REPUBLIC OF SOUTH AFRICA

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

Case Number: 12142/2022

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED. NO

20 April 2022

In the matter between:

LIESEL VENETIA RYAN	First Applicant
AFRICAN RENEWABLE DEVELOPMENTS (PROPRIETARY) LIMITED (Registration number: 2019/387461/07)	Second Applicant
CHRISTOPH HENNING EHLERS	Third Applicant
and	
BRYAN JAMES GROENENDAAL	First Respondent
BLUE CRANE BREEZE (PROPRIETARY) LIMITED (Registration number; 2019/534629/07)	Second Respondent
INVESTEC BANK LIMITED	Third Respondent

JUDGMENT [Reasons]

SIWENDU J

Introduction

[1] On 12 April 2022, the applicants launched an urgent application in terms of Rule 6(12) of the Uniform Rules of Court. They sought interim interdictory relief concerning a business account of the second respondent held with Investec Bank

pending the adjudication of an opposed motion application instituted under case number 2021/27590 (the main application).

[2] On 14 April 2022, I determined that the application should be heard as one of urgency and granted the alternative order (with reasons to follow) that:

> "The first respondent be and is hereby permitted to make the necessary and required withdrawals and/or payments from the Investec Account (being the Bank Account with the following details: Account Name: Blue Crane Breeze (Pty) Ltd; Account Number: [....]; Branch Code: [....]; Account Type: Current Account; Branch: Investec Bank Limited, 100 Grayston Drive) for the second respondent's reasonable and necessary business expenditure and/or expenses, but only upon receipt of written confirmation from the applicants (or the applicants' attorneys of record) enabling the first respondent to do so, pending the determination and adjudication of the opposed motion proceedings instituted in this Court (under case number 2021/27590).

The Parties and Background

[3] As is apparent from the relief, the urgent application was launched in the context of a pending opposed motion application for the winding up of the second respondent. There are disagreements between the applicants and the respondents (as shareholders) about the running of the business of the second respondent, Blue Crane Breeze (Proprietary) Limited (Blue Crane Breeze) [emphasis added].

[4] Blue Crane Breeze, the company whose banking account is in dispute is a special purpose vehicle (SPV) incorporated to exploit opportunities in the Independent Power Production (IPP) and renewable energy sector. It sought to develop wind farms, with either Eskom or the private sector as off takers.

[5] Consistent with the SPV structure, the first applicant Liesel Venetia Ryan(Ryan) is the sole shareholder of Africa Renewable Development (Pty) Ltd (Afrendev). Afrendev is a majority shareholder in Blue Crane Breeze, holding 51% of its issued shares. Afrendev is the second applicant. The third applicant is Chrilstoph Henning Ehlers (Ehlers), a director of the Afrendev. Afrendev and Ryan in particular are second respondents in the main application for the winding up.

[6] The first respondent, Bryan James Groenendaal is a 49% shareholder in Blue Crane Breeze. Currently, he is the sole director of Blue Crane Breeze. On 9 June 2021 Groenendaal initiated the pending main application for winding-up of Blue Crane Breeze under case number 2021/27590 as alluded to above. Groenendaal opposed this urgent application not in his personal capacity but in his capacity as the sole director of Blue Crane Breeze.

[7] It is not necessary to traverse the intricacies of the issues save to point out that Groenendaal secured an exclusivity agreement with owners for the purpose of the wind farm project in Mpumalanga. Previously, Ryan was a director of Blue Crane Breeze until November 2020 when she resigned.

[8] The co-operation agreement is thin on the details of the commercial arrangements between the applicants and the respondents. However, it is common cause that, Afrendev is a majority shareholder and a funder and has a loan account in Blue Crane Breeze, and Groenendaal is the minority shareholder.

[9] It is also common cause that on 13 August 2021, Ryan and Afrendev (a major shareholder of Blue Crane Breeze) opposed the main application for the winding up of Blue Crane Breeze launched by Groenendaal. Ryan and Afrendev have instituted a counter-application to the main application in terms of section 163(2)(e) of the Companies Act 71 of 2008 (the Companies Act). In the counter-application, Ryan and Afrendev seek an order that Groenendaal sells his shares in Blue Crane Breeze to Afrendev for R1 388 64.00. To the extent that Groenendaal rejects the purchase price of R1 388 364.00, then the purchase price would be determined by a third party.

