REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 3158/2019

REPORTABLE:NO
OF INTEREST TO OTHER JUDGES:YES
REVISED: YES
14/04/2022

In the matter between:

J[....] S[....] B[....] First Applicant

EL ROI MOTORS Second Applicant

and

C[....] H[....] B[....] Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] The First Applicant and Respondent are estranged husband and wife currently involved in a hostile divorce. They are also co-directors of the Second Applicant. The Applicants brought an application against the Respondent comprising Part A and B. Following argument before Greyling-Coetzer AJ on 28 May 2020, the following order was made on Part A:

> *"1. The Respondent's Application for postponement is dismissed with costs as on the scale between Attorney and Client;*
>
> *2. The Respondent is to launch an Application for leave to institute a counter-Application, if at all, within 10 days (i.e 7 June 2020) from date of this Order (i.e. 28 May 2020);*
>
> *3. The South African Institute of Chartered Account ("SAICA") is to appoint a suitable person within 10 days of service of this Order in terms of the provisions of Section 163(2)(f)(i) of the Companies Act, 71 of 2008 ("the Act"), as a director of the second Applicant. It is further directed that:[SIC]*
>
> > *3.1 SAICA is to appoint within 10 days of service of this Order, an independent auditor, which person is to report to this Court, within 45 days from either the date of this Order, or the date upon which he/she receives the documentation and information from the Respondent, as alluded to in prayer 9 (including sub-prayers 9.1 to 9.3) infra, on any of the issues contemplated in Section 163(2) of the Act.*
>
> *4. The Respondent is interdicted and restrained from receiving any payments from the clients of the Second Applicant, whether directly and/or indirectly, without prior authorisation from the Second Applicant (excluding the payments due in respect of the NIVARA bakkies with Registration numbers [....]*

and [....], which the Respondent is entitled to receive for the purpose of servicing the Finance Agreement with the financial institutions involved;

5. The Respondent is interdicted and restrained from approaching any of the clients of the second Applicant in relation to the affairs of the second Applicant which inter alia includes the collection of monies and/or entering into further agreements;

6. The conducting of the management and the affairs of the second Applicant be continued on the basis that should any deadlock arise between the first Applicant and the Respondent regarding any decisions required to be taken in the furtherance of the affairs of the second Applicant, then and in that event that person appointed in terms of prayer 3 supra, shall exercise a decisive vote and determine by his/her vote or support any potential deadlock that may arise between the first Applicant and the Respondent pertaining to the conducting of the business and affairs of the second Applicant;

7. The Respondent is interdicted from breaching his fiduciary duties by inter alia entering directly into agreements with clients of the second Applicant and to the detriment of both the Applicants (my underlining);

8. Prayers 4 to 7 supra serves as interim interdictory relief, with immediate effect, pending the finalisation of part B of the Notice of Motion and Counter Application, if any, to be instituted per 2 above;

9. The first Applicant and Respondent is Ordered to provide to the second Applicant and/or his appointed auditor, the following documentation and/or information: [SIC]

9.1 Complete bank account statements of all accounts held by the or under the control of the First Applicant and Respondent from January 2019 to May 2020;

9.2 A complete list of cash payments collected from clients from January 2019 to May 2020, if any;

9.3 All other financial information as requested by the financial auditor in terms of 3.1 (12.3.1) above;

10. The costs of part A of this Application to be reserved for adjudication at the conclusion of part B;

11. That the relief set out in part B of the Notice of Motion be postponed sine die."

[2] In this Part B, the Applicants now seek to have the Respondent firstly, removed as a –co-director of the Second Applicant, secondly, that he be declared a delinquent director as contemplated in Section 162 of the Companies Act, 71 of 2008 ("the Companies Act") and thirdly, that he be ordered to return certain vehicles owned by the Second Applicant failing which the sheriff be authorised to remove them from his premises. In opposition, the Respondent has raised several preliminary points, which he maintains, will be dispositive of the whole matter if upheld.

[3] The preliminary points raised by the Respondent are:

3.1 Lack of authority;

3.2 Lack of *locus standi;*

3.3 Non-joinder of the State;

3.4 Adoption of incorrect procedure.

BACKGROUND FACTS

[4] Before traversing the preliminary points described above, it is necessary to set out the background against which this whole matter arose. As part of the order of 28 May 2020, Greyling-Coetzer AJ directed that:

4.1 The South African Institute of Chartered Accountants ("SAICA") was to appoint an independent auditor to report to this court regarding any issues as contemplated in Section 163(2) of the Companies Act;

4.2 The Respondent was interdicted from receiving any monies from clients of the Second Applicant and from approaching any of the Second Applicant's clients;

4.3 A person be appointed by SAICA as a director of the Second Applicant and that such a person would exercise a decisive vote where the parties reach a deadlock regarding the management of the Second Applicant.

