

SOUTH AFRICA / JUDGMENT

Farraque v Mhlongo In re: Mholongo v Farraque and Others (43344/21) [2021] ZAGPPHC 850 (17 November 2021) [2021] ZAGPPHC 850

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi

CASE / FILE NUMBER

43344/21

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 43344/21

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE:

17 NOVEMBER 2021

In

the matter between: DULA
EDMEN
FARRAQUE
APPLICANT
And
NTANDO
ZWELIHLE
MHLONGO
RESPONDENT
In
re: NTANDO
ZWELIHLE MHLONGO
APPLICANT
DULA
EDMEN FARRAQUE
FIRST RESPONDENT
ABSA
LTD
SECOND RESPONDENT
FIRST
NATIONAL BANK LTD
THIRD RESPONDENT

JUDGMENT

TLHAPI J

- [1] On 22 October 2021 the following order was granted in favour of the first Respondent with reasons to follow:
1. The rule nisi issued under the above case number dated 20 September 2021 is hereby discharged;
 2. The rule nisi issued under the above case number dated 22 September 2021 is hereby discharged;
 3. The application is dismissed with the Applicant to pay costs on a party and party scale;
 4. 2nd respondent is directed to remove the hold placed on the 1st respondents Accounts held by the 2nd respondent under account numbers [...] and [...].
- [2] This application was set down on an urgent basis for reconsideration in terms of Rule 6(12) (c), for an order seeking the discharge of two rule nisi obtained ex parte under the above case number, dated 20 and 22 September 2021 respectively. The rule nisi were returnable on 20 October 2021. Although the reconsideration application was to be heard on 19 October 2021, due to the heavy roll I placed the matter for hearing on 20 October 2021 which accommodated the return date and, I further extended the rules to 21 October 2021 since I had requested counsel to file heads of argument. For convenience, reference shall be made

to the parties as they appeared in the ex parte application.

- [3] On 20 September 2021 the applicant obtained an order directing that second respondent retain a sum of R3 511 158.00, which was paid into account [...] held by the first respondent, as part payment of R3 546 629.00, paid to the first respondent on 8 September 2021. The second respondent was interdicted and restrained from giving the first respondent access to such account. The second respondent was further directed to disclose activity on such account since 8 September 2021. The respondents were invited to show cause on the return date why the money should not be repaid to the applicant.
- [4] On 22 September 2021 the second respondent was interdicted and restrained from allowing the first respondent to draw against a sum of R3 500 000.00 paid into a savings account of the first respondent held under [...] with the second respondent and the same restraint that pertained to the former order applied. The second respondent was ordered to preserve the monies.
- [5] The first respondent filed a rejoinder affidavit without leave of the court which he requested be condoned, in that it was filed in fairness to him; it was necessitated that he respond to the applicant alleging new facts upon which he relied in reply. It was contended that these facts were within knowledge of the applicant and were not disclosed in the founding affidavits in the ex parte applications. I allowed the affidavit the reasons as shall become clear below.

BACKGROUND

- [6] The applicant contended that he erroneously deposited into an account of the first respondent a sum of R3 546 620.00 instead of R35 462.00. 00 The latter amount was in respect of tyres purchased from the first respondent after negotiations were concluded via cellphone and WhatsApp on 9 August 2021 and, the first respondent provided his bank details as seen from a copy of a screenshot in Annexure 'EF1'. The tyres were advertised on Instagram. The monies were deposited into an account [...] held by the first respondent with the second respondent on 8 September
- 2021. At the time the applicant was located in Sandton, Johannesburg and it was also the date agreed upon for delivery of the tyres. Proof of payment was annexed as 'EF2'. The first respondent failed to deliver the tyres as promised.
- [7] On 9 September 2021 after realizing the erroneous payment the applicant called the first respondent, who answered but dropped the call. After several frantic calls to the first respondent to no avail, the applicant contacted his bank, the third respondent for assistance for the reversal of payment but the money had already been transferred to the first respondent. The second respondent advised the applicant to report the incident to its fraud department and another report was made to the police. A docket was opened at the Sandton Police Station under docket 175/09/2021. Arrangements were made to launch an urgent ex parte application to preserve the monies in the first respondents accounts, after it transpired that his accounts were not blocked by the bank and the first respondent was not responding

to calls made to him. Without a court order the first respondent would dissipate the monies in his account since the applicant would not have any control over them and the first respondent was not cooperating to refund the monies erroneously deposited.