[10] The relief Ryan and Afrendev seek in the counter application is based on allegations of prejudicial and oppressive conduct by Groenendaal in the running of the affairs of Blue Crane. Once more, it is not necessary to delve into the intricacies of the allegations save to note that Mr Van Tonder (for the applicants), as confirmed in Ryan's affidavit asked the court to take regard of the allegations in the counter application which could not be annexed to these papers in view of the Directives applicable to Urgent Applications.

[11] It was a further common cause at the hearing of the urgent application that Groenendaal does not oppose the counter–application to sell his shares to Afrendev. Mr Williams (for Groenendaal) confirmed that he has consented to the transfer of his shares. For reasons unexplained, he has delayed the prosecution of the main application. On 17 November 2021, the applicants had to apply to Court to compel him to file Heads of Argument. I was informed during the hearing that, instead of filing the Heads of Arguments, he has opposed the interlocutory application to compel him to do so.

[12] The applicants say what hastened the need for an urgent application is that Groenendaal, as sole director of Blue Crane Breeze, instructed Investec Bank to transfer all the funds/monies currently held within the Investec Account to a new and unknown bank account of Blue Crane Breeze. They fear (as already articulated, to some extent, in Afrendev's counter-application) that if the instruction is carried out, Groenendaal will be in a position to unlawfully dissipate or spirit-away Blue Crane Breeze's monies/funds or unlawfully misappropriate Blue Crane Breeze's monies/funds.

[13] Ryan says these permutations negatively affect Blue Crane Breeze, its operations, its liquidity and ultimately its shareholders of which Afrendev is the largest. Afrendev is also Blue Crane Breeze's largest creditor - by way of a shareholders' loan - which constitutes, in part, the monies/funds currently held in the Investec Account. The Investec Account was opened by the applicants, on behalf of Blue Crane Breeze, during November 2019. To the best of the applicants' knowledge, there is an amount of R432 080.47 held within the Investec Account.

[14] The applicants seek a mechanism that will permit them exercise oversight over the monies currently held within the second respondent's bank account, pending the adjudication and determination of the main application, while ensuring in the meantime that the necessary and required business expenses of the second respondent are satisfied.

[15] The urgent application before me and the pending main and counter-applications are not the first disagreements between the parties. Before Ryan resigned, the applicants launched urgent interim interdictory relief against Groenendaal and Green Building Africa on 22 October 2021, which urgent application was enrolled for hearing on 28 October 2021.

[16] I glean from the papers that there are allegations that despite being the director of Blue Crane Breeze, Groenendaal wearing a different hat as the sole director, Editor and publisher of GBA Digital Media (Pty) Ltd t/a Green Building Africa ("Green Building Africa") sought to publish an article which, according the applicant, would have placed Blue Crane Breeze and the applicants in a negative light. Ultimately, Groenendaal and the applicants reached a settlement on 27 and 28 October 2021 where both Groenendaal and Green Building Africa confirmed and undertook (towards the applicants) that they would not publish the intended article which resolved the interdict.

Opposition

[17] Groenendaal’s main contentions against the relief are twofold. He disputes the urgency of the application. He also argues that the applicants lack *locus standi* to seek the relief before the court. In addition, he says that the applicants lack the *prima facie* right which entitles them to the relief.

[18] He contends that the dispute about the bank account arose after the applicants resigned because Groenendaal had requested the termination of Ryan’s

mandate as signatory to the bank account. The issues regarding the bank account have been ongoing since December 2020.

[19] Mr Williams also asserts that Groenendaal's status as the sole director of Blue Crane Breeze is not affected. As the sole director, he should not be restricted from having a free reign and unfettered access and use to the bank account. The bank is complying with a lawful instruction to move the bank account to a new account.

[20] The foundation for the argument that the applicants have no *prima facie* right to the relief they seek is that our law recognises a clear distinction between directors and shareholders[1]. Directors control and manage the affairs and assets of the company. They do not control and manage the affairs and assets of the company's members.

[21] In developing this line of argument, Mr Williams contended that the main application deals exclusively with the shareholding in Blue Crane Breeze. He contends that the position is supported by the provisions of the companies act and the court's decision in *De Bruyn v Steinhoff International Holdings NV and Others.*[2] He says it is a misconceived notion that the applicants, as shareholders, are entitled to have oversight over the monies held within Blue Crane Breeze." I return to this argument later in the judgment.

Urgency

[22] What persuaded me to determine the matter as one of urgency is that on 30 January 2022, Groenendaal directed an electronic mail to Ryan advising that he had

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[1] Section 66(1) of the Companies Act.

