REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19/26787

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15/10/2015
DATE

SIGNATURE

In the application of:

ISITIYA INVESTMENT HOLDINGS (PTY) LTD	Applicant
and	
OBARO HANDEL (PTY) LTD	First Respondent
MASEMONG BUSINESS INVESTMENTS (PTY) LTD	Second Respondent
SIYAKHA MANAGEMENT SERVICES (PTY) LTD	Third Respondent
EPA DEVELOPMENT GROUP (PTY) LTD	Fourth Respondent

J U D G M E N T

MAKUME, J:

[1] In this matter the Third and Fourth Respondents seek an order in terms of Rule 6(12)(c) of the Uniform Rules of Court for a reconsideration of an urgent *ex parte* order granted on the 1st August 2019 against them.

[2] This matter served before me on the 17th September 2019. Prior to that on the 16th September 2019 the Applicant abandoned its order in respect of the First Respondent.

[3] The order under reconsideration reads as follows:

> 3.1 That pending the final determination of the application or action instituted against the Third and Fourth Respondents under case number 36671/18.
>
> > 3.1.1 The First Respondent is directed to withhold payment and is interdicted from giving effect to any transaction that has the effect of paying out any dividends declared as being due to the Second Respondent.
> >
> > 3.1.2 The Second Respondent is directed to withhold payment and is interdicted from giving effect to any transaction that has the effect of paying out any dividends declared as being due to the Third Respondent, and

3.1.3 The Third Respondent is directed to withhold payment and is interdicted from giving effect to any transaction that has the effect of paying out any dividends declared as being due to the Fourth Respondent.

3.1.4 The Third Respondent is directed to furnish to the Applicant, the Third Respondent's accounting records for the period March 2015 to February 2017 as well as a true and proper statement of account together with substantiating documents reflecting the correct income, assets, expenditure and liabilities of the Third Respondent.

[4] On the 22nd August 2019 the Third Respondent complied with the order as set out in paragraph 3.1.4 above.

FACTUAL BACKGROUND

[5] On or about the 5th May 2016 the Applicant and the Fourth Respondent entered into a written agreement in terms of which the Applicant sold to the Fourth Respondent the Applicant's 94 260 shares which the Applicant held in the Third Respondent (Isitiya Management Services) for a purchase price of R8.5 million.

[6] The purchase price was payable as follows:

6.1 R6 246 240.00 on date of delivery of the share certificate as well as transfer forms.

6.2 R2 260 725.00 was to be retained by the Fourth Respondent for any current and future expenses relating to and consequential to Siyakha Management Services (Pty) Ltd which are incurred in the normal course of business and which expenses will be determined by the Fourth Respondent within its sole discretion (the Retained amount).

6.3 Should there be any surplus of the Purchase Price available upon settlement of the expenses contemplated in 6.2 above the purchasers (Fourth Respondent) will pay such surplus to the Applicant.

[7] During October 2018 the Applicant instituted an application against the Third and Fourth Respondents under case number 36671/18 in which the Applicant sought an order that the Third Respondent render to it its accounting records for the period commencing 5th May 2016 to date. Secondly that Third Respondent give a true and proper statement of account together with substantiating documents reflecting the correct income, assets, expenditure and liabilities of the Third Respondent. Lastly that the Fourth Respondent be directed to pay to the Applicant whatever amount appear to be due to the Applicant pursuant to debatement of the account.

[8] I need to mention that what the Applicant sough in case number 36671/18 is what was granted in prayer 4 of the *ex parte* application order dated the 1st August 2019, which prayer has now been complied with.

[9] The Applicant proceeded with its *ex parte* urgent application on the 1st August 2019 for according to the Applicant the Third and Fourth Respondents failure to account or to effect payment of amounts lawfully due (or even the undisputed sum) creates the impression that the Third Respondent and Fourth Respondent have no intention to effecting payment to the Applicant.

[10] The payment that the Applicant seeks is the amount retained as part of the purchase price when Applicant sold its shares in Siyakha Management Services to the Fourth Respondents.

[11] The Applicant maintains that if dividends are declared which would eventually lead to payment of same to Third and Fourth Respondents then the two entities will dissipate the money and not pay the Applicant the surplus of the retained amount.

[12] In responding to this Mr Bonile Simon Jack on behalf of the Third and Fourth Respondents forthright and right upfront indicated that in instituting this application the Applicant failed to disclose material facts which facts would have had a material bearing on the outcome of the *ex parte* application.

[13] Mr Jack continued in the same vien and told the court that not only was there a wilful suppression of facts by the Applicant but on their own version there is a dispute of facts

[14] It is common cause that shortly after the Applicant had commenced proceedings under case number 36671/18 the parties engaged in protracted settlement negotiations which amongst others resulted in the furnishing of a balance sheet and supporting vouchers to the Applicant. This was on the 6th December 2018.

