

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

CASE NO: 20227/2019

REPORTABLE: ~~YES~~ / NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED.

02/09/2021

In the matter between:

BCM SUPPLIES (PTY) LTD

Applicant

and

MARTHINUS CHRISTOFFEL MINNE

Respondent

JUDGMENT

MINNAAR AJ:

1. This is an opposed application in terms of which the applicant seeks an order directing the respondent to return the following assets to the applicant:

- 1.1 a white Honda Jazz motor vehicle, registration number [...] ('the vehicle');
- 1.2 a blue BMW motorcycle, registration number [...] ('the motorcycle');
- 1.3 a silver 15-inch Apple Mac Book, 2.3 GHZ ('the Mac Book'); and

1.4 a Vodacom data card with number [...] under account number [...] ('the data card').

2. It is the applicant's case that the subject assets were placed in the respondent's possession by virtue of the respondent's employment with the Applicant. According to the applicant the respondent was previously a director and employee of the applicant. On 15 April 2019 the respondent was removed as a director of the applicant by virtue of a resolution passed by the majority of the shareholders of the applicant. On 22 May 2019 the respondent's employment was terminated as the applicant placed the respondent on retirement. It is the case of the applicant that, since the respondent is no longer employed by the applicant, that the assets should be returned to the applicant and that, despite demand, the respondent refuses to return the applicant's assets to it.

Condonation: late delivery of the respondent's answering affidavit:

3. The respondent brought an application to condone the late delivery of his answering affidavit.

4. No formal opposition was noted to the application for condonation. The applicant rather elected to deal with the condonation in the replying affidavit. In this regard the applicant stated that it will abide by the court's decision but proceeded to place facts before the court in support of a costs order.

5. Relevant to the costs is the wasted costs occasioned on 7 October 2020 when the application was postponed *sine die* and the respondent was ordered to file an application for condonation.

6. As indicated during the hearing of the application, this court was satisfied with the explanation provided by the respondent as to the lateness of the delivery of the answering affidavit. Same was premised, amongst others, on the challenges faced by the respondent's attorney to finalize the answering affidavit.

7. As the respondent seeks an indulgence with the condonation application, and since the application could not proceed on 7 October 2020 as the respondent's answering affidavit was not at hand, it follows that the respondent should pay the costs of the application for condonation and that such costs should include the wasted costs incurred on 7 October 2020.

8. The respondent raised three points *in limine*. These points *in limine* are:

8.1 *Locus standi* of the applicant;

8.2 Non-joinder of Mr. Iain Hampton ('Mr Hampton') to the proceedings;
and

8.3 Stay of proceedings.

First point *in limine*: *Locus standi* of the applicant:

9. In this instance it is the case of the respondent that the application is proceeded with by the applicant without the authority of Mr Hampton.

10. Mr Hampton was appointed by an order of this court on 13 September 2019 to have the sole authority over the applicant, to the exclusion of any other directors appointed by the shareholders or members of the applicant.

11. In answer, it is the case of the applicant that the respondent should have invoked the provisions of Rule 7(1) of the Uniform Rules of Court if he wanted to challenge the authority of the applicant to proceed with these proceedings.

12. In Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 SCA it was made clear that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.

13. In Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705, Flemming DJP stated that the care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was a party to the litigation carried on in his name. His signature to the process, or when that does not

eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. It went on to state that the developed view, adopted in rule 7(1) of the Rules of Court, is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of a party then the application necessarily is that of such party. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. The Eskom-judgment was also referred to by the Supreme Court of Appeal in Unlawful Occupiers of the School Site v City of Johannesburg 2005 (4) SA 199 (SCA) at paragraphs 14 to 16.

14. In this instance, I am in agreement with the applicant, that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant, is not to challenge the authority in the answering affidavit, but instead to make use of rule 7(1) of the Rules of Court.

15. The respondent did not invoke the provisions of Rule 7(1) of the Uniform Rules of Court and as such this point *in limine* cannot succeed.

Second point in limine: Non-joinder of Mr Hampton:

16. Respondent takes issue with Mr. Hampton, being appointed as sole director, by an order of court, to run the affairs of the applicant, not being joint to these proceedings.

17. From the replying affidavit it appears that Mr. Hampton is aware of these proceedings and does not take issue with not being joined.

18. It is common cause that the assets, forming the subject of this application, is the property of the applicant.

19. I struggle to see on what legal or factual basis Mr. Hampton had to be joined to these proceedings and as such this point *in limine* cannot be upheld.

Third point *in limine*: Stay of proceedings:

20. The respondent launched an application, in this court, under case number 41655/2019.

21. In that application the following relief, relevant to this application, is sought:

21.1 That the resolution to remove the respondent as director of the applicant is set aside (prayer 2 of the application); and

21.2 Immediate restoration of the respondent's benefits as a director of the applicant which includes use of the vehicle, motorcycle, the Mac Book and data card (prayer 3.2.2 of the application).

22. The relief sought under case number 41655/2019 is interim relief pending the finalization of the application under case number 26448/2019. The latter is the application in terms of which Mr Hampton was appointed to take control of the applicant. From the replying affidavit it is evident that on 5 October 2020, and by consent, these two applications were consolidated under case number 26488/2019.

23. The respondent is seeking a stay of the proceedings *in casu*, pending finalization of the application under case number 42788/2019. In the replying affidavit the applicant takes issue with this case number and states that Me Minne (as deponent to the replying affidavit) is unaware of such a case number. Premised on the relief claimed *in casu*, and the relief claimed under case number 41655/2019, it is accepted that the reference to case number 42788/2019 should have been a reference to case number 41655/2019 and that the respondent is seeking a stay of proceedings until finalization of the application under case number 41655/2019. Same has however now been consolidated under case number 26488/2019.

