REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

CASE NO: 29833/2016 &

2495/2016

In the matter between:-

ANDREW SAUL TAIT NO **First Applicant**

LYNETTE TAIT NO **Second Applicant**

and

WESCOM BUSINESS VENTURES (PTY) LTD (Registration No:[…]) **First Respondent**

JOSEF FREDERICK VAN NIEKERK NO **Second Respondent**

MARIA MAGDALENA VAN NIEKERK NO **Third Respondent**

JACOBUS FRANCOIS VAN HEERDEN NO **Fourth Respondent**

AND

In the matter between:-

ANDREW SAUL TAIT NO **First Applicant**

LYNETTE TAIT NO **Second Applicant**

ANDREW SAUL TAIT **Third Applicant**
[IDENTITY NUMBER: […]]

WEBCOM BUSINESS VENTURES (PTY) LTD **Fourth Applicant**
[Registration No:[…]]

and

JOSEF FREDERICK VAN NIEKERK **First Respondent**

[IDENTITY NUMBER:[…]]

JOSEF FREDERICK VAN NIEKERK NO **Second Respondent**

FIRST NATIONAL BANK **Third Respondent**

JUDGMENT

CRUTCHFIELD AJ: ·

[1] This is an application for leave to appeal brought by the applicants under case numbers 2495/2016 and 29833/2016.

[2] The parties are referred to as they were in the judgment in respect of which the application for leave to appeal is brought.

[3] Section 17(1) of the Superior Courts Act 10 of 2013, provides inter alia for the test of whether the appeal would have a reasonable prospect of success.

[4] The respondents argued that there were no such prospects and that leave to appeal should be denied.

[5] I deal with each of the applicants' grounds of appeal in turn.

The costs in the urgent application

[6] The fact that the urgent application comprised a Mareva injunction did not automatically entitle the applicant to launch the application and procure an order in terms thereof, without prior service of the application upon the respondents, as contended for by the applicants.

> 6.1 The entirety of the facts were required to be considered in respect of whether or not there existed any reason not to serve the application prior to an order being sought from a court. The default position, in the light of the fundamental premise of audi alteram partem, is that service takes place prior to an order being granted.

[7] Notice of the shareholders' meeting was remitted, according to the applicants, by way of email on 2 and 9 December 2015, and by way of facsimile transmission on 9 December 2015. The email transmissions were heavily contested between the parties in the initial proceedings as well as the application for leave to appeal. The applicants carried the burden of demonstrating proper service of the shareholders' meeting as alleged in the founding papers.

> 7.1 Josef and the second respondent's version was that the initial email of 2 December 2015 did not include the attachment comprising the notice of the shareholders' meeting. That averment was substantiated by way of correspondence to that effect sent by the respondents' attorneys on 4 December 2015, and, seemingly accepted by the applicants' attorney who then sent the second email, including the attachment, on 9 December 2015. The respondents' attorneys did not receive the second email. The applicants did not provide a 'read receipt' in respect of the email transmission of 9 December 2015 to the second respondent and Josef's

attorneys.

7.2 Given the context of difficulties then being experienced by the applicants' attorneys with their electronic mail correspondence, the denial of receipt was plausible and nothing was placed before me by the applicants to dislodge the balance of probabilities in favour of the Van Niekerks' attorneys' explanation.

7.3 If I test the outcome on this point differently, by way of application of the *Plascon-Evans* rule, the applicant is left with the respondent's explanation on the disputed emails, which explanation was perfectly plausible.

7.4 The applicants relied upon the 'read receipt' sent by Josef in response to the email of 2 December 2015. That 'read receipt', however, did not demonstrate that notice of the shareholders meeting was received by Josef and the second respondent as the applicants contend.

7.5 I reconsidered the 'read receipt' annexed to the replying papers whilst preparing this judgment and I remain of the view that the 'read receipt' related to the email transmission of 2 December 2015, in respect of which Josef contended that the attachment, comprising the notice of the shareholders' meeting, was absent.

7.6 The correspondence of 4 December 2015 served to substantiate the alleged absence.

7.7 Hence, the 'read receipt' did not show on a balance of probabilities that notice of the meeting was furnished to Josef and the second respondent on 2 December 2015.

[8] As to the facsimile transmission on 9 December 2015, assuming without finding in favour of the applicants that the facsimile and the attached notice of the

shareholders' meeting was received by the respondents' attorneys, that fact alone would not serve to alter the requirement for service of the urgent application on the second respondent and Josef for the reasons referred to below.

8.1 The applicants argued that I erred in finding that the urgent application ought to have been served prior to the interim order being granted as the application was brought in order to overcome the delay by CIPC in updating its records regarding the change in Webcom's directorship.

8.2 CIPC's delay, however, was not the sole basis of the application. The founding affidavit created a background of alleged misappropriation of funds by the second respondent from Webcom that the applicants proffered as an additional ground for the relief sought. That served as an additional ground upon which the applicants were obliged to serve the application on the second respondent prior to seeking an order.

8.3 The second respondent's transactions, albeit that he was informed not to access Webcom's bank account, were executed bona fide in pursuit of Webcom's business. Not a single transaction was shown to be unlawful, or to the (unlawful) benefit of the second respondent.

8.4 In the light of the completed papers, including the depletion of Webcom's bank account by the first applicant subsequent to the granting of the order, I remain of the view that an injustice was caused to Josef and the LVN, and potentially also to Webcom.

