

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 13/5/16 SIGNATURE [Signature]

13/5/16

CASE NO: 75673/2015

In the matter between:

**BIZ AFRICA 985 (PTY) LIMITED**

Applicant

and

**SAKI MINING CONSTRUCTION AND PROJECTS  
(PTY) LIMITED**

First Respondent

**SAKI MOJAWESI**

Second Respondent

**THE SHERIFF FOR THE DISTRICT OF THABAZIMBI**

Third Respondent

**STANDARD BANK OF SOUTHERN AFRICA  
LIMITED**

Fourth Respondent

Date of hearing: 17 March 2016.

Date of Judgment: 13 May 2016.

<b>JUDGMENT</b>
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**MOTHLE J**

***Introduction***

1. Biz Africa 985 (Pty) Ltd, (*“the Applicant”*), claims relief against Saki Mining Construction and Projects (Pty) Ltd and Saki Mojawesi (*“the First and Second Respondents respectively”*), arising out of a Joint Venture Agreement between the two companies.
2. The First and Second Respondents (*“the Respondents”*) oppose this application. No relief is sought against the Fourth Respondent or a costs order against the Third and Fourth Respondents, unless either of the parties elects to oppose the application.

***Background***

3. The application first came by way of urgency and this Court, on 29 September 2015, struck the application from the roll for lack

of urgency. The matter was then re-enrolled in the ordinary course in terms of the Uniform Rules of Court applicable to opposed motions.

4. The issues giving rise to this claim concern a Joint Venture Agreement between the Applicant and the First Respondent, entered into on or about 27 March 2015 at or near Rustenburg North West Province. The purpose for the Joint Venture ("JV") was to tender for and conclude a contract for execution of certain building works. The tender was awarded to the JV and the contract for the building works concluded with the Joint Venture. The latter got involved in the building project.
5. The material terms of the Joint Venture Agreement are that:
  - 5.1 The parties to the Joint Venture Agreement will constitute the management of the project;
  - 5.2 The parties elected to open a JV banking account into which all payments and from which all withdrawals for the projects will be made, in the course of managing the project;
  - 5.3 The representatives of both parties will be authorised to sign for any payments made out of the JV account; and
  - 5.4 The Applicant and the First Respondent would share in the profits and losses of the JV in equal proportions.

6. According to the Applicant, disputes arose between the parties and have escalated to the point where further co-operation between the parties in respect of the affairs of the Joint Venture has become impossible. Consequently, the Applicant seek relief in the form of:
- 6.1 Specific performance, wherein the Second Respondent is ordered to ensure payments of certain amounts out of the JV account;
- 6.2 An order that the Second Respondent be *"interdicted and directed to immediately upon request by the Applicant to take such steps, do all such things necessary and sign all such documents as are reasonably required to give effect to the provisions of prayers 2 hereof and to effect payment in accordance therewith"*; and ordering the Second Respondent to take such steps, failing which the Third Respondent, as the Sheriff, being authorised to do that in the place of the Second Respondent.

***Issues in contention***

7. In its affidavit filed when the matter was first enrolled in the court for urgent applications, the Respondents attack the urgency of the application on three main grounds, namely:
  - 7.1 That no case has been made out to support that the payment of the employees' salaries as well as the other creditors was urgent. It needs to be mentioned at this stage that during the hearing of this matter, the Court was informed that the employees' salaries have since been paid;
  - 7.2 That the application is one of an interdict and the requirements for an interdict have not been set out in the founding affidavit; and
  - 7.3 That there are disputes of fact between the Applicant and the First Respondent which may not be resolved on the papers before this Court.
8. In support of its claim, the Applicant, in paragraph 31 of its founding affidavit, sets out the various areas of dispute existing between itself on the one side and the Respondents on the

other. The disputes identified by the Applicants include, amongst others:

- 8.1 That the Second Respondent regularly absented himself from the building site and was rarely, if ever, present to comply with any of his obligations;
- 8.2 The Respondents failed to contribute financially to the working capital of the Joint Venture and owes the Joint Venture R681,718.63. The Joint Venture in turn owes the Applicant and amount of R 742 837,59.
9. It is alleged that the First Respondent misappropriated substantial amounts of money of the Joint Venture. The details appear in paragraph 33 of the founding affidavit.
10. The Applicant concludes in paragraph 35 of the founding affidavit by describing the disputes between the parties as having escalated to the point where further co-operation between the parties has become impossible.
11. In the answering affidavit, the Respondents confirm the existence of disputes between the parties and in fact raises

their side of the complaints. Amongst others, they contend that among the creditors which the Applicant pleads should be paid, is an entity which supplied products to the project during the construction and has since emerged to be a subsidiary of the Applicant. The Applicant had not disclosed this relationship to the Respondents. In essence, the Respondents are complaining that the Applicant acted in bad faith in not disclosing that it was conducting business with a Joint Venture through one of its subsidiaries known as Ellecon.

12. The Respondents also raises inaccuracies in the payment of invoices which the Applicants made to suppliers. They allege that the payments are unrelated to the project or the business of the JV. The Applicant, in the replying affidavit, dismisses this charge as a mistake which it made when it paid invoices out of the JV bank account, to other suppliers, unrelated to the business of the Joint Venture.

