

**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 2025-202136

|                                      |                                                 |
|--------------------------------------|-------------------------------------------------|
| (1)                                  | REPORTABLE: YES / <u>NO</u>                     |
| (2)                                  | OF INTEREST TO OTHER JUDGES:<br>YES / <u>NO</u> |
| (3)                                  | REVISED: YES / <u>NO</u>                        |
| <u>28.11.2025</u> <u>[Signature]</u> |                                                 |
| DATE                                 | SIGNATURE                                       |

In the matter between: -

**SANLAM LIFE INSURANCE LIMITED**

Applicant

[Registration number: 1998/021121/06]

and

**NELLWYN CC**

First Respondent

[Registration no: 1997/056836/23]

**RAJESH RAMALL**

Second Respondent

[Identity no: 750107 5067 082]

**DANIEL ANDRIES BENEKE**

Third Respondent

[Identity no: 601026 5132 087]

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## JUDGMENT

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Van Aswegen AJ

### INTRODUCTION:

- [1] This matter concerns a reconsideration in terms of Rule 6(12)(c) of the Uniform Rules of court of a *rule nisi* order which was granted on an urgent *ex parte* basis. A return date was set of 1 December 2025 for the Respondents to show cause why the landlord's hypothec relating to the movables at Warehouses A, B, and C, located at CORNER COLUMBIA AND ENTERPRISE AVENUE, INTERNATIONAL BUSINESS GATEWAY, MIDRIDGE PARK, MIDRAND, GAUTENG ("the premises"), should not be confirmed.
- [2] The First Respondent and any person acting on its behalf was also interdicted and restrained from removing any and all content of the leased premises and to return any and all items already removed pending the final determination of this matter.

### FACTUAL MATRIX AS PRESENTED BY THE APPLICANT TO THE URGENT COURT

- [3] In its urgent application, the Applicant presented its case by outlining the pertinent facts and provided justifications for urgency, as summarised below.
- [4] The Applicant holds legal title to the commercial premises under a lease agreement. The referenced premises include:
- [4.1] Warehouses A - 2 261.83 square meters;
  - [4.2] Warehouse B - 2 420.21 square meters;
  - [4.3] Warehouse C - 2 819.941 square meters;
  - [4.4] Auditorium - 407.35 square meters; and
  - [4.5] 10 covered dedicated parking bays.

- [5] On 5 October 2023, the First Respondent entered into a written lease agreement, granting them beneficial occupation and enjoyment of the premises.<sup>1</sup>
- [6] The First Respondent failed to make the required monthly payments, breaching the agreement despite benefiting from the occupation of the property.
- [7] The First Respondent was indebted to the Applicant in the following amounts:
- [7.1] R2 022 544.46 for unpaid rental and charges, with interest at 13.75% per annum compounded monthly from 2 November 2024 until payment.
- [7.2] R653 793.00 for unpaid rental and charges, plus 13.00% annual interest compounded monthly from 2 April 2025 until paid;
- [7.3] R12 415 621.09 for fair damages (positive interesse) resulting from early lease termination due to the First Respondent's breach and failure to remedy after demand, plus 13% interest from cancellation until payment;
- [8] There are currently two separate cases before the court, under case numbers 2024-126311 and 2025-043974, both seeking recovery of the specified amounts and an order for the eviction of the First Respondent from the premises. The Respondents have filed defences in both matters.

**URGENCY:**

- [9] The urgency in this matter was predicated on an observation made by the Operations Manager, Mr. Philip Ferreira, on 27 November 2025. Mr. Ferreira observed that the First Respondent was actively loading

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<sup>1</sup> Annexure FA3

various items from the leased premises into vehicles, indicating the removal of the contents. He promptly reported this to the Applicant after speaking with an employee of the First Respondent, who confirmed that the First Respondent was vacating the premises. The unidentified employee indicated that the First Respondent was required to complete the vacating process by *Thursday, 30 October 2025*. This information was corroborated by photographic evidence.<sup>2</sup> JHI's legal department was promptly contacted, followed by the Applicant's attorneys; thereafter, counsel was retained and the urgent application was prepared.

- [10] The relocation of the movable assets was undertaken in direct response to the pending legal proceedings against the Respondents.
- [11] Mr. Jonathan Bell of Reaan Swanepoel Attorneys contacted the Respondents' attorneys to urgently request a written undertaking that the Respondents would immediately cease the removal of any goods from the premises by *16:00 on 27 October 2025*. He further advised that, should the Applicant not receive the requested urgent undertaking, an urgent application would be brought to secure the landlord's hypothec.<sup>3</sup>
- [12] At *16:05 on 27 October 2025*, the Respondents' attorney stated he would take instructions and reply by *close of business on 28 October 2025*.<sup>4</sup>
- [13] The Applicant asserted that the Respondents' actions constituted a delaying strategy intended to facilitate the removal of goods in order to circumvent the landlord's hypothec.

#### **RECONSIDERATION OF RULE NISI:**

- [14] The Respondents requested the court to reconsider the urgent court order on several grounds:

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<sup>2</sup> Annexures FA4.1 to FA4.23 at

<sup>3</sup> Annexure FA5 at 0001-115

<sup>4</sup> Annexure FA6 at 0001-118

- [14.1] The Applicant's failure to give notice of the application ("the Failure to give Notice");
  - [14.2] The nature of the First Respondent's business operations and the Applicant's failure to disclose such to the Court ("the First Respondent's Business");
  - [14.3] Communication between the Applicant and the First Respondent's representatives supporting the fact that the Applicant knew that the First Respondent had and has no intention to vacate the premises and the Applicant's failure to also disclose such material fact to the Court ("the Communications");
  - [14.4] The disputes between the Applicant and the Respondents, the nature of which the Applicant elected to also not disclose to the Court ("the Material Disputes");
  - [14.5] The effect of the Order, in the light of all the material circumstances ("the Effect of the Order");
  - [14.6] The First Respondent's substantial and irreparable harm.
  - [14.7] Urgency.
- [15] I shall deal with the raised grounds for reconsideration in sequence here in below.

**FAILURE TO GIVE NOTICE:**

- [16] The Applicant in its Founding Affidavit as a reason for failure to give notice, relies on the following:

*"32. I am advised that generally, these types of applications are brought ex parte with a return date, because of the risk that*

*between giving notice and the matter being heard that the respondent would have removed all the moveable assets.”*

[17] It is important to take cognisance of and evident from correspondence that, at the time of the urgent application, the representatives of both parties were engaged in ongoing communications and active settlement negotiations.<sup>5</sup> Furthermore, an offer from the First Respondent was pending, awaiting either acceptance or rejection. However, this information was not revealed to the urgent court.

