

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)

CASE NO: 36850\05

DATE: 1/6/2005

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: /NO.

(2) OF INTEREST TO OTHER JUDGES: /NO

(3) REVISED.

In the matter between:

HYPERCEPTION PROPERTIES 98 C C
RICHARD VUSI DUBE
AGNES MOLAPO

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT

and

R. F. RADEBE

RESPONDENT

In re:

HYPERCEPTION PROPERTIES 98 C C
RICHARD VUSI DUBE
AGNES MOLAPO

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT

and

ELIAS VUSI RADEBE
NEDCOR BANK LTD

FIRST RESPONDENT
SECOND RESPONDENT

JUDGMENT

SHONGWE, J

[1] This is the return date of the Rule Nisi granted on the 9 February 2005.

The applicants requested that the Rule be confirmed and an amended

final order be granted pending the finalization of an action which has already been instituted under Case Number 3619\05.

- [2] The applicants have also filed an application to join the 3rd Respondent, being the wife of the 1st Respondent, to whom she is married in community of property. She is also to be joined in the action as the 2nd defendant.
- [3] The 1st Respondent vehemently opposes the confirmation of the Rule Nisi and also the application to join her as the 2nd Defendant to the action. A whole host of grounds are put forward why the Rule should not be confirmed. I pause to mention that all the grounds raised are highly technical not a single one of them affects the merits of this case. Infact the 1st Respondent makes a concession on very crucial aspects of this case.
- [4] The essence of the interim order granted on the 9th February 2005 is that the 1st and 2nd Respondent be interdicted and restrained from withdrawing the amount of R 157 371. 00 from Account Number No: 8294675100101 held in the name of the 1st Respondent with the 2nd Respondent. That they be interdicted from withdrawing the amount of R60 000.00 from Account number No: 158534481810, held in the name of the 1st Respondent , t/a Radebe Taxi Services, with the 2nd

Respondent. That the interdict be effective immediately pending the finalisation of the application and the action under Case No: 3619\05.

- [5] Firstly the Respondent says that the order is defective in that it does not specify who is interdicted from withdrawing the money. Secondly that the Account Number No: 8294675100101 is not in the name of the 1st Respondent but the name of his wife. Thirdly That the Account Number mentioned in paragraph 1.1.2 of the order is incorrect. The difference being the last two numbers namely "10". The correct Account Number No: is without the last two numbers. Fourthly that the initials of his wife are incorrect instead of R.F they are N.S.T.
- [6] As I have said earlier all these points raised in opposing the application are highly technical. It stands to reason that the interdict was intended to restrain the 1st Respondent and the 2nd Respondent. The second Respondent was able to trace the incorrect Account Number to the 1st Respondent. It is not in dispute that the Account Number belongs to the 1st Respondent and his wife being their home loan Account Number. For some reason the initials of the 1st Respondent's wife were typed incorrectly. What is clear is that she is the wife of the 1st Respondent, married in community of property in whose name the home loan account number is held.

7. The 1st Respondent is not prejudiced in any manner. I shall be failing in my duty not to take judicial notice of the fact that the evidence demonstrates that we are dealing with the same persons, that is, the 1st Respondent and his wife together with Account Numbers held by both of them. Even the incorrect number, the 2nd Respondent was able to trace it to Radebe Taxi Services which Account Number belongs to the 1st Respondent.
8. The facts of this case are clear and common cause. The second and third applicants together with the 1st Respondent formed a Close Corporation named Hyperception Properties 98 Cc. The 1st applicant in this matter. The core business was to buy and sell properties, obviously to share the profit too. It appears that disagreements arose which conducted to the agreement that the business be dissolved. The last property in existence was sold and the 1st Respondent deposited part of the proceeds into his wife's home loan account instead of keeping the money in the business account of the 1st Applicant. The other sum he deposited into his Taxi Business account. The rest he withdrew from the 1st applicant's account and used it for his personal affairs.
9. The 1st Respondent's conduct is obviously wrong. He was not authorised by the other members of the C C to withdraw money for his personal use or to deposit same into his own home loan account. The

1st Respondent's explanation is that he has been doing this sort of thing all along and that is how he ran the business. Even if his explanation could be correct, which I doubt, it does not make business sense to deposit money which belongs to a CC into ones personal home loan and Taxi business. The interdict was sought under circumstances as explained above.

10. Now that the applicants have the correct information, the 3rd Respondent is sought to be joined in the application as well as in the pending action. In her affidavit she says she will abide by the decision of the court, although she raises certain issues for the attention of the court. She does not oppose the application to join her.

11. **R vs Herpworth 1928 (AD) 265 at 277** Carlewis JA (as he then was) said the following:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to the recognised rules of procedure but to see that justice is done".

12. I associate myself fully with the words of Carlewis JA and confirm that it is not only in a criminal trial but in all instances where a judge sits to adjudicate on issues before him. Be it criminal or civil. My sense of justice dictates that all the wrongs or mistakes done by the applicants may be condoned with impunity purely because no prejudice will ensue for the Respondents.
13. I also agree with Ngwenya J in **Desai-Chilwan NO vs Ross & Another 2003 (2) SA 644 (CPO) at 652** where he said '*the court retains a discretion to condone a defect in a citation. More so where the defect is highly technical*'. In casu it is not disputed that the person sought to be joined is the 1st Respondent's wife, even though the initials are incorrect. The bank account number referred to does exist and the 1st Respondent is connected somehow with it. The association between the applicants and the 1st and the 2nd Respondents is not in dispute. Therefore this is a classical situation where this court ought to exercise its discretion to condone the technical mistakes.
14. The 1st Respondent is married in community of property to his wife. It is not disputed that the sum of R157 371.00 was deposited in account number 8294675100101/ being the home loan of the 1st Respondent and his wife. The interim order was justifiably granted, though certain technical mistakes existed. In my view these mistakes cannot vitiate the true and uncontroverted facts. We are now told that the home loan

account number has been closed. To confirm the order in this respect would be academic.

15. It stands to reason that the 1st Respondent's wife needs to be joined because the money deposited in their home loan account benefited both of them. Therefore an order joining her in the application and the action makes judicial sense.
16. Even though it is said that there is no money standing in credit in account number 1585344818 it is not a futile exercise to confirm the Rule Nisi pending the finalization of the action. The evidence will show what happened to the money. The interdict is the only remedy under the circumstances especially in the light of the admissions made by the 1st Respondent.
17. I conclude that the applicants have made out a proper case, despite the mistakes.
18. **Consequently I make the following order:**
 - (a) **The amended Rule Nisi is confirmed.**
 - (b) **The application to join the 3rd Respondent in the application as well as the action pending under Case Number 3619\05 is granted .**

- (c) The 1st, 2nd and 3rd Respondents are interdicted from withdrawing the amount of R60-000 or any amount from account number 1585344818 held in the name of the 1st Respondent, t/a Radebe Taxi Services with the 2nd Respondent.
- (d) The order referred to in (C) above will be effective immediately pending the finalization of the action under case number 3619\05 in this Court.
- (e) The 1st Respondent shall pay the costs of this application including the costs of opposition against the application to join the 3rd Respondent in the action pending under case number 3619\05.



J.B. SHONGWE

JUDGE OF THE HIGH COURT

FOR THE APPUCANT'S: ADV T STRYDOM
INSTRUCTED BY: MESSRS SOLOMON NICOLSON REIN & VERSTER INC
FOR THE RESPONDENT: ADV A T NCONGWANE
INSTRUCTED BY: MESSRS J'10TLA CONRADIE INC
DATE OF JUDGMENT: 3/06/05
HEARD ON: 27 MAY 2005