Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: The Honourable Mr Acting Justice De Waal

Hearing: 8 February 2019
Judgment: 15 February 2019

Case No: **1577/19**

INTERFOCUS SA INVESTMENTS 172 (PTY) LTD First Applicant

J S Second Applicant

vs

P S First Respondent

THE TRUSTEES FOR THE TIME BEING OF THE JC & P TRUST Second Respondent

---

JUDGMENT

---

1. This urgent application is related to the divorce proceedings pending between Second Applicant ("**Mr S**") and the First Respondent ("**Ms S**") in this Division

under Case Number 18088/2018. The Ss married more than 20 years ago. They have one grown-up child.

2. On 2 October 2018 Ms S caused summons to be issued for a decree of divorce; maintenance and a division of the parties' joint estate. They now live separately. Fairly shortly after the commencement of the divorce proceedings, Ms S launched an urgent application under the same case number for the immediate division of the joint estate into equal shares in terms of s 20 of the Matrimonial Property Act 88 of 1984. By agreement between the parties that application was referred to the semi-urgent roll for hearing on 29 May 2019.

3. In the present urgent application, Mr S and the First Applicant, i.e. the company Interfocus SA Investments 172 (Pty) Ltd ("**the company**"), seek an order directing Ms S to deliver a Mercedes Benz GLC 250d to Rola Motors Mercedes Benz, Somerset West. I shall deal with the basis for this application below.

4. The further relevant background is that the company is the registered owner of certain commercial property situated in Gauteng ("**Helikon Park**") and its business is the renting out of space to various third party tenants, including a supermarket chain store. Mr & Ms S are the only directors of the company. The shareholders are Mr S (50%) and the Second Respondent, i.e. the Trustees for the Time being of the JC & P Trust (50%) ("**the Trust**").

5. Mr & Ms S have for many years lived from the profits of the company's business activities. The company pays Hermanus Property Administration, a

sole proprietorship in Mr S's name, income for the management of the rentals. This income was presumably used by Mr S to support him and his family. In addition the company pays certain expenses of Mr & Ms S directly. They receive these payments as fringe benefits. One of the fringe benefits is payment for the vehicles that the Ss drive.

6. In this regard the company concluded a Finance Agreement (outside the National Credit Act 34 of 2005) with Mercedes Benz Financial Services South Africa (Pty) Ltd ("**MBFS**") for the lease of a Mercedes Benz GLC 250d ("**the Mercedes**"). This agreement, to which I shall refer as "*the lease*", was concluded on 5 February 2016. The Mercedes was to be used by Ms S. The lease was for a period of 36 months with a monthly instalment of R15 377.47.

7. The company also committed to finance the purchase of a Jeep Wrangler ("**the Jeep**") at a monthly cost of R14 619.83 for the use of Mr S.

8. In the founding affidavit, deposed to by Mr S, he contends that the company was no longer able to continue to incur the increased level of expenditure since the separation between himself and Ms S. He claimed that, after the separation, expenditure increased from between R75 000.00 and R80 000.00 per month to nearly R130 000.00 per month. He further claimed that the higher drawings have been financed from a mortgage loan secured against the Helikon Park property. Due to the downward turn in the commercial rental market and the separation, Mr S claimed that at the current rate of withdrawal the money available from the loan would be extinguished by the end of the 2019 calendar year.

9. Against this background, Mr S proposed to Ms S that the expenses of the company in respect of motor vehicles be reduced. In the first place, he proposed that, once the lease with MBFS regarding the Mercedes comes to an end on 5 February 2019, that this vehicle be returned. He further proposed that the Jeep be sold. The total saving in respect of the two vehicles would be about R30 000.00 per month.

