°REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

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

CASE NO: 010321/2019

IN THE MATTER BETWEEN

GLENCORE SOUTH AFRICA OIL INVESTMENTS PROPRIETARY LIMITED	Applicant

And

MASHUDU ELIAS RAMANO	First Respondent
MSIBITHI INVESTMENTS PROPRIETARY LIMITED	Second Respondent
MASHUDU ELPHAS TSHIVASE	Third Respondent
TSHIRA CONSOLIDATED INVESTMENTS PROPRIETARY LIMITED	Fourth Respondent

TRUSTEES FOR THE TIME BEING OF	
THE MBAZENI TRUST	Fifth Respondent
DIBHESI SAM TUNTUBELE	Sixth Respondent
PHAMBILI INVESTMENT CORPORATION	
PROPRIETARY LIMITED	Seventh Respondent
EASTERN CAPE BLACK EMPOWERMENT	
CONSORTIUM PROPRIETARY LIMITED	Eighth Respondent
OFF THE SHELF INVESTMENTS FIFTY-SIX (RF)	
PROPRIETARY LIMITED	Ninth Respondent
AFRICAN LEGEND INVESTMENTS	
PROPRIETARY LIMITED	Tenth Respondent

JUDGMENT

LEVENBERG AJ

I. THE COURT ORDERS

[1] This matter was set down to determine the issue of costs as between the Applicant and the First Respondent in the wake of an interdict granted in the urgent court. Both parties were represented by senior and junior counsel. Mr Pearse SC appeared for the Applicant and Mr Seleka SC appeared for the Respondent. I want to thank all counsel for the extensive heads of

argument that they provided and the professional manner in which they dealt with the application.

[2] This matter started out as a successful urgent application ("the Application") launched by the Applicant ("the Applicant" or "Glencore") on 19 March 2019. The Application arose out of the failure of the First to Eighth Respondents (collectively "the Shareholder Respondents") to give an undertaking that they would honour certain prior Irrevocable Undertakings relating to their shareholdings in African Legend Investments (Proprietary) Limited ("ALI"), the Tenth Respondent in the Application.

[3] There was no formal opposition to the Application and an order was granted by Dippenaar J on 2 April 2019 as follows:

> "1. The Tenth Respondent is directed to hold a shareholders meeting called in terms of the notice attached to the founding affidavit marked "FA16" ("the Notice") at 9h30 on 4 April 2019 at the Maslow Hotel, Auditorium Room, cnr of Grayston Drive and Rivonia Road ("the Meeting"), for the purpose of the shareholders voting on Special Resolution 1 referred to in the Notice.
>
> 2. The First to Eighth Respondents are directed to attend the meeting, in person or by proxy, to vote such shares as they own or control in favour of Special Resolution 1 (relating to the transactions set out in the two Sale and

Purchase of Shares Agreements between the Applicant and the Ninth Respondent on 6 October 2017) in compliance with irrevocable undertakings given by the First to Eighth Respondents during September 2017, and the Sheriff of the High Court, Sandton, or his deputy is authorised, in the stead of the First to Eighth Respondents, to attend the meeting and vote in favour of Special Resolution 1 in the event that the First to Eighth Respondents are not present at the meeting and/or do not vote in accordance with the irrevocable undertakings given by the First to Eighth Respondents during September 2017.

3. The costs of this application, including the costs of two counsel, are to be paid by the First Respondent."

[4] As soon as he became aware of the order, the First Respondent, Mashudu Ramano ("First Respondent" or "Ramano"), instructed his attorneys, Herold Gie Attorneys ("Gie"), to address a letter to the Applicant's attorney on 3 April 2019 (erroneously dated 12 March 2019).

[5] In that letter he maintained that, as none of the Respondents had opposed the Application, it was improper to make an adverse costs order against the First Respondent.

[6] He referred specifically to prayer 4 of the notice of motion which provides:

"Directing the First Respondent **and such Respondent (s) as may oppose the relief sought in this application** to pay the costs of this application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved." [emphasis added].

[7] The letter then went on to state:

"4. The Notice of Motion accordingly only provides for costs orders to be sought against Respondents who oppose this application.

5. None of the Respondents opposed the application and accordingly no costs order should have been granted.

6. We confirm that had you sought a costs order against any of the Respondents regardless of whether or not they opposed the application, such prayer/relief would have been opposed by our client/s. In this regard we point out that we were not provided with a draft order and that the First Respondent who was in fact present at court on 2 April for a related matter would not have consented to a costs order against him under any circumstances.