[5] On 9 June 2020, the parties were advised that SAICA had appointed Mr Theo Theophanous ("Theophanous") as the independent auditor. Upon assumption of his duties in that capacity, Theophanous informed the parties that he required certain issues emanating from the court order of 28 May 2020 clarified. The first of these was whether or not the roles of the director and independent auditor were to be executed by one individual because if this was the intended outcome, it would create a conflict of interest.

[6] Furthermore, he wished to know whether or not the powers of the proposed third director would be limited to voting only in those instances where the directors have deadlocked. Lastly, whether or not his mandate was limited to the revenue of the

Second Applicant or whether or not he could report on claims by parties for work done but not compensated for.

[7] Responding to the questions by Theophanous, the attorney for the Applicants stated that the mandate was limited to that of an independent auditor. That said, his mandate was limited to the four corners of the court order having regard to the relief claimed by the Applicant against the Respondent. The attorneys of the Respondent for the time being then said that the mandate was premised on an investigation of the factors listed in Section 163(2) of the Companies Act. The mandate was not only limited to an inspection of the Respondent and the company, but includes the first Applicant. He believed that Theophanous could act as the third director.

[8] It appears to be the Respondent's contention that since he had no difficulties in Theophanous acting as a third director as well, if the Applicants thought it improper for him to do so, it was incumbent upon them to approach SAICA for the appointment of a third director. On 18 November 2020, Theophanous presented his draft report to the co-directors. The report was critical of their flaws as co-directors of the Second Applicant.

[9] Theophanous established that the Respondent and the First Applicant owed amounts of R57 825.00 and R838 947.00 to the Second Applicant respectively. Additionally, Theophanous noted that amounts received and expended by the co-directors on behalf of the Second Applicant since inception had been characterised as their own. To this extent the co-directors failed to distinguish between them and the Second Respondent as a separate legal entity.

[10] Theophanous further observed that the co-directors did not cause the Second Applicant to keep proper accounting books as required in terms of Section 28 of the Companies Act. As though that was not sufficient, no tax returns were submitted to SARS on behalf of the Second Applicant for the years 2014 to 2020 and it was not registered for VAT or as an employer for purposes of PAYE. A further damning finding

of Theophanous was that vehicles which belonged to the Second Applicant were used by the co-directors as their own.

[11] The Respondent alleges that the First Applicant was not the happiest person when it emerged that as a director responsible for keeping the books of the Second Applicant and in charge of control of the administration of the Second Applicant, Theophanous had incriminated her too in the report as being a negligent director. Thereafter, the attorney of the First Applicant addressed a letter to Theophanous describing his difficulties with the report.

[12] The attorney required that Theophanous modify the report in a manner that would show whether or not he believed that the Respondent should be removed as a director and be declared a delinquent director. On 27 January 2021, Theophanous submitted his final report wherein he pointed out that he has had regard to the First Applicant's letter and associated allegations. Theophanous reported that he had confronted the Respondent with the accusations against him. He was persuaded that the answers supplied by the Respondent were true.

[13] He elaborated that the amounts owed by the co-directors to the Second Applicant remained the same. He went on to state that he noted several contraventions of the directors failing to cause the company to report in terms of the Companies Act. He added that the directors also did not ensure, as they were required to do, that the company was registered and reported in terms of the Tax Administration Act 28 of 2011 and pay over the appropriate taxes.

[14] Finally, he found that the co-directors did not pay over or report to the Second Applicant. The First Applicant acknowledged her debt to the Second Applicant in terms of funds received from clients into her own personal bank account after the deduction of expenses incurred on behalf of the Second Applicant. As such, she had unhindered access to the funds of the Second Applicant, which contrary to the Companies Act, she used for her personal expenses.

[15] Theophanous found that the directors, specifically the First Applicant as the financial director, failed to:

15.1 Keep accurate and complete accounting records;

15.2 Compile annual financial statements

15.3 Submit income tax returns;

15.4 Register for VAT; and

15.5 Register as an employer for PAYE purposes.

[16] Both co-directors can be declared delinquent directors, says Theophanous. However, that cannot be done without disastrous consequences to the Second Applicant whose business may not endure the declaration. Theophanous recommends instead that in line with Section 163(2) of the Companies Act, the co-directors should:

16.1 Cease accepting monies belonging to the Second Applicant into their respective bank accounts;

16.2 Deposit the monies into the bank account of the Second Applicant;

16.3 Compile accounting records and financial statements;

16.4 Submit tax returns to SARS;

16.5 Register the Second Applicant as an employer with SARS for PAYE purposes.

[17] The First Applicant is disgruntled with the contents of the final report. She does not believe that firstly, Theophanous had a mandate to investigate and make findings against her, secondly, that he should have accepted that the Respondent incurred expenses on behalf of the Second Applicant after the court order was granted and thirdly, that he recognised that the summary of expenses was correct. She now wants this Court to 'turn a blind eye' to all findings and recommendations made against her by Theophanous.

