IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case No: 2007/9053

In the matter between:-

OOSTHUIZEN; JAN LEWIES	Applicant
and	
MIJS; ANTHONY	Respondent
In re:-	
MIJS, ANTHONY	Applicant
and	
OOSTHUIZEN; JAN LEWIES	Respondent

SUMMARY

WEPENER, AJ

Uniform Rules of Court – Rule 6(12)(c) - Reconsideration of Order

The Court held that when reconsidering an urgent application granted in the absence of a party, it is not limited to reconsider the original application but should also have regard to the facts placed before it on affidavit.

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DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓

22/02/2008
DATE SIGNATURE

JUDGMENT

WEPENER, AJ: The Applicant launched an application for reconsideration of an order granted against him in his absence on an urgent basis. The

application for reconsideration is brought in terms of Rule 6(12)(c) of the Uniform Rules of Court which reads as follows:-

> *"A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."*

In **Rhino Hotel & Resort (Pty) Ltd v Forbes** 2000 (1) SA 1180 (W) at 1182B-E, Joffe J interpreted this rule as follows:-

> *"In terms of Rule 6(12)(c) of the Uniform Rules of Court, a party against whom an order was granted in his absence in an urgent application may, by notice, set the matter down for reconsideration of the order. The Rule envisages a redetermination of the matter. The Court that entertains the application in the absence of the respondent does not have the benefit and advantage of argument from the respondent. Accordingly, when the application is re-enrolled by the respondent for consideration, it is a redetermination with the benefit of argument from the respondent. See, in this regard, generally* ***Lourenco and Others v Ferela (Pty) Ltd and Others*** *(No 1) 1998 (3) SA 281 (T) at 290D. In addition to the Rule of Court, para 7.1 of the Court order of 28 September 1999 gave the first and third respondents the right to apply to Court on not less than 24 hours'*

notice for a variation or setting aside of the order. This provision in the Court order seems to envisage that the application is to be launched by the respondent whereas the Rules, in particular Rule 6(12)(c), do not require such an application. Where Rule 6(12)(c) is utilised, the original application is reconsidered on its own without reference to anything else."

To hold that the court is confined only to the original application without reference to anything else is in conflict with various decisions on this point. In **I S D N Solutions (Pty) Ltd v C S D N Solutions CC and Others** 1996 (4) SA 484 (W), where Farber AJ said this at 486H to 487D:-

"*The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order.*

Given this, the dominant purpose of the Rule seems relatively plain. It affords an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of

urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or part, or the engraftment of additions thereto.

The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress is open to attainment by virtue of the exercise of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on the facts and the particularities inherent therein."

This passage was referred to with approval by Traverso DJP in **National Director of Public Prosecutions v Braun and Another** 2007 (1) SA 189 (C) at 194A-E and also by Southwood J in **Lourenco and Others v Ferela (Pty) Ltd and Others** (No 1) 1998 (3) SA 281 (T) at 290E-H. In the **Lourenco matter** Southwood J allowed affidavits to be filed. (See judgment at p 287E-F and 288C). I am of the view that the only manner in which a court can weigh up the various factors is if evidence is place before the court by way of affidavit.

In **Sheriff Pretoria North East v Flink and Another** [2005] 3 All SA 492 (T) the nature and ambit of the discretion in terms of Rule 6(12)(c) was considered at p 498 where the following appears:-

> "*The discretion created in terms of rule 6(12)(c) is a wide one. There can be no doubt that the reconsideration of the matter can be performed on the basis of a set of circumstances quite different to that under which the original order was obtained (**Reclamation Group (Pty) Ltd v Smit and Others** 2004 (1) SA 215 (SE) at 218E-F).*
>
> *Mr Bofilatos referred me to the decision in **Tom v Minister of Safety and Security** [1998] 1 All SA 629 (E) in which it was decided that in proceedings under rule 42(1)(a) the Court is confined to the four*