8. In light of the above, we ask that you consent to the amendment of the court order by replacing paragraph 3 herewith with:

8.1 "No order as to costs" or, alternatively,

8.2 "Costs to stand over for later determination"".

[8] The Applicant's attorneys responded by letter in which they agreed to amend the court order. In the result, an amended order

was entered by agreement which provided that: *"Costs to stand over for determination"*.

[9] After the amended order was entered, the parties' attorneys exchanged various correspondence in an attempt to avoid having to set the matter down specifically to argue the issue of costs. Both parties claimed that they were reasonable in the positions they took with regard to the costs. It is not necessary for me to decide this issue.

[10] As the attempt to resolve the issue of costs failed, the matter was set down in the motion court for the argument on costs. At the hearing, both parties were represented by senior and junior counsel. The hearing took nearly a full day of argument.

[11] It is regrettable that a matter of this size and magnitude had to be set down for lengthy argument simply over an issue of costs. One would have hoped that the parties could have come to some reasonable accommodation to avoid this eventuality. However, be that as it may, the parties were entitled to have the issue of costs (which could be substantial in this case) properly argued and ventilated and this is exactly what occurred.

II. BACKGROUND TO THE URGENT APPLICATION[1]

[12] During 2015 an opportunity arose for the Applicant to acquire from a USA oil company, Chevron, a 75% shareholding in Caltex SA (which also holds 100% of the shares in Caltex Botswana). This opportunity arose through Off The Shelf Investments 50-6 (RF)(Pty) Ltd, the Ninth Respondent in these proceedings ("OT56"). OT56 had a right of pre-emption to acquire Chevron's 75% shareholding in Caltex SA but lacked the funds to implement the transaction.

[13] Chevron insisted that the terms of the right pre-emption be strictly observed, with the result that the shares were transferred by Chevron to OT56. The Applicant loaned OT56 an amount of US$1.165 billion (approximately R17 billion on current exchange rates) to OT56 in order to enable it to exercise the right of pre-emption and to pay the purchase price.

[14] A two stage transaction was envisaged, pursuant to which OT56 initially acquired the shareholding from Chevron on the strength of the loan made by the Applicant. Thereafter, pursuant to certain

[1] The Respondents did not file any answering affidavits in the application. As a result, the facts set out in the founding affidavit (which are summarised below) are undisputed.

side agreements concluded between the Applicant and the Respondents, OT56 was to on sell the shares to the Applicant's nominee, Luxanio Trading 180 (Pty) Ltd ("JVIV"), for the amount of $1.156 billion (the amount initially advanced by the Applicant to OT56).

[15] The controlling shareholder in OTS56 was ALI. In order to complete the transaction, it was necessary for the shareholders of ALI to attend a general meeting to approve of the disposal by OTS56 to Glencore of all of the shares in the Caltex entities in terms of sections 112 and 115 of the Companies Act 71 of 2008 ("the Companies Act").

[16] For its role in the transaction, OTS56 would earn a substantial facilitation fee of US$20 million (approximately R290 million). A deposit of US$5 million was paid over to OTS56 on the closing of the transaction with the American seller. The other $15 million was to be paid over to OTS56 when the shares were transferred to Glencore or its nominee.

[17] Ramano holds 40.54% of the shares in ALI. The Second to Eighth Respondents between them holds 7.27% of the voting rights in

ALI. In order to secure the necessary shareholder approval for the transfer to Glencore, as contemplated by the Companies Act, it was necessary that all of the shares of the First to Eighth Respondents be voted in favour of the transaction.