[18] Prior to the urgent application the Applicant's attorneys also on 27 October 2025 requested an undertaking that the First Respondent would not remove any goods from the premises. The Respondents' attorneys had responded in an email sent on the same date (27 October 2025) by advising that he would obtain instructions and revert by close of business on 28 October 2025.<sup>6</sup>

[19] In light of the aforesaid it was crucial for the Applicant to explain (which the Applicant elected not to do):

[19.1] why despite constant communication between the attorneys the Respondents' attorney could not have been contacted directly;

[19.2] the settlement negotiations and the pending offer were not disclosed and

[19.3] despite pending settlement negotiations there was a fear of dissipation of the stock and

[19.4] why a response on 28 October 2025 were seen as a delaying tactic.

[20] The Applicant omitted the aforementioned information in submissions before the urgent court, as these facts might have affected the court's

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<sup>5</sup> Annexure F at 008-2;

<sup>6</sup> Case Lines 008-3

consideration of hearing the matter on an *ex parte* basis. The lack of service might most likely have been subject to judicial scrutiny.

#### **NON-DISCLOSURE OF MATERIAL FACTS AND APPLICABLE CASELAW:**

[21] Primarily, it was contended on the Respondents' behalf that, in applying for the rule nisi on an *ex parte* basis, the Applicant failed to fulfil its obligation to exercise the utmost good faith by presenting all relevant and material facts to the court. Accordingly, it was argued that the Applicant had a duty to disclose all pertinent information, but elected not to do this.

[22] Moultrie AJ made the following observations about *ex parte* applications in *Supercart South Africa (Pty) Ltd v Vanesco (Pty) Ltd and Another 2024 (3) SA 550 (GJ) [75]* :

*"[75] It is trite that an applicant who approaches a court on an ex parte basis is required to act with the utmost good faith and must in particular disclose all material facts. The bar of materiality for non-disclosure is set relatively low - it only needs to be shown that disclosure of the facts in question might (not would) have influenced the court in coming to its decision and it is unnecessary to demonstrate that the non- disclosure or suppression was wilful or mala fide. In exercising its discretion to set aside the order on grounds of non- disclosure, a court must consider (i) the extent of the non- disclosure; (ii) whether the first court might have been influenced by a proper disclosure; (iii) the reasons for the non-disclosure; and (iv) the consequences of setting the order aside." (my underlining)*

[23] The principles and standards in respect of the duty to disclose was dealt with by the Supreme Court of Appeal in *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs 2019 (3) SA 251 (SCA) (Redisa)* as follow:

'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' (para 45).

'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 matter she regarded as irrelevant was sufficiently material to require disclosure' (para 47). (my underlining)

[24] The aforesaid well-established rule regarding disclosure in ex parte applications was further highlighted and reinforced by the Supreme Court of Appeal in *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) as follows:

"[29] It is trite that an ex parte applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion the later Court will have regard to the extent of the non-

disclosure; the question whether the first Court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside."  
(my underlining)

**NON-DISCLOSURE: NATURE OF FIRST RESPONDENT'S BUSINESS:**

- [25] Since the inception of the lease in *November 2023*,<sup>7</sup> the Applicant was aware that the First Respondent operated a business delivering logistical and warehousing services for Shoprite Checkers. The Applicant understood that the First Respondent's normal business activities included:
- [25.1] that the vehicles owned by the First Respondent frequently entered and exited the leased property;
- [25.2] stock is delivered to the leased premises and kept in the warehouses and
- [25.3] stock is routinely transferred from the warehouses and leased premises to the client's various locations.
- [26] Noteworthy, the Applicant was furthermore notified on *25 September 2025* that the First Respondent would stay at the premises until the lease agreement expired, and would operate its business from another property (which was not disputed).<sup>8</sup>
- [27] The Applicant did not disclose the aforesaid information to the court, which might and would have affected the urgent court's view on the reason for the removal of the stock from the premises.
- [28] The application was launched on an urgent *ex parte* basis, primarily because the Applicant contended that the First Respondent, on *Monday, 27 October 2025*, began unlawfully removing movable assets from the property without the Applicant's consent. This removal it was argued had

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<sup>7</sup> Annexure FA3 at 0001- 46;

<sup>8</sup> Case Lines 008-2; para 26.2 at 002-16

the effect of reducing or otherwise compromising the security afforded to the Applicant under its landlord hypothec.

[29] The Applicant's attorneys also on 27 October 2025 requested an undertaking that the First Respondent would not remove any goods from the premises. The Respondents' attorney had responded in an email sent on the same date by advising that he would obtain instructions and revert by close of business on 28 October 2025.<sup>9</sup>

[30] Prior to the deadline, close of business on 28 October 2025 :

[30.1] the Applicant directed security at the premises to deny entry to or exit from the premises for the First Respondent's delivery vehicles<sup>10</sup> and

[30.2] the urgent application was launched.

[31] Importantly, the Respondents' attorneys' letter in response to the undertaking sought, dated 28 October 2025, was not disclosed to the urgent court.<sup>11</sup> The said response might and would have influenced the court's assessment of the matter.

[32] The *ex parte* application was considered on 28 October 2025, relying on the hearsay evidence provided by an unidentified employee<sup>12</sup> which stated that the Respondents intended to relocate all or most of the goods on the leased premises by *Thursday, 30 October 2025*. This evidence was tendered without the invocation of section 3(1) of the Law of Evidence Amendment Act 45 of 1988, as well as based upon photographic evidence depicting vacant warehouses. The said evidence served as the catalyst for the filing and hearing of the urgent application on an *ex parte* basis.

[33] Significantly, the Applicant did not disclose to the court that, since the lease began, it had been aware that the First Respondent's business

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<sup>9</sup> Case Lines 008-3

<sup>10</sup> Case Lines para 3.8 at 008-3

<sup>11</sup> Case Lines 008-2

<sup>12</sup> Para 24 at 0001-17

operations on the premises involved moving its vehicles and clients' goods on and off the leased premises.

[34] The removal of the goods from and onto the leased premises was accordingly a frequent occurrence which was not disclosed to the court.

[35] Had the urgent court been aware of the recurrent removal of the stock, it might and would have evaluated the urgent application in a different manner.

[36] Essentially, the Applicant was required to inform the urgent court about the nature and extent of the First Respondent's activities at the leased property. The Applicant had known from the start of the lease that the Respondents' business involved vehicles coming in and out of the leased premises, as well as the moving of clients' stock.

[36.1] The Applicant also had full knowledge of the fact that:

[36.1.1] stock is brought onto the leased premises and stored in the warehouses;

[36.1.2] stock is moved out of the warehouses and from the premises to the various locations of the First Respondent's client often.<sup>13</sup> This had been the case for a period of almost 2 (two) years.

