REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NUMBER: 34408/2011

In the matter between

ASH, CHANAN MOSHE **APPLICANT**

and

MANNERING, LAWRENCE HENRY **FIRST RESPONDENT**

EASTERN SUBURBS MEDICINE SUPPLIES CC **SECOND RESPONDENT**

JUDGMENT

Windell AJ:

INTRODUCTION

[1] This is an application in terms of rule 49(11) of the Uniform Rules of Court for leave to execute an order of this court (the order) pending an application for leave to appeal. The first respondent has filed a notice in terms of rule 30 A objecting to the applicant's use of a short form of notice of

motion. This was abandoned by the first respondent and the parties agreed that the matter was ready to be argued as it is.

[2] The judgment that forms the subject matter of this application was delivered on the 5 December 2012 by Moshidi J. The application was brought by way of urgency and the relief claimed was for an interim interdict. Having heard oral arguments the following order was made by Moshidi J:

> *1. Pending the final determination of the relief set out in Part B of the application, the first respondent be:*
>
> *(i). Interdicted and restrained from directly or indirectly interfering with the applicant in the exercise of the applicant's member's interest in the second respondent;*
>
> *(ii). Directed to recognize the applicant's 95% membership interest in the second respondent;*
>
> *(iii). Directed to grant the applicant full access to all books, records and other documents of and relating to the second respondent and its business and affairs;*
>
> *2. Directing that the costs be reserved for determination with the relief in Part B of the application.*
>
> *3. Should reasons for this decision be requested, such reasons will be furnished within 14 days of such request being made.*

Written reasons for the order were given by Moshidi J on the 11 December 2012.

[3] It is necessary to briefly refer to the relief prayed for in Part B of the application. In Part B the applicant seeks an order declaring the agreement of the sale of a 95% member's interest in Eastern Suburbs Medicine Supplies CC (second respondent) to be valid and of full force. The parties to the disputed agreement are the applicant (as the purchaser) and first respondent, who is the sole member of second respondent, as seller.

[4] First respondent filed a notice of application for leave to appeal on the 13 December 2012. The application is still pending.

[5] The grounds in support of the application for leave to appeal can be summarized as follows:

(1) The order is final and definitive in effect and accordingly is a judgment or order subject to appeal as contemplated in Section 20 of the Supreme Court Act 59 of 1959.
(2) The court erred in not finding that there is nothing in the relief claimed by the applicant in Part A of his notice of motion that may be reviewed or altered by the Court which ultimately hears Part B and, that if one has regard to the clear wording of these prayers, they are couched on the premise that the applicant is in fact and in law a member of the Second Respondent.
(3) The court erred in not referring the application to oral evidence, despite the number of disputes of facts between the parties which are evident from the papers.
(4) The court erred in finding no prejudice to the first respondent in the granting of the interim interdict.
(5) The court erred in finding that the balance of convenience and respective prejudice which would be suffered by the applicant was greater than the balance of convenience and respective prejudice which would be suffered by the first respondent.
(6) The court erred in finding that the applicant had no alternative remedies available to him.
(7) The court erred in not striking out new matter raised by applicant in his replying affidavit.
(8) The court erred in finding that the applicant made out an appropriate case for granting the interim interdict.

[6] One of the main disputes between the parties is whether the order made by Moshidi J is appealable. The applicant submits that the order is not appealable as it is an interim interdict and therefore not final in effect or in form, insofar as the substantive issues between the parties are concerned, as these will be addressed again by the court when hearing the application for final relief. In support of this counsel relied on the following authorities:
Knox D'Arcy Ltd v Jamieson 1996(4) SA 348 (AD) at 359 F-H and 360 A-C; and *Metlika Trading Limited and Others v Commissioner SARS 2005(3) SA 1 (SCA) at par 19-24.*

[7] The respondent contends that the order is appealable in that it is final and not capable of amendment by the court in part B of the application. The order has immediate effect and may be extremely prejudicial to the first respondent. In support of this the following authorities were quoted:
International Trade Administration Commission v Scaw South Africa (Pty) Ltd 2012(4) SA 618 (CC) at 638 C-D;
National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012(6) SA 223 (CC) at paragraphs 24-25;
Zweni v Minister of Law and Order 1993(1) SA 523(A) at 532-533;

THE APPEALABLILITY OF THE ORDER

[8] The question arises whether it would be proper for this court at this stage of the proceedings to decide whether the order is appealable. This can lead to the unsustainable situation where one court hearing the application in terms of rule 49(11), might come to one finding on the appealability and another court, hearing the application for leave to appeal, coming to a different finding on the same issue.