24. In case number 41655/2019 the respondent challenges the resolution to remove him as a director of the applicant. This is the same resolution relied on by the applicant and is attached to the founding affidavit in these proceedings.

25. Throughout the answering affidavit it is the case of the respondent that he came into possession of the assets in four capacities, being as director of the

applicant, as an employee of the applicant, as a shareholder of the applicant and for personal use. In reply the applicant is adamant that the respondent only had the use of the assets as an employee and as such, since he is no longer employed, that he is no longer entitled to the use and possession of the assets. No specific response is given to the allegations pertaining the respondent's right to possession as director, shareholder and for personal use.

26. Respondent has been in possession of the vehicle since July 2016, the motorcycle since October 2012 and the Mac Book since April 2013. According to him the data card was cancelled in 2019 and same was returned to the applicant.

27. Having regard to the lengthy period of time the assets have been in the possession of the respondent, it is difficult to accept the applicant's contention that these assets are (and by implication, was) to be used to advance the applicant's business. It is further difficult to understand how the respondent, when the assets were acquired and he still was a director of the applicant, would have only been placed in possession of the assets premised on his employment with the applicant.

28. Nowhere in the applicant's papers is it stated in what capacity the respondent was employed. The letter of termination, attached to the founding affidavit, also does not shed any light in this regard. In the applicant's heads of argument (paragraphs 1 and 24), it is stated that the assets were placed in the respondent's possession by virtue of the respondent's employment and directorship with the applicant. This makes logical sense on the facts before this court. As such the respondent's possession of the assets must be regarded as, at least, in his capacity as employee and director.

29. The respondent relies on the principle of *lis pendens* in seeking a stay of these proceedings.

30. It would appear that the application under case number 41655/2019 was instituted subsequent to the application before this court. But that would not be a bar to entertain the respondent's request for a stay of proceedings. In Van As v Appollus en Andere 1993 (1) SA 606 at 610D-G the following was found:

'Na my mening gaan hierdie submissie nie op nie. Die Hof het 'n diskresie om te besluit watter van die verrigtinge voortgaan. Hoewel dit seker dikwels sal gebeur dat 'n Hof sal besluit dat die lis wat eerste aanhangig gemaak is die een is wat behoort voort te gaan, is dit nie 'n onwrikbare reël nie. In Geldenhuys v Kotzé 1964 (2) SA 167 (O), byvoorbeeld, het die Hof op grond van oorwegings van gerief en billikheid toegelaat dat mosieverrigtinge wat ná 'n aksie ingestel is, eerder as die aksie self voortgesit word. Insgelyks is daar in Loader v Dursot Bros (Pty) Ltd 1948 (3) SA 136 (T) beslis dat die Hof 'n diskresie besit om die een of die ander van die verrigtinge te laat voortgaan. Die later ingestelde verrigtinge vir voorlopige vonnis is op grond van billikheidsoorwegings toegelaat om voort te gaan.

Oorwegings van gerief en billikheid oorheers by hierdie vraagstuk. Dit blyk uit die sake wat ek reeds hierbo bespreek het asook uit Kempster Sedgwick (Pty) Ltd v Rajah 1959 (1) SA 314 (N), Osman v Hector 1933 CPD 503, Michaelson v Lowenstein 1905 TS 324 en Dale v Dale 1948 (4) SA 741 (K) te 744.'

31. In Janse van Rensburg and Others NNO v Steenkamp and Another Janse van Rensburg and Others NNO v Myburgh and Others 2010 (1) SA 649 (SCA), at paragraph 35, it is stated that *lis alibi pendens* is a discretionary remedy. It requires a balance of the interests of the affected parties to achieve a fair result.

32. The respondent has been in possession of these assets for many years and as such the scale of balance should tip in his favour: it is only interim relief that is sought by the respondent at this stage.

33. In this application it is evident that the relief claimed under case number 41655/2019 might have a direct influence on the relief claimed in the application before this court.

34. In the premises this third point *in limine* raised by the respondent will be upheld.

Merits:

35. As the third point *in limine* is upheld, there is no need for this court to consider the merits of the application.

Costs:

36. The applicant is being represented by Me Brenda Minne. The respondent is the father of Me Minne. It is a sad day when family members drag one another to court in commercial disputes between them. This sentiment was conveyed to the respective counsel at the commencement of the hearing.

37. Although the applicant was more successful than the applicant (in that the applicant was successful in opposing two of the three points *in limine*) the normal order that costs should follow the cause will not be applied. This is to show this court's disapproval to the fact that, in essence, it is a daughter and her father who are litigating herein. Under normal circumstances, one would expect parties in such close relationship to find alternative means to settle their disputes. The court should not be a battleground for such purpose. In the premises neither of the parties will be rewarded any costs in this application.

ORDER:

In the premises the following order is made an order of court:

1. The respondent's late delivery of the answering affidavit is condoned;
2. The respondent is ordered to pay the costs of the application for condonation, such costs to include the wasted costs incurred on 7 October 2020;
3. The respondent's first point *in limine* is dismissed;
4. The respondent's second point *in limine* is dismissed;
5. The respondent's third point *in limine* is upheld and as such the proceedings herein are stayed pending finalization of the application under case number 26488/2019;
6. There shall be no order as to costs.

J MINNAAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed electronically by uploading same on CaseLines and by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 2 September 2021.

Appearances:

Applicant's Counsel: Adv A Coetzee
Applicant's Attorney: Senekal Simmonds Inc.

Respondent's Counsel: Adv E van der Hoven
Respondent's Attorney: Walter Niedinger

Date of hearing: 16 August 2021
Date of judgment: 2 September 2021