

SOUTH AFRICA / JUDGMENT

VLG Accounting CC and Another v Koloni Consulting Enterprise CC and Others (95/2021) [2021] ZAECELLC 22 (7 September 2021)

[2021] ZAECELLC 22

COURT

Eastern Cape High Court, East London Local Court

BEFORE

M.J. Lowe

CASE / FILE NUMBER

95/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

EAST

LONDON CIRCUIT LOCAL DIVISION

CASE

NO: 95/2021

Date

heard: 26 August 2021

Date

delivered: 07 September 2021

In

the matter between:

VLG
ACCOUNTING CC
(Registration
number: 2[...])
First
Applicant
TUNIMART
(PTY) LTD
(Registration
number: 2[...])
Second
Applicant
and
KOLONI
CONSULTING ENTERPRISE CC
(Registration
number: 2[...])
First
Respondent
PUMEZA
GWIJA
(Identity
number: 7[...])
Second
Respondent
VUKILE
POKWANA
(Identity
number: 7[...])
Third
Respondent
ABSA
BANK
Fourth
Respondent
FIRST
NATIONAL BANK
Fifth
Respondent
CAPITEC
BANK
Sixth
Respondent

JUDGMENT

LOWE, J

INTRODUCTION

- [1] This matter, an application for the re-instatement of a rule nisi, was set down before me on 26 August 2021.
- [2] This application was launched on 22 June 2021, notice to oppose being given for Respondents on 28 June 2021, the papers being some 51 pages all in all.
- [3] The history of the matter can be shortly stated.
- [4] On 2 February 2021 Applicants instituted an urgent anti-dissipation application against Respondents.
- [5] A Judge's directive authorised the set down of the matter.
- [6] On 2 February 2021 and ex parte Norman AJ issued the following order in the form of a rule nisi as follows:

"IT IS ORDERED THAT:

- 1. Condoning that the usual forms and services be abridged and that the application be heard on the basis of urgency
- 2. A rule nisi hereby issue calling upon the Respondents to show cause on the 2 March 2021 at 09h30 or soon thereafter as the matter may be heard why an order in the following terms should not be made final:
 - 2.1 The amount of R9 548 256.40 (Nine million five hundred and forty-eight thousand two hundred and fifty-six rand forty cents) and interest thereon be kept and/or held in the:
 - 2.1.1 First Respondent's banking account number 409 800 3903 which is held at the Vincent Branch of Absa in East London or
 - 2.1.2 First Respondent's banking account number 6230 553 4530 which is held at the Vincent Branch of First National Bank or any other bank account held by First, Second and Third Respondents with ABSA Bank, FNB Bank or Capitec Bank to which it has been transferred pending the outcome of action proceedings which have been instituted by the Applicants against the First, Second and Third Respondents for the recovery of the money owing to Applicants and other ancillary relief.
 - 3. Paragraphs 2.1 and 2.2 shall operate as an interim relief and mandamus in the Applicant's favour.

4. Costs of the application shall be determined in the action proceedings instituted by the Applicant under case no. 95/2021 against the First Respondent, on a date within 30 (thirty) days from the date of this order.”
- [7] Paragraphs 2.1 and 2.2 of the order, that the amount of R9,548,256.40 held in First Respondent’s bank accounts, be kept and held therein pending the outcome of an action instituted against First to Third Respondents for the recovery of the money allegedly owing to Applicants, was to operate with immediate effect.
- [8] The matter was opposed and answering and replying papers filed.
- [9] The Rule operated until 2 March 2021 and appears to have been extended to 20 May 2021 when the matter was set down for hearing.
- [10] On 20 May 2021 the matter came before Mnqandi AJ and an order was made that the matter “is removed from the roll” with no order as to costs[1].
- [11] On 1 June 2021, presumably having been again placed on the roll it was again “struck off the roll” by Rusi AJ.
- [12] On 13 July 2021 Tokota J postponed this matter (the reinstatement application) to 26 August 2021, Applicants to file their replying affidavit by 18 July 2021.
- [13] The reply was in fact filed on 20 July 2021.
- [14] The need for the reinstatement application arose from the proceedings having been removed from the roll on 20 May 2021, no order being made extending the rule nisi on that date. Applicants allege that this was through no fault of theirs but by oversight of their legal representative.
- [15] There was a delay in bringing the reinstatement application from 20 May 2021 to its launch on 22 June 2021, just more than a month later.
- [16] As the matter was opposed and by order of Tokota J on 13 July 2021, when it was originally to be heard, was postponed to 26 August 2021 coming before me.
- [17] The main application itself, which had been struck off on 1 June 2021, was not set down before me and I was informed that by agreement with the Registrar this was to be heard on 9 September 2021 before the Duty Judge on that day as an opposed motion. This renders the need to give their judgment urgently, in less time than I would have liked.

