

SOUTH AFRICA / JUDGMENT

Badenhorst and Another v Badenhorst (19578/2024) [2024] ZAWCHC 315 (15 October 2024) [2024] ZAWCHC 315

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

19578/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 19578/2024

In

the matter between:

DALEEN

CORNELIA BADENHORST

First Applicant

CHEETAH

ESTATES CC

Second Applicant

And

CASPER

HENDRIK BADENHORST

Respondent

Heard:

08 October 2024

Delivered:

Electronically on 15 October 2024

JUDGMENT

LEKHULENI J

Introduction

[1] Two urgent applications served before this court on 08 October 2024. The first is an application by the applicants seeking an order that the respondent be interdicted and restrained pendente lite from making any transfers, withdrawals or payments of any nature or form from the second applicant's bank account without the first

applicant's prior consent. The second is a counter application by the respondent in which he seeks an order that pending the final

determination of the application for the second applicant's winding up as a solvent entity on the just and equitable grounds under case number 20266/24, neither the applicant nor the respondent shall be entitled to transact on the second applicant's bank account held in its name with Nedbank Ltd in any manner or form without the express prior consent of the other to do so.

The Applicants' Application

[2] The first applicant was married to the respondent's brother. The second applicant was established by the respondent and his late brother, who were 50/50 members of the second applicant. The respondent and the first applicant's late husband were also 50/50 members of another close cooperation, Midnight Trading 106 CC ('Midnight Spark'), which conducted the filling station business Careno Strand, Western Cape. On 23 February 2020, the first applicant's late husband passed away, and the first applicant inherited his member's interest in Midnight Spark and the second applicant herein.

[3] For the past four years, since the passing away of the first applicant's husband, the applicant managed the second applicant by carrying on the business of the second applicant in the ordinary course while the respondent managed the business of Midnight's Spark. The first applicant drew a salary from the second applicant and attended to all its day-to-day operations, while the respondent did the same regarding Midnight Spark. The first applicant states that during 2024, it came to her knowledge that the respondent was mismanaging the affairs of Midnight Spark by physically removing cash from the business of Midnight Spark and running the business from his personal bank account. Netbank threatened to call up Midnight Spark's

overdraft facility. Astron, the fuel supplier and landlord, claimed more than R1,1 million for utilities and R250,000 for franchise fees, which Midnight Spark could not pay.

[4] Pursuant thereto, on 2 September 2024, the first applicant launched an application for the liquidation of Midnight Spark in this court under case number 19124/24. Although the respondent disputed that Midnight Spark was unable to pay its debts, he agreed to Midnight

Spark's liquidation on just and equitable grounds. Midnight Spark was accordingly placed in provisional liquidation by this court on Thursday, 19 September 2024. While that application against Midnight Spark was still pending, on 11 September 2024, the respondent made a unilateral transfer of R70,000 from the bank account of the second applicant and paid it to the trust account of his attorneys of record. The respondent did so without the first applicant's knowledge and consent.

- [5] As previously stated, the first applicant asserted that they are 50/50 members of the second applicant. The first applicant states that except for the day-to-day management and payments done in the ordinary course of the second applicant's business, which is by agreement conducted by the first applicant, neither one of them may accordingly make decisions for and on behalf of the second applicant without the authority of the other, and, except as aforesaid, neither the first applicant nor the respondent may make unilateral transfers, withdrawals and or payments that are not in the ordinary course of the second applicant's business, from its bank account.
- [6] The first applicant states that the respondent did precisely that when he caused a transfer of funds belonging to the second applicant from the bank account of the second applicant to the trust account of the firm of attorneys acting for the respondent personally without the first applicant's knowledge and consent. According to the first applicant, the respondent appropriated a total sum of R70 000 and presumably used the said funds for his personal legal expenses, alternatively that of Midnight Spark Trading 106 CC, to oppose a liquidation application brought against the latter and to instruct his attorneys to draft and institute a liquidation application against the second respondent. The liquidation application against the second applicant was, in fact, subsequently issued by this court under case number 20266/2024.
- [7] In addition to not being authorised to withdraw funds from the second applicant's account, the first applicant asserts that the transfer was not in the ordinary course of the second applicant's business. When the first applicant called upon the respondent to return the R70,000 to the second applicant, the respondent refused to do so. The

first applicant instructed her attorneys of record to immediately address a letter of demand to the respondent and the respondent's

attorneys for the refund of the R70,000. In response, the respondent's attorneys stated that the first applicant and the respondent each own a 50% member's interest in Midnight Spark Trading 106 CC and in the second applicant. The respondent's attorneys further asserted that both the first applicant and the respondent are entitled to 50% of the profit and loss of each of these entities and

that the respondent would not refund the R70 000.

