



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 2025-075815

In the matter between:

ROBERTO GARDINI

Applicant

and

THE GARDINI COLLECTION (PTY) LTD

First respondent

JASON GARDINI

Second

respondent

REASONS DELIVERED ON 26 NOVEMBER 2025

VAN ZYL, AJ:

Introduction

"Good faith is a sine qua non in ex parte applications. If any material facts are not disclosed, whether they were wilfully suppressed or negligently omitted, the court may on that ground alone dismiss an ex parte application. The court will also not hold itself bound by any order obtained

*under the consequent misapprehension of the true position. ...*¹

1. This matter involved cars, good faith, and the anticipation of a rule *nisi* granted against the respondents on 29 May 2025 on an *ex parte* basis. In terms of the interim order, read with Rule 6(8), the respondents were entitled to anticipate the return day on not less than 24 hours' notice.
2. On 17 June 2025 I granted an order in the following terms:
 - 3.1 The rule *nisi* granted *ex parte* on 29 May 2025 at the applicant's behest is set aside.
 - 3.2 The applicant shall pay the respondents' costs on the scale as between attorney and client.
3. These are, briefly, the reasons for the grant of the order. I was in agreement with the submissions made by the respondents' counsel that the interim order had been granted because of various material non-disclosures by the applicant in the *ex parte* application. Had the Court known of the true facts at the time, it would probably not have granted the order.

The interim order

4. The first respondent was incorporated in 2024. Its business is the renting of vehicles to mainly foreign clients in Cape Town on a short-term basis. It accordingly purchased various vehicles for that purpose. The second respondent is the first respondent's sole director, and the applicant's son.
5. In the *ex parte* application the applicant motivated the need for an order

¹ Bertelsmann et al *Erasmus Superior Court Practice* (Juta, looseleaf) at B1-42.

on various bases. The applicant claimed true ownership of the vehicles registered in the first respondent's name, alleging that those vehicles had been purchased with funds he had provided; and that ownership remained with him until the respondents repaid the amounts owed. The applicant alleged that the respondents owe him USD 781,566.54, which included loans and investments made to support the first respondent's business and the second respondent's personal expenses.

6. The applicant contended that the respondents were dissipating the assets of the first respondent, including selling vehicles without his consent, which jeopardized his ability to recover the debt owed. Here therefore sought an urgent *ex parte* preservation order to prevent the respondents from further dissipating assets, arguing that the first respondent was insolvent and that the dissipation would leave it as an empty shell, making recovery impossible.
7. The interim order subsequently granted prohibited the first respondent company from "*disposing or concealing*" of any of its assets, including cash, its bank accounts, and eight motor vehicles which are listed in the order, namely an Aston Martin, a Range Rover, a Jeep, a Mini Coopeer, a Maserati, a Vespa scooter, a BMW 650i, and a BMW 320i.
8. The interim order was undoubtedly wide-ranging in effect, as it effectively prevented the first respondent from conducting any business.² While it was theoretically possible for the first respondent rent out its vehicles, it could not dispose of any funds from its bank account in order to manage the business. The vehicles constitute one of the respondents' bones of contention with the applicant: they say that the applicant knew that some of the vehicles listed in the interim order had already been sold and thus no longer belonged to the first respondent.

² Going to the balance of convenience.

9. The *ex parte* application was but part of a wider landscape of litigation between the parties. During early 2025 the first respondent launched an urgent application in which it sought an order that the applicant return a BMW 650i motor vehicle to it (“the BMW application”). That application was opposed, and the first respondent delivered a replying affidavit in April 2025 which was deposed to by the second respondent. As will be seen, the content of the replying affidavit was important in relation to the non-disclosures that the respondents complained of. The applicant did not indicate to the court in the *ex parte* application that there were allegations in the replying affidavit that could have had a material impact on the outcome of the *ex parte* application.
10. In relation to the BMW dispute, the first respondent also launched an *ex parte* application pursuant to which a bank account owned by the applicant was attached in April 2025 to confirm jurisdiction for a damages claim by the first respondent against the applicant (“the jurisdiction application”), as the applicant resides in Zimbabwe and is a *peregrinus*. The claim arose from the applicant’s alleged unlawful possession of the BMW. The jurisdiction application, which is opposed, will be determined on a return day enrolled during January 2026.
11. In the present *ex parte* application, the applicant did not disclose certain material disputes between the parties which arose from the jurisdiction application, and which could have had an impact on the outcome of the *ex parte* application.