[15] On the 9th January 2019 Applicant's attorneys took issue with a number of items and aspects in the balance sheet. I propose hereunder to quote contents of that letter as in my view it forms the basis of not only the urgent application but it sets out the Applicant's claim against the Fourth Respondent. It is the flow of dividends that the Applicant want to be intercepted so as to enable it to have payment to it for the "retained amount" referred to in the Sale of Shares Purchase Agreement.

[16] The letter which is attached to the papers as annexure "SA17" reads in part as follows:

> [13] Our client (Isitiya) has now had an opportunity to consider the annual financial statements as well as the additional documentation furnished to us entitled "Shareholder Expense Breakdown and Surplus Pay-out" as well as the 49 pages of service provider transaction history

between your client and your firm, Hajibey-Bhyat Inc, Boshoff Drotsky and EPA Development and Training (Pty) Ltd.

"4.4 If regard is had to clause 2.3.2 of the offer to Purchase Shares dated the 3rd May 2016 the amount of R2 260 725.00 was retained for "current and future expenses" incurred in the normal course of the business of Siyakha Management Service (Pty) Ltd. On what basis therefore does the spreadsheet entitled Shareholder Expense Break-down and Surplus Pay-out purport to deduct expenses incurred prior to May 2016 from the aforesaid retained amount."

"[5] Quite apart from the aforegoing based on your own information and documentation provided our client is at least entitled to an amount in the sum of R1 260 859.04."

[7] In the circumstances we hold instructions to amend the pending court application (supplemented accordingly) to seek an order for an interim payment in the sum of R1 260 859.04 without prejudice to our client's rights to persist with its remaining prayers and its rights in general to claim all amounts that are found to be due to it."

[17] As indicated above and true to form on the 5th February 2019 Ms Gladly Mlibo Mgudlwa deposed to an affidavit amending the Applicant's notice of motion in case number 36671/18 to read as follows:

"The Applicant seeks an amendment to the Application and therefore seeks an additional prayer as follows:

7.1 an order for an interim payment in the sum of R1 266 859.04"

[18] That supplementary founding affidavit without leave of the court and stand to be dealt with in case number 36671/18.

[19] I revert now to the urgent *ex parte* court application and the subsequent order. It is said by the Applicant that the purpose of this application is to prevent the Third and Fourth Respondents from dissipating dividends that would shortly accrue to them so as to avoid payment to the Applicant of the surplus of the retained purchase price amount referred to in the Sale of Share amount.

[20] This application was unnecessary and in my view amounts to an abuse of the urgent court process. The Applicant knew as far back as February that there was a dispute around the payment of the retained surplus. This was raised in the document titled "Shareholder Expenses Break-down and Surplus Pay-out" in which document Third and Fourth Respondents Accountants raised deferred capital gain stax in the amount of R5 109 545.00 and concluded by indicating that in actual fact the Applicant has been over paid in the sum of R211 160.00.

[21] When the above document was made available to the Applicant as far back as December 2018 settlement discussion ensued. Applicant requested tax indemnification under circumstances that would have amounted to a contravention of the Tax Act. The Applicant simply refused to acknowledge that it was liable for contingent liability in respect of Capital Gains Tax.

[22] Boshoff and the Third and Fourth Respondents were able to demonstrate that the contingent liability for Capital Gain Tax of the Third Respondent for the selling price of the Shares as per the Shareholder surplus payment calculation is the sum of R5 109 545.00.

[23] The Applicant had knowledge of the dispute about Capital Gains Tax during one of the negotiations meetings held on the 20th February 2019 and withheld that information from the court. Applicant failed to place material and relevant facts to the urgent court on the 1st August 2019 and thus did not act with utmost good faith.

[25] In reply to paragraph 17 of the answering affidavit the Applicant in my view glibly glosses over the real issue raised therein by contending that the tax issue was only being raised now in the answering affidavit and that it was never raised in the settlement negotiations held earlier in February/March 2019. This is not correct for in its reply at paragraph 27.3 Applicant say that: "Any tax aspect discussed pertained only to Isitiya's removal of the tax indemnification clause in the second iteration of the settlement agreement."

[26] The crucial issue raised in the answering papers which the Applicant has dismally failed to address which issue is at the core of this litigation is to be found in paragraphs 22.4.2 as wells as paragraph 22.5 of the answering affidavit in which Ms Bonile Jack deposes to the following:

> [22.4.2] The sum of R2 260 725 would be retained by the purchaser for any current and future expenses relating to and consequential to Siyakha Management Services (Pty) Ltd which are incurred in the normal course of business and which expenses will be determined by the purchaser within its sole discretion"
>
> [22.5] The purchasers sole discretion has been exercised and that exercise means the Capital Gains Tax as I have set out above has been withheld as an expense. If the amounts were paid out, the Applicant would be overpaid when the debt materialises.

