NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO. EL 1474/2022

In the matter between:

DR L JAMJAM AND PARTNER INCORPORATED	First Applicant
LULAMILE JAMJAM	Second Applicant
and	
LUNGILE MBALEKWA	First Respondent
STANDARD BANK OF SOUTH AFRICA	Second Respondent

JUDGMENT

HARTLE J

[1] The second applicant approached this court on an urgent basis seeking interim relief pending the institution of an application to wind up the first applicant ("the company"). He does so both in his personal capacity and as a director of the company acting in furtherance of his fiduciary responsibilities towards it.

[2] The second applicant and the first respondent are medical doctors and co-directors of the first applicant who have conducted their professional association under its auspices. The first applicant is a private liability company.

[3] There is clearly an acrimonious history between the doctors that has been coming since June 2022. What or who caused the division or the reasons for it are not the court's concern for present purposes. They appear to accept that their relationship has irretrievably broken down and that it is imperative that the company be liquidated.

[4] Negotiations were underway to conclude their association on appropriate terms with the assistance of their separate legal representatives. For reasons that remain unclear - although the first respondent appears to have complained mid-August that “the lawyers are not fast enough”, he went off track and unilaterally appropriated to himself an amount of R1 970 000.00 which he withdrew from the company’s bank account held with the second respondent on 31 August 2022. This amount (short of R15 000.00 or so) represents approximately 50% of the total funds in the company’s bank account as at the date of the electronic transfer. On 1 September 2022 he withdrew a further sum of R30 000.00 from the account (although this only came to the attention of the second applicant after the launch of the present application), bringing the total of claimed unauthorized withdrawals to R2 000 000.00.[1]

[5] The second applicant complained in his founding affidavit that the first withdrawal (this was all he had knowledge of at the time) was unexpected since the parties had agreed through their legal representatives to attempt to end their professional association in an amicable manner, subject to an appropriate agreement reached. The second applicant sought to reverse the transaction after his discovery but was unsuccessful.

[1] The second sum appears to have been transferred out of the company’s bank account on the evening of 31 August 2022 already but only reflected as a debit on the 1st. The transaction however clearly followed the dispatch of the second applicant’s attorney’s demand referred to in par [6] above sent by email on the 31st at 18h19.

[6] This evidently prompted the launch of the current application *inter alia* seeking repayment of the first sum withdrawn but not before the first respondent was placed on terms to provide an undertaking to repay the company by 1 September 2022 pending the finalization of the now inevitable liquidation proceedings.

[7] Underpinning the necessity for the additional remedy claimed was the applicants' (valid as it turns out) concern that given the first respondent's unilateral withdrawal of the R1 970 000.00 he would re access the bank account and withdraw more money. A further fear was voiced that he would follow through on a prior threat made to disrupt the medical practice, prejudicing the company, its creditors, staff, and patients in the process. The second applicant foresaw that he might remove, encumber, or alienate the company's other assets as well. Indeed, the first respondent did not challenge the second applicant's averment made in a supplementary affidavit filed on 5 September 2022 in which he revealed that not only had the first respondent appropriated the second sum of R 30 000.00 to himself after being placed on terms to repay the first amount withdrawn, but that he had also attempted to remove half of the furniture from the company's leased premises on 2 September 2022 coinciding with his relocation to new premises.

[8] Unbeknown to the applicants, between placing the first respondent on terms and the first appearance of the application on the unopposed motion court roll on 6 September 2022, his erstwhile legal representatives, Messrs. Tunzi Attorneys had responded to the demand. Their email is dated 1 September 2022, but only came to the attention of the applicants' attorneys after the delivery of the first respondent's answering affidavit on 8 September 2022. It transpired that it had been sent by his then attorneys to the applicants' attorney's offices, to an e-mail address of a secretary who was on sick leave at the time. The letter, which was only accessed after the fact, states as follows:

> "In response to your e-mail of 31st August 2022 our client wishes to state that he has only transferred the funds to his personal account to save them, has no

intentions to use or (embezzle) them, other than to protect them after realizing that your client continues to make withdrawals from the business account despite having been advised to stop in our previous correspondence."[2]

[9] If the email had been brought to the notice of the applicants' attorneys prior to the launch of the present application this may have rendered it superfluous or have impacted what remedy or relief was then still necessary or appropriate, but the matter took a somewhat strange turn thereafter.