[2] 2022 (1) SA 442 (GJ) at para 136 Unterhalter J holds that: In general, directors of a company owe fiduciary duties to the company and not to its members. This is an incident of the *Salomon* principle that a company is distinct from its members. Directors control and manage the affairs and assets of the company. They do not control or manage the affairs or assets of the members. It is this legal relationship between the directors and the company that requires that the fiduciary duties of directors are owed to the company. That this is so is a matter of high and durable authority. A director is a trustee for the company and is required as a result to show the utmost good faith towards the company.

initiated steps with the third respondent to remove her as a signatory on the Investec Account.

[23] The removal would give Groenendaal sole the rights as signatory to the Investec account. I understand that at first, Investec Bank declined to execute the instruction. Despite her resignation, Ryan had remained the co-signatory to the Investec account. Even though Mr Williams submitted to the court that the dispute about “transaction-ability” on the account is not new, the events that followed are not in disputed. Ryan states that nothing happened after Investec’s refusal to act on Groenendaal’s instruction.

[24] She stated that after the January exchange, she believed that Groenendaal would not be able to exercise any control over the Investec Account while she remained an authorised signatory. This was not disputed and there is no plausible reason not to accept this explanation.

[25] The lull was short lived because on 22 March 2022 at 11:15, Ryan received an electronic mail from Investec’s Geeta Bhagwandas, in further response to Groenendaal's electronic mail of 30 January 2022. It reads as follows:

> “As you are aware, there has been an ongoing dispute relating to this account and to date the Bank has not received a court order providing direction to the parties. The Bank has made a decision to close the account and all facilities of the Company. Any credit balances will be transferred to the Company's new bank account.”

[26] It seems without her knowledge Investec Bank made a decision to close account. As I understand it, the fear is that as the above email states, the credit balance in the Investec Account would be *"transferred to the Company's new bank account"* controlled by Groenendaal to her exclusion. Investec does not oppose the application. On 25 March 2022, it confirmed that it will abide any decision made by the Court. As stated above, Groenendaal does not dispute issuing this instruction because he considers it a lawful instruction issued in his capacity as a director of Blue Crane Breeze.

[27] In my view, the trigger event of 22 March 2022 and the new tac by Groenendaal which altered the basis for the disagreement from one about signatories and transacting rights on the Investec Account to one about a unilateral change of Blue Cranes Breezes' Business Bankers. These facts drove me to conclude that the application is urgent.

Locus Standi

[28] The disputed contentions centre on *locus standi* and the *prima facie* rights of the applicants as a shareholder. The debate about the standing of the applicants falls to be considered first before the merits. It also seems to me that Groenendaal pressed on that issue because he was aware that once resolved, interim relief would most likely follow.

[29] Mr Van Tonder (for the applicants) argued that the application is predicated on the pending main application for the winding - up alluded to above, in which the applicants, as majority shareholders and respondents, counter apply to prevent the winding-up of Blue Crane Breeze. The declaratory relief they seek in the counter application is in terms of section 163 (2) (e) of the Companies Act, based on allegations about Groenendaal's oppressive and prejudicial conduct. The applicants have an interest in Blue Crane Breeze and the transfer of Groenendaal's shares in terms of section 163(2)(e) of the Companies Act. He contends that I should adopt a broad approach to their standing based on the above and the Constitutional Court's decision in *Giant Concerts CC v Rinaldo investments* (Pty) Ltd and Others[3]. There the court said:

> "The own-interest litigant must, therefore, demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned.
>
> …

[3] 2013 3 BCLR 251 (CC) at par. 28 —29 and par. 41 —43.

> Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble….
>
> Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed."

[30] Mr Van Tonder contends that the pending main application, and the applicants' protectable interest therein, is the proximate cause for the institution of this urgent application requesting interim interdictory relief. Ryan says the applicants have a *prima facie right* to protect Blue Crane Breeze's monies/funds pending the determination and adjudication of the opposed main application.

[31] I have considered the resistance mounted by Groenendaal. I agree that the segregation of the rights and duties between the company, the directors and shareholders in our law and under Companies Act cannot be refuted. Mr Williams cited the decision in *De Bruyn v Steinhoff International Holdings NV and Others* in opposition. I agree that the decision confirms the long standing common law principle that entrenches a segregation between the company, the directors and the shareholders.