[8] The respondent contended that because he owns 50% of the member's interest in the second applicant, he is entitled to 50% of the profit and loss of the second applicant and that he cannot steal his own money. To this end, the first applicant asserted that the respondent is treating the money belonging to the second applicant as his own

and considered it his money. According to the first applicant, the respondent is intent on dipping into the funds of the second

applicant as and when it pleases him without the applicant's knowledge and consent and without having to account to the first applicant in any way whatsoever.

[9] The first applicant contended that the respondent's stance described above is wrong and that the second applicant and the first applicant have the right, which is at the very least prima facie established, to protect the funds belonging to the second applicant, and to prevent unauthorised transfers, withdrawals and or payments from the bank account of the second applicant by one of its members on the basis that it is his money. The first applicant contended that prima facie, the respondent is not within his right to act in a unilateral and unauthorised manner.

[10] Furthermore, the first applicant stated that the respondent already has a debt loan in the second applicant amounting to R1 420 972.76 as of 29 February 2024. In other words, the respondent owes the said amount to the second applicant. The first applicant feared that if the interdict was not granted, the respondent would make further transfers from the second applicant's bank account without her consent to the prejudice of the second applicant. The first applicant implored the court to grant the relief claimed in the notice of motion.

The Respondent's Counter Application

[11] The respondent thoroughly explained how he worked with his brother, the first applicant's deceased husband, from 1991 after the respondent sold his service station in Pretoria and bought Camps Bay Service Station situated in Camps Bay. The respondent stated that during the lifetime of his brother (the first applicant's deceased husband), they agreed that his brother would take over the day-to-day management of the Marine Drive Service Station (second applicant), and they proceeded to purchase the Caltex Careno Service Station which was subsequently transferred to Midnight Spark Trading 106 CC.

[12] The respondent and his brother were 50/50 members in Midnight Spark 106 CC. The respondent stated that he and his brother considered themselves to be equal partners in both service stations. They were both fully entitled to participate in the management of both businesses and to share in the profit and loss of both businesses, in accordance with section 46 of the Close Corporation Act 69 of 1984 ('the Close Corporation Act'). As regards profit sharing, the respondent asserted that the understanding between the respondent and his brother was that if there were distributable profits available in either business, each of them could pay themselves up to 50% thereof as and when they required the funds without seeking the other's permission to do so.

- [13] If there were insufficient profits available and they needed money, they would similarly each withdraw funds from a loan account without seeking the other's permission to do so. They trusted one another implicitly and had full confidence in the fact that each of them had the best interest of the businesses at heart, as is required by section 42 of the Close Corporation Act.
- [14] The untimely passing of his brother on 23 February 2020 resulted in the first applicant's inheritance of his brother's 50% member's interest in both Midnight Spark and the second applicant in this matter. As a result, the applicant became his business partner by circumstances rather than design. According to the respondent, the first applicant and he proved to be incompatible business partners, and relations between them soon soured to the point where it became apparent that they could not cooperate and work together in managing either the second applicant or Midnight Spark's affairs. This has resulted in both entities being effectively paralysed by deadlock and the institution of the applications for the winding up of both Midnight Spark and the second applicant on just and equitable grounds.
- [15] The respondent denied that the first applicant is entitled to the relief she seeks because, as the second applicant's founding member and its current 50% member, he has always been fully entitled to operate its bank account and to make transfers, withdrawals and or payments therefrom as he considered appropriate. The respondent stated that there is simply no basis in fact or in law for the first applicant to claim that merely because she is also a salaried employee of the second applicant, her 50% member's interest in it is somehow elevated to super status entitling her to control its finances, business and bank account to his exclusion.
- [16] Given the complete breakdown in relations between the first applicant and the respondent, the respondent averred that he is prepared to consent to an order that prohibits both the first applicant and the respondent from transacting on the second applicant's bank account without the other's consent pending the final determination of the liquidation application under case number 20266/2024. The respondent admitted that neither the first applicant nor the respondent may make decisions for and on behalf of the second applicant without the authority of the other. To this end, the respondent stated that it is accordingly surprising that the first applicant has taken it upon herself to unilaterally decide to join the second applicant as a party to this application and to instruct her attorneys to represent the second applicant when she is clearly and by her own admission not entitled to do so.
- [17] The respondent admitted that he transferred R70,000 to himself on 11 September 2024 and stated that it was a portion of his profit share. He denied that he required the first applicant's specific prior consent to do so, just as the first applicant would not have required his consent to transfer a portion of her own profit share to herself. The respondent denied that he unlawfully appropriated the R70 000 from the second applicant or that by paying himself what he was entitled to receive as a member of the second applicant can somehow be

considered to fall outside of the ordinary course of business. In his view, what he has chosen to do with his own funds is none of the first applicant's business.