THE RULE NISI

- [18] A rule nisi is an order calling upon Respondents to show cause, if any, on a fixed date why the rule should not be made final. It may, or may not, have interim effect.
- [19] A rule will almost always be granted in an ex parte application as in this matter.
- [20] Such interim order is temporary and provisional[2].

- [21] On the return day of the rule Applicant moves for it to be made final.
- [22] The postponement of a rule nisi does not, so it has been held, of itself end the rule but automatically has the effect of excluding the rule according to *Crundall Brothers (Pvt) Ltd v Lazarus NO and Another* [3].
- [23] However, in my view as a rule nisi is an interim order, and in this matter given *ex parte*, it is conditional upon confirmation by the Court. It seems to me that a Court has no authority to *mero motu* extend the life of a lapsed order whether or not a rule[4].
- [24] On the return day of a rule accordingly if a matter is postponed, or as in this case, removed from the roll with no extension of the rule and no date for the matter to be heard in the future, the rule must automatically lapse – discharging Respondents from the duty of compliance[5].
- [25] In any event both counsel in this matter accepted that the Rule had been discharged by effluxion of time and non-extension thereof on 20 May 2021.
- [26] It was also accepted, as I understand it that the return date was not postponed and that the rule was not dealt with at all[6].
- [27] It was in order to address the issue of a lapsed rule nisi (in the absence of appearance by Applicant) that Rule 27(4) was inserted into the rules in 1987, and probably as a result of *Fischer v Fischer* (*supra*).
- [28] The rule reads as follows:
- “After a rule nisi has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.”*
- [29] The trigger is said to be in “default of appearance by the Applicant”. The first question is to consider whether this includes a situation where the parties appear but by agreement (or otherwise) the matter is removed by the Court, the file not being in order (as in this matter) but eh Rule not extended. The rules are for the Court and not vice versa and in context the purpose of Rule 27(4) was to lessen the burden on an Applicant whose rule was discharged due to non-appearance[7].
- [30] The rules are intended, *inter alia*, to expedite the decision of the Court[8]. They are interpreted and applied in a spirit that will facilitate the work of the Courts and enable litigants to resolve their differences in a speedy and inexpensive manner[9]. The Courts do, of course, have inherent jurisdiction to grant relief should insistence on exact compliance with the Rules cause injustice – though exercised sparingly[10].
- [31] In the result it seems to me that the removal from the roll without extension of the rule, in this matter, is such as to be essentially the type of issue which the rule envisages as being subject to revival on application in appropriate circumstances.

- [32] If I am wrong in this respect that would be the end of the matter for Applicants, the rule not being capable of being simply revived and the matter then to be such as to have to be brought afresh.
- [33] If a rule nisi is such as to be revived, once discharged by default, the Court may so rule and direct that it need not again be served.
- [34] This will only occur where there is no possible prejudice. Put differently if the interests of the parties may be affected, the rule is unlikely to be revived.
- [35] The provisions of Rule 27(4) was considered in *Ex Parte S & U TV Services (Pty) Ltd: In Re S & U TV Services (Pty) Ltd (In Provisional Liquidation)* [11].
- [36] Harms : Civil Procedure in the Supreme Court, LexisNexis provides that:

“B27.9 Revival of rule nisi If a rule nisi is discharged the court is in principle functus officio and a new application would be necessary for the same order. The object of the sub-rule is to lessen the burden on an applicant whose rule was discharged due to his failure to appear on the return date. The sub-rule does not disclose an intention to override or detract from the rights of other or third parties, and before the rule can be revived it is necessary to determine what the effect of the revival would be. A rule which lapsed because of the fulfilment of a resolute condition, cannot be revived.”

- [37] In *S & U TV Services* the Court held that:

“With no contrary indication gained from the said factors or from any other source, I conclude that Rule 27(4) discloses no intent to override or detract from rights or interests of a litigious opponent or of third parties. Neither does it diminish the need to care for such interests. The application of Rule 27(4) must therefore be strongly influenced by the particular instance before the Court.

Crucial to the said approach would be to determine what effect the revival of the rule nisi would have. Counsel suggested that the effect would be the same as if the rule had not been discharged on 6 January. This is what the Rule intended. Rule 27(4) does not mention a 'new' rule which is then or later confirmed.

In certain cases, sequestration being an example, a final order may only be ordered after a rule nisi is issued. But it is not only in such cases that the impact of retrospective continuation of the discharged rule upon other parties must receive attention.

