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

REPUBLIC OF SOUTH AFRICA

CASE NUMBER: 57094/2016

(1) REPORTABLE: ~~YES~~ / NO

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

(3) REVISED.

16.8.2016
DATE

SIGNATURE

Date Heard: 10 August 2016

Date delivered: 16 August 2016

In the matter between:

WERNER CAWOOD N.O.	First Applicant
MATHEUS JOHANNES SCHELCHTER N.O (In their official capacities as business rescue practitioners for the third applicant)	Second Applicant
EKURHULENI FM (NPC) T/A EAST RAND STEREO (in business rescue)	Third Applicant
and	
WILLEM JOSEPH DELPORT	First Respondent
ABSA BANK	Second Respondent
FIRST NATIONAL BANK	Third Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent

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JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] On 26 July 2016, Khumalo J issued an order in the urgent court against the first to third respondents. The order was granted *ex parte* and contained both final and interim relief. A rule *nisi* returnable on 10 August 2016 was issued in respect of the interim relief.

[2] Only the first respondent opposes the application and has, *inter alia*, raised three points *in limine*, to wit:

i. the inappropriateness of *ex parte* order taken;

ii. lack of urgency; and

iii. material non-joiner.

BACKGROUND

[3] The third applicant ("the company") is a non-profit company that conducts the business of a community based radio station in Gauteng.

[4] On 24 November 2015, the first respondent and the other three directors of the company resolved to place the company in business rescue because, according to the resolution, the company is *"financially distressed"*.

[5] On 2 December 2015, the applicants were duly appointed by the fourth respondent as the business rescue practitioners of the company.

[6] The first respondent remained in control of the day-to-day running of the affairs of the company and as time progressed, the relationship between the applicants and the first respondent became increasingly strained.

[7] The applicants allege that, due to the first respondent's obstructive conduct, it is no longer possible to fulfil their duties imposed in terms of sections 140 and 142 of the Companies Act, 71 of 2008.

[8] The fact that the first respondent acts on his own volition and in total disregard of the provisions *supra* is common cause on the papers.

EX PARTE ORDER

[9] The first respondent avers that the applicants have not placed all material facts before court when it applied for the order on an *ex parte* basis.

[10] Accordingly to the first respondent, the parties were involved in settlement negotiations when the application was brought. This fact was not disclosed in the applicants' founding papers and the first respondent submits that Khumalo J would not have granted the order if she was informed of the settlement negotiations.

[11] In support of his contention that *"settlement negotiations"* were discussed by the parties, the first respondent relies on a letter addressed by his attorney to the applicants on 21 July 2016. The letter proposes that settlement discussions be held as a matter of urgency.

[12] The applicants did not respond to the proposal and consequently no settlement negotiations existed when the *ex parte* order was granted on 26 July 2016.

[13] In the premises, this point has no merits.

[14] During argument, Mr Bothma, counsel on behalf of the first respondent, submitted that the final relief granted by the court on 26 July 2016 is not final because it was granted *ex parte*. The final relief pertains to access to bank accounts held by the company at the second and third respondents.

[15] Mr van der Merwe, counsel on behalf of the applicants, pointed out that the first respondent did not apply for a reconsideration of the final relief as envisaged in rule 6(12)(c).

[16] It is clear that the rule was designed to afford a party against whom a final order was granted *ex parte*, the opportunity to be heard. In the premises, Mr Bothma's submission that a final order cannot be granted *ex parte*, is not correct.

[17] This point *in limine* is consequently dismissed with costs.

LACK OF URGENCY

[18] Only the interim relief granted by the court on 26 July 2016 is the subject matter of the urgent hearing.

[19] The rule *nisi* was granted in respect of the following relief:

"a. That the 1st Respondent be removed as a director and/or member of the 3rd applicant and that the fourth respondent be ordered to amend the 3rd Applicant's records accordingly;

b. An order declaring that the 1st Respondent misappropriated, without authorization, an amount of R 135 000, 00 of the funds of the 3rd Applicant;

c. That the 1st Respondent be ordered to repay the amount of R 135 000,00 to the 3rd Applicant within 48 hours from date of order;

d. That the 1st Respondent pay the cost and expenses of the 1st and 2nd Applicants associated with dealing with this application at the rate for a small enterprise as prescribed in Regulation 128 to the Companies Act, Act 71 of 2008, which expenses shall specifically include the costs of the Applicants' attorneys of record, on an attorney and client scale."

[20] Business rescue proceedings is by its very nature urgent and I according entertained the matter in the urgent court.

MATERIAL NON-JOINDER

[21] The first respondent submitted that all affected persons as defined in the Companies Act and at the very least the employees and members of the radio station should have been joined as parties.

[22] In view of the relief claimed, it is not clear on what basis the mentioned parties have a direct and substantial interest in the order sought against the first respondent.

[23] In his heads of argument, Mr Bothma submitted that:

"The applicants themselves, in other litigation in which they have been involved, are extremely fond of taking the point of non-joinder. This same standard should now be applied to them."

[24] Each matter should, however, be adjudicated on the facts of the matter and the relief claimed therein.

