The name of this matter has been anonymised to maintain confidentiality.

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 9138/2019

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 21 June 2019
Judgment: 24 June 2019

In the matter between:

XXX CC Applicant

and

PHN Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicant close corporation is a distributor of certain makes of condom to a high street retailer. The respondent is a member of the close corporation, who is currently engaged in what appear to be acrimonious and hotly contested arbitration proceedings with one of his fellow members in respect of the enforceability of a buy-out agreement formalising his exit from the corporation. Pending the determination of those proceedings, the respondent retains his registered proprietary interest in the applicant, but he is no longer involved practically in the conduct of its business.

[2] In the matter before me, on the extended return day of a rule *nisi* granted on 29 May 2019 in *ex parte* proceedings before Bozalek J, the applicant seeks to have made final an interdict operating against the respondent under the rule that prohibits him, or any person acting on his instructions, from –

1. disclosing confidential information regarding the applicant to the high street retailer to which the applicant supplies condoms;
2. providing the said retailer with any of the following:
    2.1 the applicant's bank statements,
    2.2 the applicant's bank statements,
    2.3 the applicant's management accounts,
    2.4 the applicant's supplier invoices,
    2.5 the applicant's supplier agreements,
    2.6 details relating to the pending arbitration, and
    2.7 any documentation obtained by the respondent through the discovery process in the arbitration proceedings;
3. joining the high street retailer as a party to the proceedings without the prior leave of the court
4. directly or indirectly drawing the attention of the high street retailer to the existence of the current application.

[3] It is necessary to give some background to the dispute between the members of the applicant that has given rise to the unresolved dispute between them that led to the pending arbitration proceedings.

[4] The respondent was previously the chief executive officer and chief financial officer of the applicant. There are two other members of the corporation, only one of whom also played an executive role in the conduct of its business. The other active member of the corporation was the deponent to the applicant's principal founding affidavit in the current proceedings.

[5] During 2018 the respondent was placed on suspension from his executive positions in the applicant's business because it was alleged that he had made an unauthorised withdrawal of funds from his loan account. One of the terms of his suspension was that he was forbidden during the period of suspension from having contact with the applicant's customers. In breach of that condition, he reportedly made contact with the relevant buyer in the employ of the high street retailer that was the applicant's major customer, and also with the overseas supplier of the condoms distributed locally by the applicant. Consequent on the findings in a disciplinary enquiry into the aforementioned breach of his terms of suspension, the respondent was dismissed from his employment with the applicant.

[6] The respondent thereupon instituted proceedings for the liquidation of the applicant on the grounds of deadlock with his fellow members. Those proceedings were adjudged by the fellow members to be critically prejudicial to the survival of the applicant's business by reason of a clause in its contract with the high street retailer entitling the latter to terminate the agreement with immediate effect should the applicant be provisionally or finally wound up. The respondent's fellow members who currently continue to manage the applicant's business aver that they felt constrained in the circumstances to conclude a buy-out agreement with the respondent to avert any possibility of a winding-up order. In the result an agreement was concluded in terms of which the deponent to the applicant's principal founding affidavit in the current proceedings undertook to purchase the respondent's member's interest for the sum of R5,5 million.

[7] Payment of the agreed purchase price was thereafter withheld however when it was discovered in an investigation into the applicant's financial affairs by an independent auditing firm that the respondent appeared to have misled the other members as to 'the extent of his loan account as well as the extent of the applicant's liability to SARS'. The respondent referred the dispute concerning those allegations to arbitration in terms of the sale of member's interest agreement. The respondent's claim in those proceedings has been defended and also met with a larger counterclaim. It is common ground that

the conduct of the arbitration proceedings will necessitate the disclosure, within that forum, of a considerable amount of the applicant's confidential information. For reasons that it not necessary to detail for present purposes, the arbitration proceedings have not proceeded smoothly. I have gained the impression that the acrimony between the contesting sides has in large part contributed to the difficulties.

