REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 6238/2021
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
Date: 27/06/2023

In the matter between:

EQUISTOCKS 8 (PTY) LTD	**APPLICANT**
And	
WILLEM JACOBUS SAAIMAN OOSTHUIZEN	**FIRST RESPONDENT**
KAREN OOSTHUIZEN	**SECOND RESPONDENT**
LADUMA BISCUITS (PTY) LTD	**THIRD RESPONDENT**
ALI IFTIKHAR T/A PAN AFRICAN FURNISHERS	**FOURTH RESPONDENT**
BANANAWORLD (PTY)LTD	**FIFTH RESPONDENT**

LUCAS VAN VUUREN T/A MFG **SIXTH RESPONDENT**

GERHARDUS MARTHINUS OOSTHUIZEN T/A DC MOTORS **SEVENTH RESPONDENT**

JUDGMENT: APPLICATION FOR LEAVE OF APPEAL

DIAMOND AJ:

[1] This court delivered judgment, on 27 March 2023 dismissing the application of the Applicant and ordering that the Deponent to the founding affidavit shall pay the costs of the Respondents.

[2] The Applicant filed an application for leave to appeal on 18 April 2023, and Hendrik Andre Coetzee, the deponent to the founding affidavit against whom the cost order was made, filed an application for leave to appeal on 19 April 2023.

[3] The application for leave to appeal of the Applicant states the three grounds for the application for leave to appeal: Firstly, the Applicant contend that the court erred in that the court failed to properly apply the test in motion proceedings, rephrased in ***National Director of Public Prosecutions v Zuma*** [1]; Secondly, the Applicant contend that the court erred in not applying the dictum as set out in ***Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*** [2] and repeated by the Supreme Court of Appeal in the second *Oudekraal* [3] judgement, in that the court held that the deponent to the founding affidavit was not a director of the First

[1] 2009 (2) SA 277 (SCA).
[2] 2004 (6) SA 222 (SCA).
[3] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA).

Respondent despite his name appearing in the Company and Intellectual Property Commission's ("CIPC") register of directors; and thirdly, that the court erred in holding that the Applicant had an alternative remedy, and that this application was simply an application intended to while the main application was "in limbo".

[4] As part of the second ground of appeal, viz that the court erred in failing to apply the dictum in the *Oudekraal* judgements, the Applicant submit that this court erred to find that the Application was not properly authorised, and the Applicant makes this contention since the Respondents did not file a challenge in terms of Rule 7 of the Uniform Rules of Court. I will deal with this particular ground for leave to appeal together with the application for leave to appeal by Hendrik Andre Coetzee.

[5] The first ground of the application for leave to appeal: the Applicant submits that this court found, without any evidence whatsoever, that the Trust of the deceased held the shares merely as security for the loan. I do not agree. This court referred extensively in paragraphs 47 - 53 of the judgement to the evidential basis for its conclusion. The Applicant further contend that the Respondents failed to apply for an order in terms of Section 161 of the Companies Act[4], to protect their securities. The Applicant do not explain how this neglect of the Respondents fits into the contention that the court erred in applying the principles in Zuma correctly. Be that as it may, and insofar as it may be relevant, the Respondents did institute proceedings in the content High Court to claim transfer of the disputed shares. That much is common cause between the parties. A further contention of the Applicant is that the court accepted that the Respondents had paid of the loans to the deceased. This ground for the application for leave to appeal is equally untenable. This court never made a finding that the loans were in fact paid off. What the court did find

[4] Companies Act, 2008 (Act 71 of 2008).

though, is that, should the version of the Respondents, which version includes the allegation that they did paid off the loans, be proven eventually in the court action pending in the North Gauteng High Court, then they would have made out a case for the transfer of the shares into their name. What the court did find further, was that the Respondents allege, with support by the auditor of the Applicant, that the loans were indeed paid off, while the Applicant did not, and was not in any position to dispute this version. Be that as it may, this is exactly the dispute pending in the North Gauteng High Court. The Applicant further contend that, to lend credibility to the version of the Respondents, the Respondents had to advance evidence how receipt of the monthly rental was eventually reflected in the books of the Applicant. This court fails to see why this piece of evidence is essential to sustain the version of the Respondents. The Applicant submit further that this court erred in considering the fact that the Deponent cannot have any knowledge with regard to the historical relationship between the parties. What is of importance, so they contend, is the Applicant's current entitlement to receive the rental income. I once again do not agree. It is the version of the Respondents, that given the historical relationship between the parties, that they have always been receiving the rental income of the buildings. It is consequently important to assess the historical relationship between the parties to come to a conclusion whether the Respondent's placed a credible version before the court.