#### **WORDING OF INTERDICT IMPACTED UPON BY NON- DISCLOSURE OF THE EXACT NATURE OF FIRST RESPONDENT'S BUSINESS**

[37] The wording of the interim interdict granted is evidence of both the fact that the exact nature of the First Respondent's business was not dealt with in the founding affidavit and the importance of such disclosure on the court order. The wording of the interim interdict granted reads as follows:

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<sup>13</sup> Applicant's Founding Affidavit (FA), annexure "FA3", the lease agreement, at 0001-46;

"1. *The first respondent and / or any person acting for and on behalf of the first respondent is interdicted and restrained from removing any and all content of the leased premises referred to hereunder and to return any and all items already removed pending the final determination of this matter.*" (my underlining and emphasis)

[38] The urgent court was therefore not informed that:

[38.1] the First Respondent conducted its business by offering logistical and warehousing services to its client, Shoprite Checkers.

[38.1.1] Essentially, the First Respondent's operations - which included the delivery of client's stock to the leased premises, where it was stored, and thereafter transported to various destinations - remained undisclosed.

[39] The non-disclosure of the nature of the First Respondent's business of which the Applicant had knowledge since the inception of the lease, resulted in a court order that effectively halted the Respondents' operations entirely. I agree with the Respondents that this order is unnecessarily oppressive, considering the specific nature of their business. More importantly, the order is impractical, as compliance is unattainable; the return of dispatched stock is not possible. It was conceded by the Applicant's counsel, rightly so, that the return of dispatched goods was not a competent order. The court order also remains in place pending the resolution of the litigation between the parties regarding claims for rental and damages. Given that the litigation (trial actions) may continue for several years, the interdictory relief is, in effect, therefor final in its application.

[40] In consideration of the Respondents' business activities, the court order appears excessively broad and, as a result, unduly burdensome, effectively halting the Respondents' operations on the premises. Had the

court been fully apprised of the specific nature of the Respondents' business, it is unlikely that such a restrictive order might and would have been issued.

[41] If the urgent court had known of:

[41.1] the exact nature of the Respondents' business;

[41.2] that the Applicant was aware since *25 September 2025* that:

[41.2.1] the Respondents would also be operating from another premises (which is undisputed) and

[41.2.2] that the First Respondent would remain on the premises until the effluxion of the lease (undisputed) the court's relief might have been different.

[42] The Applicant's representative knew of the First Respondent's business operations and that it remained unchanged since the commencement of the lease agreement on 1 November 2023,<sup>14</sup> a fact the Applicant elected not to disclose to the Court.

***NON-DISCLOSURE OF THE DISPUTE BETWEEN THE PARTIES:***

[43] Furthermore, the Respondents contended that the Applicant did not reveal the following significant and material facts in the urgent application, specifically:

[43.1] The dispute between the Applicant and Respondents as formalised in the Respondents' pleadings and in pending cases remained undisclosed. The Applicant, without explanation, submitted only its Summons to the Court,<sup>15</sup> omitting the Respondents' Plea, Counterclaim, and opposing affidavits for summary judgment. The Applicant merely

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<sup>14</sup> Case Lines 0001-46

<sup>15</sup> Annexure FA1 at 0001-22

pleaded that the action was defended without any disclosure of the exact nature of the disputes between the parties.

[43.1.1] The Applicant did not disclose to the urgent court that:

[43.1.1.1] the portion of the Applicant's claim which is undisputed had been paid in full and was up to date;

[43.1.1.2] the portion of the Applicant's claim that was disputed had not been paid and formed the subject matter of the litigation;

[43.1.1.3] the parties had pending settlement negotiations;

[43.1.1.4] a second settlement meeting was held on *25 September 2025*. The Respondents had made an offer which was still awaiting acceptance or rejection by the Applicant. These facts were highly relevant and significant information, and casted a totally different light on the urgent application. It countered the picture of recalcitrant litigants avoiding their obligations;<sup>16</sup>

[43.1.1.5] that summary judgment applications were launched, pursuant to which opposing affidavits had been delivered.<sup>17</sup> The Applicant had not taken any

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<sup>16</sup> Annexure F at 008-2;

<sup>17</sup> Annexures I1 and I2 at 012-2 and 013-2

steps in respect of the summary judgment applications and

[43.1.1.6] that there are *bona fide* legal defences raised to the Applicant's actions.

[43.2] The Applicant's representatives had been notified as early as 25 September 2025 that the First Respondent did not intend to vacate the leased premises;<sup>18</sup>

[43.2.1] This evidence remained undisputed.

[43.2.2] This is an essential indicator that the Respondents, despite being given notice to vacate, was not about to leave the leased premises precipitously.

[43.3] The Applicant's representatives were notified of, and expressly consented to, the First Respondent conducting its business operations also from an additional location.<sup>19</sup>

[44] Counsel for the Applicant submitted that the aforementioned facts are immaterial and did not impact on its entitlement to a hypothec. The court summarily rejects this argument, noting that the removal of goods from the premises constituted a routine aspect of the First Respondent's normal and recurrent business operations. Consequently, knowledge of such a business activity might and would have affected the court's perception of the purpose of the removal of stock and whether there was any compromise to prejudice the Applicant's security. Knowledge of the exact nature of the First Respondent's business might accordingly have been a factor which might have influenced the urgent court's assessment of the matter.

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<sup>18</sup> Para 26.2 at 002-16;

<sup>19</sup> Para 12 to 20, at 002-7; para 23, at 002-10; para 25, at 002-11, read with annexure "D", at 006-2; para 26, at 002-16, read with annexure "E", at 007-2, annexure "F", at 008-2, para 30, at 002-18; para 34 to 39, at 002-19, read with annexure "H1" at 010-2, "H2" at 011-2, "11" at 012-2, and "12" at 013-2;

- [45] The urgent application created the impression that the Respondents are uncooperative debtors who lacked any *bona fide* legal defences and sought to evade their obligations by attempting to remove property from the leased premises.

#### **NON-DISCLOSURE OF COMMUNICATIONS:**

- [46] The Applicant elected to not disclose that there were regular communications exchanged between the legal representatives of both the Applicant and the Respondents.
- [47] The court was likewise not made aware of the Respondents' attorneys' letter in response to the Applicant's demand for an urgent undertaking dated 28 October 2025<sup>20</sup>. This letter was accordingly not considered and might also have influenced the urgent court.
- [48] The Respondents' attorneys' letter at paragraph 3.2 thereof, stipulates that during the second settlement meeting held between the parties on 25 September 2025, the Respondents informed the Applicant they had relocated part of their operations to premises managed by one of their customers. This information was disclosed to the Applicant, who did not take any action after receiving it.
- [49] At the same meeting, Mr. Ramall, representing the Respondents, had indicated that operations at the premises would continue until the expiration of the lease. In response, Ms. Spies, the deponent of the founding affidavit and an attendee at the meeting, suggested that the First Respondent should contemplate extending the lease beyond its original term.
- [50] The aforementioned material facts were not disclosed to the urgent court. As this was an *ex parte* urgent application, the Applicant was under a duty to disclose all material and relevant information.