[8] Against that background, the matter that gave rise to the application brought *ex parte* as a matter of urgency before Bozalek J for immediate interdictory relief was the intimation to one of the applicant's members by an employee of the high street retailer ('Mr J') that he had been contacted by the respondent and told that the latter considered that he (the employee) might 'be implicated in wrongdoing in relation to payments made by the applicant as reflected in the applicant's bank statements'. Mr J reported that the respondent had suggested that he should accompany the respondent to a meeting with the head of the high street retailer's legal department 'in order to make a full disclosure relating to these payments'.

[9] Mr J claims to have no knowledge of any irregular payments, but reported the approach by the respondent to the applicant's current chief executive because he was unsettled by the allegations and concerned that they could negatively affect his employment by the high street retailer. Mr J was aware of payments that had been made into his banking account by the applicant periodically over a period of some years, but those were in respect of amounts due to his wife, who had been engaged by the applicant as a self-employed sales reporter and merchandiser

[10] The applicant avers that Mr J had been an employee of the high street retailer at the time it had commenced negotiating its business relationship with the retailer, but that he had not been in a position to have any influence whatsoever on the contract that had been entered into between the applicant and the high street retailer in 2012. It also pointed out that during the period 2011-2014, Mr J had broken his employment with the retailer to pursue his own interests, starting up a merchandising business with his wife. On becoming re-employed by the retailer, Mr J again occupied a post that did not

place him in any position to influence the established business relationship between the applicant and the retailer.

[11] The respondent in his answering affidavit, however, whilst admitting that Mr J was not in the employ of the high street retailer when the contract was concluded between the applicant and the retailer, maintained that Mr J had been involved in the applicant's initial approaches to the retailer, and that after the conclusion of the contract he had approached the respondent and one of the other members of the applicant to suggest that the applicant should use the services of his wife's business and pay her a one per cent commission on the applicant's turnover on the contract 'in return for [Mr J's] pivotal role in securing the contract'. He said that he and the deponent to the applicant's principal founding affidavit 'felt compelled to accommodate [Mr J] as he was the reason the applicant had secured the business of [the high street retailer] even though the applicant had no need to engage the services of his wife'. The respondent's evidence does not, however, explain how or why [Mr J's] role was pivotal to the contractual engagement between the applicant and the high street retailer; it does not identify any impropriety attending or influencing the conclusion of the contract; and it therefore leaves one mystified as to quite why precisely he should have felt compelled to agree to the applicant acceding to [Mr J's] alleged extortion of a 'gratification' within the meaning of that word in the Prevention and Combatting of Corrupt Activities Act 12 of 2004.

[12] It was averred on the applicant's behalf that the respondent's approach to Mr J was perceived as an obvious attempt by the respondent to stir up trouble between the applicant and its major customer. The deponent to the principal founding affidavit said that the applicant's members were aware that the respondent had started a new business under the name Halo Healthcare to conduct business in competition with the applicant. His reported conduct was seen as a form of unlawful competition.

[13] The applicant therefore instructed its attorneys to address the attorneys then representing the respondent in the pending arbitration proceedings to

demand that the respondent (who, it will be recalled, is still a member of the applicant close corporation) refrain from –

1. contacting the high street retailer or any of its representatives;
2. making defamatory statements regarding the applicant;
3. conducting himself in a manner that tarnishes the applicant's good name; and
4. attempting to solicit business from the applicant's customers.

A written demand to that effect was addressed by the applicant's attorneys to the respondent's attorneys on 24 May 2019.

[14] The response, dated 26 May 2019, by the respondent's then attorneys to the applicant's demand contained the following statements:

> Our instructions are that our client did meet with an employee at [the retailer], [Mr J] … to advise him as a courtesy that the dispute regarding [the applicant] ("the close corporation") is subject to arbitration, that the presentation of evidence will commence shortly and that the financial statements of the close corporation submitted by your client are materially in dispute in the arbitration, the source documents on which they have been compiled will be interrogated at length in that process.
>
> …
>
> Our client further advised [Mr J] that the bank records of the close corporation reflect numerous payments made to [Mr J], which do not appear to have been accounted for in the financial statements submitted by your client, whether properly or at all, and that accordingly our client has been advised to make full disclosure to [the high street retailer] regarding the background and nature of these payments.
>
> …
>
> As it appears that our client's approach to [Mr J] has been misconstrued by your client and/or [Mr J] for ulterior reasons, we have now advised our client to propose a meeting between members of the

