REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

Signature .....

Date 29/6/2026

CASE NO: 2987/2020

In the matter between:

HLAHLEDI FRANK MOROPA	**FIRST APPLICANT**
MAHLODI LILLY NOHLALA	**SECOND APPLICANT**
and	
KINESH SACHIDANANDAN PATHER	**FIRST RESPONDENT**
MOGOMPANE CHROME (PTY) LTD	**SECOND RESPONDENT**
MARULA COMMUNITY CHROME (PTY) LTD	**THIRD RESPONDENT**
THE BOARD OF DIRECTORS OF MOGOMPANE CHROME (PTY) LTD	**FOURTH RESPNDENT**
THE BOARD OF DIRECTORS OF MARULA COMMUNITY CHROME (PTY) LTD	**FIFTH RESPONDENT**
MASTER OF THE HIGH COURT, POLOKWANE	**SIXTH RESPONDENT**
ESTATE LATE ELIAS TSHIDI MOHLALA	**SEVENTH RESPONDENT**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**EIGHTH RESPONDENT**
FINANCIAL INTELLEGENCE CENTRE	**NINTH RESPONDENT**
FIRST NATIONAL BANK LINITED (FNB)	**TENTH RESPONDENT**
STANDARD BANK LIMITED	**ELEVENTH RESPONDENT**
BAJABOHWA CRHOME (PTY) LTD	**TWELFTH RESPONDENT**

REASONS FOR JUDGMENT

MAKGOBA JP

[1] This matter came before me, on urgent basis, as an anticipation of the return date (Rule 6(8)) and reconsideration of an interim order (Rule 6(12)(c)) granted in favour of the Applicants on 26 May 2020.

[2] Upon hearing Counsel for the parties I granted the following order:

"*1. The order granted on 26 May 2020 under the above-mentioned case number, by Mudau J is reconsidered and set aside.*

2. The rule nisi is discharged.

3. The Applicants are ordered to pay the costs on an attorney and client scale."

[3] What follows are my reasons for the order.

[4] On 26 May 2020 the Applicants sought and obtained an ex parte order of a wide ranging nature. The order provides:

"*1. This application is dealt with as an urgent application for the purposes of being dealt with in terms of Rule 6(12) read with the prevailing rules and forms of the Honourable Court and the said rules and forms of the Honourable Court are dispensed with.*

2. *Pending the outcome and finalization of an application to declare the First Respondent and or any inflicted Directors delinquent, which application should be instituted within 21 (twenty one) days from the date of issuing of this interim order.*

3. *The First, Fourth and Fifth Respondents are interdicted and prohibited from having access to all bank accounts of the Second and Third Respondents, which includes online banking, withdrawals and making payments.*

4. *The First, Fourth and Fifth Respondents are prevented and prohibited from executing and or carrying on any duties as a director of the Second and Third Respondents, pending the outcome of the application referred to above.*

5. *The First and Second Applicants and Shadrack Mokgale Matjie are appointed as the interim Directors of the Second and Third Respondents pending the finalization of the application referred to above.*

6. *The Applicants are granted leave to supplement their papers.*

7. *A rule nisi issued calling upon the Respondents on the* ***20th of AUGUST 2020*** *to show cause why this rule nisi should not be confirmed.*

8. *The First Respondent is ordered to pay the costs of this application as on attorney and own client scale, the one paying the other to be absolved."*

[5] My reasons for setting aside the interim order and discharging the *rule nisi* are based on one or more of the following aspects:

5.1. Applicants' lack of standing (*Locus Standi*).

5.2. None – Joinder of a Trust.

5.3. Absence of Jurisdiction.

5.4. Non – disclosure of material facts.

5.5. Abuse of *Ex parte* proceedings.

[6] Before dealing with the aforesaid aspects I proceed to deal with the Court order as it affects the Fourth and Fifth Respondents, being the Board of Directors of Second and Third Respondents companies.

As it appears from the papers the Fourth Respondent is simply described as "the Board of Directors of Magompane Chrome (Pty) Ltd" ("Magompane") and the Fifth Respondent is described as "the Board of Directors of Marula Community Chrome (Pty) Ltd" ("Marula").There are some thirteen directors comprising the Boards of Magompane and Marula. All of them are subject to the prohibitions contained in the order. Yet, a consideration of the founding affidavit makes no case against any of these directors other than the First Respondent, Mr Pather.

Even in their replying affidavit, the Applicants made no case against the other directors.

[7] Apart from the sweeping and unsupported assertions contained in the founding affidavit, no specific allegations are leveled against the other directors of Magompane and Marula, yet they are stripped of their duties and rights as directors of the companies.

Counsel for the Applicants readily conceded, correctly so, that no case is made against the aforesaid directors and consequently the order against them falls to be discharged.

