

SOUTH AFRICA / JUDGMENT

Kruger v Ithala Soc Ltd (19051/2023)

[2024] ZAKZPHC 17 (14 March 2024)

[2024] ZAKZPHC 17**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Veerasamy AJ

CASE / FILE NUMBER

19051/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****DIVISION, PIETERMARITZBURG****CASE****NO: 19051/2023****In**

the matter between:

JOHANNES

GEORGE KRUGER

N.O.

Applicant

and

ITHALA

SOC LTD

Respondent

ORDER

(a) The

respondent is given leave to deliver its supplementary affidavit.

(b) The

order of Mossop J dated 22 December 2023 is reconsidered and discharged under Uniform Rule 6(12)(c).

It is replaced with the following order:

“The

application is struck from the roll”

(c) The

applicant is directed to pay the respondent’s costs of the reconsideration application, such costs to include the costs of two

counsel where employed.

JUDGMENT

Veerasamy AJ

- [1] This is an application brought on an urgent basis for the reconsideration of the order granted by Mossop J on 22 December 2023 ('the PMB order'). It was common cause during argument that the reconsideration application was urgent.
- [2] Before dealing with subject matter of the application there is the issue of the respondent's supplementary affidavit. Leave for delivery of same was sought at the hearing and in the affidavit.[1] The supplementary affidavit was delivered a day before the applicant's replying affidavit. The applicant in his replying affidavit advised that he would respond in a separate affidavit to the any new allegation raised, but no such supplementary replying affidavit was ever delivered.[2]
- [3] It is appropriate that all the facts be placed before the court, so that the main application and this application for reconsideration can be determined on a complete and correct conspectus of the facts. That is plainly in the litigants' interests and in the interests of this court.[3]
- [4] Accordingly, the respondent is given leave to deliver its supplementary affidavit.

The PMB order

- [5] I do not intend to set out exhaustively the terms of the PMB order[4] but it inter alia:–
 - (a) Ordered that the application would be heard in camera in terms of section 32 of the Superior Courts Act 10 of 2013;
 - (b) Directed the Registrar of the Court keeps the content of the Court file confidential unless otherwise directed;
 - (c) Authorised the applicant to instituted proceedings in terms of section 84(1A)(b)(ii) of the Banks Act 94 of 1990 ('the Banks Act').
 - (d) Empowered the applicant and his representatives to serve and execute the PMB Order in accordance with the Superior Courts Act and the Uniform Rules
 - (e) Empowered the applicant to recover and take possession of the assets of the respondent in terms of section 84(1A)(b)(i) of the Banks Act;
 - (f) Empowered the applicant to act in accordance with section 84(4) read with sections 84(5) and 84(8) of the Banks Act.

- (g) Directed the respondent to declare under oath to the applicant within five days of the service of the PMB order the whereabouts of the assets of the respondent wherever they may be situated and to identify these assets with sufficient particularity in PMB order to enable the applicant to recover and take possession of those assets in terms of section 84(1A)(b)(i) of the Banks Act.
- [6] The orders as foreshadowed in paragraphs 3 to 6 of the PMB order (paragraphs 5(c) to 5(f) above) to would operate as interim relief

with immediate effect.

- [7] A rule nisi was issued calling upon the respondent to show cause on 19 March 2024 at 9h30 as to why any assets recovered and which are in the possession of the applicant in terms of paragraphs 5 and 7 of the PMB order (being paragraphs 5(f) and 5(g) above) should not remain in the possession of the applicant pursuant to the provisions of sections 83 and 84 of the Banks Act.
- [8] This is the order that is the subject of the reconsideration application. The applicant in these proceedings is the respondent in the interim order but, for the sake of convenience the parties are referred to as in the main application.