> close corporation …with …the head of legal and Company Secretary of [the high street retailer] and that they jointly make a full disclosure of the nature of the relationship between the close corporation and [Mr J] with reference to the payments reflected in its bank statements as that would best provide for a transparent disclosure of all matters relating to that relationship consistent with the requirements of good corporate governance.
>
> …
>
> We further place on record that in the event that your client does not respond positively to our client's proposal by or before 16h00 on Monday, 27 May 2019, our client will arrange a meeting with Mr [X] at [the high street retailer] without further notice to and/or participation by the remaining members of the corporation or [Mr J].
>
> …
>
> We also place on record that in the event that your client nevertheless proceeds with an urgent application against your client, but fails to cite [the high street retailer] in those proceedings, our client will join [the high street retailer] as it has a material interest in the matters that will be addressed by our Client in responding to that litigation.

The letter did not allege that the respondent and the deponent to the applicant's principal founding affidavit had agreed to pay Mr J a gratification and that the payments in respect of services ostensibly rendered by Mrs J's merchandising business were used as a disguise for any gratification paid to Mr J.

[15] The applicant alleges that the respondent's aforementioned conduct infringes or prejudices its right –

1. not to be defamed;
2. not to have its confidential information disclosed to its clients or any third party;
3. to carry on its business without undue [?unlawful] interference;

4. not to have its business relationships unjustly interfered with
5. not to have the information contained in the confidential arbitration disclosed;
6. not to have documentation produced during confidential discovery processes disclosed
7. to the respect by the respondent of his fiduciary duties to the applicant; and
8. not to be subjected to undue influence to enter into agreements.

The essence of the applicant's complaint is that the respondent's conduct is directed at unlawfully prejudicing its business and seeking to place it under pressure in an extortionate manner to compromise its (actually one of its member's) position in the pending arbitration. It fears that even a whiff of scandal might prompt the high street retailer, which is a listed company, to terminate its business relationship with the applicant

[16] The respondent alleges that the payments into Mr J's account, of which, on his own version, he was aware and party to from the outset, were a matter that came up with his advisors in the context of the preparation of his case in the pending arbitration. He says that he was advised by his then legal representatives (the authors of the letter quoted from in paragraph [14] above] to make a full disclosure of them to the high street retailer. He averred that that his understanding of the reasons for his duty to make this disclosure was –

1. that his and his fellow member's conduct in that connection would be exposed in the arbitration process and he was advised that 'it would be prudent to make a full disclosure of the nature of the relationship to [the high street retailer] in anticipation of it coming under scrutiny at the arbitration;
2. his erstwhile attorneys had been placed in a conflict of interest situation by the disclosure of the unlawful payments as [the high street retailer] is a client of theirs. He had been informed that unless he was prepared to make a full disclosure to [the high

street retailer] the attorneys would not be able to act for him in the arbitration; and

3. 'any prospect of the applicant continuing its relationship with [the high street retailer] would require the unsolicited and unconditional disclosure to [the high street retailer] of the nature of the relationship with [Mr J]. The applicant would then be in [the high street retailer's] hands as to whether it wished to continue with the contract. [His fellow member and he] would then have been afforded the opportunity to persuade [the high street retailer] not to terminate the contract and thereby protect [their] member's interest in the applicant'.

[17] The respondent said that he had been advised to give Mr J prior notice about his intention to make the disclosure; this 'as a matter of courtesy'. He had done so on 21 May 2019. The respondent notably did not offer any explanation, however, why he had not approached his co-member to join him in making the disclosure until after the applicant's abovementioned demand through its attorneys, dated 24 May 2019, that he refrain from prejudicing its commercial relationship with the high street retailer.

[18] The respondent's claim to have wanted to make the disclosure motivated by a concern to facilitate the protection of the applicant's relationship with the high street retailer in order '*to protect his member's interest in the applicant*' is singularly unconvincing. The value of the respondent's interest was by that stage represented in the R5,5 million purchase price stipulated in the agreement with his co-member that is the subject matter of the arbitration proceedings. On the face of it, his entitlement to that amount falls to be determined irrespective of the fate of the continuing business relationship between the applicant and the high street retailer.

