Republic of South Africa

In the High Court of South Africa
(Western Cape High Court, Cape Town)

In the matter between:

Case No: 17828/2010

Daniel Desmond St Dare	Applicant
Versus	
Warren Edwin Dean	First Respondent
Eliz McIntyre	Second Respondent
The Power of 2 CC	Third Respondent
Wiz Financial Health Consultants CC	Fourth Respondent
First National Bank	Fifth Respondent
Back Office Fund Solutions (Pty) Ltd	Sixth Respondent
Discovery Health Medical Scheme (Pty) Ltd	Seventh Respondent
Vitality Health Style (Pty) Ltd	Eight Respondent
Discovery Life Investment Services (Pty) Ltd	Ninth Respondent
Discovery Life Collective Investments (Pty) Ltd	Tenth Respondent
Discovery Life Ltd	Eleventh Respondent
TSA Administration (Pty) Ltd	Twelfth Respondent

Judgment delivered: 30 November 2010

LOUW J

[1] This is an application launched on 16 August 2010 as a matter of urgency for interim as well as final relief. The applicant placed the matter on the roll in the motion court on 8 September 2010. The first to fourth and sixth respondents oppose the application and filed opposing papers on 8 September 2010. Apart from dealing with the substance of the application,

they deny that the matter should be heard as one deserving preference on the role.

[2] The fifth and seventh to twelfth respondents do not oppose the relief sought and abide the decision of the court. I shall refer herein, unless the context otherwise indicates, to the first to fourth and sixth respondents, who oppose the application, individually or, as the respondents.

[3] The respondents contend that although the applicant had full knowledge of the facts underlying his cause of action by February 2010 and knew already in May 2010 that the respondents would not yield to his demands, he delayed bringing the application until August 2010. On 8 September 2010 the papers were already voluminous and the matter not being ripe for hearing, the court postponed the matter for hearing in the fourth division on 4 November 2010 and expressly recorded that it made no finding in regard to the urgency of the matter or whether the matter was deserving of any preference on the roll and the respondents' rights in this regard were reserved.

[4] The court further ordered the applicant to file his replying papers on 5 October 2010. The applicant filed his replying papers late, on 20 October 2010 and he now applies for condonation for the late filing of the papers. The application for condonation is opposed.

[5] There is a further preliminary issue. The respondents, who, as they are obliged to do, have 'pleaded over', apply for the striking out of certain passages from the launching and replying affidavits of the applicant as containing inadmissible hearsay.

[6] I return to these preliminary issues hereunder.

[7] Although the applicant's share-holding in the sixth respondent is in dispute, I will accept for purposes of deciding this application that the applicant is indeed a 50 percent shareholder of the sixth respondent. The remaining 50 percent of the shares is owned by the first respondent. The applicant and the first and second respondents are the only directors of the sixth respondent. The first and second respondents are the sole shareholders and directors of the third and fourth respondents.

[8] The applicant states that the application is brought to protect his rights as a shareholder and as a director of the sixth respondent and also to protect the rights of the sixth respondent itself, which rights he contends were and are being violated by his co-directors, the first and second respondents who have devised and is in the process of executing a plan to divest the applicant of all value in his shareholding and loan account in the sixth respondent by diverting the income generating business, assets and business opportunities of the sixth respondent to their company, the third respondent. This they did, it is contended, without consulting the applicant as their co-director. Their conduct, the applicant asserts, is contrary to the interest of the sixth

respondent and is in conflict with their fiduciary duty as directors of the sixth respondent. In order to protect these rights the applicant seeks both final as well as interim relief pending the outcome of the common law derivative action or the action in terms of Section 266 of the Companies Act, 61 of 1973, the applicant intends instituting on behalf of the sixth respondent.

[9] Apart from orders relating to urgency and costs the applicant seeks the following relief:

'2. Declaring that the Applicant remains a director of the Sixth Respondent and is authorised to represent the Sixth Respondent insofar as his capacity as director entitles him to do so;

3. That pending the outcome of the proposal legal action referred to in paragraph 173 & 174 of the founding affidavit annexed hereto, the First, Second, Third and Fourth Respondents be interdicted:

3.1. from competing with the Sixth Respondent for the sale of (a) pension fund consulting services, (b) medical aid consulting services, and (c) life insurance and investment products to any person who was a client of the Sixth Respondent over the period between June 2003 to date;

3.2. inducing the Sixth Respondent's service providers or clients to alter or terminate any contractual arrangements with the Sixth Respondent;

3.3. Concluding any contract for the sale of the aforesaid products or consulting services for the marketing or sale of any of the aforesaid products or consulting services for or on behalf of persons, juristic or otherwise, who were service providers to the Six Respondent over the period from June 2003 to date;

3.4. Inducing any person who has currently mandated the Sixth Respondent to act as its financial service provider, to alter or terminate any such mandate with the Sixth Respondent or to conclude a similar mandate with the Third or Fourth Respondents;

3.5. Misappropriating the funds of the Sixth Respondent whether by withdrawing funds from the Sixth Respondent's accounts and paying them over to any other person or by inducing persons, juristic and otherwise, from whom funds are due to the Sixth Respondent, to pay such funds over to any other person.