- [18] The respondent also denied that the first and second applicants have any right whatsoever to prevent him from claiming and paying himself his profit share as and when he requires it. According to the respondent, the first applicant's evidence and conduct in this application simply betray her lack of knowledge and understanding of the agreement between the respondent and his late brother regarding their joint management of the second applicant. The respondent asked the court to dismiss the first applicant's application with costs and for the grant of the relief sought in the counter application.

Principal Submissions by the parties

- [19] Mr Engela, who appeared for the applicant, submitted that the applicants had established a prima facie right on the papers. Counsel submitted that from the respondent's answering affidavit, the respondent does not see anything wrong with what he did. Mr Engela referred the court to paragraph 28.2 of the respondent's answering affidavit wherein the respondent stated that his share of the profit is his money and that he is entitled to pay himself as and when he requires it, just as his brother was entitled to do so.
- [20] Counsel argued that there was no association agreement between the first applicant and the respondent for such withdrawal. Mr Engela further submitted that the respondent's conduct offends the provisions of section 46(f) of the Close Corporation Act. Counsel implored the court to grant the relief sought to prevent the respondent from making further unauthorised withdrawals from the second respondent's account.
- [21] On the other hand, Mr Coston, the respondent's Counsel, argued that the respondent did not need the first applicant's consent to withdraw R70 000 from the second applicant's account. According to Counsel, this has been done before by the members of the second applicant. Counsel further asserted that in terms of the counter application, the respondent is prepared to consent to an order that prohibits both the first applicant and the respondent from transacting on the second applicant's bank account without the other's consent pending the final determination of the liquidation application under case number 20266/2024.
- [22] According to Counsel, this is the best remedy in that if one of the parties unreasonably refuses his consent, the innocent party may approach the court for a remedy. Mr Coston implored the court to dismiss the applicants' application and to grant the relief sought in the counter application. According to Counsel, this is the best remedy in that if one of the parties unreasonably refuses his consent, the innocent party may approach the court for a remedy. Mr Coston implored the court to dismiss the applicants' application and to grant the relief sought in the counter application.

The Applicable Legal Principles and Discussion

[23] The applicants seek an interlocutory interdict. The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court.[1] The requirements which an applicant for an interlocutory interdict must satisfy are the following:

- (a) A prima facie right;
- (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) A balance of convenience in favour of the granting of the interim relief; and
- (d) The absence of any other satisfactory remedy.

[24] For the sake of convenience, I will deal with the abovementioned requirements for an interim interdict vis-à-vis the present matter in series or ad seriatim.

- (a) A prima facie right;

[25] An interim interdict will be granted if the court is satisfied that the applicant has established a prima facie right that the respondent has invaded it or threatened to do it.[2] In *Webster v Mitchell*, [3] the court stated that the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities.

If it is prima facie established though open to some doubt that is enough. In my view, this is so because the application is merely

interlocutory, and the effect of the granting thereof is only temporary and not finally decisive of either party's rights. Thus,

the court will grant an interdict upon a degree of proof less exacting than that required to grant a final interdict.

[26] In the present matter, the first applicant is a 50% holder of interest in the second applicant. The first applicant averred that the sum of R70,000 was unlawfully appropriated by the respondent and used to fund his personal legal expenses. When the first applicant called upon the respondent to return the R70,000, the respondent refused to do so. The respondent contended that because he owns 50% of the member's interest in the second applicant, he is entitled to 50% of the profit and loss of the second applicant and that he cannot steal his own money. In other words, the respondent considered the money belonging to the second applicant to be his own.

