REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

10/09/2019
DATE

SIGNATURE

CASE NO: 60578/2016

In the matter between:

RENJITH JOSE GEORGE PALAMATTOM	**APPLICANT**
and	
LIAM SHERIDAN MC DERMOTT	**FIRST RESPONDENT**
LAINU NINAN KURUVILLA	**SECOND RESPONDENT**
ANDREW CHRISTOPHER GATES	**THIRD RESPONDENT**
APPLIED PAYMENTS (PTY) LTD	**FOURTH RESPONDENT**

THE COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION **FIFTH RESPONDENT**

JUDGMENT

COLLIS J:

INTRODUCTION

[1] In this opposed application, the applicant seeks a declaratory order directing that he is the owner of (8) eight issued shares held within the fourth respondent. The applicant alleges that presently the eight shares are wrongly depicted in the fourth respondent's securities register as being the first respondent's shares:

'The shares with numbers 32-39 depicted in share certificate number 7.'

[2] The applicant seeks a further declaratory order directing the he is the owner of (8) eight shares held within the fourth respondent. The applicant alleges that presently the eight shares are wrongly depicted in the fourth respondent's securities register as being the second respondent's shares:

'The shares with numbers 40-47 depicted in share certificate with number 6.'

[3] The applicant seeks a further declaratory order directing that he is the owner of (8) eight shares held within the fourth respondent. The applicant alleges that presently the eight shares are wrongly depicted in the fourth respondent's securities register as being the third respondent's shares:

'The shares with numbers 48-55 depicted in share certificate with number 5.'

[4] The further relief sought is for an order directing that the company secretary of the fourth respondent and/or the fifth respondent be instructed to amend the securities

register and to do everything necessary to ensure that the said shares referred to in paragraphs 1, 2, and 3 above are reflected as being the shares of the applicant.

[5] Therefore the effect of the relief sought is that the applicant will become the owner of a total of 55 % of the issued share capital within the fourth respondent and each of the respondents will become a holder of 15% of the issued share capital in the fourth respondent. The relief sought against the fifth respondent is merely of a formal nature regarding the implementation of the declaratory orders sought by the applicant.

[6] It is common cause between the parties that the applicant and the first to third respondents are shareholders in the fourth respondent. As per the founding affidavit it is alleged that the first to fourth respondents have unlawfully and without the consent of the applicant and/or an agreement or without any other cause, transferred shares owned by the applicant within the fourth respondent to themselves and to his wife. The applicant therefore seeks a retransfer of his shares within the fourth respondent.[1]

[7] By way of background: During early February 2015, the applicant alleges that he provided the respondents with company documents which concerned the proposed registration of the fourth respondent and the shareholding in the fourth respondent as follows, namely the applicant as a 55% shareholder, and each of the respondents holding a 15% shareholding in the fourth respondent. The proposed shareholding appears from a resolution taken at a directors meeting held on 1 February 2015.[2]

[8] The respondents albeit that they admitted having signed the company documents reflecting the shareholding as set out above, denied that the applicant would be the holder of 55% shares in the fourth respondent. The first respondent alleges that it was always their understanding that the applicant would be the holder of only 50% shares in the fourth respondent [i.e. 20% in his personal capacity and 30% in escrow to be reallocated to future partners and that the remaining 5% was that of Nimin (the wife of the applicant).[3]

[9] In his replying affidavit the applicant denied the averment that Nimin's shareholding

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[1] Founding affidavit para 9 p 12
[2] Founding affidavit para 16 & 17 p 16
[3] Answering affidavit para 3.18 p 307

was 5%. In this regard the applicant alleges, that he at the time had informed the respondents that Nimin's shareholding would stand over to be discussed in future.[4]

[10] Apparent from the above is that at some point there was a discussion about shareholding to be allocated to Nimin, but the exact allocation of shares to her was not finally concluded. Therefore it follows that a dispute in this regard exists.

ISSUES TO BE DETERMINED

[11] In adjudicating this application, the issues to be determined entail what agreement was reached between the parties at the shareholders meeting held on 30 April 2015, if any.

[12] The applicant alleges that he travelled to South Africa for a meeting with the respondents. During this meeting the applicant alleges as per the minute recorded of such meeting that no agreement as to the shareholding within the fourth respondent was reached and that the discussion was to continue on a future date.