13.

***Evaluation.***

14. Clause 16 of the Joint Venture Agreement makes provision for reference of disputes to arbitration. It elaborately sets out the circumstances under which an arbitrator can be identified and

appointed and the entire mechanism of how disputes between the two parties can be resolved.

15. During the hearing of this matter, the Court enquired from the parties, mainly the Applicant, as to why this matter was not referred to arbitration prior to the issues being raised in Court. The Applicant's counsel submitted that there is authority supporting the view that even where the parties have agreed to submit to arbitration, this does not preclude them from approaching Court for relief. It was further argued on behalf of the Applicant that the Respondents should have applied for a stay of the proceedings in order to have the disputes resolved by arbitration.<sup>1</sup>

16. This Court is familiar with the authorities and in fact agrees that there are instances where resort to arbitration may not be an appropriate relief in specific circumstances. However, in this particular case, the Respondents in their answering affidavit raise the question of arbitration thus:

*"29. It is common cause that none of these disputes are capable of being resolved on the present papers and that at*

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<sup>1</sup> Conress (Pty) Ltd v Gallic Construction (Pty) Ltd 1981 (3) SA 73 (W); Delfante v Delta Electrical Industries Ltd 1992 (2) SA 221.



***least one of them has been referred to trial by arbitration.”***

(Court emphasis)

17. The Applicant in the replying affidavit, generally denies the allegations but does not specifically deal with the allegation that at least one of the disputes has been referred to trial. It is the Court's view that the relief sought by the Applicant cannot be addressed while the disputes identified by both parties, in particular as raised by the Applicant, remain unresolved. The Applicant lodged this application being fully aware of the arbitration clause in the Joint Venture Agreement, and more importantly, being aware of the existence of the disputes of fact.
18. It was also submitted on behalf of the Applicant that some of the allegations raised in the founding affidavit have not been specifically responded to or denied in the Respondents' answering affidavit and they thus stand undisputed. There is indeed reference to the specific paragraphs. The submission is that relief should then be granted based on the portions of the founding affidavit which appear undisputed.
19. The disputes between the parties mainly arise from the management of the finances of the Joint Venture. The

Respondents, while in some instances do not deal with each and every allegation in some of the paragraphs; raise a defence which confirms the applicant's averment that the parties are locked in factual disputes. The averments in the answering affidavits are not just bare denials, but present a general response to the applicant's claim. They raise issues which in the Court's view supersedes the specific response to the allegations, such as the non-disclosure of the relationship between the applicant and its subsidiary, Ellecon.

20. At the nub of the relief sought by the applicant, is the payment of money allegedly due to the Applicant and other creditors, including its disputed subsidiary, Ellecon. The allegation that the Respondents do not deny the products received by the JV and therefore have to pay, does not deal with the allegation of non-disclosure of the relationship between Ellecon and the Applicant, as raised by the Respondents. There is also the allegation that the applicant made payments from the bank account of the JV, to other parties for business unrelated to the JV project. The applicant does not deny this allegation.
21. The disputes between the parties are thus wide-ranging and cannot be dealt with piece-meal or in isolation. Thus any order to authorise payment from the JV's bank account in favour of

either of the parties, prior to the resolution of these disputes, will have an impact on the finances and result in the prejudice to one or the other of the parties.

22. It is the Court's view that it will thus be premature and inappropriate to grant any relief relating to the payment of any moneys, prior to the disputes being resolved, even where it appears the Respondents have not specifically responded to an allegation raised in the founding affidavit.
23. In light of the decision this Court is about to take, it will thus be unnecessary to deal extensively with the merits of the Applicant's claims in support for the relief it seeks.

### ***Conclusion***

24. Having regard to the conspectus of the evidence, this Court is of the view that the application raises serious disputes of fact which are too wide-ranging from both sides and thus not capable of being resolved on the papers or by referral to oral evidence<sup>2</sup>. It seems to me that the only suitable process that would assist the parties to define the issues between them would be to refer the matter to trial. The parties may however

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<sup>2</sup> Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1161-1162.

exercise the option of settlement or arbitration, with a view to a just, cost effective and expeditious resolution of their disputes.<sup>3</sup>

25. I am also of the view that the costs of the hearing of this application should be reserved.

26. In the premises I make the following order:

1. This application is referred to trial with the following directive:

1.1 The notice of motion shall stand as simple summons;

1.2 The answering affidavit as a notice of intention to defend;

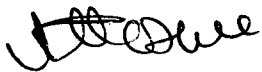
1.3 The applicant, as plaintiff, shall file a declaration within 20 days from the date of this order; and

1.4 The Uniform Rules relating to further pleadings, discovery, preparation for and the conduct of trial proceedings shall thereafter apply.

2. The costs relating to the hearing of this application are reserved.

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<sup>3</sup> Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd 2006 (4) SA 458 (SCA).



**SP MOTHLE**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA.**

For the Applicant: **Adv. SD WAGENER SC**

Instructed by: **WEAVIND & WEAVIND ATTORNEYS**

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For the Respondents: **Adv. DC MPOFU SC**

Instructed by: **AK NKOME Attorneys**

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**HATFIELD, PRETORIA.**