10. As to alternatives for the Mercedes and the Jeep, Mr S initially proposed that he would use a Nissan Bakkie (2005 model) and that he would be prepared to sponsor a vehicle for Ms S to the value of R250 000.00. However, in a subsequent draft order handed to me by Mr Benade, who appeared for Ms S, it was proposed that Ms S makes use of the Jeep for a period of five months or until such time as the Court hands down Judgment in Ms S's application in terms of s 20 of the Matrimonial Property Act.

11. As to the grounds for urgency, Mr S contended in the founding affidavit that when the lease comes to an end on 5 February 2019, the company had two options. It could elect to return the vehicle to MBFS or it could purchase the vehicle outright for the lump sum amount of R538 913.80. It was contended that the matter is urgent because the company was unable to pay the lump sum to MBFS and Ms S was refusing to return the vehicle. This meant that the company would default and become vulnerable to legal actions aimed at repossessing the vehicle or claiming the lump sum. It was further contended that such legal proceedings would affect the credit rating of the company which was, in turn, essential to ensure that financing could be obtained for the

purpose of settling the division of the estate and the payment of Ms S's half share to her.

12. Ms S raises a number of defences to the urgent application. Her defences, in summary, are the following:

12.1. That the company has not duly authorised the institution of the proceedings and that Mr S in his capacity as director does not have *locus standi* in respect of the relief sought.

12.2. That the company authorised her to extend the lease with MBFS and that she had in fact done so. Further, that even if she was not allowed to extend the lease that, on a proper interpretation thereof, the lease automatically renewed on 5 February 2019 on the same terms unless MBFS decided otherwise.

12.3. That the matter was not urgent *inter alia* because the company was not in financial trouble as claimed by Mr S.

13. I shall deal with each of these defences below.

Authorisation / *locus standi*

14. Two questions arise. The first is whether the institution of the proceedings were properly authorised by the company and the second is whether Mr S in his capacity as director of the company had *locus standi* to institute the proceedings.

15. On the first issue, Mr De Villiers, who appeared for Ms S together with Ms Wade, had a simple argument. They referred to the Judgment of Watermeyer J in *Mall (Cape) (Pty) Ltd vs Marino Ko-operasie Beperk* 1957 (2) SA 347 (C) at 351H, where the learned Judge stated that when a company commences proceedings some evidence should be placed before the Court to show that it has duly resolved to institute those proceedings. In the present instance, it was argued that no evidence had been produced to that effect. It was further contended that no such resolution can exist because Mr & Ms S are the only two directors of the company and the latter obviously did not agree to the institution of proceedings against herself. Against this, it was argued for Mr S that he had always been the chief executive officer of the company and responsible for the day-to-day management. As such, it was claimed that he was duly authorised by the board of directors to do whatever is necessary to advance the best interest of the company. Reference was made to s 66(1) of the Companies Act 71 of 2008 which vests the powers of the company in the board of directors.

16. In my view, given the circumstances of the matter, insufficient evidence was placed before the Court to show that Mr S was authorised to institute proceedings on behalf of the company or that the company resolved in some other way to do so. It follows from s 66(1) of the Companies Act that, unless otherwise provided in the Act or the company's memorandum or a resolution, the board of directors retains all the powers of the company, which would include the power to institute legal proceedings. In the present instance it is inconceivable that the board could have authorised the institution of proceedings, given the dispute between the Ss, and given that they are the

only two directors of the company. I accordingly conclude that the Applicants did not demonstrate that the proceedings were properly authorised by the company.

17. Turning to the standing of Mr S to bring the application, it was contended that he was vested with such a right in terms of s 163 of the Companies Act. That section allows a director of a company to approach a Court *inter alia* when the powers of a director or a person related to the company are being exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the applicant. It was contended that Ms S's failure to return the vehicle was unfairly prejudicial to Mr S as she was not acting in the best interest of the company and that her conduct was to be regarded as unfairly prejudicial to Mr S.

