NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case no. 6094/10

In the matter between:

NSIKAYOMUZI GOODMAN GOQO **PLAINTIFF**

and

JOHANNES GEORGE KRUGER N.O. **FIRST RESPONDENT**

DALES BROTHERS AUCTIONEERS **SECOND RESPONDENT**

THE SHERIFF OF THE HIGH COURT, PINETOWN / DURBAN SOUTH **THIRD RESPONDENT**

JUDGMENT

GORVEN J

1] The applicant approached this court on the basis of urgency, *ex-parte* and without notice to the respondents, on 26 June 2010. An order was granted on that date in the following terms:

> That a rule *nisi* do hereby issue calling upon the respondents to show cause, if any, on the 16th day of July 2010 at 09H30 or soon (sic) thereafter as the matter may be heard why:-
>
> a) pending an application by the applicant to the Registrar of Banks alternatively to this Court to consider whether assets had been properly seized in terms of the order of this Court dated 26th May 2010.

b) pending determination by the Registrar of Banks and this Court whether the business conducted by the applicant (GOODMAN NSIKAYOMUZI GOQO) and / or Ingede Mineral Holdings (Pty) Ltd at any time violated the provisions of the Banks Act 94 of 1990.

c) pending the reconsideration in terms of Rule 6(12)(c) of the Rules of Court of the Order of this Court granted on the 26th May 2010:-

an order should not be granted in the following terms:

i) That the auction sale to be conducted by Dales Brothers Auctioneers at 1 Caversham Road, Pinetown at 10h00 on Saturday 26th June 2010 as advertised in the Mercury Newspaper dated 24th June 2010 of the following assets relating to the Fund Manager of Ingede Mineral Holding (Pty) Ltd, to wit:

(a) a white BMW X5M, registration number NC 20290, chassis number WBSGY020701h67021, engine number 20824554, registered in the name of Goqo.

(b) an Audi TT Coupe, DSG, registration number NU 143768, chassis number TTRUZZZ8J4A1001278, engine number BWA 266296, registration (sic) in the name of Goqo.

be and is hereby forthwith interdicted.

ii) That the Respondents are forthwith [interdicted] from advertising for sale or proceeding with the sale of any of the goods and assets attached by the Sheriff of this Honourable Court; Pinetown and / or Durban South in terms of notices of attachment in execution dated 27th May 2010 in case number 6094/2010 out of this Honourable Court.

iii) That in the event of the Respondents opposing this application, they are ordered to pay the costs of this application, jointly and severally with any other Respondent so opposing such application.

iv) That the Applicant is ordered to institute the review proceedings foreshadowed herein within 14 days of the confirmation of this

order.

The rule *nisi* which issued on that date does not provide for interim relief. Despite this, it does not seem as if the sale proceeded on the advertised date or that any further steps were taken in the interim by the respondents. The rule was extended on various occasions and came before me as an opposed matter on 7 September 2010.

2] The applicant seeks confirmation of the rule *nisi*. This means that the applicant seeks an interlocutory interdict pending the outcome of the proceedings foreshadowed in the rule. The requirements for interlocutory interdicts are well known, namely a *prima facie* right albeit open to some doubt, a well grounded apprehension of irreparable harm if the interim relief is not granted and the alternative relief is eventually granted, a balance of convenience in favour of the granting of the interim relief and the absence of any other satisfactory remedy.[1] In the first respondent's answering affidavit he gave notice that it would be argued at the hearing of the application that the applicant did not make out a case in the founding affidavit for the relief which he seeks.

3] The relief sought is an interdict of the sale of certain movable property owned by the applicant and a further interdict preventing the first respondent from advertising for sale or proceeding with the sale of any of the goods or assets attached in terms of notices of attachment in execution dated 27 May 2010. It is therefore incumbent on the applicant to show a *prima facie* right on the basis that the proceedings which the

1 *Setlogelo v Setlogelo* 1914 AD 221 at 227

applicant says he will institute have prospects of success.[2] This, in essence, requires prospects of success to set aside the seizure of the assets attached, prospects of success in showing that the applicant or Ingede Mineral Holdings (Pty) Ltd ("Ingede") did not violate the provisions of the Banks Act No. 94 of 1990 ("the Act") or prospects of success in a reconsideration in terms of Rule 6 (12)(c) of the Uniform Rules of Court of the order granted ex-parte in favour of the first respondent on 26 May 2010. The only averment that I can find in the founding papers which even vaguely addresses any of these issues is that contained in paragraph 11 to the following effect:

> In due course I shall demonstrate that the substratum of the application that had been launched by the first respondent resulting in the Order in his favour on 26th May 2010 was without foundation.

