REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29799/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

15/12/2015 _____

DATE SIGNATURE

PETER TSOTETSI — 1ST APPLICANT

OUPA ISAAC SHONGWE — 2ND APPLICANT

CEPPWAWU INVESTMENTS (PTY) LTD — 3RD APPLICANT

LETSEMA INVESTMENTS (PTY) LTD — 4TH APPLICANT

And

JACOB MABENA 1ST RESPONDENT

SIMON MOFOKENG 2ND RESPONDENT

JUDGMENT

WENTZEL, AJ

1. This is an application in terms of Rule 6(8) and/or Rule 6(12)(c) to reconsider the ex parte order granted by Foulkes-Jones AJ on 21 August 2015.

2. The papers put before Foulkes-Jones AJ were voluminous detailing several years of infighting aimed at wrestling of control over the extensive investments of the CEPPWAWU union held by it through its investment arm, CEPPWAWU INVESTMENTS (PTY) LTD ("CI"), the third applicant, to the tune of some R 5 billion.

3. Control of these funds currently vests in LETSEMA INVESTMENTS (PTY) LTD ("Letsema"), the fourth applicant through a management agreement concluded in April 2000 entitling it to 27.5 % of the investments which over the years has amounted to several billion rands. The continued operation of this management agreement will entitle Letsema to earn further management fees of R 1 billion. The CEO of Letsema is one DEREK

THOMAS and Shongwe is both a director of Letsema and a trustee of the trust established to enable the members to benefit from the investment of its funds through CI.

4. As a result of the settlement of litigation aimed at impeaching the management agreement driven by MABENA, the first respondent, and one MDLALOSE, the then acting general secretary of CEPPWAWU, it has been agreed that the management agreement may only be terminated on 12 months notice substantially entrenching Letsema's control of the union's investments. Needless to say, there are several stakeholders seeking to displace Letsema and get their hands on these funds. Predictably, this is not the union members which own the funds which despite being the beneficiary of the CEPPWAWU Development trust ("the trust") holding 100% of the shares in CI, does not seem to have been the primary recipient of these funds siphoned off in the guise of staggering management fees.

5. Not that those jostling for control do not intend to do just the same and the Court is left with the impression that the years of infighting have been driven by individual greed with none of the players genuinely having the interests of the union members at heart. Indeed so little concerned are the key players in the interests of the union members that the trust has been left inchoate and unable to function for several years. Of great concern to this court is the fact that in the report by Norton Rose dated 3 August 2012, dealt with more fully hereafter, it is stated that despite the fact that

the value of CI's investments valued at R 5 billion and being several millions at the stage of the report, no benefit had yet flowed to the union.

6. The second applicant as a trustee of the trust owning the shares in CI has a vested interest in the continuation of the management agreement being a director of Letsema. He has sought to justify the staggering fees earned by Letsema by insisting that the management agreement is in effect a partnership agreement between it and CI entitling Letsema to a share in the profits of the investments made jointly by them in return for the substantial risk undertaken and skill exercised by Letsema which has seen CI's Investments grow from nothing to several billions of rands. As the funds have grown, several fund managers have been circling to get a piece of the pie.

7. In a further attempt to wrestle control over these investments from Letsema, the first respondent, MABENA, having garnered the support of the second respondent MOFOKENG, sought to convene a meeting of the board of directors of CI to table an urgent resolution purportedly to investigate the management agreement with a view to considering whether it should be cancelled and in the interim, effectively sterilizing the business of Letsema to continue to manage the funds of CI in breach of the management agreement. (See in particular paragraph 20 of the proposed resolutions where it is also sought that Shongwe and Thomas are no longer authorized to represent the company on the negotiations

regarding key investments including the Ubuntu, Totla, Imithi, Aspen and/or RMB transactions)

8. In order to conduct these investigations unimpeded, it was sought that the applicant's attorney's services be terminated and it be investigated how he acquired his mandate to represent the company in the first place. In addition, the resolution proposed that TSOTETSI be removed as Chairman of the Board of the company and MABENA be appointed in his stead. Further, it was proposed that SHONWE'S signing powers on the company's bank account be suspended and replaced with MABENA or MOFOKENG (albeit under the supervision of independent auditors). That not being enough, the resolution proposed that the decision taken by the Board to pursue proceedings against MOFOKENG as a delinquent director be revoked.