[6] For the above reasons, I believe there is no reasonable possibility that another court will conclude other than the conclusion reached by this Court, on the above issues.

[7] In my view, the second ground for the application for leave to appeal is equally untenable. The argument of the Applicant is for as long as the deponent's name is reflected as a director in the information systems of CIPC, it's cannot simply

be ignored, at least until and unless the appearance of the name reviewed and is set aside. For this proposition the Applicant relies on the judgment of ***Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and others*** [5]. This judgement can in no way be applicable to the current situation. This judgement deals with the registration status of a company, and in terms of the Companies Act, it is the act of registration of CIPC that brings the legal personality of the company into being.[6] With regard to directorships, there is no provision that it is a prerequisite for a person that his or her name shall appear in the information systems of CIPC, before a person shall be a director endowed with all the applications of the director. There is a single stipulation[7], stipulating that a company shall file a notice within ten business day after a person <u>becomes</u> or ceases to be a director. What is required is simply the filing of the notice <u>after the fact.</u> The fact that the name of the person appears as a director, or does not appear as a director, in the information system of CIPC, is neither here nor there to establish whether a person is indeed a director of the company. If a person cannot indicate, that he/she became a director pursuant to the requirements of the Act, such a person cannot claim to be a director, despite the fact that his or her name appears on the CIPC system as being a director. For these reasons, there is, in my view, no possibility that another court will come to another conclusion.

[8] The third ground for the application for leave to appeal is, in my view, not sustainable. The Applicant states in this ground for application for leave of appeal that "The Respondents have failed to prosecute the action for almost a decade but in that time collected the rental income". This court found that the only evidence before this court (placed by the Respondents before the court) was that, the practice that the Respondents collected the rental income commenced from the inception of

---

[5] [2012] 3 All SA 183 (WCC).
[6] See Section 14(4).
[7] Section 70(1) of the Companies Act, 2008.

the registration of the First Respondent, that is as from October 1999, that is more than a decade before the action in the North Gauteng High Court was instituted. What this court found that the Applicant (Deponent), was unable to place even the slightest evidence before the court, to dispute this version of the Respondents.

[9] I now turn to the application for leave to appeal of Mr Hendrik Andre Coetzee ("Coetzee"). The Appellant also raised the same grounds for the application for leave to appeal and what follows below applies to both applications for leave to appeal.

[10] The applications for leave to appeal state that the grounds for the application are, in summary, twofold, firstly that this court erred in finding that the Deponent did not have the authority to institute proceedings on behalf of the Applicant and, secondly, against the cost order granted against the Deponent of the founding affidavit.

[11] The broad background of the first ground of appeal is that the Applicant filed an application, and the Respondent never challenged the attorney of the Applicant in terms of Rule 7 to prove its authority to bring the application and to act on behalf of the Applicant. Despite this failure of the Respondents, this court eventually found that the Deponent to the founding affidavit could not prove that he was authorised to bring the application on behalf of the Applicant.

[12] The first ground of appeal relates to paragraphs [77] - [142] of the judgment, and in particular the way in which the court applied the judgements of ***ESKOM v SOWETO CITY COUNCIL*** **("Eskom")**[8] **and** ***GANES AND ANOTHER v TELECOM***

[8] 1992 (2) SA 703 (W).

NAMIBIA LTD *("Ganes".)*[9]*.*

[13] This court held, in a nutshell, that Rule 7, interpreted in the light of *Eskom* and *Ganes* judgments means the following: That Rule 7 is clearly intended to apply to the authority of an attorney to act on behalf of a party; that should that authority not be challenged in the way prescribed in the rule, the attorney can continue act to act on behalf of the party; that it is up to the attorney to place evidential material before the court in support of the relief sought; that the evidential material before the court should be sufficient to support the relief prayed for, and that includes allegations that the company resolved to institute and prosecute proceedings; and that it is not sufficient for the Respondent to try to attack the authority of the deponent by mere textual criticism of the allegations in the affidavit, and not even when a deponent states in an affidavit by way of a bald statement that he is authorised to bring an application.

[14] What this court did find, however, was that where a Respondent attacks the authority of a deponent to bring an application, in his answering affidavit, and were the respondent does so in detail and places substantial evidence before the court, which points to the Applicant not having resolved to institute and prosecute the application, then an applicant still has the duty to reply to the attack of the respondent. If he fails to do so, and if it appears that, given that the totality of the evidence before the court that a company never resolved to institute and prosecute legal proceedings, then a court may, and should conclude that the institution of the proceedings was not authorised.