The relevant legal principles

12. The principles underlying the anticipation of an interim order granted in

a party's absence are well-known:³

"A person against whom an order was granted in his absence in an urgent application. may simply by notice set the matter down for reconsideration of the order. The reconsideration of the matter can be performed on the basis of a set of circumstances quite different from that under which the original order was obtained. The jurisdictional facts establishing the discretion provided for are (i) the granting of an order in the absence of the party affected thereby (ii) by way of urgent proceedings as intended under rule 6(12). The court has a wide discretion to redress imbalances in and injustices and oppression flowing from an order granted in urgency and in the absence of the affected party. An order under this provision is not the same as the discharge of a rule nisi. The court redetermines the matter. This it may do with reference not only to the matter that was before it when the order was granted but it may take into account all the relevant and permissible facts that are before it at that stage."

13. Under Uniform Rule 6(12)(c) the court has a wide discretion, and *"the factors which may determine whether an order falls to be reconsidered, include the reasons for the absence, the nature of the order granted and the period during which it has remained operative. Other factors to be taken into consideration will be whether an imbalance, oppression or injustice has resulted, and, if so, the extent and nature thereof, and whether alternative remedies are available. The convenience of the parties is another factor to be taken into consideration. ... "*⁴

14. A century ago, *Estate Logie v Priest*⁵ held that in an *ex parte* application the utmost good faith must be observed by an applicant. A failure to disclose fully and fairly all material facts known to him or her may lead, in the exercise of the court's discretion, to the dismissal of the

³ See the discussion in Harms *Civil Procedure in the Superior Courts* (LexisNexis, looseleaf) at B6.67. Emphasis supplied.

⁴ Bertelsmann *et al Erasmus Superior Court Practice* (Juta, looseleaf) at B1-56C to B1-56D (emphasis supplied). See also *Sheriff v Pretoria North-East v Flink and another* [2005] 3 All SA 392 (T).

⁵ 1926 AD 312 at 323.

application on that ground alone.⁶

15. The Supreme Court of Appeal⁷ has more recently summarised the principles as follows:

“[45] The principle of disclosure in ex parte proceedings is clear. In NDPP v Basson this court said:

‘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).’

[46] The duty of the 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. The law sometimes allows a departure from this principle in the interests of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence.

[47] 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 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

⁶ See also *Trakman NO v Livschitz* 19 95 (1) SA 282 (A), at 288E-F.

⁷ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) paras 45-52 (emphasis supplied).

matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective.

...

[49] ... She should not make disclosure in a way calculated to deflect the Judge's attention from the force and substance of the absent respondent's known or likely stance on the matters in issue. Generally this will require disclosure in the body of the affidavit. The Judge, who hears an ex parte application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.

[50] In regard to the court's discretion as to whether to set aside an ex parte order because of non-disclosure, Le Roux J said in Schlesinger v Schlesinger:

'... [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.'...

16. What did this spell for the present matter?

The non-disclosures in the ex parte application

17. The founding affidavit in the *ex parte* application contained allegations which are substantially similar to those made in the applicant's answering affidavit in the BMW application. Whilst the applicant disclosed some of the allegations contained the first respondent's founding affidavit in the BMW application, he did so selectively. He dealt with his own arguments in the BMW application, but failed to mention the existence of the contents, even in broad terms, of the first respondent's replying affidavit in the BMW application. I agreed with the respondents' submission that such omission was material. The fact that the first respondent delivered a replying affidavit in the BMW application in which those allegations were denied was significant, and should have

been disclosed to the court hearing the *ex parte* application.

