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.

10 March 2021

Case No:22900/2020

In the matter between:

MASHABA, AUSWELL	First Applicant
LANGREBE, WOLFRAM CARL HELMUTH	Second Applicant
WKH LANDGREBE & CO	Third Applicant
JOHN JOSEPH FINLAY CAMERON	Intervening Applicant

and

MULLER, JOHANNES ZACHARIAS HUMAN	First Respondent
MULLER, JOHANNES ZACHARIAS HUMAN NO	Second Respondent
NDYAMARA AVIWE NTANDAZO NO	Third Respondent
MADLALA MANDLA PROFESSOR NO	Fourth Respondent
THE MASTER OF THE HIGH COURT	Fifth Respondent

JUDGMENT

SK Hassim AJ

Introduction

[1] Swifambo Rail Leasing (Pty) Ltd ("*the company in liquidation*" or "*Swifambo*") has been in liquidation since December 2018. The second to fourth respondents, collectively referred to as "*the respondents*" or "*the liquidators*", are the final co-liquidators of Swifambo having been appointed by the fifth respondent (*"the Master*") as such on 18 March 2019. The fifth respondent will be referred to as the "*Master*".

[2] The first applicant, Auswell Mashaba (*"Mr Mashaba*") was a director of Swifambo. He was also the director of the latter's shareholder, Railpro Holdings (Pty) Ltd (*"Railpro*"). As such he controlled the shareholding in Swifambo. He also has interests in other entities related to Swifambo. Railpro, too, is in winding-up.

[3] The second applicant, Wolfram Carl Helmuth Langrebe ("*Langrebe*"), is a partner in the partnership WKH Langrebe & Co, the third applicant, (*"WKH*"). The applicants allege that WKH proved a claim at the second meeting of creditors. The respondents admit that WKH proved a claim at the second meeting of creditors. They however aver that subsequent thereto they discovered facts from which it is clear that WKH has no claim against Swifambo. I need say no more about this.

Orders sought by the applicants

[4] The applicants seek a *mandamus* in the following terms:

> *"2. Ordering the first and second respondents, within 24 (twenty-four) hours of the grant of this order, to depose to and thereafter to furnish an affidavit (by e-mail) to attorney John Joseph Finlay Cameron, email address johncam@mweb.co.za in which affidavit he will:-*
>
> *2.1 identify that person or those persons who directed threats and/or acted in a manner designed to intimidate him (as recorded by him in paragraph 46 of an affidavit dated 8th May 2020 under case no. 20975/2020); and*
>
> *2.2 indicate the times, dates and places during which the threats and acts of intimidation were received by him; and*
>
> *2.2 indicate the exact nature of the threats and acts of intimidation and in the event that the threats were in writing, to indicate same and to attach same to the affidavit (including copies of the screenshots of his cellular telephone); and*

3. *that the second respondent shall not be entitled to recover any of his costs incurred in opposing the applicants' application from the insolvent estate of Swifambo Rail Leasing (Pty) Ltd; and*

4. *that the costs of this application be paid by the first respondent on the scale as between attorney and client."*

The application for intervention by the applicants' attorney

[5] The applicants' attorney, Mr John Joseph Finlay Cameron (*"Cameron*" or " *the intervening applicant*), applied to intervene in the application. I was informed at the commencement of the hearing that the respondents accede to the application for Mr Cameron's intervention. I issued such an order. The intervening applicant, Mr Cameron, and the applicants are collectively referred to as *"the applicants".*

[6] The applicants' withdrew their application to strike out portions of the respondents' answering affidavit and tendered the costs of the application.

[7] The respondents argue in the heads of argument that the applicants attempted to make out a new case in the replying affidavit. Mr Hollander who appeared on behalf of the applicants informed me at the hearing that the applicants to not pursue the new case in the replying affidavit.

The relevant historical facts

[8] It is clear from the papers that there is deep-seated acrimony between at least the first applicant and the first respondent, Mr Muller. The acrimony stems from the conflict between Mr Mahaba and the liquidators appointed by the Master to wind up the company.

