REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 37327/2019

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: ~~YES~~/NO

2.OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

3.REVISED

18/11/2018 .....
DATE

.....
SIGNATURE

In the matter between:

GUNDO INVESTMENTS (PTY) LTD	Applicant
and	
NELSON BORMAN AND PARTNERS	First Respondent
JCN BORMAN N.O.	Second Respondent
TSHIMBILUNI INVESTMENT HOLDINGS (PTY) LTD	Third Respondent
PEMBALANI INVESTMENT HOLDINGS (PTY) LTD	Fourth Respondent
KOTULO-NALA CC	Fifth Respondent

BINDI J-ZEE TRADING ENTERPROSES CC Sixth Respondent

ISENZO ESHILE CONTRACTORS CC Sevent Respondent

JUDGMENT

DIPPENAAR J

Introduction

[1] The applicant launched an urgent application on 23 October 2019, enrolled for hearing on 29 October 2019, seeking a declaratory order that the first and second respondents are in contempt of court due to their failure to comply with a court order granted under case number 2012/10411 on 27 July 2012 and amended on 5 December 2012. It is alleged that the first and second respondents are in contempt due to their failure to pay money held in trust in terms of that order, to the applicant following a determination of a dispute before the North Gauteng High Court under case number 49867/2010 ("the shareholders' dispute"). It also sought an order directing the first and second respondents to pay the money held in trust into the applicant's bank account within 24 hours of granting of an order.

[2] The relevant portion of the order as amended provides as follows: *"All monies held at Investec, on behalf of the Applicant, be released into the trust account of Nelson Borman and Partners Inc pending the outcome of case number 499867/10 in the North Gauteng High Court".*

[3] The applicant cited only the first and second respondents as parties to the application. The application did not comply with the practice directives in relation to urgency, nor did the papers make out any case for the urgency with which the

application was brought. These factors have a bearing on the costs order I intend to grant.

[4] I would have been justified in striking the application from the roll for lack of urgency. I was however persuaded not to do so and to deal with the application on its merits, as at the hearing, the third to seventh respondents ("the intervening shareholders") sought leave to intervene in the proceedings.

[5] The intervening shareholders were all parties to the shareholder dispute proceedings in the Gauteng North High Court. The dispute centered around the shareholding in the applicant. The deponent to the applicant's founding papers, Ms Neo Moselakae, was also a party to those proceedings. Two factions had formed in relation to the shareholding of the applicant, the Moselakae parties and the intervening shareholders. These proceedings were finally determined by the Supreme Court of Appeal on 27 September 2019. The intervening shareholders were successful in those proceedings, both before the court a quo and the Supreme Court of Appeal.

[6] The outcome of those proceedings was that the intervening shareholders are entitled to have their names inserted onto the applicant's share register and to appoint directors to its board, which would result in the majority of the applicant's directors being individuals appointed by the intervening shareholders. On this basis, the intervening shareholders disputed Ms Moselakae's authority to institute the present application on behalf of the applicant.

[7] These facts were not disclosed by the applicant in its founding papers. It was also not disclosed that prior to the institution of the present proceedings, substantial correspondence was exchanged between the various parties regarding the funds held in trust by the first respondent.

[8] The legal representatives of the intervening shareholders had, as early as 27 August 2019, when the judgment of the Supreme Court of Appeal was still pending, addressed correspondence to the first and second respondents, the applicant and Ms Maselakae requesting confirmation that no monies would be released pending delivery of the said judgment and the parties reaching a mutual agreement as to the distribution of the funds, whereafter their legal representatives and the representatives of the Maselakae parties, Swanepoel attorneys, would jointly instruct the first and second respondents.

[9] Both the first and second respondents and Swanepoel attorneys gave the undertakings sought. The first and second respondents made their position clear that no funds would be released absent a joint written instruction from the attorneys of all the shareholder parties, Klagsbrun Edelstein Bosman De Vries ("klagsbrun") and Swanepoel attorneys.

[10] On 28 September 2019, the applicant terminated the mandate of Swanepoel attorneys and addressed a letter of demand to the first respondent, demanding the release of the funds to the applicant's bank account.