- [8] The second urgent application was launched when it came to the applicant's knowledge that the first respondent had transferred R3 500 000.00 into a Depositor Plus account with the same bank and that only R60 000.00 remained in account [....]. The applicant contended that he had the first respondent's two cell phone numbers and email address but he had no knowledge of his whereabouts and the services of a tracing agent were employed. The first respondent could not be found at his home where the applicant had been on several occasions to demand the return of the money erroneously deposited
- [9] The first respondent contended that he met the applicant during December 2020 at a Mercedes dealership in Nelspruit, and thereafter they had contact with each other to discuss vehicle alterations and other business dealings. He annexed screenshots of conversations held with the applicant in May, July and August of 2021. He denied having placed an advertisement for the sale of tyres on Instagram or that contact with the applicant was initiated as a result of this advertisement. The applicant had failed to furnish proof that such alleged advertisement existed.
- [10] During July 2021 there were discussions initiated by the applicant as middle-man, on behalf of one Cedric (Mothegi Jael Mashile), regarding the sale of two vehicles a Porsche and an Aston Martin. The latter had allegedly been pawned at an entity in Johannesburg. Two tax invoices were sent to the first respondent reflecting the value of the vehicles as seen from annexure 'D'. He had interest in acquiring the Aston Martin at R3 800 000.00 as he intended reselling it at a 10-15% profit. He then arranged with the applicant for payment of what was due to the Pawn Shop in the amount R2 600 000.00. The balance would be paid to the applicant.
- [11] On 20 July 2021 an amount of R57 000 was paid to the applicant. The Pawn Shop was paid in staggered amounts and on 23 July 2021 of R1 000 000.00; R900 000.00; R500 000.00; R100 000.00; R100 000.00. It was further arranged that since the first respondent was in Mozambique that the applicant would take delivery of the vehicle on behalf of the first respondent to be parked at the first respondent's residence and this was done on 23 July 2021. The balance of payments to the applicant were made during August 2021 onwards into the business of the applicant 'Lichaweletu Trading Enterprise', where applicant is sole director. On 19 August 2021, R300 000.00 was paid and further two payments of R50 000.00 and a further amount paid in cash of R50 000.00. According to the first respondent he had other deals with the applicant as reflected in amounts paid by applicant to him on 24 August 2021 of R24 000.00 and R100 000.00 on 30 August 2021.
- [12] It was also in August 2021 when the applicant acting as middleman

indicated that he had a buyer for the Aston Martin. As they had previous deals, he reconciled the amounts owing to him by the applicant also making provision for a profit, he fixed the sale price at R3 546 620.00. The applicant insisted on delivery during the first week of September and on 8 September he made payment of the amount from his business account and arrangements were made for the delivery of the vehicle on the same day.

[13] The first respondent was in Mozambique and as the applicant was

insisting on delivery arrangements were made for an employee to facilitate delivery. The first respondent transcribed some of the

messages on the voice notes emanating from the applicant during that time. Criminal charges were laid against the applicant after the first respondents house was ransacked and R150 000.00 stolen during the process of delivery of the vehicle. The first respondent

contended that applicant wished to defraud him by reversing payment of the vehicle after he had taken possession thereof at his house. According to the first defendant his house was ransacked by the applicant and there was theft of dollars worth R150 000 taken by the applicant and those who accompanied him his house, the first respondent travelled to Edenvale on 8 September 2021 to lay criminal charges against the applicant.

[14] In reply the applicant denied that he had said that he obtained the first respondent's contact on Instagram. He denied having failed to disclose material facts in the founding papers in that the application was launched under extreme urgency, which only allowed for relevant facts to be included when the ex parte applications were launched. He denied that he got the first respondents telephone details from the Instagram advertisement, he had those number before as he in the past had business dealings with first respondent.

[15] The applicant annexed ZM5 and ZM6 being printouts from his WhatsApp

messenger regarding discussions on the purchase of the truck tyres and erroneous payment. He intended buying the truck tyres to sell for a profit. On 29 July 2021 the first respondent sent photographs of tyres he could supply and he used the details on the tyres to seek a quote for the same tyres from Thomas Tyres to negotiate an affordable price with the first respondent. He communicated with the first respondent via one of his many cell phones with numbers on 258 84 756 5010.