The test for reconsideration

- [9] The dominant purpose of Uniform rule 6(12)(c) is to afford an aggrieved party a mechanism to redress any imbalance, injustice or repression flowing from an order which was granted as a matter of urgency in such party's absence.[5]
- [10] The two jurisdictional facts, which must be available to a party seeking to reconsider an order are that the main application was heard as a matter of urgency and that the impugned order was granted in the aggrieved party's absence. It is common cause that both of those jurisdictional facts exist in these proceedings.
- [11] The court in *Sheriff Pretoria North-East v Flink (Flink)*[6] described the application of the above mentioned jurisdiction facts as follows:

‘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.’[7]

- [12] In these proceedings, the parties delivered a full set of affidavits.[8] Thus, the ‘result is that the reconsideration of this application 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.’[9] In these new circumstances the order will be reconsidered in light of the execution of the previous order, the variation of the order and the further affidavits file by the parties.[10]
- [13] The effect is that first, ‘the issues are to be reconsidered in light of the fact that both sides of the story are now before the court’ and, second, that ‘the execution of the original order may have had the effect that those issues are not exactly the same issues which were before Court when the original application was heard.’[11]
- [14] The court is not confined only to the original application papers without reference to anything else. Such an approach is in conflict with the various decisions relating to reconsideration applications.[12]
- [15] A court dealing with a reconsideration application does so with the benefit not only of oral argument made on behalf of the party absent during the initial proceedings but also with the benefit of the facts contained in all the affidavits filed in the matter.[13]
- [16] There is no exhaustive list or set of facts, which a court must take into consideration when addressing a reconsideration application.
- Each case will turn on its own facts and ‘the peculiarities inherent therein’.[14]
- [17] Of importance, the court must consider the circumstances emanating from the execution of the court order.[15]

Analysis

of the reconsideration application

- [18] The respondent submits that the applicant failed to place material facts and evidence before Mossop J when he sought the PMB order. These omitted facts emanate from the following chronology of events as described hereunder.
- [19] It appears to be common cause between the parties that the Prudential Authority[16] refused a further extension of the respondent’s exemption, which exemption permitted the respondent to provide its various retail banking services.
- [20] The respondent argues that during the period of December 2023, before the PMB order was granted, there were various meetings conducted with the Prudential Authority during which the Prudential Authority expressed its intention to appoint the applicant as the repayment administrator.[17]

- [21] The respondent submits that during such meetings the Prudential Authority described the role and function of the repayment administrator as being a 're-purposed repayment administrator'. [18]
- [22] The respondent argues that it was advised by the Prudential Authority that the repayment administrator was merely a caretaker. It further submits that the Prudential Authority unambiguously acknowledged that salaries and remittances that are currently paid through the respondent would suffer no disruption and that the repayment administrator would ensure that such monies are received and released.
- [23] It contends that the Prudential Authority assured the respondent that it would not be required to stop taking deposits and thus it continued with its deposit taking activities whilst under the supervision of the applicant as the repayment administrator.
- [24] The applicant was appointed as the repayment administrator on 18 December 2023. [19]
- [25] However, despite the theme of the discussions as described by the respondent, between itself and Prudential Authority, the respondent ultimately instituted an urgent application against the Prudential Authority in the Gauteng Division of the High Court, Pretoria, under case no. 2023/123161, in which it sought an order suspending the winding-down of its deposit taking activities and the appointment of the applicant as repayment administrator. [20]
- [26] Such application was met by a counter urgent application from the Prudential Authority, under case no. 2023/123199, in which it sought confirmation that the final exemption notice had lapsed and the respondent be directed to cooperate with the repayment administrator in respect of further depositing activities. [21]
- [27] Both of these applications were set down for hearing prior to the set down of the applicant's application for the PMB order.
- [28] Both applications were consolidated and eventually a consent order was taken between the respondent and the Prudential Authority on 21 December 2023 ('the Pretoria order'). [22]
- [29] Before me, the respondent argues that the Pretoria order was intended to limit the powers of the applicant and, as such, when the applicant sought the PMB order he did so with the singular purpose to extend his powers so he could act beyond the injunction created by the Pretoria order and imposed on him by consent with the Prudential Authority.
- [30] The respondent further argues that the PMB order was granted under the umbrella of an ex parte application in circumstances where the applicant sought to deal with the role and extent of the applicant's powers in terms of the Banks Act. This the respondent argues was the subject of the issues in the Pretoria litigation when the Pretoria order was granted.