9. There has been much mud slugging between Mofokeng and Shongwe who Shongwe has accused of mismanagement of the Union's funds in his capacity as General Secretary of CEPPWAWU with reputed shortages of millions of rands since he took office in 2008. Mofokeng's support for the resolution constituted a total *volte face* of his previous position and statements under oath which has always been in support of the management agreement which Mabena and Mdlalose has sought to attack over the years.

10. The passing of this resolution was in the bag, so to speak, with Mabena and Mofokeng having garnered the support of a fellow director, Mary Nxumalo. Reading between the lines, after considerable pressure was put to bear on her by Shongwe, she withdrew her support and tendered her resignation as director. That left Tsotsetsi as Chairman and Shongwe, Mabena and Mofekeng as the directors of CI. That however, did not remove the real risk of the resolution being passed as it was contemplated that Shongwe be precluded from voting as his interests were conflicted. Whilst the respondents insist that they are not similarly conflicted, this is not accepted by this Court and it is suspected that plans are afoot to replace Letsema with an alternative fund manager in which they will have an interest.

11. Realizing his predicament, Shongwe and Tsotetsi approached this Court urgently without notice to interdict the holding of the meeting and the tabling of the resolution, which was granted which is the subject matter of the current application. In so doing, they effectively prevented the management agreement being cancelled and secured specific performance of the management agreement at least until the return date scheduled for hearing in February 2016 to consider part B of the notice of motion in which the removal of the respondents as delinquent directors is sought.

12. On hearing of the interim Order, the respondents approached the urgent Court to reconsider it on the grounds that it was improperly sought *ex*

parte and by way of urgency and that its effect had been to hamstring the business of CI.

13. It is not necessary for me to decide the merits of the dispute canvassed fully with me in argument by the applicant's counsel, Mr Wessels. Suffice to state that for the purposes of this application, I accept that the proposed resolution was part of a stratagem to cancel the management agreement under the guise of investigating it with a view to gaining control themselves of the investments of CI. Mr Morrison SC, appearing for the respondents, admitted as much in argument accepting that the investigations were a precursor to the proposed cancellation of the management agreement.

14. He sought to persuade me not to delve into the motives of the respondents in seeking to table the resolution. He argued that the interim Order granted fell to be set aside simply on the grounds that:

14.1. The purported basis for proceeding *ex parte*, namely that if the respondents had got wind of the application, Section 74 of the Companies Act could be utilised to push through the resolution by way of round – robin had no basis in view of the express prohibition of such an approach in the company's memorandum and articles of association which must have been known to the applicants and their attorney who was an experienced commercial attorney;

14.2. The applicants did not demonstrate the utmost good faith as required in proceeding *ex parte* and failed to disclose relevant facts to the Court and in particular, the letter from Norton Rose in which the management agreement was questioned;

14.3. The requirements for an interdict were not established and in particular, a *prima facie* right to prevent the holding of a Board meeting and the tabling of a resolution. The applicant had an alternative remedy to go to the meeting and speak to the resolution and if they considered it unlawfully adopted to interdict its implementation.

14.4. No urgency had been established.

15. In addition Mr Morrison SC argued that the effect of the Order has been to preclude the respondents, as directors of CI from discharging their fiduciary duties and to propose resolutions to investigate the validity of the management agreement pursuant to which over a billion is to flow to Letsema and not to the Union members and their families as the ultimate beneficiaries. I repeat my skepticism as to the respondents' true motives and thus the merits of such a contention.

16. Although it was averred in the papers that the effect of the resolution was to hamstring the business of CI and prevent it from adopting its financial statements, this was not persisted in argument. Mr Morrison SC also did

not persist with the point taken with regard to Section 165 of the Companies Act or the newly discovered fact that neither Letsema nor the second applicant are licensed in terms of section 8 of the Financial Advisory and Intermediary Services Act 2002 to provide the financial advisory services performed by them in terms of the management agreement rendering it unlawful.

