



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

CASE NO: 2025-115482

- (1) REPORTABLE: **NO.**
(2) OF INTEREST TO OTHER JUDGES: **NO.**
(3) JUDGMENT : **3 AUGUST 2025**

Frank Snyckers
.....

In the matter between –

HLABANG TRADING ENTERPRISE (PTY) LTD

Applicant

And

CATERPILLAR FINANCIAL SERVICES (PTY) LTD

First Respondent

MRS MIRINDA GALANT SHERIFF MTUBATUBA

Second Respondent

MR GRADUATE NDLOVU SHERIFF LOWER UMFOLOZI

Third Respondent

In re the *ex parte* application between –

CATERPILLAR FINANCIAL SERVICES (PTY) LTD

Applicant

and

HLABANG TRADING ENTERPRISE (PTY) LTD

Respondent

*

SNYCKERS AJ

JUDGMENT

INTRODUCTION

1. This application came before me in the urgent court week of 28 July 2025. It was argued and heard on 30 July 2025. Argument consumed the best part of the day on 30 July 2025. I reserved judgment at the end of argument.
2. The application concerns the reconsideration, under Rule 6(12)(c), of an order granted *ex parte* in favour of Caterpillar Financial Services (Pty) Ltd (“Catfin”), by Raubenheimer AJ, on 10 June 2025.
3. The order was against Hlabang Trading Enterprise (Pty) Ltd. It concerned repossession of yellow plant (3 heavy industrial yellow plant vehicles) owned and financed by Catfin and delivered to and used by Hlabang under an instalment sale agreement (the MISA), on the strength of cancellation for default in terms of the MISA.

4. Instead of enrolling the reconsideration by way of delivery of an answering affidavit to the initial *ex parte* application,¹ Hlabang launched a fresh and independent urgent application, this application. It was an application on notice of motion with founding affidavit, which replied, by way of a replying affidavit, to the papers that Catfin filed in response to the Hlabang founding affidavit. It sought, not only the reconsideration of the order granted *ex parte* and its setting aside, but substantive relief in the form essentially of return of the repossessed machines. Catfin objected to this methodology. It conferred a procedural advantage on Hlabang, allowing it a “reply” to Catfin’s reply in the reconsideration application, when the substantive relief sought would in any event flow naturally from success in setting aside the *ex parte* order. As a result, the position adopted in the papers and heads of argument for Catfin was that the contents of the Hlabang “reply” should not be taken into account, especially as it overwhelmingly dealt with the reconsideration issues only, as the proverbial “second bite”.
5. There is much to be said for Catfin’s objection. A consideration of the nature of Hlabang’s application, however, suggests it not to be as contrived as suggested. Hlabang contends that the *ex parte* order ought not to have been granted, mainly because of material non-disclosures and an inadequate case having been made out for failing to proceed on notice to Hlabang. It also contends that Catfin acted unlawfully in the manner in which it “executed” the repossession on the strength of the *ex parte* order. It raises various bases upon which it alleges that the conduct of “execution” was unlawful, particularly that

¹ See *Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulkors A/S (in liquidation)* 2024 (1) SA 373 (SCA) paras 13 and 14.

no warrant had been obtained, and that the nature of the process was not adequately explained to individuals in possession of the machines in a language they could understand. This meant that, according to Hlabang, it had an independent cause of action for return of the machines, quite apart from the question whether the *ex parte* order fell to be set aside. In argument before me it was clarified and confirmed with Mr *Ngcukaitobi*, who appeared with Ms *Naidoo* for Hlabang, that what this independent cause of action in essence amounted to was a *mandament van spolie*, in that it sought restoration of possession unlawfully disturbed by the “execution”. This meant that the application before me was really two proceedings rolled up in one – the reconsideration proceedings, and a spoliation application, and the rolled up single urgent application was the most appropriate method of proceeding.