[18] To secure its position, the Applicant obtained irrevocable undertakings from the First to Eighth Respondents in identical terms. I set out below the relevant portion of the undertaking of the First Respondent:

> "1.1 I, Mashudu Elias Ramano, being registered and beneficial owner of ordinary shares in ALI, have been advised that ALI's subsidiary, Off The Shelf Investments 56 (RF) (Proprietary) Limited ("SPV") wishes to conclude a transaction ("Proposed Transaction") in terms of which –
>
> 1.1.1 it will accept the offer ("Offer") from Chevron Global Energy Inc ("CGEI") dated 20 July 2017, to acquire ("CGEI Sale") a 75 percent shareholding in Chevron South Africa (Proprietary) Limited ("CSA"), a 100% shareholding in Chevron Botswana (Proprietary) Limited and certain related interests (collectively, the "CGEI Sale Assets").
>
> 1.1.2 to enable it to perform hereunder, and implement, the CGEI Sale, it will conclude an exchangeable loan agreement ("Exchangeable Loan") with JVIV in terms of which JVIV shall lend to SPV the full purchase consideration payable to CGEI in terms of the CGEI Sale;

1.1.3 once acquired by it, the CGEI Sale Assets will constitute all or a greater part of the SPV's assets;

1.1.4 on closing of the CGEI sale, the CGEI sale assets will immediately be onsold to JVIV on substantially the same terms as the CGEI sale ("JVIV sale"), and JVIV 's obligation to pay the consideration under the JVIV sale will be offset against the SPV's obligation to settle the Exchangeable Loan;

1.1.5 it will receive an amount of $20 000 000 from JVIV pursuant to its role in facilitating the above transaction;

1.1.6 immediately following the JVIV sale, it will continue to hold the shares in the CSA that it holds as at the date of signature of this letter, which shares constitute 23% of the issued share capital of CSA …

2.1 **Irrevocable undertaking**

I hereby irrevocably and unconditionally undertake (subject to paragraph 2.2 below) in the favour of JVIV -

2.2.1 to vote all the Subject Shares in favour of all the resolutions to be proposed at the meeting/s of shareholders of ALI (or at any adjournment thereof) to be converted in order to approve and/or implement the Proposed Transaction.

2.1.2 for the period commencing on the date of signature of this letter and terminating 180 calendar days[2] following the closing of the Proposed Transaction, not to -

[2] In argument the Applicant did not focus on this 180 day calendar time limit which commences to run at the time of the closing of the Proposed Transaction. It is not clear to me what the closing date of the Proposed Transaction was. However, this time limit would no doubt have added an extra element of urgency to the application.

2.1.2.1 dispose of, make-over, cede, assign, delegate, encumber and/or otherwise deal with the Subject Shares; and

2.1.2.2 implement any agreement and/or transaction which could result in a direct or indirect exchange of control of SPV;

2.1.3 not to take any action or make any statement which is reasonably likely to be prejudicial to the success of the Proposed Transaction, including voting in favour of any share issues or share repurchases of ALI;

2.1.4 to treat as strictly confidential my giving of the undertaking and the contents hereof."

[19] It is at once apparent that, from the time that it advanced the purchase price of $1.165 billion, the Applicant would have been in a precarious position until the Caltex shares were formally transferred into the JVIV's name. Any commercial entity in the position of the Applicant would have been concerned to ensure that the final stage of the transaction was implemented as soon as possible. Any delay created by the Shareholder Respondents would undoubtedly have caused great anxiety and uncetainty for both the directors of the Applicant, its shareholders and Caltex employees.

[20] A meeting of the shareholders of ALI was convened for 30 November 2018 for the purpose of taking the necessary resolution under section 115 of the Companies Act to enable the transfer of the Caltex shares to the Applicant's nominee. Ramano chaired that meeting. However, in his capacity as the chairperson of the meeting he motivated that the special resolution not be voted on at that meeting and for it to be deferred to a later meeting, subsequent to him having explored various options in relation to the transactions referred to in the Special Resolution.

[21] One can only imagine how much consternation the deferral of this meeting must have caused the Applicant, given its huge financial commitment to the transaction. Although Ramano and the other shareholders did not directly repudiate their obligation arising out of the Irrevocable Undertaking, their actions created an appearance that they were trying to avoid having to go through with the transaction.

[22] On an unspecified date, the Applicant also became aware that a general meeting of shareholders of ALI was to be convened for 13 March 2019. That notice, which was signed by Ramano, as the Chairman was entitled:

> "Notice of a general meeting of the shareholders of the company called in terms of a mandate given by the shareholders at the Annual General Meeting held on 30 November 2018".