[9] During 2013 Swifambo was awarded a tender for the supply of locomotives to the Passenger Rail Agency of South Africa ("*PRASA").* On the application of PRASA, Francis J on 3 July 2017 set aside PRASA's decision to award the tender to *Swifambo.* In December 2018, Swifambo and its holding company Railpro were voluntarily wound up by a special resolution adopted in terms of section 351 (1) of the Companies Act, Act No 61 of 1973 ("*the Act"*) and registered on 18 December 2018.

[10] The respondents were authorised to hold an enquiry in terms of section 417 and 418 of the Act. They aver that they conclusively established that the affairs of the company in winding up had been mismanaged and hundreds of millions of rands had been dissipated. They also aver that evidence of *prima facie* criminal conduct on the part of amongst others Mr Mashaba has been uncovered.

[11] In addition to this application, the parties are entangled in a number of matters pending in this court and/or in the Gauteng Division, Johannesburg. Mr Mashaba as a co-applicant has brought three applications against, among others, the respondents.

(i) under case number 88912/19 ("*the first application")* launched on 26 November 2019 he seeks amongst others the setting aside of the appointment of the respondents as provisional liquidators as well as final liquidators;

(ii) under case number 12450/20 (*the second application")* launched on 25 February 2020 he seeks amongst others the setting aside of the shareholders' meeting at which the shareholders resolved to wind up Swifambo;

(iii) under case number 20975/20 ("*the third application*") launched on 25 March 2020 he seeks relief which overlaps with the relief claimed in the other applications.

The basis for the application and the opposition thereto

[12] Mr Mashaba, or entities associated with him, amongst others, are defendants in four pending actions by the liquidators of Swifambo and Railpro instituted in the Gauteng Division of the High Court in Johannesburg for the repayment of astronomical sums of money.

[13] The genesis of this application is paragraph 46.1 of the affidavit deposed to by Mr Muller in opposition to the third application which reads:

> *"During the time when my previous affidavits were being prepared, signed and thereafter delivered, several threats and acts which I perceived were calculated to intimidate me, were received.*"

[14] The applicants consider the threats to be aimed at compelling Muller to abandon, the actions brought by the liquidators and/or, the opposition to the applications refered to in paragraph 11 above. The applicants contend that the alleged threats constitute an offence contemplated in section 1 (1) (a)(ii) and/or section 1 (1)(b) of the Intimidation Act, Act No 72 of 1982.

[15] The applicants interpret (or as Mr Mashaba describes it 'accurately speculate') the statement in paragraph 46.1 of the opposing affidavit in the third application as an accusation by Mr Muller that the threats were made at their behest to persuade him not to persist with the actions brought by the liquidators and to withdraw the opposition to the applications referred to in paragraph 11 above. The applicants claim in this regard that:

(i) they have *"a fundamental right to protect [themselves] against any suggestion or possible finding, (by a Court in the Main Application), that [they] have employed a 'heavy'or 'heavies'to intimidate and to harass Mr Muller so that he is 'persuaded' from carrying out his legal obligations and, ... to withdraw the legal actions against [them](and third parties in which [they] have an interest) and to withdraw the opposition by the liquidators of [Swifambo] to at least two pending applications and possibly as regards the opposition by the liquidators of another insolvent estate (Railpro Holdings (Pty) Ltd), one of the liquidators being Ndyamara [the third respondent]".*

(ii) "[*by] virtue of... the serious nature of the unlawful misconduct of the intimidator/s [the applicants] are compelled to protect [themselves] (including [their] dignity and professional images)"* by pursuing two courses of action. Firstly, lodge criminal complaints against the intimidator/s because they have a " *fundamental interest*" in the unlawful misconduct and have not only a right but a duty to lodge a complaint with the South African Police Service. Secondly, demand that the intimidator/s

"*suspend*" the intimidate treat tactics against Mr Muller and in the event the demand is not met, to bring an urgent application interdicting further intimidation of Mr Muller.