[18] In her letter to Theophanous she advises him that the Respondent had, in contravention of the agreements concluded between the Second Applicant and the various clients, admitted having persuaded the latter to make payments directly to him. She alleges further that subsequent to the court order, the Respondent advised the clients to make payments neither to him nor the Applicants. In substantiation of this, she annexes two documents purporting to be telephone transcripts of conversations between the Respondent and her, one dated the 4th of August 2020 and the other, the 8th of March 2021.

[19] The Respondent contends that the purported telephone transcripts are not admissible as evidence because they have not been verified. Besides, the court does not know who recorded or transcribed them, where, when and under which circumstances. However, in the event that the court nonetheless admits the transcripts, it ought to note that he stopped payments into his account and not the Applicants'. For similar reasons, the Respondent finds the second transcription objectionable.

[20] Regarding the second transcription, it is the Respondent's assertion that the vehicles have always been freely accessible to the First Applicant for collection. He denies ever prohibiting access to them. He admits, however, accusing the First Applicant of appropriation and use of the business proceeds of the Second Applicant for her personal benefit and means. He alleged further that a greater number of the vehicles were in a disrepair state making them useless for income creation for the Second Applicant.

[21] Although the court order of 28 May 2020 does not direct the Respondent to return any vehicles to the Applicants, the First Applicant contends that the Respondent's refusal to allow her access to the vehicles is in violation of the court order of Greyling-Coetzer AJ. The vehicles whose return is being sought are either registered in the name of the Second Applicant, which has been deregistered by the Companies and Intellectual Properties Commissioner (the Commissioner"), or an entity known as Country Cloud Trading 54 with Registration Number: 2004/008941/23 ("Country Cloud"). Accordingly, Greyling-Coetzer AJ's refusal to grant an order returning the vehicles to the Applicants ought to be understood in that context. I will explore this more fully below. Now that the background matrix have been set out, it is appropriate to turn to the points in *limine* that the Respondent has raised prior to dealing with the merits.

LOCUS STANDI

[22] The Respondent argues that neither Applicant has *locus standi* to claim the return of the vehicles mentioned in the notice of motion using *rei vindicatio* as a remedy. For the Applicants to succeed with a claim for the return of the vehicles, they are required to allege and prove that the ownership of the vehicles vests in them and that they are in the possession of the Respondent. Both Applicants have failed to do this. See, *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*[1] and *Graham v Ridley*[2]**.**

[23] It was argued on behalf of the Applicants that despite ownership of the vehicles vesting in Country Cloud, the Second Applicant would deal with them as its own. This is extraordinary and cannot happen as to accede to the request will divest Country Cloud of its legitimate ownership of the vehicles. Besides, this Court has not been given any legal framework within which such can occur. Accordingly, it is rejected as devoid of any merit.

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[1] (1993) 1 All SA 259 (A)
[2] 1931 TPD 476

[24] To the extent that the Respondent has established that ownership of the vehicles legally vests in Country Cloud, they cannot be returned to either Applicant as both lack *locus standi*. These vehicles are items 3.9 to 3.12, 3.17 to 3.19 and 3.21 to 3.26 of the notice of motion. These vehicles are**: Ford Focus [....], Ford Bantam [....], Isuzu KB 200 [....], VW Jetter [....], BMW 520 [....], Ford Ranger [....], BMW 320 [....], Colt Bakkie [....], Nissan Almera [....], Nissan Hardbody [....], Nissan Navara [....], Nissan Navara [....] AND Nissan Xtrail [....]**. The evidence before court is unambiguous - the registered owner of these vehicles is Country Cloud. Moreover, Country Cloud has been deregistered and could not be part of these proceedings. In the circumstances, neither Applicant can claim their valid return.

[25] Turning to those vehicles registered in the name of the Second Applicant, the First Applicant has not shown that the Second Applicant, in whose name the vehicles are registered, has given her the necessary authority to claim their return. In the absence of a resolution emanating from the Second Applicant to that effect, the First Applicant does not have *locus standi*. In the result, the point in *limine* pertaining to *locus standi* is upheld.

NON-JOINDER

[26] Here the argument is that since the vehicles whose return is sought are registered in the name of Country Cloud, which has been fully deregistered leaving ownership of its assets vacant, the State has *ex lege* assumed ownership of those assets. As such, the State has become a party with a direct and substantial interest sufficient to warrant its joinder. The non-joinder of the State to these proceedings is as such, fatally defective and the application cannot succeed.

