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

CASE NO: D1162/25

In the matter between:

THE INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED **APPLICANT**

and

ARTSOLAR (PTY) LTD **FIRST RESPONDENT**

BRETT LATIMER **SECOND RESPONDENT**

KANDACE SINGH **THIRD RESPONDENT**

SHALENDRA HANSRAJ **FOURTH RESPONDENT**

BONGANI HANS **FIFTH RESPONDENT**

In re the matter between:

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and

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JUDGMENT

P WALLIS AJ

[1] The application before me is interlocutory to an application instituted by Artsolar (Pty) Ltd ("Artsolar") against four respondents. The four respondents were respectively Brett Latimer ("Latimer") (who may fairly be described as the guiding mind of a customer of Artsolar), Kandace Singh ("Singh") and Shalendra Hansraj ("Hansraj") (who were both erstwhile employees of Artsolar), and Bongani Hans (a journalist).

[2] In that application, which was issued on 24 March 2025 for hearing on 26 March 2025, it was (in broad terms) contended by Artsolar that Latimer, Singh and Hansraj were defaming Artsolar to *inter alia* Hans. An interdict was sought on 26 March 2025 and an order was granted on the same date in the following terms:

"1. That a rule *nisi* do hereby issue calling upon the respondents to show cause, if any, to this court on the 29th day of July 2025 why an order in the following terms should not be granted:

1.1 the respondents are interdicted and restrained from making written or verbal defamatory statements concerning the applicant, including by stating or implying that:

1.1.1 the applicant conducts business unethically or dishonestly;

1.1.2 the applicant defrauded the first respondent or the first respondent's company including by misrepresenting that alternative electricity generation equipment being solar panels supplied by the applicant to the first respondent's company were manufactured locally when in truth and in fact they were manufactured in China;

1.1.3 alleging or implying that the applicant has falsely inflated prices charged to the first respondent or any of his companies, in the supply and/or installation of solar panels.

1.2 That the aforesaid interdict will apply irrespective of to whom the said defamatory allegations are made, but in the case of the first to third respondents, will extend specifically to members of the press, Bongani Hans, the Independent Media Group, the International Trade Administration Commission of South Africa (ITAC), the Industrial Development Corporation of South Africa (IDC) and the Department of Trade, Industry and Competition (DTIC).

1.3 The fourth respondent is interdicted from publishing any such statements, and including publishing them as constituting allegations made by any third party to the effect set out in para 1.1 above.

1.4 That the first to third respondents are directed to pay the costs of this application jointly and severally, but in the event of the application being opposed by the fourth respondent, that all four respondents are to pay those costs jointly and severally, on scale C.

2. Pending the return date or any extension thereof, the provisions of paragraphs 1.1 to 1.3 above will operate as interim orders with immediate effect."

[3] As mentioned, the application that served before me was interlocutory to the application where an order was granted on 26 March 2025. In this interlocutory application, the Industrial Development Corporation of South Africa Limited ("IDC") seeks:

(a) an urgent hearing;

(b) to be joined as the fifth respondent in the main application; and

(c) a reconsideration of the order granted on 26 March 2025 so as to delete the reference to the IDC in paragraph 1.3 of the Order.

[4] The reconsideration is limited only to the rule nisi and interim relief. It is not finally dispositive any matter - whether between the named parties, or between Artsolar and the IDC.

[5] The interlocutory application was issued on 3 April 2025 for a hearing on 9 April 2025. By the date of hearing Artsolar had filed what was described as a preliminary answering affidavit. In court on 9 April 2025 I was advised by Mr Broster (who appeared for the IDC) that the IDC did not intend to file a replying affidavit and regarded the matter as ripe for hearing.

[6] Consequently, on 9 April 2025 I was required to consider the following three questions:

(a) was the matter sufficiently urgent to justify a hearing on 9 April 2025;

(b) was a case made by the IDC for its joinder as fifth respondent in the main application; and

(c) was a case made by the IDC for reconsideration in the terms that it sought.

[7] As set out in argument for Artsolar (by Mr Stokes SC who appeared together with Mr Shapiro SC), the reconsideration question includes a question of whether a party that is not originally cited is entitled to invoke the provisions of uniform rule 6(12)(c) in pursuit of a reconsideration.