(iii) they have " *every right to fear that the intimidator/s will continue with [the] threats against [Mr] Muller as [they have] no doubt that Muller has not 'given into' the threats i.e. the consequence of this is that the intimidator/s will cause further prejudice to [the second applicant] and [Mr Mashaba] and more particularly [they] would 'face' additional criminal complaints from [Mr] Muller i.e. [they] obviously need to 'stop intimidator/s' in his tracks*".

(iv) without the name/s of the intimidator/s and the nature of the threats the intimidator/s could continue "*the campaign*" to intimidate Mr Muller. The intimidation of Mr Muller will be prejudicial to the applicants' professional image "*and no doubt, the possibility exists that the Presiding Judge at the main application*[1]*, may question the conduct of the intimidator/s and whether [the applicants] 'played a part' in the intimidation process*". They also fear a complaint to the professional bodies to which they belong and are concerned that criminal conduct imputed to them will be professionally detrimental.

[16] The applicants submit that they have the right (i) to preserve their professional status and dignity; and (ii) to take steps against the intimidator/s. To this end, they require Mr Muller's cooperation which has not been forthcoming. They aver that Mr Muller has "*resisted [Mr Mashaba's] attempts to obtain the demanded information*".

[17] In the replying affidavit, the applicants call in aid various provisions[2] in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). As indicated earlier the applicants did not pursue the application on the constitutional grounds. Mr

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1 It is not clear which of the application is the main application. This is of no consequence in the adjudication of this application.

2 Section 10(right to dignity), 32(1) (right information), and 38 (the right to enforce in a court of law the Bill of Rights).

Hollander argued that the applicants' cause of action is a mandatory interdict; it is not located in the Promotion of Access to Information Act, Act No. 2 of 2000 (this is of course consistent with the abandonment of a course of action located in the Constitution).

Have the applicants made out a case for the relief sought?

[18] The respondents deny that the applicants have made out a case for an interdict. Their case is that the law does not recognise a right to information asserted by the applicants nor a right to information for the purpose for which it is being sought by the applicants. In the notice of motion the applicants seek an order compelling Mr Muller amongst others to identify the person who threatened him. Mr Muller disputes that the applicants have a right to the information sought. In the answering affidavit Mr Muller reveals the identity of the person who intimidated him ("*the intimidator*") . He further discloses that he has preferred a charge of intimidation against the intimidator at the Villieria police station, identifies the date on which this occurred and provides the case number. He mentions that the intimidator "*held out to [him] that he had been mandated by Mr Mashaba and Mr Cameron to approach him".*

[19] The applicants are seeking final interdictory relief. They cannot succeed unless they demonstrate the three requisites for an interdict: (i) a clear right; (ii) an injury has been committed or is reasonably apprehended; and (iii) the only remedy they can invoke to protect the right and avert the injury, is an interdict. The first hurdle the applicants must overcome is to show that they have a clear right. If they cannot do so, then the application must immediately fail.

[20] I am unable to identify the right which the applicants wish to protect by a prohibitory interdict. The right identified in the heads of argument appears to be a right to information. While the Constitution guarantees a broad right to information, the applicants' case does not rest in the Constitution. (I am not required to make a finding whether persons such as the applicants may call the Constitution in aid either directly, or through legislation

contemplated in the Constitution to give effect to the broad right to information, for the relief they seek. I therefore refrain from expressing a view on the issue).

[21] At the hearing I invited Mr Hollander to identify the substantive right which the applicants contend they wish to protect. He argued that a party does not have to show that an interdict is required to protect a substantive right and a party may resort to interdictory relief to protect a procedural right. He submitted that the right which the applicants sought to protect stems from, and is the right which Unterhalter J recognised in, Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd and Others[3]. He submitted that if the applicants are unable to show that Nampak applies they must fail. He attempted to persuade me that the facts align with those in Nampak.