- [31] Thus, the respondent submits that the applicant failed to disclose to Mossop J the context and spirit under which the Pretoria order had been granted. The applicant kept the 'gist' of the Pretoria order a secret.
- [32] The further defences raised by the respondent in its affidavit and its heads of argument were not persisted with vigorously before me and correctly so since this remains a live debate in an opposed application in the Pretoria litigation which I was advised was set down for hearing on 8 March 2023.
- [33] Before me, the respondent advanced the argument that if I concluded that the application was defective on a procedural basis then it follows that the application for reconsideration should be successful.
- [34] The first procedural defective highlighted was the failure by the applicant to deliver a certificate for the matter to be heard in camera. This is different to a certificate of urgency.
- [35] The application which was moved before Mossop J sought as specific relief that the application 'should not be heard in open court, in terms of section 32 of the Superior Courts Act, 2013 (Act No. 10 of 2013 – "Superior Courts Act">).[23] This in fact was the very order granted in the PMB order.[24]
- [36] During the proceedings I enquired from the applicant's counsel as to whether such a certificate had been delivered. I was advised that such certificate had not been delivered but the applicant submitted that such a certificate was not needed, since the matter was ultimately heard in open court. It was not disputed by the applicant that such a certificate would be necessary if the proceedings were in fact in camera and that such certificate was a procedural requirement.
- [37] Where an application is heard in camera, a certificate must be delivered by the counsel appearing expressing the view that it is in the interests of justice that the matter be heard in camera.[25]
- [38] In respect of in camera applications relating to Anton Piller orders, the absence of such certificate disentitles the applicant to the relief which they seek.[26] The same would apply to any other proceedings which are intended to be dealt with in camera.[27] Before any relief was obtained on the 23 December 2023, for the urgent application to be heard in camera, the filing of such a certificate would have been necessary.
- [39] The applicant purposefully sought direction from the court for these proceedings to be carried out in camera in terms of section 32 of the Superior Courts Act. Before me, the applicant submitted that the proceedings before Mossop J were held in a courtroom and it was recorded. The argument advance by the applicant was that the application was not heard in camera.

[40] The mere fact that the application was heard within the confines of a courtroom does not mean that it was heard in open court. Proceedings

in a courtroom are in camera when effectively members of the public are not permitted to enter the court while it is in session.[28]

[41] In accordance with the judgment of Three Cities,[29] for the proceedings before Mossop J to have been heard in camera there ought to have been a certificate filed for an in camera hearing. In Three Cities the court held that in the absence of an in camera certificate the applicant was not entitled to any relief. On this score alone the reconsideration application should succeed.

[42] However, the difficulties that confronted the applicant when he instituted his application ex parte at 8h30 do not end with just the absence of the in camera certificate.

[43] When the application was brought as an urgent ex parte application, the applicant relied upon a founding affidavit comprising 28 pages and 69 paragraphs.[30]

[44] The facts upon which the applicant relied upon for the application to be heard urgently and ex parte are set out in paragraphs 64 to 69 of the founding affidavit under the heading “NEED FOR THE APPLICATION TO BE HEARD URGENTLY, EX PARTE AND IN CHAMBERS”.[31]

[45] For the purposes of this reconsideration application, it is important that I set out exactly what the applicant states in these paragraphs:

‘64. The reasons for applying for the relief on an urgent i basis and a direction that this matter should be heard in chambers, in terms of section 32 of the Superior Courts Act, should be readily apparent. I respectfully submit that this is a special case which necessitates its hearing on an ex parte basis, as contemplated by section 32.

1.25cm; margin-bottom: 0cm; line-height: 150%"> 65. The reason for seeking such a direction is that the Respondent is well-known in the KwaZulu-Natal province whereby any person acquiring knowledge of this application could forewarn any member of the public that deposited money with the Respondent pertaining to the subject matter of this application.