6. I think this way of treating the application(s) makes sense. It ultimately did not matter before me, as Mr *Kairinos*, who appeared with Mr *Van der Merwe* for Catfin, was content to argue the applications thus, and for me to consider all the affidavits filed, including further supplementary affidavits filed both by Hlabang and by Catfin. This I did.
7. Catfin contended that the case on unlawful execution rested on a basic fallacious premise, that what was at issue was “execution” or “attachment”, instead of simply repossession by an owner as a contractual right, as authorised by a court order.
8. I am inclined to agree with Catfin on this. It is, however, given the conclusion that I reach, unnecessary for me to determine the spoliation application.

9. This kind of reconsideration application must make out its own case for urgency – independent of the urgency that may have attached to the initial application. The parties were *ad idem* that this was the law.
10. I am satisfied that a sufficient case for urgency is made out and that notice in the circumstances was reasonable, or at least not so unreasonable as to deprive Hlabang of its entitlement to have its application heard in urgent court. Catfin should be commended for the work it produced in answering the papers, and Hlabang in turn for the work it produced in reply. In this I refer to quality, not bulk. Both sets of counsel supplied me with extensive heads of argument. These were welcome in assisting me to refresh and supplement my notes in preparing this judgment after a very crowded urgent court week. They were also, as were the submissions before me, helpful, to the point and of a high standard. I am grateful for this.

RECONSIDERATION, MERITS AND DISCRETION

11. A good starting point is the following from Wilson J in *Le Grellier & Another v Kamionski*:²

“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.”

² 2023 JDR 4369 (GJ) para 6.

12. The Supreme Court of Appeal explained the two dimensions in such reconsiderations as follows in *The Fonarun Naree*:³

“If an affidavit is filed in support of the application for reconsideration, then the party that obtained the order is entitled to deliver a reply thereto, subject to the usual limitations applicable to replying affidavits. When that is done, and the party seeking reconsideration does not argue a preliminary point at the outset that the founding affidavit did not make out a case for relief, the case must be argued on all the factual material before the judge dealing with the reconsideration proceedings. That material may be significantly more extensive and the nature of the issues may have changed as a result of the execution of the original ex parte order.”

13. So there are two stages to the enquiry – a potential “preliminary point” at the outset that the founding affidavit did not make out a case for relief, and a resolution of the application on the merits (applying the rules of assessment of versions in motion proceedings), now with the benefit of the papers filed by the respondent (the party seeking reconsideration – Hlabang in the instant case).

14. The initial inquiry can further be divided into two distinct potential attacks on the order -

14.1. The respondent (party seeking reconsideration) may contend that the applicant had failed to disclose material facts that may have made a difference to the assessment by the *ex parte* judge, and had breached the duty of utmost good faith burdening an *ex parte* applicant; or

³ *The Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees Copanship Bulklers A/S (in liquidation) & Others* 2024 (1) SA 373 (SCA) para 14.

14.2. The respondent may contend that the applicant had not made out a sufficient case on the papers in the *ex parte* application to have warranted dispensing with notice to the respondent – that the affidavit in support of the *ex parte* application did not contain “*evidence to support a conclusion that the giving of notice to the defendant and permitting him to defend the application would defeat the purpose of the application.*”⁴

15. Hlabang relies on both these bases to contend that Catfin had abused the *ex parte* procedure in the present case.

16. The main question debated before me, and my main concern in determining this application, was the extent to which a very strong (if not overwhelming) case on the merits in favour of Catfin could overcome defects in relation to its employment of the *ex parte* process in obtaining its initial order.

17. The jurisprudence contains two strands. There is a strand that strongly suggests that, once the respondent (party seeking reconsideration) persuades the court either that the *ex parte* application contained material non-disclosures that would, or at least reasonably could, have led the judge to have declined to grant the relief if disclosed, or that the allegations in the founding papers in the *ex parte* application seeking to justify why no notice was given to the respondent were inadequate, then the reconsidering court should set aside the

⁴ Turner AJ (Adams J concurring) in *Glo-See Chemicals CC v Hulley* [2023] ZAGPJHC 621 (GJ) (5 June 2023) para 29, having cited and endorsed the test as set out in the commentary by Erasmus et al *Superior Court Practice*.