[9] As to the applicants' argument that given the applicants 60% shareholding in the first respondent the outcome of the shareholders' meeting was a foregone conclusion, and it mattered not whether the respondents were given notice of that meeting, the ineluctable consequences of the 60% shareholding did not serve to legitimise a failure to respect the second respondent and Josef's right to receive notice of the meeting.

9.1 Nor does it negate the finding that the respondents had nothing to gain from not attending the meeting in the event that they received notice thereof.

[10] Assuming in favour of the applicants that they did not have knowledge of the remaining trustees of the LVN Trust, that fact alone would not result in an appeal on this issue having a reasonable prospect of success.

[11] I am of the **view** that there is no reasonable possibility that another court would come to a different conclusion in respect of the costs of the urgent application.

Ad Paragraph 2 The winding-up application

[12] The applicants argued that I erred in finding that the winding-up application was brought ex-parte, whilst simultaneously finding that the application was served on the respondents' attorneys.

12.1 Given that the disputes between the applicants and the respondents had existed for some months when the winding-up application was launched, my view was that the respondents ought to have been cited as parties to that application.

12.2 Service on the attorneys was not, in my view, sufficient to overcome the failure to cite the respondents as parties to the application. The respondents were entitled as of right to be joined, and ought not to have been put to the cost of the intervention application, which the applicants, correctly, did not oppose.

[13] As to the second respondent's alleged mismanagement of the first respondent, it was common cause that the second respondent had managed the first respondent well and profitably. Historically, there had not been any cause for

concern.

[14] The basis for the winding-up application was the alleged deadlock caused by the dispute between the shareholders, the Taits and the LVN.

14.1 Given that the fact of the deadlock was essentially conceded by the respondents at the hearing, the applicants argued that the reasons for the deadlock and any dispute in respect thereof were irrelevant. Hence, the submission that I erred in finding that there was a relevant dispute of fact in respect of the deadlock.

14.2 That argument was flawed, however, as the respondents denied that it was just and equitable to wind up Webcom in the light of the reasons alleged for the deadlock, including that the applicants were relying on the first applicant's alleged misconduct in order to wind up Webcom.

14.3 In the light of the respondents' claim that it was not just to wind up Webcom, the exercise of the court's discretion in respect of the winding-up required consideration of the reasons for the deadlock, the factual dispute in respect of which operated against the applicants.

[15] Whilst the applicants' version was that the altered sale of proposed shares agreement was the cause of the deadlock, the respondents' version was otherwise, being that the first applicant/Andrew had engineered the deadlock upon which he sought to rely for the purposes of the liquidation.

15.1 The applicants alleged that the deadlock was premised upon the alleged fraudulent alteration (by the second respondent) of the proposed sale of shares agreement.

15.2 The second respondent's alteration, however, was the result of the applicants' amendment of certain terms of the agreement in the first instance. The respondents sought to correct the changes made by the

applicants in order to bring the document in line with that agreed at the settlement meeting on 18 February 2016.

15.3 This was in circumstances where the first applicant conceded on the papers that agreement was reached at the meeting.

[16] Furthermore, the respondent's assertion that the sale of shares agreement would have served to break the deadlock, could not be ignored.

[17] In the circumstances, I am of the view that there is no reasonable possibility that another court would come to a different conclusion in respect of the winding up application or the costs of that application.

Ad Paragraph 3 The counter-application under case number 2495/2016

[18] The first applicant contended, (commencing at paragraph 42 of the founding papers in the liquidation application), that:

"During this meeting (18 February 2016) and after some negotiation it was decided that my Family Trust would purchase the LVN Family Trust's shares at a value determined by an independent valuator. My attorney would draft the Sale of Shares Agreement and the finer detail would be ventilated between the attorneys whereafter the parties would sign the Agreement. ... Whilst Mr Van Niekerk's attorneys were searching for another valuator, my attorney completed the Sale of Share's Agreement...

(During) the roundtable meeting it was agreed that the Respondent will, pending the finalisation of the dispute, continue to pay Mr Van Niekerk's salary ... ".

[19] The first applicant stated in the applicants ' replying affidavit that:

"At the roundtable, the essence of the agreement having been sorted, it was agreed that my attorneys of record will draft the sale of shares agreement on the terms agreed upon there".

[20] Hence, consensus was reached and an agreement concluded at the meeting on 18 February 2016, and the subsequent Sale of Shares Agreement served in effect as a recordal of the agreement.

[21] The second respondent's four amendments to the recordal were referred to in paragraph 50 of the judgment.

[22] The applicants relied upon the second respondent's amendments of the recordal as the basis for the alleged deadlock in the winding up application. Not with standing no mention was made by the applicants' of the amendment to the effective date, in the founding papers in the liquidation application. No date was deposed to by the applicants, a fact of which the first applicant had personal knowledge.

[23] Hence, my finding that the effective date was as alleged by the second respondent and that there was no real or genuine dispute of fact as contended by the applicants.

[24] By reason of the aforementioned, I am of the view that there is no reasonable possibility that another court would come to a different conclusion in respect of the counter-application and the costs thereof.

[25] In the circumstances, the application for leave to appeal is dismissed with costs.

A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 26 April 2018.

DATE OF JUDGMENT: 29 June 2018.