18. The respondents point to various facts and aspects which were omitted from the applicant's founding papers. I refer to only a few of them.
19. The first aspects related to the first respondent's buying and selling of vehicles. In the founding affidavit the applicant created the impression that the first respondent was selling vehicles effectively to get rid of its assets, and that if that state of affairs was allowed to continue, the first respondent would be rendered an empty shell. This was incorrect. Whilst the applicant alleged that a Maserati vehicle and Vespa scooter had been sold, he did not inform the court that the first respondent had in fact purchased a BMW 320i, which purchase the applicant had been aware of.
20. The respondents had stated in the replying affidavit already, which was delivered on 29 April 2025, that the Maserati and Vespa had been sold. The impression created in the founding papers in the *ex parte* application was that the applicant had discovered this fact through his own investigations prior to 29 April 2025, and it was thus evidence of the respondents' alleged secretive disposal of assets. Had the applicant disclosed that the respondents had stated under oath in the BMW replying affidavit that those assets had been sold and that the first respondent was entitled to do so, the court would not have considered the granting of the *ex parte* order on that basis.
21. Further, the applicant knew that the first respondent did not own a BMW 320i at the time when he deposed to his answering affidavit in the BMW application. He disclosed the fact that the BMW 320i was owned by the first respondent in the founding affidavit in the *ex parte* application but stated that the money he had advanced to the first respondent had been used to purchase that vehicle. That was not correct, as the

applicant knew that the BMW 320i must have been purchased after the institution of the BMW application, and thus that the first respondent had purchased a vehicle in addition to selling them. The disclosure of this fact would have countered the narrative that the first respondent was in the process of denuding itself of its assets, and could very well have resulted in the court not granting the interim order.

22. This aspect tied in with the applicant's allegations in the *ex parte* application that, if notice of the application had been given prior to the hearing, the first respondent would accelerate its disposal of assets. There was no evidence to justify that conclusion, particularly given the content of the BMW replying affidavit, and there was thus no basis for seeking an *ex parte* order.

23. The respondents explained that there was nothing untoward in the sale and purchase of vehicles in a business which rented out vehicles for short-term use, particularly over the festive season. Thus, the sale of vehicles was in itself nothing unusual. The first respondent has often sold vehicles that were expensive to maintain or that did not achieve proper rental demand. In the off-season, the first respondent has purchased other types of vehicles and has employed those to earn income via chauffer, tour, and Uber Black services. The proceeds of the sale of the Maserati were utilised to buy the BMW 320i, which was cheaper to operate, and more suitable to the first respondent's business needs.

24. The second aspect that should have been dealt with in more detail by the applicant related to the ownership of the vehicles which formed the subject of the interim order. The applicant alleged that he was the owner of those vehicles, and that he was on that basis entitled to the interim order. In the replying affidavit in the BMW application the first respondent denied this. The Vespa, for example, was never owned by

the first respondent. The Jeep, too, had always been owned by the second respondent in his personal capacity. This should, in my view, have been disclosed. Coupled with this was the fact that the applicant had, In January 2025 prior to the launch of the BMW application, sent correspondence to the respondents in which he stated that he was holding the BMW 650i as collateral for amounts owed to him. As one cannot hold one's own property as collateral, that would count against the allegations of ownership contained in the *ex parte* application. The applicant did not disclose his prior correspondence to the court in the *ex parte* application.

25. The third aspect related to the applicant's circumstances, and the situation in which he would allegedly find himself should the interim order not have been granted. In the founding affidavit in the *ex parte* application, the applicant portrays himself as an economically vulnerable, elderly man who had invested his life savings into a business operated by his son, and in the course of which various motor vehicles have, unbeknownst to the applicant, been sold to frustrate his claims, which are effectively undisputed. He did not disclose that in the first respondent's replying affidavit it had been pointed out that the applicant was a dollar millionaire, and thus a man of considerable means.

26. The applicant argued that his claim was in effect quasi-vindictory as contemplated in *Fey NO v Van der Westhuizen and others*,⁸ and that the applicant therefore did not have to show an intention to dissipate on the first respondent's part.⁹ He was also not required to prove a well-grounded apprehension of irreparable harm, because harm was presumed.¹⁰ It accordingly did not matter that the facts relied upon by the respondents in their anticipation application had not been disclosed

⁸ 2005 (2) SA 236 (C); and see *Cellucity (Pty) Ltd v Phillipson-Garcia and others* 2025 (3) SA 170 (WCC) paras 34-36.

⁹ *Fey NO supra* at 249E.

¹⁰ *Fey NO supra* at 250D.

to the court in the *ex parte* application – those facts were not material to the relief sought.