The applicant does not set out any facts at all relating to his assertions that any suggestion that he or Ingede have been involved in any activity which falls foul of the Act or acted illegally is false. It is claimed that the applicant has been unable to collect affidavits from the relevant people who can support these assertions. The applicant also asserted a right to supplement the papers in this fashion. At no stage did he do so, nor did he deliver any supplementary founding affidavit dealing with any other matter. No matter arising in the founding affidavit was relied on in argument by the applicant.

4] When invited during argument to indicate whether there were any averments making out a basis for the relief sought in the founding application papers, Mr Shaw QC, who together with Mr Mannikam

2 *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd & Others* 2001 (3) SA 344 (N) at 357D

appeared for the applicant, fairly conceded that he could find no such averments. He relied entirely on the averments contained in the supplementary replying affidavit deposed to by the applicant. These dealt with certain alleged defects in the appointment of the first respondent as manager of the applicant and Ingede in terms of s 84 (1) of the Act.

5] The circumstances in which an applicant is entitled to introduce new matter in a replying affidavit have been dealt with in a number of cases. A distinction is drawn between a case in which new material is first brought to light by the applicant who knew of it at the time when his or her founding affidavit was prepared and the case in which facts alleged in the respondent's answering affidavit disclose potential further basis for relief. Courts will readily allow new material in a replying affidavit in the latter situation. However, it is clear that no court permits an applicant to make out a case in reply when no case at all was made out in the original application.[3]

6] In the present matter, nothing has been said in the supplementary replying affidavit as to why the evidence introduced in that affidavit was not dealt with in the founding affidavit or even the replying affidavit. Indeed, it is clear from the founding affidavit that all the evidence referred to was within the knowledge of the applicant at the time the founding papers were prepared. The case made out relates primarily to alleged

3 Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and another 1980 (1) SA 313 (D) at 315 H - 316 A

defects in the appointment of the first respondent and it is clear from the earlier application papers that this issue was pertinently canvassed in those papers and that the applicant had documents relating to these aspects at the time he launched a previous application. This will be dealt with more fully below. It is my view, accordingly, that the founding papers do not make out a case for the relief claimed and granted by way of the rule *nisi*. For this reason alone, I consider the application to be fatally flawed.

7] In addition, and as was pointed out by the first respondent, there are a number of material non disclosures in the founding papers. It is trite law that, in applications brought *ex parte* without notice, there is a duty on an applicant to disclose to the court all material facts.[4] In the present case, the applicant indicates that a writ of execution was issued on 26 May 2010. He nowhere indicates that this writ was served on him. He nowhere indicates that one of the vehicles whose sale is sought to be interdicted was in fact handed over by him and was not simply attached by virtue of the writ. When this was mentioned in the answering affidavit, his reply was that he handed over the vehicle under duress. He does not indicate the nature of this duress. It is clear from the papers in this application that, as early as 27 May 2010, he was aware of the writ of attachment. Nowhere in the founding papers, or at all, does he indicate what steps he took to address the unlawfulness which he alleges attached to the writ by virtue of the appointment of the first respondent not having been made properly under the Act. No mention is made that

4 *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349

an application was launched by Ingede and the applicant on 5 March 2010, in support of which the applicant deposed to both the founding and replying affidavits, seeking to review and set aside the decision by the Registrar of Banks to appoint the first respondent in the present matter as a manager in terms of s 84 (1) of the Act. No mention is made that the respondents in that application, which included the present first respondent, raised facts and law showing that Ingede fell foul of the Act and that the applicant and Ingede failed to deal with this, claiming that it was not necessary for the determination of the application. No mention is made that this application was dismissed on the grounds that this court had no jurisdiction but, more importantly, that the application sought to review and set aside the appointment of the first respondent in terms of s 84(1) of the Act, which contentions were fully dealt with in answering affidavits delivered by the first respondent in that application. None of these facts was disclosed in the founding papers in this application. The applicant therefore did not fulfill the requirements of an *ex parte* application.