ex parte order without considering the merits at all.⁵ There is also a strand that suggests that an overall discretion remains whether to set aside the *ex parte* order and that retaining the order in place may be appropriate in certain cases even if *ex parte* relief ought not to have been granted.⁶

18. Sutherland DJP in *Mazetti*⁷ expressed the question in tentative (or guarded) terms as follows:

*“I have yet to deal with the substantive merits, if any, of the application and, **strictly speaking**, in the light of the conclusions to which I have already come, **it could be argued** it is unnecessary because, were the substantive relief sought, either in whole or in part, to have been meritorious, the proper route to obtaining such relief would, in any event, have been proceedings launched upon proper notice”* (my emphasis).

19. The reason this question assumes such prominence in the instant case is because, on my assessment, Hlabang has a strong case for setting aside the *ex parte* order on the basis of the absence of allegations sufficient to have justified dispensing with notice, and to a lesser degree material non-disclosure, whereas Catfin may have a strong case for saying the merits are overwhelmingly in favour of the relief it obtained *ex parte*.

20. The closest one comes to guidance on the exercise of a discretion despite a finding that relief ought not to have been sought or granted *ex parte* is the

⁵ See, for example, in particular *Emerald Capital (Pty) Ltd v Ace Auto Salvage CC* 2023 JDR 3282 (GJ) Senyatsi J, para 17; *Mokweni v Plaatjies* [2023] ZAWCC 266, para 51; *Caterpillar Financial Services (Pty) Ltd v Khongo Investments (Pty) Ltd* [2025] ZAGPJHC 692 (30 June 2025) paras 22 and 23.

⁶ *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348-9; *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 (5) SA 306 (W), paras 31 to 32, citing *Jewel Net CC v Arthur J Kaplan (Pty) Ltd* 2002 BIP 194 (W) para 67.

⁷ *Mazetti Management Services (Pty) Ltd & Another v Amabhungane Centre for Investigative Journalism NPC & Others* 2023 (6) SA 578 (GJ) para 17.

adumbration of factors set out in the *Arthur Kaplan* case as endorsed in the *Insamcor* case:⁸

- (a) *The extent to which the rule has been breached;*
- (b) *The reasons for non-disclosure;*
- (c) *The extent to which the court may have been influenced by proper disclosure in the application;*
- (d) *The consequences from the point of doing justice between the parties of denying relief in the application for the order;*
- (e) *The interests of innocent third parties.*

21. Mr *Kairinos* stressed factor (d) above before me.

22. The problem in the present case with this is that what was pressed before me in relation to factor (d) was nothing more than the strength of Catfin's case for repossession on the basis of the absence of a credible defence against cancellation and repossession under the MISA.

23. I notice in the cases I refer to above (in the second strand) a pre-occupation with material non-disclosures (as the basis for supporting the setting aside of the *ex parte* order) against other factors that would favour keeping the order in place despite material non-disclosures. *Schlesinger* for example talks of "very cogent practical reasons" in the formulation that has become seminal on this issue:

⁸ See footnote 6.

*“It appears to me that unless 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.”*⁹

24. I am not sure what “*very cogent practical reasons*” would be. They can hardly, in my view, be the mere inevitability of relief being granted to the party that had obtained the order *ex parte* should it go to the trouble of seeking the order on notice (i.e. nothing more than a strong case). If that were so, then little would be left of the independence of the first dimension, as the creditor would often be able to persuade the reconsideration court that the debtor has no credible defence and proceeding on notice would really simply be a waste of everybody’s time and resources. It seems to me what was contemplated in *Schlesinger* were practical considerations such as that restoration of the *status quo ante* would be impossible, or that it may wreak disproportionate harm on the creditor (I can think of a case where the creditor had a very strong case for approaching the court without notice to the debtor, based on well-established fears of dissipation or destruction, yet was guilty of material non-disclosures in seeking *ex parte* relief. It may be that in some cases the severity of the non-disclosure would be outweighed by the consequences of restoration of the *status quo ante*. This would really simply be paying heed to factor (d) listed in

⁹ *Schlessinger* see footnote 6 at 350B-C.

