/SG

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

DATE:
CASE NO: 80528/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

25/11/2014 .....
DATE SIGNATURE

28/11/2014

In the matter between:

CITICONNECT COMMUNICATIONS (PTY) LIMITED APPLICANT

And

KEITH KENNETH RESPONDENT

REASONS FOR JUDGMENT

MAKGOBA, J

[1] The respondent is a director of the applicant. The applicant brought an urgent application against the respondent interdicting the respondent from acting contrary to and in breach of his fiduciary duties.

[2] The basis for the interdict is essentially the following:

2.1 The respondent acted contrary to and in breach of his fiduciary duties in that he spread false rumours that the applicant's banking facility was at risk. Such rumours were addressed to the City of Johannesburg Metropolitan Municipality ("COJ") and the applicant's bankers/creditors, Investec Bank.

2.2 The respondent acted in breach of his fiduciary duties towards the applicant in disclosing confidential information to third parties, namely attorneys of COJ pursuant to the applicant's shareholders meeting of 27 October 2014 in which an offer of settlement proposed by COJ was rejected by the applicant.

[3] At the conclusion of the hearing of this application on 19 November 20141 I made a finding that the applicant has made out a proper case for the interdict sought and granted an order in the following terms:

1. That the matter is heard as one of urgency and that the applicant's failure to have complied with the Uniform Rules of Court relating to service and time periods is condoned.

2. That pending resolution of the arbitration between the applicant and Bwired Broadband (Pty) Ltd with the City of Johannesburg Metropolitan Municipality by way of settlement or otherwise, the respondent is interdicted and restrained from:

2.1 involving with any decision of the applicant, duly taken in relation to the arbitration and/or any settlement negotiations pertaining thereto; and/or

2.2 corresponding directly or indirectly, with the attorneys and/or other representative of the City of Johannesburg Metropolitan Municipality;

3. That the respondent pay the costs of this application, such costs to include the costs of senior counsel.

[4] What follows are my reasons for the order granted on 19 November 2014.

[5] It is common cause that there is a pending dispute between the applicant and the COJ arising out of a purported termination of a contract by COJ. On 20 October 2014 the COJ, through its attorneys communicated an

offer of settlement to the applicant for consideration. On 27 October 2014 a meeting of the shareholders of the applicant was held to consider the offer of settlement. All the applicant's shareholders were represented at the meeting. The respondent attended the meeting as a director and as a representative of the shareholder, Siyakha Community Trust.

[6] The shareholders, through a majority vote of 83% decided not to accept the COJ's settlement offer. Only the Trust, represented by the respondent, voted in favour of accepting the settlement offer. At this meeting a concern was raised that the respondent conveyed everything discussed at board level and even between the shareholders to the COJ. The respondent reacted by stating that he would do as he pleases.

[7] On 28 October 2024 the respondent communicated to the COJ and/or its attorneys the discussions of the meeting of 27 October 2014 concerning the rejection of the settlement offer and stated his different point of view or stance on the matter.

[8] The applicant regards the respondent's direct correspondence with the COJ and the feeding of confidential information of exactly what happens

at board and shareholders' meetings of the applicant as prejudicial to the applicant in the pending settlement negotiations and/or arbitration. The applicant's attorneys directed two letters of demand to the respondent calling upon him to give an undertaking to desist from such conduct but the respondent failed to do as requested. Hence this application for an interdict.

[9] In his defence the respondent avers that the present application has been brought *mala fide* and is an attempt to whitewash serious corporate governance failures within the applicant. That the application is part of a vendetta conducted against him as a director of the applicant as a direct result of his insistence on good corporate governance within the applicant and its subsidiary.

[10] The applicant denies any such serious corporate governance failures within the applicant and any vendetta against the respondent. The applicant points out, correctly in my view, that the respondent does have his rights in terms of the Companies Act and/or the common law and that he is entitled to protect such rights. This does, however, not allow him to break his fiduciary duty towards the applicant and in particular to disclose

confidential information arising from the applicant's shareholders meeting to third parties and in particular to COJ.

[11] It is common cause that the respondent disclosed information about the confidential discussions to the COJ. All these discussions that took place between the shareholders during which the settlement offer by the COJ and counter-offer by the applicant were discussed, were confidential and privileged by their very nature and in particular vis-à-vis third parties, most notably the COJ, being the opposing party.

[12] Section 76(3)(b) of the Companies Act 71 of 2008 provides that a director of a company has a fiduciary duty towards the company which he must exercise in the best interest of the company. This is in line with well established common law principles. On this basis too, the respondent has a positive obligation to act at all times in the best interests of the applicant and to avoid a conflict between his personal interests and the interests of the applicant.

[13] It is common cause that arbitration proceedings are pending between the applicant and the COJ relating to the dispute giving rise to the offer of settlement rejected on 27 October 2014. The parties have signed a

pre-arbitration agreement and Advocate C Puckrin SC has been appointed as an arbitrator.

[14] It is trite that a company has a right to conduct the meetings of its board of directors in strict confidence so that any matters affecting the company may be discussed freely and openly.

See: ***Janit and Anotehr v Motor Industry Fund Administrators (Pty) Ltd*** **1995 4 SA 293 (AD) 303B**.

[15] In his judgment in ***Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others*** **1991 2 SA 117 (W) 132I-133A** JOFFE J held that:

> "*In exercising the right to trade and carry on a lawful business, a company or other juristic person would be entitled to regard the confidential oral or written communications of its directors and employees as sacrosanct and would in appropriate circumstances be entitled to enforce the confidentiality of the aforesaid oral and written communications. To my mind, such right would in appropriate circumstances be enforceable against whosoever is in possession thereof and whosoever seeks to utilise it.*"

[16] This view of the law was approved of by the Supreme Court of Appeal on appeal in ***Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another*** **1993 2 SA 451 (A) 464D-F** where it was held that:

> "*There is a public interest of a high order in preserving confidentiality within an organisation. Employees must be entitled to discuss problems freely, raise their doubts and express their disagreements without the fear that they may be used to discredit the company and perhaps imperil the existence of the company and the livelihood of all those who work for it.*"

[17] The occasion of a company's board meeting or general meeting is a privileged one. The statements made by a director or shareholder of the company and concerning another director or shareholder relating to the carrying on of the business of the company are all made on a privileged occasion. See: ***Vengtas v Nydoo and Others (5)*** **1963 4 SA 359 (DCLD) 384A-B.**

[18] *In casu* the respondent became privy to the settlement offer by the COJ and what was discussed and decided in relation thereto by the applicant's shareholders. There is litigation (arbitration) pending between the

applicant and the COJ. What was discussed of and concerning the proposed settlement (and the counter-offer subsequently made) is confidential and privileged and may not, not without the permission of the applicant, be disclosed to third parties and in particular not to the COJ, who made an offer and who is the opposing party to the relevant contractual disputes.

[19] Based on the common cause facts that the respondent did disclose information which came to his knowledge at a shareholders meeting of the applicant to the COJ, I make a finding that such information is by the very nature thereof privileged and confidential and that the disclosure thereof by the respondent is a breach of his fiduciary duty.

[20] The applicant has made out a proper case for an interdict sought and in the result I granted the appropriate order on 19 November 2014.

E M MAKGOBA
JUDGE OF THE GAUTENG DIVISION, PRETORIA

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Heard on:	19 November 2014
For the Applicant:	Adv K W Luderitz Sc
Instructed by:	Roestoff & Kruse Attorneys
For the Respondent:	AdvJ G Smit
Instructed by:	Cliff Dekker Hofmeyer Attorneys
Date of Judgment:	