[16] He admitted sending the invoice of the Aston Martin and Porsche to the first respondent and that the Aston Martin had been pawned as explained by the first respondent and he used the same cell phone number mentioned above used to send photographs of the truck tyres.

[17] The applicant contended that the real owner of the Aston Martin was one Cedric who was also his neighbour. Cedric had pawned the vehicles with a Mr Peretz for purpose of securing a loan to set up a business. Cedric could not repay the loan and in order to prevent Cedric from losing the vehicle, he demanded that the first respondent pay back monies owed to him in respect of another previous deal and the first respondent owed him R2 600 000.00. He

instructed the first respondent not to pay him direct but to make payment to Mr Peretz for release of the Aston Martin. He did not want the payment to reflect in his business account to avoid tax implications. Cedric could not take delivery of the vehicle because he was traveling abroad. Mr Peretz informed him that he would only release the vehicle if instructions came from Cedric for the release of the vehicle to the applicant. Authorization was given as seen to the applicant as seen in ZM9. The applicant requested the vehicle to be stored at the first respondent's place to be collected by Cedric on his return. He annexed confirmatory affidavits from Cedrick and Mr Perez.

[18] The applicant admitted taking delivery of the Aston Martin and he

contended that he delivered it for storage at the first respondent for collection by Cedric. It was also around this time that when he was involved in negotiations with the first respondent to purchase the tyres. He denied having broken into the first respondents house and removed certain items.

THE

ISSUES

[19] The applicant seeks an order for the reversal of monies allegedly

erroneously deposited into the bank account of the first respondent held with the second respondent on 8 September 2021. The first

respondent in a reconsideration application seeks a discharge of the rule nisi of 20 September 2021 and 22 September 2021 and a dismissal of the ex parte application and, that the hold on the first respondent's two accounts [...] and [...] be removed.

THE LAW

[20] Although this is an application in terms of the Uniform Rules, Rule

6(12)(c) for the reconsideration of the orders granted ex parte on the 20 September 2021 and ' 22 September 2021, this hearing almost coincided with the return date on which the respondents had to show cause if any, why the monies preserved should not be paid back to the applicant. In my view the application for reconsideration before me conforms to what was stated in I S D Solutions (Pty) Ltd v C S D N Solutions and Others 1996 (4) SA 483 (W) where Faber AJ stated the following at 4870:

" Something needs to be said about the procedure. Although no hard and fast rule need to be laid down, it seems the 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."

Of importance is that the version of the parties is before me in that the applicant filed a replying affidavit. Although I do not want to refer to the application as a hybrid, in considering the affidavits I shall deal with the facts also as if the first respondent's affidavit complies with the order that seeks him to show cause why the rule nisi should not be confirmed.

[21] The first respondent sought leave to introduce a further affidavit in response to the applicant's affidavit. It is trite that the court should generally observe the rules regarding the number of sets of affidavits in motion proceedings, however, the court has a discretion to allow or not to allow a further affidavit, and that discretion should be exercised only where good reasons are given, *Hano Trading CC v JR Investments (Pty) Ltd and Another* (650/11)

[2012] ZASCA 127 (21 September 2012) at paragraph [11]; in *James Brown and Hamer (Pty) Ltd* (previously named *Gilbert & Co Ltd*) v *Simmons* NO 1963 (4) SA 656 (A) at 660 D-H the court stated:

"It is in the interests of the administration of justice that the well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed.

That is not to say that those general rules must always be rigidly applied; some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted...."

As shall be seen below, the applicant in my view, sought to, in a subtle manner to introduce new facts in reply. The applicant had knowledge of the facts he introduced when the applications were launched and as shall be seen below, though repetitive of the facts already summarized I give reasons why it was necessary to have disclosed as he approached the court in both ex parte applications. By not disclosing such information he denied the court information necessary to assess whether the first respondent should be served, also denying the first respondent an opportunity to be heard. It often happens and depending on the facts that an applicant is ordered to serve his/her opponent even where he has launched an ex parte application before the matter is heard.

