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

CASE NO.: 21392/2020

(1) REPORTABLE: /NO
(2) OF INTEREST TO OTHER JUDGES: /NO
(3) REVISED. NO
SIGNATURE DATE: 22 JUNE 2022

In the matter between:

SANNAH SANKIE MOREDUBI	First Applicant
JOSEPH MABUSENG MOREBUDI	Second Applicant
NEO THANDO ELLIOT HOLDINGS (PTY) LTD	Third Applicant

and

BRAD BARKER	First Respondent
CHARLES LUYCKX	Second Respondent
ELLIOT MOBILITY (PTY) LTD	Third Respondent
NEO THANDO ELLIOT MOBILITY (PTY) LTD	Fourth Respondent

JUDGEMENT

SARDIWALLA J:

[1] This is an urgent application in terms of the provisions of Rule 6(12) (a) of the Uniform Rules of Court resulting from a refusal by the first respondent and second respondent's to postpone the meeting for the removal of the first and second applicant as directors of Neo Thando Elliot Mobility (Pty) Ltd ("NTEM"). The applicants seek to interdict or restrain the first and second respondents meeting for the removal as director's pending the winding up of NTEM.

Background to the Application:

[2] On 16 February 2015, the third applicant and the third respondent entered into a joint venture with the sole purpose of:

> "To comply with a joint bid to the Department of International Relations and Cooperation of the Republic of South Africa [DIRCO] in response to its invitation for the appointment of a service provider based in South Africa to provide services for the removal, packaging , storage (In South Africa only) and insurance of household goods and vehicles transferred officials to and from missions abroad and domestic moves within the RSA for a period of 4 years and to thereafter, of the bid is successful, incorporate a Newco (the fourth respondent) in which Neo-Thando (the third applicant) shall have 55% shareholding and Elliot Mobility (the third respondent) 45% shareholding and to regulate matters pertaining thereto."[1]

[3] The Joint Venture was successful in its bid and was implemented with NTEM entering into a fixed term Service Level Agreement which expired on 5 November 2019. However, a written shareholders' agreement as contemplated by the joint venture agreement when NTEM was formed on 11 December 2015, this did not

materialise. Therefore, the Joint Venture governs the shareholder's agreement either by express, implied and/or tacit agreement on the terms set out in the Joint Venture Agreement.

[4] On 25 February the third respondent filed an urgent application for the recovery of funds paid to the fourth Respondent which was to be repaid and credited to its loan account to the under case number 11191/2020 seeking the following relief:

> *"1. Condoning the Applicant's non-compliance with the Rules of this Honourable Court, in so far as it may be necessary and directing that this application ne heard as one of urgency, in terms of Rule (6) (12).*
>
> *2. Directing the Fourth Respondent to sign such documents as are necessary, alternatively to do such things as are necessary, in order to transfer R 4 766 071.82 from the First Respondent's bank account number [....], held at the Fifth Respondent, to the Applicant's bank account number [....]. Held at the Fifth Respondent, within 3 days of the date of the granting of this order.*
>
> *3. Authorising and directing the Sixth Respondent, in the event the Fourth Respondent /not complying with 2 above to sign the aforesaid payment instructions for and on behalf of the First Respondent and to do all things necessary to facilitate payment to the Applicant of the said amount.*
>
> *4. Authorising and directing the Fifth Respondent to effect payment to the Applicant in accordance with prayers 2 and/or 3 above.*
>
> *5. Directing that the costs of this application, on the scale as between attorney and client, be paid by the Third and Fourth Respondent's jointly and severally, the one paying the other to be absolved, and that no order for costs be sought against the First, Fifth and Sixth Respondents, save in the event of opposition.*

[1] Notice of Motion, page 8.

6 Granting the Applicant further and/or alternative relief."[2]

[5] The urgent application by the third respondent was ultimately resolved between the parties. Thereafter on 24 March 2020 the second applicant received a "Notice of Intention to Remove Directors" at a meeting of the board of directors which was to be held on 17 April 2020. On 25 March 2020 the first applicant was suspended from her employment as Chief Operating Officer by the first and/or second and/or third respondent pending a disciplinary enquiry.

[6] The applicants through their attorneys requested a postponement of the meeting which was refused on 8 April 2020. The refusal of the first and second respondents is the basis of the urgent application before me.

