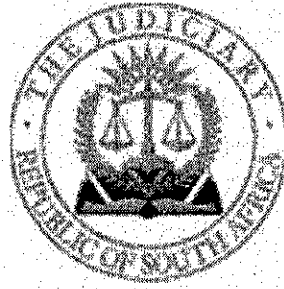


REPUBLIC OF SOUTH AFRICA



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

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

27 MAY 2022

FHD VAN OOSTEN

CASE NO: 7451/2021

In the matter between

EMIRA PROPERTY FUND LTD

APPLICANT

and

PUMZO MBANA

RESPONDENT

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] In this application the applicant seeks declaratory relief and payment.

[2] The application is opposed by the respondent, who has instituted a counter-application against the applicant for payment of damages premised upon defamation in that the applicant has allegedly wrongfully and unlawfully instituted this application against the respondent.

[3] The counter-application, for damages resulting from defamation, having been brought on motion, cannot be entertained. In *EFF v Manuel* (711/2019) [2020] ZASCA 172 (17 December 2020), the Supreme Court of Appeal held that the application procedure is inappropriate for a claim for damages for defamation even if no material dispute of fact arises. Counsel for the respondent readily and correctly conceded as much.

Background

[4] On 23 September 2020 judgment by default was granted by this court, in the matter between the applicant, as plaintiff, and P Mbana Incorporated, as the defendant, for payment by the defendant to the plaintiff of the amounts of R48 591.87 (Claim 1) and R123 892.53 (Claim 2), interest thereon and costs of suit on the scale as between attorney and client (the default judgment).

[5] The cause of action in the action was an alleged indebtedness of P Mbana Incorporated, arising from its breach of a written lease agreement in respect of commercial immovable property, concluded between the parties, in failing to pay monthly rentals and charges as provided for in the lease agreement.

[6] The respondent is a director of P Mbana Incorporated, a personal liability company, as provided for in s (8)(2)(c) of the Companies Act, 71 of 2008 (the Companies Act).

Relief sought

[7] In this application the applicant seeks a declarator that the respondent be declared liable, jointly and severally with P Mbana Incorporated, for payment of the amounts interest and costs in respect of which the judgment by default was granted and costs of the application.

Discussion

[8] The declarator sought is premised on s 19(3) of the Companies Act which provides that 'the directors and past directors of a personal liability company are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during the respective periods of office'.

[9] The declarator sought merely duplicates what has already been provided for in s 19 of the Companies Act. It is accordingly superfluous and inappropriate for this court to issue a declarator merely reiterating a statutory provision, which in any event applies. The reliance on s 19 would normally be pleaded in proceedings instituted against the personal liability company, in respect of its liability *and* its director, in which the director's *in solidum* liability is premised on the provisions of s 19. This application however differs materially from the norm in that the default judgment liability of the company is inexplicably sought to be transposed onto the respondent, simply by way of the declarator sought, in circumstances where the respondent was not a party to the proceedings in which the default judgment was granted. Counsel for the applicant submitted that the mere fact of the judgment debt, in terms of the declarator sought, saddled the respondent with *in solidum* liability. The contention is, as is this application, misconceived.

[10] The fundamental flaw in the procedure adopted in this application is that it negates the firmly established rule of natural justice, *audi alteram partem*, which is enshrined under the bill of rights in the Constitution. The respondent was not afforded the opportunity in any manner whatsoever, of participating in the main action. Counsel for the respondent aptly borrowed the non-joinder concept in a different format: the failure of the applicant in joining the respondent in the main application, he submitted, with reliance on *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC), constitutes a non-joinder which cannot be cured by the declaration sought and is fatal to this application. The respondent had a direct and substantial interest in the main application and cannot be held bound by the default judgment by simply applying s 19 or, as this court is now urged to do, by issuing the declarator sought.

[11] For this reason alone, the application must fail.

Costs

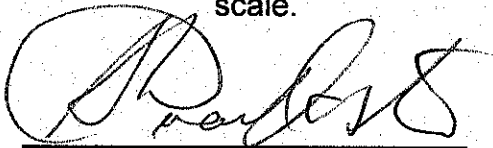
[12] Counsel for the respondent has asked for punitive costs on the ground that a legally unsustainable application was launched, resulting in the waste of costs and time. Counsel for the applicant likewise asked for punitive costs in regard to the dismissal of the counter-application. In the award of costs this court is vested with a

wide discretion (see *Rondalia Assurance Corporation of SA Ltd v Page and Others* 1975 (1) SA 708 (A) 720A; *Ward v Sulzer* 1973 (3) SA 701 (A) 706). Having considered that both the application and counter-application on the same ground suffering the same fate, I consider it just to award costs to the respondent excluding such costs as there may be in regard to the counter-application, on the scale as between party and party.

Order

[13] In the result the following order is made:

1. The main application is dismissed.
2. The counter-application is dismissed.
3. The applicant shall pay the costs of the application, excluding the costs relating to the counter-application, if any, on the party and party scale.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

ADV JG DOBIE

APPLICANT'S ATTORNEYS

REAAN SWANEPOEL ATTORNEYS

COUNSEL FOR RESPONDENT

ADV PW MAKWAMBENI

RESPONDENT'S ATTORNEYS

SA MANINJWA ATTORNEYS

DATE OF HEARING

26 MAY 2022

DATE OF JUDGMENT

27 MAY 2022