[15] It is this interpretation of the court, so it seems to me, which is the ground of the first application for leave to appeal.

---

[9] 2004 (3) SA 615 (SCA).

[16] This court is of the view that the above-mentioned interpretation and application of the *Eskom* and Ganes judgements *in casu* is correct. However, should this court have misconceived the implications of the *Eskom* and Ganes judgments, then an appeal against the judgement of the court would have a reasonable prospect of success.

[17] The second ground of appeal relates to the cost order granted against Coetzee since the court concluded that the Applicant did not resolve to institute the legal proceedings before this court.

[18] The Respondents gave an indication in the answering affidavit that they would, at the date of the hearing, apply that the cost order be given against the Deponent, since the institution of the proceedings was not authorised.

[19] The second ground of appeal states that this court erred in this regard and questions the sufficiency of the notice given to Coetzee in the answering affidavit.

[20] Both Coetzee and the Applicant indicate in their applications for leave to appeal that they understood the cost order to be an order to pay costs de *bonis propriis* against Coetzee.

[21] Nowhere in the judgment of the court did the court indicate that the cost order against Coetzee, is an order *de bonis propriis.*

[22] Cilliers[10] states the following:

[10] Cilliers, AC, 'Law of Costs, Chapter 10 Costs in Relation to Certain Types of Litigants, COSTS DEBONIS PROPRIIS.' (LexisNexis). In par 10.22.

"The principle of awarding costs de bonis propriis is applicable only where a *person acts or litigates in* a *representative capacity. (The converse situation, where* a *person purports to act in a representative capacity, or believes that he is doing* so, *but where this turns out not to be the case, may lead to cost orders that have similar practical results, even though they may not be costs orders de bonis propriis in the strict sense.)*

[23] **The author states further**[11] :

"Until recently, there was apparently no South African authority directly in point in respect of the liability of practitioners for the costs of proceedings brought on behalf of a non-existing client (such as a company which has been wound up) or brought without authority. In English law solicitors can be held liable for costs in such circumstances, the basis of the liability apparently being a warranty of authority. In Babury Ltd v London Industrial PLC, solicitors were ordered to pay costs where they had in good faith pursued an action on behalf of a company that had been dissolved. In this case it was accepted that a solicitor acting without authority is (generally) in breach of a warranty of authority, and on that account liable for costs incurred.

However, in the form of the decision in Motala and Others v Master of the High Court (North Gauteng) and Others, there is now local authority dealing with the issue. In that case the appellants (Applicant before the High Court) were liquidators of a company that had deliberately been dissolved yet continued with litigation notwithstanding this. They had applied for an order declaring the dissolution to have been void (with a view to continuing the

[11] 'Law of Costs, Chapter 15 Costs in Relation to Certain Types of Litigants, Par 15.28, Liability of practitioners for the costs of unauthorised proceedings (non-existing principal), and other comparable situations.'

aforesaid litigation, against certain of the respondents). Their appeal was dismissed with costs. As to costs, the court held as follows in paragraph 19: "On any footing the liquidators have been discharged from office as a result of the dissolution of the company. It follows that the costs order must lie against them personally and should be joint and several."

Although there can be no quarrel with this result, it is perhaps unfortunate that the court did not make clear what it regarded as the conceptual basis of the order, that is, precisely what is the basis for imposing personal liability for costs in such circumstances. Although one may of course look to the example of English law, discussed above, in search of a plausible rationale, the Supreme Court of Appeal's cryptic and straight-forward formulation of the matter in paragraph 19 of its judgment (quoted above) suggests the possibility that no doctrinal justification is needed for such an order except to say that the persons in question were responsible for the litigation and that in such cases there is by definition no available principal to whom the consequences of their actions could be attributed."[12]

[24] See also the following dictum in ***Interim Ward S19 Council v Premier Western Cape Province & others*** [13]:

"It is clear, in my view, that somebody has to be liable for the legal costs incurred by a respondent as a result of a failed application. I leave aside special circumstances which indicate a special costs order It cannot be so that an entity with no legal standing at common law can bring a person to court and then simply disappear like mist before the sun, leaving the respondent with the burden of paying the legal costs

[12] Emphasis added. The author referred to *Motala and others v Master of the High Court (North Gauteng) and others* (2014] 2 All SA 154 (SCA).