[8] The questions set out above must necessarily be sequentially answered. Put simply: if the matter is not urgent then it is not necessary to consider the question of joinder because the matter ought not to be enrolled, but if the matter is urgent and the joinder is refused then it is unnecessary to consider the question of reconsideration. That being said, the factual basis for each of the questions is interrelated and, to some extent, the impact of the conclusion in the latter questions informs the former.

Urgency

[9] Assuming for the purposes of the consideration of urgency that the application is properly one instituted in accordance with uniform rule 6(12)(c) a question arises as to appropriate test for urgency in reconsideration applications.

[10] Rule 6(12)(c) itself contains no internal directive regarding urgency. That rule simply requires that reconsideration be set down on notice. The rule is a sub-rule to rule 6(12) which provides in 6(12)(a) for urgent applications. As a matter of construction, it seems to me that a party seeking a reconsideration under 6(12)(c) is required, if it wishes that the reconsideration be dealt with urgently, to provide a basis justifying an urgent hearing for the reconsideration.

[11] This accords with the analysis in *Erasmus*[1] wherein it is recorded:

"It has been held that an application for reconsideration is not urgent for the purposes of rule 6(12) simply because an order was granted in the urgent court. This means that, in the absence of demonstrable prejudice in the time between when an application may be heard before an urgent court and in the ordinary course, a party seeking a reconsideration must set out the prejudice that will ensue. The threshold is the same whether in an application for reconsideration or when approaching the court under rule 6(12)(a). In both instances, the parties seeking relief must set out in clear terms facts duly supported that will pass the threshold of 'absence of substantive relief' if the matter is not heard before the urgent court."

[12] *Erasmus* supports that contention by reference to an unreported decision in the Gauteng Court in *Joint Venture Comprising Gorogang Plant Razz Civils v Infiniti Insurance Ltd.*[2]

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[1] *Erasmus,* Superior Court Practice, Second Edition, D1 – Rule 6-62: Service 25, 2024
[2] [2024] ZAGP JHC 1048 (15 October 2024)

[13] That approach is reinforced by the judgment in *Sheriff Pretoria North-East v Flink and Another*[3] wherein *Raath AJ* observed:

"Nothing in rule 6(12)(c) suggests that such a respondent would be entitled to enrol the matter for reconsideration again on an urgent basis merely because the order had been obtained on an urgent basis. A proper case will have to be made out independently for the urgency of reconsideration of the order."

[14] In contrast, this court in *United Medical Devices LLC and Another v Blue Rock Capital Ltd and Another*[4] held as follows:

"As stated, the purpose of rule 6(12)(c) is to allow parties who were not present when an urgent *ex parte* order is made, to approach the court for reconsideration of the order and to place facts before the court. To permit the respondents to themselves now claim lack of urgency on the part of the applicants would undermine *audi alteram partem* which rule 6(12)(c) gives effect to."

[15] It seems to me that the approach of the KwaZulu-Natal Court recognises implicitly that a party who has obtained an *ex parte* order (which for the purposes of the question of urgency I assume to have been wrongly obtained) ought not to be permitted to benefit from that order merely because the matter was initially heard *ex parte*. Such an approach would be to encourage *ex parte* applications in the hope that court procedure and overburdened court rolls would secure a benefit to which the *ex parte* applicant was never entitled.

[16] The IDC's case for urgency is somewhat tersely set out and may be summarised as follows:

(a) there is a potential for significant harm to the mandate and reputation of the IDC given the sum of over R90 million advanced by the IDC to Artsolar;

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[3] [2005] JOL 14761 (T)
[4] (13398/2015) [2016] ZAKZDHC 12 (4 March 2016) at [42]

(b) the potential harm extends beyond the IDC affecting the public at large and the South African economy and the IDC goal of localising the production of products of this nature; and

(c) the order will have the effect of delaying the investigation of the complaint to the IDC about Artsolar beyond the ninety day period requested by the Department of Trade, Industry and Competition ("DTIC").

[17] Artsolar disputes that the harm will arise and particularly disputes that the ninety day period is of any great moment given that it is "self-imposed".