[27] The Applicant has failed dismally and avoided dealing with the issue raised above by only saying in its paragraph 28 that the Applicant only received communication from Obaro on the 12th September 2019.

<u>DID THE APPLICANT (ISITIYA) SATISFY THE REQUIREMENTS FOR AN INTERIM INTEDICT VIS-AVIS RECONSIDERATION IN TERMS OF RULE 6(12) C</u>

[28] Wepener J in **Oosthuizen v Mijs 2009(6) SA 266 (W)** held as follows:

"I am of the view that a court that reconsiders any orders should do so with the benefit not only of the argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in affidavit filed in the matter."

[29] If Isitiya had served the urgent application on notice not *ex parte* I doubt if it would have survived set down. That application was not urgent. The Applicant in attempting to plead urgency refers to the hearsay evidence by one Ms Kanana that the Obaro dividends were due in July and that dividends would be paid to Third Respondent in early August 2019 Isitiya did not bother to get any confirmation about that allegation nor did it source a confirmatory affidavit by Ms Kanana at the most Isitiya could have simply requested an undertaking from the Third and Fourth Respondents that they would not dissipate the dividends pending the outcome of the proceedings in case number 36671/2018.

[30] It is trite law that there are four requirements for the grant of an interim interdict namely:

(a) A *prima facie* right.

(b) A well-grounded apprehension of irreparable harm if the interdict relief is not granted and the ultimate relief is eventually granted.

(c) The balance of convenience in favour of the granting of the interim relief.

(d) The absence of any other satisfactory remedy.

PRIMA FACIE RIGHT

[31] This right which is often referred to as "a clear right" or a "prima facie" proof of a clear right" has been subjected to what has become popularly known as the Plascon Evan Rule. In **Webster v Mitchell 1948 (1) (SA) 1186 (W)** Clayden J said that the proper manner of approach to consider this right is to take the facts as set out by the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute and to consider whether having regard to the inherent probabilities the Applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the Respondent should then be considered. If serious doubt is thrown upon the case of the Applicant he could not succeed in obtaining the temporary relief.

[32] The Respondents affidavit in seeking reconsideration is clear the Applicant does not have a right to payment worse still the Respondent pleads that the Applicant has been over paid and that there is potential for a counterclaim. The Applicant has in my view failed to demonstrate any *prima facie* right.

IRREPARABLE HARM BALANCE OF CONVENIENCE AND NO OTHER SATISFACTORY RELIEF

[33] This requirement is clearly linked to each other. I have found that the Applicant has failed to demonstrate any *prima facie* a clear right and

accordingly there can be no talk of irreparable harm. The balance of inconvenience does not favour the Applicant. The Applicant does have other satisfactory relief. Firstly and in their own words the Applicant confirms that Third and Fourth Respondents have furnished and disclosed documents as requested in case no 36671/2018 whether those documents are reliable or sufficient is not for this court to decide. There is pending action in that matter where the disputed issues will be debated and at this stage to grant the interim relief will be tantamount to stiffling economic activities of the entities involved in this matter.

[33] The Applicant Isitiya has accordingly failed to satisfy the requirements to sustain an interdict as envisaged in its notice of motion.

[34] I am satisfied that the Third and Fourth Respondents as the parties aggrieved by the interim interdict have been prejudiced by the order granted ex parte as a matter of urgency and qualify for redress. If the application had been served on them they would have put up in their answering affidavit facts material enough to dissuade a court from granting interdictory relief. In the result the interim order falls to be set aside.

[35] The Respondent has asked this court to consider a punitive costs order on the basis that firstly the application is misleading, opportunistic and an abuse of court processes. Secondly that in the answering affidavit the Respondents invited the Applicant to abandon the interdict and tender costs which invitation was rejected by the Applicant.

[36] It is so that costs are in the discretion of the court. I have after careful consideration come to the conclusion that this urgent court application was unnecessary and is an abuse of the urgent court process and should be visited by a punitive costs order. In the result I make the following order.

ORDER

1. The interim order is set aside.
2. The Applicant is ordered to pay the Third and Fourth Respondents taxed costs on an attorney and client scale.

DATED at JOHANNESBURG this the 15th day of OCTOBER 2019.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	:	19th September 2019
DATE OF DELIVERY	:	15th October 2019
FOR APPLICANTS	:	Adv R Martenbroek
INSTRUCTED BY		Morgan Law Inc
FOR RESPONDENTS	:	Adv C Cremen
INSTRUCTED BY		Messrs Ramsay Webber Inc