Lack of Standing (*Locus standi*)

[8] The First Applicant purported to come to Court on the basis that he was the major shareholder of the Second Respondent. In support of this assertion, he attached what he described as a "shareholder certificate" being annexure "HFM1" to the founding affidavit. It turned out, however that annexure "HFM1" is not a share certificate at all. It is a resolution by representatives of Tswako Mohlala Community. The First Applicant is shown not to be a shareholder in his own right but merely a nominee of the mentioned community. The community is not the shareholder. The Tswako Mante Trust holds 90% shares in the company on behalf of the community as beneficiaries. Beneficiaries cannot act on behalf of the Tswako Mante Trust.

Therefore, the First Applicant as a beneficiary has no *locus standi* to institute the present proceedings.

[9] The Second Applicant bases her alleged standing on the fact that she is the widow of the late Elias Mohlala and the heir of his shares to which he was allegedly entitled. The Applicants attached the death certificate of the late Mr Mohlala which indicates that he was "never married".

This anomaly is not addressed even in the replying affidavit. Counsel for the Applicants did not address this issue at the hearing of this application. Such failure is fatal to the Second Applicant's *locus standi*.

In any event in terms of a resolution by the Board of Directors of Magompane dated 21 September 2012 it is confirmed that the shares held by the late Mr Mohlala were "trust shares" and these shares had been transferred to a new nominee, referred to as K W Mohlala.

Non- Joinder of Trust

[10] The Tswako Mante Trust is the majority shareholder of Magompane. The Trust clearly has a direct and substantial interest in the outcome of this matter. The Trust acts and holds shares on behalf of the community. The community is the beneficiary of the dividends paid to the Trust. The relief sought by the Applicants includes having all the directors of Magompane declared delinquent. The Trust manifestly has a direct and substantial interest in this relief- **ABSA Bank Limited vs Naude NO 2016(6) SA 540 (SCA)**.

It follows that the failure to cite the Trust and the trustees is fatal to this application.

Absence of Jurisdiction

[11] The Applicants make a bald and unsubstantiated assertion that this Court has the necessary jurisdiction as the whole cause of action arose within the Court's area of jurisdiction. With respect, the cause of action is extremely difficult to discern in this matter.

In the papers, the First, Second, Third, Fourth and Fifth Respondents are reflected as being in Sandton. The two banks (Tenth and Eleventh Respondents) are cited with addresses in Johannesburg.

[12] It is common cause that the First to Fifth, Tenth and Eleventh Respondents fall within the High Court of Johannesburg's jurisdiction. The Second and Third Respondents have their registered office and carry on business in the jurisdiction of Johannesburg.

In the result this Court does not have jurisdiction to entertain this matter, as the majority of the parties, as cited by the Applicants, are situated within the High Court of Johannesburg's jurisdiction.

Non- disclosure of material facts

[13] The omission of material facts may be either willful or negligent. Regardless, the Court may on this ground alone dismiss an ex parte application.

In **Schlesinger v Schlesinger 1979(4) SA 342 (W)** an order obtained ex parte was set aside with costs on an attorney and client scale because the applicant had displayed a reckless disregard of his duty in making full and frank disclosure of all known facts that might influence the court in reaching a just conclusion.

[14] In the present case it is a fact that one Mr Shadrack Matjie was dismissed as the Chairman and director of the Magompane on 31 July 2019 on account of mismanagement of the company. The Applicants proceeded to obtain an ex parte order in this matter appointing Mr Matjie as their co-director in the two companies, Magompane and Marula. This was a material non-disclosure. It was critical to the relief sought and obtained ex parte.

In regard to the Court's discretion as to whether to set aside an ex parte order because of non-disclosure, Le Roux J said in **Schlesinger** (Supra):

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

[15] It is furthermore evident from the papers that the Applicants failed in their duty to disclose the following material facts:

15.1 The First Applicant is not a shareholder but rather a nominee of the Trust. He failed to disclose that Annexure "HFM1" is not a shareholders certificate but a resolution passed long ago on 17 August 2007.

15.2 The Applicants failed to disclose the proper shareholding of Magompane and, in particular that the Trust held 90% of the shares

15.3 The Applicants failed to disclose that the shares of the late Elias Mohlala were transferred to KW Mohlala and as such the Second Applicant had no locus standi.

15.4 The Applicants failed to disclose the facts concerning Mr Matjie's position and in particular the circumstances giving rise to his removal as a director.

[16] All of these facts were highly material and the Applicants (and their legal advisors) were under a duty to disclose them since they chose to proceed ex parte. The failure to disclose material facts in an ex parte application constitutes a basis for setting aside any order obtained.

[17] In **Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs 2019 (3) SA 251 (SCA)** the Court emphasized the longstanding principle of full disclosure in ex parte applications. The Court stated:

"[45] The principle of disclosure in ex parte proceedings is clear.

In NDPP v Basson this court said:

"Where an order is sought ex parte it is well-established that the utmost good faith must be observed. All material facts must be disclosed which might influence a Court in coming to its decision, and the withholding, or suppression of material facts, by itself, entitles a Court to set aside an order, even if the non-disclosure or suppression was not willful or mala fide (Schlesinger v Schlesinger 1979(4) SA 342 (W) at 348E-349B)

[46] The duty of utmost good faith, in particular the duty of full and fair disclosure, is imposed because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely ***audi alteram partem****. The law sometimes allows a departure from the principle in the interest of justice but in those exceptional circumstances the ex parte applicant assumes a heavy responsibility to neutralize the prejudice the affected party suffers by his or her absence.*

[47] The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstance 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 matters regarded as irrelevant was sufficiently material to require disclosure. The test is objective."

