**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**Case No: 1722/2013**

**In the matter between:**

**SAGADAVA NAIDOO** **APPLICANT**

**and**

**SIVARAJ NAIDOO** **RESPONDENT**

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**JUDGMENT**

Delivered on: 03 March 2014

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CHILI, AJ

[1] The relief sought by the applicant is divided into two parts. In the first part of the relief the applicant seeks confirmation of the *rule nisi* granted by the court *ex parte* on 21 February 2013 in the following terms:

'(1) (b) That pending the final outcome of the action referred to in this Order, that the Respondent be and is hereby interdicted and restrained from:

(i) disposing of any of the members' interests and loan accounts in and to the Close Corporations, Odora Trading CC, Multibrand Logistics CC, and Acrita CC ("the corporations"):

(i)] disposing of any of the shares and loan accounts RGN Farms (Pty) Ltd and Rockhill Investments (Pty) Ltd ("the companies")

(iii) Disposing of the following immovable properties:

1. situated at 5[…]/5[…] W[…] Street, V[…];
2. R[…] Lot 12, R[….];
3. R[…] Lot 13, R[…]; (“the immovable properties”)

(iv) disposing of any of the underlying assets, whether immovable or movable (including incorporeal assets) and/ or monies and/ or rights in and to property of whatever description of the corporations and companies, other than in the normal course of business;

(v) hypothecating any of the immovable properties or any of the underlying assets and/ or properties of the corporations and companies;

(vi) drawing from one or more of the corporations and companies in aggregate am amount in excess of R 50 000 in respect of his personal living expenses;’

2. In the second part of the relief, the applicant seeks an order in the following terms:

‘(c) that pending the final outcome of the said action the Respondent is directed to do everything necessary to cause one or more of the corporations and companies to pay to the Applicant, as his drawings for personal living expenses:

(i) the sum of R 50 000 per month, commencing immediately;

(ii) an immediate contribution to the Applicant’s legal expenses in the amount of R1 million in the present proceedings and the said action alternatively in such amount for legal expenses as may be determined by the Registrar of this Court, on the basis that the Respondent shall be entitled to drawings in an equivalent amount in respect of his own legal expenses therein:

(d) pending the final outcome of the said action the Respondent is further directed to:

(i) do everything necessary to cause the companies and corporations to:

1. comply with their statuary obligations to maintain proper books of account and produce financial statements and monthly management accounts and to furnish a copy of same to the Applicant;

2. pay all rates and municipal charges for utility services in respect of the immovable properties and any immovable properties owned by the companies or corporations;

(ii) account to the Applicant on a monthly basis in respect of all drawings in respect of the companies and close corporations and all income received and expenses paid in respect of immovable properties;

(iii) deliver to the Applicant the current license discs in respect of the following vehicles:

1. Toyota hi-lux light delivery registration number N[…];
2. Toyota hi-lux light delivery vehicle registration number N[…];
3. Mercedes Benz Truck registration number N[…];
4. Mercedes Benz motor car registration number R[…];
5. VW Microbus Caravelle registration number N[…];

(iv) deliver to the Applicant the Applicant's MTN sim card for cell phone number 0[…];

(e) that the Applicant is directed to institute an action for final relief within a period of 30 days of the confirmation of the rule *nisi.*

(f) that the costs of this application shall be reserved for decision in the said action;

(g) Further and/or alternative relief.

2. That the Orders set out in paragraphs (1) (a) and (b) hereof shall operate as interim relief pending the return day of the *rule nisi.*'

The applicant's version of events leading to the present application

[2] The applicant is the respondent's elder brother. He alleges very briefly in his founding affidavit that during November 2000, he was sequestrated on the basis of a 'friendly request' for sequestration. He arranged with his brother that all his assets were to be transferred into the respondent's name on the understanding that once he is rehabilitated, the respondent would return the assets back to him. He was eventually rehabilitated on 1 November 2011.

[3] Following on his automatic rehabilitation, he then set up to reclaim his assets from the respondent as arranged. He had meetings with the respondent and eventually they agreed verbally on how the assets were to be divided. They engaged services of an attorney Rivandra Maniklall who subsequently reduced the verbal agreement into writing. The document purporting to be the said agreement is attached to the applicant's founding affidavit (division of assets agreement). All that was left therefore, according to the applicant, was for the parties to append their signatures to the 'division of assets agreement'.

The Respondent's Version:

[4] The respondent denies having acted as the applicant's nominee in respect of the assets mentioned in the relief sought. He alleges that he is the lawful owner of these assets and that the applicant has no claim whatsoever over them. In his answering affidavit he gave an account of how he obtained the assets and, where necessary, filed documents in support of his claim. He further denies having made an undertaking to sign a division of assets agreement. It was submitted on behalf of the applicant that there exists a clear dispute with regards to the ownership of assets, which can only be decided by the trial court, Following on that submission, it was argued that unless the relief sought by the applicant were granted, the applicant, who is already suffering financial prejudice at the hands of the respondent, would suffer irreparable harm.