This is not a case where the revival, if ordered, is created almost immediately after the discharge of the rule, ie while matters are still essentially *res integra*. Three weeks have expired. The time period is not of importance for its own sake. It is important because in the present case it leaves adequate room for a probability that matters are no longer *res integra*. (For that reason a respondent who attends Court and hears the discharge of the rule nisi and order which interdicted him from certain actions would thenceforth be able to commit the prohibited actions without being guilty of contempt of Court. If the attendance of the respondent is known to the Court, even the lapse of a very short period may be adequate reason why the interdict should not be revived without notice to the respondent.)” [12]

- [38] So what effect would the revival of the rule nisi have? Effectively the rule provides for re-instatement as to the original return date (20 May 2021).
- [39] Usually that is where matters are essentially res integra. The time lapse here goes to the probability, especially relevant to the preservation of funds, that matters are indeed res integra. The lapse of the Rule nisi has the effect that the prohibited action can be committed or performed without being in contempt of Court.
- [40] The founding papers are essentially limited on the res integra issue.
- [41] The answering affidavit points out that the hold was uplifted from the bank accounts of First Respondent when the rule nisi lapsed on 20 May 2021.
- [42] The reply fails to be join issue with the question of prejudice to First Respondent or the factual issues as to whether the matters are still essentially res integra.
- [43] It seems to me to follow that in a matter where an anti-dissipation interdict is sought to attach funds in a bank account, and a rule granted effective immediately, this of itself is likely to cause potential prejudice if the rule is later discharged and then revived, as to the conduct of the bank account in the interim, which in this matter is a substantial period.
- [44] The automatic lapse of the rule is such as to raise the injunction on the bank accounts and is such to allow First Respondent to utilise same.
- [45] With a delay of many weeks between lapse on 20 May 2021 and the launch of the re-instatement application and the hearing thereof, there is almost certainly prejudice to the First Respondent, were I to re-instate the rule nisi, which would have retrospective effect to 20 May 2021.
- [46] The fact that the lapse of the rule nisi was due to no fault of Applicants cannot in my view change the issues referred to above in respect of Rule 27(4). The lapse of the rule nisi although, or so it was argued, due to Applicants' legal representative's error, cannot change the prejudice issue nor

in such circumstances can Applicants rely hereon[13].

- [47] In the circumstances the application must be dismissed with costs. This judgment will clearly impact on the main application to be heard apparently on 9 September 2021[14], having regard to the conclusion reached and that the Court is in principle functus officio as pointed out in Harms (supra).

ORDER

- [48] In the result the following order issues:

1. The application for the revival of the rule nisi is refused.

2. Applicants are to pay First to Third Respondents' costs jointly and severally the one paying the other to be absolved including such costs as were reserved in respect of this application.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearances:

Obo Applicants: Adv A Mafu Instructed by: Malusi & Company Attorneys, East London Obo First, Second & Third Respondents: Adv T Sellem Instructed by: Bakumeni Attorneys, King William's Town c/o Gode Attorneys, East London

- [1] This was, it would appear, because the file had not been placed in order and the application papers were mixed up with those of the trial action.
- [2] Development Bank of Southern Africa Ltd v Van Rensburg NNO 2002
- (5) SA 425 (SCA).
- [3] 1991
- (3) SA 812 (ZH) 823 G – I.
- [4] MV Snow Delta : Serva Ship Ltd v Discount Tonnage Ltd 2000
- (4) SA 746 (SCA).
- [5] National Director of Public Prosecutions v Walsh & Others 2009
- (1) SACR 603 T [24] and [25].
- [6] Fischer v Fischer 1965
- (4) SA 644 (W).
- [7] Manton v Croucamp NO and Others 2001
- (4) SA 374 (W) 380I-381J.
- [8] SOS Kinderdorf International v Effie Lentin Architects 1993
- (2) SA 481 (NM) 491D-R; Centre for Child Law v Hoërskool Fochville and Another 2016
- (2) SA 121 (SCA) 131G; Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie 2017
- (1) SA 236 (GJ)
- [9] Herbstein & Van Winsen, The Civil Practice of the High Courts, Fifth Edition, Volume 1 page 30.
- [10] Herbstein (supra) 30/31.

[11] 1990

(4) SA 88 (W). See also *Commissioner for the South African Revenue Services v Bachir and Others* (87306/2014)

[2016] ZAGPPHC 251 (22 April 2016).

[12] 90H – 91C.

[13] See *Mabudsha v Commissioner for Conciliation, Mediation and Arbitration and Others* (JR33472010)

[2014] zalcjhb 57 (9 January 2014). See further *Saloojee v Minister of Community Development* 1964

(2) SA 135 (A); *Xayiya v African National Congress* [2000] 4 BLLR 477 (LC); *First National Bank v CCMA* [2000] 12 BLLR 1429 (LC); *A Hardrodt (SA) (Pty) Ltd v Behardien* (2002) 23 ILJ 1229 (LAC); *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC); *GIWUSA obo Hyeneke v Klein Karoo Korporasie Bpk* (2005) 26 ILJ 1083 (LC).

[14] See the order made in *Ex Parte S & U TV* 92 – 93.

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