*corners of the record which served before the Court when the order was granted (**Tom** at 638g-h). As will appear below, that view is a rather contentious one. But there can be no doubt that rule 6(12)(c) is not subject to such restrictions. In **Lourenco and Others v Ferela (Pty) Ltd and Others** (1) 1998 (3) SA 281 (T) at 290B-H Southwood J considered the ambit of rule 6(12)(c). He referred to the* Shorter Oxford Dictionary *for the meaning of the word 'reconsider':*

> *'1. To consider (a matter or thing) again; (b) to consider (a decision, etc.) a second time with a view to changing or amending it; to rescind, alter.*
>
> *2. To reflect on one's conduct with a view to ... amendment."*

*He also quoted with approval from **ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others** 1996 (4) SA 484 (W) at 486H-487B to the effect that the rule is widely formulated; that it permits an aggrieved person against whom an order was granted to have that order reconsidered provided only that it was granted in his absence; and that:*

'... the dominant purpose of the rule seems relatively plain. It affords an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter or urgency in his absence. In circumstances of urgency where an affected person is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief, or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve the deletion of the order, either in whole or in part, or the engraftment of additions thereto.

The framers of the rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered.'

The jurisdictional facts establishing the wide discretion provided for in rule 6(12)(c) are therefore only the following:

i) The granting of an order in the absence of the party affected thereby,

ii) by way of urgent proceedings as intended in rule 6(12).

Once these jurisdictional facts have been established, the court is free to reconsider *the order initially given in the widest sense of the word. By direct implication, it is free to reconsider any* judgment *given in the urgent application, which led to the order. Thus it can most certainly, in a proper case, issue an order of rescission by way of a final judgment which disposes of the case* ***en toto*** *– as opposed to a rescinding order which merely restores the procedural* ***status quo*** *ante, reinstating the parties to the position in which they were prior to the rescinded judgment, with the merits of the main dispute still to be decided."*

In the **Reclamation Group (Pty) Ltd V Smit And Others** 2004 (1) SA 215 (SE), full sets of affidavits were delivered dealing with the facts upon which the reconsideration of the matter was done. Froneman J stated at p 218D-F as follows:-

"*The result of all this is that the reconsideration of the matter needs to be done on the basis of a set of circumstances quite different to that under which the original ex parte order was obtained. Reconsideration need not always take this form but Rule 6(12)(c) is widely formulated and in my view permits a reconsideration in this*

manner. (cf Lourenco and Others v Ferela (Pty) Ltd and Others (No 1) 1998 (3) SA 281 (T) at 290A-H). The consequences of this are twofold. The first is that the issues are to be reconsidered in the light of the fact that both sides of the story are now before court. The second is that the execution of the original order may have had the effect that those issues are not exactly the same as the issues before Court when the original application was heard."

In the **I S D N Solutions matter (supra)** Farber AJ said the following at p 487D:-

"Something need to be said about the procedure. Although no hard and fast rule need to be laid down, it seems desirable that a party seeking to invoke the Rule ought in an affidavit to detail the form of reconsideration required and the circumstances upon which it is based."

I am of the view that a court that reconsiders any order should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in affidavits filed in the matter.

The applicant filed an affidavit in support of its "set down" for a reconsideration. The respondent filed an answering affidavit and a reply was served and filed. If a court had to reconsider the order granted on an urgent basis in the absence of a party by limiting the hearing to permitting a party to supply additional argument and utilising the record of the original application only, a court would be closing its eyes to the facts placed before it that could have led to a completely different result when the order was originally granted in the absence of the one party. I am consequently of the view that a Court should consider all the permissible facts disclosed in the affidavits before it.

I am fortified in this view as a result of the fact that the applicant is entitled to approach the court not only in terms of Rule 6(12)(c) but also pursuant to Rule 6(8) and the common law – (see **Lourenco and Others (supra)** at 289F-G) and I accordingly, respectfully differ from Joffe J in limiting the matter to a question of argument on the original application and am satisfied that to so hold, is wrong.

