due. The cancellation notice afforded Khongo until 12h00 on 31 January 2025 to disclose the whereabouts of the CAT equipment. On 31 January 2025,

Khongo, through its attorneys, disputed being in breach, denied that Catfin had the right to terminate the agreement and refused to disclose the location of the CAT equipment or give up possession.

7.7. On 5 February 2025, Catfin's attorneys communicated their instructions to bring an urgent application for an order for the return of the CAT equipment. On 6 February 2025, the *ex parte* application was brought by Catfin. Unaware of the *ex parte* application, Khongo advised Catfin on 11 February 2025 that it had the requisite insurance in place and confirmed that it disputed Catfin's allegations of breach and its right to cancel the MISA.

8. The reasons advanced by Catfin for bringing the application *ex parte* appears from the following passages of the founding affidavit in support of the *ex parte* application:

"79. There is a very real prospect that the CAT equipment will be lost, destroyed, abandoned and/or stripped.

80. The CAT equipment are movable assets which can be moved from their current locations, albeit with difficulty.

81. The UMS (which includes vehicle trackers) can be removed/ tampered with, to avoid tracking the position of the CAT equipment.

82. The CAT equipment may be vandalised and/or destroyed, and the parts can be used by the respondent, or anyone else with access to the CAT equipment for spare parts on other similar equipment. There is a very real prospect that the CAT equipment will be lost, destroyed, abandoned and/or stripped.

83. The sites where the CAT equipment are used are not owned by the respondent, and there is no indication that the sites are properly secured. If the respondent denies this, it is called upon to prove ownership of the sites.

84. CAT equipment is prone to being stripped with the parts being sold separately.

85. The sites where the CAT equipment are used, are remote and isolated. The respondent (or anyone else for that matter) may strip the CAT equipment at their leisure, and without detection.

86. Usage of the CAT equipment for illegal mining operations, expose same to attachment and forfeiture to the state, apart from the wear and tear occasioned by the usage of same.

87. The applicant is unaware who operates the CAT equipment as these may be used by persons other than employees of the respondent who are not trained in the operation of CAT equipment. If the respondent alleges that only its drivers/ operators, operate the CAT equipment it is required to render the time sheets for each operator as rendered to its clients, to prove that only its employees operate the CAT equipment.

88. The CAT equipment is the applicant's only source of security for the respondent's indebtedness under the contracts.

89. The applicant fears that the respondent will run the CAT equipment at maximum tilt, for as long as possible to secure maximum profit, pending attachment, and removal.

90. If the respondent gets wind of this application, the CAT equipment may be moved after disconnection of the UMS to evade the relief sought/ enforcement of the relief claimed.

91. A delay occasioned by notice and opposition will enable the respondent to achieve maximum (unlawful) benefit from CAT equipment pending the determination of part A.

92. If part A is opposed the respondent will seek to derail an urgent hearing, and if same is heard in the ordinary course that will take at least 6-8 months for adjudication of part A.”

9. Khongo contends that Catfin has failed to disclose all the relevant facts and deliberately misled the court in the *ex parte* application. According to Khongo, the undisclosed facts and misrepresentations include -

9.1. That Catfin failed to reveal that it had delayed enforcing its purported contractual rights and only decided to act urgently in early February 2025. In this regard, Khongo relies on the fact that Catfin had claimed, already in December 2023, that Khongo had been in default. Khongo accordingly contends that the urgency on which Catfin relied was of its own making.

9.2. That Catfin failed to disclose evidence of Khongo’s attempts to cooperate and resolve the dispute. Had these facts been disclosed they would have demonstrated that Khongo was not a recalcitrant debtor scheming to abscond with the CAT equipment, but a party with whom Catfin had been negotiating – undermining the need for an *ex parte* application.

9.3. That Catfin did not disclose how devastating the interim interdict would be for Khongo’s business. The CAT equipment are Khongo’s primary income producing assets and repossessing them would effectively paralyse Khongo’s operations and cash flow to the detriment of its business and the livelihood of its employees.

9.4. That, in claiming in its founding affidavit the CAT equipment was left completely uninsured after Khongo cancelled its commercial insurance policies, Catfin failed

to disclose that Khongo had a valid insurance policy in place for the CAT equipment.