18. The short answer to this contention is that Mr S did not rely on s 163 of the Companies Act in his founding affidavit or, for that matter, in his replying affidavit. The question of whether s 163 may be invoked in the present circumstances depends on facts that neither of the parties dealt with in their papers. It is in any event not clear what "*power*" Ms S exercised which was oppressive or unfairly prejudicial to Mr S himself. She simply did nothing. Also, as explained above, Mr S's case was that <u>the company was prejudiced</u> and not him.

19. For this reason I find that Mr S did not demonstrate that he has *locus standi* in his capacity as director in respect of the relief sought. His reliance on s 163 was not properly pleaded. He also does not have standing under the common law. Whilst he has a financial interest in the relief sought, I fail to see how he

has, as a director, standing to approach the Court in his own right in respect of a contractual agreement between the company and a third party (MBFS).

Extension of the lease

20. Even if I am wrong in respect of the authorisation / standing issues, I do not believe that the Applicants have established a clear right to the relief they seek. The Applicants must meet this requirement as they seek a final order directing Ms S to immediately deliver the Mercedes Benz to Rola Motors.

21. Ms S's defence on this aspect was twofold.

22. Firstly, it was contended on her behalf that she was authorised by a resolution of the company dated February 2016 to bind the company to MBFS to "*any agreements relating to the purchase, rental, leasing or financing of any goods in any manner whatsoever and to settle all and any documentation or terms to give effect to such transactions*". This resolution further provided that Ms S's authority shall "*continue to be operative until such time as it is revoked by written notice*" sent by the company to MBFS. The resolution, however, appears inconsistent with the minutes of a meeting of the directors of the company held on 31 January 2016 where it was resolved that the company will "*purchase*" a GLC 250d Mercedes from Rola Motors and that *Mr or Ms S* is authorised to do whatever may be necessary to give effect to the resolution. Apart from the inconsistency between the resolution and the minutes, no clear evidence was presented that Ms S had in fact exercised her power to extend the lease and that MBFS agreed to same.

23. In my view it is not necessary to decide the first issue as the second argument of Ms S, which is that the lease automatically renewed after the expiry of the first three years appears to me to be unanswerable. In this regard, Ms S relied on clause 26 of the lease, which provides as follows (my underlining):

> *"26.* ***Expiry if you have chosen the Agility / Contract Purchase Agreement***
>
> *26.1 We guarantee that the vehicle will have the value specified in the payment Schedule hereto at the expiry of this Agreement, provided that you have complied with all of your obligations in terms of this Agreement.*
>
> *26.2 Upon expiry of the Agreement you will at your own cost return the vehicle to us in the same good condition in which the vehicle was received, fair wear and tear only accepted, at an address specified by us, together with all documents and service records relating to the vehicle.*
>
> *26.3 Any modifications should be removed at your own cost and to our satisfaction.*
>
> *26.4 Subject to the provisions of clause 26.2 you will be entitled to purchase the vehicle at the value referred to in 26.1 above by payment of such amount, either:*
>
> *26.4.1 immediately in one lump sum payment; or*
>
> *26.4.2 enter into a new Agreement in the amount set out in the Schedule hereto and on the terms and conditions as we may determine in our absolute and sole discretion.*
>
> *26.5 In the event that you have failed to comply with any terms or obligations set out in this Agreement, we will value the vehicle and will be entitled to claim from you payment of any amount*

required to restore the vehicle into the condition referred to in clause 26.2 above. Any amount will be payable upon demand and the certificate referred to in clause 18.3 will constitute prima facie proof of such amount being owed by you to us.

26.6 Expiry if you have chosen an Agreement with a Balloon Payment or Guaranteed Future Value

26.6.1 Should you fail to return the vehicle on the date of expiry of this agreement as provided for in clause 26.2 or fail to make the payment as referred to in clause 26.4, then the Balloon Payment or Guaranteed Future Value due will be refinanced by us in our sole discretion, subject to you having complied with all your obligation in terms of the agreement and on the following basis:

26.6.2 We will recalculate the balance due by extension of the period of the agreement with a period that will allow you to maintain monthly instalments similar as to what you have paid during the agreement. We will send you written confirmation of the period of payment.