[19] When I pressed the respondent's counsel during argument as to the legal basis for the respondent's professed pressing duty to make a disclosure to the high street retailer in respect of matter that was not only generally in dispute, but apparently contentious in pending arbitration proceedings - and especially at this stage, rather than after the arbitrator had pronounced on it -

counsel mentioned s 34 of the Prevention and Combatting of Corrupt Activities Act. The respondent, however, did not refer to the Act in his answering affidavit at all. That the Act *might* be applicable was only hinted at obliquely by way of the reference to the payments made into [Mr J's] banking account as 'unlawful' and the suggestion that in some or other unspecified way the contractual relationship between the applicant and the high street retailer was associated with, or the product of, corruption to which Mr J, the respondent and his active co-member in the applicant had been party.

[20] The Act creates a number of offences that might, depending on the facts, be implicated in the current matter were the respondent's vague allegations of impropriety to be fleshed out and substantiated. There is the 'general offence of corruption' defined in s 3 of the Act, the 'offences of receiving or offering of unauthorised gratification by or to party to an employment relationship' defined in s 10 and the 'offences in respect of corrupt activities relating to contracts' in s 12. Section 34 is a provision that imposes a duty on persons in authority (which, in terms of the definition in subsection (4), would include the respondent in the current case) who know or ought reasonably to have known or suspected that *any other person* has committed any of the aforementioned offences involving an amount of R100 000 or more to report such knowledge or suspicion, or cause such knowledge or suspicion to be reported, to the police official in the Directorate for Priority Crime Investigation referred to in section 17C of the South African Police Service Act, 1995.

[21] The respondent has given no indication of any intention of making a report in terms of s 34, as one might have expected him to do were his professed concern about the unlawfulness of the payments to [Mr J] genuine and the need to tell the high street retailer about them bona fide. There is in any event nothing in the interdict, nor could there competently be, that prohibits the respondent from complying with s 34 if he does indeed know or suspect that any of the offences under the Act have been committed.

[22] On the other hand, if the respondent were to mala fide report allegations of corrupt activity, unfounded as he might actually know them to

be, to the listed entity with which the applicant does considerable business, that could very conceivably be extremely prejudicial to the applicant. The high street retailer might well feel bound in the context of receiving such a report itself to make a report in terms of 34 of the Act, and to leave it to the relevant authorities to undertake whatever investigations they might deem meet. The high street retailer might in such circumstances understandably have a measure of discomfort of remaining in a business relationship with a close corporation that was subject of a relevant report in terms of s 34, at least until after the relevant authorities had determined there was no substance in the allegations.

[23] I cannot accept that in the context of the content of their response to the applicant's demand of 24 May 2019, the respondent's attorneys would not have advised him of the provisions of s 34 of Prevention and Combatting of Corrupt Activities Act and that, if he were bona fide, he would not have been concerned rather with reporting his knowledge or suspicions to the relevant authority rather than to the high street retailer. In the context of the surrounding circumstances described above the evidence points very much towards the respondent's conduct in making it known that he was intent in making a prejudicial report to the applicant's major customer being part of an improper strategy in the resolution of the pending dispute arising from his co-member's repudiation of the buy-out agreement.

[24] The impression that the respondent has been, and, but for the interdict, may well have continued to act in bad faith in this connection is reinforced by the fact that when legal proceedings were threatened by the applicant, he responded by indicating that he would join the high street retailer to them. That threat was unambiguously issued in the face of an appreciation by him that the joinder of the retailer would, by itself, defeat the effectiveness of the interdictory remedy that the applicant had indicated that it might be forced to seek. It was redolent of malice.

[25] In all the circumstances I have been satisfied that the rule should be confirmed, and the interdict against the respondent made final. Nothing in the confirmation of the rule will prevent him from applying for the discharge of the

interdict after the completion of the arbitration should he in the circumstances then prevailing still feel a need, and be able to make out a case for being permitted, to make a report to the high street retailer at that stage.