10. In *NDPP v Basson*³ the Supreme Court of Appeal held:

“Where an order is sought *ex parte* it is well established that the **utmost good faith** must be observed. **All material facts must be disclosed** which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E–349B).” [my emphasis]

11. Applicants in *ex parte* applications bears a heightened duty of sincerity and disclosure. The duty of utmost good faith, and in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, *audi alteram partem*.⁴ By electing this procedure Catfin was therefore required to offer all facts that could possibly affect the court’s decision, including those facts which may be unfavourable to its case.
12. Although our law allows a departure from the *audi alteram partem* principle when exceptional circumstances exist and it is in the interests of justice, the *ex parte* applicant assumes a heavy responsibility to neutralise the prejudice the respondent suffers by his or her absence.⁵ Not only is the *ex parte* applicant required to be thorough and fair in presenting its case, the applicant must also disclose all relevant facts it reasonably anticipates the absent respondent would want presented to the court – whether or not the applicant believes the facts to be true. In addition there is an obligation on the *ex parte* applicant to exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking *ex parte* relief.⁶

³ *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at para 21. See also *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at paras 45-52.

⁴ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at para 46. See also *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at para 102 where Langa CJ held that “It is our law that an applicant in an *ex parte* application bears a duty of utmost good faith in placing all the relevant material facts before **C** the court. The duty of good faith requires a disclosure of all material facts within the applicant’s knowledge.”

⁵ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at para 46.

⁶ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at para 47.

13. In the absence of a full and frank disclosure by the *ex parte* applicant, a court should set aside an order obtained on incomplete information. The factors to be considered in the exercise of the court's discretion include the extent of the non-disclosure, the question whether the judge hearing the *ex parte* application might have been influenced by proper disclosure, the reasons for non-disclosure and the consequences of setting the order aside.⁷
14. Apart from saying that the undisclosed facts are irrelevant for purposes of its *ex parte* application, Catfin did not advance any explanation for not disclosing those facts. Considering the extent of the non-disclosure, the lack of reasons therefore and the consequences of setting aside the order, I am of the firm view, as will be elaborated upon below, that those facts would indeed have had an influence on Adams J who heard the *ex parte* application had it been disclosed.
15. Le Roux J said in *Schlesinger v Schlesinger*⁸:

‘(U)nless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.’

C. The purpose of rule 6(12)(c)

16. The wording of rule 6(12)(c), when read in its proper context, is clear and admits of little if any ambiguity. Being alive to the caution expressed in *Endumeni*,⁹ the purpose of rule 6(12)(c) seems to me to be evident from the ordinary grammatical meaning of the words used, i.e. to afford a person against whom an order was granted in such person's absence in an urgent application the opportunity to set down the matter for reconsideration.
17. In *Emerald Capital (Pty) Ltd v Ace Auto Salvage CC*¹⁰ it was held in this Division by Senyatsi J regarding rule 6(12)(c):

“It must be stated clearly that this application for reconsideration is not about the merits of the perfection application, but rather, whether on the evidence before Jacob J, the application met the requirements of Rule 6(12) which required exceptional circumstances to be shown for an *ex parte*

⁷ *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at para 29.

⁸ *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 350B.

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 25.

¹⁰ *Emerald Capital (Pty) Ltd v Ace Auto Salvage CC* 2023 JDR 3282 (GJ) at para 7.

application on [an] urgent basis and whether on facts, the applicant had made out a case for urgency.”

18. Less than two months after the *Emerald* judgment, Wilson J held in *Le Grellier v Kamionsky*:¹¹

“Reconsideration under Rule 6(12)(c) encompasses a full rehearing of the applicant’s case with the benefit of the respondent’s affidavits and legal submissions. A court sitting in reconsideration of an order granted in the respondent’s absence must give the order that the court that heard the applicant *ex parte* would have given if it had heard from the respondent.”

19. The court hearing a reconsideration application has a wide discretion. The available relief upon such reconsideration may involve setting aside the order in whole or in part, the amendment of the order or additions thereto.¹²
20. The two main jurisdictional facts which are required for bringing an application in terms of rule 6(12)(c) are that an order was granted against a party in its absence pursuant to an application which was brought on an urgent basis. Both these jurisdictional facts are met in the present matter. Accordingly, in exercising my discretion, I am required to consider the further factors, including whether the applicant has demonstrated exceptional circumstances for deviating from the *audi alteram partem* principle and whether the applicant has made a full and sincere disclosure of all relevant facts.
21. As part of the process of rehearing Catfin’s case and reconsidering the *ex parte* order granted, it requires to be determined whether the bringing of the application on an *ex parte* basis was justified in the circumstances. This includes a determination, or redetermination of the question whether Catfin assumed the heavy responsibility of acting in the utmost good faith and made a full disclosure of all the relevant facts, including any adverse facts. If it was not, the court should set aside the *ex parte* order even if the relief sought was otherwise meritorious.¹³

¹¹ *Le Grellier and another v Kamionsky and another* 2023 JDR 4369 (GJ) at para 6.