[7] A pre-trial conference was held on 11 April 2020 on Microsoft Teams with Judge Teffo who issued directives regarding the further conduct of the matter including the parties engaging in settlement negotiations. The applicants complied with Judge Teffo's directives and sent the respondents a letter which it received no response. No answering affidavits or heads or argument were filed by the Respondent.

Applicant's Argument

[8] The applicants aver that it has a *prima facie* right in terms of the Joint Venture to participate in the control and management of NTEM and that the third applicant is the majority shareholders in terms of the Joint Venture Agreement and has a right to be represented on the Board of Directors. Further that they are entitled to proper notice and a reasonable opportunity to respond to the allegations against them. The applicants submit that the suspension of the first applicant and the notice of removal are clear indications of the respondent's intention to have complete control of NTEM which it sought to seek through its urgent application under 11191/2020 but failed and has now found another way to achieve its objective. They also submit that removing them as directors will also divest their right to wind up the of the third respondent, which they aver must be done as there is a deadlock between the shareholders.

[2] Notice of Motion, case number 11191/2020.

Interim Interdict

[9] An interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In this regard the Constitutional Court said the following:[3]

> *"An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo."*[4]

[10] The requirements for the granting of an interim interdict are the following: a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim relief, and that the applicant has no other satisfactory remedy.[5] In this regard Holmes JA[6] said the following:

> *"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at*

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[3] *In National Gambling Board v Premier, Kwa-Zulu Natal and Others 2002(2) SA 715 CC.*
[4] *At page 730 – 731 para 49.*
[5] *See Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another 1973(3)SA 685 (A) Knox D Arcy Ltd v Jamison and Other 1996(4) SA 348 (A) at 361*
[6] *In Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another, supra, at 691.*

p. 227. In general the requisites are –

(a) a right which, 'though prima facie established, is open to some doubt';

(b) a well grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see Olympic Passenger Service (Pty.) Ltd. v Ramlagan, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."

[11] Where the right is clear *"… the remaining questions are whether the applicant has also shown:*

(a) an infringement of his right by the respondent; or a well-grounded apprehension of such an infringement;

(b) the absence of any other satisfactory remedy;

(c) that the balance of convenience favours the granting of an interlocutory interdict."[7]

[12] In this case the applicant seeks an interdict and restrain the first and second respondent's from removing them as directors pending the disciplinary enquiry and the winding up of the third respondent. There is a dispute about whether the applicant has a right to engage with and/or participate in the management and/or control of the fourth

[7] *Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W) at 592 – 593.*

respondent as well as an opportunity to respond to the against them before a decision to remove them as directors can be taken. The question therefore is whether it has established a *prima facie* right. The approach to be adopted in considering whether an applicant has established a *prima facie* right has been stated to be the following:[8]

> "*The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.*"[9]

The *Audi Alteram Partem* Rule

[13] A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment[10]. Peach sums up the *audi* rule as follows:[11]

> "*The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party*."

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[8] *In Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA).*
[9] *At 228; See also Webster v Mitchell 1948 (1) SA* 1186 (W) at 1189 *and Manong & Associates (Pty) LTD v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) at 180.
[10] *See* De Smith, SA (1955) *"The right to a hearing in English Administrative Law" 68(4) Harvard Law Review 569-599, 569.*
[11] See Peach, VL (2003) "*The application of the audi alteram partem rule to the proceedings of commissions of inquiry*" Thesis (LL.M. (Public Law))—North-West University, Potchefstroom Campus

[14] In ***Du Preez and another v Truth and Reconciliation Commission***[12] **(*Du Preez*)**, the court held that the Commission was under a duty to act fairly towards those implicated by the information received during the course of its investigations or hearings. The court in ***Du Preez*** further indicated that it was instructive that the Committee's findings in this regard and its report to the Commission could accuse or condemn persons in the position of the appellants. The court also noted that, subject to the granting of amnesty, the ultimate result could be criminal or civil proceedings against such persons. The court noted that the whole process was potentially prejudicial to them and their rights of personality. They had to be treated fairly. Procedural fairness meant they had to be informed of the substance of the allegations against them, with sufficient detail to know what the case was all about.

[15] The requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or procedural fairness has ancient origins. In general terms, the principles of natural justice consist of two component parts, *to wit*; the first is the hearing rule, which requires decision-makers to hear a person before adverse decisions against them are taken. The second and equally important component is the principle which provides for the disqualification of a decision-maker where circumstances give rise to a reasonable apprehension that he or she may not bring an impartial mind to the determination of the question before them. The latter aspect is not relevant in this matter.