66. Such knowledge will in all probability cause a “bank run” or “run on the bank” where depositors withdraw their deposits from an institution if they believe they will be unable to withdraw their deposits or if they believe the institution will cease to operate soon due to liquidity issues.

67. An exchange of the pleadings in the registrar’s office which will be the inevitable consequence of giving notice to the Respondent therefore poses an unacceptable risk. The Respondent has all the protection afforded to a respondent against whom relief is granted ex parte.

68. In addition to the above I seek a direction from this Honourable Court to the Registrar of this Honourable Court to keep the content of this court file confidential until otherwise directed by this Honourable Court. The contents of this file should not be shared with any party unless written permission is obtained from this Honourable Court and/or the Applicant.
69. Full legal argument will be addressed at the hearing of this application in this regard insofar as it may be necessary.'
- [46] No reference is made directly to the any conduct which may be committed by the respondent which the applicant wished to avoid by giving notice and why the respondent should not be given notice in some form. The applicant's complaints relate to the 'bank run' or 'run on bank' risk which the applicant foresaw.
- [47] During argument, the applicant leveraged on two reasons as to why he was entitled to deal with the matter on an ex parte urgent basis. The first reason given was that there was a risk that notice to the respondent might result in a divestment of its assets and the second reason was that the issues of notice and urgency were decided with finality in favour of the application in the case of *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhokinkosi Zulu and another* [2017] 1 All SA 1 (SCA).
- [48] On the first reason proffered, when I asked the applicant to direct my attention to where such allegation might be located in the founding affidavit, the applicant submitted that he relied upon paragraph 24 of his affidavit and the annexure to which such paragraph refers.
- [49] Paragraph 24 of the founding affidavit reads as follows:
- 'I attach the Notice of Motion and the founding affidavit in the PA application as it summarises prior litigation and judgments as annexure 'JGK11'. I do not contend that all the allegations are common cause.'
- [32]
- [50] Annexure 'JGK11' is the affidavit delivered by the Prudential Authority in the Pretoria litigation.[33] The applicant contends that based on what has been alleged by the Prudential Authority in its Pretoria affidavit, the applicant was justified in moving this application urgently and ex parte against the respondent.
- [51] The Prudential Authority who actively relied on its allegations in the Pretoria litigation did not move its application ex parte. Thus, those allegations alone are insufficient for an ex parte in camera hearing.
- [52] The application before Mossop J was 246 pages in volume. The application was set down for hearing on 22 December 2023 at 8h30 and issued on 21 December 2023. There is no indication as to what time the papers were issued and when same were given to Mossop J for consideration.

[53] Under such truncated timelines, the applicant bore a duty to place the facts which he relied upon squarely in the body of the founding

affidavit rather than obliquely rely upon an annexure and expect the judge hearing the application to have trawled through the annexures in order to find the material which the applicant relies upon. This is equally important in respect of the further disclosures which the applicant ought to have engaged with in the affidavit. I deal with those further on.[34]

[54] Thus, the founding affidavit did not, in my view, deal with the issue of why the application ought to be heard ex parte as against the respondent.

[55] The respondent submits that that there were various negotiations which led to the Pretoria order. It argued that the applicant had the obligation to place these facts before Mossop J, especially in circumstances where the application was brought ex parte.

[56] The applicant contends that he was not a party to any of those discussions in Pretoria and thus could not have known about those

discussion which the respondent contends are material.

[57] The respondent argues that what should have been placed before Mossop J apart from the plethora of correspondence and negotiations that had been ongoing with the Prudential Authority was the fact that the order sought and ultimately agreed to by consent in Pretoria was a pared down order.

[58] The respondent argues that the relief which was omitted by agreement in the Pretoria order is the relief which the applicant sought in the PMB order.

[59] The respondent's submission is that the Prudential Authority and it had agreed that the powers sought by the applicant in the PMB order would not be conferred on the applicant.

