

SOUTH AFRICA / JUDGMENT

Ambanc (Pty) Limited t/a Hiref v Sukha and Others (2017/8310) [2017] ZAGPJHC 76 (16 March 2017) [2017] ZAGPJHC 76

COURT

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

2017/8310

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Not Reportable

Not of interest to

other judges

Revised.

16

March 2017

CASE

NO: 2017/8310

In

the matter between:

AMBANC
(PTY) LIMITED t/a
HIREF Applicant
and

SUKHA: MYRAN
ANDRE First
Respondent
HIREF
(SOUTH AFRICA) (PTY)
LIMITED Second
Respondent
THE
STANDARD BANK OF SOUTH AFRICA LIMITED Third
Respondent
COMPANIES
& INTELLECTUAL PROPERTY
COMMISSION OF
SOUTH AFRICA
Fourth
Respondent
And

SUKHA: MYRAN
ANDRE Applicant

SUKHA: SEHMA
(‘RAMONA’) Respondent

JUDGMENT

ADAMS J:

[1]. The applicant in the main application (‘Ambanc’) launched an urgent application for an interim order interdicting the first and second respondents from inter alia:-

1.1 Conducting business under the name and style of ‘HiRef’ or any other form or style containing the word ‘HiRef’ or any variation thereof;

1.2 Using any of the trade names of the applicant, namely: Galletti Airconditioning, Stone Airconditioning, MAS Properties, Euroklimat and Cetra;

1.3 Diverting any monies and payments due to the applicant into their own accounts or into the bank accounts of any person or entities connected or affiliated to them in any manner;

1.4 Changing the details of the applicant with fourth respondent or any other supplier or client of the applicant;

[2]. In a nutshell Ambanc, ostensibly represented in the proceedings by Sehma Sukha (‘Ramona’), applies for an Order excluding the first respondent, a founding member of the applicant, from participating as a director in any and / or all activities in Ambanc.

[3]. Central to the applicant's case is the issue whether or not the first respondent is at present still a director of Ambanc. Ramona alleges that the first respondent is no longer a director of Ambanc, he having resigned his position on the 1st of February 2017, which resignation was accepted by her, in her capacity as the remaining sole director. The first respondent denies that he is no longer a director of the applicant, because he had withdrawn his resignation on or about the 4th of February 2017. If this issue is decided in favour of the first respondent, then that would be the end of the Ambanc's

application because that would mean that the company had not authorised the application. I will return to this issue presently.

[4]. The first respondent, in turn, has launched his own application against Ramona, which he styled a 'counter application' against Ramona also on an urgent basis. Strictly speaking this latter application stands on its own in that the respondent in that

application is not cited as a party in the main application. All the same, the two urgent applications are inextricably intertwined and arise from the same set of facts and circumstances. In the 'counter application' the first respondent applies in terms of section 71 of the Companies Act number 71 of 2008 ('the Companies Act') for an interim order which would have the effect of excluding Ramona from any and / or all activities as a director of the Ambanc, and leaving the first respondent to in effect run the applicant as a sole director.

[5]. Ramona, purportedly acting on behalf of Ambanc, alleges that the main application is urgent because the first respondent is 'sabotaging' the operations of Ambanc, which, will ultimately result in the downfall of Ambanc unless the first respondent is interdicted from his alleged unlawful conduct. The first respondent, on the other hand, claims that because of the incompetence of Ramona in her administration of the applicant, it is about to implode. In view of my findings below it is not necessary for me to rule on the urgency of either one or both of the applications.

THE

FACTS

[6]. Ramona and the first respondent were married to each in community of property on the 24th August 1985. They are at present going through a divorce, which, by all accounts, is rather acrimonious and not conducive to a continued business relationship. The problems in the marriage started from during 2013 when the relationship between these two parties started crumbling. They nevertheless appear to have soldiered on in their business relationship, and it looks as if it has only been recently that they seem to be bumping heads in the business.

[7]. The applicant was incorporated by the first respondent during 1986, and during 2006 Ramona was appointed a co – director with the first respondent and also became a 50% shareholder in the company with effect from the said date. This means that at all times material hereto the first respondent and Ramona were equal shareholders in the applicant and were the only directors of the said company.

THE MAIN APPLICATION

[8]. As I indicated supra that there is a dispute between the parties as to whether or not the first respondent is at present a director of the applicant or whether he had resigned his position effective the 1st of February 2017. The first respondent admits that he attempted to resign from Ambanc in emails of the 1st of February 2017 addressed to Ramona and to the Auditors of the applicant. However, it is furthermore his version that he revoked his resignation, and this was accepted by Ramona as evidenced by events which occurred on the 4th February 2017, that is a mere 3 days after the attempted resignation. At a meeting between ‘the directors of Ambanc (Pty) Ltd’, which meeting was attended by the first respondent, Ramona and their legal representatives, it was agreed between those present that Myran, being the first respondent, would continue as a director of Ambanc, and that both Myron and Ramona would be equal directors of the said company. What is telling is that in her founding affidavit Ramona makes no mention of the meeting between the directors on the 4th of February 2017, and the agreement reached that the first respondent would ‘resume’ his duties as a director. Moreover, in response to a Rule 7(1) notice by the first respondent dated the 10th of March 2017 calling on the applicant’s attorneys to prove their authority to act on behalf of Ambanc, a Power of Attorney by Ramona dated the 10th of January 2017 is furnished. I agree with the submission by Mr Van Nieuwenhuizen, who appeared on behalf of the first and second respondents, that this fact, even if Ramona’s version is accepted that the first respondent resigned as a director on the 1st of February 2017, demonstrates that she is not bona fide because she acts without authority at a time when the company had two directors.