¹² *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 486I–487A; *Lourenco v Ferela (Pty) Ltd (No 1)* 1998 (3) SA 281 (T) at 290C–H; *National Director of Public Prosecutions v Braun* 2007 (1) SA 189 (C) at 194C; *Kirpal v Peters In Re: Peters v Kirpal* [2022] JOL 55133 (GP) at para 13.

¹³ As Le Roux J held in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 350B: “(U)nless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.”

22. To rehear and reconsider Catfin's case without first determining whether the *ex parte* nature thereof was justified in the circumstances may presuppose that Catfin successfully demonstrated exceptional circumstances where this may not be the case, therefore skipping a step. Before the main application is reheard, it must therefore be determined whether the bringing of the application on an *ex parte* basis was justified, i.e. whether there were sufficient exceptional circumstances to neutralise the prejudice Khongo suffered by its absence. To put it differently, were there circumstances justifying that the sacred right of *audi alteram partem* may be relaxed, which include facts to conclude that notice of the application would defeat the legitimate object of the order.¹⁴
23. It is accordingly required to first determine whether Catfin demonstrated exceptional circumstances to deviate from the *audi alteram partem* principle. In this regard I agree with the following passages from *BDFM* and *Le Grellier*:

"The principle of *audi alteram partem* is sacrosanct in the South African legal system. Although, like all other constitutional values, it is not absolute and must be flexible enough to prevent inadvertent harm, the only times that a court will consider a matter behind a litigant's back are in exceptional circumstances. The phrase 'exceptional circumstances' has regrettably, through overuse and the habits of hyperbole, lost much of its impact. To do that phrase justice it must mean 'very rarely'—only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established."¹⁵

"Ex parte orders are granted on the basis that the applicant's claim is so strong, and the prejudice to the applicant from giving notice to the respondent is likely to be so severe, that a court can safely dispense with the general necessity to hear from the person against whom the *ex parte* order is to be granted. The test for granting such an order is strict and exacting. Those who seek *ex parte* relief must show that giving notice of their application to the person against whom they seek relief would defeat the purpose of that relief, and that without the relief being granted *ex parte*, the applicant would suffer irreparable harm."¹⁶

24. Although not disclosed in the *ex parte* application by Catfin, it is clear from Khongo's affidavit that the parties were in regular communication regarding Khongo's alleged arrears and possible breach of the MISA during the course of 2024. It was incumbent on

¹⁴ Sutherland DJP in *Mazetti Management Services (Pty) Ltd and another v Amabhungane Centre for Investigative Journalism NPC and others* 2023 (6) SA 578 (GJ) at para 1 referring to *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 15H–I and *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ) at para 22.

¹⁵ Sutherland J in *South African Airways SOC v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at para 22.

¹⁶ Wilson J in *Le Grellier and another v Kamionsky and another* 2023 JDR 4369 (GJ) at para 7, with reference to *Shoba, Officer Commanding Temporary Police Camp, Wagendrift Dam* 1995 (4) SA 1 (A) p 15H–I; *South African Airways SOC v BDFM Publishers* 2016 (2) SA 561 (GJ) para 22; and *Mazetti Management Services (Pty) Ltd v Amabhungane Centre for Investigative Journalism NPC* 2023 JDR 2338 (GJ) para 1.

Catfin during that period of time to make its enquiries regarding the issues it complained of in the founding affidavit. There is nothing to suggest that the UMS devices installed in the CAT equipment were not giving report as to the whereabouts and condition of the equipment. There is also no suggestion that Catfin enquired about the required insurance during the time of engagement between the parties. The first enquiry in this regard was made on 3 February 2025, only days before bringing the *ex parte* application. However, Catfin did not make the enquiry with Khongo but with an agent of the insurer. There was a duty on Catfin to exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking *ex parte* relief.¹⁷

25. Upon examination of the reasons advanced by Catfin for bringing the application on an *ex parte* basis, the following becomes evident:

- 25.1. There is nothing concrete to support Catfin's allegation that the CAT equipment would be lost, destroyed, abandoned, stripped and/or vandalised. To the contrary, Khongo explains that the CAT equipment is crucial to its operations and that the repossession thereof severely hampered its revenue, its employees' livelihoods and the contractual obligations it owed to its clients. It would not make sense for Khongo to damage the CAT equipment in any way in those circumstances.
- 25.2. Catfin's allegation that the CAT equipment, being movable assets, can be moved from their current locations is unpersuasive. Apart from being speculative (*can be moved*), the fact that the equipment is moved around cannot be in itself support the notion of risk. I accept that the equipment is occasionally moved between sites as and when required and that this is done, on Catfin's version, with difficulty.
- 25.3. Catfin alleged that the UMS of each vehicle can be removed or tampered with to avoid tracking of the vehicle. I find this unconvincing. Firstly, there is no evidence advanced by Catfin that any UMS has indeed been removed or tampered with. From Catfin's explanation of the UMS, it appears to me that the removal or tampering of the UMS is something that can be monitored and ascertained.

