IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO.: 2427/2020

REPORTABLE

In the matter between:

G[...] D[...]	Applicant
and	
G[...] J[...] D[...]	1st Respondent
JOHAN DU TOIT N.O.	2nd Respondent
PETER COWEN	3rd Respondent
PCOWEN HOLDINGS (PTY) LTD	4th Respondent
DISRUPTIVE VISION (PTY) LTD	5th Respondent
INVESTEC BANK LIMITED	6th Respondent

ALL OTHER CREDITORS OF DISRUPTIVE VISION (PTY) LTD	7th Respondent
1TEC INVESTMENTS (PTY) LTD	8th Respondent
CIPC	9th Respondent
KATHEA ENERGY (PTY) LTD	10th Respondent

IN RE

G[...] D[...] (previously D[...])	Plaintiff

And

G[...] J[...] D[...]	1st Defendant
G[...] J[...] D[...] N.O.	2nd Defendant
G[...] D[...] N.O.	3rd Defendant
NICHOLAS GORDON ALP N.O.	4th Defendant
PAUL WARWICK SPENCER N.O.	5th Defendant
MOORE STEPHENS WK TRUST AND ESTATE PLANNING (PTY) LTD N.O.	6th Defendant

Herein represented by **JOHANNES MARTHINUS**

WILHELM VIVIERS

THE MASTER OF THE HIGH COURT

PRETORIA, GAUTENG 7th Defendant

JUDGMENT

GQAMANA J

[1] This application is brought in terms of Rule 6(12)(c) of the Uniform Rules of Court for the reconsideration of the order granted by this Court[1] on 24 June 2025. It is brought by the employees of the fifth respondent and certain creditors of the seventh respondent.[2]

[2] As a brief background, the applicant and the first respondent are involved in an acrimonious divorce proceeding which are still pending before this Court. Amongst the hotly contented issues in that action is the maintenance of the applicant and the minor children as well as the proprietary consequences of their marriage. The applicant contends that in or during 2021, she came across a document authored by the first respondent entitled 'plan of attack' which explained a strategy by the latter to ensure that she would not be the children's primary carer and that she would be rendered financially destitute. The applicant believes that the first respondent has consistently executed such 'plan of attack' in the divorce proceedings. In the divorce proceedings the applicant has obtained two orders in terms of Rule 43 for interim maintenance for her and the minor children and for payment of other welfare expenses, *inter alia*, school fees, accommodation and their medical expenses. Despite the existence of the Rule 43 orders, the first respondent has consistently failed to comply with them and

[1] per Makaula J.

[2] Their names and full details are as listed in annexures A1 and A2 attached to the Notice in terms of Rule 6(12) (c).

consequently he was found guilty of contempt of court on 27 March 2025.[3] The first respondent was ordered to comply with the Rule 43 orders or to face a penal sanction.

[3] The applicant contends that the first respondent in an attempt to circumvent the contempt order, he resolved on 16 April 2025 to place the fifth respondent in business rescue and has also applied to voluntary surrender his estate. Although she was aware during April 2025 that the fifth respondent is in business rescue but, she only received the business rescue plan on 13 June 2025. Simultaneously she became aware of the contemplated meeting of creditors in terms of s 151 and 152 of the Companies Act which was scheduled for 24 June 2025. On the basis of that information, she brought the urgent application seeking an order *inter alia*, the suspension of the business rescue process, the postponement of the section 151 creditors meeting, the suspension of the implementation of the business rescue plan pending the final determination of her anticipated review application. Only two of the fifth respondent's creditors were served with that application before the hearing, although the notice refers to the seventh respondent as being "All other creditors of Disruptive Vision Pty Ltd." The Uniform Rules of Court make provision for an urgent reconsideration of the order granted on 24 June 2025.

[4] It is common cause that the opposing affected persons were not served and joined in the application before it was heard. But before I engage with the legal principles dealing with reconsideration and the submissions by both Counsel, it is necessary to briefly mention the nature of the fifth respondent's business operation.

[5] The fifth respondent has been in operation since 2016 as an importer and distributor of solar energy infrastructure and components. Its business structure has two divisions, the residential and commercial divisions. The residential side of the business distributes the products suitable for use in houses and the commercial side focuses on suitable solar energy generation and backup power solution for commercial and

[3] per Ellis AJ's judgment.

industrial infrastructure with high electricity demand. However, in 2023 and 2024 the fifth respondent experienced significant trading losses and as a result it was placed in business rescue in April 2025. The second respondent was appointed as its business rescue practitioner ('BRP') on 23 April 2025.