[27] I must stress that each member of a closed corporation stands in a fiduciary relationship to the corporation.[4] Members of a close corporation owe the corporation fiduciary duties and duties of care and skill. A member of a close corporation must, in relation to the close corporation, act honestly and in good faith and must exercise such powers as he may have to manage or represent the corporation in the interest and for the benefit of the corporation.[5]

- [28] In bringing this application, the first applicant, in my view, acted in the best interest of the second applicant. On the respondent's version, notwithstanding that there is no association agreement between them as envisaged in section 44 of the Close Corporation Act, he believes that he can transfer funds from the bank of the second applicant at will without informing the first applicant of such transfer, and without being under any obligation to repay any funds to the second applicant at all. The respondent asserted that the first applicant's conduct displays her lack of knowledge and understanding of the agreement between the respondent and his late brother regarding their joint management of the second applicant. In my view, this stance cannot be correct and should not be countenanced.
- [29] After the passing of the applicant's husband, I must point out that the first applicant and the respondent never entered into an association agreement to regulate the sharing of profits and internal relationships. As such, the respondent, in my view, could not unilaterally withdraw the sum of R70 000 from the second respondent without the knowledge of the first applicant. I am mindful that the first applicant and the respondent are entitled to participate in the carrying on of the corporation's business unless an association agreement or the Act provides otherwise.[6]
- [30] I am also mindful of the fact that in the absence of an association agreement, each member has the implied power to do any act that entails the carrying on of the second applicant's business in the ordinary course. However, the respondent's unilateral withdrawal of the sum of R70 000 from the second applicant's bank account, in my view, did not involve the carrying on of the second applicant's business in the ordinary course.
- [31] I am of the firm opinion that the applicants have clearly established their prima facie right to the sanctity of the second applicant's funds and to protect those funds from unilateral appropriation by the respondent.
- (b) Well-Grounded apprehension of harm
- [32] The second requisite for an interlocutory interdict is a well-grounded apprehension of irreparable harm if the interim relief is not granted.[7] Irreparable harm or loss may be defined as the loss of property in circumstances where its recovery is impossible or improbable. The loss need not necessarily be any financial: it may consist of an irremediable breach of the applicant's rights.[8] In the present matter, the first applicant asserted that the respondent has a debit loan account in the second applicant amounting to R1 420 972. 76 as of 29 February 2024.
- [33] The first applicant claimed that the respondent showed no remorse for transferring R70,000 from the bank account of the second respondent without consent. The respondent regards this transfer as a payment of his profit share to the second applicant. According to the respondent, his share of the profits is his money that he is entitled to pay himself as and when he requires it. The respondent denied that the first or the second applicant had any

right to prevent him from claiming and paying himself his profit share as and when he required it.

- [34] It cannot be disputed that the first applicant and the respondent did not agree on the payment or withdrawal of the R70,000 by the respondent. The respondent's stance in my view is untenable and displays a fundamental misunderstanding of the rights and duties of members of a close corporation as contained in sections 42, 46(f) and
51. Until a dividend, if any, is agreed upon and determined in accordance with the provisions of the Close Corporation Act, a member of a Close Corporation is by no means at liberty to make unilateral payments from the bank account of the Close Corporation under the guise of paying a profit share to himself or herself.
- [35] Most importantly, the allegation that the respondent does not require the first applicant's consent for such unilateral transfers explicitly offends section 46(f) of the Close Corporation Act, which provides:

"Payments by a corporation to its members by reason only of their membership in terms of section 51(1) shall be of such amounts and be affected at such times as the members may from time to time agree upon, and such payments shall be made to members in proportion to their respective interests in the corporation." (emphasis added)

- [36] The first applicant asserts that for the past four and half years since the passing of her husband, neither of them took a profit share from the second applicant. On the contrary, they both owe the second applicant substantial amounts on loan accounts. Thus, the use of profit shares by the respondent is completely misplaced in relation to the second applicant, as the profits of a close corporation can only be distributed by its members by declaring a dividend. Moreover, members of a close corporation can only declare a dividend if there was, in fact, a profit made in any given financial period after due consideration of the close corporation's financial positions, bearing in mind, among others, the solvency test. To this end, section 51(1) of the Close Corporation Act provides:

"(1) Any payment by a corporation to any member by reasons only of his membership, may be made only-

- (a) if, after such payment is made, the corporation's assets, fairly valued, exceed all its liabilities;
 - (b) if the corporation is able to pay its debts as they become due in the ordinary course of its business; and
 - (c) if such payment will in the particular circumstances not in fact render the corporation unable to pay its debts as they become due in the ordinary course of its business."
- [37] Evidently, no dividend has ever been declared by the first applicant and the respondent in respect of the second applicant, at least not in the past four and half years of the applicant's membership in the second applicant. Therefore, no profit share was available for the

respondent at any given time. The applicant's apprehension that the respondent will make further unilateral transfers, withdrawals and/or payments from the bank account of the second applicant is accordingly more than justified. In my view, the respondent's stance offends section 46(f) of the Close Corporation Act and clearly shows that further harm is imminent if an interdictory relief is not granted. A unilateral transfer of funds belonging to a corporate entity diminishes the entity's patrimony.