17. I have in a previous ruling by me detailed the requirements of seeking relief under Rule 6(8) and Rule 6(12) (c) and the power of the court to reconsider the Order afresh which I do not intend to repeat.

18. I propose to deal with the grounds upon which relief has been sought by Mr Morrison SC in turn.

The grounds for proceeding *ex parte*

19. The applicants averred that if notice of the proceedings is given to the respondents, who could not be trusted, they will resort to unlawful means to pass and implement the resolutions surreptitiously thus frustrating the relief sought. Furthermore, there is a real risk that the respondents might, if given forewarning of this application resort to the wrongful misapplication of section 74 of the Companies Act by adopting these resolutions. This would enable the respondents to empty the coffers of CI to the irrevocable prejudice of CI as well as Letsema and the Union.

20. I do not accept that these constitute valid grounds for proceeding *ex parte*. Once the application was served seeking to interdict the holding of the meeting and the tabling of the resolutions, the respondents would have been hard pressed to proceed. The Court could have been urgently approached to place an interim interdict in place affording the respondents the opportunity to file papers and show cause why it should not be held in place pending the outcome of the proceedings instituted under part B. Had the resolutions been surreptitiously passed having been afforded notice, it would not have taken much to persuade a Court to set the resolution aside or preclude it from being implemented.

21. There are stringent requirements for proceeding *ex parte*. The applicants would need to show the Court that the relief that they seek would be rendered nugatory in the sense that there is a real danger that the giving of notice will defeat the object of the interdict. (National Director of Public Prosecutions v Mohamed NO 2003 (4) SA 1 (CC); Universal City Studios Inc v Network Video (Pty) Ltd 1986 (2) SA 734 AD at 753C). This has not been established.

22. In addition, the averred fear that section 74 would be invoked to pass the resolution by round- robin had no basis as the articles of association of the company requires that all directors sign a round-robin resolution.

23. Mr Wessels states that on the basis of the principles enunciated by Sutherland J in Industrial Development Corporation of South Africa v

Sooliman 2013 (5) SA 603 (GSJ) quoted by me in my interim ruling, the Court in reconsidering the Order may have regard to subsequent events which may serve to corroborate and justify the applicant's fears that giving notice may have thwarted the relief sought. He pointed to the protest organised by Mabena on acquiring knowledge of the order in breach of the interdict granted inciting the union members to force CI to cancel the management agreement on the grounds that it was proposed that Letsema be paid 1 billion from funds that were rightfully theirs. Mr Morrison SC was not able to convince me that this was not in breach of interdicting the respondents from directly or indirectly unlawfully interfering with the contractual relationship between CI and Letsema in any other manner whatsoever. The protest was not simply the exercise by Mabena of his constitutional right to protest. It was aimed at garnering support to cancel the management agreement.

24. This, so Mr Wessels argued was confirmation of the applicants' fears that the respondents would act unlawfully and would ignore the application had it been served. There is merit in this argument and it does show that Mabena was intent on cancelling the management agreement by any means. But I am not entirely convinced that this justified proceeding without notice as had the respondents sought to cancel the management agreement by stealth or some unlawful means, this could have been set aside by way of urgency and the *status quo* restored.

The failure to disclose material facts to the Court

25. It is averred that the applicants failed to discharge the duty of utmost good faith in disclosing all material facts which might reasonably influence a Court in coming to a decision. (National Director of Public Prosecutions v Kyriacou 2004 (1) SA 379 SCA; Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of public Prosecutions 2009 (1) SA 1 (CC) at paras 296 and 297.) This duty, so it was argued, was breached in failing to disclose the vital context of the Norton Rose report .

26. Norton Rose acted on the instructions of three of the trustees of the Trust including Azar Bham SC to investigate, *inter alia*, who the trust's beneficiary was; whether Shongwe was in a conflict of interests position and whether this justified his removal as contended by the union; whether the management agreement was susceptible to challenge and can be set aside.

27. In that report the conflict of interests and dereliction of his fiduciary duties as trustee of the Trust was seriously criticized and it was recommended that he be removed as a trustee of the trust. It also concluded that Shongwe acted improperly in entering into the management agreement in which he had an interest where he could not properly discharge his fiduciary duties to the beneficiaries of the trust. It was considered contrary

to public policy that such exorbitant management fees be earned by Letsema. It was recommended that the management agreement be investigated by the Board of CI with a view to reclaiming the several million paid to Letsema over the years.

