

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

CASE NO: 2022-43794

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
16 JANUARY 2023

In the matter of:

TSHEPO BEN MONNAKGOTLA

Applicant

And

KALEB VICTOR RANGAKA

First Respondent

OUPA ORIA RANGAKA

Second Respondent

VITSOU TRADING CC

Third Respondent

ABSA BANK LIMITED

Fourth Respondent

NEDBANK LIMITED

Fifth Respondent

JUDGMENT

BESTER AJ

Introduction

[1] The respondents seek the reconsideration of an *ex parte* order obtained by the applicant on 15 November 2022. The order, granted by Maier-Frawley J, provides as follows:

“IT IS ORDERED THAT, PENDING RESOLUTION OF PART B OF THIS APPLICATION:

1. the bank accounts in the name of Vitsou Trading CC (the Third Respondent) held at Nedbank Limited (Account Number: [....]) and Absa Bank Limited (Account Number: [....]) be handed over to be operated by a chartered accountant with no less than 5 (five) years of experience, appointed by the Chairman for the time being of the South African Institute of Chartered Accountants (the "Trustee") within 10 (ten) days of the date of this Order.
2. ABSA Bank Limited and Nedbank Limited (the Fourth and Fifth Respondents) grant unrestricted access to the Trustee mentioned in paragraph 1. above, to the exclusion of all other persons, pending resolution of Part B of this application.
3. Kaleb Victor Rangaka and Oupa Oria Rangaka (the First and Second Respondents) are interdicted and restrained from opening or

operating any other bank account(s) in the name of the Third Respondent pending conclusion of Part B of this application.

4. the First and Second Respondents are prohibited from, and/or forthwith cease with the encumbrance, transfer and/or alienation of any movable or immovable assets, including intangible assets of the Third Respondent to any other third party without the written consent of the Trustee, pending conclusion of Part B of this application.

5. the First and Second Respondents are prohibited from, and/or forthwith cease with the conclusion of any contracts in the names of the Third Respondent, inclusive of leases and hire-purchase agreements, without the prior written consent of the Trustee pending conclusion of Part B of this application.

6. The Respondents may bring an application for reconsideration of this Order as provided for in Rule 6(8) of this Honourable Court's Uniform Rules.

7. That costs in Part A shall be the costs in the main application.”

[2] The nub of the respondents’ case for reconsideration, is that the applicant materially misrepresented facts before Maier-Frawley J, and that on the true facts no order should have been granted.

The applicant’s evidence in support of the *ex parte* order

[3] The essence of the case placed before Maier-Frawley J, was this:

a) The applicant and the first and second respondents are the members of a close corporation, the third respondent, which operates two restaurants.

b) The first and second respondents have caused substantial funds to be transferred from the third respondent’s bank accounts in favour of a

separate legal entity, MeatnChill (Pty) Ltd, which also operates a restaurant, under the same name as used by the third respondent, and in competition with it.

c) The first respondent surreptitiously moved ownership of the trademark name under which the restaurants trade to a separate legal entity.

d) The first and second respondents are acting to the detriment of the applicant as a member of the third respondent.

[4] The applicant thus sought control of the bank accounts to be placed in the hands of an independent party, pending a forensic inquiry, which he proposed to seek in the ordinary course under part B of the application.

The facts as they emerged on reconsideration

[5] The reality is somewhat different. The first respondent explains, and the applicant concedes in reply, that:

a) The applicant, the first respondent and the second respondent are the shareholders of MeatnChill and are its directors. They have set it up and operate it as a restaurant utilising the same brand name and the same formula as the two restaurants operated by the third respondent.

b) The applicant on the one hand and the first and second respondents on the other, do not see eye to eye on how to continue the restaurant businesses. The applicant had sought to be bought out of MeatnChill, but this has not transpired.

[6] There are disputes of fact on (i) the details of the disagreements between the business partners, (ii) the details of how the restaurants are operated and managed, (iii) the level of the applicant's involvement and (iv) what has been agreed between them in respect of the future of their venture. However, these issues have no impact on this application.

Analysis

[7] The *ex parte* order was expressly obtained on the basis that the third respondent's funds were diverted surreptitiously by the first and second respondents to a competing entity, which the applicant said he had nothing to do with. He explained that his only interaction with MeatnChill was when he made a payment on its behalf for R35 000,00. The context of this payment remains unexplained.

[8] The applicant testified that he was reflected as a director in the records of the Companies and Intellectual Property Commissioners Records against his will and knowledge and contended that this was done to create a veneer of legitimacy in the affairs of MeatnChill. He expressly relied on the third respondent being prejudiced on the basis that its funds were depleted in favour of a competing entity.

[9] In truth, MeatnChill was simply another vehicle for the restaurant business conducted by the applicant and the first and second respondents. The applicant raised several points of no consequence to support his denial that the third respondent and MeatnChill were the start of a 'group of companies' as claimed by the first and second respondents. His hair-splitting does not change the facts - rather than an unrelated competitor, MeatnChill is part and parcel of the business affairs of the applicant and the first and second respondents. The applicant's signature appears on documents such as MeatnChill's liquor licence application and the assignment of the trademark to a separate legal entity.

[10] Caught out with the true facts, the applicant sought to recast his case in reply. In his heads of argument Mr Phukubje, who appeared for the applicant, formulated the applicant's revised case as follows:

"The respondents miss the important point that it not about whether MeatnChill is a competitor or not, it is about the financial resources of the close corporation being diverted, without consensus, to finance a business that is clearly not doing well."

[11] This is not the case presented by the applicant in his *ex parte* application. An applicant will only be allowed to make out his case in reply in exceptional circumstances.¹ This is not one of those instances – quite the contrary. The withholding or suppression of material facts in an *ex parte* application by itself entitles a court to set aside an order, even if the nondisclosure was not wilful or *mala fide*.² The Court exercises its discretion in such circumstances and will have regard to factors such as³ (i) the extent of the nondisclosure; (ii) whether the Court might have been influenced by proper disclosure; (iii) the reasons for the nondisclosure and (iv) the consequences of setting the provisional order aside.

[12] There were material omissions of pertinent facts in the founding affidavit. The substratum on which the application was based is a fabrication. The very basis upon which the order was granted is false. Even if there is substance to the applicant's complaints that the first and second respondents are acting to his detriment in the affairs of the third respondent (on which I express no view), that is not to be decided here. It is an issue which the applicant intends to pursue under part B of the application. It is not a basis to let the order stand in the face of the misleading case in the founding papers.

[13] Taking all the factors into account, I conclude that this is appropriate to set aside the order obtained based on material nondisclosures.

Conclusion

[14] In the result, I make the following order:

- (1) The order granted by Maier-Frawley J on 15 November 2022 is set aside.

¹ *Betlane v Shelly Court* CC 2011 (1) SA 388 (CC) in [29].

² *National Director of Prosecutions v Basson* [2002] 2 All SA 225 (SCA) in [21].

³ *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) in [29]; *Recycling and Economic Development Initiative of South African NPC v Minister of Environmental Affairs* 2019 (2) 251 (SCA) in [52].

(2) The applicant shall pay the costs of Part A of the application, including the costs pertaining to the reconsideration of the *ex parte* order and including the wasted costs of Wednesday, 11 January 2023.

A Bester
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Heard: 13 January 2023

Judgment: 16 January 2023

Counsel for the Applicant: Adv M Phukubje

Instructed by: BA Ramdass Attorneys

Counsel for the First & Second

Respondents: Mr RJN Brits from VR Law Incorporated

No appearance for the Third to Fifth Respondents