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<sup>20</sup> Case Lines 008-2

[51] The Applicant, after its attorney's letter dated *27 October 2025* to the Respondents' attorney, in respect of which the attorney, Mr. Rens responded on *28 October 2025*, launched an *ex parte* application despite the Respondents' attorneys' communication to the Applicant's attorneys on *28 October 2025*. The Applicant contended that the Respondents intended to delay by wanting to answer before close of business on *28 October 2025*. Having regard to the Applicant seeking an undertaking late afternoon of *27 October 2025* and the Respondents response on *28 October 2025* this court cannot find that there was any delay.

#### **SETTING ASIDE THE RULE NISI:**

[52] The court's discretionary authority to set aside an *ex parte* order due to non-disclosure is governed by the standard articulated in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 350B:

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

[53] The factors relevant to the exercise of the court's discretion were identified in *Phillips and others v National Director of Public Prosecutions* 2003(6) SA 447 (SCA) at paragraph 29 as being:

[53.1] the extent of the non-disclosure;

[53.2] whether the judge hearing the *ex parte* application might have been influenced by proper disclosure;

[53.3] the reasons for non-disclosure; and

[53.4] the consequences of setting the provisional order aside.

The materiality of the non-closure is plainly pertinent (*Redisa*, para 54).

[54] In this matter, the Applicant's omission to specify:

[54.1] the exact nature of the First Respondent's business;

[54.2] the nature and scope of the Respondents' defences regarding their dispute over liability for arrear rental;

[54.3] the fact that the parties were engaged in settlement negotiations with the Respondents' outstanding offer awaiting the Applicant's acceptance or rejection and

[54.4] all the communications between the parties' attorneys constituted significant and material non-disclosures.

[55] The Applicant's claim to a tacit hypothec, which formed the basis for all relief sought, depended on whether the First Respondent was indeed in arrears on rental payments. Proper disclosure of the First Respondent's position might and would have unquestionably affected the outcome of the *ex parte* application.

[56] In determining urgency and whether the First Respondent was likely to remove the movable property from the leased premises if it was given notice of the application, the following material facts remained undisclosed and might have influenced the court:

[56.1] the exact nature of the First Respondent's business,

[56.2] that the Applicant had knowledge since *25 September 2025* of the fact that:

[56.2.1] the First Respondent had operated from another premises and

[56.2.2] that the First Respondent would remain on the premises until the effluxion of the lease agreement. The Applicant's failure to disclose the said information was therefore material.

[57] The Applicant offered no compelling reasons why the relevant information was not disclosed in its founding affidavit. The Applicant may contend that annexures have been included and that certain information is provided within those documents. However, the Supreme Court of

Appeal pointed out in *Redisa*, that a judge determining an urgent *ex parte* application cannot be expected to trawl through annexures to discern the true facts. Cachalia JA referred to the observations by Waller J in *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485 (QB) that points in favour of the absent party should be clearly drawn to the judge's attention, and '[t]here should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough' (para 49), before stating:

'The ex parte litigant should not be guided by any notion of doing the bare minimum. 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.' (para 49). (my underlining)

[58] The Applicant elected to persist with the urgent application, despite communications between the parties since 27 October 2025.<sup>21</sup> More specifically a letter addressed to the Applicant's attorneys on 28 October 2025<sup>22</sup> which was apparently sent prior to the urgent application being heard. This letter did not form part of the urgent application and was in answer to the Applicant's demand on 27 October 2025.

[59] It is clear from the correspondence<sup>23</sup> sent that:

[59.1] the litigation between the parties was ongoing,

[59.2] settlement negotiations were in process,

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<sup>21</sup> Case Lines 0001-115

<sup>22</sup> Case Lines 008-2

<sup>23</sup> Case Lines 008-2

- [59.3] an offer was made pending acceptance or rejection by the Applicant,
- [59.4] one portion of the claim was paid in full leaving only the disputed portion of the claim,
- [59.5] the First Respondent would continue to operate from the leased premises not abandon the premises,
- [59.6] the Applicant demanded the First Respondent's vehicles to enter and exit the premises undisturbed and
- [59.7] the urgent was launched prior to the Respondents' attorneys response had been received in respect of the undertaking sought on 27 October 2025.<sup>24</sup>

#### **ENTITLEMENT TO URGENT EX PARTE RELIEF**

- [60] The importance of the *audi alterem partem* principle is highlighted in *Mazetti Management Services (Pty) Ltd and another v Amabhungane Centre for Investigative Journalism NCP and Others 2023 (6) SA 578 (GJ) [1]* which holds:

*"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 A sacred right of audi alteram partem may be relaxed, but wits 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. The procedure is rare and is called an ex parte application. The classic examples of its usage are where the applicant is the victim of a theft and seeks an order*

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<sup>24</sup> Case Lines 0001-115

*to either recover the stolen goods from the thief or procure evidence of the crime through an unannounced raid on the premises of the alleged perpetrator, a spouse who seeks protection from a violent partner or a creditor who seeks to freeze the bank account of debtor when grounds exist to fear illegitimate dissipation, especially in insolvency proceedings. An order made ex parte is provisional. The Uniform Rules of Court, make provision for an urgent reconsideration of such an order."*

[61] The Applicant was required to satisfy two separate elements:

[61.1] it had to show that the application was urgent and,

[61.2] that notice to the Respondents of the application would have resulted in a defeat of the purpose of the order.

[62] The Applicant did not disclose that the First Respondent operates a logistics and warehousing business for Shoprite Checkers<sup>25</sup>, which has been ongoing since the lease began on 1 November 2023.<sup>26</sup> The Applicant had known this since the start of the lease.

[63] The Applicant knew of the following information but did not disclose it to the court in its founding affidavit:

[63.1] the vehicles used by the First Respondent come in and out of the leased premises regularly;

[63.2] stock is brought onto the leased premises and stored in the warehouses;

[63.3] stock is moved out of the warehouses and from the premises to the various locations of the client regularly.<sup>27</sup> This had been the case for a period of almost 2 (two) years;

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<sup>25</sup> Para 12 to 15 at 002-7;

<sup>26</sup> Applicant's Founding Affidavit (FA), annexure "FA3", the lease agreement at 0001-46;

<sup>27</sup> Para 20 at 002-9;

[63.4] since *25 September 2025*, the Applicant's representatives were advised that some of the First Respondent's operations would also be conducted from another premises. However, the First Respondent would remain in occupation of the lease premises until the expiration of the lease.<sup>28</sup> The Applicant had no objection to the aforesaid, and

[63.5] the parties' attorneys were in communication with one another at the stage of the urgent application and the Respondents' offer to settle was under consideration by the Applicant.