[23] In short, the meeting that was to be convened for 13 March 2019 was to consider other options as contemplated at the meeting on 30 November 2018. The notice states, *inter alia*, as follows:

> "Part of the Glencore funding agreements included a letter of undertaking by Glencore in which Glencore agreed that OTS (controlled by the company) may make an "commercially attractive offer" to Glencore "at any time between T1 and T2 for [Glencore's] consideration in good faith".
>
> In light of the above as well as other rights afforded to CTS in terms of the Glencore transaction, the following three options were proposed at the AGM, namely:
>
> 1. Reduce Glencore's shareholding below 75% through the exercise of the OTS 7% option as per the Framework Agreement between Glencore and OTS.
>
> 2. Reduce Glencore to approximately 32% as originally intended and captured in various clauses in the OTS Glencore Framework Agreement; or
>
> 3. Purchasing the Glencore 75% shares in terms of the Letter of Undertaking.
>
> Accordingly, the shareholders at the Annual General Meeting of the Company held on 30 November 2018 agreed to mandate Mashudu Elias Ramano to investigate the above options and report back to the shareholders

with a view to complete the transaction by the end of March 2019."

[24] It is difficult to read this notice as anything other than attempt by the Shareholder Respondents, as led by Ramano, to try to find a way to resile from their obligation to comply with their Irrevocable Undertakings. The action proposed is directly in conflict with what was undertaken in the Irrevocable Undertakings.

[25] The First Respondent's counsel suggested during the course of argument that the Applicant overreacted to the postponement of the 30 November 2018 annual general meeting and to this particular notice. He also argued that Ramano (who is the chairman) was unfairly singled out simply because he was carrying out the will of the other shareholders.

[26] I cannot agree with this contention. To my mind the action proposed is in direct conflict with the terms of the Irrevocable Undertakings and stops just short of an outright repudiation. The other shareholders lead by Ramano, were clearly attempting to exercise the leverage that they had because the shares had not yet been registered in the name of the Glencore entity, JVIV, in

order to renegotiate a better and more advantageous deal. Their conduct is not in accordance with principles of good faith.

[27] On 14 March 2019, a notice was issued by the ALI board to the ALI shareholders convening a shareholders meeting on Thursday, 4 April 2019 for the purpose of considering and passing the necessary special resolution to affect the transfer of the shares into the names of the Glencore entity, JVIV.

[28] On the same day, 14 March 2019, the Applicants sent letters to all the shareholders of ALI who had provided irrevocable undertakings, including the First to Eighth Respondents, seeking confirmation by 16h00 on 18 March 2019 that the First to Eighth Respondents would honour the undertakings by attending the shareholders meeting, in person or by proxy, and voting their shares in favour of the special resolution, failing which the Applicant would bring urgent proceedings in the Court to compel them to honour their undertakings.

[29] Ramano responded through his attorneys, Gie, by letter dated 18 March 2019. In that letter, after confirming that Gie represented Ramano, the attorney stated:

> "We write this correspondence to you for and on behalf of our client, who warrants that the views expressed hereunder are shared by the following shareholders, Msibithi Investments (Pty) Ltd, Mashudu Elphas Tshivase, Tshira Consolidated Investments (Pty) Ltd, Mbazeni Trust, Women In Capital Growth (Pty) Ltd, Sam Tuntubele, Phamibili Investment Corporation (Pty) Ltd, and the Eastern Cape Black Empowerment Consortium. In this regard, our client has procured the permission from the aforementioned to align their respective responses in concert with his own responses as set out below.
>
> 3. We refer to Glencore letter and, in particular, the demand made in paragraphs 5 and 6 hereof.
>
> 4. Our client is currently seeking our legal advice concerning a number of legal issues relating to the Glencore sale agreement and related issues concerning the Pre-emption Framework Agreement. The time period you have imposed upon our client to respond to your demand is unreasonable, but we shall do so by close of business on Wednesday, 20 March 2019.
>
> 5. We are not responding to the entire contents of your letter under reply but reserve our client's rights to do so. Obviously, no inference should be drawn from our client's decision at this stage not to respond thereto. However, I wish to reiterate there is no basis upon which you may draw the inference referred to in paragraph 6 of the Glencore letter under reply nor should you do so."

[30] One cannot help but feel that Ramano and the shareholders who supported him were engaged in a game of cat and mouse with Glencore, trying to extract whatever leverage they could in order to sweeten the transaction for themselves. As noted above, I do not consider that there conduct was consonant with good faith.

They had given an undertaking and it was not commercially unreasonable, in the light of their past conduct, and the size of the transaction that the Applicant, should ask them to reaffirm their undertakings before the meeting.