(c) The Balance of Convenience

[38] The third requisite for an interlocutory interdict is a balance of convenience in favour of the granting of the interim relief. The court must weigh the prejudice to the applicant if the interlocutory interdict is refused against the prejudice to the respondent if it is granted.[9] This is sometimes called the balance of convenience.

[39] The balance of convenience, in this case, is overwhelmingly in the applicant's favour. I am mindful that the second applicant is facing a liquidation application and that the inconvenience of having funds transferred, or withdrawn or paid from its bank account is prejudicial to the applicant and even creditors of the second applicant. For the past four years, the parties have never paid themselves any profit share. As correctly pointed out by the first applicant, it ill behoves a member of a close corporation, in circumstances where there was no members meeting, no approval of financial statements, or otherwise, to simply take it upon himself to make a unilateral withdrawal from the bank account of the close corporation on the basis that he is paying himself what he perceives to be entitled to.

[40] In my view, the balance of convenience weighs heavily in favour of granting the interdict. The respondent's assertion that what he does with the second respondent's funds is none of the first applicant's business is precisely why an interdict against the respondent is necessary and appropriate. In any case, the applicants are merely seeking an order pendente lite, pending the final determination of the liquidation application which will barely inconvenience the respondent.

(d) Absence of any other satisfactory remedy

[41] The fourth requisite for granting an interlocutory interdict is the absence of another adequate ordinary remedy. In the present matter, the applicants have no other satisfactory remedy other than an interim interdict. An application for the liquidation of the second applicant has been lodged with this Court. If an interim interdict is not granted and pursuant to the stance taken by the respondent, it is most likely that the respondent would withdraw funds from the second applicant at whim under the auspices that it is his profit share. This will be prejudicial to the applicants. In my view, this requirement has been satisfied. This leads me to the respondent's counter-application.

[42] The respondent contends that given the complete breakdown in relations between him and the first applicant as well as the accompanying mistrust between them, he seeks an order directing that pending the final determination of the application for the second applicant's

winding up as a solvent entity on the just and equitable grounds under case number 20266/2024, neither the first applicant nor the respondent shall be entitled to transact on the second applicant's bank account in any manner or form without the express prior consent of the other to do so.

- [43] This counter application, in my view, is ill-founded. The applicant did not breach any provisions of the Close Corporation Act. The first applicant has not acted unlawfully, and there is no indication that the applicant intends to do so. The first applicant has not withdrawn any funds from the second applicant without the respondent's knowledge. The applicant has been responsible for the day-to-day management of the second applicant for the past four years, and she has been drawing a salary from the second applicant in return for doing so. The respondent has done the same in respect of Midnight Spark. The respondent managed Midnight Spark and drew the same salary.
- [44] The approval of the counter application is poised to have adverse ramifications on the operational dynamics of the second applicant. Numerous financial disbursements necessitate daily and weekly transactions from the second applicant's bank account to sustain the seamless functionality of the close corporation's business operations. The first applicant has been making these payments and handling the bookkeeping of the second applicant in collaboration with the second applicant's accountants and auditors for several years.
- [45] In my view, it will be impracticable for the applicant to obtain the respondent's prior consent for these types of transactions. If an order is granted against the applicant without any valid reason, it will essentially stop the second applicant's business operations, leading to an inevitable liquidation application against the second applicant. More so, the very purpose of the applicant's application is to obtain an order preserving the status quo until the hearing of the liquidation application.
- [46] In the circumstances, the respondent's counter application must fail.

Order

[47] Given all these considerations, the following order is granted:

47.1 The respondent's counter application is hereby dismissed.

47.2 Pending the final determination of the liquidation application under case number 20266/2024, the respondent is interdicted and restrained pendente lite from making any transfers, withdrawals or payments from the second applicant's bank account without the first applicant's prior consent.

47.3 The respondent shall pay the first applicant's costs on scale C.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Mr Engela

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For the Respondent: Mr Coston

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[1] Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another 1973

(3) SA 685 (A) at 691C-G.

[2] Zulu v Minister of Defence 2005

(6) SA 446 (T).

[3] Webster v Mitchell 1948

(1) SA 1186 (W) at 1188.

[4] See section 42(1).

[5] See section 42(2)(a)(i).

[6] See section 46(a) of the Act.

[7] Tshwane City v Afriforum 2016

(6) SA 279 (CC) at 300B.

[8] Braham v Wood 1956

(1) SA 651 (D) at 655.

[9] Breedenkamp v Standard Bank of South Africa Ltd 2009

(5) SA 304 (GSI at 314G.

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