26.6.3 Your interest rate will remain the same as during the agreement and on the same terms and conditions as set out in clause 4 of this agreement.

26.6.4 All other terms and conditions of this agreement will revive and will continue to be applicable and apply in each and every respect until you have settled the vehicle in full by paying the aforesaid amount. Ownership of the vehicle will remain with us until you have fulfilled your obligation in terms hereof by paying the full balance outstanding.

26.6.5 Upon fulfilment of all the terms and conditions and having made full payment of the recalculated amount as per clause 26.6.2, ownership of the vehicle will be given to you upon providing you with the registration papers of the vehicle forming the subject matter herein."

24. In my view, clause 26.6.1 is only open to the interpretation contended for by Ms S, which is that if the vehicle is not returned on the expiry date and the lump sum payment is not made, then the vehicle will be automatically refinanced if the lessee complied with all his obligations in terms of the lease. MBFS may however in its discretion decide otherwise. It has however not been contended by Mr S that MBFS on some or other basis decided to deactivate the automatic renewal clause.

25. The basis on which the automatic renewal takes place is also set out in clause 26. In this regard, clause 26.6.2 provides that the monthly instalments will be similar as was paid during the lease that expired. In terms of clause 26.6.4 all other terms and conditions will revive and continue to be applicable and apply in each and every respect until the vehicle has been paid in full.

26. The consequence of the above is that on 5 February 2014, when the initial lease expired, there was no obligation on the company to return the vehicle or to pay the lump sum amount of R538 913.80 to MBFS. The obligation of the company will remain the same as before the expiry date and it seems that it will only be liable to pay MBFS the monthly amount of R15 488.06. As things

stand, the company has not yet failed to pay that amount and it is thus not vulnerable in respect of any legal action from MBFS. In the circumstances, neither the company nor Mr S has any clear right to demand that Ms S returns the vehicle to MBFS. They cannot make that demand until the lease is somehow terminated, which presently has not been done.

27. For these reasons, I find that the Applicants have failed to establish a clear right to the relief they seek.

Urgency

28. If the Mercedes did not have to be returned on 5 February 2019 and the lump sum did not become due on that day, then the matter is self-evidently not urgent. Whilst there was some evidence on the papers that suggest that the company is taking financial strain due to the downturn in the demand for rental properties as well as the increased expenditure after the separation of the Ss, it cannot be contended, nor was it, that the company is unable to continue to make payments of the monthly instalments for the Mercedes at least until the application brought by Ms S for the division of the joint estate is heard on 29 May 2019. The determination of that application, as I understand it, will render the present proceedings moot. The assets and liabilities of the Ss, including the liabilities in respect of the vehicles, will then be divided between them leaving only the maintenance claim for Ms S to be determined in the divorce proceedings.

29. On a proper interpretation of the lease the prudent course would have been to await the outcome of the application to divide the joint estate instead of

approaching the Court on an urgent basis to compel Ms S to return the Mercedes to Rola Motors. This is another reason why the application could not succeed in the "*fast lane*" of the Third Division of this Court.

30. In the circumstances, the application is dismissed with costs, such costs to be paid by the Second Respondent (Mr S). I can only make an order against him because of my finding that the company did not properly authorise the institution of the proceedings. I do not recall Mr De Villiers asking for the cost of two counsel to be awarded and I also do not believe that it would be justified in the circumstances of the case to make such an order.

_____

H J DE WAAL AJ

Acting Judge of the High Court

Cape Town

15 February 2019

APPEARANCES

Applicants' counsel: T Benade
Applicants' attorneys: Voster & Steyn Attorneys, Hermanus

First Respondents' counsel: A De Villiers & L Wade
First Respondents' attorneys: Van Dyk Saayman Attorneys, Hermanus