[22] In *Cometal-Mometal SARL v Corlana Enterprise (Pty) Ltd* 1981

(2) SA 412 (W) at 414 E Marg J stated:

""(1) in ex parte applications all material facts must be disclosed which might influence the court in coming to a decision;

(2) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission (ie of the order obtained ex parte); and

(3) the Court apprised of the true facts, has a discretion to set aside the former Order or to preserve it."

[23] In *Somnium Holdings (Pty) Ltd v Vodacom Service Provider (Pty) Ltd and 2 Others* (Case 33399/2010 Gauteng High Court unreported judgement of Tuchten J delivered on 17 September 2010) is a echoes the principle uberrima tides in ex parte application, and the reason why a material non-disclosure may result in the dismissal of an order already granted:

"50. I would add this: in this division, a most pernicious practice has become prevalent. Counsel frequently moves for rules nisi, without service, which contain far reaching provisions for interim relief, operative immediately. The grounds on which the applicant asks the Court to dispense with service which contain far reaching provisions for interim relief, operative immediately. The grounds on which the applicants asks the Court to dispense with service are often flimsy at best and buttressed with the assertion from the bar that what is being sought is only a rule nisi, as if what was being sought was trivial, formal relief which if found to have been incorrectly granted, could easily be remedied at a hearing in due course. That is in many cases not so. The present is a case in point.

"51 The harm which was caused to Vodacom may, if Gogga is unable to pay what it owes, be irreversible. In many cases respondents with slender means are faced with a choice of failing to comply with a court order or fighting a long uphill battle to reverse the order already made against them. We do not see the cases that such respondents have to settle or conceded because of the injustice that denied them a fair hearing at the outset.....Lay litigants may not understand the nicer points of the application of the principle of audi alteram partem to motion proceedings. Their representatives however do.....

"52secondly, that Somnium was guilty of material non-disclosure in relation to its failure to disclose the December 2007 agreement and the true inwardness of Hatzeberg's interaction with Conradie..."

[24] The duty to disclose material facts and the extent to which an applicant in an ex parte application is expected to conduct the application is aptly put in *Recycling and Economic Development Initiative of SA NPC v Minister of Environmental Affairs* 2019

(3) SA 251 (SCA) at paragraph 47, where the following is stated:

"The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing of 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 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 the matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective."

[25] It is common cause that the applicant and first respondent gave

different accounts of the disputes and since these were material disputes of fact there was no request to refer the hearing to oral evidence. Counsel for the applicant contended that the defence raised by the first respondent was "untenable, far fetched and fabricated" and that the relief sought ought not to be granted. It is trite that in these circumstances the matter is to be determined in terms of the principles in *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) DA 623 (A) where the following was stated:

"Where there is a dispute as to the facts a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the facts admitted in the applicant's affidavit justify such an order, or where it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted, requires clarification and perhaps qualification.

There may be exceptions to this general rule, for example where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

[26] It is one thing for a contention that the evidence of the first

respondent was untenable, far fetched and fabricated without first dealing with the evidence that the applicant failed to disclose and which had relevance in making a determination of the application. The mere fact that the applicant made several admissions confronted with the version of the first respondent such version cannot be said to be mere fabrication.

[27] Counsel for the applicant contended that the applications were based

on vindication and not on a *mareva* injunction. The applicant sought to retrieve his own property and not to preserve the property of another person. Further, that the applicant was entitled to bring the application to seek relief, even though temporary in nature. The applicant contended that urgency was motivated by the fact that the applicant did not have knowledge of the whereabouts of the first respondent, he could not reach him and the first respondent did not have assets in South Africa. Counsel for the first respondent contended that the applicant had breached an important requirement in ex parte applications being that of *uberrima fides*, being a duty placed on an applicant who approaches the court without service on the other party to disclose every circumstance which might

influence the court in granting or not granting the relief sought. It was further contended that a failure to disclose material facts may result in the court dismissing the application on that ground alone and that in this case the applicant had wilfully misrepresented the true facts and had consequently obtained two court orders.

8 September 2021

[28] In the founding affidavit applicant contends that he made payment

erroneously into the account of the first respondent of R3 546 620.00 instead of R35 462.00 which was for the purchase of tyres which sale had already been negotiated. Annexure EF2 reflects that this transaction went through at about 09.26.13. The applicant stated that he awaited delivery of the tyres on the same day as arranged but the tyres were not delivered. It does not seem that on this version any action or attempts to contact the first respondent were taken, after all payment was effected. The first time that he tried to contact the first respondent was the following day when he became aware of the erroneous payment. The version of the first respondent shows that on 8 September 2021 the applicant knew where he could have made contact with the first respondent for the delivery of the tyres, so not knowing his whereabouts or residence which could be ascertained telephonically or by visiting the applicant's residence because he had been there in July 2021 already, would not have been problematic to find him the following day as shall be seen below.