[16] The principles of natural justice are founded upon fundamental ideas of fairness and the inter-related concept of good administration. Natural justice contributes to the accuracy of the decision on the substance of the case. The rules of natural justice help to ensure objectivity and impartiality, and facilitate the treatment of like cases alike. Natural justice broadly defined can also be seen as protecting human dignity by ensuring that the affected individual is made aware of the basis upon which he or she is being treated unfavourably, and by enabling the individual to participate in the decision-making process.

(Accessed at http://hdl.handle.net/10394/58), 8.

[12] 1997 (3) SA 204 (A).

[17] In a delicate balancing act, it is the duty of the courts to uphold and vindicate the constitutional rights of the applicant to his good name this cannot have the effect of precluding other parties from discharging duties and responsibilities exclusively assigned to it by the Constitution. However, such an inquiry may only proceed in a manner which strictly recognises the right of the applicant to have the inquiry conducted in accordance with natural justice and fair procedures.

Analysis and findings

[18] There is no doubt in my mind that the removal and suspension of the first applicant and second applicant directly impacts the applicants and implies that the violated their fiduciary duties. It is also prudent in a fact finding investigation to inform and interact with a person whose rights may be adversely affected. In the present matter the respondents have not at any stage of their investigations and or discussions find it necessary to engage with the applicants, who are clearly implicated, until the issuing of the notice of intention to remove directors on 24 March 2020. This goes against the principles of natural justice and fair procedure.

[19] At this stage, I am satisfied that the applicants have a *prima facie* right more particularly to challenge and present their version or evidence relating to the respondent's conclusions of their conduct as directors of NTEM and as majority shareholders. It cannot be disputed that the first to third respondent's refusal to afford the applicants a postponement of the meeting scheduled for 17 April 2020 and an opportunity to respond is threatening the applicant's aforesaid right to natural justice and fair procedures. It cannot be denied that if the applicants are not granted the relief that they seek that they will be removed as directors which will interfere with the rights of the applicant. Also important to note that the respondents have not filed an answering affidavit and therefore there is no version for the respondents before this Court to dispute to rebut the submissions of the applicants. I am also satisfied that if the aforesaid meeting goes ahead and decisions are taken the applicants will suffer irreparable harm. Furthermore, I am satisfied that the balance of convenience favours the granting of the interim order. The applicant will suffer prejudice if the interim interdict

is not granted and on the other hand the respondent will suffer a mere delay if the interim interdict is granted. However, should the interdict not be granted the damage to the applicant's reputation would be irreversible. The applicants in these circumstances have no other remedy except the interim relief that they seek.

[20] Accordingly, the following order is made:

1 Pending the final determination of the relief in Part B of the notice of motion:

1.1 the respondents are forthwith restrained from proceeding on 17 April 2020 at 14h00 or at any time thereafter, with a meeting of the board of directors of the fourth respondent, Neo Thando Elliot Mobility (Pty) Ltd, called by the first and second respondents at which meeting the first and second respondents intend determining whether the first and second applicants have been negligent or derelict in the performance of their functions as directors of the fourth respondent.

1.2 the respondents alternatively the first and second respondents are restrained from holding such meeting and/or from taking any such steps in terms of section 71 or otherwise which will have the result of the first and second applicants being excluded from the control and/or management of the fourth respondent and/or decision making and other acts which they may have participated in or carried out solely or jointly with the first and second respondents since the conclusion of the Joint Venture Agreement on 16 February 2015 and/ or the incorporation and registration of the fourth respondent on 11 December 2015.

1.3 the respondents alternatively the first and second respondents are restrained from acting unlawfully and withholding the first applicant's remuneration contrary to the notice of suspension dated 24 March 2020.

2 The costs of Part A of this application are to be paid jointly and severally on an attorney and own client scale by the first, second and third respondents.

3 The applicants are granted leave to supplement the papers insofar as it relates to the relief claimed in Part B of the Notice of Motion.

SARDIWALLA J
JUDGE OF THE HUGH COURT

Appearances:

Date of Judgement:	**22 June 2022**
Counsel for the Applicant:	Adv. S Hassim SC Adv PA Venter
Instructed by:	VZLR Attorneys
For the First Respondents:	Nochumsohn & Teper Inc.