[31] The Applicant responded to this letter, as it was entitled to do, by bringing an urgent application to obtain a *mandamus* to compel the First to Eighth Respondents to comply with their obligations.

[32] None of the Respondents filed a notice of intention to oppose the application. However, in response to a letter to Judge Van Der Linde requesting that the matter be allocated on the urgent roll, he wrote, on behalf of the First to Eighth Respondents that:

> "3. Our clients have not delivered a notice of intention to oppose and do not oppose the application.
>
> 4. Although not opposing, our clients believe that it is incumbent upon them to draw attention to the following two issues:
>
> 4.1 First, the urgent application concerns a meeting of shareholders of a company cited as the tenth respondent, namely African Legend Investments (Pty) Ltd ("ALI"). More specifically, the urgent application concerns a shareholders meeting that has been convened by ALI for 4 April 2019. The application brought by Glencore is essentially to compel certain

shareholders, namely the first to eighth respondents, to vote in a particular way at the 4 April 2019 meeting. The vote concerns a subsidiary of ALI disposing of the greater part of its assets and/or undertakings. However, many of ALI's shareholders have not been joined in the urgent application despite the directness of substantial interest in the outcome of whatever order may make; and

4.2 Secondly, the primary relief sought in paragraph 2 of the notice of motion is an order directing that the shareholders meeting takes place on 4 April 2019. However, Glencore is a separate and unrelated third party with no standing to oblige the company to hold a shareholders meeting, nor to enforce that the meeting proceeds. The order would preclude the adjournment of the meeting for some principle reason."

[33] This letter is a very unusual letter. The attorney indicates that the First to Eighth Respondents are not opposing the application. However, it suggests to Judge Van Der Linde reasons why the matter cannot go forward on the relevant date. The eight Respondents, as obviously led by Ramano, are blowing hot and cold. Although this letter is not a formal notice of intention to defend and ultimately had no impact on the outcome of the proceeding, it is a form of opposition to the proceeding. Accordingly, when the First Respondent says that he did not oppose the proceeding this is not entirely correct.

III. LIABILITY FOR COSTS

A. GENERAL PRINCIPLES

[34] More than a hundred years ago, Innes CJ stated in *Pelser v Levy*[3] stated that:

> "The question of costs is one largely in the discretion of the court which tries the case. At the same time it is essential that that discretion, which is a judicial one, should be exercised as far as possible in accordance with definite principles. One of those principles seems to me to be this: **where a man is compelled to come to court, and recovers a substantial portion of what he claims, then he should have his costs**. Of course, this rule is subject to exceptions; but it is a general rule, and one important to be observed in adjudicating upon a question of costs." [emphasis added].

[35] In *Fripp v Gibbon & Co*[4], Lord De Villiers CJ held:

> "In appeals upon questions of cost two general principles should be observed. The first is that the court of first instance has a judicial discretion as to costs, **and the second is that the successful party should, as a general rule, have his costs.** The discretion of such court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that the successful party should be awarded his costs." [emphasis added].

[3] *Pelser v Levy* 1905 TS 466, 469.
[4] *Fripp v Gibbon & Co* 1913 AD 354, 357.

[36] In *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) 863 as follows:

> "A litigant's right to recover the costs of an opposed application from his opponent will, in general, depend on whether he was in the right, either in making the application or in opposing it as the case may be (provided always there are no grounds for exercising a judicial discretion to deprive him of these costs). **The form in which this rule is usually stated is that the successful party is entitled to his costs unless the Court for good reason in the exercise of its discretion deprives him of those costs**. Now, discarding for the moment the idea of discretion, **in an appeal** against an order for costs the court of appeal does not judge a party's right to his costs in the Court *a quo* by asking the question *was he the successful party* in the Court. It asks *ought he to have been* the successful party in the Court and decides the question of costs accordingly. It may or may not be necessary in such cases to deal with the order which was actually made on the merits. It may even be that no order on the merits was made in the Court *a quo* because by the time the matter came before that Court the necessity for an order was gone and the sole question was one of costs. This shows that the merits of the dispute in the Court below must be investigated, in order to decide whether the order as to costs made in the dispute was properly made or not. In deciding whether or not the Court below made the correct order as to costs the reasons which prompted the Court to make its order must be examined and those reasons must be the actual reasons and no others." [emphasis added].