[60] I am alive to the fact that the interpretation of the Pretoria order and the issue regarding whether this agreement with the Prudential

Authority existed is a live dispute before the Pretoria High Court, which had been set down to be heard on 8 March 2024. However, these facts more especially the alleged deliberately pairing down of the Pretoria order was not placed before Mossop J when he was asked to grant the PMB order.[35]

[61] The applicant's argument is that he could not know about the discussions between the Prudential Authority and the respondent

because he was not party to those discussions. Whilst his submission being that he could not disclose those discussions to the court is inviting it is however somewhat divorced from the actual position the applicant was placed in and is not an answer to the question of whether he could have ascertained such information prior to moving his application before Mossop J.

[62] The applicant is correct in that he was not a party to the litigation leading up to the Pretoria order and there is nothing in the

affidavits which indicate that he was aware of the discussions between the respondent and the Prudential Authority.

[63] However, when the applicant sought the PMB order, he did so almost in conjunction with the Prudential Authority.

[64] I say this because I raised with the applicant a question about service on the Prudential Authority and whether that statutory requirement

had been met. The applicant, in response, submitted that a similar question had been raised by Mossop J at the initial hearing. The applicant's response to Mossop J (as it was to me) was that the Prudential Authority had delivered a confirmatory affidavit in these proceedings and was thus aware of same.[36]

[65] The confirmatory affidavit serves as proof of discussions between the applicant and the Prudential Authority in which the applicant sought support for this application, such discussions resulting in the very confirmatory he relied upon to prove service.

[66] The applicant sought the confirmatory affidavit so that (on his own version) could leverage off the Pretoria litigation to obtain his relief before Mossop J. In doing so he was obliged to ensure that he elicited all information from the Prudential Authority which he might need to be placed before Mossop J when the matter was first heard.

[67] Mr Kerwin Martin[37] tendered the 'Prudential Authority' confirmatory affidavit which is intended to confirm the Prudential Authority's affidavit the Pretoria litigation marked annexure 'JK11' as referenced in paragraph 24 of the applicant's founding affidavit. Mr Martin is also the deponent to annexure 'JK11'.

[68] As the applicant contends in paragraph 24 of his founding, Mr Martin's affidavit in the Pretoria litigation details a litany of ongoing litigation in Pretoria and in particular the litigation which eventually led to the Pretoria order being granted days before the PMB order was granted. Mr Martin's confirmatory affidavit was attested to on 20 December 2023. [38] 'JK11' was attested to by Mr Martin on 12 December 2023.[39]

[69] On 21 December 2023, prior to granting the PMB order, the applicant delivered a supplementary affidavit[40] in which it details the granting of the Pretoria order on 20 December 2023.

[70] There is no explanation as to why information had not been not sought by the applicant from the Prudential Authority regarding basis on which the Pretoria order was obtained especially when a confirmatory affidavit was sought from the Prudential Authority by the applicant for its urgent application.

- [71] When an ex parte order is sought the utmost good faith must be observed which requires all material facts to be disclosed which might influence a court in coming to its decision. 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 wilful or mala fide.’[41]
- [72] Where the law allows for a departure from the principle of audi alteram partem, such departure occurs in exceptional circumstances and when it is sought the ex parte applicant assumes a ‘heavy responsibility to neutralise the prejudice the affected party suffers by his or her absence’.[42]
- [73] What was required of the applicant when he came before Mossop J was to speak for the respondent by ‘not only disclosing all of the relevant facts’ that he knew but also those which he could reasonably expect the absent party would have wanted to place before the court. The applicant must disclose and deal fairly with any defences which he is aware of or those he may reasonably anticipate. More importantly, the applicant must ‘exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances’ before seeking an order for ex parte relief.[43]
- [74] In the present circumstances, the applicant made no investigation as to why the consent order was taken and the ambit of the consent order. He conducted no investigation as to what defences the respondent might wish to place before Mossop J.
- [75] The submission by the applicant that he was not seized with the facts nor was he a party to the Pretoria proceedings, would ignore the fact that the applicant was in direct communication with the Prudential Authority and sought their involvement in these very proceedings.
- [76] It would have cost the applicant little to have enquired from the Prudential Authority as to what the basis of the settlement was and the events leading up to same which resulted in the Pretoria order, or at the very least, whether the Prudential Authority foresaw any opposition from the respondent and the basis for that opposition.
- [77] At the very least, the applicant should have explained why he could not conduct such investigations and make such enquiries and why to do so would be unreasonable in the circumstances, considering the fact that on the applicant’s own version Prudential Authority was an active supporter of his application.
- [78] The respondent contends that the omitted information regarding the settlement discussion and the the relief which the Prudential

