IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 9731/22

DATE: 26 AUGUST 2022

REPORTABLE: YES / NO

OF INTEREST TO OTHER JUDGES: YES / NO

REVISED

26 August 2022

In the matter between:-

PHOSOLO JACKSON ALEXANDER MPHAFUDI	Applicant
VS	
ABEL RAMATLHATSWANA SENTLE	First Respondent
TMNS ENTERPRISE (PTY) LTD	Second Respondent
NCHAUPE MALEBYE	Third Respondent
FRANCINA MMAPOTE TLHABANE	Fourth Respondent

In her personal capacity and as the Executor of the Late Estate Tlhabane, (ID: [....]) [Master's Ref: 135/06]

LEBURU TEBOGO JACOB MPHAFUDI N.O.	Fifth Respondent
MOTLALEPULE TABEA MATJILA N.O.	Sixth Respondent
MPHO KUNENE N.O.	Seventh Respondent
PHESOLO JACKSON ALEXANDER MPHAFUDI N.O.	Eighth Respondent
JAN ERASMUS N.O.	Ninth Respondent
JAN ERASMUS AUDITORS	Tenth Respondent
KWR CONSORTIUM (PTY) LTD	Eleventh Respondent
PIETER SNYMAN REKENMEESTERS	Twelfth Respondent
COMPANIES & INTELLECTUAL PROPERTY COMMISSION	Thirteenth Respondent

JUDGMENT

KOOVERJIE J

[1] The applicant seeks interim relief pending the finalization of two pending matters. The relief sought, *inter* alia, includes an order in terms of Section 163 of the Companies Act. At the hearing the applicant had indicated that it would not be pursuing the relief

pertaining to setting aside of the current auditor. The applicant submitted that this application was necessitated by the recent actions of Mr Sentle (the first respondent).

[2] In this application the applicant seeks, *inter alia*, the following interim relief that:

(i) an independent director be appointed to the board of TMNS (the second respondent);

(ii) the applicant be reinstated as a director of TMNS;

(iii) the applicant be included in the decision making processes of the company affairs, particularly provided with all the formal documents and minutes, agreements and notices as well as attend meetings. This he argued was to ensure that there was compliance with corporate governance principles until the action proceedings are finalised.

For the purposes of this judgment, the first respondent will be referred to as "Mr Sentle" and the second respondent, TMNS Enterprises (Pty) Ltd as "TMNS".

[3] In seeking interdictory relief, the applicant is required to satisfy the jurisdictional factors for an interim interdict, namely that:

(i) he has a *prima facie* right;

(ii) demonstrate there is irreparable harm;

(iii) the balance of convenience favours the applicant; and

(iv) there is no alternative remedy.

POINTS IN LIMINE

- **Lis pendens**

[4] The thrust of the respondents' argument is premised on the *lis pendens* point. It was argued that the relief sought in this application is pending in two matters which have not as yet been finalized in court, namely, action and motion proceedings.

[5] It was pointed out that the applicant had already under case nr. 187713/2020 sought declaratory relief in an action instituted concerning his directorship and declaring the meeting of 27 February 2019 void. Under the current proceedings the applicant seeks the same relief, namely that he be declared a director of TMNS. Before I proceed to deal with the merits of this matter, it is necessary firstly to make a ruling on the *lis pendens* issue.

[6] It was argued that since the matters concern the same subject matter with the same parties, the applicant should be barred from proceeding with this application until such time that the action proceedings under case nr. 187713/2020 is adjudicated.

[7] The applicant, however, argued that the relief sought in this application is of an interim nature only. In fact, it was pointed out that this application was instituted on an urgent basis upon the applicant becoming aware that he was removed as director from the CIPC records which was in December 2021. Furthermore, in February 2022, the applicant learnt that Mr Sentle was holding shareholder meetings without his knowledge.

[8] The applicant did not dispute that the said action and application proceedings were instituted prior to this application and is currently pending, but argued that the respondent, despite being aware of the dispute between the parties and the said pending litigation, proceeded to take steps to remove the applicant as a director from TMNS.

[9] It may be that the parties and the subject matter are the same. However, the applicant submitted that the objective of these proceedings is to obtain an interim order pending the finalisation of the pending matters.