[18] Even if I were to accept that the period is self-imposed, it appears to me that courts should incentivise proactive investigation by organs of State and State owned companies rather than imposing impediments upon such investigations.

[19] It also appears to me that the issues arising in this particular application are narrow in scope and primarily of a legal nature. Consequently, there is only a limited prejudice, if any, to be suffered by Artsolar arising from truncated time periods for the filing of an answering affidavit. Even if the answering affidavit is styled "preliminary", it is unclear to me what further facts might have been placed before the court (assuming that any were permissible given the form or reconsideration) even had a longer period been provided for.

[20] In having regard to the various contentions as relates to urgency, I ultimately conclude that it would be appropriate to adopt the approach of *Pullinger AJ* in the *Joint Venture Comprising Gorogang Plant Razz Civils and Others* matter wherein at paragraph 6 after endorsing the proposition that a reconsideration is not automatically urgent, the court nonetheless adopted the position that it was:

"…not inclined to strike this matter from the roll and [instead] preferred to address the merits of the matter as all the papers are before me, [because] I have heard full argument in relation to both the procedural aspects and the merits and therefore there is no good reason to burden another court in the circumstances."

[21] It seems to me that the same approach should be adopted here because, even if the case for urgency advanced by the IDC is somewhat limited, it is nonetheless a more appropriate use of judicial resources, and a more appropriate balancing of the rights of the parties to consider the application on the merits than to ascribe strictly to procedural rules relating to urgency.

Request to join as respondent

[22] The IDC case for joinder culminates in paragraph 22 of the founding affidavit which reads:

"Given the fact that the IDC has a direct and substantial interest in the order sought by Artsolar, the IDC ought to have been joined to these proceedings and is entitled to an order to be joined to these proceedings as the fifth respondent."

[23] That paragraph is predicated upon an earlier discursus in which the IDC sets out that:

(a) it received a whistleblower complaint; and

(b) it wishes to conduct an investigation into that complaint (which is said already to have been commenced).

[24] In contrast Artsolar contends that:

(a) the IDC has no legal interest in receiving defamatory allegations (and it posits that the original court order necessarily included a *prima facie* finding that the statements were defamatory); and

(b) allied to that contention it is argued that the IDC's position is that of a private contracting party and not a public authority with any investigative rights or obligations.

[25] The applicable test for intervention has been set out in detail by the Constitutional Court in *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others*[5] where that court held:

"[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

"In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.""

[26] In my view, the opposition to joinder loses sight of two key aspects.

[27] Firstly, s16(1)(b) of the constitution, 1996 provides:

"Everyone has the right to freedom of expression, which includes –

(b) freedom to receive or impart information or ideas."

[28] Although not every right in the bill of rights applies to juristic persons, on the facts of this matter (and taking into account the juristic persons such

[5] 2017 (5) SA 1 (CC)

as media organisations have previously asserted rights under s16) I see no reason why the IDC ought not be able to invoke the right to receive information or ideas as identified in s16(1)(b) of the constitution. This then is the starting point for the consideration of whether any rights of IDC are affected.

[29] Furthermore, it is not in my view correct, as contended for by Artsolar, to treat the IDC as simply another lending institution with private law contractual rights. Plainly, the IDC does have such private law rights but it also fulfils a function different to that fulfilled by other commercial lenders. The IDC was established by statute[6] and its objects as set out in s3 include:

"(b) To facilitate, promote, guide and assist in the financing of:

(i) new industries and industrial, or ancillary or related economic, undertakings; and

(ii) schemes for the expansion, better organisation and modernisation of and the more efficient carrying out of operations in existing industries and industrial, or ancillary or related economic, undertakings

to the end that the economic requirements of the Republic may be met and industrial development within the Republic, Southern African region and the rest of Africa may be planned, expedited and conducted on sound business principles;

(g) to encourage the creation of new knowledge based industries and services in the establishment and growth of new technology based firms; and

(h) to enhance corporate governance so as to achieve business excellence."

[30] Whilst, as Artsolar correctly contends, the loan agreements concluded between the IDC and Artsolar do not expressly identify that Artsolar was to effect local production of solar panels, the IDC alleges directly that:

"The primary purpose of this funding was to enable Artsolar to install the latest technology manufacturing plant/line and machinery for the local production of the

[6] Industrial Development Corporation Act No. 22 of 1940

latest technology photovoltaic modules (solar panels) such as the 550W photovoltaic modules."