[37] I therefore approach the matter on the basis that the Applicant, as a successful party, should be entitled to its costs unless there are good reasons for the court to exercise his discretion and refuse the costs order.

B. THE MERITS OF THE APPLICATION

[38] The order that was granted to the Applicant was a mandatory interdict. While nobody appeared to oppose the matter when the Application was moved, the decision of the learned Judge granting the order is, in the absence of an application for rescission or an appeal by one of the parties, final and binding upon them. I am therefore obliged to accept for purposes of deciding this request for costs that the Applicant was the successful party and that the Applicant made out a proper case that the relief that it sought was necessary, appropriate, and urgent.

[39] In reaching this conclusion, I am mindful of that portion of the judgment of Watermeyer CJ in *Pretoria Garrison* that states that, in assessing the appropriateness of a costs award on appeal, the Appeal Court should consider whether the successful party *"ought to have been successful"*. I do not believe that the same considerations apply to a decision of this Court, which is a Court of first instance. The powers of an Appeal Court are wider than mine. The decision of my sister Dippenaar J is *functus officio* and I am not entitled to reopen it.

[40] In any event, even if I was entitled to reopen it, it is my opinion that a proper case was made out for a mandatory interdict.

[41] In *Setlogelo v Setlogelo* 1914 AD 221, 227, Innes JA (as he then was) held:

> "The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

[42] In the present case, the Applicant had a clear right based upon the Letters of Undertaking. It also had a reasonable apprehension of injury – the Respondent had failed to honour the undertakings at an earlier meeting of shareholders; they had given notice of another meeting of shareholders, the object of which was to consider alternatives to honouring the Letters of Undertaking; and they had refused to give an undertaking that they would honour the Letters of Undertaking. There was a huge sum of money involved.

[43] In addition, there was an absence of similar protection by any other ordinary remedy. A resort to a claim for damages would have been difficult to prove and there would have been an added

question about whether the Respondents were good for the money. There is a further factor on the merits – the fact that the Respondents never filed an answering affidavit. Accordingly, all of the allegations in the founding affidavit and the inferences drawn in the founding affidavit must be taken to be uncontested.

[44] The mandatory interdict that was granted was a final interdict, not an interim interdict. As the appropriateness of the order will therefor not be tested again in an application for final relief, it is appropriate for me to make an order for costs rather than to reserve the costs for determination by another Court order.[5] As final relief was granted, the merits of the claim will not be revisisted in subsequent proceedings.

C. THE RESPONDENTS' CONTENTIONS

[45] Mr *Seleka*, who appeared for the Respondent, Romano, maintained that his client should not pay costs for the following reasons:

[5] *Maccsand CC v Macassar Land Claims Committee* [2005] 2 All SA 469 (SCA) para 13 (in interlocutory interdict proceedings the general rule is the costs should be reserved for determination by the court finally hearing the matter because it is in a better position to decide the appropriateness of a costs order); cf *De Villiers v Kapela Holdings* [2016] JOL 36191 (GJ) (The court did not regard itself as bound by *Maccsand* because the practice in the South Gauteng High Court was different).

- He contended that, where a matter is unopposed, the usual order is not to make a costs award;

- He contended that the Application was both unnecessary and not urgent because the Respondents had not stated affirmatively that they would not vote in accordance with the Irrevocable Undertakings;

- He maintained that prayer 4 of the notice of motion indicated that costs would only have to be paid by any Respondent who opposed. The First Respondent did not oppose the application. As the Application was unopposed, it is inappropriate for any costs to be awarded to be made against him.

- It is not equitable to make the First Respondent pay the costs of the application.

[46] I deal with each of these arguments individually below.

(i) <u>The contention that it is inappropriate to make a costs award where the application is unopposed</u>

[47] In his argument, Mr *Seleka* cited to the following paragraph in *Cilliers Law of Costs* para 2.07A, p2-11:

> "Related to the subject-matter of the previous paragraph is the general principal that, where there is a complete lack of opposition in litigation, there is no need for a costs order – and, except perhaps in exceptional circumstances, perhaps even no scope. This is probably also the explanation for the common practice to pray for costs only in the case of opposition.
>
> The principle applies also on appeal. An appeal court has also on this basis interfered with costs granted in the court *a quo*."

[48] Based on this passage, Mr *Seleka* contended that it was inappropriate to make a costs award because the Respondents had not opposed the application.