[9] In *Sorec Properties Hillbrow (PTY) LTD and Another v Van Rooyen 1981(3) SA 650 (W)* the argument was raised that the respondent had no reasonable success on appeal. The court found with reference to *Byron v Anderson & Co 1955(3) SA 590 (D), Bam v Bhadha 1947(1) SA 399 (N) and*

Wood NO v Edwards and Another 1966(3) SA 443 (R) at 446 that in proceedings in terms of Rule of Court 49 (11), the court is not called upon to enquire into the whole case or to attempt to evaluate the prospects of success on appeal. Only if the Court is satisfied that the appeal has minimal prospects of success or is hopeless, it will take that into account and may draw the inference from it that the appeal was noted *mala fide*, or for the purpose of delay.

[10] In my view, applying the above principles, it would not be proper for this court at this stage, to determine the issue as to the appealibility. I propose to deal with this application on the précis that the order is appealable.

[11] As for the prospects of success on appeal, I am in unable to find that the appeal is frivolous or vexatious, or that it has been noted *mala fides*.

THE RULE 49(11) APPLICATION

[12] It is trite that the court in adjudicating an application under Rule 49(11) has a wide general discretion to grant or refuse leave to execute. Such discretion must be exercised judiciously taking into consideration what is just and equitable in the specific circumstances of each case having regard to *inter alia* the following factors:

a) the potentiality of irreparable harm or prejudice being sustained by (i) the appellant on appeal (respondent in the application) if leave to execute were to be granted, and (ii) by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
b) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg to gain time or to harass the other party;

c) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

[13] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA 534 (A)* at 545B - 546C Corbett JA dealt with the relevant principles as follows:

> *"I have a wide general discretion to grant or refuse the application and, if I grant it, to determine the conditions upon which the vehicles may be used pending the conclusion of any appeal against my judgment. I must do what is just and equitable in all the circumstances. In this regard the potentiality of harm or prejudice and the balance of convenience in regard to such harm or prejudice may, and usually will, carry considerable weight"*

[14] In *Airy v Cross Border Road Transport Agency 2001(1) SA 737 (T)* it was reiterated that the appropriateness of granting a rule 49(11) application will depend on the circumstances of each case. In this regard Tuchten AJ stated as follows:

> *"The Judge who presides in a Court which considers a Rule 49(11) application must try to do real and substantial justice, for which purpose he may take into account all relevant circumstances surrounding the case. Ideally therefore, he should be fully acquainted with the proceedings which led to the order giving rise to the Rule 49(11) application. He must form a view on the prospects of success on appeal. He must consider the prejudice to the parties. The Judge who made the order under attack will more often than not already have done a substantial part of the work required for the proper adjudication of a Rule 49(11) application. Another Judge would have to reiterate much of the work of his erstwhile Colleague."*

[15] The requirements for an interim interdict and some of the factors to be taking into consideration in determining a rule 49(11) application are similar. For an applicant to be successful in obtaining an interim interdict the following must be proven: a clear right, an injury actually committed or reasonably apprehended, the absence of similar protection by any other ordinary remedy and the balance of convenience.

THE MERITS

[16] Applicant in the main application alleged that he has 95% of the member's interest in second respondent; that he is suffering irreparable harm being excluded by first respondent from the business and affairs of the second respondent.

[17] At the hearing of the application Moshidi J ruled the matter to be urgent. The learned judge found that the persistent exclusion of the applicant from exercising his right as a 95% member in the second respondent exposes the applicant to continued suffering and prejudice and that it was not equitable and just to expect the applicant to await the final determination of the matter before taking effective control of the corporation.

[18] The applicant now contends that he will suffer the same prejudice as was found by Moshidi J which will be exasperated should he be required to await the outcome of the application for leave to appeal and possible further appeal proceedings.

[19]. It is submitted by first respondent that the applicant and his attorneys do not know themselves what effect the order of 5 December 2012 has and that he is in any event not interfering with the applicant's purported member's interest.

[20] I am unable to find anything in the first respondent's answering affidavit indicating why the court should not grant this application. The contention that the first respondent might suffer prejudice if leave to execute is granted, as the applicant would then in effect have the right to for example sell or dispose of his 95% member's interest in the second respondent, in my view, can be minimized in ordering appropriate conditions as part of the order I prepare to make. Counsel for the applicant raised no objections thereto.

[21] The onus of establishing a proper case for the grant of leave to execute rests on the applicant, irrespective of whether the judgment in question is one sounding in money only or other forms of relief. I am satisfied that a refusal of this application will negate the whole purpose of obtaining the interim interdict on an urgent basis in the first place. The prejudice the applicant will further suffer if leave to execute is not granted is substantial. The balance of convenience also heavily weighs in favour of the applicant. No irreparable prejudice to the first respondent, other than the possibility of prejudice that with which I have dealt above, has been suggested or comes to mind.

[22] In the result the following order is made:

1. Leave to execute is granted.
2. The applicant is interdicted from selling or disposing of the 95% member's interest pending the outcome of the appeal procedure.
3. Costs of the application are made costs in the appeal.

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L. Windell

Acting Judge of the South Gauteng High Court

Counsel for applicant	: Adv. BM Gilbert
Counsel for respondents	: Adv MW Verster
Date of hearing	: 31 January 2013
Date of judgment	: 14 February 2013