[64] The Respondents' letter of *28 October 2025*,<sup>29</sup> sent on the day of the urgent application in response to the Applicant's letter of *27 October 2025*, and which was not disclosed to the court, states that:

[64.1] The parties were engaged in settlement negotiations, and the Applicant was awaiting either acceptance or rejection of its offer from the Respondents.

[64.2] On *27 October 2025*, a demand was issued requesting an undertaking that the First Respondent would refrain from removing any goods from the premises. In response, the Respondents' attorneys informed the Applicants' attorneys via email on the same date that they would seek instructions and respond by close of business on *28 October 2025*.

[64.3] Prior to the stated deadline, the Applicant's security personnel at the premises denied entry and exit to the Respondents' delivery vehicles, preventing the Respondents from delivering perishable goods to their clients.

[64.4] the goods were owned by the Respondents' client's customers for which the distribution was done.

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<sup>28</sup> Para 26.2 at 002-16;

<sup>29</sup> Annexure F at 008-3

[65] Annexure “F”<sup>30</sup> – a letter to the Applicant’s attorney, dated 28 October 2025 also refuted the claim of abandonment of the leased premises. The letter clearly stipulates the following:

- “5. My client will continue to operate from your client's premises until the termination of the lease and will continue to pay rental for the premises it utilises.
6. You advised yesterday that your client received information that my client intends to abandon the premises. This is untrue and my client has no idea where this rumour emanated from.
7. The undertaking you seek can however not be provided as this will prohibit my client to conduct its business.
8. Demand is made herewith that the refusal to allow my clients' vehicles to enter and exit the premises is lifted immediately and that confirmation is received by 12h00 today that your client will comply with this request. My client requested me to advise that the volumes of goods they transport at present had increased substantially with Black Friday approaching, contributing to the risks my client faces if it cannot comply with its aforesaid contractual obligations.”

[66] The court holds the view that the contents of the aforementioned might and would have impacted the urgent court’s assessment regarding the urgent application.

#### **INFORMATION RECEIVED FROM UNIDENTIFIED EMPLOYEE OF FIRST RESPONDENT**

[67] Hearsay evidence may be admitted in urgent applications, provided that the source of the information is disclosed with sufficient specificity and

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<sup>30</sup> Case Lines 008 -4

the process follows a practical, common-sense approach.<sup>31</sup> Nonetheless this does not constitute an unrestricted acceptance of hearsay evidence.

[68] The Applicant contends that on *27 October 2025*, its representative, Mr. Ferreira:

[68.1] observed items being removed from the premises

[68.1.1] The Applicant however elected not to disclose that the removal of goods was an ordinary occurrence in light of the nature of the First Respondent's business.

[68.2] spoke with an unidentified employee who stated that the First Respondent is permanently vacating the premises.

[68.2.1] No information on the date when this information was obtained is provided, neither the circumstances under which it was obtained.

[68.2.2] The Applicant knew how to contact Messrs. Beneke and Ramall, members of the First Respondent, and could have easily confirmed this by calling them or the Respondents' attorney.

[68.2.3] There was communications exchanged between the parties' legal representatives since *27 October 2025*.

[69] The information given to the Applicant's representative is inadmissible hearsay, seems to be inconsistent with the facts, and its reliability is challenged.<sup>32</sup>

[70] The Respondents are also unable to test, verify, or confirm the truth of the allegations made by the Applicant. Neither was the source of the claim identified nor did the Applicant's representative state that he had

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<sup>31</sup> *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 143 (SCA) [13]

<sup>32</sup> Para 21, pp 002-10;

no reason to doubt the information by the unidentified individual. The Applicant also did not place reliance upon section 3(1) of the Law of Evidence Amendment Act, Act 45 of 1988.

[70.1] Section 3(1)(c) allows the court to accept hearsay evidence in the interest of justice.

[70.2] Section 3 of Act 45 of 1988 states:

*"3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*

*(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

*(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*

*(c) the court, having regard to-*

*(i) the nature of the proceedings;*

*(ii) the nature of the evidence;*

*(iii) the purpose for which the evidence is tendered;*

*(iv) the probative value of the evidence;*

*(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*

*(vi) any prejudice to a party which the admission of such evidence might entail; and*

*(vii) any other factor which should in the opinion of the court be taken into*

*account, is of the opinion that such evidence should be admitted in the interests of justice."*

- [71] The Applicant did not meet the above requirements, nor made any attempt to do so in its founding affidavit to the urgent application. No explanation is given why the evidence could not be tendered by the unidentified individual.
- [72] The admission of such hearsay evidence, particularly given that the application was brought and the order granted on an *ex parte basis*, significantly undermines both the interests of justice and the proper administration of justice.
- [73] Notably, in its replying affidavit, the Applicant also elected not to disclose the identity of the individual in question. No explanation is also tendered why the individual's identity cannot be disclosed.

#### **NATURE AND EXTENT OF NON-DISCLOSURES:**

- [74] In summary, failure to disclose the following material and disputed facts might and would have also influenced the urgent court's decision. These facts are the following:

[74.1] From the commencement of the lease, the Applicant knew that the nature of the First Respondent's business is providing logistical and warehousing services to its client, Shoprite Checkers. Goods are accordingly transported onto the premises by distributors and would leave from the premises to their respective destinations. It's important to understand that removing goods from the premises is a standard procedure and doesn't mean the debtor is attempting to avoid their responsibilities. Therefore, I simply cannot agree with the Applicant that the Respondents' business might and would not have influenced the court's consideration of granting the *rule nisi*. In fact, it was extremely pertinent information. The

absence thereof had affected the formulating of the court order.

[74.1.1] The standard operations of the First Respondent, as discussed here in before, involves the following:

[74.1.1.1] Distributors deliver third-party goods to the First Respondent using their own vehicles.

[74.1.1.2] Typically, the goods that have been delivered are kept at the premises for a certain period before they are sent to the First Respondent's client.

[74.1.1.3] Once these goods are requested for delivery, they are loaded into the First Respondent's vehicles and transported to their designated locations.

[74.2] The nature of the dispute between the parties: The Applicant consciously elected to submit only its Summons to the Court,<sup>33</sup> excluding the Respondents' Plea, Counter-claim, and the affidavits opposing the Applicant's Summary Judgment application. Merely informing the court that the Respondents defended the action is insufficient.