Analysis

[5] In light of the view I take of this matter I propose dealing firstly with the criticism leveled against the applicant relating to either omitting or withholding material facts which in all probabilities would have influenced the court hearing the *ex parte* application. The applicant was criticized for not disclosing to the court that he previously testified at an insolvency enquiry and also attested to an affidavit in Rule 43 divorce proceedings involving him and his ex-wife, where he made damning averments about his assets.

[6] Responding to the allegation made by the applicant in his founding affidavit that the respondent was merely a nominee and nothing more than that, the respondent filed copies of transcripts of the record of an insolvency enquiry held the during 2005 where the applicant repeatedly denied during cross examination that the respondent was his nominee. The applicant conceded having lied at the insolvency enquiry and in paragraph 34 of his replying affidavit he states:

> 'I admit that my denials of the nominee relationship in the insolvency interrogation were incorrect and with the benefit of hindsight, I have been advised and submit that I ought not to have answered in the manner in which I answered, for which I apologies'.[1]

[7] With regard to the affidavit he made during the Rule 43 proceedings, he concedes having shielded his assets from his ex-wife.[2]

[8] It was submitted on behalf of the applicant, that the applicant's conduct during the insolvency enquiry and the divorce proceedings is history. It was argued that the Court should only focus on the present *vis-a-vis* is the agreement between the applicant and the respondent relating to the division of assets.

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[1] Page 587 of the bundle of documents, Applicant's replying affidavit.
[2] Record para 22 page 585;Applicant's replying affidavit.

[9] It may very well be there was an arrangement of some sort between the applicant and the respondent regarding the division of certain assets. However, the most unfortunate part is that the foundation of whatever arrangements may have been made is lies and deception. It seems to me that the applicant was on a mission to defraud his creditors and this he did either by himself or in collaboration with others. This is evident from the allegations levelled against him and the averments he himself makes both in his founding and answering affidavits. By way of example, in paragraph14 of his founding affidavit at page 11, he states:

'During or about 1998, on advise from a paralegal, by the name of Mr Ayood Fareed, and in order to afford me a measure of protection against creditors, (it also suited me as at the stage I was about to enter what I anticipated to be a full time career in politics) should my financial position deteriorate, I transferred a farm known as RGN Farm, on which certainly (sic) Litchi farming was conducted and which was approx. 45 acres in extent together with a two acre additional portion which I inherited from my grandfather into the name of the respondent'. (my emphasis)

I pause to mention that it is common cause that the above averment is contrary to what the applicant stated at the insolvency enquiry and in his affidavit filed consequent upon an application by his wife brought in terms of Rule 43

[10] Responding to the respondent's averment that his (applicant's) benefits were derived in stark contradiction with clause 5 (g) (ii) of their late grandfather's will stating: '"should any of the heirs become insolvent, that the particular heir will immediately forfeit his or her shares of the shops and/or flats situated in Evergreen Court building', the applicant made the following averments:

'I admit the allegation in para 19 [para 19 of respondent's answering affidavit] regarding clause 5 (g) (ii) of my late grandfather's will. This provision was discussed with the respondent and the bookkeeper Mr Inder Manilall and I was advised by them that I should not worry about this'. (my emphasis).

Although I appreciate the fact that the respondent would not have been expected to deal with the averments made by the applicant in the above passage, given the fact that the said averments were only made in the answering affidavit, I am satisfied, on probabilities, that the applicant, to some extent with the assistance of other persons, was on a mission to defraud his creditors. I will return to this aspect later in my judgment. I pause to deal with argument relating to certain parts of the relief.

[11] It was argued on behalf of the respondent that part of the relief sought has a final effect. To that end reference was made to the following paragraphs:

i) ad para 1 [b] [vi] restraining the respondent from drawing an amount in excess of R 50 000 in respect of personal living expenses;

ii) ad para 1 [c] [i] compelling the respondent to make payment to the applicant from one or more of the corporations and the companies in the sum of R50 000 per month;

iii) ad para 1 [c] [1] directing the respondent to make a contribution of R 1 million towards the applicant's legal expenses;

iv) ad para 1 [d] [ii] compelling the respondent to account to the applicant and

v) ad para 1 [d] [iii] directing the respondent to deliver to the applicant license discs in respect of certain motor vehicles

It was argued, that once that relief had been obtained and performed, it cannot be undone and is clearly final in effect irrespective of whether there is a pending trial or not and irrespective of the outcome of the trial. There is merit in that submission.

[12] In as much as it was submitted on behalf of the applicant that he (the applicant) is prepared to reimburse the respondent in the event that it is

established at the trial that he is not entitled to any of the assets mentioned in the relief sought, what concerns me mostly is the fact that no undertaking of that sort is made by the applicant in the papers.

[13] In order to justify his entitlement to an amount of R50 000 (living expenses) and R1 million (legal expenses), the applicant at para 157 of his founding affidavit at page 41 made the following averments:

> ' My reasonable monthly expenses are presently R 50 000 per month and I further submit that *pendete lite* the respondent should be ordered to pay that amount to me on a monthly basis, together with my legal expenses in the contemplated action, and present application'.