[49] With the utmost respect to the learned author, I do not believe that the cases that he cites to in support of this sweeping proposition support him. Some of the cases that the author relies upon are cases in which the Respondent was a public body, an arbitrator, or somebody else cited *nomine officio*. There are sound policy considerations why in the case of a review application (for

example) the respondent (who may be a public body, a magistrate, a Master, or an arbitrator) would not be required to pay the costs of the application, save in the event of opposition. The same considerations do not apply to applications for relief against ordinary commercial entities. I analyse some of the cases cited to by *Cilliers* below.

[50] In *Groenewald v Mokgethi* [2016] JOL 34589 (LC), the Applicant was an employee who brought an application before the Labour Court in terms of section 77(3) of the Labour Relations Act for payment of an outstanding performance bonus. The Applicant failed to make out a proper case. The respondent did not oppose the application. The Court dismissed the application but made no award of costs against **the applicant** because there had been no opposition by the **respondent**. This was not a case in which a successful applicant in an unopposed matter was refused his costs.

[51] The learned author also relies upon *Shatterprufe (Pty) Ltd v Sesani NO* [2016] JOL 35676 (LAC) para 30. In that case the Court dismissed an appeal against an order of the Labour Court refusing to set aside an arbitrator's award on the grounds of

material irregularity. The Court did not award costs against the unsuccessful appellant because there was no opposition to the appeal and because there was a fair alternative to dismissal, which the arbitrator might have followed. This case is therefore on a similar footing to *Groenewald*.

[52] In *Nedbank Limited v Jones* [2017] JOL 38025 (WCC) para 30, the Court considered an application to review a decision of a magistrate, one Jones. The magistrate did not oppose and no order as to costs was made.

[53] In *Da Cruz v Cape Town City* 2017 (4) SA 106 (WCC) para 73 the Court awarded costs against the City of Cape Town because it had chosen to adopt an actively oppositional role. It is implicit in the judgment that, had the City of Cape Town not opposed, it might not have been ordered to pay the costs. However, as noted above, the City of Cape Town is a public body and differing considerations should apply in such a case.

[54] In *Nedbank Limited v Steyn* 2016 (2) SA 416 (SCA), the Court considered six appeals by Nedbank against the refusal of the North Gauteng High Court to grant a number of similarly situated

default judgments. The appeals were not necessitated by any action of the defendants in those actions but by the decision of the Court *a quo* to refuse the default judgments sought on grounds that the SCA considered inappropriate. No order was made with respect to the costs of appeal. The defendants (who were the respondents in the appeal) had not opposed.

[55] However, what is telling in *Nedbank v Steyn* is that the SCA, after reversing the decision of the Court *a quo* not to grant the default judgments, also granted default judgments against the respondents. The order granting the default judgments, included an order for costs to be paid by the defendants on the attorney and client scale. In short, the Appeal Court considered it entirely appropriate that, in the case of a default judgment, the successful plaintiff should be entitled to its costs.

[56] I note that none of the cases cited to by *Cilliers* express the very broad proposition enunciated by *Cilliers*. In addition, based upon my own experience practising for many years in the South Gauteng High Court (and its predecessor Court) this principle does not accord with practice in that division. Indeed, as noted above, the decision in *Nedbank v Steyn* suggests the contrary.

(iii) The Application was unnecessary

[57] In my opinion, the Applicant did not overreact in bringing the Application. The Applicant had $1.165 billion (approximately R17 billion) at stake. This is a staggeringly large amount of money. It had every reason to be nervous. Moreover, uncertainty in a transaction of this scale affects not only the immediate parties to the transaction – it could potentially have had a negative impact on the stock values of Glencore and therefore on its shareholders. More importantly, these uncertainties would undoubtedly have caused anxiety and insecurity for the employees of Caltex. It would also have made it difficult for Caltex to prepare and execute its business plans effectively.

[58] It is clear on an assessment of the documentation that the Respondents were not cooperating and were trying to avoid complying with their contractual obligations. As I noted above, their conduct (particularly that of the First Respondent as their principal spokesperson) left much to be desired.