3.6. In any other way soliciting or interfering with the business and trade connections of the Sixth Respondent.

4. That the First and Second Respondents be interdicted from taking any steps to exclude the Applicant from access to, control over or involvement in the management of the Sixth Respondent;

5. That the Fifth Respondent shall forthwith freeze or place a hold on the Sixth Respondent's banking accounts (including internet banking, debit and credit cards) and shall not pay out any

amount from such accounts save on written instruction signed by the Applicant and the First and Second Respondents;

6. The Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Respondents shall render an account to the Sixth Respondent and to the Applicant, of all amounts paid by them or on their behalf to the First, Second, Third and/or Fourth Respondents since 1 February 2009;

7. That there shall be debatement of the accounts referred to in the previous paragraph and that upon the conclusion of such a debatement the Seventh, Eight, Ninth, Tenth, Eleventh and Twelfth Respondents shall pay to the Sixth Respondent such amounts as may be found due to it upon such debatement;

8. That the legal action referred to in paragraph 173 & 174 of the founding affidavit shall be instituted within 20 court days of the date of this order.

9. In the event that any of the relief set out above is opposed, that determination of such aspect of relief be postponed for hearing on a date to be determined by this Honourable Court with such provision for the filing of papers and the further conduct of the matter as the Court may deem fit.'

[10] It is common cause that up to 2005 the sixth respondent's business consisted of three components:

1. the business related to the EFACTS computer software, which is described as 'a web based compliance tool' which the applicant and the first respondent had developed;
2. the business related to the ENTERCAL computer software, which is described as 'a medical aid online advice tool', and
3. the commission generating consultancy business.

[11] The second respondent joined the business as a secretarial and administrative assistant in 2003 and became a director of the sixth respondent in 2004.

[12] In 2003 the sixth respondent lost a major software client and by 2005, the sixth respondent found itself in financial difficulties. It was not trading at a profit and was probably insolvent.

[13] At the time, the sixth respondent had recently registered with the Financial Services Board (the FSB) as a Financial Service Provider (FSP) and the first and second respondents were appointed as the only accredited consultants associated with the sixth respondent. In addition, the second respondent was the designated compliance officer of the sixth respondent.

[14] The principal factual dispute in this matter is whether the applicant and the first respondent concluded an agreement during the course of two meetings they held on 13 and 28 October 2005 to discuss the future conduct of the business of the sixth respondent. According to the applicant they

agreed that save for a responsibility and interest in Efacts, the applicant would no longer be actively involved in the affairs of the sixth respondent and that the first and second respondents would be free to develop and grow their own consultancy business. The applicant would have no interest in and would not share in the income derived from such business. The applicant disputes that such an agreement was concluded.

[15] According to the first respondent, he and the second respondent did not have the money to form a new company or to obtain a separate FSP licence to carry on their consultancy business. Therefore, as a matter of convenience and with the full knowledge of the applicant, they 'housed' their business in the sixth respondent.

[16] According to the first respondent, by 2007, their consultancy business had generated sufficient income for them to repay all of the sixth respondent's debt. The second respondent then sought to acquire a shareholding in the sixth respondent because 'she wanted shares in the business that she was helping to build up'. Meetings were held towards the end of 2007 and e-mails annexed as 'D8' to the applicant's papers, were exchanged between the three directors of the sixth respondent. Both the applicant and the first and second respondents aver that the e-mails support their respective contentions that an agreement was (according to the respondents) and was not (according to the applicant) concluded. The contents of the e-mails are in my view not conclusive in regard to the question whether an agreement was concluded in October 2005. However, it is clear in my view that the applicant's main

interest in the sixth respondent was that his loan account be repaid and that for this reason, he wished to retain a share in the sixth respondent to serve 'as collateral security' for the money he had invested in the sixth respondent prior to 2005. The e-mails also record the first respondent's assertion that at the meeting of 13 October 2005, the applicant had been 'most emphatic' that he did not wish to get involved in 'the consulting side of the business' and the first respondent's view that the income derived from consulting 'was effectively being ring fenced' and held apart from Efacts and Entercall.