[18] The duty of good faith extends also to legal representatives

See: **Recycling and Economics Development Initiatives (Supra) at para 40; and**

Cubitt v Stannic [2000]3 ALL SA 16E at 18g

Abuse of Ex Parte Proceedings

[19] The use of ex parte procedure was both inappropriate and shambolic in this matter. The notice of motion states that should any of the respondents oppose the applicant they were required to inform the applicants' attorneys of such opposition by 1 June 2020, after the date of the set down and after the order had been taken (on 26 May 2020)

Having proceeded ex parte, one would have expected the applicants to take the necessary steps to inform the respondents of both the Court order and the basis upon which it was obtained. But this did not occur. There was no service of the order upon the respondents. The First Respondent only became aware of the Court order - handed down on 26 May 2020 – on 2 June 2020 when he received a copy of the order from the banks. This in my view, is a strange or bizarre manner of litigation.

[20] Rule 6 makes provision for both applications on notice and ex parte applications. However, ex parte applications are regarded as exceptional. Where relief is sought against a respondent ex parte a substantial case must be made out in order to proceed in such fashion. The present case is not remotely of that sort.

[21] It is a fundamental principle of the administration of justice that relief should not be granted without permitting such affected person to be heard. In the context of an ex parte application, the Court in **South African Airway SOC v BDFM Publishers (Pty) Limited 2016 (2) SA 561 (GJ)** observed that "the principle of *audi alteram partem* is sacrosanct in the South African Legal System" and that the "only times that the Court will consider a matter behind a litigant's back are in exceptional circumstances"

The Supreme Court of Appeal in **Recycling and Economic Development Initiative (Supra)** stated:

"[80] It is fundamental principle of the administration of justice that relief should not be granted against a person without allowing such person to be heard. Very rarely is a case so urgent that there is no time to give notice. In other cases, there may be a reasonable and substantiated apprehension that giving notice would defeat the applicant's legitimate purpose in seeking relief, for example because the respondent would dispose of property or evidence that the applicant wishes to claim or have preserved. In cases of this kind a court may be willing to dispense with the need to give notice but this power should be exercised with great caution and only in exceptional circumstances. The procedure adopted is even more objectionable if the applicant's case rests largely on untested hearsay, which it was in this case."

[22] The relief sought and obtained ex parte in this matter effectively strips the rightful directors of the companies involved in their statutory duties to manage the affairs of the companies. Moreover, it inserts interim directors whose eligibility does not withstand scrutiny. One of those so inserted, was previously dismissed as a director. This order has far-reaching consequences in the corporate world. There was inadequate justification for proceeding ex parte at all. In my view this constitutes abuse of the ex parte procedure.

Costs

[23] The Respondents asked for and were granted an order for the discharge of the rule nisi with costs awarded on an attorney and client scale. In my view such a cost order is justified.

[24] The Applicants levelled the most serious allegations of money laundering, fraud and theft on the part of Mr Pather, the First Respondent without any admissible evidence whatsoever. There was simply no factual substratum for the case advanced. The Applicants were repeatedly invited in the answering affidavit to withdraw these unsubstantiated allegations of criminality failing which a punitive order of costs would be requested. Remarkably the Applicants declined this invitation. In the replying affidavit, however, the

allegations of criminality were baldly repeated but without any substantiation whatsoever.

In these circumstances a punitive order of costs is manifestly justified. In my view the ex parte application brought by the Applicants has been abusive in multiple respects.

[25] Our Courts have awarded punitive costs where a party abuses the process of the Court as in the present case.

See: **Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 354**

Van Staden and Others v Pro-Wiz Group (Pty) Limited 2019 (4) SA 532 (SCA) at paras 15 & 22

Manuel v Economic Freedom Fighters and Others 2019 (5) SA 210 (GJ) at paras 80 & 84

[26] In the present case the Applicants have made reckless and serious allegations against Mr Pather in particular. None of the allegations are justified.

Furthermore, in the present case there has been a reckless disregard for the duty of disclosure in ex parte proceeding. In addition the applicants made reckless and unsubstantiated allegations of criminality and declined to retract same when invited to do so.

[27] It is for all the above reasons that I granted the order discharging the rule nisi on 23 June 2020.

E M MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	**: 23 June 2020**
Order Pronounced on	**: 23 June 2020**
Reasons Furnished on	**: 29 June 2020**
For the Applicants	**: Adv. TP Kruger SC**
Instructed by	**: Rachidi Inc Attorneys**
For the Respondent 1st, 4th, 5th& 12th	**: Adv. K Wilson**
Instructed by	**: Maluks Attorneys**
	c/o Corrie Nel & Kie Attorneys