[29] The first respondent gave a different account of the activities of 8 September 2021. The applicant had again acted as a middle man in the resale of the Aston Martin which first respondent had initially acquired through the applicant during July. As I see it, it does not seem that the first respondent knew Cedric personally. Having acted as middleman the applicant insisted on delivery 1st week of September 2021. As he was still in Mozambique he made arrangements for an employee to hand over the vehicle to the applicant and this occurred only after the applicant had paid the purchase price of R3 546 620.00 into his bank account on 8 September 2021.

[30] In reply the applicant admits that on 8 September 2021 he had gone to the house of the first respondent and he waited for a long time for the arrival of the first respondent's employee Mr Cossa, who had to travel from Mozambique to South Africa and this only occurred after he had enlisted the help of the police for the hand over of the vehicle. In the replying affidavit at paragraph 17 he states:

"17.5 I, during this time was in negotiations with the first respondent to purchase the truck tyres.

17.6 Cedric, his driver and I attended the Edenvale address on 8 September To collect the Aston Martin Vehicle. The first respondent indicated that he would send somebody to hand over the vehicle to me. I waited for a long time and eventually called the police to assist me. After informing the first respondent that the police are at his Edenvale residence, he finally responded to say someone is on the way.

17.7 I in this regard refer the Honourable Court to the affidavit which I depose to at the Edenvale Police Station which is attached hereto marked "ZM12"

[31] First of all "ZM12" is titled "Statement by Suspect"

and he states that he was informed of his rights concerning the allegations against him. The statement is not dated and is not

attested to. The question is what relevance should the court attach to such statement. Nowhere does the applicant state that he in fact had paid for the tyres and awaited delivery that very 8 September. Paragraph 17 of the replying affidavit suggests that while he had gone to fetch the Aston Martin at the first respondent's place, he was during that time engaged in negotiations to purchase truck tyres, he does not say on the 8 September I had purchased and paid for the truck tyres. Instead, he was engaged in an activity not related to the delivery of tyres. In my view, the applicant should have disclosed that he had two engagements with the first respondent on 8 September, that in addition to him having paid for and was expecting delivery of tyres that day, the first respondent was giving him problems in handing over of an Aston Martin vehicle he had placed with the first respondent for safe keeping. He had to enlist the police and even drove to Milly's Fuel Station on the N4 to pick up Mr Cossa. He annexed without addressing which parts of the more than thirty pages of illegible tracker reports "ZM13", the court had to have regard to as proof that he had taken such trip to meet Mr Cossa. Regarding the delivery of the tyres he had purchased from the first respondent, it does not make sense or there is no explanation regarding awaiting delivery from Mozambique when he was located in Johannesburg. (my underlining)

When did the applicant acquire knowledge of the first respondent or when did they become acquainted -friends / the sale or purchase of truck tyres

[32] In the founding affidavit the applicant does not give a date on which the advertisement for the sale of the tyres appeared on Instagram. He denies in reply having said he obtained the first respondent's

details on Instagram. Nowhere in the 36 paragraphs of his first founding affidavit did he allude to having encountered the first

respondent before or outside of the telephonic conversation which occurred as a result of the Instagram advert and, the information

obtained from the screenshots of the first respondent's messages of the 6 and 9 August. Contrary to what the applicant avers in reply the founding affidavit in my view, suggests that the encounter with the first respondent came about as a result of the Instagram advert and at paragraph 10 thereof he states as a result he "started to communicate with him and informed him of my interest.....using my cellphone and specifically the WhatsApp messenger service". "EF1" is a screen shot showing the first respondent's telephone number and bank details dated 6 and 9 August 2021. In my view the applicant states that these details were given for purpose of payment for the truck tyres.