[25] I am satisfied that a material non-joinder does not arise in the matter under consideration and the point is dismissed with costs.

FINAL ORDER

[26] The requisites for a final interdict are well established, to wit:

i. a clear right;

ii. an injury actually committed or reasonably apprehended; and

iii. the absence of similar protection by any other ordinary remedy.

[27] Mr van der Merwe, conceded during argument that the applicants are, at this stage, not entitled to an order in terms of paragraphs b and c. The concession was well made.

[28] In the premises, only the relief claimed in paragraph a and costs remains in dispute.

[29] As alluded to *supra* the first respondent, on his own admission, runs the affairs of the company without the authorisation of the applicants. In doing so, the first respondent acts in direct violation of the provisions of the Companies Act.

[30] The first respondent justifies his conduct by alleging that the applicants are defrauding the company, are misappropriating funds of the company and are acting *male fide* and not in the best interest of the company. Consequently, the first respondent deems it imperative to remain a director of the company in order to protect the company and its employees from the applicants' dishonest conduct.

[31] Mr Bothma defended the first respondent's stance by stating that the first respondent, in his capacity as director, retains a common law fiduciary duty to act in the company's best interests. This submission flies in the face of the clear provisions of the Act and is without merit.

[32] Mr Bothma further argued that this court should not assist the applicants due their alleged despicable behaviour and due to the fact that they have dismally failed in complying with their duties as appointed business rescue practitioners of the company.

[33] I pause to mention, that the first respondent and the other directors of the company brought an urgent application on 7 June 2016 to terminate the company's business rescue proceedings. In his founding affidavit, the first applicant summarised the basis on which the application was brought and the result thereof as follows:

> *"38. For the sake of brevity, do not attach hereto a copy of the founding affidavit filed in support of the urgent application referred to above. The affidavit was deposed to by the Frist Respondent. I do however confirm that the Applicants in that application stated that they were incorrectly advised as far as the commencement with business rescue proceedings is concerned and furthermore tried to make out a case to the effect that the BRP'S were not exercising their duties toward the company, alternatively they were not exercising their duties correctly. The main thrust of the application was furthermore to the effect that the company was no longer financially distressed. I confirm that a copy of the founding affidavit filed in support of that urgent application will be placed at the disposal of the Honourable Court, should the need therefore arise.*
>
> *39. The BRP's opposed the application and filed an extensive and detailed opposing affidavit. I do not attach hereto, again for the sake of brevity, a copy of the opposing affidavit but confirm that same will be available and placed at the disposal of the Honourable Court, should the need therefore arise.*
>
> *40. The application was heard on 7 June 2016 by His Lordship the Honourable Mr Justice Vorster. A copy of the order is attached hereto as* ***Annexure "WF9"****. The order included an order providing for the following:*

40.1 That the applicant (in that application) was not entitled o succeed and that the application was therefore consequently dismissed; and

40.2 The applicants were ordered to pay the remuneration and expenses of the BRP's, in relation to that application, as set out in regulation 128 of the Act, with reference to a small enterprise, which expenses specifically included the account of the attorney of record for the BRP's on the scale as between attorney and client."

[34] Save to state that Vorster AJ's order did not dispose of the issues between the parties and that the issues are not *res judicata*, the first respondent did not dispute the contents of these paragraphs.

[35] Mr Bothma agreed that the business rescue practitioners remain in office until removed by an order of court. The first respondent did not launch a counter application claiming the removal of the applicants as business rescue practitioners. The conduct of the business rescue practitioners relied upon by the first respondent does not take the relief claimed herein any further.

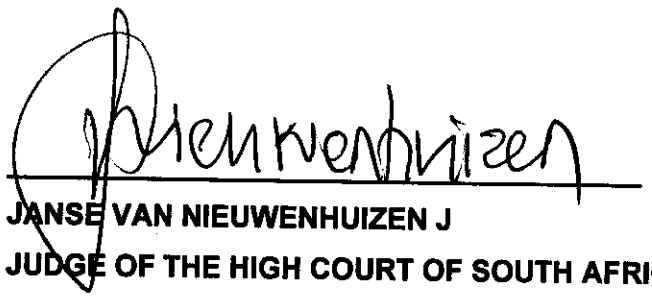
[36] I am satisfied that, on the facts that are common cause between the parties, the applicant has succeeded in satisfying all three requisites for the granting of a final interdict.

[37] Costs should follow the result.

ORDER

In the premises, I grant the following order:

1. The first respondent is removed as a director of the third applicant and the fourth respondent is ordered to amend the third applicant's records accordingly.
2. That the first respondent pay the cost and expenses of the first and second applicants associated with dealing with this application at the rate for a small enterprise as prescribed in Regulation 128 to the Companies Act, Act 71 of 2008, which expenses shall specifically include the costs of the applicants' attorneys of record, on an attorney and client scale."



JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant	:	Advocate Van Der Merwe
Instructed by	:	KOSTER ATTORNEYS
Counsel for the first Respondent	:	Advocate Bothma
Instructed by VORSTER & BRANDT INC	:	KLOPPER JONKER INC C/O