28. Mr Morrison SC argued that similar considerations pertained to the failure by the applicants to disclose the articles of association which would have demonstrated that the section 74 point relied upon had no merit.

29. There can be no doubt that this was material and ought properly to have been disclosed. Mr Morrison SC stated that Shongwe's letter dated 21 September 2012 to Judy Dlamini was selectively quoted in the founding affidavit and was not annexed as it made direct reference to the Norton Rose letter which should have been attached.

30. Replying to this, Mr Wessels stated that the Norton Rose recommendation led to the investigation of the management agreement which was found to be sound and thus it was no longer relevant. The letter had been comprehensively responded to by Shongwe and it was argued that the disclosure of the Norton Rose letter would have made the learned judge refuse to grant the Order.

31. In terms of the test propounded by the Constitutional Court in the *Thint case* supra, the letter need only have been disclosed if it might influence the judicial officer. It may well have influenced the judicial officer to

question whether the proposed resolution to investigate the management agreement was indeed proposed mala fide and may well have caused her to require that notice be given so that she might hear the other side of the story before making her Order.

32. This was a material fact which it would seem may have been deliberately not referred to as Shongwe's letter referring to the Norton Rose letter was not annexed and was selectively quoted from. The correct approach would have been to disclose the Norton Rose letter but to state that their concerns were not warranted and had been fully and comprehensively addressed by Shongwe attaching his letter in response.

The requirements for an interdict

33. The applicants asserted a *prima facie* right to preclude the respondents' intended interference with the fourth applicant's right to the management agreement by seeking to engineer its termination and to preclude it from performing in terms of the management agreement pending its investigations into the agreement. In this respect, reliance was placed upon the Constitutional Court decision in Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015 (1) SA 1 CC.

34. Mr Morrison SC argued that this was a nefarious delictual right and that the applicant had no *prima facie* right to interfere with CI's right to call a board meeting or to table a resolution; the first and second applicant's

right was limited to attending the meeting, voicing their objection and voting against it. Should they have believed that the resolution was unlawful they could have applied to set it aside or interdict its implementation.

35. However, I do not necessarily agree with this contention. The fourth respondent had a right in terms of the settlement agreement to enforce the management agreement (which the respondent avers was the effect of the interdict) which could only be terminated on 12 months notice. It had a right to enforce the Court Order making this settlement agreement an Order of Court. In terms of the settlement agreement to which the union, represented by Mabena, Letsema, CI and Shongwe and Thomas in their personal capacities were party, it was expressly provided that the parties agree that the management agreement shall continue and remain in force until terminated upon the expiry of twelve clear calendar months notice which may be given in notice at any time by CI. The proposed resolutions constituted a breach of this agreement.

36. Although CI may have had the right to resolve to investigate the settlement agreement with a view to deciding whether it should exercise its rights to terminate it on 12 months notice, it had no right to seek to sterilize the management agreement pending the outcome of its investigations. In addition, where those investigations are but a precursor to legitimise the decision probably already taken to cancel the management agreement, then the resolution would not have been *bona fide* and the applicants

would be entitled to interdict the respondents from seeking to table it where the vote was inevitably going to go in their favour.

37. The passing of the resolution was a *fait accompli* even without the support of NXUMALO as Shongwe would have been precluded from voting due to his conflict of interests and thus the vote would inevitably gone 2:1 in favour of the resolution. The resolution had far reaching consequences and I do not believe that it is an answer to say to the applicants that they were obliged to go through the motions of attending the meeting and exercising what rights they may have had to vote on the resolution before approaching the Court. That seems too technical an approach and the substance of the relief sought would have been the same.

38. This does not, however, mean that I accept that notice of the application need not have been given nor that the matter was extremely urgent as should the resolution have been passed the coffers of the company would be emptied, particularly as independent auditors were to be co-signatories on the accounts.