[74.2.1] It is patently evident from the pleadings as well as the respective affidavits filed opposing the applications for Summary Judgment that there exists a material and substantial dispute between the parties.

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<sup>33</sup> Case Lines 0001-22

[74.2.2] The Applicant elected not to inform the urgent court of the specific nature or extent of the aforementioned dispute. The fact that the cancellation of the lease agreement was contested was also not disclosed.

[74.2.3] The Applicant's claim for the *R 12 415 621.09* (twelve million four hundred and fifteen thousand six hundred and twenty-one Rand and nine Cents) is for alleged damages arising from a disputed cancellation of the lease agreement.

[74.2.3.1] It is significant that it is not a claim for unpaid rental nor for damages pertaining to the premises.

[74.2.4] The rental payments, as allegedly due, are furthermore disputed, and the Applicant did not disclose the basis thereof to the Court.

[74.3] On *25 September 2025*, the Applicant's representatives were notified that i) the First Respondent intended to remain in the leased premises and ii) that it had moved certain of its operations to a new location, which was uncontested.<sup>34</sup> Ms. Spies, representing the Applicant, even extended an invitation to the Respondents to consider extending its lease.

[74.3.1] In correspondence dated *29 October 2025* to the Applicant's attorneys<sup>35</sup> it was clearly and unequivocally communicated to the Applicant that the Respondents had relocated certain operations and would continue to operate on the leased premises until the lease agreement

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<sup>34</sup> Case Lines 002-13

<sup>35</sup> Case Lines 006-1

expired. The said correspondence – Annexure “D” states as follows:

***The Second Settlement meeting held on 25 September 2025***

*“3.10 Your client was informed during the second settlement meeting as referred to in paragraph 3.2 of the 28 October 2025 letter, that it has moved part of its operations to a premises operated by one of its customers. This fact was not withheld from your client. No action was taken by your client pursuant to the conveyance of this information.*

*3.11 At the same meeting, Mr Ramall advised that operations at the premises would continue until the termination of the lease, to which the deponent of the founding affidavit, Ms. Spies, who was present in the meeting, responded that my client should consider extending the lease beyond the term thereof.” (my underlining)*

- [75] All of the aforementioned facts contradict and negate the portrayal of the First Respondent as an uncooperative debtor, lacking a valid legal defence and rapidly removing goods from the leased premises to evade its liabilities.
- [76] The importance of the aforesaid facts as set out here in before rendered them material to the urgent application.
- [77] The specific characteristics of the Applicant's business might and would have also influenced the assessment of the requested court order.

[78] When properly interpreted, the court order prohibits the First Respondent from removing its client's stock from the premises after it has been stored in a warehouse on those premises.

[79] The removal of goods from the premises, given the First Respondent's business activities, formed an integral part of its standard routine operations. This provides an alternative and totally different perspective on the Respondents' conduct as portrayed in the Applicant's Founding Affidavit to the urgent application. The First Respondent might and would not necessarily been characterised as a delinquent debtor attempting to evade its obligations by absconding.

[80] The rationale for the removal of the goods was, in this court's view, fundamental to the urgent application. This court considers that understanding the motivation behind the removal might and would most definitely have influenced the urgent court's determination of:

[801.] whether the First Respondent constituted a recalcitrant debtor

[80.2] and whether the Applicant's security was compromised.

#### **COURT ORDER AND EFFECT THEREOF:**

[81] The court order granted stipulates that:

*"1. The first respondent and/or any person acting for and on behalf of the first respondent is interdicted and restrained from removing any and all content of the leased premises referred to hereunder and to return any and all items already removed pending the final determination of this matter."*

[82] This court order effectively prohibits the Respondents from operating their business, as they are unable to move any stock from the premises. Additionally, given the First Respondent's line of business, the order is overly broad. This is precisely why understanding the nature of their business was crucial to the urgent application.

[83] The Applicant had full knowledge of:

[83.1] the exact nature of the First Respondent's business operations (the First Respondent's client's stock was brought onto the premises, stored in the warehouses, and then moved off the premises regularly and that it was storing goods)<sup>36</sup>

[83.2] the stock belonged the First Respondent's client (it was brought onto the premises with the clear purpose of warehousing it and later moving it to the various locations of the First Respondent's client).

[84] In *Eight Kaya Sands v Valley Irrigation Equipment* 2003(2) SA 495 (T) it was held as follows:

*"'n Derde party wie se roerende eiendom tot beskikking van die huurder op die verhuurde perseel gestel is en wat daardeur die skyn skep dat die goed aan die huurder behoort stel daardie goed ook bloot aan die stilswyende hipoteek van die verhuurder. Sodra die derde sy eiendomsreg in die goed aan die verhuurder bekend maak, dan verander die regsverhoudinge. Die skyn het verdwyn. Daar is geen regsverbintenis tussen die derde as eienaar en die verhuurder as skuldeiser van die huurder nie. Daar kan dan geen regverdiging wees daarvoor dat die eiendom van 'n derde moet dien ter sekerheidstelling van die skuld van die huurder nie. Die enigste manier waarop dit wel kan geskied is dat dit skyn van die huurder se eiendomsreg bestaan het totdat daar op die goed as oënskyynlike eiendom van die huurder deur die verhuurder regtens beslag gelê is. Is daardie beslaglegging nie uitgevoer voor die skyn verdwyn het nie, dan moet die verhuurder die goedere aan die werklike eienaar laat toekom."*

[85] Consequently, the Applicant has no tacit hypothec over a third party's goods brought onto the premises with the Applicant's full knowledge thereof. Any attachment made of a third party's stock is therefore unlawful.

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<sup>36</sup> *Elliot Bros (E L) (Pty) Ltd v Smith* 1958 (30 SA 858 (E));

[86] The Respondents alleged that First Respondent's vehicles are under finance agreements and can therefore not be included in the Applicant's hypotec.

[87] As conceded by Applicant's counsel, the Applicant can furthermore not exercise a hypothec over stock that are no longer on the premises.<sup>37</sup>

[87.1] Moveable property removed from the premises are no longer the subject of the Applicant's hypotec.

[87.2] The court order also does not stipulate from which date the stock had to be returned.