[10] In ***Caesarstone Sdol-Yam Ltd v The World of Marble and Granite 2000 CC and Others***[1] the Supreme Court of Appeal held:

> *"As its name indicates a plea of lis alibi pendens is based on the proposition that the dispute between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the same court in which the plea is raised. The policy underpinning is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation."*

[11] Hence, if a party successfully raises this defence, the later proceedings are postponed pending the outcome of the pending proceedings. This is to prevent a multiplication of actions on the same dispute.

[12] Previously in ***Socratous v Grindstone Investments 134 (Pty) Ltd***[2] the court commented:

> *"Courts are public institutions under severe pressure. The last thing already congested rolls require is further congestion by an unwarranted proliferation of litigation."*

[13] In this matter we have the same cause of action, the same parties, and the same facts together with further supplemented facts.

[14] The circumstances that led to the urgent application being instituted must be considered. The urgent interim application was instituted upon the applicant learning of his removal as director. These were new facts that emerged and which caused the applicant to seek interim relief.

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[1] 2013 (6) SA 499 SCA at par 2
[2] 2011 (6) SA 325 SCA

[15] The applicant explained that although action proceedings are pending which pertain to the applicant's directorship, he was entitled to approach the court for interim relief in the meantime. The final determination as to the status of his directorship would be resolved in the action proceedings.

[16] I am mindful that the plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. This court may interfere to stay one or other of the proceedings, since it is considered *prima facie* vexatious to bring two action applications in respect of the same subject matter.[3]

[17] The applicant is required to satisfy the court that justice, equity and the balance of convenience are in favour of this later proceeding. If the court is satisfied that there is justification, then it may exercise its judicial discretion to allow the later matter to proceed.[4] Simply put, the discretion involves consideration of fairness and convenience.

[18] Ultimately, this court has a discretion whether or not to stay the proceedings or to hear the matter depending on what is just and equitable.

[19] Having considered the facts before me, I am of the view that it is not only fair but the balance of convenience favours the applicant, that this application be heard and decided upon. More particularly, in my view, the further reasons include the fact that:

(i) the further conduct of the respondents post the institution of the previous action and application proceeding;

(ii) only interim relief is sought. Such relief would stay in place until a final decision is made on the applicant's directorship.

THE APPLICANT'S CASE

[3] Eksteen v Road Accident Fund 873/2019 [2021] ZASCA 48
[4] Keyter NO v Van der Meulen and Another 2014 D5 SA 215 (ECG) at par 12 + 20

[20] The applicant seeks to restrain the manner in which Mr Sentle has been conducting the affairs of TMNS. It was contended that the appointment of an independent director would assist in the *impasse* between the parties and ensure proper governance of the company in terms of the relevant legislative provisions. The appointment of an independent director will serve to protect the interests of all the relevant stakeholders and will be beneficial to the company.

[21] The applicant submitted that it met the requirements in terms of Section 163 of the Companies Act due to the oppressive and prejudicial conduct of Mr Sentle. It was pointed out that the business of the company was conducted in an oppressive and prejudicial manner and in that the interests of the applicant shareholder or director were disregarded.

[22] The nub of the dispute between the parties, centres on whether the applicant was lawfully removed as a director of the second respondent, TMNS Enterprises (Pty) Ltd ("TMNS"). As alluded to above, in December 2021 it came to the applicant's attention that he was unlawfully removed as a director from the records of the CIPC. [5]

[23] A further factor was that in February 2022, it was brought to his attention that the first respondent, Mr Sentle, held shareholder meetings and meeting of directors without including the applicant. It was evident that the rights of the applicant as a shareholder and director of the company was compromised by such conduct.

[24] In his papers, the applicant further explained that despite numerous attempts being made to engage with Mr Sentle, it was to no avail. In fact, Mr Sentle refused to consider mediation when such proposal was made by the applicant. This left to the applicant no option but to approach this court for interim relief.