8] The application is also problematic as regards the case made out for urgency. The applicant failed to set out relevant facts relating to his knowledge of the attachment of the goods almost one month prior to the bringing of the application and the reason why he took no steps in the interim to address this. Indeed, in the present matter, the applicant indicates that information is being sought from certain persons and gives no indication whatsoever as to its nature or why the information is only

now being sought and was not acquired in the period after he was made aware of the attachment. This may well have misled the court granting the rule *nisi*, particularly where he indicates that due to the urgency of the matter he has not been able to obtain all relevant information. In my view these are material non-disclosures. If the court which granted the rule *nisi* had been made aware of these facts, it is my view that this would have resulted in the application being dismissed or struck from the roll on the respective bases of the non disclosures concerning urgency or that the urgency was self created.

9] In *Phillips v National Director of Public Prosecutions* [5] the court held that if an applicant fails to disclose all material facts and the application is nevertheless granted in provisional form, the court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. The court considering the matter will have regard to the extent of the non-disclosure, the question whether the first court might have been influenced by proper disclosure, the reasons for non- disclosure and the consequences of setting the provisional order aside.

10] I am of the view that, had the proper disclosures been made, the court which granted the rule *nisi* would not have done so. It is clear that the applicant was aware of the approach of the first respondent to at least some of the substance of the application and failed to indicate that this was the approach the first respondent had indicated in the prior

5 2003(6) SA 447 (SCA) at 455 A – C

application. In my view, the applicant failed to demonstrate the good faith required in an *ex parte* application. Regardless of whether the non disclosures were made *mala fide* or as a result of negligence, this can result at this stage in the dismissal of the application. [6] In my opinion, this is the result warranted by the non disclosures in the present matter.

11] In case I am wrong in the reasoning set out above, it is as well to turn to a consideration of the substance of the argument by the applicant before me. The submissions are, in essence, two fold, namely:

1. That the direction issued under s 83(1) of the Act requires the "institution" to repay. The institution is said to be "Ingede Mineral Holdings (Pty) Ltd and / or N G Goqo and / or any related person or entity and / or all of them". The direction is to the effect that the one, the other, or all of them are referred to as the institution. The criticism is that this is not a direction to a person but to some conglomerate that has been conjured up by the Registrar of Banks.
2. That it appears *ex facie* the appointment in terms of s 84(1) of the Act of the first respondent, that this took place prior to the service of the direction in terms of s 84(1) since the direction is addressed to the applicant and Ingede care of the first respondent. What is required, under the Act, it was submitted, is that the appointment be made after the issue of the direction. The word "issue" should not be construed in its narrow sense, but as requiring the service of the direction on the named persons.

6 *Schlesinger op cit* at 349

12] As regards the first point, the direction, addressed to Ingede and / or N G Goqo (the applicant) is clear that either or both are referred to as the institution and not any unidentifiable or non-existent conglomerate. Whilst the language is inelegant, it is sufficiently clear to indicate that they are individually and collectively to be regarded as the institution and are hit by the direction. The words "any related person or entity" are not relevant in the context of this application since no property of anyone other than the applicant is affected. It is therefore my view that there is nothing improper in the s 83(1) direction.

13] As regards the second point, the applicant submitted that the word "issuing" in s 84(1) means service on the person required to make payment. It is appropriate to set out the relevant wording of ss 83(1) and 84(1) of the Act.

14] Section 83(1) provides, in its relevant parts, as follows:

> If as a result of an inspection conducted under section 12 of the South African Reserve Bank Act, 1989 (Act 90 of 1989), the Registrar is satisfied that any person has obtained money by carrying on the business of a bank without being registered as a bank … the Registrar may in writing direct that person to repay, subject to the provisions of section 84 and in accordance with such requirements and within such period as may be specified in the direction, all money so obtained by that person in so far as such money has not yet been repaid …

15] Section 84(1) provides, in its relevant parts, as follows:

> Simultaneously with the issuing of a direction under section 83 (1), or as soon

thereafter as may be practicable, the Registrar shall by a letter of appointment signed by him or her appoint a person (hereinafter in this section referred to as the manager) to manage and control the repayment of money in compliance with the direction by the person subject thereto.