[27] As I have tersely alluded to *supra*, the complete deregistration of Country Cloud did not only divest it of the ownership of its assets including the vehicles but its existence legally ceased as contemplated in Section 82(2), which provides that once the Commissioner has received a certificate in terms of Section 1, he must firstly, record the

dissolution of the company in the prescribed manner and secondly, remove the name of the company from the companies register.

[28] Upon the cessation of the existence of a company, ownership of its assets become vacant. It is trite that once this occurs, the State takes over ownership of such assets. See, *Rainbow Diamonds (Edms) Bpk en Andere v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy*[3] and *G Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd*[4]. If Country Cloud is not in existence anymore, it stands to reason that the State, which has taken over ownership of the assets, has a direct and substantial interest in these proceedings. I am in agreement with the Respondent that the non-joinder of the State has catastrophic consequences for the case of the Applicants.

MOTION OR ACTION

[29] The Respondent is unwavering that the Applicants ought not to have brought these proceedings by way of motion. He contends that given The nature of the matter and the relief sought, the appropriate procedure would have been to institute an action. This application, continues the Respondent, is riddled with genuine material disputes of fact.

[30] These disputes of fact concern ownership of the vehicles, possession of the vehicles claimed, the First Applicant's authority to institute legal proceedings on behalf of the Second Applicant, as well as which director has behaved recklessly in the conduct of the Second Applicant's business and stands to be removed and/or declared a delinquent director.

[31] The general rule is that the determination of which procedure to choose is contingent upon whether or not the existence of genuine material dispute of fact should

[3] 1984 (3) SA 1 (A)
[4] (2011 (5) SA 14 (WCC)) [2011] ZAWCHC 261

have been foreseen. An anticipation of disputes of fact inexorably ties a litigant's hands to institute trial proceedings. This is apparent from the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd*[5] where the aforegoing was confirmed when the court held:

"…There are certain types of proceeding (e.g., in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed... There are on the other hand certain classes of case (the instances given…are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which…according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact"

[32] Where a disputes of fact arise during motion proceedings, Uniform Rule of Court 6(g) provides that:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise. It is trite that the use of the word may, is an indication that the court has a discretion whether to dismiss the application or to hear oral evidence on specified matters or refer the whole case to trial. The discretion ought to be used sensibly".

[33] In some instances, the consequences of making a wrong decision on whether to launch motion proceedings or institute an action could be grave for the party who has

[5] 1949 (3) SA 1155 (T)

launch the application. In this regard it is proper to refer to the Room Hire case *supra* once again where the following is stated:

"…application may be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into the disputed facts not capable of easy ascertainment…what is essentially the subject of an ordinary trial action."[6]

[34] Given the background of this matter, it is evident that it descends from a matrimonial dispute, an acrimonious divorce. Matrimonial matters being part of those cases where litigation by way of motion is barred, it follows that the Applicants ought to have anticipated the various disputes of fact mentioned supra. See, the Room Hire case at paragraph 32 above. Other than the nature of this case being matrimonial in nature, I agree with the Respondent that it should have dawned upon the Applicants from the exchange of correspondence between the legal representatives that disputes of fact would be inescapable.

[35] It is staggering that the Applicants have attached the aforesaid correspondence containing the disputes to their Founding Affidavit. Moreover, some of these follow from arguments traversed in Part A of the application and the admission of the First Applicant that some of the vehicles are registered in the name of Country Cloud. The Applicants should, at that juncture, have sought the transfer of this application to trial. This lack of foresight is one that should attract censure from this court.

LACK OF AUTHORITY

[36[I have carefully considered this point in *limine* and am of the view that it carries no weight at all. The Respondent should have embarked on the procedure provided in

[6] *See also, Lombaard v Droprop CC and Others* 2010 (5) SA 1 (SCA).

Uniform Rule of Court 7(1) to challenge the First Applicant's authority. The 'horses have bolted' and the Respondent must live with his decision. In the greater scheme of things though, he remains triumphant because this point in *limine* is not decisive of the outcome of this judgment.

CONCLUSION

[37] Due to the approach that I have adopted on the points in *limine*, it will be unnecessary to deal with whether or not the Respondent should be removed as a director of the Second Applicant or be declared a delinquent director. In the result, the application fails and I make the following order:

The application is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 14 April 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv AA Basson**
Instructed by:	**Day Attorneys** **C/O Du – Toit Smuts & Partners**

Counsel for the Respondent:	**Adv AM Raymond**
Instructed by:	**Jasper van der Westhuizen & Bodenstein C/O VZLR Attorneys.**
Date of Judgment:	**14 April 2022**