[88] The court order and its resulting impact are therefore unduly burdensome and contribute to a continuing disparity.<sup>38</sup>

#### **INTERIM INTERDICTS REQUIREMENTS:**

[89] In assessing whether the Applicant has met the requirements for an interim interdict, the court should consider the facts presented by the Applicant as well as any uncontested facts introduced by the Respondents. The court must then determine, based on the inherent probabilities and the ultimate burden of proof,<sup>39</sup> whether final relief can be granted. Subsequently, any evidence put forward by the Respondents that contradicts the Applicant's case should be evaluated, and if such contradictions cast substantial doubt on the Applicant's position, the application cannot succeed.<sup>40</sup>

[90] *Prima facie* proof is proof (evidence) calling for an answer. It is conclusive proof of the point in issue, unless evidence is produced to rebut it.<sup>41</sup>

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<sup>37</sup> Frank v Van Zyl 1957 (2) SA 207 (C); Kleinsakeontwikkelingskorporasie Bpk v Santam Bank Bpk 1988 (3) SA 266 (C);

<sup>38</sup> Oosthuizen v Mijs 2009 (6) SA 266 (W) 268C;

<sup>39</sup> Godbold v Tomson 1970 1 SA 61 (D) at 63D;

<sup>40</sup> Spur Steak Ranches Ltd v Saddles Steak Ranch, Claremont 1996 3 SA 706 (C) at 714; Webster v Mitchell 1948 1 SA 1186 (W) at 1188; Steenkamp v Fourie 1948 4 SA 536 (T) at 540.

<sup>41</sup> Ex Parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466 at 478.

[91] The second requirement for an interim interdict is whether a reasonable apprehension has been established that there is a real likelihood that continuance of the alleged wrong will cause irreparable harm to the Applicant.<sup>42</sup>

[92] It is trite law that there is a presumption, which may be rebutted by the Respondents, that the injury is irreparable. The test is objective, and the question is whether a reasonable person, confronted by the facts, would apprehend the probability of harm; actual harm need not be established upon a balance of probabilities.<sup>43</sup>

[92.1] The extent of the injury could not be properly determined because the court was not provided with material information about the nature of the First Respondent's business and its normal activities.

[93] The third requirement is the absence of another adequate remedy.<sup>44</sup>

[94] The last requirement is that the balance of convenience must favour the grant of the order.<sup>45</sup>

[95] The Court must weigh the prejudice the Applicant will suffer if the interdict is not granted against the prejudice the Respondents will suffer if it is. The exercise of the court's discretion usually resolves itself into a consideration of the prospects of success and the balance of convenience: the stronger the prospects of success, the less the need for such a balance to favour the Applicant; the weaker the prospects of success, the greater the need for it to favour the Applicant.

[95.1] The Respondents were prejudiced because the urgent court did not understand the specifics of the First Respondent's business and its operations, making the order unfairly

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<sup>42</sup> Setlogelo v Setlogelo 1914 AD 221 at 227.

<sup>43</sup> Minister of Law & Order v Nordin 1987 2 SA 894 (AD).

<sup>44</sup> Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 2 SA 459 (C).

<sup>45</sup> LF Boshoff Investments (Pty) Ltd v Cape Town Municipality, Cape Town Municipality v LF Boshoff Investments (Pty) Ltd 1969 2 SA 256 (C) at 267.

restrictive by preventing the First Respondent from continuing its business operations from the premises.

[96] In *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 2 SA 382 (D) confirmation is found that the exercise of the court's discretion usually resolves itself into a consideration of the prospects of success and the balance of convenience. The court held as follows:

*"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression "prima facie established though open to some doubt" seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less the need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the Applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."*

[97] A Court always has a wide discretion to refuse an interim interdict even if the requisites have been established.<sup>46</sup> This indicates that the Court may consider a range of different and incomparable factors when deciding. However, this does not mean the Court has unlimited or

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<sup>46</sup> *Setlogelo v Setlogelo* 1914 AD 221.

unrestricted discretion<sup>47</sup>—the discretion must be judicial, exercised according to legal principles<sup>48</sup> and based on proven facts.<sup>49</sup>

- [98] The failure to disclose relevant material information compromised the assessment of the interim interdict. As a result, the urgent court was presented with an incomplete perspective, which might and would not have led to a fair and equitable decision. All the requirements of an interim interdict could accordingly not have been successfully evaluated and met.

### CONCLUSION:

- [99] The *ex parte* urgent application was launched and undoubtedly tainted by the following:

- [99.1] the urgent application was launched prior to the Respondents' response being received.

[99.1.1] a demand was made on 27 October 2025<sup>50</sup> requesting an urgent undertaking and a response was to be forthcoming by close of business on 28 October 2025<sup>51</sup>. A response was provided on 28 October 2025 but not disclosed to the urgent court.<sup>52</sup>

- [99.2] the non-disclosure that the parties were in ongoing settlement negotiations and that the Respondents had made an offer which was either to be accepted or rejected by the Applicant;

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<sup>47</sup> Knox D'Arcy Ltd v Jamieson 1996 4 SA 348 (A) at 361; Hix Networking Technologies CC v System Publishers (Pty) Ltd 1997 1 SA 391 (A) at 401.

<sup>48</sup> Gründling v Beyers 1967 2 SA 131 (W) at 155.

<sup>49</sup> Benoni Town Council v Meyer 1961 3 SA 316 (W) at 326.

<sup>50</sup> Case Lines 001-115

<sup>51</sup> Case Lines 0001-118

<sup>52</sup> Case Lines 008-2

- [99.3] the non-disclosure of the nature of the First Respondent's business and that the removal and distribution of stock from the warehouses is a frequent occurrence;
- [99.4] the non-disclosure of the Respondents' legal defences and that the dispute concerned only the contested part of the Applicant's claim the remainder of the rentals were fully paid.
- [99.5] the non-disclosure that the parties' legal representatives were in ongoing communication with one another.
- [99.6] the non-disclosure that the Applicant knew that the First Respondent would remain on the premises until expiry of the lease;
- [99.7] the non-disclosure that the Applicant knew since *26 September 2025* that the First Respondent would move certain of its operations to another location.
- [99.8] The non-disclosure that the Applicant's claim for *R12 415 621.09* (twelve million four hundred and fifteen thousand six hundred and twenty-one Rand and nine Cents) is for alleged damages arising from a disputed cancellation of the lease agreement not for arrear rentals.
- [100] In essence the Applicant's urgent application are clouded by material non-disclosures of material facts which might and would have influenced the urgent court in reaching its decision in respect of the relief sought by the Applicant.
- [101] The Applicant was obligated to disclose the respective positions of both parties with greater precision and care, given that the matter was proceeded on an *ex parte* basis and legal defences had been raised in response to the Applicant's claims. Accordingly, it is essential that any such party is required to present all relevant facts to the Court, without omission or selectivity.