Authority and the respondent had agreed to exclude[44] from the Pretoria order was material and a defence which the respondent would have placed before Mossop J if it had been given notice. The initial draft of the Pretoria order included orders relating to the powers to be given to the applicant and these proposed orders were by agreement (on the respondent’s version) excised from the draft with the intention that the applicant’s powers be limited.

[79] This information was not immaterial and should have been placed before Mossop J when the applicant moved for his order. At the very least the applicant should have made an attempt to investigate the circumstances surrounding the granting of the Pretoria order,

especially since he had on his own version a legal representative at court when the Pretoria order was taken.[45] He simply didn't and it is not unreasonable to expect him to have made enquiries and conduct such investigations in these

circumstances.

[80] The applicant submits that the Supreme Court of Appeal in *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu* (*Kruger v Joint Trustees*)[46] ruled on the issues of urgency and notice in his ex parte applications as a repayment administrator. He submits that the findings of the Supreme Court of Appeal in *Kruger v Joint Trustees* is dispositive of the respondent's complaints in this reconsideration application.

[81] The applicant directed my attention to the following passage in *Kruger v Joint Trustees* where the Supreme Court of Appeal held:[47]

'To require the repayment administrator to approach a court on notice to the person subject to the directive and to require adherence to normal filing times would defeat the purpose of the repayment process.'

[82] The applicant's submission is that this settles the issue regarding whether he is obliged to give notice to the respondent and whether he institute his application urgently.

[83] *Kruger v Joint Trustees* is distinguishable from the facts in the present matter. In *Kruger v Joint Trustees*, Mr Kruger (who is also the applicant in these proceedings) tendered an affidavit which demonstrated that the respondent was operating a Ponzi scheme. There was evidence that as a result of the Ponzi scheme, Mr Zulu (the respondent in the appeal) had purchased various

assets and used his illicit gains to benefit his personal estate. Mr Kruger sought to attach the assets.

[84] In *Kruger v Joint Trustees*, it was held that the purpose of Kruger's application remains a central exercise of the discretion on whether notice ought to have been given and whilst a court should be mindful that the recommended precautionary safeguards such as notice to the party are intended to limit abuse of courts processes caution should be exercised so that a notice requirement is not imposed ritualistically as a matter of routine.[48]

[85] Whilst the Supreme Court of Appeal held that the purpose of Mr Kruger's application was to prevent the dissipation of assets which increased after a wrongdoing or guilt of a person has been established,[49] the facts in that matter are different to those presently before me. In the present matter, the respondent contends that there was an agreement with the Prudential Authority in light of the ongoing litigation regarding applicant's powers as the repayment

administrator. This was not an issue before the Supreme Court of Appeal in *Kruger v Joint Trustees*.

[86] In *Kruger v Joint Trustees* there was no ongoing debate between Mr Zulu and the Prudential Authority regarding the extent of the powers of the repayment administrator. In that case Mr Kruger approached the court on the basis that he had investigated a Ponzi scheme, found that the money, which had been illicitly gained through the Ponzi scheme, had been used to purchase assets to benefit Mr Zulu's estate. In light of these facts, Mr Kruger sought ex parte to give effect to the attachment of those assets on the threat that Mr Zulu would dissipate those assets.