[6] The business rescue plan which was voted on contemplates that the commercial division of the fifth respondent would be sold to the tenth respondent, while the residential division will remain with the company and will be wound down over a period of six months. Further the plan makes provisions to retain the employment of the affected employees and to have their employment contracts transferred over to the tenth respondent. Additional thereto, all the creditors of the fifth respondent would receive payments of their claims in full.[4]

[7] Furthermore the plan provides for post-commencement finance from Investec Bank in terms of which the latter has agreed with the BRP to continue to provide finance for the fifth respondent's operation until the plan is finally implemented. However, that funding would cease on 31 July 2025.[5]

[8] It is the affected person's case that, the fifth respondent has funds available to it until the end of July 2025, because in terms of the amendments to the plan, Investec has agreed to release the proceeds of its security until 31 July 2025 and that there would be no further extension. It is their contention that because the plan has been adopted and it cannot be amended further. That contention is under oath and is further confirmed by the BRP in his confirmatory affidavit filed herein.

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[4] The plan was adopted at the section 151 Creditors meeting held on 30 June 2025.

[5] Clause 6.6.1 in its amended form reads: In order to ensure a successful rescue of the Company, an agreement has been reached between Investec and the BRP, whereby Investec has consented to the use of the proceeds from debtors, which has been ceded to Investec, and the sale of assets, which are subject to Investec's perfected general notarial bonds, to fund the continuation of the Company's operations until 31 July 2025. This has been treated as a release of proceeds and assets from Investec's security and not PCF.

[9] The applicant, however submitted that, there is no evidence to support the affected persons' case that Investec will cease its funding to the fifth respondent post 31 July 2025. The applicant contended that, there is every indication that Investec will continue and be willing to extend the funding. Further, her contention is that, in terms of s 133(1) of the Companies Act, Investec is precluded from proceeding with any legal steps without the consent of the court. Therefore, no liquidation proceedings can be initiated against the fifth respondent until the termination of the business rescue proceedings. In addition, her contention is that, in terms of sections 136(1)(a), 136(2A), 144 of the Companies Act and section 189A of the Labour Relations Act, the employees' contract of employment is protected during the business rescue process and they would continue to receive their remuneration.

[10] The affected persons have approached this court and have raised five grounds upon which they rely on for the reconsideration of the Order. Mr Smallberger SC (together with Mr Gibson) submitted that the non-joinder of the affected parties is fatal and dispositive of the matter if upheld.

[11] As a point of departure, Rule 6(12)(c) provides:

> '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.'

[12] When hearing the reconsideration application, the onus remains on the applicant to establish the ground for the relief sought and granted in the order sought to be reconsidered.[6]

[13] Factors to be considered by a court in a reconsideration application of this nature includes *inter alia*:

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[6] Afrigrain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation) and Others 2024 (1) SA 373 (SCA) at para [59]–[61].

"(a) the reasons for the parties' absence;

(b) the nature of the order granted;

(c) the period during which the order remained operative;

(d) whether there will be an imbalance, oppression or injustice due to the grant of the order and if so the nature and the extent thereof;

(e) whether alternative remedies are available; and

(f) the inconvenience of the parties."[7]

[14] It was not my impression that the applicant takes issue with the principle of *audi alteram partem* which is sacrosanct in our legal system. However, the submission advanced on her behalf is that, it was not necessary to join the employees because their legal rights are legislatively protected and they would be joined in the main review application. In respect of the creditors, it was submitted that the two undisputed creditors were served with application, and the others were also notified of the application.

[15] The applicant must have been alive to the need to join all the creditors because the seventh respondent is cited as such. However, the affected creditors in this reconsideration application were not served and specifically joined. They have a direct legal interest in the matter. As pointed above, in terms of the business rescue plan they will receive full payment of their claims. But in the event of liquidation, payment of their claims will be significantly reduced. They stand to suffer severe prejudice. Mr Smith in argument downplayed the value of the creditors' claims. But the evidence shows that they have a substantial claim against the fifth respondent to the value of approximately R33 695 234 million.

[16] Same material defect, the employees were not cited at all and there was simply no valid explanation for that. The applicant was acutely aware of the fifth respondent's

[7] ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others 1996 (4) SA 484 (W).

address being the employees' workplace. The Order was granted in their absence. That deprived them of the right to provide the court with information about the effect that the Order would have on them, if granted and consequently they were deprived the right to be heard. The right to be heard has two-fold effects. The Supreme Court of Appeal said the following about it:

> " It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."[8]

[17 The employees and the creditors have a direct and substantial interest in the matter. The right to participate in the plan and the consequences of its approval is a legal interest vested on the affected persons. The relief sought and granted had a direct impact on their rights and such they ought to have been joined and served with the application.[9]

[18] The submission by Mr Smith that the creditors meeting and the adoption of the plan was not interdicted and as such the affected persons proceeded with the meeting and adopted the plan and accordingly the Order would not affect their rights is misplaced. Although the plan has been adopted but its implementation has been suspended. The effect of such suspension will also negatively affect them.

[19] Ms Bizos in her affidavit has been at pains in explaining the effect the Order would have on them as the employees. All the affected persons confirmed those averments. If the plan is not implemented the employees will lose their jobs and will suffer irreparable harm. Unemployment has serious effect on the employees' financial obligations, their welfare and those of their families. Same with the creditors, if the plan is not implemented they will not receive full payment of their claims.