[17] Because of a dispute between the applicant and the first respondent in regard to the extent and the terms of the applicant's loan account, the second respondent decided not to take up a share in the sixth respondent. In March 2008 the second respondent made a further attempt to acquire shares in the sixth respondent by offering to buy out all the applicant's shares. This offer was not accepted by the applicant.

[18] It is not necessary for the purposes of deciding this application to make a finding whether an agreement was concluded and, if so, what the terms of that agreement was. It is clear that after October 2005, the applicant played at best, a very insignificant role in the business affairs of the sixth respondent. His principal interest in his shareholding was the repayment of his loan account.

[19] I commence with the interim interdictory relief sought in par 3 of the notice of motion. The requirements for an interim interdict are:

1. a prima facie right;
2. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
3. that the balance of convenience favours the granting of an interim interdict; and
4. that the applicant has no other satisfactory remedy.

[20] The applicant's case for interim relief is premised on the contention that he will in due course institute an action for damages or monetary compensation in the form of

> 'either a derivative action to reclaim monies diverted to other entities and persons and possibly also damages on behalf of the sixth respondent or steps in terms of section 266 of the Companies Act . . . to reclaim the monies illegally diverted and damages suffered as a result of the unlawful conduct of the first and second respondents'.

[21] Save for the relief sought in par 3.5, the applicant in effect seeks to interdict the first to fourth respondents on an interim basis from competing with the sixth respondent in regard to the consulting business. This relief is premised thereon that the sixth respondent will in future carry on a consultancy business.

[22] It is common cause, however, that save for the question whether the sixth respondent was still receiving some income from business conducted in the past, the sixth respondent is not presently carrying on a consultancy business. Its registration as an FSP has been suspended by the FSB and the applicant has withdrawn as its compliance officer. In addition, the sixth respondent's members will reach a deadlock at a meeting of members and if a meeting of directors should be held, the applicant will be outvoted. There is therefore no prospect that the sixth respondent will, under its present regime carry on a consultancy business.

[23] All the clients mentioned by the applicant in the launching papers have on the applicant's own version by September 2009 already stopped making commission payments to the sixth respondent or were by February 2010 no longer using the sixth respondent as a broker. An interim interdict to stop the first, second and third respondents from carrying on a business on the basis that it competes with the sixth respondent, will consequently not protect the interest of the sixth respondent in the interim.

[24] An interim interdict will, on the other hand, cause serious and significant prejudice to the respondents. The first and second respondents have built up a consultancy business and, if they are stopped, it will result in serious financial consequences for them. In contrast, the sixth respondent itself does not and cannot trade, as a consultant. While the business will be lost to the respondents, such business will not, and in fact cannot, go to the sixth respondent. Such business will probably go to a third party. An interim

interdict will therefore also compromise the sixth respondent's claim under the proposed derivative action. The balance of convenience does not favour the applicant.

[25] It follows that whatever claim the applicant may ultimately have for damages or monetary compensation, he has, in my view not made out a case for an interim interdict in terms of par 3 of the notice of motion.

[26] In paragraph 3.5 the applicant seeks to interdict the first to fourth respondents from misappropriating or withdrawing the sixth respondent's funds from its bank accounts or from inducing persons or entities from paying over to them funds due to the sixth respondent. This relief relates to monies derived from the consultancy business which had, in the past been paid into the sixth respondent's bank account and to the stream of income that the applicant asserts is still being paid into the sixth respondent's bank accounts. The respondents deny that there are such funds under threat from their conduct.

[27] The case put up by the applicant in this regard is the following.

1. It is common cause that as at 14 May 2010 an income stream derived from the consultancy business is being paid into the sixth respondent's FNB bank account and that the respondents had in the past and as at 14 May 2010 withdrawn such monies from the account. It is not clear on the papers that there is an ongoing threat

that monies will be diverted from the sixth respondent's bank account by the respondents.

2. In an e-mail dated 10 April 2010, Discovery Holdings Limited stated that it would draw a distinction between business conducted by the sixth respondent with Discovery before 1 February 2009 and business done thereafter. The income derived from the former would be reversed and allocated to the sixth respondent and the income derived from the latter would be allocated to the third respondent. The applicant states, however, that despite this 'ruling' by Discovery, it had not been put into effect as far as the pre- 1 February 2009 income is concerned and that Discovery has not effected the transfer of the income derived from the pre- 1 February 2009 business to the applicant. In the respondents' answering papers it is alleged that the adjustment was made by Discovery. The position with regard to these payments from Discovery are at best for the applicant, uncertain. An interim interdict cannot, in my view, be made in these proceedings on such basis as a precursor to the applicant's claim for damages or monetary compensation.