[9]. I am therefore of the view that as and at the 4th of February 2017 and since then the first respondent was a director of Ambanc. This means that on the 9th of March 2017, that is the date on which the main application was launched on instructions from Ramona, purporting to act on behalf of Ambanc, the first respondent was still a member of the board of directors of Ambanc, and without his consent it was not competent for Ambanc to institute legal proceedings. It is common cause that the first respondent did not authorise the launching of the application.

[10]. I am therefore of the view that the point in limine by the first and second respondents to the effect that there is a lack of authority by Ambanc to institute the motion proceedings is a good point and stands to be upheld. The applicant’s cause of action is fatally defective and on this ground alone the application stands to be dismissed.

THE COUNTER-APPLICATION

[11]. I now turn to deal with the ‘counter – application’, which is by the first respondent against Ramona and is couched in terms of the provisions of section 163(1) of the Companies Act.

[12]. It is common cause that, because of the pending divorce proceedings between the first respondent and Ramona, there is no probity between them and the animosity is having a negative effect on the business of Ambanc.

[13]. There has been a marked decline in the performance of the applicant as a business especially over the last few months. The company has for example been experiencing cash flow problems and difficulty in paying its suppliers and sub – contractors.

[14]. Ramona blames the first respondent for these problems. She in particular alleges that the cash flow problems are as a result of the first respondent diverting the monies of the applicant to the second respondent and to his personal bank accounts. The first respondent, on the other hand, alleges that Ramona, as the Executive Administrator of Ambanc, is wholly incompetent and inefficient, and this is the reason for the decline in the business of Ambanc. He enumerates in a fair amount of detail the complaints against the performance of the Ramona in her capacity as director. Needless to say the accusations are denied by Ramona, who remains adamant that she has the capability to manage Ambanc and its finances, if only the first respondent would stop interfering in her duties and prejudicing the applicant in the exercise of her administrative functions. It is instructive and interesting that Ramona confidently states in her replying affidavit that her contribution to the applicant is highly valued and she is ‘to a certain extent irreplaceable’. This claim by Ramona is, in my view, not far – fetched at all. In that regard, one need only have regard to the fact that she had seemingly for a prolonged period from about 2006 been able to steer the ship apparently quite successfully.

[15]. First respondent’s claim that Ramona is incompetent should be seen in the context of the personal fight between the parties, so it should be taken whence it cometh.

[16]. The main difficulty I have with the first respondent’s application is that there is a factual dispute which is not capable of being resolved on the papers. The one thing that is certain is that the personal fight between the parties, which spilled over into their business relationship, has everything to do with the decline in the performance of Ambanc. Both of them are members of the company, as well as directors thereof. It does not avail either of them to insist on the expulsion of the other from the board of directors. It may well be that, because of irreconcilable differences, consideration should be given to a winding up of the company as no purpose would be served by trying to keep the company together. The alternative is to put their personal differences aside in the interest of the company, and to find a way to work together. In that regard, they should be guided by the provisions of the Companies Act, and run the company strictly in accordance with the dictates of that Act. That seemingly was the purpose of the meeting on the 4th of February 2017. Regrettably, the attempts were unsuccessful.

[17]. All the same, for the reason that there is a factual dispute, which is not capable of resolution on the papers, I am therefore of the view that the counter – application should suffer the same fate as the main application, that is to be dismissed.

COSTS

[18]. The disputes between the parties relate to their business relationships in ‘domestic’ companies and a family business. The first respondent is successful in his opposition to the main application. In view of the fact that I have found that Ramona was not authorised to bring the application in the name of Ambanc, a cost order should strictly speaking be against her in her personal capacity. On the other hand, Ramona was successful in opposing the application against her by the first respondent, which means that she should be awarded the costs of the counter – application. ‘Success’ means ‘substantial success’.

[19]. The one cost order may very well cancel out the other, and I am therefore of the view that an order that each party should bear its / his / her own cost would be fair, just and equitable. Therefore, in the exercise of my discretion, I do not intend awarding costs in favour of any one of the parties.

ORDER

In the result, I make the following order:-

1. The main application is dismissed.
2. The counter – application is dismissed.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 14th March 2017

JUDGMENT

DATE: FOR THE APPLICANT: 16th March 2017 Adv B Van der Merwe INSTRUCTED BY: Maharaj & Pravda Attorneys FOR THE RESPONDENT: Adv Van Niewenhuizen, INSTRUCTED BY: Scholtz & Scholtz Attorneys

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