



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

DELETE WHICHEVER IS NOT APPLICABLE

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

22 /05/2023

CASE NO: 42437/2021

In the matter between:

LULAMA SMUTS NGONYAMA

First Plaintiff

THUNDERCATS INVESTMENT 92 (PTY) LTD

Second Plaintiff

and

BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD

First Defendant

RALPH FARRELL LUTCHMAN N.O.

Second Defendant

CLOETE MURRAY N.O.

Third Defendant

OFENTSE ANDREW NONG N.O.

Fourth Defendant

TSHEPO HARRY NONYANE N.O.

Fifth Defendant

JARED MICHAEL WATSON N.O.

Sixth Defendant

NTSIMBINTLE HOLDINGS (PTY) LTD

Seventh Defendant

Neutral Citation: *Lulama Smuts Ngonyama & Another v Bosasa Youth*

Development Centres (Pty) Ltd and six Others (Case No. 42437/2021) [2023]

ZAGPJHC 545 (22 May 2023)

JUDGMENT

YACOOB J:

1. The sixth defendant, Mr Jared Michael Watson, is the excipient before this court. He is cited in the main action in his capacity as the executor of the estate of the late Gavin Watson, and contends that there is no case made out in the main action against him for the relief sought. He asks that the relief sought against him be dismissed with costs.
2. The plaintiffs have instituted action proceedings against the first to sixth defendants for a declaratory order that 184 shares in the seventh defendant which are registered as those of the first defendant do not fall within the first defendant's liquidated estate; an order that the first to sixth defendants take necessary steps to transfer to the plaintiff those 184 shares in the seventh defendant, which they contend were donated to the seventh defendant as a result of fraud, and the payment of a sum of money they contend was received by the first defendant as dividends resulting from its fraudulent ownership of the shares.
3. The second to fifth defendants are the liquidators of the first defendant.
4. The plaintiffs brought motion proceedings against the predecessor of the sixth defendant (that is, Mr Gavin Watson, who was then still alive) for the share transfer relief, which was granted by this court.¹ The sixth defendant's appeal to the

¹ Relief had initially also been sought in those proceedings against the first respondent, but the application against the first respondent was withdrawn.

Supreme Court of Appeal was successful,² and the plaintiffs unsuccessfully sought leave to appeal to the Constitutional Court.

5. The reasons for the decision of the SCA include:

5.1. that the relief sought affected Bosasa Youth Development Centres (Pty) Ltd and its liquidators (the first to fifth defendants in this matter) and ought not to have been granted in their absence, even though the application against the first defendant had been withdrawn;

5.2. that the question whether the donation of shares to the first defendant had been the result of a fraudulent misrepresentation by Mr Gavin Watson could not be properly decided in motion proceedings;

5.3. that it was likely that the sixth defendant, who was the appellant in the SCA, could do more in furtherance of transfer of shares than make a request to the liquidators, which they were not bound to comply with;

5.4. that the seventh defendant was not joined in that application.

6. The plaintiffs acknowledge in their particulars of claim that they have brought the action as a result of the judgment of the SCA and in the event that any appeal to the Constitutional Court is not successful. However, it appears that they omitted to take note of one issue in the reasoning of the SCA – that is, the question of whether the executor of Mr Gavin Watson's estate had the power to cause the transfer to occur.

7. That is, in fact, the primary basis of the exception brought by the sixth defendant. The plaintiffs do not plead that the sixth defendant has any authority or ability to do or cause to be done anything to do with transfer of shares from the first defendant,

² *Jared Michael Watson NO v Lulama Smuts Ngonyama and Thundercats Investments 92 (Pty) Ltd* 2021 (5) SA 559 (SCA)

or payment of dividends from the first defendant. In fact, even if the first defendant had not been in liquidation, there is no allegation that or from which it can be inferred that the sixth defendant has any authority in the first defendant at all.

8. The plaintiffs' heads of argument make much of the alleged fraud which is the basis of the action, and that the executors simply seek to protect a fraudster's estate by means of whatever ploys are available to them. However, this does not take away from the fact that the particulars of claim are defective in that they do not make a link between the claim and the sixth defendant. The link cannot be assumed without even being pleaded.
9. In argument it was suggested that the exception should be dismissed, or at least costs granted against the sixth defendant because the exception sought the dismissal of the claim as against him. I do not think this is appropriate, because the failure of the plaintiffs to amend their claim should properly result in the dismissal of the claim as against the sixth defendant.
10. There is no reason to not award costs against the plaintiffs, even if I grant leave to amend the particulars of claim, because they could have simply amended the particulars and avoided the costs of the hearing.
11. For these reasons I make the following order:
 - (a) The exception is upheld with costs to be paid by the plaintiffs, jointly and severally.
 - (b) The plaintiffs are granted leave to amend their particulars of claim, within 20 days of the date of this judgment.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Plaintiff: LJ Morison SC & T Scott

Instructed by: Knowles Husain Lindsay

Counsel for the Sixth Defendant: JH Loots SC & PS Bothma

Instructed by: Van Wyk & Associates

Date of hearing: 08 November 2022

Date of judgment: 22 May 2023