27. *Fey NO* was, however, decided on very different facts: there the court held that, where the trustee of an insolvent estate was seeking to preserve assets in a trust which was the *alter ego* of the insolvent pending a claim to recover them, it was not necessary for the applicant trustee to show an intention on the part of the respondent to dissipate assets to defeat the claims of creditors. The court held that the circumstances before it, which fell into the category of a quasi-vindicatory or quasi-proprietary claim, could be regarded as one of the “exceptional cases” envisaged in *Knox D’Arcy Ltd and others v Jamieson and others*.¹¹

28. In *Cellucity*, the applicant sought to preserve the first respondent’s funds pending a quasi-vindicatory claim, after the latter had stolen money from the applicant, her employer. The theft was not denied. The court was therefore satisfied that there was a sufficiently close link between the subject-matter of the applicant’s claim and the funds sought to be preserved, holding as follows: ¹²

“[48] Applying the above to the present case, the applicant has not only established a clear or at least prima facie case that the First Respondent has stolen and/or misappropriated a substantial sum of money, but also that the identified immovable properties owned by her were acquired out of this money. The First Respondent has not denied the Applicant’s specific averment to this effect.

[49] The Applicant has therefore established a clear connection between the misappropriated funds and the immovable properties. In essence, the properties represent the stolen money which it is sought to recover. The claim thus amounts to a quasi-vindicatory claim.

¹¹ 1996 (4) SA 348 (A) para 32.

¹² See *Cellucity supra* paras 48-50 (emphasis supplied).

[50] Accordingly, to establish a right to an interdict, it is not necessary to go further and show that the First Respondent is intending to dissipate these properties.”

29. The present case is somewhat different. The problem I had with the applicant's reasoning was that the applicant had known before the institution of the *ex parte* application that his alleged ownership of the vehicles was strenuously disputed. The parties were already embroiled in litigation on the same or similar issues. The applicant, should, in seeking to establish his case for the purpose of an anti-dissipation order on an *ex parte* basis, at least have disclosed the details of this dispute, as they remained material to the court's consideration of whether he had a *prima facie* right.

30. The applicant argued that the first respondent had been operating in insolvent circumstances, and that that, coupled with its disposal of vehicles, justified the grant of the interim relief. There is, however, simply not sufficient evidence on record to sustain this proposition (even on a *prima facie* basis and on the respondents' version, as the applicant would have it) when regard is had to the allegations in the replying affidavit in the BMW application, and of which the applicant was aware.

31. I was of the view that, had the full picture been placed before the court, the interim order would not have been granted, at least not on an *ex parte* basis, particularly in relation to the applicant's alleged *prima facie* right, the apprehension of harm, and the balance of convenience.¹³

Conclusion

32. It is apposite to revert to the underlying principles in *ex parte*

¹³ The first three requirements for the grant of interim interdictory relief: *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688A-E.

applications:¹⁴

“Failure to make full disclosure of all known material facts (ie, facts that might reasonably influence a court to come to a decision) may lead a court to refuse the application or to set aside the rule nisi on that ground alone, quite apart from considerations of wilfulness or mala fides. This approach should apply equally to relief obtained on facts that are incorrect either because they have been misstated or inaccurately set out in the application for the order or because they have not been sufficiently investigated.”

33. It goes without saying that the applicant was aware of the parties' prior litigation when he sought the interim order in the present matter. He knew that the allegations upon which he relied in the *ex parte* application were disputed by the respondents, but nevertheless did not disclose those disputes, or the content of the respondents' replying affidavit in the BMW application, to the court. There is, in my view, a reasonable inference to be drawn that the applicant did so because he wanted to obtain an advantage to which he was not entitled against the respondents.

34. Whatever his motivation, the interim order should not have been sought, and its continued existence not only prejudiced the respondents, but was an affront to the court. In his replying affidavit in the *ex parte* application the applicant did not explain how the omissions in his founding papers came about.

35. While costs would in any event have followed the result, I was of the view that the applicant's attitude towards the litigation and the court, and the blatant nature of the non-disclosure, rendered his conduct vexatious in the wider sense as contemplated in *Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and another*:¹⁵ “

¹⁴ Harms *Civil Procedure in the Superior Courts supra* at B6.14.

¹⁵ 1997 (1) SA 157 (A) at 177D.

... in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this terms in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear" This warranted costs on an attorney and client scale.

36.I accordingly granted the order referred to at the outset of these reasons.

P. S. VAN ZYL
Acting Judge of the High Court

Appearances:

For the applicant:

Instructed by:

Mr E. Smit

Van Rensburg & Co. Attorneys

For the respondents:

Instructed by:

Mr D. van Reenen

Nirenstein Attorneys