Arthur Kaplan. But that is a far cry from saying “where’s the defence? What’s the point of insisting on notice anyway? We will inevitably get our relief”.)

25. Less is said in these cases (in both strands referred to above) about the need to upset the *ex parte* order despite any other considerations when the reason for doing so is not material non-disclosure, but the failure to have made out a case for why no notice was given to the respondent – i.e. why it was appropriate to seek *ex parte* relief. *Khongo*,¹⁰ a case with obvious relevance to the instant case, and one heavily relied upon by Hlabang, is a clear example of regarding the first strand thinking to be applicable even if the basis for setting aside the *ex parte* order is not so much material non-disclosure as a failure to have made out the kind of case for failing to give notice as referred to in *GloSee*.¹¹

26. The reason I draw this distinction is because, on my assessment, the case for material non-disclosure is weaker than the case for the failure to have made out a proper case for failing to give notice. That latter case is very strong.

27. I believe that material non-disclosures weigh more heavily in the *Schlesinger / Arthur Kaplan / Insamcor* discretion than a failure to have made out a case for using the *ex parte* procedure. Part of the reason is that the judge hearing the *ex parte* application is in as good a position to assess the adequacy of the allegations as is the reconsideration judge, who is in a sense second-guessing the original assessment. But there is a critical difference, as appears from the passage quoted from *Le Grellier* above: the reconsideration judge has the

¹⁰ See footnote 5: *Khongo* paras 22 and 23.

¹¹ See footnote 4.

benefit of the respondent's submissions (not only the factual material put up in answer). This often makes all the difference, which is precisely why one affords someone *audi* rights.

28. I would think that, whatever scope there is for discretionary refusal to set aside the *ex parte* order despite coming to a conclusion that it ought not to have been sought or granted in the first place, this can never be based *only* on the merits of the creditor's case. I am not persuaded that the first strand referred to above means there is no discretion at all. I believe the factors set out in *Arthur Kaplan* do still operate and there is a discretion, and I have said how the case may differ depending on whether one is dealing with material non-disclosure or a failure to have made out a case for *ex parte* relief. There must, however, be something more to put on the creditor's side of the ledger than the merits of its case, something which is absent in this case. Mr *Kairinos* suggested one could apply the healing balm of a cost order to express censure, in the event that the debtor has no defence and where insisting on another round on notice would seem to be a waste of time and money. I think that would potentially set a dangerous precedent. I can see big finance houses buying their *ex parte* orders with cost awards. This court is not selling.

29. So, in the present case, if Hlabang succeeded in persuading me that the order should not have been sought and granted *ex parte*, that would, in my view, given the circumstances here, be sufficient to set aside the order, even if I agreed with Catfin that Hlabang had no defence on the merits. Since Hlabang did indeed succeed on this score, I do not consider the merits any further, as

this would, in light of my conclusion and order, be inappropriately anticipating what another court should assess.¹²

NON-DISCLOSURES AND A CASE FOR EX PARTE RELIEF

30. On 28 March 2025, this court (Pretorius J), having heard argument in a reconsideration application on 27 March 2025, handed down an order setting aside an *ex parte* order granted to Catfin on 11 February 2025, and ordering Catfin to pay costs including costs of two counsel on scale C. The debtor was an entity called Khongo. Catfin's attorneys were the attorneys of record in this matter.

31. Reasons were sought on 1 April 2025 and provided by way of the *Khongo* judgment¹³ on 30 June 2025.

32. The order was set aside mainly on two bases. The first was that Catfin had failed to set out the interactions between the parties leading up to its cancellation, including the payment history of Khongo. This was sufficiently material on the applicable tests. See in this regard the formulation by a unanimous Supreme Court of Appeal in *Recycling*:¹⁴

“The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also

¹² See the remarks of Senyatsi J in *Emerald Capital*, footnote 5 above, paras 17 and 18.