3. The twelfth respondent (TSA) stopped paying commission into the sixth respondent's bank account after July 2009. It is clear from the hearsay evidence alluded to by the applicant in this regard that at least by June 2010, TSA had appointed the third respondent as their broker/financial advisor. There is therefore no basis on which

an interim interdict, pending the applicant's claims for damages or monetary compensation can be made. The past income has already been paid to the respondents and in respect of the future, TSA has given a mandate to the third respondent. As indicated earlier, there is no prospect that the sixth respondent will under its present regime carry on a consultancy business. There can therefore be no competition between the sixth respondent and the third respondent and consequently, the applicant is not entitled to an interdict relating to the income derived from the exercise of the mandate given by TSA to the third respondent.

[28] In paragraph 2 of the notice of motion an order is sought declaring the applicant to be a director of the sixth respondent and declaring that he is authorised to represent the sixth respondent 'insofar as his capacity as director entitles him to do so.'

[29] It is common cause that the applicant has remained a director of the sixth respondent. This has never been in issue. The applicant has by operation of law the rights, duties and obligations of a director. The order sought will not add to this and will consequently be meaningless and have no exigible content.

[30] The order sought in paragraph 4 of the notice of motion seeks to interdict the first and second respondents 'from taking any steps to exclude the applicant from access to, control over or involvement in the management

of the sixth respondent.' The applicant is a director of the sixth respondent and is entitled to exercise the powers, duties and responsibilities of that position. However, it is the directors acting as a body who are vested, save to the extent that it has been delegated, with the management and control of the company. Henochsberg on the Companies Act, vol 2 Issue 28 at p 1031 states:

> 'The powers conferred by the articles on the directors are conferred upon them collectively to be exercised (unless the articles provide otherwise) in accordance with the will of the majority of them (see further the notes on art 75). The case of the sole director of a private company apart (see further *infra*), an individual ordinary director, as such, has no authority to act for the company for any purpose unless he is authorised expressly, impliedly or ostensibly to do so (*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 216 – 218, in which it was held also that a delegation by the directors of any of their powers to one or more of their number may ensue not only formally by way of a board resolution, but also informally by the directors acquiescing in a course of dealing, which might be inferred from the circumstances of a particular case.'

[31] It is clear from the papers that since 2006, the first and second respondents have been managing the affairs of the sixth respondent. This could only have been with the consent or acquiescence of all three its directors. The applicant described himself in a recent letter (9 June 2010) to

the FSB as 'currently a non-executive director' of the sixth respondent. As a director, the applicant is entitled to call for a meeting of the directors of the sixth respondent. The court cannot make an order giving him the rights of management and control which the board of directors may or may not delegate to him. The applicant is in the minority on the board of directors and on the facts of this case, he will be outvoted in regard to the management and control over the affairs of the sixth respondent. The same goes for the relief sought in paragraph 5 of the notice of motion, namely an order that the sixth respondent's bank account be frozen and that no amount be paid from such account save on written instructions signed by all three the directors, i.e., the applicant and first and second respondents. This court cannot interfere with the affairs of the sixth respondent by in effect giving the applicant as one of three directors, a veto right in regard to the conduct of the sixth respondent's bank account.

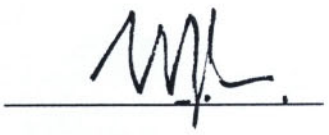
[32] The relief sought in paragraphs 6 and 7 is for an order that the seventh to twelfth respondents render accounts to the sixth respondent and to the applicant and thereafter for the debatement of such accounts and the payment of monies to the sixth respondent. Not surprisingly, Mr. Bremridge on behalf of the applicant did not pursue this relief with any enthusiasm. It is in effect, an attempt to obtain discovery of documents from parties who are not directly involved in the dispute between the applicant and the opposing respondents. It does not follow from the fact that the respondents in question are not opposing the relief and that they abide the decision of the court, that the relief should be granted against them. No basis has been advanced as to

why these orders can and should be made in proceedings on notice of motion in which the said respondents are parties. Once the proposed action is instituted by the applicant, the documents may be obtained from these parties by subpoenas duces tecum.

[33] The applicant is in my view therefore not entitled to the relief sought. In the light of this conclusion, it is not necessary to deal with the preliminary issues referred to earlier.

[34] The following order is consequently made:

1. The application is dismissed; and
2. The applicant is ordered to pay the costs, including the costs occasioned by the various preliminary issues.



W.J. LOUW

Judge of the High Court