[33] In the second founding affidavit the applicant mentioned the first

respondent's cellphone numbers and an email address and states that he does not have any knowledge of the first respondent's whereabouts

and he had to resort to employing a tracing agent who also had to establish the whereabouts of the first respondent. The question I ask is, did the applicant inform his legal representative that the first respondent was in Mozambique, that he was in contact with the first respondent telephonically the entire day of 8 September 2021 regarding another incident not related to the delivery of the truck tyres he had allegedly paid for, that he had gained entry to the residence of the respondent on that day in the presence of the first respondent's employee and one Cedric and a driver? As I see it the presence of the first respondent in Mozambique at the time he was being traced only came about in reply. The tracing instructions were conducted on 21 September 2021 seeking the exact location of the first respondent about 11 days after being to his house and only after launching the first ex parte application. Now paragraph 22 and 23 of this affidavit contradicts the denial by the applicant of knowledge of the whereabouts of the first respondent:

"I am aware of the fact that the residential address of the first respondent is a two-bedroomed apartment. I attended to the first respondent's residential address on various occasions to ask the first respondent to return the funds which I erroneously deposited into his bank account to me"(my underlining)

These attendances at the first respondent's house could only have occurred after the incident 8 September 2021. The Search Works search does not give an Edenvale address being the place where applicant alleged the vehicle was parked. The fact of the matter is that the first respondent may have been in Mozambique and if he was not responding to his telephone calls, no indication is given that applicant made an attempt to communicate via email. His version is that from the 9 September 2021 the first respondent was not taking his calls, but this does not mean that communication with the first respondent could not have been achieved via email.

[34] The first respondent denies that there was an Instagram advert or the alleged first encounter via details found on Instagram. His acquaintance begun with the meeting at a Mercedes garage in December

2020 and this chance meeting blossomed into annexures A,(May 2021 pictures of a truck and construction vehicles sent by the applicant

to first respondent); B (August 2021 document illegible but first respondent says it relates to a coal deal where applicant acted on behalf of another entity), (C July 2021 an affidavit by applicant stating that first respondent was his business partner). He contended that he gave his bank details to the applicant on 9 August 2021 for him to repay a personal loan which was indeed repaid on 24 August

2021. The applicant had admitted having received other sums of money from the first respondent. before the alleged payment for the tryres.

- [35] In reply the applicant states Mbombela being near to the border and was extremely busy, he saw a business opportunity to buy tyres from the first respondent at a reduced price. Relevant to the negotiations about the truck tyres and erroneous payment he annexed "ZM5". He alleged that the first respondent sent photographs of the truck tyres he could supply; that he used the details of the tyre, brand, size, in order as depicted in the photographs to approach Thomas Tyres in Nelspruit for a quotation, which was sent to first respondent to discuss the purchase a price which would make it financially viable for him. He sent the first respondent "ZM6" and "ZM7" and latter was the quotation he received from Thomas Tyres.
- [36] In first respondent's rejoinder affidavit he again denies ever placing an advert on Instagram, that he has never had an Instagram account. In response to "ZM5" and "ZM6" he stated that the applicant had failed to provide the chat history for scrutiny by the court. He contended that "ZM5" was not an advert but a mere photo of a Dunlop tyre and ZM6 reflected a R10 000.00 which was an amount paid by him to a company of the applicant "Litchaweletu Trading Enterprise" and he asks a question how it was possible to advertise the sale of tyres and still pay an amount of R10 000.00 to the applicant. The first respondent stated that he had requested the applicant to obtain a quotation "ZMT" from Thomas tyres in order to compare with the prices in Mozambique for his construction fleet. It is not denied first respondent he carried on such business
- [37] In my view it is only in reply that the applicant for the first time gives insight into his relationship with the first respondent. Negotiations regarding the sale advertised if true could have commenced before or around 27 July 2021. Now in my view this whole version in annexures above is something that was within the knowledge of the applicant when the first ex parte application was launched and, more than 10 days had elapsed after the 8 September 2021. He was in and around Gauteng and the nature of his complaint about the erroneous payment demanded that he approach the court on an extreme urgent basis and he failed to do so. That he waited more than 10 days should have given him ample opportunity to amass all the information tendered in reply which he now seeks to be considered by the court. Further, I consider this version about the sale of the tyres nothing more than pulling wool over my eyes for the following reasons: as the first respondent states "ZM5" is but a mere photograph of tyres. It is not possible to see the tyre size, the brand and the year of manufacture by merely looking at the photograph there is no indication whether the tyres were new ones or used ones.
- [38] ZM6" is indeed proof of payment by the first respondent to the applicant. Why would he pay the applicant when he was the one selling the tyres to the applicant. Again, according to the applicant he had discovered an opportunity to go into a business of selling tyres which he could source from the first respondent if his prices were a financially viable price. The inference drawn is that he would rather have imported tyres from the first respondent in Mozambique which he says he finally did and paid for. There is so much detail in that trans-border transaction which is not proffered by the applicant in his founding papers. Having