ANALYSIS

[5] Annexure 'JK15'

[25] It is not in dispute that the applicant was removed as a director of TMNS; shareholder meetings and director meetings were held without the applicant's presence, and that the applicant and the first respondent were co-directors and shareholders of TMNS Enterprise (Pty) Ltd for the past 30 years since the incorporation of the entity.

[26] The discord between the parties came about during 2019 and 2020, when the first respondent challenged the applicant's shareholding and directorship on the basis that the applicant attained his shareholding and directorship in a fraudulent manner.[6] It was pointed out that Mr Sentle perceiving this to be true, held shareholder meetings where resolutions were taken. Such actions were not in the applicant's favour. The resolutions sought was firstly to remove the applicant as a director, secondly, to appoint the third respondent as director, thirdly, to remove the auditor and appoint a new auditor.[7]

[27] The events played out as follows. On 27 February 2019 a shareholder meeting was held where Mr Sentle sought to re-elect the third respondent, Mr Malebye as director as well as the appointment of the new auditor. The applicant objected to this appointment.

[28] The applicant approached court on an urgent basis to prevent the meeting from proceeding. The matter was unopposed and a court order was obtained.[8] It is necessary to consider the order. In this particular order, granted on 18 February 2020, Mr Sentle was interdicted and restrained from proceeding with a meeting on 19 February 2020 for the purposes of removing the applicant as a director in terms of Section 71 of the Companies Act. Furthermore, Mr Sentle's notice, dated 27 January 2020, calling for a Section 71 shareholders meeting was set aside. Such order was granted on 18 February 2020.

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[6] Founding affidavit 004-17
[7] Annexure RA5, 008-9-12 and founding affidavit 004-17
[8] Annexure JK7 and 005-17

[29] On 2 March 2020, Mr Sentle called again for the same meeting. Such meeting was held on 19 March 2020. The applicant once again objected thereto, on the basis of Mr Sentle's undesirous conduct. In order to protect his directorship, the applicant instituted action proceedings under case number 18113/20.

[30] Thereafter, on 20 July 2020, the first respondent and the applicant as directors of the company attended a directors' meeting to discuss the affairs of the company and resolve the ongoing disputes between the parties. It was contended that at this meeting, Mr Sentle, in fact, acknowledged the applicant as a director and shareholder. Same was recorded in the minutes of the meeting.[9]

[31] Of significance is the fact that in the said minutes it was recorded that the directors agreed that the current shareholding of the company was as follows, namely that:

(i) Abel Sentle has 100 shares;

(ii) Dr Jackie Mphafudi 120 shares[10];

(iii) late estate Tlhabane 80 shares;

(iv) late estate Mphafudi 80 shares.

[32] The applicant argued that the first respondent's conduct has been prejudicial which caused him to institute firstly, action proceedings under case nr. 18713/2020 on 12 March 2020 where he sought declaratory relief confirming his shareholding and directorship in the company; and secondly, an urgent application under case nr. 46175/2020 (urgent application) issued on 13 September 2021 where he sought interim interdictory relief, interdicting the third respondent (Mr Malebye) from representing the company and that the first and third respondents be interdicted from acting pursuant to

[9] Annexure JK8, page 005-19
[10] my emphasis

certain unlawful shareholder meetings.[11] The said action and application have not been finalised as yet and are pending.

[33] For the applicant to succeed, he is required to demonstrate that the respondents' conduct in removing him as director constituted oppressive behaviour as envisaged in Section 163of the Companies Act. ***Grancy Property Ltd v Manala and Others***[12]***,*** is the leading authority wherein the concept "oppressive conduct" was defined in the context of section 163 of the Act. It was stated:

> *"[22] To determine the meaning of the concept of 'oppressive' in s 163 it is apposite to refer to Aspek Pipe Co (Pty) Ltd v Mauerberger 1968 (1) SA 517 (C) which held (at 525H-526E):*
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> > *'I turn next to a consideration of what is meant by conduct which is "oppressive", as that word is used in sec. 111 bis or sec. 210 of the English Act. Many definitions of the word in the context of the section have been laid down in decisions both of our Courts and in England and Scotland and as I feel that a proper appreciation of what was intended by the Legislature in affording relief to shareholders who complain that the affairs of a company are being conducted in a manner "oppressive" to them is basic to the issue which presently lies for decision by me, it is necessary to attempt to extract from such definitions a formulation of such intention. "Oppressive" conduct has been defined as "unjust or harsh or tyrannical" . . . or "burdensome, harsh and wrongful" . . . or which "involves at least an element of lack of probity or fair dealing" . . . or "a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely" . . . It will be readily appreciated that these various definitions represent widely divergent concepts of "oppressive"*