[10] When the application was first called on 6 September 2022 amidst a busy motion court roll and upon the indication given that the first respondent wished to oppose and indeed launch a counter application, counsel who appeared for the first respondent was evidently quite reluctant to furnish any undertaking at all on his behalf to safeguard the funds pending the hearing of the urgent application for interim relief. Since the parties wished to file additional papers, I considered that it was necessary pending the exchange of these that it be established where the monies were at that point and that the court receive an undertaking that the funds ostensibly taken by the first respondent not be utilized (and the bank account not be accessed further) until I could hear counsel on the ensuing Friday. I accordingly prevailed upon the parties to adopt some form of consensus in this respect.

[11] In consequence of this expectation an undertaking was given by the first respondent, but also by the second applicant, that the company's funds would be out of reach for until I could hear the matter.

[12] The undertaking given by the first respondent, which I incorporated in the order I granted postponing the matter until 9 September 2022 (and which I consequently extended pending the delivery of this judgment), was stated thus:

[2] What previous correspondence is being referred to was not clarified.

> "The first respondent undertakes not to access or utilize the R1 970 000.00, removed from the first applicants bank account on 31 Aug 2022, and the R30 000.00 removed from the first applicant bank account on 1 September 2022, and which amounts are currently in the first respondent's personal banking account (held with ABSA Bank, branch number 63200500], until this application (and any counter application) is finalized."

[13] The first respondent did not challenge the application based on the claimed urgency and conceded unequivocally that the company must be liquidated. He however opposed the relief sought on the basis that the withdrawal of the funds from the company's banking account amounted to a lawful exercise of his rights. Quite contrary to the placatory approach adopted in Messrs. Tunzi Attorney's email dated 1 September 2022 (of which he said nothing in his answering affidavit) he sang a different tune under the auspices of his new attorneys who were substituted on 8 September 2022.

[14] Justifying his claim that his withdrawal of the R2 000 000.00 was entirely lawful, he explained that prior to the falling out between the parties they had adopted a somewhat casual approach to the management of the company's affairs. In this respect they had enjoyed the freedom to access its bank account for monies needed for their personal use, evidently with no questions asked, and without a prior resolution required. By way of example, he adverted to the fact that the second applicant had himself drawn a sum of R999 424.61 (this conclusion drawn from a sample of Tax Type reports indicating transactions over a random period) that had nothing to do with either him or the company but was entirely for his personal use and in keeping with how they ran the affairs of the company.

[15] Against this background he purported to justify his withdrawal of the two amounts in contention as follows:

> "I drew the amount of R2 000 000.00 (two million rand) from the first applicant's account on the basis of my and the second applicant's old management style of

the affairs of the first applicant referred to above. First, I drew a sum of R1 970 000.00 (one million, nine hundred and seventy thousand rand). I utilized it for personal use. It was not enough for the personal debts I wanted to defray. I then drew another sum for R30 000.00 (thirty-thousand rand). I utilized it for personal use, paying debts that I have accumulated over the years. I am in no position to pay the money that the second applicant seeks I should pay back to the account of the first applicant. This should cater for the question whether the relief sought in paragraphs 2 and 3 of the notice of motion by the second applicant can competently be sought and granted."

[16] In reply the second applicant agreed in respect of past payments that the doctors were allowed the freedom, within the company's financial constraints and under discussion with their accountant at the time, to make personal withdrawals (the in-principle agreement being to draw a salary of approximately R100 000.00 each per month), but claimed that such withdrawals hardly exceeded R160 000.00 per month. He emphasized that it was certainly not within their contemplation that either of them could draw R 2 000, 000.00 for personal use, a notion that is simply ludicrous if not unlawful and in clear contravention of the Companies Act.[3] He further denied that he had withdrawn the sum of R999 424.61 for his personal use citing the incorrect attribution of association expenses to him in the "Tax Type" reports relied upon by the first respondent for the purportedly unfounded accusation that he was taking personal advantage at the expense of the company. He clarified that the true nature of each transaction would be corrected in the accounting going forward. He attached bank statements from the company's business bank account for the preceding six months to demonstrate the true pattern of their respective drawings, which on the face of it do not reflect amounts exceeding the monthly average contended for by him.

[3] No 71 of 2008. See definition of "distribution" in section 1, read with section 46 as well as section 76 that spells out the standard of conduct expected from directors that extends beyond the common law duty by compelling them to act honestly, in good faith and in a manner that they reasonably believe to be in the best interests of, and for the benefit of, the company served by them.