¹³ See footnote 5 above.

¹⁴ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) para 47.

exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the ex parte applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.”

33. The second basis for setting aside the order in *Khongo* was a finding that there had been failure of the test enunciated in *Glosee* relating to the need to employ the *ex parte* procedure.

34. In essence, the allegations relating to fears of spiriting away the machines, and removing their tracking devices, were boiler-plate general speculative assertions that were not tied to the particular respondent, *Khongo*, in any way.

35. This was held to have been entirely inadequate.¹⁵

36. There was, in this last regard, what the court termed “a more fundamental twist”.¹⁶

“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

¹⁵ *Khongo* paras 8, 25 and 26.

¹⁶ *Khongo* para 27.

genuinely fears that a possessor of goods would dissipate, destroy, move or hide property upon notice of an application,”

37. In the case before me, Mr *Ngcukaitobi* contended that the failure to set out the full history of interactions with Hlabang mirrored that in *Khongo*. Mr *Kairinos* pointed to a material difference: in *Khongo*, the debtor was contending, to the knowledge of Catfin, that it had in fact paid off the arrears before Catfin cancelled, and that the additional amount that Catfin had levied, and that Khongo had not paid, was not something Catfin was entitled to levy, meaning that Catfin was not in fact entitled to cancel. Although this contention appeared objectively to have lacked merit on a consideration of the MISA in *Khongo* (I do not pronounce on this), it was clearly something that fell well within the *Recycling* test as requiring disclosure, the absence of which would be material.

38. There was no such dispute in this case.¹⁷ There were occasions when Hlabang failed to pay, and then paid later. One of the three January debit orders was not honoured, later debit orders were honoured, but then in April two debit orders were again dishonoured. The January debt remained unpaid. All debit orders in May were dishonoured. The first serious demand letter was sent on 17 February 2025. Hlabang says it made certain payments to Barloworld, the entity to which it had paid the deposit and which is the supplier of the machines,¹⁸ after that. Be all that as it may, by the time of cancellation, 28 May 2025,

¹⁷ Since the filing of the Hlabang application, its case had become that cancellation was not competent in the circumstances. Some of the bases appeared for the first time in argument before me. But until the application was brought, Hlabang did not dispute Catfin’s right to cancel. Indeed, it requested a “reinstallation” of the MISA on 8 July, after cancellation, and after the *ex parte* order had been obtained.

¹⁸ Catfin says it is not Barloworld and Barloworld is not its agent for payment. It does not specifically say it was unaware of these payments.

Hlabang was *not* adopting the attitude that there was no right to cancel, or that it had in fact cleared the arrears. Nor that the acceleration clause had not been triggered, rendering the full amount of some R7,85m payable. Instead, it directed a letter to Catfin on 28 May 2025, the same day as the cancellation, some ten minutes after receipt of the cancellation email, to the following effect:

“Hi Johan.

Please note that the government of SA as my clients have been unable to make any payments to any suppliers in KZN due to their BAS system changes for the last three months. I have been making other arrangements to make payments for my machines as I am continuing using them on site and this month the 7th debit orders were returned. And on the 1st I will make such payments lagging behind.”

39. There were no further communications between the parties between this communication and the launch of the *ex parte* application on 5 June 2025. In the meantime, the 1st of June came and went, without any payment or further communication from Hlabang.

40. I do not believe any of the communications to which Mr *Ngcukaitobi* referred could be classed as “payment arrangements”. At best for Hlabang, there were previous occasions upon which it partially cleared previous defaults, and Catfin held back on cancellation despite an entitlement under the MISA to cancel and despite its February demand.

