

SOUTH AFRICA / JUDGMENT

A.H v A.H and Another (52044/2013) [2014] ZAGPPHC 374 (16 May 2014)

[2014] ZAGPPHC 374**COURT**

North Gauteng High Court, Pretoria

BEFORE

De Vries

CASE / FILE NUMBER

52044/2013

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE NUMBER:** 52044/2013**DATE:** 16 MAY 2014
In

the matter between: A.
H.
APPLICANT
(ID:.....)
and
A.
H.
1ST
RESPONDENT
LOSKOP PLASTIEK PYPE
CC
2ND
RESPONDENT
(REG
NO: CK96/58831/23)

CORAM: DE
VRIES
AJ

JUDGMENT

1. In this matter the Applicant applies for a final interdict against the 1st Respondent, prohibiting her from effecting any payments not authorised by the Applicant from the account of the 2nd Respondent.

2. The 1st Respondent apposes this Application and brings a counter application in the following terms:

2.1 That pendente lite the adjudication of the divorce action between the Applicant and the 1st Respondent under case number 6511/2012, both the Applicant and the 1st Respondent are interdicted and restrained from disposing or dealing, in any way, with any assets and/or funds of the 2nd Respondent, except in the normal day-to-day running of the business, in the absence of the expressed consent of the other;

2.2 That Danie Sauer Auditors, with business address at corner of West-and Cowen Ntuli Streets, Middelburg, Mpumalanga, is requested and authorised to conduct a forensic financial audit on the 2nd Respondent and to obtain all information and documents required for the purpose thereof;

2.3 The Applicant and the 2nd Respondent are ordered to provide all information and documents requested by Danie Sauer Auditors for purposes of the aforementioned audit;

2.4 That the costs of the forensic audit be paid by the 2nd Respondent;

2.5 That the Applicant, should the counter application be opposed, be ordered to pay the 1st Respondent's costs.

FACTUAL

BACKGROUND

3. The Applicant and the 1st Respondent each hold a 50% interest in the 2nd Respondent, a close corporation.

4. Divorce proceedings are pending between the Applicant and the 1st Respondent.

5. The 2nd Respondent conducts a successful business with an annual turnover of R 10 000 000.00 per annum (1st Respondent avers that the turnover is R 15 000 000.00 per annum).

6. The day-to-day running of the 2nd Respondent is attended to by the Applicant, the 1st Respondent not having been involved with the day-to-day running of the 2nd Respondent since 2007 due to other business commitments.
7. Both the Applicant and the 1st Respondent have signing authority on the bank account of the 2nd Respondent.

THE DISPUTE:

8. Applicant avers that the 1st Respondent drew the following amounts from the account of the 2nd Respondent:

8.1 On 11 January 2012

R 15 000.00;

8.2 On 13 January 2012

R 6 000.00;

8.3 On 13 January 2012

R 5 000.00;

8.4 On 19 January 2012

R 10 000.00;

8.5 On 12 March 2012

R 5 000.00;

8.6 On 22 March 2012

R 5 000.00;

8.7 On 25 April 2012

R 5 000.00;

8.8 On 11 May 2012

R 5 000.00;

8.9 On 16 May 2012

R 20 621.00;

8.10 On 6 August 2012

R 5 000.00;

8.11 On 6 August 2012

R 3 000.00;

8.12 On 12 September 2012

R 5 000.00;

8.13 On 22 September 2012

R 5 000.00;

8.14 On 29 September 2012

R 5 000.00;

8.15 On 10 October 2012

R 5 000.00;

8.16 On 2 November 2012

R 5 000.00;

8.17 On 12 November 2012

R 5 000.00;

8.18 On 23 November 2012

R 5 000.00;

8.19 On 4 December 2012

R 30 000.00;

8.20 On 13 December 2012

R 5 000.00;

8.21 On 12 February 2013

R 5 000.00;

8.22 On 9 March 2013

R 5 000.00;

8.23 On 30 May 2013

R 5 000.00;

8.24 On 29 June 2013

R 2 000.00.

9. Apart from these withdrawals, the Applicant complains that the 1st Respondent is frustrating the business activities of the 2nd Respondent by refusing to sign the 2nd Respondent's financial statements or the minutes of meetings. The Applicant further contends that attempts have been made to settle their differences without success.
10. No mention is made by the Applicant of the Respondent's loan account or capital account in respect of the close corporation,

indicating that the withdrawals as enumerated were in fact unlawful.

11. The 1st Respondent in her opposing affidavit indicates that both the Applicant and the 1st Respondent, from time to time, withdrew money as they saw fit for personal expenses and to maintain the children born of the marriage.
12. The 1st Respondent further alleges that the Applicant disposes and deals with the assets and funds of the 2nd Respondent without her knowledge or consent.
13. With regard to the failure to sign financial statements, the Respondent alleges that she has been denied access to the accounts and records of the 2nd Respondent, which she has not had the opportunity of inspecting or verifying.
14. The 1st Respondent further alleges that the Applicant transferred funds from the account from the 2nd Respondent as follows:

14.1 26 June 2013

R 380 000.00;

14.2 13 September 2013

R 100 000.00;

14.3 30 September 2013

R 500 000.00; and annexes bank statements evidencing these debits against the bank account of the 2nd Respondent.

15. In response to the allegation that the Applicant has withdrawn large sums of money from the account of the 2nd Respondent, the Applicant in reply alleges that these were simple transfers to another account of the 2nd Respondent without annexing any documentary proof of the veracity of his statement.
16. The 1st Respondent, in her affidavit, although opposing the Application, states:

"I have no objection to the relief prayed for by the Applicant, being granted, as long as the same relief is granted to me, as holder of the other 50% membership interest in the 2nd Respondent."

JUDGEMENT

17. In view of the factual disputes on the papers, the Court would, in the normal course of events, have dismissed the Application and

counter-application by virtue of the lack of essential averments to sustain the prayers sought.

18. Section 49 of the Close Corporation Act however enjoins a Court, in the event of allegation of conduct which is unfairly prejudicial, unjust or inequitable to make such an order as is just and equitable with a view to settling the dispute, whether for regulating the future conduct of the affairs of the corporation or for the purchase of the interest of any member of the corporation by other members thereof or by the corporation.

19. As illustration of the deficiencies in the papers, the counter-claim enjoins the Court to make an order in terms of which a firm of chartered accountants is to carry out a forensic audit, without any indication on the papers that the said firm is prepared to carry out such an instruction.

20. In order to give effect to what has been set out herein before the Court makes the following order:

20.1 The Applicant and the 1st Respondent are prohibited from making any withdrawals from the account of the 2nd Respondent, other than in the normal course of business, until adjudication of the divorce under case number 6511/2012;

20.2 The accounting officers of the 2nd Respondent must authorise all payments, made pursuant to this order, as being in the normal course of the business of the 2nd Respondent;

20.3 The Applicant grants free access to the 1st Respondent to the accounting records of the 2nd Respondent for perusal by her personally or any accountant nominated by her to do such an inspection on her behalf;

20.4 Each party is ordered to pay their own costs.

DE VRIES, AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

Representation for the Applicant:

Counsel

Adv: C Rip

Instructed by

Representation for respondent:

Counsel

Adv: J J Greef

Instructed by:

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