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[8] Psychological Society of South Africa v Qwelane and Others 2017 (8) BCLR 1039 (CC) at para 34.

[9] Independent Development Corporatin of South Africa Ltd v Van den Steen N.O. and others (9935/18) [2018] ZAGPJHC 70 (6April 2018).

[20] Evidence is there that Investec's funding will cease on 31July 2025, and from thereon the funds will dry up. That inevitability would result in the liquidation of the fifth respondents. The mployees would then lose their employment and the creditors would not receive full payment of their claims. The moratorium against legal proceedings is only there for the duration of the business rescue process. It is not difficult to understand that if the funds dry up, the BRP will have to apply for the liquidation of the fifth respondent.

[21] To the contrary the applicant has no interest whatsoever to the business rescue process. She is not the shareholder of the fifth respondent. She is not an employee of that company either. No maintenance order was granted by the court against the fifth respondent. Her constitutional rights and claims and as well as those of her minor children are against first respondent. Her fixation that placing of the fifth respondent in business rescue is the stratagem by the first respondent as set out in the "plan of attack" document is unfounded. During argument Mr Smith even submitted that the BRP, the affected persons' attorneys, the third respondent, Mr Peter Cowen, and his entities, the fourth and tenth respondents and Investec are all part and parcel of the scheme in collusion with the first respondent to implement his "plan of attack.'' That submission is not born out of the evidence before me.

[22] In my view, the order granted on 24 June 2025, it materially and negatively affects the employees and the creditors' legal rights and legal interest and as such they ought to have been joined. They had that right to be joined to the application.

[23] In Mazzeti Management Services v Amabhungane Centre for Investigative Journalism NPC and Others,[10] it was held that:

[10] 2023 (6) SA 578 (G) at para 14.

> "Rule 6(12) (c) confess a wide discretion on the court hearing the reconsideration application. [It]exists to remedy an injustice if one was done when the [Order] was granted. What it creates is the opportunity for the respondent to rebut the case for the Order. To that end a Respondent may either argue that the Order was unjustified on its own terms or provide additional facts on affidavit to support an argument that, on an enlarged factual matrix, the Order should set aside. … The scheme of the Rule takes as its point of departure that the applicant has got its Order and the reconsideration is about whether it can keep its Order."

[24] Consequently, on the facts and evidence herein, the non-joinder of the affected persons was fatal. The employees and the creditors ought to have been joined and served with the application before it was heard. The Order that was granted in the absence impacts on them negatively and materially. The employees stand to lose their jobs if it is not set aside. Similarly, with the creditors their claims will be significantly reduced if the fifth respondent were to be liquidated and the order is not set aside. In light of my findings in this regard, it is necessary to consider the other points raised by the affected persons in this reconsideration application.

[25] With regards to urgency, the applicant was aware as early as in April 2025, that the fifth respondent is in business rescue. She instituted no legal proceedings to interdict the business rescue process. She waited for a period in excess of two months before rushing to Court on 21 June 2025 on truncated time periods without citing all the relevant parties. Her application was instituted on the eve of the section 151 meeting. The applicant has proffered no explanation for such dilatory attitude. Therefore, her application which was heard on 24 June 2025 was not urgent.

[26] However, as far as the reconsideration application, the evidence is that the Investec funding is available only up to 31 July 2025. If the plan is not implemented and the Order remains in effect, liquidation is inevitable. The interdict order is the death knell to the fifth respondent's business rescue. Further business rescue proceedings are by

their very nature urgent [11]. The liquidation of the fifth respondent will be inevitable if the Order is not set aside.

[27] In the circumstances the following order is issued :

1. The non-compliance by the seventh respondent with the Uniform Rules of Court relating to forms, service and time periods is condoned and the application is dealt with as the matter of urgency in terms of Rule 6(12) as read with Rule 6(12) (c).

2. The Order granted by Makaula J under the above case number on 24 June 2025 is reconsidered and set aside.

3. The application brought by the applicant (G[...] D[...]) on 20 June 2025 under the above case number is dismissed with costs on a party and party scale C.

4. The costs of this reconsideration application including the costs of two counsel are to be paid by the applicant (G[...] D[...]) on a party and party scale C.

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JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	*Adv D A Smith*
Instructed by	:	C/O Heuer & Associates Attorneys

[11] Koen v Wedgewood Village Golf and Country Estate Pty Ltd and others 2012 (2) SA 378 (WCC) at para [10] and Maengo Airlines SOC Limited and others v Minister of Public Enterprises and Others 2024 JDR 0120 (GP)at para [24].

		Gqeberha
Counsel for Respondent(s)	:	*Adv A Smalberger SC and Adv C Gibson*
Instructed by	:	Werksmans Attorneys C/O Van Heerdens Attorneys Inc. Gqeberha
Heard on	:	22 July 2025
Judgment delivered on	:	29 July 2025