16] The applicant relied, for his submission that the word “issuing” in s 84(1) of the s 83(1) notice meant service on the person required to make a payment, on the case of *Allen v Casey N.O. and another.*[7] In that matter, the court was interpreting an Ordinance for the Province of Natal. Sub-section (12)(a) of s 77 of the Ordinance provided that, for the purposes of that section, “the date of issue of the notice contemplated in ss (1) shall be the date upon which the notice was served upon or posted to the person concerned in terms of that subsection....”. Howard JP reviewed the legislation, found that penalties accumulated from the date of service of the notice and concluded as follows: “The word 'issue' is not used elsewhere in the section, and it seems clear that 'date of issue' was used in this context as the equivalent of 'date of service'”.

17] The present legislation differs materially from that referred to in *Allen*. In the first instance, no means by which service should be effected, nor a specification that the word “issuing” meant service are included. In the second place, no penalties accumulate with effect from the date of issue. Thirdly, it seems highly unlikely that the legislature intended that the direction only be issued or regarded as issued once service has taken place in the context of the purpose of the Act. Whilst it is necessary, if

7 1991(3) SA 480 (D) at 486

any sanctions are to follow from the issue of the direction, that service is effected on the person concerned, there is no necessity, in the context of the Act, that service take place prior to the appointment of a manager. I can conceive of no reason why the legislature would require anything more than the issuing of the direction, understood in its narrow form, prior to or at the same time as the appointment of a manager. In the result, I do not consider the point to be sound. It is quite clear from the earlier application papers that the applicant received the direction as well as the notice in terms of s 84(1) appointing the first respondent. This was done prior to the attachment. I am not prepared to hold that there are prospects of showing that the appointment was invalid under the Act on the basis that it was made prior to service of the direction under s 83(1).

18] There was some debate about precisely what relief would be sought by the applicant in the foreshadowed proceedings. In the end, the applicant abandoned reliance on a review by the Registrar of Banks and confined his intentions to a review application in court of the aspects mentioned in the Notice of Motion. As indicated, my view is that there is no prospect that the applicant will succeed in such an application on the grounds set out in the application papers. These are not difficult questions of law.

19] The cases make it clear that, the weaker the prospects of success, the greater must be the balance of convenience.[8] In *Ramlagan* this was

8 *Olympic Passenger Service(Pty) Ltd v Ramlagan* 1957 (2) SA 382 (N) at 383A – F. See also *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) where this so-called sliding scale approach was adopted and applied.

succinctly set out by Holmes J (as he then was) in the following words:

> It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.

20] The applicant appeared to rely, as regards the balance of convenience, on investors drawing an adverse inference from the sale as also that such a sale would result in “bargain basement prices” for the vehicles. Once again, no evidence was given on this aspect. The applicant satisfied himself with assertions to that effect. The first respondent indicates that he acts as a manager for the repayment of investor funds in terms of the statutory powers granted him under the Act and that the convenience of investors must be considered. Even if the balance of convenience is strongly in favour of the applicant, and I cannot find this

to be so, the right asserted is non-existent. Considering all the requisites as a whole, therefore, I can find no basis on which to exercise my discretion in favour of the applicant.[9] Even considering the supplementary replying affidavit, I consider that no case has been made out for the grant of an interdict as sought pending the outcome of any procedures foreshadowed in the rule *nisi*.

21] This means that the application cannot succeed on any of the three bases referred to above. In the result, the rule nisi issued on 26 June 2010 is discharged with costs.

Date of hearing:	7 September 2010
Date of judgment:	29 October 2010
For the applicant:	DJ Shaw QC and M Mannikam
	Instructed by Ngcobo Xulu Inc.
For the first respondent:	EL Theron
	Instructed by Hahn & Hahn, locally represented
	By de Villiers Evans & Petit

9 *Cambridge Plan AG v Moore* 1987 (4) SA 821 (D) at 833G-H