41. This case contained two instances of what Pretorius J in *Khongo* called the “more fundamental twist” – intimations or threats from Catfin that it would proceed to court to repossess the machines. The first was in a demand letter dated 17 February 2025 and the second was in the letter of cancellation of 28 May 2025. Both of these were attached to the founding papers in the *ex parte* order, although the affidavit did not specifically draw attention to these threats.
42. The *ex parte* order was granted on 10 June 2025. In a somewhat tragic twist, Hlabang made the payment that it had promised on 28 May, on 10 June – although I understand this did not include the unpaid January debt. By then, the dogs had been let slip, and had caught the fox. And of course the debt had now been accelerated to R7,85m.
43. Given the 28 May letter from Hlabang, I do not believe that the earlier history in relation to default and payment should reasonably have been felt by Catfin to have been relevant enough to a case Hlabang might seek to advance to require disclosure in the *ex parte* proceedings. This is, however, subject to one rather important *caveat*. As the post-balance sheet event on 10 June demonstrated, and as the previous history appeared to suggest, Hlabang was the kind of debtor that made efforts to regularise default, to keep the hounds off, so that it could continue with its business. The machines were its business. This might well have been thought relevant, by the *ex parte* judge, to the question whether Catfin genuinely feared Hlabang might run off with the machines, or strip them naked, the moment it was given any notice of court proceedings. This was the reasoning employed in *Khongo*, albeit in that case relating to disputed debts,¹⁹

¹⁹ “This is not the conduct of a recalcitrant debtor” – *Khongo* para 33.

which reasoning I must also employ unless I believe it to be clearly wrong, and I do not.

44. Furthermore, the reasoning relating to the “*more fundamental twist*” in *Khongo* is of a *fortiori* application in this case. I do not find such reasoning to be clearly wrong. In fact, with respect, it is persuasive.

45. What is most troubling is this. In *Khongo*, Catfin advanced fourteen short paragraphs adumbrating its fears that were said to justify dispensing with notice. These are quoted in paragraph 8 of the judgment, and dealt with in paragraph 25. These paragraphs were repeated *verbatim* in this *ex parte* application – the only change being that illegal mining was now feared in Mtubatuba, not Phalaborwa. These allegations were not in any way made peculiar to Hlabang, as they were not made peculiar to *Khongo*.

46. There were some additional allegations relating to Hlabang in this application. The 28 May letter called upon Hlabang to advise of the whereabouts of the machines so that they could be repossessed, and this was not addressed in the letter 10 minutes later promising payment. But the letter promising payment could not reasonably have been thought to be reconcilable with acquiescence in the repossession of the machines; it was obviously a plea from a debtor to be given an opportunity to pay, to enable it to continue the relationship and its business. There was no response to this at all from Catfin, least of all something to the effect of “quite apart from any promises to pay, where are the machines?”

47. In addition, the founding papers in the *ex parte* application alleged that the UMS (trackers) in the machines routinely ‘pinged’ their location once a day, and that

the last ‘pings’ were received on 1 June. Oddly, despite what this appeared to imply, the affidavit did *not* proceed to say the inference was drawn that the UMS had been removed or disabled, and that efforts to engage the UMS by Catfin after 1 June were unsuccessful. Hlabang furnished evidence in reply that the UMS were active at all times. Indeed, in Catfin’s heads of argument, the following disavowal is offered:

“It was not Catfin’s case that the UMS systems were removed or tampered with in the founding affidavit, but that there was a risk that same could eventuate.”

48. This was one of the assertions repeated *verbatim* from *Khongo*.

49. Catfin did not contend, in these proceedings, that it was unfair to say it simply repeated the general speculative allegations from *Khongo* wholesale and *verbatim* in this case. The *Khongo* judgment is not mentioned in Catfin’s heads of argument.

50. This is a rather disconcerting *modus operandi*. Mr *Ngcukaitobi* referred me to the censure such printing press affidavits attracted from a full court of this Division in a different context, in *Lembore*.²⁰

51. There is the added disconcerting feature, that these allegations were employed again in an *ex parte* application by Catfin, with the same attorneys of record, after the *ex parte* order had been handed down in *Khongo* and while reasons

²⁰ *Lembore & Others v Minister of Home Affairs & Others* 2024 (5) SA 251 (GJ), paras 92 and 93.

were awaited for the order. I did not have the papers in *Khongo*, but it appears from the judgment that the boilerplate and speculative nature of the allegations relating to Catfin's fears featured prominently in argument in the matter. One would have thought the prudent thing for Catfin to do was at least to see whether the court upheld these arguments before repeating the precise same speculative boilerplate allegations in another yellow plant *ex parte* repossession a few months later. Or, if this were to have been risked, to have drawn the attention of the court to the order in *Khongo* and the fact that reasons were still awaited. This may well have given the *ex parte* judge some cause for pause.