[102] In *Schlesinger supra* the court held as follows in respect of ex parte applications:

*"Although on the one hand the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts which might affect the granting or otherwise of an ex parte order. The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether willfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the grounds of non-disclosure. It should however be noted that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or set aside the proceedings...."*

*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"*. (my underlining)

[103] The Supreme Court of Appeal affirmed the principle of utmost good faith in *Powell NO and Others v Van der Merwe and Others*.<sup>53</sup> The Court stated that this standard applies even when relief is granted based on facts that are misstated or inaccurately presented in the application, particularly where a right in the Bill of Rights has been infringed. The principle should be strictly enforced in such cases.

[104] in *Thint (Pty) Ltd v NDPP and Others; Zuma and Another v NDPP & Others* [2008] JOL 22119 (CC) at paragraph 102, the Constitutional

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<sup>53</sup> 2005 BCLR 675 (SCA) par [73]-[75]

Court held that Applicants in *ex parte* applications must act in utmost good faith and disclose all relevant facts they know.

- [105] The Applicant before court's *ex parte* application is devoid of many non-disclosures. Although certain information was included in the annexures, it should have been addressed in the founding affidavit, particularly since the matter was brought before an urgent court.<sup>54</sup>
- [106] The claim that the Respondents were removing stock to the Applicant's disadvantage, supported by photos of empty warehouses, is unconvincing and rings hollow given that the First Respondent typically stores stock for its clients and redistributes it - something the Applicant was aware of. Additionally, the urgent application was filed before the close of business deadline on 28 October 2025, against the backdrop of pending settlement negotiations (First Respondent's offer was awaiting either acceptance or rejection). The court was not made aware of these facts either.
- [107] The court order is also unenforceable (removed stock cannot be the subject of the Applicant's hypothec and the time period from when the removed stock ought to have been returned is unknown) and its effect created an imbalance, is oppressive, and unjust. The court order had the effect of stopping the operation of the First Respondent's business from the premises. Allowing only for operation from another premises of which the Applicant also had knowledge.
- [108] The purpose of a reconsideration under rule 6(12)(c) is to provide an aggrieved party with a mechanism for addressing imbalances, injustices, or oppression resulting from the granting of an urgent order in their absence.<sup>55</sup> The court retains broad discretionary authority, and reconsideration may entail partial or complete deletion of the initial order, or the addition of new provisions.<sup>56</sup> Factors to be considered include

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<sup>54</sup> Redisa supra

<sup>55</sup> ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others 1996 (4) SA 484 W

<sup>56</sup> ISDN supra 486I-487A/B ; Rhino Hotel & Resort (Pty) Ltd v Forbes & Others 2000 (1) SA 1180 (W) 1182 B-E; Steeldale Ore at Rebar (Pty) Ltd v Ore at Rebar (Pty) Ltd & Others

whether there has been an imbalance, injustice, or oppression; the availability of alternative remedies; the nature of the order; and the rationale for seeking the order *ex parte*. These considerations are not exhaustive.

- [109] 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 in a subsequent application by the same applicant.' (*Schlesinger* at 350B-C)
- [110] The key principle is that good faith is essential in *ex parte* applications. All material facts that might influence the court must be disclosed, regardless of whether any omission was intentional or accidental. The court's likelihood of granting relief even after full disclosure of all relevant information does not change this requirement.
- [111] The Applicant was subject to this duty and did not disclose several material facts to the urgent court, thereby compromising the integrity of the application.
- [112] If all relevant facts had been presented, the urgent court might and would have interpreted the removal of stock from the premises (which is part of the First Respondent's business operations) differently and issued an alternative order.
- [113] This court is of the firm opinion that to let the urgent court order stand will amount to severe injustice. The order must be set aside.
- [114] Regarding costs, an *ex parte* application represents a significant deviation from the standard principles governing civil proceedings. The *audi alteram partem* principle is compromised. *Ex parte* procedures should only be employed when there is valid justification for doing so, such as circumstances in which providing notice would undermine the

very purpose of the order being sought. It is well established that, in an *ex parte* application, the Applicant has a duty to act with the utmost good faith by presenting to the court all relevant material facts that may impact its decision. All material facts within the Applicant's knowledge should be disclosed. More so when the application is brought on an urgent basis.

[115] The application for urgent relief was issued and heard before the Respondents had provided a response to the Applicant's request for an undertaking, within the context of ongoing settlement negotiations. At the time, the Respondents' offer was awaiting the Applicant's acceptance or rejection, both parties were legally represented, and there was ongoing correspondence between their respective attorneys. None of the aforesaid information was placed before the urgent court.

[116] The Applicant did not fulfil its obligation to disclose all relevant material facts, as previously referred to in this judgment, to the urgent court. The Applicant was required to exercise the highest standard of good faith by presenting all pertinent information to the court, which it did not do in this instance. Had the Applicant adhered to this duty, it is possible that the court might and would have considered granting alternative relief.

[117] This court must express its serious concern and dissatisfaction regarding the Applicant's presentation of selective evidence and views it as a breach of an Applicant's duty of utmost good faith. The Applicant's account provided an imbalanced perspective, which did not support a court order that upholds justice.

[118] As for costs, there is no reason to depart from the standard principle that costs should follow the outcome.

[119] The Respondents are seeking costs on an attorney and client scale. The imposition of a punitive cost order is justified for the following reasons:

[119.1] It has been convincingly shown that the *ex parte* application did not provide the court with all relevant and material

information which might and would have influenced the assessment of the matter by the urgent court.

[119.2] The courts are generally concerned that parties properly fulfil their duty of disclosure in an *ex parte* application.<sup>57</sup>

[119.3] The launching of the *ex parte* urgent application against the undisclosed backdrop of pending settlement negotiations and the Respondents' offer awaiting acceptance or rejection by the Applicant.

[119.4] The imposition of a punitive costs order for non-compliance with disclosure is warranted both as compensation for the aggrieved party and as an independent measure to encourage corrective discipline among litigants.

[120] I accordingly make the following order:

*Order*

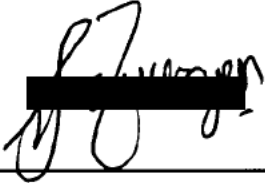
[1] The Respondents' non-compliance with the provisions of the Uniform Rules of Court, Practice Manual and Directives regarding the forms, service, and time-periods in respect of this application is condoned and this application is enrolled, heard and adjudicated upon as a matter of urgency in terms of Uniform Rule 6(12).

[2] The Order granted on 28 October 2025 by the Honourable Justice Nthambeleni AJ is hereby reconsidered and set aside.

[3] The Applicant is to pay the costs of the application, including this application and including the costs of two counsel, where so employed on Scale C, on a punitive scale.

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<sup>57</sup> *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) and *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251(SCA).

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**S VAN ASWEGEN  
ACTING JUDGE OF THE HIGH COURT  
JOHANNESBURG**

**Hearing date: 12 November 2025**

**Delivery date: 28 November 2025**

**For the Applicant:**

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