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

CASE NO: 24225/19

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

…… ……
DATE SIGNATURE

In the matter between:

NYATHI, PONTSO RETHABISENG	First applicant
DUNAMIS EMPORIUM SERVICES (PTY) LTD	Second applicant
NYATHI, NOEL JANAVARI	Third applicant
and	
MOGASE, TUMELO EZEKIEL	First respondent
KUYALUNGA TRAFFIC SOLUTIONS (PTY) LTD	Second respondent
FIRST NATIONAL BANK	Third respondent

JUDGMENT

CORAM: ENGELBRECHT AJ

1. When business is struggling and business partners fall out, the intervention of a court is sometimes the only solution – even more so when there is a dispute about unpaid dues to creditors and only one of the business partners is in control of the bank account.

2. Dunamis Emporium Services (Pty) Ltd (Dunamis) holds 50% of the shares in the second respondent (KTS), with the first applicant (Ms Nyathi) and the third applicant (Mr

Nyathi) holding a 50% interest each in Dunamis. Mr Nyathi is, or was, depending on who is to be believed, the Chief Operating Officer (COO) of KTS. In the period between 8 March 2018 and 27 August 2018 he was also a director of KTS. Ms Nyathi is also a former director of KTS (until 27 February 2018).

3. Once upon a time, the Nyathis and the first respondent (Mr Mogase) had been friends. For reasons not important to the determination of this application, the relationship between the *dramatis personae* appears to have deteriorated to such a degree that by 6 March 2019 Mr Mogase indicated to the Nyathis that '*I feel that I have reached the end of our collective business experience'* and indicating a proposal for his exit from Dunamis. By 11 March 2019, he appears to have had a change of heart regarding his exit. He purported to dismiss Mr Nyathi from his position as COO if Dunamis on the basis that Dunamis could not afford his salary – even though Mr Nyathi was not earning a salary and despite the fact that he was appointed as a shareholder representative. Mr Mogase also argued by this date that an addendum to the shareholders' agreement was void. By the next day, Mr Nyathi was asked to collect his personal possessions from the offices of KTS. All of this happened against the backdrop of -

3.1. the parties anticipating payment of an arbitration award of just over R3 million following an arbitration involving KTS and Tswaing Municipality;

3.2. the parties knowing that KTS owed a debt to SARS of about R1,8 million, in addition to other outstanding liabilities.

4. By 1 April 2019, the Nyathis proposed a roundtable discussion on the future of KTS and sought clarity *inter alia* on the use of KTS bank accounts for Mr Mogase in his personal capacity. An undertaking was sought from Mr Mogase that he refrain from

using the KTS funds for personal purposes and that he refrain from engagement with creditors without the involvement of the applicants. Towards the end of April Mr Mogase, in a telephone conversation with Mr Nyathi's attorney, agreed to a meeting in May and said that he would not transact on the KTS account until resolution of the disputes between the parties. He also undertook that the funds due to be paid from any creditor – in particular Tswaing Municipality – would be used or allocated according to a schedule of payments to be agreed at the roundtable meeting to be held. Already at this stage, the applicants harboured a fear that Mr Mogase would misappropriate funds once they were paid into the KTS bank account. Efforts were made to require dual approval of transactions on the relevant accounts, but Mr Mogase failed to sign the requisite mandate.

5. On 6 May 2019, the arbitration award in favour of KTS was made an order of court, but by this time nothing had come of the offer of Mr Mogase to participate in a round table meeting in that week. It was only by 20 May 2019 that Mr Mogase's attorney indicated that a round table meeting would be held on 23 May 2019. Mr Mogase's attorney undertook that Mr Mogase would not operate the KTS bank account until finalization of this meeting.

6. The meeting was held, but the parties were unable to agree on the terms of how to bring their business relationship to an end. Be that as it may, according to the applicants, Mr Mogase (1)confirmed that he would give a written guarantee that he would not transact on the KTS bank account until resolution of the disputes between the parties; and (2) offered that the arbitration award could be paid into his attorney's trust account. Mr Mogase denies this agreement, although that agreement was recorded in a letter from Mr Mogase's attorney. Mr Mogase now says his attorney held no instruction to send this letter.

7. On 5 July 2019, just short of R3 million due under the arbitration reward was paid into one of the KTS accounts – an account different from the one mentioned in the arbitration award, on the apparent instruction of Mr Mogase. He confirms that banking details were provided to KTS' attorneys on a KTS letterhead. On the very same day that the monies were paid into the account, Mr Mogase made payments totaling about R900 000 from that account. Thereafter, on 8 July 2019, Mr Mogase blocked Ms Nyathi's access to the KTS accounts.