[59] The First Respondent also contended that the Application was not urgent as the Applicant did not react after the deferment of the

meeting of 30 November 2018 until some four months later when notice was given of the next meeting. I do not believe that the issue of urgency affects the Applicant's entitlement to costs. While the question of urgency may have been of some concern to the Judge who heard the urgent application, it is of no concern to me at this stage. The question remains, as indicated in the *Pretoria Garrison* case, whether the application itself was necessary. I have expressed the view that it clearly was necessary to ensure that the Respondents, who had behaved in an unacceptable manner, complied with their contractual obligations.

[60] In any event, I am of the view that the matter was appropriately brought in the urgent court. Had the Application been brought in the ordinary course it might have taken up to a year or more before the Court heard it. Accordingly even if the Application had been brought in December of 2018 it would have had to be brought on a semi-urgent basis in any event.

[61] In addition, by the time that the urgent application was launched, there had been further conduct by the Respondents that gave the Applicant cause for alarm. This included the noticing of a meeting

for March 2019 where suggestions were made for an approach that might have amounted to a repudiation of the Irrevocable Undertakings. The immediate urgency was precipitated to by the imminent shareholders meeting which had been noticed for a specific date in the near future. In all the circumstances, had urgency been argued before me, I would also have concluded that the matter was urgent.

(iii) <u>The interpretation of prayer 4 of the notice of motion</u>

[62] The Respondent interpreted prayer 4 as indicating that only such Respondent as opposed the Application would have to pay the costs. This interpretation ignores the presence of the words *"the First Respondent and"* before the words *"such other Respondent(s)"*. It seems to me that prayer 4 was clear. The First Respondent was to pay the costs along with any other Respondents who might oppose.

[63] Mr *Seleka* maintains that the language was ambiguous. He argues that it is clear that the First Respondent interpreted the prayer in a different way because the First Respondent reacted

immediately after reading the order and insisted that the order be amended with respect to costs.

[64] I do not see any ambiguity in the prayer. However, even if there was ambiguity, the order was in any event amended and the Respondent was afforded his day in Court to argue against the costs. Accordingly, Ramano suffered no prejudice as a result of the alleged ambiguity.

(iv) <u>The contention that it is not equitable to make the First Respondent pay the costs</u>

[65] Mr *Seleka* submitted that the Court had a broad equitable discretion to refuse to award the Applicant costs. He maintained that this was an appropriate case for the Court to exercise its discretion and refuse to award costs to the Applicant.

[66] As noted above, it is not correct that the Court's discretion is unlimited. It is curtailed by certain specific rules such as the rule that costs usually follow the event.

[67] Mr *Seleka* also argued that it was unfair to single out the First Respondent to pay the costs because he was simply the

spokesman for the other Respondents. I do not agree with this contention. First, Ramano was the principal shareholder among the other Respondents and it is clear from the papers that they followed his lead. Second, even if that were not the case, if a costs order against Ramano is warranted, it matters not that the Applicant did not seek costs from any other Respondent against whom a costs order might have been justified.

[68] Mr *Seleka* maintains a costs order against his client would also be inequitable because Ramano never actually refused to comply with the Irrevocable Undertaking. That is not the test. The First Respondent was playing a tactical game in the hope that he would secure a better deal. He took a gamble and the gamble failed. His cat and mouse behaviour forced the Applicant to incur significant costs. He must now pay the price.

[69] Mr *Seleka* also argued that it was inequitable to make the First Respondent pay the costs because the language of the notice of motion was ambiguous. I have already dealt with this contention above. In any event, the First Respondent has now had ample opportunity to argue his case on costs and was therefore not prejudiced by the ambiguity.

IV. COSTS

[70] The Application involved a significant amount of money and the issues that it raised were complex. In the circumstances, costs of two counsel is warranted. This is borne out by the fact that, even at the hearing on costs, both parties were represented by two counsel.

[71] The costs involved are the costs of the Application itself and the costs of the argument on costs.

V. CONCLUSION

[72] I therefore make the following order:

1. The First Respondent is to pay the costs of the Application which costs include all costs relating to the hearing and order obtained on 2 April 2019 (as amended) and the costs relating to the hearing on 11 September 2019.

2. The costs include the costs of two counsel.

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P.N. LEVENBERG AJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances:

Date of hearing	: 11 September 2019
Date of Judgment	: 30 September 2019
For the Applicant	: RM Pearse SC ALS Msimang
Instructed by	: Werksmans Attorneys
For the Respondents	: PG Seleka SC Kerusha Pillay
Instructed by	: Herold Gie Attorneys