[17] Not surprisingly he alluded to the purported justification recorded in the first respondent's attorney's email dated 1 September 2022 that had in the meantime come to light and pointed out that the stated objective in it of the withdrawal of the R1 970 000.00 blatantly contradicted his present claim that he had used up the money transferred to his personal bank account, considered himself lawfully entitled to it, and had no intention of repaying it.

[18] Rather startingly, the first respondent thereafter (on 9 September 2022) denied that he had instructed his erstwhile attorneys to record in the letter of 1 September 2022 that he was keeping the money he had withdrawn safe. In this respect he sought to set the record straight in an affidavit co-incidentally filed in substantiation of an interlocutory application for condonation for the late delivery of his answering affidavit filed last minute before the hearing that this was factually incorrect.

[19] In the affidavit he attributes his delay in filing papers late to a fall out he had with Messrs. Tunzi Attorneys as follows:

> "The reason for my default is that I had a fallout with my previous attorneys, Messrs Tunzi Attorneys, after my discovery, at midday on Wednesday, 07 September 2022 of the fact that they had written a letter to the second applicant's attorneys and suggested that I was keeping the money I had withdrawn when in fact that was factually incorrect. I then had to look for a new attorney, my current attorneys of record who had no knowledge nor history of the matter. That letter is now relied upon by the second applicant and is attached to the replying affidavit."

[20] His disclaimer does not explain why he failed to mention the factual inaccuracy at all in his answering affidavit filed the day before, although I accept that the discovery of the disavowed email may have occurred after the fact. More significantly however the "explanatory affidavit"(sic) says nothing about his undertaking that was made an order of court or the probable inference to be drawn from it which is that on 6 September 2022

he must still have been in possession of the money and able fairly to give it. Was he misleading this court? If he felt constrained to reject the ostensible assurance given by Messrs. Tunzi attorneys that he was keeping the money safe, why not the undertaking given to the court as well? In my view this strange situation placed an obligation on the first respondent to deal with the contrary inference, which is that he is in contempt of this court's order of 6 September 2022 by taunting that he used up all the monies to pay his personal debt after giving the assurance that he would not. He has not taken this court into his confidence to show how he used the money and why he says it is not possible to repay it. To compound matters he rather mischievously suggests that the fact that the vast sum of R2 000 000.00 has been dissipated caters for the question whether the relief prayed for by the applicants in the notice of motion that he repay the monies unilaterally taken (pending the liquidation proceedings) can competently be sought and granted.

[21] I am astounded by his lack of appreciation of his fiduciary responsibilities if not his audacity and contempt shown to this court. It is not for this court to glean between the lines what the position is or to wonder about his intention not formally or properly accounted for in the papers. In my view I am entitled to rely on his undertaking given on 6 September 2022 and to accept that he is able to bring the monies back into the company's coffers. In any event he should not be permitted to benefit from his wrongdoing.

[22] Whilst the claimed arrangement between the doctors might have been perfectly acceptable and in accordance with their association agreement prior to the breakdown in their relationship, the acknowledgement of both that the winding up of the company was inevitable irrevocably changed the legal landscape. I am moreover satisfied that the total sum withdrawn by him, even if personal withdrawals of large sums of money might have been countenanced before, cannot be justified on the basis claimed by him and especially not under the present circumstances where the doctors were evidently still in negotiations to determine a basis upon which to terminate their professional association.

[23] The first respondent has also not taken this court into his confidence concerning the reason why he disassociated himself from the settlement negotiations, but he could have been under no illusion, certainly by the time the undertaking was sought from him on 31 August 2022 to repay the initial sum of money back in the company's bank account, that his conduct was considered unlawful *vis-à-vis* the company and in breach of his fiduciary duties as co-director.

[24] Still, he persisted with his high handed and unlawful conduct, I infer to make the point that he will not be dictated to as indicated in a WhatsApp message he sent to the second applicant on 26 June 2022, the contents of which I need not repeat here.

[25] The first respondent has ostensibly overlooked the fact that the first applicant it is a separate and distinct entity from its shareholders and its directors, as well as the peculiar duty resting on both him and the second applicant in their capacities as co-director, to act *bona fide* and in the best interests of the company. The first respondent has made himself egregiously guilty of violating those duties and acting in a manner prejudicial to the company. The suggestion that the monies withdrawn - which he had ostensibly hoped to appropriate to himself permanently, amounts to simple drawings is to be rejected as patently absurd.