[11] See JK9 and 10
[12] Grancy Property Ltd v Manala and Others 2015 (3) SA 313 (SCA).

conduct. Conduct which is "tyrannical" is obviously notionally completely different from conduct which is "a violation of the conditions of fair play".' (My emphasis)

[34] "Oppressive conduct" also means burdensome, harsh or wrongful, failure to adhere to the company affairs or to "fair play" on which every shareholder is entitled to rely. ***Marshall & Marshall (Pty) Ltd and Others (1954) 35A 571 (N) at 580.***

[35] A lack of probity means conduct that demonstrates lack of good faith and fair dealing, to the prejudice of some members. A more recent decision of the Supreme Court of Appeal – ***Geffen and Others v Dominquez-Martin and Others [2018] I ALL SA 21 (WCC) at par 23*** – upheld the ***Grancy Property*** approach but went on to set out the requirements that have to be met for a section 163 relief.

[36] Hence relief sought under section 163 cannot simply be based on vague and generalised allegations. It is necessary to establish:

(i) the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged;

(ii) such an act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to the applicants or to some members of the company;

(iii) the nature of the relief which must be granted to bring an end to the matters of which such is a complaint.

Ultimately, the applicant has to rely on clear evidence in order to invoke the provisions of Section 163 of the Act[13].

[13] Harilal v Rajman and Others 2017 (2) ALL SA 188 K2D at par 84

[37] I am mindful that this court is not required to resolve every factual dispute. In ***De Sousa***, the court identified that the core issue for determination is "whether there is a lack of probity and unfair dealing in the affairs of the company which has given rise to the breakdown in the confidence and trust among the shareholders; whether the majority voting power has been abused or unfairly used to the prejudice of the minority shareholders and whether the plaintiffs have been treated by the company in a manner that is unfairly prejudicial, unjust and inequitable.[14] (My emphasis)

[38] In these papers I have noted various correspondence where the first respondent was requested to resolve the dispute between the parties. In my view, the respondent failed to furnish a reasonable explanation that he was acting in the best interest of the entity and that this conduct was not prejudicial to the applicant. [15]

[39] I have further noted that prior to instituting this application, the applicant had in fact made the necessary enquiries pertaining to his removal as director.

[40] The applicant argued that it would be to the detriment of TMNS if he is precluded from participating in the business affairs of TMNS. Other irregularities pertaining to the TMNS were further pointed out, namely possible non-compliance with the TMNS's tax obligations pertaining to the registration for VAT. Such letter was written to the auditors requesting the necessary information.[16]

[41] Further evidence illustrating oppressive conduct on the part of Mr Sentle is that on 7 February 2022 the applicant's attorney received a letter from KWR Consortium (Pty) Ltd informing the auditors that the shareholding of the company had been considered. The applicant was not aware of these shareholders' meetings and proposed shareholders' resolutions since March 2020. It cannot be disputed that the first respondent's conduct in shareholders' meetings was without the applicant's knowledge.

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[14] De Sousa and Another v Technology Corporate Management (Property) Limited and Others 2017(5) SA 577 GJ par 67
[15] 005-47
[16] Annexure 'JK16'

[42] The contention that the applicant was lawfully removed as an executive director in terms of Section 71 of the Companies Act and that the third respondent was re-elected as director and nominated by the first respondent is a matter for final determination in the action proceedings.

[43] I have noted that from the confirmation by the auditors that the applicant is in fact the owner of 120 shares. This fact was not contested by the first respondent at the meeting held on 20 July 2020.[17] Furthermore, the minutes, in fact, record the applicant as a director.