52. The Caselines file includes the papers and orders in the matter of *Catfin v Musor* 2025-023190. Suffice it to say that an examination of the founding papers in *Musor* reveals a striking similarity between the boilerplate, speculative and generalised assertions there, and those employed in *Khongo* and here with respect to Hlabang. There are some differences with respect to activity reflected by the UMS in *Musor* but also no suggestion that it was clear the UMS had been removed.

53. *Musor* yielded an *ex parte* order, granted by Mahomed J, on 25 February 2025. A reconsideration application was brought and struck from the roll "*for a lack of urgency*" on 28 March 2025, by Pretorius J (I am told this was the same Pretorius J who handed down the judgment in *Khongo* and who had given his order in reconsideration in *Khongo*, also on 28 March 2025).

54. This cannot begin to suggest that Pretorius J was satisfied with the *ex parte* order in *Musor*. All it suggests is that the learned judge entertained the

reconsideration in *Khongo* as urgent, but declined to do so in *Musor*. Mr *Kairinos* correctly did not seek to submit that I should draw any inferences of approval or endorsement of the *ex parte* order from the fact that the reconsideration application had been struck from the roll for want of urgency.

55. But what *Musor* does confirm is that the *ex parte* affidavits for repossession of yellow plant by Catfin on its MISAs look very, very similar, not only with respect to the boilerplate assertions relating to why notice is not being given.

56. I would strongly urge Catfin, and its attorneys, to approach future applications for repossession on a more circumspect basis, and to bring them on an *ex parte* basis only when there are facts, peculiar to the debtor in question, that truly warrant dispensing with notice to them. At the very least, if the practice is to threaten court proceedings, only then to go *ex parte*, there will always be a problem with the “*more fundamental twist*” in *Khongo* as an initial formidable obstacle.

57. I agree with the submission that a punitive cost order is warranted in the circumstances. I am not inclined to make it *de bonis propriis*. I am making it against Catfin. It can take it up with its attorneys.

58. I was asked to award costs against the attorneys *de bonis propriis* or alternatively against Catfin on an attorney-client basis, on scale C, including the costs of two counsel. I am mindful, however, of the admonition in *Maano*, that attorney-and-client awards and awards on scale C are mutually exclusive concepts:²¹

²¹ *Maano Chemicals (Pty) Ltd v Rand Water SOC Ltd* 2024 JDR 3663 (GJ) Goedhart J, para 61.

“The respondent, which has substantially succeeded in this matter, seeks costs ‘on an attorney and client scale on Scale C’. This approach conflates two distinct concepts. As a matter of law, Rule 67A does not apply to costs on the attorney and client scale; it applies only to ‘fees and disbursements as between party-and-party’.”

59.I accordingly make the following order:

59.1. The application is determined to be urgent.

59.2. The *ex parte* order granted by Raubenheimer AJ on 10 June 2025 under case number 2025-084594 is set aside.

59.3. The first respondent in this application, Caterpillar Financial Services (Pty) Ltd, is directed to pay the costs of the application, on an attorney-client basis, such costs to include the costs of two counsel.

HEARD 30 JULY 2025

JUDGMENT 3 AUGUST 2025

For Applicant (respondent in ex parte):

T Ngcukaitobi SC

J Naidoo

Instructed by :

Saney Mbatha & Associates, Sandton

For Respondent (applicant in ex parte):

G Kairinos SC**C van der Merwe**

(heads of argument prepared by C van der Merwe)

Instructed by:

Senekal Simmonds Inc

Bedfordview