In the circumstances and having regard to the affidavits before me I reject the argument of Mr Bruwer that the matter should be dismissed because, on a reconsideration of the matter based the original affidavit only, it can not be argued that the order should not have been granted. I will

consequently consider the matter by having regard to the affidavits before me.

The affidavits disclose a dispute of fact regarding whether the applicant had knowledge of the set down of the original application. It is not disputed that the application was served at an incorrect address and arguments by the respondent that it believes that the applicant received the notice of motion do not detract from the fact that the applicant states under oath that it did not receive it as the service address was incorrect. I accept that the applicant did not have notice of the urgent application and therefore did not appear and that the order was granted in his absence in those circumstances. Whether the applicant's knowledge or otherwise is relevant, I need not decide. It is common cause that the order was granted in his absence.

The original order granted was for:-

a) the return of a motor vehicle;

b) payment of the sum of R20 000,00;

c) costs on the attorney and client scale.

The applicant does not seek a reconsideration of a) and concedes that the respondent was entitled to that order pursuant to the respondent being spoliated by the applicant. If regard is had to the definition of the word "reconsider" as was referred to by Southwood J in the **Lourenco case (supra)**, a court should be entitled to amend the original order. That in my view, includes the power to leave the order partially intact and to change or amend that which is shown to require amendment. See the remarks of Farber AJ in the **I S D N matter (supra)** at 487A

The applicant seeks a reconsideration of orders b) and c). These orders were granted as a result of factual allegations made by the respondent in the papers regarding an agreement between applicant and respondent which agreement had been cancelled with the result that a repayment of the sum of R20 000,00 was sought. The applicant's version is entirely different and is to the effect that there was no cancellation and that the respondent is indeed indebted to him in a further sum of R30 000,00. Both counsel agreed that it was not possible to resolve the issue regarding the agreement on the papers.

Having regard to the affidavit of the applicant, it may very well be that his version may be correct. A court would not have granted costs on a punitive scale if his version was known. The argument on behalf of the applicant in

relation to order c) is that it should not have paid the costs on the attorney and client scale. He concedes that the respondent was entitled to approach the court for an order in terms of prayer a) and that the costs in relation thereto would have been incurred.

In all the circumstances, I make the following order:-

1. Order c) is substituted with the following:-

   "*Respondent is to pay the costs of the application*".

2. Order b) is deleted and I make the following order:-

2.1. The question of the nature and terms of the oral agreement between applicant and respondent reached in relation to the sale of cattle as well as the question of whether a settlement was reached in relation to that issue prior to the urgent application having been launched, is referred for the hearing of oral evidence on a date to be arranged with the Registrar.

2.2. The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however to what is provided in paragraph 3 hereof.

2.3. Save for witnesses whose evidence is already on affidavit in this application, neither party shall be entitled to call any witnesses unless:-

2.3.1. it has served on the other party at least fifteen days before the date appointed for hearing (in the case of a witness to be called by the applicant) and at least ten days before such date (in the case of a witness to be called by the respondent) a statement wherein the evidence to be given in chief by such person is set out; or

2.3.2. the Court, at the hearing, permits such person to be called despite the fact that no such statement has been served in respect of his evidence.

2.4. Either party may subpoena, in terms of Rule 38, any person to give evidence at the hearing whether such person has consented to furnish a statement or not.

2.5. The fact that the party has served a statement in terms of paragraph 3 hereof, or have subpoenaed a witness, shall not oblige such party to call the witness concerned.

2.6. Within twenty days from today, each of the parties shall make discovery on oath of all documents relating to the issues referred to in paragraph 1 hereof, which all have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Rule of Court 35(1) and 35(a) and the provisions of Rule 35 with regard to the inspection and production of documents discovered shall be operative.

2.7. The question of costs in relation to the application for reconsideration shall be determined after the hearing of the oral evidence.

Counsel for the Applicant: J L Engelbrecht

Instructed by: Smith Van der Watt Inc

Counsel for the Respondent: A P Bruwer

Instructed by: Le Roux Wagenaar

WEPENER AJ
Judge of the High Court