[26] The appropriation leaves the company at risk of not being able to meet payment of its expenses, most notably staff salaries and its commitment to SARS for its tax liability. The further obvious effect is that the second applicant's claim to 50% of the eventual profits of the company, once determined, has been compromised.[4]

[27] I am satisfied that the applicants have established the requisite requirements for the grant of an interim interdict and that the first applicant necessarily requires protection against the unlawful interference of its rights, as does the second applicant to

[4] These conclusions evidence the clear right of both applicants asserted in the founding affidavit.

fair and due process through the liquidation proceedings since the settlement negotiations have reached a clear impasse.

[28] Before concluding, the first respondent ironically raised a technical objection to the second applicant's authority to represent the company claiming that it was not properly before court in the absence of a resolution of a meeting of its directors resolving that an application for and in its name be instituted. He also filed a notice in terms of Uniform Rule 7 demanding a copy of the resolution of directors which he self-evidently knows not to exist.

[29] The second applicant has however satisfactorily explained in my view that apart from vindicating his personal interest in the matter by insisting on a lawful dissolution of the company, he was obliged in accordance with his fiduciary duty towards the company to look out for its interests as well against the unlawful interference by the first respondent with the running of its business. Indeed, I would have been surprised if he did not act with alacrity to ensure its institutional interests from being compromised under these unique circumstances where the large sum of money withdrawn from its bank account amounts to an irregular distribution within the meaning of the definition in the Companies Act, to its obvious prejudice.

[30] A formal resolution is not always required in order to give an individual the necessary authority to act in legal proceedings on behalf of a juristic person, and indeed in this instance I do not consider it fatal to the application, against the background of the ostensible breach of the first respondent's fiduciary responsibilities owed to the company both in terms of the common law and section 76 of the Companies Act by him having made off with R 2 000 000.00 of its funds vital to its liquidity and ability to meet its financial commitments *inter alia* to its staff and SARS ,that the elusive resolution now insisted upon was not provided.[5]

[5] See in this regard Graham v Park Mews Body Corporate & Another 2012(1) SA 355 (WCC) at [16]-[19].

[31] On the issue of an appropriate remedy, I am satisfied that the order below is necessary to maintain the *status quo* pending the finalization of the anticipated liquidation proceedings which I was assured last week would be launched within five days of the hearing. Since the first respondent was paid his regular drawings on 29 August 2022 according to the bank statements provided, the R2 000 000.00 must immediately be reimbursed to the company. Whilst the R30 000.00 appears to be a tit for tat for payment by the company to the second applicant and his spouse for rental of the company's business premises (because of the circumstances that have rendered it necessary for him to acquire his own premises for practice elsewhere), that is something to be taken up with the appointed liquidator in due course.

[32] Given that the first respondent has already vacated the business premises of the company, it is in my view unnecessary to accede to prayer 4.3 denying the first respondent the use of or access to the company's business premises pending the liquidation process.

[33] The applicants have asked for attorney and client costs. In my view the impatience and selfishness of the first respondent (entailing the breach of his fiduciary duty to act *bona fide* and in the interests of the company by putting his personal interests above those of the company), the self-help employed by him, and the contempt shown to this court warrant costs being awarded against him on a punitive scale.[6]

[34] I issue the following order:

1. The first respondent is to repay to the first applicant the sum of R1 970 000.00 within 72 hours of this order.

[6] The applicants asked for a further order that I refer the first respondent's conduct to the National Director of Public Prosecutions for further investigation. This is to my mind unnecessary. I cannot equate his impetuousness to criminal intent.

2. The payment in terms of paragraph 1 above is to be effected to the first applicant's banking account, with details as below:

Account holder:	Dr L JamJam and Partners Inc.
Bank:	Standard Bank of South Africa
Account type:	Current account
Account number:	[....].

3. The first respondent is interdicted and restrained from:

3.1 removing, encumbering and/or alienating the first applicant's assets, and

3.2 accessing and/or utilizing the first applicant's funds including funds held under bank account with the second respondent under account number [....].

4. The interdict set out in paragraphs 3 above shall operate pending the finalization of the liquidation proceedings which are to be launched within five days of this order.

5. The first respondent is to pay the costs this application on the scale as between attorney and client.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 9 September 2022

DATE OF JUDGMENT: 22 September 2022*

*Judgment deemed delivered at 09h30 on this date by email to the parties.

APPEARANCES:

For the applicants: Ms. N Molony instructed by Bate Chubb & Dickson Inc., East London (ref. Mr. P Van Zyl).

For the first respondent: Ms. S Mashiya instructed K B Mabanga Inc. Attorneys, East London (ref. Mr. Mabanga).

For the second respondent: No appearance.