¹⁷ Recycling at para 47.

Accordingly, Catfin's allegation appears to be pure speculation regarding a possible risk which risk was present since the inception of the MISA.

- 25.4. Catfin's allegation that the CAT equipment is not on property belonging to Khongo is similarly unconvincing. Catfin calls upon Khongo to prove ownership of the property where the CAT equipment is. From this it is evident that Catfin speculates regarding the ownership and, maybe more significantly, Catfin knows exactly where the equipment is. The allegation that the CAT equipment is used on sites that are remote also does not tip the scales in Catfin's favour.
- 25.5. In regard to illegal mining operations, Catfin says that one of its "*main concerns are that the CAT equipment is being used near illegal mining sites in the Phalaborwa area*", yet, so Catfin says, it "*cannot say with 100% accuracy that the CAT equipment is operating on an illegal mining site.*" Again, these allegations appear to be lacking support. It seems to me that with the proper use of the UMS of each vehicle, Catfin should be able to pinpoint with near 100% accuracy where the Cat equipment is. In any event, should the CAT equipment be confiscated Catfin would be able to claim repossession thereof premised on its reservation of ownership.
- 25.6. The allegation that Catfin is unaware who operates the CAT equipment as these may be used by persons other than employees of Khongo is speculative at best. This is evident from the fact that Catfin, instead of making its own case, again calls on Khongo to prove the contrary.
- 25.7. The fact that the CAT equipment is Catfin's only security for Khongo's indebtedness is no reason on its own to seek the relief without affording Khongo a voice.
26. I am not convinced that any of the reasons advanced by Catfin is sufficient to constitute exceptional circumstances to deviate from the *audi alteram partem* principle.

27. Can it then be said that notice of the application to Khongo would defeat the purpose of the relief sought and cause irreparable harm to Catfin?¹⁸ I doubt this would be the case in the present matter particularly considering the engagements between the parties since December 2023 until the end of January 2025. During this time Catfin was seemingly content with the state of affairs and there is no indication of it anticipating imminent harm.
28. But there is a more fundamental twist in the present matter. Catfin notified Khongo in correspondence before bringing the application that it would bring an urgent application for, what appears to be, similar relief than what it sought in the *ex parte* application. Despite notifying Khongo of its intention to bring the application, Catfin elected not to give Khongo notice of the application itself which it then set down for hearing almost two weeks thereafter. The fact that Catfin elected to notify Khongo that it would bring an urgent application militates against its contention that notice of the application would have defeated the purpose of the order. This is not the conduct of someone who genuinely fears that a possessor of goods would dissipate, destroy, move or hide property upon notice of an application.
29. Mr Motau argued that once an applicant has given notice in correspondence that it intends seeking relief on an urgent basis, it will not have the luxury to change its ways and not tell the respondent when and where the urgent application will be moved or what the basis is upon which it will seek the order. Catfin, so the argument goes, waived its entitlement to rely on the principle that giving notice of the application (i.e. properly serving the application) would defeat the application. Considering the circumstances of the matter and particularly Khongo's dispute of the purported cancellation of the MISA and its expressed intention to oppose any urgent application to be brought by Catfin, I agree with Mr Motau's submissions.
30. Turning to the merits of the matter, it appears from the papers that there are disputes regarding the nature and amount of any outstanding amount under the MISA, any breach by Khongo and the cancellation of the MISA. These disputes certainly justify a full ventilation of all the relevant facts.

¹⁸ *Le Grellier* at para 7.

31. Having found that there are not sufficient exceptional circumstances to justify a deviation from the *audi alteram parte* principle and that notice of the application would not have defeated the purpose of the order, it is not required of me, nor do I think appropriate in the circumstances, to make any findings in respect of the merits of the matter. Suffice it to say that a breach of contract *per se* is not justification enough for an application to be brought on an *ex parte* basis. A breach will not necessarily (or very rarely) constitute exceptional circumstances. If that was the case, remedies in respect of the breach of any contract could be sought *ex parte* – which is not the purpose of this very rare exception to the *audi alteram partem* rule.