[22] Mr Terblanche SC, who appeared for the respondents argued that interdictory relief is only available to a party who is able to demonstrate that a substantive right has been infringed (or there exists a reasonable apprehension that this will occur) and that an interdict is required to prevent the infringement and the resultant harm. He submitted that the decision in Nampak finds no application. I am inclined to agree with Mr Terblanche.

[23] Nampak is distinguishable and is not authority for a right to seek the information which the applicants seek. The first point to be made is that Nampak was not seeking an interdict but an order which Unterhalter J described as " *bear[ing] a certain family resemblance to the Anton Pillar that preserves evidence in advance of the institution of substantive litigation*".

[24] Nampak does not confer a substantive right to information. It confers a procedural right to remedy the harm inflicted upon an injured person.[4] It is to assist a person wronged (victim) to identify the perpetrator to give effect to a victim's substantive right which in Nampak was found to be the right of a victim (or the person wronged) to access court to remedy the harm suffered.

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3 2019(1) SA 257 (GJ).

4 *Cf.* Nampak para 11.

[25] The court in Nampak found that Nampak had been wronged; it suffered a robbery and was entitled to pursue an action against the wrongdoers if they could be identified. An order of the sort issued in Nampak is aimed at assisting an injured person. Vodacom possessed information that might have assisted Nampak in identifying the perpertrators for it to approach a court for relief remedying the wrong.

[26] Unterhalter J adopted the decision in Norwich Pharmacal Co and Others v Customs and Excise Commissioners 1974 AC 133 (HL) ([1973] 2 All ER 943) and set out the conditions which an applicant must satisfy for a court to exercise the power to issue an order compelling the disclosure of information and in this regard stated as follows:

> " *[16] In English law, the requirements for obtaining Norwich Pharmacal relief have been summarised as follows:*
>
> *'The three conditions to be satisfied for the court to exercise the power to order Norwich Pharmacal relief are:*
>
> *(i) A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;*
>
> *(ii) There must be a need for an order to enable action to be brought against the ultimate wrongdoer; and*
>
> *(iii) The person against whom the order is sought must (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.*
>
> *[17] Apart from these requirements, the court enjoys a discretion even if the requirements are met, to determine whether an order should be granted and, if so, on what terms."*

[27] There is a fundamental misunderstanding, of the Nampak decision, on the part of the applicants. Unterhalter J found that the common law should be developed to create procedural mechanisms. However the circumstances under which the mechanisms are available is limited as set out in Norwich Pharmacal.

[28] The relief granted in Nampak is available only to a person who has been injured or wronged and the relief is available against a person who is "*mixed up in so as to have facilitated the wrong*". The applicants have not proven that they have been wronged. Furthermore, they are seeking relief against Mr Muller who (i) is the person wronged (Mr

Muller has had a wrong perpetrated on him); and (ii) did not facilitate the wrong. The requirements for the Norwich Pharmacal relief are not met in this case.

[29] I accordingly find that the applicants have not demonstrated a clear right for an interdict; the Nampak decision does not apply to this application. The applicants have not overcome the first hurdle that confronted them; they have not satisfied the requirements for a final interdict. Nor have they satisfied the requirements for the type of relief granted in Nampak (the Norwich Pharmacal relief). This application must therefore fail.

Costs

[30] The respondents seek punitive costs against the applicants, including Mr Cameron, on the scale between attorney and own client. I am not inclined to mulct the applicants with punitive costs. There is however no reason why costs should not follow the result.

Order

[31] Consequently, I make the following order:

(a) The application is dismissed.

(b) The applicants and Mr Cameron, must jointly and severally pay the costs of the application as well as the costs of the application to strike out, which costs include the costs occasioned by the employment of two counsel.

S K Hassim AJ

Acting Judge: Gauteng Division, Pretoria

(electronic signature appended)

10 March 2021

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the plaintiff's legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 March 2021.

For the applicants:	Adv. L Hollander
For the first to fourth respondents:	Adv F H Terblanche SC Adv JG Cilliers SC Adv H Struwig