[32] Something Mr Williams does not raise forcefully is that the in *De Bruyn* the court also recognises that even though there is no general duty owed by director to shareholders, directors *may* owe fiduciary duties to shareholders in special circumstances in addition to their fiduciary duties owing to the company. It states that:

> "What is required for directors to owe duties to shareholders has been described as a special factual relationship subsisting between the directors and the shareholders. There is no closed list of these special factual relationships. A fiduciary duty owed by directors to shareholders has been

recognised in certain cases where directors have persuaded outside shareholders to sell their shares in the company to the directors. In family companies where shareholders reposed trust and confidence in a family member and sought advice and information, a fiduciary duty was recognised. So too, in circumstances where directors had made representations to shareholders to secure options, undertaking to sell the shares of shareholders, the directors assumed a position of agency and were accountable to the shareholders".

[33] Firstly, *De Bruyn* deals with a JSE listed company where regulation *requires* such segregation in duties and integrity of the listing depends on an equal treatment of all shareholders. In this instance Blue Crane Breeze is a privately held SPV its shares jointly held by the second applicant (represented by Ryan) and Groenendaal. From inception, until the disagreements surfaced, there had been an overlap in the roles between the shareholders and the directors. Ryan and Groenendaal were not put in office as directors through a vote. They were directors appointed in their *representative capacity as shareholders*. For this reason, their authority as a Board derived from the respective joint shareholding rather than some other external or independent authority.

[34] I find that Mr. Williams also mischaracterizes the true dispute. In my view, the dispute about the management of the Bank Account is quintessentially a shareholder dispute. It is clear from the papers that the affairs of Blue Crane Breeze, in particular, the Investec Bank Account was managed jointly by an arrangement between Ryan and Groenendaal as shareholders rather than their respective positions as directors. The joint management of the Investec account was by agreement and persisted even after Ryan resigned. As shareholders, they were free to come to such an arrangement about the affairs of Blue Crane Breeze.

[35] In my view, the essence of the relief the applicants seek is to reinstate a position *ante.* It essentially restores an earlier agreement, arrangement and practice between them before Groenendaal's unilateral action[4]. On this score, the

[4] Section 15(7) of the Companies Act permits agreements between shareholders about the affairs of a company.

circumstances of this case differ materially, and the above factors render *De Bruyn* distinguishable. What is more is that in view the concession by Groenendaal to sell the shares in Blue Crane Breeze, once the valuation dispute is resolved, he is not likely to remain a director of Blue Crane Breeze.

[36] Even if I am wrong on this, in *Gihwala & Others v Grancy Property Ltd & Others,*[5] a case not referred to by the parties, the Supreme Court of Appeal stated that the relationship between shareholders and the directors they have put into office involved a 'bond of trust'. Even if not put in office by Ryan and Afrendev*, per se*, given the SPV structure and the representative capacity in which he acts, Groenendaal owes a fiduciary duty to Blue Crane not to act to its detriment. It was not contended on his behalf that he gave an undertaking not to do so given the disagreements.

[38] The counter application which he does not opposed is replete with allegations that, now as the sole director in the SPV, he has breached the duty he owes to Blue Crane Breeze. I find the *'bond of trust'* referred to in *Gihwala* extends to him as the remaining director a duty to uphold earlier agreements, conduct and practices with shareholders.

[37] Given the special factual relationship of the SPV, the pending litigation, the risk and the financial exposure Afrendev and the applicants are likely to suffer, it is pragmatic and fitting to grant the applicants requisite standing to protect their interest in Blue Crane Breeze.

[5] 2017 (2) SA 337 at para 144.

Interdictory Relief

[38] The trite requirements for an interim interdict are well established and I need not regurgitate them here. Given the finding on the standing of the applicants, I also find they have established, their prima facie right to relief based on the recent conduct and the unopposed counter application.

[39] I agree with the assertion that the balance of convenience favours the applicants. If the valuation dispute is resolved, there are no prospects that Groenendaal would remain a director of Blue Crane Breeze. If the court does not grant the applicants relief, the applicants as major shareholders and funders of Blue Crane Breeze and Blue Crane Breeze stand to suffer irreparable financial harm. It is no answer to say as Mr Williams suggests, that they must once more enter into yet another parallel shareholder spat to challenge to composition of the board.

[40] It is for the above reasons that I granted the applicants the interim relief which does no more than reinstate an earlier arrangement between them. I made no order as to costs because, Groenendaal did not oppose the application in his personal capacity but on behalf of Blue Crane Breeze. I find it would not be appropriate to burden the company with costs.

T. SIWENDU J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 20 April 2022.

Heard on:	13 April 2022
Reason for the Order:	20 April 2022
Counsel for the Applicants:	Adv. L Van Rhyn van Tonder
Instructed by:	C. F. Krause, Krause Incorporated
Counsel for the Respondent:	Mr Williams

Instructed by: B. MacGregor,Malherbe,Rigg and Ranwell inc.