D. Urgency

32. In *Sheriff Pretoria North-East v Flink*¹⁹ it was held regarding the urgency of reconsideration applications in terms of rule 6(12)(c) that:

“Nothing in rule 6(12)(c) suggests that such a respondent would be entitled to enrol the matter for reconsideration again on an urgent basis merely because the order had been obtained on an urgent basis. A proper case will have to be made out independently for the urgency of reconsideration of the order.”

33. Catfin contends that the reconsideration application is not sufficiently urgent to have been enrolled. For this Catfin essentially relies on the history of default on payment of instalments, alleging that Khongo was incapable of making payment, and the absence of irreparable harm. What appears from the history as described by Khongo, as it was not initially disclosed by Catfin, and the evidence presented is that Khongo took steps to make payment of the amounts alleged to be outstanding even though they were disputed. There is no evidence whatsoever that Khongo was incapable of making payment to Catfin. It is also evident that Khongo engaged with Catfin. This is not the conduct of a recalcitrant debtor. As for the lack of irreparable harm, Catfin criticises Khongo’s

¹⁹ *Sheriff Pretoria North-East v Flink and another* [2005] 3 All SA 492 (t) at 497. See also *Joint Venture Comprising Gorogang Plant Razz Civils and others v Infiniti Insurance Limited and another* 2024 JDR 4449 (GJ) at para 71 where it was held “An application for reconsideration is not urgent for the purposes of Rule 6(12) simply because an order was granted in the Urgent Court. This means, that in the absence of demonstrable prejudice in the time between when an application may be heard before an Urgent Court and in the ordinary course, a party seeking a reconsideration must set out the prejudice that will ensue. ... The threshold is the same whether in an application for reconsideration or when approaching the Court under Rule 6(12)(a). In both instances, the parties seeking relief must set out in clear terms facts duly supported that will pass the threshold of “absence of substantive relief” if the matter is not heard before the Urgent Court.”

reliance on the damaging effect of the repossession on its business and argued that any claim for damages can be remedied in due course. Apart from the fact that Khongo has indemnified Catfin in terms of the MISA and that such a damages claim may be impossible or at least limited, following this logic, Catfin's *ex parte* application should have suffered the same fate. It is however not necessary for me to determine whether the *ex parte* application was sufficiently urgent.

34. It seems to me that Khongo relies on more than the possible pecuniary damages it stands to suffer as a result of the repossession. It presented evidence in confirmation of the adverse effect the repossession of the CAT equipment has and will continue to have on Khongo's business and, by extension, to the number of individuals employed by Khongo whose livelihood depends on Khongo's business and Khongo's successful completion of pending contracts with clients. Catfin dismisses the evidence on the basis that it is self-authored but does not say who in its view should have authored the schedule relied upon by Khongo. Considering that it pertains to facts within Khongo's knowledge, I cannot find any reason why Khongo cannot rely thereon. Apart from this, Catfin can apparently not contest the veracity of the information.²⁰
35. It appears to me self-evident that without the CAT equipment, Khongo is not able to complete the contracts with its clients. In the absence of any rebuttal of the evidence advanced by Khongo, its version must prevail in the present circumstances. This constitutes evidence which the court who heard Catfin's initial application would have considered had that application not been brought *ex parte*. Having found that the bringing of the application *ex parte* was not justified, I see no reason why I should ignore those circumstances at this stage.

E. Costs

36. The normal principle is that costs follow the result and there is no reason to deviate from this principle. Khongo, having been successful, must be awarded the costs.

²⁰ On the application of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–G Khongo's version prevails in such circumstances.

F. The order

37. Accordingly, the following order was granted on 28 March 2025:

1. The non-compliance by the respondent (Khongo Investments (Pty) Ltd) with the Uniform Rules of Court relating to forms, service and time periods is condoned.
2. The *ex parte* order granted on 11 February 2025 is set aside in its entirety.
3. The applicant (Caterpillar Financial Services South Africa (Pty) Ltd) shall bear the costs of the respondent's reconsideration application, including the costs consequent upon the employment of two counsel, on scale C.



JF PRETORIUS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING: 27 March 2025

DATE OF ORDER: 28 March 2025

REASONS REQUESTED: 1 April 2025

DATE OF JUDGMENT: 30 June 2025

COUNSEL FOR THE APPLICANT: Adv K Meyer

INSTRUCTED BY: Senekal Simmonds Inc.

COUNSEL FOR THE RESPONDENT: Adv T Motau SC

Adv D Sive

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