[13] [2003] JOL 11650 (C).

incurred in the process. The non-existence, in law, of the entity does not change the fact that there is a real person behind that entity, giving instructions to attorneys and signing the papers necessary to pursue the litigation. When the entity fails, that person must take responsibility.

The view I take of this matter is that fourth respondent is entitled to a costs order in its favour from the person or persons who instituted the main application… I do not consider it the duty of the court in this application to seek to go behind the identity of the person or persons who instituted and conducted the litigation in the name of applicant. Nor do I consider it necessary to investigate the circumstances that led to the institution of the main application in the name of applicant.

Whether or not the person or persons who instituted the main application did so in the bona fide belief that they were acting for a universitas personarum; whether they were actively misled or allowed themselves to be misled, is not in issue here. Those questions will only arise when the person or persons who are ordered to pay the costs seek to recover a share from others or seek to claim reimbursement from a party or parties who may be liable for misleading them.

Fourth respondent is entitled to look to the person or persons who are the immediate cause of the costs they incurred in defending themselves against the claims made in the main application. The person or persons liable are those who announced that he, she or they represent the applicant and are standing up to act on its behalf If such person is found to have been incorrect then that fact should not prejudice the innocent opponent. The representative who was prepared to act without adequate authority must stand in for his or her error." [14]

[14] My emphasis

[25] Even if the cost order against Coetzee is to be regarded as a cost order *de bonis propriis,* uncertainty still exists. In the case of ***Chithi and others In Re Luhlwini Mchunu Community v Hancock and Others*** [15] the Supreme Court of Appeal ruled that an order costs de *bonis propriis,* can only be made against a person once such a person at least has had the opportunity to address the court regarding such a possible costs order. The issue that was not clearly determined in that case, is what is the nature of the notice that should be given to a person, that he should make representations to the court regarding a possible costs order *de bonis propriis* against him. Hence, in a situation where a court decides that it contemplates granting such a court order, it is conceivable that a court will have to resort to some mechanism, such as a rule *nisi* with a return date, affording a person the opportunity to make representations to the court. If, however, on the other hand, one of the parties to the litigation indicates beforehand, in the answering affidavit, that it intends to apply for a cost order *de bonis propriis,* the question is whether such a notice would be sufficient enough to give the person that is exposed to the de *bonis propriis* order, notice that he/she has the opportunity to make representations to the court. In the case of **Hlumisa *Technologies (Pty) Ltd and another v Voigt NO and others*** [16] the court ruled that such a notice is sufficient.

[26] This court found explicitly that the proceedings *in casu* were unauthorised, and that being the case, a cost order was granted against the deponent to the founding affidavit, Coetzee, and there was no cost order de *bonis propriis.*

[27] If, however, this court misconceived the distinction between orders of costs *de bonis propriis* on the one hand and unauthorised proceedings on the other hand, or if

---

[15] [2021] JOL 51092 (SCA).
[16] [2020] JOL 49141 (ECG).

notice in the answering affidavit is insufficient notice of intention to argue a *de bonis propriis* costs order, then an appeal would have a reasonable prospect of success.

[28] Mr Wessels, appearing for Coetzee and Mr Kruger SC, appearing for the Applicant, both applied that leave to appeal shall be granted to the Supreme Court of Appeal, on the basis of the fact that there are compelling reasons that the Supreme Court of Appeal should rule clearly on the implications of a failure by a litigant to file a Rule 7 challenge and further to rule on the nature of a cost order that follows in the event of unauthorised proceedings and the requirement of the nature notice to persons exposed to *de bonis propriis* costs orders.

This court consequently makes the following order:

a. The Applicant is granted leave to the Supreme Court of Appeal against the order of this court delivered on 27 March 2023.

b. Mr HA Coetzee is granted leave to appeal to the Supreme Court of Appeal against the judgement and paragraph (b) of the order of 27 March 2023.

c. Costs is to be costs in the appeal.

G. J. DIAMOND
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON: **13 June 2023 [Virtually]**

JUDGMENT DELIVERED ON:	**27 June 2023** This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be **27 June 2023** at **16:15**
FOR THE APPLICANT:	Adv. H Wessels
INSTRUCTED BY:	Hurter Spies Incorporated c/o Clarrence Mangena Incorporated
FOR THE 1st - 3rd RESPONDENTS:	Mr. J Moolman
INSTRUCTED BY:	Pratt Luyt & De Lange
FOR THE 8th RESPONDENT:	Adv. TP Kryger SC
INSTRUCTED BY:	Cilliers & Associates Attorneys c/o Becker Attorneys