[31] An investment for the purpose identified by the IDC would accord with the stated objects of the IDC as encapsulated in legislation.

[32] The combination of the right under s16(1)(b) and the statutory objects of the IDC is such, in my view, as to make clear that the IDC has a direct and substantial interest in the application.

[33] Having regard to what I have set out above, I am satisfied that the IDC has a right to be joined in the application.

[34] Artsolar also contends that there is in effect no harm suffered by the IDC because it has other private law contractual entitlements to conduct inspections and to have sight of Artsolar's documents and factory.

[35] That last point is in my view not helpful in the question of joinder since as the Constitutional Court pointed out in *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* matter where a party asserts *"some right which is affected by the order issued, permission to intervene must be granted."*

Reconsideration

[36] Having thus determined both that the matter should be entertained as one of urgency and that in the first instance the IDC ought to have been joined in the application, all that remains is a question of whether the IDC's requested reconsideration should be upheld or rejected.

[37] Artsolar contends that it is not open to the IDC to invoke Rule 6(12)(c) because, as I understand the argument, the IDC was not a party at the hearing and thus was not a party in whose absence an Order was granted. I do not accept that argument. Firstly, the rule appears to me to be

wide enough to accommodate a person who has successfully contended for their joinder even if not originally cited. Secondly, once it is accepted that a party enjoyed a right to be joined, any formalistic approach to the rules must necessarily be eschewed in favour of an approach that does justice.

[38] The approach to reconsideration has been settled by the Supreme Court of Appeal in *Afgri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulkers A/S (in liquidation) and Others*[7] which held:

"[12] Rule 6(12)*(c)* does not prescribe how an application for reconsideration is to be pursued. The absence of prescription was intentional and the procedure will vary depending upon the basis on which the party applying for reconsideration seeks relief against the order granted *ex parte* and in its absence. A party wishing to have the order set aside, on the ground that the papers did not make a case for that relief, may deliver a notice to this effect and set the matter down, for argument and reconsideration, on those papers. It may do the same if it merely wishes certain provisions in the order to be amended, or qualified, or supplemented. The matter is then argued on the original papers. It is not open to the original applicant, save possibly in the most exceptional circumstances, or where the need to do this has been foreshadowed in the original founding affidavit, to bolster its original application by filing a supplementary founding affidavit."[8]

[13] The party seeking reconsideration is not confined to this route. It may file an answering affidavit, either traversing the entire case against it, or restricted to certain issues relevant to the reconsideration. In many instances such an affidavit will be desirable[9]. Even if an affidavit is filed, however, it does not preclude the party seeking reconsideration arguing at the outset, on the basis of the application papers alone, that the applicant has not made out a case for relief. That is a well-established entitlement in application proceedings[10] and there is no reason why it should not be adopted in reconsideration applications.[11]

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[7] 2024 (1) SA 373 (SCA)
[8] *Basil Read (Pty) Ltd v Nedbank Ltd and Another* 2012 (6) SA 514 (GSJ) para 37.
[9] *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 487C-D
[10] *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 136B-C; *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at 519E-F; *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 465E-G.
[11] It was adopted in *Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)* 1998 (3) SA 281 (W) at 291B-G.

[14] If an affidavit is filed in support of the application for reconsideration then the party that obtained the order is entitled to deliver a reply thereto, subject to the usual limitations applicable to replying affidavits. When that is done, and the party seeking reconsideration does not argue a preliminary point at the outset that the founding affidavit did not make out a case for relief, the case must be argued on all the factual material before the judge dealing with the reconsideration proceedings[12].That material may be significantly more extensive and the nature of the issues may have changed as a result of the execution of the original *ex parte* order.[13]"

[39] The approach of the IDC falls somewhat in between the two approaches identified by the Supreme Court of Appeal. While the IDC did file an affidavit (thus placing itself somewhat outside the form of reconsideration that proceeds only on the founding papers) it did so primarily to adduce evidence in support of its intervention rather than in support of the reconsideration. Further, an answering affidavit (albeit preliminary) has been filed by Artsolar, and additionally Latimer, Singh and Hansraj have filed comprehensive answering affidavits. It follows that the material before this court is not quite the same material as was before the court hearing the main application in the first instance.