[13] In this regard it would be apposite to quote the extract of the minute which reads as follows:

'Shareholdings

- Ideal situation would be equal shares for four directors
- Everyone to do more research on shares
- Shareholding certificate to be submitted May End
- Dividends is separate from shares', a shareholders meeting was conducted whereat as alleged by the respondents an agreement was reached that the applicant would transfer a portion of the applicant's shares, held in the fourth respondent to each of the first to third respondents.[5]

[14] In answer to the allegations made by the applicant, the first respondent replied

[4] Replying affidavit para 38 p 534
[5] Founding affidavit para 19 & 20 p 18

that at the said meeting and after some debate, consensus was reached as to the shareholding in the company and that it was agreed by all that the shareholding would be as follows: applicant 26%, Nimin 5% and the respondents each 23%. Furthermore, that it was never the intention of the parties that one person would hold a true majority of shares in the company [50% plus] but that it was rather intended for the applicant to have a slight majority over the respondents as recognition for him being the founder of the business to be operated by the company.[6]

[15] In the replying affidavit, the applicant denied that any consensus was reached in relation to the shareholding as alleged by the respondents and set out above. In this regard, albeit that the applicant conceded that the respondents proposed on how the shares according to them ought to be divided, being to give him 26%, Nimin 5% and each of the respondents 23%, the decision according to the applicant was postponed and the final decision deferred. It was as a result on this basis that the parties had agreed that the issue should be resolved before the end of May 2015 as reflected in the minutes produced after such meeting. As this never transpired the debate around the share allocation was once again revived during October 2015.[7]

[16] Apparent from what has been set out above, it is clear that some discussion concerning the shareholding did occur during the April 2015 shareholders meeting as proposed by the respondents. This much the applicant has conceded, but the disagreement concerns the applicant's allegations that no final decision in this regard was reached and the decision was deferred.

[17] It as a result follows that the parties have divergent views as to the exact scope of such discussions and whether any consensus was reached amongst them.

[18] On the applicant's version the discussion regarding the shareholding indeed was later resumed at the instance of the first respondent in an email dated 14 October 2015, wherein the proposal received from the first respondent was that each of the first to third respondents would hold a 23% shareholding, the applicant 26%

[6] Answering affidavit para 3.19 & 3.20 p 308
[7] Replying affidavit para 39 p 534

shareholding and Nimin 5% shareholding across each branch of the company.[8]

[19] This proposal found favour with the applicant and in response to such proposal he replied as follows:

'Hi Liam

I am happy with the breakdown. It is as we had discussed and agreed.

I do agree to keep the same across all branches/ units as suggested.

Kind regards.'[9]

[20] The proposal also found favour with the third respondent who was the first to reply to the above email, wherein he stated as follows:

'I think it's the fairest way of dealing with the shareholding, so I vote yes.

I hadn't thought about how we would deal divvy up the different companies, but it makes sense to keep it the same.

Regards.

Andrew Gates.'[10]

[21] It also found favour with the second respondent wherein he stated the following:

'I am going to say yes for the SA branch, but I have a few questions for the other branches.

If for example we decide to give John Doe 1% of US or India branch, would that apply to all branches?'

Thanks and regards.

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[8] Founding affidavit para 22 p 19 & Annexure X3 p 70

[9] Founding affidavit para 23 p 20 & Annexure X 4 p 71.

[10] Founding affidavit para 25 p 21 & Annexure X5 p 72; Answering affidavit para 3.29 p 313

Lainu'[11]

[22] It is on the basis of the various responses received by all concerned that the first respondent contends that indeed an agreement as to the proposed shareholding in the fourth respondent was reached at the meeting held 30 April 2015, and that the purpose of his email dated 14 October 2015, was to confirm shareholding in the company and in addition he also sought confirmation as to how shareholding in the company to be registered in India and the USA would work.[12]

[23] In his replying affidavit the applicant denies that an agreement was reached between the parties as to the shareholding during the April 2015 meeting. In relation to his email wherein he made reference to the phrase: *"is as we had discussed and agreed"* this phrase so he asserts does not refer to any previous agreement reached between the parties, but rather is indicative of his poor choice of words to force an alleged agreement on him, which he persists to assert was not reached between the parties.[13]

[24] Having regard to what has been set out above, it is clear that the parties had put forward divergent views in their respective affidavits as to the nature of the agreement concluded between them(*with reference to the shareholding in the fourth respondent*) if any, during the shareholders meeting held on 30 April 2105. This to my mind constitute a real, genuine and bona fide dispute.

[25] As to the approach to be adopted by the court when faced with a dispute of fact, it would be appropriate to have a look at the provisions of Uniform Rule 6(5) (g) which provides as follows:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such an order as it deems fit with a view of ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear

[11] Founding affidavit para 26 p 21 & Annexure X6 p 72; Answering affidavit para3.31 p 134
[12] Answering affidavit para 3.32 p 314
[13] Replying affidavit para 47 p 541

personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[26] If material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.

[27] Furthermore, the Supreme Court of Appeal has cautioned that a court should be astute to prevent an abuse of its process in such a situation by an unscrupulous litigant intent only on delay or intent on a fishing expedition to ascertain whether there might be a defense without there being any credible reason to believe that there is one.

[28] In resolving to refer a matter for oral evidence a court has a wide discretion,[14] and the court will to a large extent be guided by the prospects of *viva voce* evidence tipping the balance in favour of the applicant.

[29] In every case the court must examine an alleged dispute of fact and see whether in truth there is a real[15] dispute of fact, which cannot be satisfactorily be determined without the aid of oral evidence; if this is not done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.