[26] The respondent's counsel argued, however, that, irrespective of its merit, the application should be dismissed because in bringing the application on an *ex parte* basis, the applicant, in breach of its duty of utmost good faith to disclose any evidence that *might* – not necessarily *would* - have persuaded the court not to grant the relief without first hearing the respondent, had failed to attach to its founding papers a copy of the respondent's attorneys' aforementioned letter of 26 May 2019, from which, as apparent from paragraph [14] above, selected passages were quoted in the principal founding affidavit. Counsel relied heavily in this connection on the well-known jurisprudence, notably *Schlesinger v Schlesinger* 1979 (4) SA 342 (W), in which Le Roux J highlighted that established authority holds that:

> '(1) in *ex parte* applications all material facts must be disclosed which *might* influence a court in coming to a decision;
> (2) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission; and
> (3) the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.'

The learned judge proceeded from that observation to say '*Although these broad principles appear well-settled, I have not come across an authoritative statement as to when a Court will exercise its discretion in favour of a party who has been remiss in its duty to disclose, rather than to set aside the order obtained by it on incomplete facts. On the other hand, the circumstances may be so divergent and variegated that it is impossible to lay down any guideline at all*'. He nevertheless later concluded '*It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant*'.

[27] In my respectful view, there is no rational reason for the exercise of the court's discretion in circumstances when there has been a failure by the applicant in an *ex parte* application to disclose evidence that should have been included in the supporting papers in deciding whether or not on subsequent consideration to rescind the relief granted to be informed by an à priori presumption in favour of setting the order that was obtained *ex parte* aside. I would rather subscribe to the approach enunciated by Howie P in *Phillips and others v National Director of Public Prosecutions* [2003] 4 All SA 16 (SCA), 2003 (6) SA 447, 2003 (2) SACR 410, at para. 29, where the learned President of the appeal court stated: '*It is trite that an* ***ex parte*** *applicant must disclose all material facts which might influence the court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion the later court will have regard to the extent of the non-disclosure; the question whether the first court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside*'.

[28] I have no doubt that a copy of the respondent's attorneys letter should indeed have been attached to the applicant's founding affidavit. I have no reason, however, to believe that there was any intention by the applicant to withhold the letter from the court's notice. Indeed, the very reliance on the letter in the founding affidavit points to the contrary. The copious quotation from the letter in the founding affidavit virtually invited the court seized of the *ex parte* application to notice the failure to annex it and enquire as to why a copy had not been made available. The applicant explained in an affidavit by its attorney, *jurat* 7 June 2019, that due to the urgency that had attended the institution of the application, the annexure of the letter had been 'erroneously omitted'. I have no reason not to accept this explanation. Having had regard to the content of the letter as a whole, I consider that it is possible, but unlikely, that if Bozalek J had seen it he might have required very short notice to the respondent before granting the relief. I do not think that anything in the letter would have persuaded him not to grant the relief. Indeed, in the

applicant's replying affidavit it was averred that '[d]*uring the presentation of the* ***ex parte*** *application to the Honourable Mr Justice Bozalek, counsel for the applicant sought to draw his attention to the letter in support of the application. It was at this stage when it became apparent that the letter had been omitted erroneously. A request was made to the court that the matter stand down in order for the letter to be filed, the request was declined, and the court indicated that it did not require the letter itself to grant the interim relief*'.

[29] No practical purpose would be served by setting aside an order that I am satisfied on a consideration of all the evidence the applicant was entitled to have obtained. If I were minded that this was a matter in which the court should mark its disapproval of the applicant's omission by some form of censure (which I am not), I would consider that an order depriving it of some or all of its costs would suffice, and be more appropriate in the circumstances than discharging the rule.

[30] For all these reasons an order in the following terms will issue:

1. That the rule nisi issued on 29 May 2019 is confirmed and the interdict against the respondent in terms of sub-paragraphs 2.1 to 2.4 of the rule is made final.
2. The respondent is ordered to pay the applicant's costs of suit.

A.G. BINNS-WARD
Judge of the High Court