[44] The first respondent, however, disputes the status and denied that the minutes was a true recordal of the decisions arrived at and disputed the status of the meeting, namely that:

(i) the minutes were not signed by him;

(ii) it was not a meeting of the board of directors; and

(iii) the purpose of the meeting was for the parties to resolve the dispute between the parties.[18]

[45] The respondent further relied on Section 66 of the Companies Act (71 of 2008) pertaining to the lawful removal of the applicant as director which, in essence, states that the Board has the authority to exercise its powers and manage the affairs of the company.

INTERIM RELIEF

- ***Prima facie* case**

[17] The minutes of a meeting reflects this
[18] 007-22

[46] In the said circumstances, the applicant is only required to establish that it has a *prima* facie right. This court is not required to determine the matter on the merits. In other words, whether his reinstatement is justified will be determined at the hearing of the action proceedings where he seeks relief pertaining to his directorship. I am satisfied that the applicant has made a sufficient case for interim relief. More particularly, relief in terms of Section 163, pending the outcome of the action proceedings.

[47] The applicant has established a *prima facie* right as he was a director and shareholder of TMNS until the removal of his directorship and the dispute raised regarding his shareholding.

- **Irreparable harm**

[48] Mr Sentle's actions firstly, by removing the applicant as a director despite a court order restraining him from doing so, portrays that his conduct was not *bona fide*. The applicant has, in his papers, demonstrated that Mr Sentle's conduct may not be in the best interest of TMNS and the shareholders. Currently the applicant has been excluded from all decision making and participation processes as director and shareholder since this is also placed in dispute. A further issue for consideration in the action proceedings is whether in fact the third respondent is lawfully appointed as a director. It was contended that he could not hold directorship since he is not a shareholder.

- **Balance of convenience**

[49] The granting of the interim relief sought would make provision for the transparent and fair management of TMNS and the finalisation of the pending proceedings. By reinstating the applicant and making provision for appointment of a further director until the finalisation of the pending proceedings would not prejudice TMNS, Mr Sentle and the other directors. Certainly, there could be no prejudice to Mr Sentle.

- **No other remedy**

[50] As alluded to above, the applicant had explained his difficulty in not only attempting to resolve the matter through mediation but making various attempts to address the issues between the parties but to no avail.

[51] In this regard Mr Erasmus's answering affidavit, filed on behalf of the ninth and tenth respondents further has relevance. Mr Erasmus confirmed that the 10 July 2020 meeting was, in fact, a board meeting called for by both directors, the applicant and the first respondent.[19] He further advises that as a rightful holder in the title of shares of the Leburu Trust, Mr Erasmus was never called to any shareholders' meetings during 2019 to 2022. This he argued would question the status of such meetings.[20] In conclusion, I am satisfied that the jurisdictional requirements for an interim interdict have been met.

[52] In the premises I make the following order:

Pending the final determination of the action instituted under case no 18713/20 the following order is made that:

1. An independent director be appointed to the board of the second respondent (in addition to the director/s in office), by the shareholders of the second respondent, failing which, the shareholders of the second respondent are to approach the institute of Directors South Africa to nominate a suitable independent director to be appointed to the board of the second respondent.

2. The respondents take all steps necessary in reinstating the applicant as a director.

3. The first and second respondent will provide the applicant with copies of any and all minutes of all formal, alternatively, official meetings held by the shareholders and the board of directors of the second respondent in the absence of the applicant for the period 20 March 2020 to date.

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[19] P010-6 of the record
[20] 010-7 of the record

4. The first and second respondent will provide the applicant with copies of any and all notices issued and submitted to CIPC and agreements entered into by the board of directors of the second respondent in the absence of the applicant for the period 20 March 2020 to date.

5. Forthwith, the applicant shall be provided with notice of any and all meeting of the shareholders of the second respondent as well as proper notice of any and all meetings of the directors of the second respondent.

6. The said steps set out in prayers 1 to 5 are to be complied with within 15 days of this court order.

7. The respondents are ordered to pay the costs of this application.

H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	Adv HM Vermaak
Instructed by:	Hartley and Joubert Inc.
Counsel for the first, second, third & fourth respondents:	Adv H Legoabe
Instructed by:	Molati Attorneys
Date heard:	28 July 2022
Date of Judgment:	26 August 2022