8. This application was then launched on 10 July 2019. It started out as an urgent *ex parte* application in which the applicants sought an interim order prohibiting the first respondent (Mr Mogase) from in any way dealing with or transacting on or withdrawing from certain bank accounts in the name of KTS and held with the third respondent (FNB). In terms of the notice of motion, the relief was sought to operate pending resolution of the dispute between the shareholders in KTS or pending the outcome of an arbitration to resolve the disputes. A rule *nisi* was issued on 10 July 2019. The rule was extended twice, and became opposed, ultimately for the matter to be argued before me on 6 February 2020. By this time it had became apparent that no roundtable discussion would be held to resolve the matter.

9. Mr Chavalala raised a point *in limine* on the standing of Mr and Ms Nyathi, on the basis that they are neither shareholders nor directors of KTS, but he accepted that Dunamis enjoyed standing. On that basis alone, I was compelled to hear the merits of the application. Moreover, I not persuaded by the submission that Mr and Ms Nyathi do not enjoy standing in this application: they have asserted that they were directors of KTS at a time when KTS incurred certain debts with the South African Revenue Service (SARS), and that SARS may turn to them for payment of the outstanding amount. The rights and interests of the Nyathis have clearly been affected by the

election of Mr Mogase to make payments to certain creditors, but to delay the payment of monies to SARS. Moreover, given Mr Mogase's challenge to the addendum to the shareholders' agreement, the Nyathis were entitled to assert their interests in their own right. I also cannot leave out of account that Ms Nyathi has stood surety for the overdraft facilities of KTS – further dissipation of the funds in the account may expose Ms Nyathi to further liability.

10. Mr Chavalala did not press a point on the non-joinder of SARS that had been raised in the papers, correctly so. Any indirect financial interest that SARS might have in the outcome of the application is not such that it necessitated the joinder of SARS.

11. This brings me to the merits of the application. In accordance with the trite requirements for an interim interdict as set out in *Olympic Passenger Service (Pty) v Ramlagan* 1957 (2) SA 382 (D), in order for them to succeed, the applicants must show:

11.1. a *prima facie* right (though open to some doubt);

11.2. an injury committed or a reasonable apprehension of irreparable harm;

11.3. that the balance of convenience favours the applicants; and

11.4. the absence of similar protection offered by any other ordinary remedy.

12. These requirements seem simple enough, but the grant of interim relief is an extraordinary remedy, as was recognized in *Erikson Motors (Welkom)) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (A) at 691D-E, and this court enjoys a wide discretion in accordance with the principles set out in *Knox D'Arcy Ltd and Others v Jamieson & Others* 1996 (4) SA 348 (A) at 361I.

13. Upon a weighing of the averments in the respective affidavits, and guided by the principles as enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 643H – 635C, I have come to the conclusion that Mr Mogase has acted in a manner indicative of a particular state of mind. He has taken a number of steps indicating that he wished to take full control of the funds of KTS and that he will unilaterally exercise his discretion on which creditors to pay and which not, despite the manifest interest of the applicants in the appropriate disbursement of the monies. Mr Mogase has all but ensured that Dunamis and its shareholders are excluded from any oversight role in respect of KTS. In his answering affidavit, Mr Mogase stated expressly that he disagrees with demands made by the applicants (including that he should not make payment of personal accounts from the KTS accounts and not perform transactions on the KTS accounts). He says, in terms, that the applicants '*do not have a right to dictate to [KTS] which of its creditors it must pay and which must not be paid'*. Yet, for himself, he assumes the right – not to dictate, but to decide unilaterally, and seemingly without coming to an agreement with his business partners.

14. Unfortunately, the elections made by Mr Mogase on which creditors he would make payment to, and particularly the election not to make payment to SARS immediately upon receipt of the funds, is supportive of the applicants' claims that they fear misappropriation that may carry consequences for the applicants. In argument before me, Mr Chavalala sought to convince me not to grant the order sought because a SARS debt incurs significant interest and penalties. In his submission, if the order is not granted, the payment to SARS can be made to avoid further penalties. That was also Mr Mogase's submission in his answering papers. Yet, Mr Mogase had elected not to make payment to SARS on 5 July 2019 when he rushed to make payments to others

who were allegedly creditors of KTS. And he did not make payment to SARS in the days that followed between then and the grant of the rule *nisi* on 10 July 2019. The submission that Mr Mogase intended to make payment, but was prevented from doing so in light of the application rings hollow in the circumstances. It is also unconvincing in light of the fact that Mr Mogase took three days to confirm the list of payments allegedly made to his attorney for – so he says – onward transmission to the applicants. Why, if Mr Mogase was midway-through making a list of payments, was he sending the report at that stage? The email certainly did not suggest that payment to SARS was imminent.