[11] Despite a letter from Klagsbrun on 10 October 2019, requesting the applicant and Ms Moselakae to serve any urgent application on them and advising that a *de bonis propriis* order would be sought, the intervening shareholders were not joined to this application.

[12] There is merit in the contention of the intervening shareholders that Ms Maselakae attempted to steal a march on them by launching the present proceedings in their absence. I am fortified in this view by the applicant's strenuous opposition to the joinder of the intervening shareholders, despite their material interest in the proceedings being self- evident. No grounds of substance were raised to oppose the joinder. As the hearing I granted the intervening shareholders leave to intervene. The applicant did not

seek any postponement of the proceedings nor an opportunity to deliver any further affidavit.

[13] The case made out by the applicant in its founding papers against the first and second respondent is in very broad terms and refers only to demands made for payment by the applicant. It is baldly alleged that the respondents are unlawfully withholding the applicant's funds, which is put up as an excuse for not complying with the orders made in the shareholders' dispute. The applicant did not take the court into its confidence by disclosing all the relevant facts including that the funds so held in trust are substantial and amount to some R13 666 041.24.

[14] The applicant on its papers makes out no case that the first and second respondents are in contempt and fall woefully short of the requirements for such relief.[1] The applicant failed to prove any breach of the 2012 order by the first and second respondents. As pointed out by the first and second respondents, they are holding the funds as a stakeholder, to be dealt with on the joint instructions of the parties advancing competing claims to the funds or in accordance with a court order. The applicant is not unilaterally entitled to demand payment of the disputed funds.

[15] The facts further do not support any conclusion that the first and second respondents have acted *mala fide* or in deliberate breach of such order. To the contrary, the facts establish the opposite. It follows that the application must fail.

[16] The respondents all argue that the application constitute an egregious abuse of process. There is merit in such submission. The applicant has not disclosed the true facts, but instead launched contempt proceedings in an attempt to obtain an order which would allow substantial funds to be released to the applicant, behind the backs of

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[1] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras [9] and [10]; *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC)

the intervening shareholders who have a direct and substantial interest in the applicant. In my view such conduct is deserving of censure[2].

[17] The normal principle is that the costs follow the result. There is no basis to deviate from this principle. Both the first and second respondents and the intervening shareholders sought punitive costs orders. Considering the approach adopted by the applicant in relation to these proceedings, such a costs order is warranted.

[18] The first and second respondents have not sought any costs orders against the deponent to the applicant's affidavits, Mr Mosalakae. The intervening shareholders seek such an order and point out that Ms Mosalakae was warned that such a costs order would be sought if the applicant launched an urgent application. The intervening shareholders point out that if an adverse costs order is granted against the applicant, it would be prejudicial to their interests in the applicant. There is merit in this contention insofar as it pertains to the position of the shareholders amongst themselves. In such capacity it would be a just exercise of the discretion afforded to direct Ms Mosalakae to pay the costs of the intervening shareholders in relation to these proceedings.

[19] I grant the following order

[1] The application is dismissed.

[2] The applicant is directed to pay the costs of the first and second respondents, on the scale as between attorney and client, including the costs of senior counsel.

[2] The deponent to the applicant's affidavits, Ms Mosalakae, is directed to pay the costs of the intervening parties, the third to seventh respondents, both in relation to the intervention application and the urgent application, on the scale as between attorney and client, including the costs of senior counsel.

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[2] *Beinash v Wixley* 1997 (3) SA 721 (SCA)

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	29 October 2019
DATE OF JUDGMENT	:	18 November 2019
APPLICANT'S COUNSEL	:	Mr Ditheko
APPLICANT'S ATTORNEYS	:	Ditheko Lebethe attorneys Mr Ditheko
FIRST AND SECOND RESPONDENTS' COUNSEL	:	Adv P Roodt SC
FIRST AND SECOND RESPONDENTS' ATTORNEYS	:	Nelson Borman & Partners Mr Borman
INTERVENING PARTIES		
THIRD TO SEVENTH RESPONDENTS' COUNSEL	:	Adv V Maleka SC
THIRD TO SEVENTH RESPONDENTS' ATTORNEYS	:	Klagsbrun Edelstein Bosman De Vries Mr J Greenberg