[87] In these proceedings the applicant's affidavits lay no factual foundation for why he entertains the suspicion that the respondent,

which is a public entity and Provincial Government Business Enterprises,[50] will deliberately start dissipating its assets so as to avoid scrutiny of a repayment administrator.

[88] Quite clearly in the matter before the Supreme Court of Appeal the allegations of the author of a pyramid/Ponzi scheme using his illicit gains to fodder his personal estate was sufficiently weighty enough for the matter to be heard urgently and ex parte.

[89] Allegations of equal force and weight do not appear in the applicant's founding affidavit in these proceedings. Such allegations would have been able lend some support the applicant's reliance on his general experience as a repayment administrator. In these proceedings the applicant did not attempt to explain why the conduct of the respondent in consenting to the Pretoria order is insufficient to allay any fears he may have had as at 21 December 2023.

[90] The applicant appears to have elevated the findings of the Supreme Court of Appeal in *Kruger v Joint Trustees*, to a general right to instituted his applications ex parte and urgently, without having to say more than he is the appointed repayment administrator, and his general experience supports the

application being instituted on such an basis. In my view it this is incorrect. The applicant still has an obligation to set out the facts as to why he believes the respondent would fall within the ambit of his general experience. In these proceedings he did not do that.

[91] The respondent's contention is that, confronted with all the facts it has now caused to be placed before this court, the PMB order might not have been granted and that the reconsideration threshold is sufficiently low for me to grant the reconsideration application.

[92] The applicant cautions me that a discharge of the rule nisi would result in the countenance of an illegality. Such submission would require me to ignore the Pretoria order which expressly prevents the respondent from acting unlawfully and illegally. Further the applicant may yet prevail in these proceedings when the matter is heard on the merits with the respondent present.

[93] This application at this stage merely seeks to address the question of whether the respondent ought to be present when the applicant seeks the relief foreshadowed in his notice of motion.

[94] Based on the above, I am of the opinion that the existing order created an injustice to the respondent because it was obtained in its absence on an urgent basis.

[95] The application ought to have been served on the respondent and mechanisms could have been employed by the applicant to ensure that

the matter was heard in camera, if he wanted to prevent the risk of a “bank run” or “run on the bank”.

[96] The applicant failed to establish why the order had to be granted ex parte to the prejudice of respondent. There was no basis institute the application without notice at 8:30am in the morning in circumstance

where the plight of respondent was already the subject of litigation in the Pretoria High Court. Nothing could meaningfully be achieved by such urgency and absence of notice except the absence of the respondent.

[97] The applicant would still have been able to obtain substantial redress if the application was moved a later time and on notice to the respondent. The applicant could have built in safeguards for the hearing of the application so that it would be heard to the exclusion of members of the public, but on notice to the respondent. I am of the view that the application was not sufficiently urgent to me moved ex parte at 8:30 on the morning.

[98] There was a material nondisclosure of facts which might have influenced the outcome of the application had the respondent been present. It accordingly follows that the reconsideration application must succeed on the basis of the procedural regulatory complained of by the respondent.

[99] It follows that the respondent has been substantially successful in these proceedings in which both parties utilised the services of two counsel. As such the respondent is entitled to it costs.[51]

Order

[100] Having considered the papers and submissions before me, the following order is made:

I VEERASAMY AJ

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Date of Hearing

: 06 March 2024

Date of Judgment

: 14 March 2024

[1] The record vol 5 at 450 – 458.

[2] The record vol 5 at 507, the replying affidavit para 110.

[3] Khunou and others v M Fihrer & Son (Pty) Ltd and others 1982 (3) SA 353 (W) at 355F-I;
Tantoush v Refugee Appeal Board and others

[2007] ZAGPHC 191; 2008 (1) SA 232 (T) para 51.

[4] The record vol 3 at 299, Annexure 'AA1', the PMB order.

[5] ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others 1996 (4) SA 484 (W) at 486H-487
(ISDN Solutions).

[6] Sheriff Pretoria North-East v Flink and another [2005] 3 All SA 492 (T).

[7] Flink at 499e-f.