He goes on to say, of relevance to note:

> ' In relation to the calculation of this amount of R 50 000 I refer to annexure "C11" which is a list compiled by the respondent to demonstrate to attorney Manikall the monthly expenses that he caused one or more of the companies and corporations to pay for me over a period of 9 months from November 2010 to july 2011. (my emphasis). This came to a total of R 958722.99 which is equivalent to R 106 524.77 per month.'

[14] This document (annexure "C 11") referred to *supra* merely reflects expenses in respect of certain business entities and nothing more than that. Nowhere in this document is any mention made of the applicant's living expenses. I should also mention that in para 176 of his answering affidavit, the respondent specifically disputes the fact that the applicant is entitled to any living expenses and confirms the observation made immediately herein before, that annexure "C 11 " is no more than a document reflecting expenses of certain entities. It is worthy to be noted further, that nowhere in his reply does the applicant deal with the respondent's denial.

[15] The document attached to the applicant's founding affidavit (annexure "K" at page 183 of the indexed papers) purporting to reflect the applicant's monthly living expense, does not advance the applicant's case at all. It is without

foundation and thus confusing. By way of example, the applicant by implication (if one is to go by the contents of the list of expenses in annexure "K") owns three vehicles in respect of which he expends amounts of R3 000, R1 000, and R5 000 respectively towards fuel. Nowhere in his affidavit does he make a mention of these vehicles. He expends an amount R5 000 towards security workshop, sheds and redundant motor vehicles. Again nowhere in his affidavits does he say anything about that expenditure. The list goes on.

Perhaps the reason why the applicant is unable to provide any proof of the moneys he received either from the respondent or any of the entities listed in the relief is because there are no records to that effect. Who could blame him for not keeping records of transactions that could probably link him to the entities that he denied ownership of?

[16] I am expected to close my eyes to the applicant's fraudulent schemes which in all probabilities put him in the position in which he presently finds himself, and treat him as an innocent litigant who approached the court with clean hands. I am not inclined to do that. What the applicant did amounts, in my view, to a gross violation of the *uberrima fides* rule which places a duty on a litigant who approaches the court in *ex parte* applications to disclose every circumstance which might influence the court in deciding to grant or refuse the relief sought.[3] Although he sought to suggest that the ownership of the assets mentioned in the relief was a matter for determination by the trial court, he created an impression that he was a legitimate owner of such assets, the factor which was very influential in the court's decision. In the process he deliberately withheld or suppressed extremely vital information regarding his interrogation at an insolvency enquiry into his estate.

[17] Had the court been alive to the manner in which the applicant conducted himself at that enquiry, denying ownership of the very assets which he now claims as his, with the view to defrauding his creditors, I seriously doubt that it would have granted him the relief. I align myself with the view taken by Le

[3] In this regard see MV *Rizcun (4)*; MV *Rizcun Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C), *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349A

Roux J in *Schlesinger supra* [4] that the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it. In *Cometal-Mometal S A L R v Corlana Enterprises (Pty) Ltd* [5] Margo J listed the factors a court should take into account in the exercise of its discretion whether to grant or deny relief to a litigant who has breached the *uberrima fides* rule as follows:

(a) The extent to which the rule has been breached;
(b) The reasons for the non-disclosure;
(c) The consequences, from the point of doing justice between the parties of denying relief to the applicant on the *ex-parte* order; and
(d) The interests of innocent third parties.

I have already expressed my view with regards to the extent to which the applicant breached the *uberrima fides* rule and need say no more. The reason for non-disclosure was in my view simply to suppress the facts which if disclosed would have influenced the court into denying the applicant the relief sought, For that reason alone, I would be justified in discharging the rule. But that is not only reason, The overriding factor in my view is the extent of prejudice that the applicant's fraudulent acts must have caused his creditors. It could safely be inferred, based on the applicants own admissions, and his assertion to the effect that the assets he claims to be his are worth millions of rands, that the prejudice his fraudulent acts must have caused his creditors is enormous. For the above reasons, I am of the view that there is no justification in confirming the interim order granted *ex parte* on 21 February 2013. The remainder of the relief sought also falls to be dismissed.

Costs

[19] I was requested to make a punitive costs order against the applicant because of his audacity to mislead the court. I was tempted to do that. However, it seems to me that at least a possibility exists, that the respondent was himself involved in the applicant's fraudulent scheme. In as much as I am satisfied

[4] At 349A-B
[5] 1981 (2) SA 412 (W) at 414G- H

that the applicant should bear the costs of bringing the respondent to court, I am not persuaded that such cost should be awarded on a punitive scale.

Recommendation

[20] I recommend that the record of these proceedings be forwarded to the Master of the High Court, the trustees of the applicant's insolvent estate and the office of the Director of Public Prosecutions.

[21] The order I make is as follows:

1. The rule is discharged.
2. The remainder of the relief sought is dismissed.
3. The applicant is to bear costs of the application including costs consequent upon the employment of senior counsel.

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CHILI, AJ

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| DATE OF HEARING: | |
| DATE OF JUDGMENT: | 03 MARCH 2014 |