[30] In the present matter the principles regarding referral for oral evidence as espoused in Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co. (Pty) Ltd[16] per Colman J are relevant to the circumstances of the present case, namely:

"My conclusion rests upon my experience, and the experience of others before me, that shows that an assertion or a denial which seems very probable or improbable on a reading of a set of affidavits often takes on a different colour when the veracity of the person which has made it is tested by cross-examination. There is the rare case

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[14] Lombaard v Droprop CC 2010 (5) SA 1 (SCA) at 10A-D
[15] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)at 634I
[16] 1971 (2) SA 388 (WLD) at p 390F-H

of course, in which a disputed statement made on affidavit is so manifestly untrue, or so grossly improbable and unconvincing that the court is justified in disregarding it without recourse to oral evidence. But I cannot say that Mr. Rowe's assertions on the point in dispute fall into one of those categories. They fall rather into the class of assertions which, although apparently improbable, might be accepted after an oral hearing."

[31] As the applicant seeks final relief by way of motion proceedings, disputes of fact on the papers must be determined if the facts stated by the respondent, together with the admitted facts in the applicant's affidavit, justify the order sought.

[32] In the decision National Director of Public Prosecutions v J.G Zuma [17] Harms JA described the so-called "Plascon-Evans test " as follows:

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual disputes because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings dispute of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which had been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or un-creditworthy denials, raises fictitious disputes of fact is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on the probabilities without rejecting the NDPP's version."

[33] Having regard to the principles espoused *supra*, I am not persuaded that the disputed fact, with specific reference to the terms agreed upon during a meeting held on 30 April 2015, can be determined without the aid of oral evidence.

[34] In relation to the stage by when an applicant can seek a referral for oral evidence, once it becomes clear that an applicant is failing to convince a court on the papers, the respondents had argued that such an application should be made *in limine* and

[17] 2009 (2) SA 277 (SCA) at para [26]

may not be requested in the alternative. In support of this contention the respondents had placed reliance on the case of Law Society, Northern Provinces v Mogami 2010 (1) SA 186 (SCA) at 195C-D, wherein it was held that only in exceptional circumstances will a court permit an applicant to apply in the alternative for a matter to be referred to evidence should the main argument fail. In the same judgment it was further held to be undesirable that a court *mero motu* orders the referral to oral evidence.

[35] In opposing the above view, the counsel for the applicant had argued that reliance on the Mogami-matter had been taken out of context, if one has regard that in the Mogami-matter the Supreme Court of Appeal had found, that it would not entertain a referral to evidence when such request was first made on appeal during the hearing of the appeal. It is on this basis that counsel had argued, that the Mogami-matter was distinguishable from the present matter.

[36] In further support of the applicant's view in this regard counsel had placed reliance on the views expressed by Botha JA in the decision Administrator Transvaal, and Others v Theletsane and Others 1991 (2) SA 192, wherein the Learned Judge of Appeal had made the following remark:

'In this Court their counsel submitted that, if his main argument based on the appellant's affidavit failed, the application should nevertheless not be dismissed, but should be referred to viva voce evidence. This is in accordance with the stance taken up by counsel in the Court a quo. In Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 981D-E Corbett JA, after referring to a number of cases in which it was held that an application to refer a matter to evidence should be made out at the outset and not after argument on the merits, observed that that was no doubt a salutary general rule, but that he did not regard it as an inflexible one. The recent tendency of our Courts seems to be to allow counsel for an applicant, as a general rule, to present his case on the footing that the applicant is entitled to relief on the papers, but to apply in the alternative for the matter to be referred to evidence if the main argument should fail. See Marques v Trust Bank of Africa Ltd and Another 1988 (2) SA 526 (W) at 530E-531I and Fax Directories (Pty) Ltd v SA Fax Listings CC 1990 (2) SA 164 (D) at 167B-J.'

[37] At the hearing of the application, counsel for the applicant had therefore argued that it was first entitled to argue the application and that he could succeed on the papers alone, but that if the court found a dispute exist it was Mr. Swart's request for the matter to be referred to evidence.

[38] Having regard to what has been set out above, and this court having concluded that a real, genuine and bona fide dispute of fact exist as to the agreement reached at the shareholders meeting held on 30 April 2015, this dispute I conclude calls for this aspect to be referred to oral evidence.

ORDER

[39] Consequently, the following order is made:

39.1 The application is postponed *sine die*.

39.2 The parties are directed to present oral evidence as to whether at the shareholders meeting held on 30 April 2015, an agreement was concluded between the parties and the nature of the oral agreement concluded.

39.3 Once this dispute has been resolved by oral evidence, the case will be decided on the basis of that finding together with the affidavit evidence that is not in dispute.

39.4 Costs, to be costs in the application.

COLLIS J

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

Appearances:

For the Applicant: Adv. B.H. Swart SC & Adv. D. Van Den Bogert
Attorney of the Applicant: CWA Pistorius Inc.
For the First Respondent: Adv. A.G. South SC
Attorney for the Respondent: Tiaan Smuths Attorneys
Date of Hearing: 29 November 2018
Date of Judgment: 10 September 2019