acquired "ZMA5" "ZMT" from about 27 to 29 July 2021 and payment for the tyres being made on 8 September 2021 no details are given of the number of units, the unit price and total, the brand, the size, no purchase invoice. I am surprised as averred in reply that a legal representative, counsel or an attorney who should know that approaching a court ex parte required uberrima fides on the part of the applicant, would advise the applicant not to disclose his prior relationship with the first respondent because it had nothing to do with the erroneous payment which he made. In reply the previous relationship has revealed annexures and a relationship as discussed above, which had relevance to the purchase of the tyres and the Aston Martin. I find that the conduct of the applicant in the two ex parte applications of not disclosing prior encounters which had relevance to the matter amounted to him concealing any acquittance/business dealings/friendship with the first respondent before the 6 and 9 August 2021 in order to bolster his version regarding the purchase of the tyres.

Erroneous payment of R 3 546 620.00 I Purchase price of Tyres R 35 462.00 The payment of R2 600 000.00 and other substantial sums that have exchanged hands

[39] Unfortunately, none of the parties requested a referral to oral evidence, both seeking to have their issues determined urgently and the courts having exercised its discretion to deal with the matter on affidavits presented. Further, it does not assist the applicant who failed to disclose material details in his founding papers (like asserting in other business circumstances that the first respondent was his business partner and even availing the first respondent use of his vehicle into Mozambique). In *Recycling supra* it is stated that even evidence that is adverse to an applicant must be disclosed in ex parte applications, when the applicant knows that a respondent might disclose such information in his defence.

[40] The first respondent disputed the version of the applicant that the payment of 8 September was erroneous. Apart from stating that he purchased tyres for the sum of R35 462.00 the applicant has failed to give any detail from the first respondent showing what purchase price had to be deposited into his account. Regarding the details of the alleged erroneous payment it is the first respondent who gave details in answer. The applicant acting as a middle man for one Mashile wanted to release his vehicles from a pawn shop, that it was an urgent sale in that interest on the loan/pawnshop transaction was accruing. As a party being interested only in the Aston Martin and not the Porsche, the first respondent released the vehicle with the intention of re-selling it at a profit by paying the R2 600 000. 00, being the amount owed to Mr Petzer. The first respondent was willing

to buy the car for R3 800 000.00 and to resell it at a profit of between 10% - 15%. Counsel for the applicant contends that the first respondent has not offered any explanation why he agreed to sell the vehicle for R3 546 629.00 at a loss one month after purchasing same. What was paid to Mr Petzer was only what was due for the release of the vehicle and not the full purchase price. What is evident in the relationship of the applicant and first respondent is that substantial sums of money has exchanged hands on various occasions even before the alleged purchase of the tyres. On the applicant's version given only in reply is that the first respondent owed him the said

amount of R2 600 000.00. No details are given, I suppose it is not necessary for the court to know the details. So, the applicant proffers no detail at first instance but the first respondent gives details, (pay on behalf of Mashile who cannot pay Mr Petzer and the loan-pawnshop transaction is accruing interest and Mashile can not pay to release the vehicle). The applicant admits that an amount of R2 600 000.00 was paid to Mr Petzer. He instructed the first respondent to pay Mr Petzer and not himself, the intention being to avoid him paying tax on the amount R2 600 000.00 (paying a third party or diverting payment to himself, by extension paying a third party as a tax avoidance transaction) on the amount.

[41] It is the breach of the principle uberrima fides on several material aspects that resulted in the dismissal of the application.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON

: 22 OCTOBER 2021

JUDGMENT

RESERVED ON

: 22 OCTOBER 2021

ATTORNEYS FOR THE APPLICANTS :

ADRIAAN DU PLESSIS

ATTORNEYS FOR THE RESPONDENTS : VORSTER & BRANDT INC

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