

SOUTH AFRICA / JUDGMENT

Badenhorst v Absa Bank Limited and Others (6263/2018) [2018] ZAGPPHC 355 (8 February 2018) [2018] ZAGPPHC 355

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa

CASE / FILE NUMBER

6263/2018

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IN

THE HIGH COURT OF SOUTH
AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

NOT

REPORTABLE

(2)

NOT

OF INTEREST TO OTHER JUDGES

(3)

REVISED

CASE NO: 6263/2018

8/2/2018

In the matter between: ALWYN
 PETRUS BADENHORST
 Applicant
 and
 ABSA BANK
 LIMITED
 First
 Respondent
 BELL'S
 FIRE
 CC
 Second Respondent
 ROBERT
 FREDRICK CLAASE
 Third Respondent

JUDGMENT

Baqwa J

- [1] In this matter, the applicant, who holds a 40% membership interest in the second respondent, a close corporation seeks to pursue his rights in terms of section 46 of the Close Corporations Act by seeking an order in which the first respondent is ordered to:
1. Acknowledge and accept that the applicant as the only other member of the second respondent is entitled to have access to all accounts and associated information in the name of the second respondent;
 2. Record the applicant's details as a party entitled to obtain such information and sign any and all documentation on behalf of the
- second respondent insofar as the first respondent is concerned and that the applicant becomes a co-signatory on behalf of the second respondent.
- [2] The applicant also sought an order for the revocation of any previous power of authority and/or power of a signatory granted to any employee of the second respondent. That prayer has however been abandoned by the applicant.
- [3] The applicant is one of two members of the second respondent with the other member being the third respondent with a 60% members interest whilst the applicant holds 40% members interest.
- [4] The first respondent is ABSA bank whilst the second respondent is Bell's Fire South Africa CC of 5th Street Bashewa, Pretoria.

- [5] The third respondent is Mr Robert F. Claase who is the majority interest holder. The third respondent is currently incapacitated and is a patient in the care of Pretoria East Hospital.

Urgency

- [6] The matter has been brought before this court by way of an urgent application due firstly to the sudden illness and incapacity of the third respondent. Secondly the applicant sought access to the close corporation documents and account information currently held by the first respondent. The latter indicated by letter that it could not give such access due to an arrangement by the third respondent in terms of which access could only be given to the third respondent and his wife Mrs Claase and that the first respondent would only give the applicant access upon receipt of a court order, hence the present application.

- [7] The applicant considered that continued lack of access could be prejudicial to him and the close corporation in that he could not

exercise oversight as the remaining operational member if he continued to be kept at arm's length from the banking records or activities of the close corporation.

- [8] The application has been opposed by the second and third respondents who submitted in limine that the matter was not urgent. It is trite that if the urgent court route is not followed the matter could have been dealt with in about three months' time in the unopposed roll alternatively in 10 to 12 months' time in the opposed roll. I considered the issue of urgency and ruled that the matter has properly been brought before the urgent court precisely because it could be viewed as dereliction of duty should something untoward happen in the interim when the applicant could be forced to plead ignorance.
- [9] Until the third respondent's affliction, it had been agreed between the applicant and the third respondent that the applicant would not be a signatory to the accounts of the second respondent. It was agreed that the third respondent and Mrs Claase would remain as the signatories to the accounts, Mrs Claase being duly authorised by the majority member of the second respondent. As matters presently stand, Mrs Claase, who is not a member of the second respondent is the remaining signatory. There is therefore presently no member of the second respondent who has direct access to the first respondent and the records it keeps. Section 46 of the Close Corporations Act 69 of 1984 provides:

"46 Variable Rules regarding Internal Relations

The following rules in respect of internal relations in a corporation shall apply insofar as this Act or an association agreement in respect of the corporation does not provide otherwise -

- (a) Every member shall be entitled to participate in the carrying on of the business of the corporation.
- (b) Subject to the provision of section 47, members shall have equal rights in regard to the management of the business of the corporation..."

[10] The respondents submit that it is not necessary for the applicant to have direct access to information held by the first respondent or to become a co-signatory even in the temporary absence of the third respondent because the applicant has access to information and bank statements currently held at the second respondent's place of business. They also make reference to the arrangement referred to above made between the first and third respondents. It is trite that as a member, good governance practice demands that the applicant perform his fight to fiduciary duties of oversight over the second respondent. I considered therefore that he was not on a mere frolic only in bringing this application.

[11] I have considered the submissions and weighed them against the changed circumstances regarding the second respondent. The third respondent is currently a patient at Pretoria East Hospital and in one of the letters obtained from a physician attending to him, Dr Thomas Gray (letter dated 2018 - 01 - 29) states:

"re: Mr R Claase (05 - 03 - 1947)

Mr Claase is currently under treatment in our ICU unit at Pretoria East Hospital, critically ill on a ventilator. (He suffered a major stroke in December following prior surgery.)

I hereby confirm that Mr Claase it is not fit to make any legally binding decisions at present, and for the foreseeable future.

Yours faithfully

T, Grey (physician)"

[12] The contents of this letter have been contested by the respondents' counsel on the basis that it is not an affidavit and that the

veracity be of has not been tested. She could however not dispute that Dr Gray is a physician at Pretoria East Hospital. Whilst

floating the said contestation, I have taken judicial cognisance of the letter in light of the admission contained in paragraph 5.10.1 of the respondents' opposing affidavit in which it is stated as follows:

"5.10.1 It is admitted that the third respondent is currently incapable of managing the affairs of the second respondent as the third respondent is critically ill ..."

This admission corroborates the information obtained from Pretoria East Hospital.

[13] In Plascon-Evans 1984

(3) SA 623A at 634H - 6358 the Appellate Division dealt with disputes of fact in motion proceedings as follows:

". .. where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with

the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 8820 - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks..."

The contestation, therefore, regarding the contents of the letter by Dr Gray did not raise a real, genuine or bona fide dispute of fact in the context of this application.

[14] I have considered also that the applicant does not seek to change any of the arrangements made by the third respondent with the first respondent save to allow him the opportunity to exercise his fiduciary duty vis-a-vis the second respondent. I have considered

that he can do so in conjunction with Mrs Claase as arranged by the third respondent.

[15] The applicant is not only a member of the second respondent but also holds such members interest conjointly with the third respondent. I therefore do not consider it appropriate to grant any costs order against the respondent.

[16] I have also considered that the applicant's right and duties arise ex lege and that he ought to be assisted to do so.

[17] In the result, make the following order.

The first respondent is ordered to:

1.1 Acknowledge and accept that the applicant, as the only other member of the second respondent, is entitled to have access to all accounts and associated information in the name of the second respondent.

1.2 Record the applicant's details as a party entitled to obtain such information and sign as co-signatory with Mrs Caase any and all

documentation on behalf of the second respondent in so far as the first respondent is concerned and that the applicant becomes a co-signatory as aforesaid on behalf of the second respondent.

2. Each party will pay their own costs.

S.A.M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Heard on:

08 February 2018

Delivered on:

08 February 2018

For the Applicant:

Advocate M. R. Halstead

Instructed by:

Spies Bester Potgieter Attorneys

For the 2nd and 3rd Respondents: Advocate K. Fitzroy

Instructed by:

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