15. It does not help Mr Mogase's cause that he asserts an inability to show proof of payment to the creditors who had allegedly been paid by relying on the consequences of the interdict. Importantly, he not only failed to provide proof of payment, but also failed to provide proof of any kind that those amounts were indeed due to the creditors listed. Of concern is his allegation in the answer that R600 000 was paid to '*Intellect'*, which is understood to be a reference to Inteleg (Pty) Ltd (Inteleg), the holder of the remaining 50% of the shares in KTS with Dunamis. Mr Mogase is the sole shareholder in and sole director of Inteleg. But even if the reference is not to Inteleg, the reality is that the payments were made despite an undertaking that payments would *not* be made and that Mr Mogase would *not* transact on the accounts once the monies came in. The applicants had every reason to be concerned when Mr Mogase acted in contravention of that undertaking, which had been recorded in a letter from his attorney. He now disavows that undertaking as a defence. Moreover, the different versions of payments made as set out in the email to the attorney, a letter from the attorney and as described in the answer, creates a

cause for concern about the veracity of the allegations on payments said to have been made.

16. The balance of convenience favours the grant of an order. The facts advanced by Mr Mogase are not sufficient to persuade me that it would be better to release the hold on the accounts, in order for him to make further decisions on payments. Manifestly SARS has to be paid, but there may also be other creditors still remaining. This court is not in a position to consider who ought to be paid and who not, and it seems inappropriate to leave that determination to the discretion of Mr Mogase, given the elections he made when the monies were first paid into the account. And if the money is gone, the applicants are unlikely to have any recourse against Mr Mogase. A referral to arbitration does not appear to me to be an appropriate course of action in the circumstances of the case, especially in light of the submission that Dunamis intends to make application for the winding up of KTS. Mr Chavalala submitted that the business is doing better, but I have no facts on the papers in this regard. And, even if I accept these facts from the Bar, it suggests that KTS has not been hampered in its ability to conduct business as a consequence of the interdict that has been granted. It cannot prejudice KTS if its funds are preserved in order for a determination on their proper disbursement to be made.

17. At the hearing, Ms Lipschitz, who appeared for the applicants, proposed that I grant an order interdicting and restraining the Mr Mogase from dealing with or transacting on or withdrawing funds from the back accounts registered and operated under the name of KTS and held with the third respondent (FNB). It was proposed that the order operate pending the finalization of a winding up application for the dissolution of KTS to be launched by Dunamis within 14 days of the grant of this order, failing which the interim order would lapse. Furthermore, it was proposed that, should the winding up

application be granted, the interdict ought to continue to operate until a liquidator is appointed, but if it were to be dismissed the interim order would cease to operate.

18. Mr Chavalala, who appeared for Mr Mogase and KTS, suggested that the better alternative would be for me to release the freeze on the bank accounts and to direct Mr Mogase to make payment to SARS of the funds remaining in the bank account.

19. I am not convinced that I enjoy the jurisdiction to make the order proposed by Mr Chavalala. I am anxious that I should not make an order that could or would affect any winding up process that may follow these proceedings. As mentioned above, Mr Chavalala told me from the Bar that the fortunes of the business have improved, but I cannot place any reliance on that submission, which is not based on the papers before me. More importantly, if the fortunes of KTS have indeed improved, the applicants will not succeed in an application for the winding up of KTS and, should I follow the proposal of Ms Lipschitz, that will mean that my order will cease to operate. It seems to me to be far more desirable to allow for the interim order, which provides safeguards to all parties until a court in a winding up application is able to make a full assessment of the facts.

20. On the issue of costs, I agree with the submission of Ms Lipschitz that Mr Mogase ought to bear the costs of the application. He is the director of KTS whose conduct has led to the need for the application. He is also the party that failed to give undertakings to put the minds of the applicants at ease, and who made the election to make payment to a number of alleged creditors that did not include SARS, but did appear to include another legal entity in which he holds an interest. I see no need to burden KTS with a costs order when clearly the responsible party here is Mr Mogase.

21. In the circumstances, I make the following order:

21.1. The first respondent is interdicted and restrained from in any way dealing with or transacting on or withdrawing funds from the bank accounts with account numbers […]01 and […]61 that are registered and operated under the name of the second respondent, and held with the third respondent (the Interdict);

21.2. The Interdict shall operate pending the finalization of a winding up application for the dissolution of the second respondent, which shall be launched by the second applicant within 14 days from the grant of this order, failing which the Interdict shall lapse.

21.3. Should the winding up application be granted, the Interdict will continue to operator until a liquidator is appointed;

21.4. Should the winding up application be dismissed, the Interdict will cease to operate.

21.5. The costs of this application, including all reserved costs, shall be paid by the first respondent.

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ENGELBRECHT AJ

Acting Judge of the High Court of South Africa

Appearances:
Adv: Lipshilt for Applicant
Adv: Chavalala for Respondents
Held on: 06 February 2020
Delivered on: 13 February 2020