[40] At this point, it is appropriate to return to the order that was granted by the court hearing the matter in the first instance.

[41] Mr Stokes contended that there can be no entitlement on the part of the IDC to receive defamatory information and consequently that the IDC could not assert that any legitimate right had been infringed by the terms of the order. That submission is seductive in its simplicity but, in my view, cannot be adopted without qualification.

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[12] *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 269H-J.
[13] *The Reclamation Group (Pty) Ltd v Smit and Others* 2004 (1) SA 215 (SE) at 218D-F.

[42] The first qualification is one of law; which is to note that there are circumstances in which defamatory statements might legitimately be made. These include all of the various forms of qualified privilege, as well as circumstances peculiar to the press, or where it can be contended that the statements are both true and for the public benefit, There is thus no absolute right to be protected from being the subject of defamatory allegations.

[43] The allegations which are precluded under the original order include either direct statements or implications that Artsolar conducts its business unethically or dishonestly; and allegations relating to where solar panels were represented to have been made as opposed to where they were in fact made; as well as further allegations relating to representations as to price.

[44] In the context of the objects of the IDC, and the alleged purpose of the loan, it appears to me at least *prima facie* that disclosures of the nature interdicted (assuming that they were truthful) would be defensible either as being truthful and for the public benefit or as a form of qualified privilege. For that reason, merely on principles of law I would grant the reconsideration.

[45] There is however a further practical reason why the reconsideration should be granted. That is because upon an analysis of the order from the perspective of the IDC it prohibits plainly permissible statements that could be made by Latimer, Singh and Hansraj to the IDC. By way of example, and assuming without finding that the facts supported these statements, it would in my view not be defamatory for the three principal respondents to make the following statements to the IDC:

(a) the solar panels installed by the applicant were said by the applicant to be manufactured in South Africa; but
(b) factually the solar panels are manufactured in China; and
(c) the solar panels would not have been purchased had it been known that the panels were manufactured in China and not in South Africa; and

(d) the principal respondents believe that Artsolar both knew that its representation was wrong and further knew that the representation was relied upon.

[46] If those statements can *bona fide* and honestly be made by the first to third respondents, then I can see no grounds for prohibiting them. However, the necessary implication of those statements would be that:

(a) Artsolar conducts business unethically or dishonestly; and

(b) Artsolar defrauded the first respondent's company.

[47] The order as presently framed precludes disclosures to the IDC that may have that implication. In my view, such a prohibition is not justified.

[48] Further, the founding affidavit in the original application made no real case (as against the IDC) that disclosures, even defamatory ones, could not be cured by a suitable alternative remedy in the form of damages claimable against a party making untrue and defamatory allegations. There was also no examination in the original founding papers of the balance of harm *vis a vis* the IDC. For that reason also, I hold that the reconsideration is well founded because no case for interdictory relief was made out in the original founding papers *vis a vis* the IDC.

[49] As to costs, I see no reason why costs ought not to follow the result. Artsolar instructed two senior counsel which reflects the gravity of the matter and in my view, it would be appropriate to award costs on scale C. Because this application is only interlocutory, rather than final, the costs are only those occasioned by the hearing on 9 April 2025.

[50] For the reasons set out above, I grant the following order:

(a) the Industrial Development Corporation of South Africa Limited is granted leave to intervene and is hereby joined as a fifth respondent under Case No. D1162/25;

(b) the order granted on 26 March 2025 be and hereby is reconsidered by deletion in paragraph 1.2 thereof of the words “the Industrial Development Corporation of South Africa (IDC)”;

(c) Artsolar (Pty) Ltd is to pay the costs of Industrial Development Corporation of South Africa Limited occasioned by the hearing on 9 April 2025 on scale C.

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P Wallis AJ

Appearances

Counsel for IDC:	Adv JP Broster
Attorneys of IDC:	Pather and Pather Attorneys Ref: Edward Abraham/CR/I292
Counsel for Artsolar (Pty) Ltd:	Adv A Stokes SC and Adv W N Shapiro SC
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