[8] Founding affidavit, supplementary founding affidavit, answering affidavit in the
reconsideration application and a replying affidavit.

[9] The Reclamation Group (Pty) Ltd v Smit and others 2004 (1) SA 215 (SE) at 418D (Reclamation
Group).

[10] Reclamation Group at 218D–G.

[11] Reclamation Group at 218D-F.

[12] Oosthuizen v Mijs 2009 (6) SA 266 (W) at 267E-F (Oosthuizen).

[13] Oosthuizen at 269-270.

[14] ISDN Solutions at 487C-D.

- [15] Reclamation Group at 218D–G
- [16] The Prudential Authority is a juristic person, and previously known as the Registrar of Banks, is established in terms of section 32 of the Financial Sector Regulation Act 9 of 2017. It is merely referred to as ‘the Authority’ in the Banks Act, in this judgment it remains ‘the Prudential Authority’.
- [17] The record vol 3 at 269, the answering affidavit (“AA”) para 45 and 46.
- [18] The record vol 3 at 279/281, the answering affidavit paras 47, 54; and vol 4 at 364 – 404, annexure ‘AA8’.
- [19] The record vol 1 at 27, founding affidavit para 36 -37.
- [20] The record vol 1 at 19. founding affidavit para 22.4.
- [21] The record vol 1 at 19, founding affidavit para 22.5.
- [22] The record vol 3 at 310 -302, annexure ‘AA2’, the Pretoria Order.
- [23] The record vol 1 at 1, notice of motion para 2.1.
- [24] The record vol 3 at 299, annexure ‘AA’ para 1 of the PMB order.
- [25] *Jafta v Minister of Law and order* 1991 (2) SA 286 (A).
- [26] *Three Cities Investments Limited v Signature Life (Pty) Ltd* 2011 JDR 1054 (KZD) para 32 (Three Cities).
- [27] There are Practice Directives in the other Divisions which permit in camera proceedings to be embarked upon without a certificate. No such Practice Directive exist in the KwaZulu Natal Division and as such the obligation to deliver a certificate remains.
- [28] *Magqabi v Mafundityala and another* 1979 (4) SA 106 (E) at 109H-110A.
- [29] *Three Cities* para 32
- [30] The record vol 1 at 9-36.
- [31] The record vol 1 at 35.
- [32] The record vol 1 at 20, para 24.
- [33] The record vol 2 at 152-188.
- [34] *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs*
- [2019] ZASCA 1; 2019 (3) SA 251 (SCA); [2019] 2 All SA 1 (SCA) paras 45 – 52 (Recycling and Economic Development).
- [35] The record vol 3 at 302.

- [36] The record vol 2 at 191, Prudential Authority's confirmatory affidavit.
- [37] The record vol 2 at 191.
- [38] The record vol 2 at 192.
- [39] The record vol 2 at 188.
- [40] The record vol 3 at 240, this is the applicant's supplementary affidavit, which talks only to the granting of the Pretoria order.
- [41] National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) para 21 with reference to Schlesinger v Schlesinger 1979
- (4) SA 342 (W) at 348E - 349B.
- [42] Recycling and Economic Development para 46.
- [43] Recycling and Economic Development para 47.
- [44] The record vol 5 at 465 – This is the first draft order which was presented by the Prudential Authority to the respondent. This includes relief relating to the powers of the applicant. This was paired down by agreement and resulted in the Pretoria order (The record vol 3 at 301-302). The pairing down was in respect of the powers to be granted to the applicant.
- [45] The record vol 1 at 20, founding affidavit para 22.7.
- [46] Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and another
- [2017] 1 All SA 1 (SCA).
- [47] Kruger v Joint Trustees para 30.
- [48] Kruger v Joint Trustees para 32.
- [49] Kruger v Joint Trustees para 29.
- [50] Part D of Schedule 3 Public Finance Management Act 1 of 1999. record vol 3 at 260, para 13
- [51] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others
- [1996] ZACC 27; 1996
- (2) SA 621 (CC) Para 3

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