39. There is also little debate that the balance of convenience favoured Letsema who, stood to lose several millions should the management agreement be terminated which it may not necessarily have been able to recover in an action for damages. The effects of the resolution were profound effectively sterilizing the business of Letsema and its ability to generate revenue for both it and CI. It also proposed spending vast sums

to re-investigate the management agreement. CI's remedy was to on notice give termination of the management agreement which Mr Wessels insisted the applicants did not intend to tie CI to the management agreement and conceded that it could be terminated on 12 months calendar notice.

40. I do not believe that a resolution to this effect could be opposed provided that the directors act *bona fide* in the interests of the Trust in doing so and in accordance with their fiduciary duties to the company. Where an investigation is premised on the directors' satisfying themselves that their decision is justified it would not be impeachable. However, in light of the avowed intent to terminate the management agreement, it is questionable that union funds should be spent on carrying out investigations but only to justify a decision already taken.

Urgency

41. I do not believe that there was any urgency that warranted the calling of the meeting to table the resolutions on 12 days notice. Mabena sought to justify this on the basis that it had been proposed that Letsema be paid an additional monthly management fee of R 381 034 which was nothing else than pure greed which conjures up an image of a pig feeding at the trough. This, so Mabena avers, convinced him that his misgivings about the management agreement were well founded and that Thomas and Shongwe's intentions were to milk the union. These were, however

sentiments which had been held for several years and had been the subject of much litigation. They were sentiments that may well have founded a decision to cancel the management agreement but that also ought to have been on notice and did not justify the urgent calling of a Board meeting. Mabena states that he did not know that Shongwe was going to be away but refused to extend the time of the meeting to accommodate him.

42. Clearly with the meeting being imminent, the applicants had the right to approach this Court as a matter of urgency for relief.

43. But again this did not entitle the applicants to approach the Court *ex parte*.

44. What then does the Court do where, after considering both sides, the relief sought and granted is felt to be justified but feels that notice ought properly to have been given?. Mr Morrison SC argued that this, in itself, warranted the setting aside of the Order as a mark of displeasure by this Court.

45. The Court has wide powers in reconsidering the Order granted referred to by me in my interim ruling. As I believe that the Order was justified and that it is to operate only in the interim pending the outcome of the applicant's application under Part B which has been set down for hearing in February next year (although I accept that it will not in all likelihood proceed on that date as it is unlikely that the matter will be ripe for hearing and there has been no agreement to this effect), an interdict to preclude

the passing of the proposed resolution and from unlawfully interfering with the management agreement should remain in place.

46. However, the interdict granted is too wide and would preclude the giving of notice to terminate the management agreement on 12 months notice which the applicants are not entitled to do. Indeed this was conceded by Mr Wessels in argument. The litigation under part B could conceivably be dragged out for several months thereby negating CI's contractual right to provide the notice thereby improperly extending the life of the management agreement beyond the stipulated 12 months.

47. However as a mark of the Court's disapproval of the manner in which the Order was sought, I intend to Order that the applicants bear the costs of the application on the attorney and client scale. As I stated in my interim ruling, parties seek orders *ex parte* at their peril.

48. In the circumstances I intend to set aside the Order granted and substitute it for the following Order:

48.1. A rule *nisi* be issued in terms whereof the respondents are to show cause on the extended return date why (pending the final determination of Part B of this application) the following Order should not be made final:

48.1.1. The respondents are interdicted from tabling resolutions as set out in their notice dated 13 August 2015 calling for a meeting of the Board of directors or other like resolutions save that the directors of the third applicant may not be precluded from tabling a resolution to terminate the management agreement dated 12 April 2000 with the fourth applicant on 12 full calendar months notice and directing that the second applicant be precluded from voting thereon;

48.1.2. The respondents are interdicted from directly or indirectly unlawfully interfering with the performance of CI's obligations under the management agreement in any manner whatsoever.

48.2. The applicants are directed to pay the costs of this application on the attorney and client scale.

S WENTZEL

ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG LOCAL DIVISON

Date of Judgment:	15 December 2015
Applicants Attorneys:	Mendolow-Jacobs Attorneys
Counsel for the Applicants:	Adv Wessels
Respondents Attorneys:	Stephen Hardie Attorneys
Counsel for the Respondents:	Adv Les Morrison (SC)