

SOUTH AFRICA / JUDGMENT

Barbaglia v Barbaglia and Others (16659/2021) [2022] ZAGPJHC 198 (4 April 2022) [2022] ZAGPJHC 198

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala M L

CASE / FILE NUMBER

16659/2021

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 16659/2021

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
04/04/2022
In

the matter between:

GREGORY
MASSIMO BARBAGLIA
APPLICANT
And
MICHAEL
BARBAGLIA
FIRST RESPONDENT
PABAR
(PROPRIETARY) LIMITED
SECOND RESPONDENT
SILVAN
BARBAGLIA
THIRD RESPONDENT
SILVANA
BARBAGLIA N.O.
FOURTH RESPONDENT
CHARL
EDWARD ANDERSON N.O.
FIFTH RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 4th April 2022

TWALA J

[1] The bitter disputes between the two siblings in the Barbaglia family which arose before and after the death of Mr Barbaglia who died on the 10th of December 2020, has led the applicant, the youngest son of the Barbaglias to launching this application before this Court in which he seeks the following order:

1.1 Ordering that an interim interdict be issued against the first and second respondents in terms of which they are:

1.1.1 interdicted from disposing of, alienating or encumbering any of the second respondent's, that is, Pabar (Pty) Ltd's, assets other than in circumstances where the disposition, alienation or encumbrance is required in the ordinary course of business; and

1.1.2 compelled to furnish the applicant on a monthly basis with Pabar's following records:

1.1.2.1 the general ledger;

1.1.2.2 bank statements;

1.1.2.3 payment breakdowns;

1.1.2.4 turnover reports;

1.1.2.5 income statements;

1.1.2.6 cash flow projections; and

1.1.2.7 management accounts.

1.1.3 compelled to respond to any of the applicant's queries relating to the financial records and business activities of Pabar within 5 working days of receipt of the query;

1.1.4. compelled to permit the applicant access during normal business hours to the business premises of Pabar in order for the applicant to exercise the rights in 1.1.2 and 1.1.3 of this order;

1.1.5 interdicted from using pabar's funds to pay for the first respondent's personal legal fees and expenses and or legal fees and expenses which are rendered directly or indirectly for the first respondent's personal benefit.

1.2 Ordering that the interim interdict will operate with immediate effect pending the final determination of the relief sought under case number 8931/2021;

1.3 Ordering the first respondent to desist from preventing Pabar to comply with the terms of the settlement agreement concluded between Pabar and the applicant on 5 September 2018 in terms of which Pabar is to pay the applicant his monthly salary pending the final determination of case number 2018/42568;

1.4 Ordering Pabar to comply with the terms of the settlement agreement concluded between it and the applicant on 5 September 2018 in terms of which Pabar is to pay the applicant his monthly salary pending the final determination of case number 2018/42568;

1.5 Costs, such costs to include the costs consequent upon the employment of two counsel.

[2] The application is opposed by the first respondent who has filed substantial opposing papers. Since there is no order sought against the third, fourth and fifth respondents, save for the second respondent, they did not participate in these proceedings – hence I propose to refer only to the applicant and the respondent when referring to the first respondent in this judgment.

[3] As alluded above, the applicant is Gregory Massimo Barbaglia and adult businessman, the youngest son of the third respondent and a brother of the first respondent.

[4] The first respondent is Michael Barbaglia, the sibling of the applicant and an adult businessman who is employed by, and at the moment the sole shareholder and director of Pabar, the second respondent in this case.

[5] The second respondent is Pabar (Pty) Ltd ("Pabar"), a private company duly incorporated and registered in terms of the company laws of the Republic of South Africa, having its principal

place of business at 7 Fransen Street, Chamdor, Krugersdorp, Gauteng and carrying on business as a manufacturer of metal pressing products and other products.

- [6] The third respondent is Silvana Barbaglia, an adult retired female who is the shareholder in the second respondent and is the mother of both the applicant and the first respondent. She is the widow of the deceased the late Mr Vincenzo Barbaglia who at the time of his death was the eighty-four percent (84%) shareholder in the second respondent.
- [7] The fourth respondent is Silvana Barbaglia N.O., cited in her official capacity as the duly appointed executrix in the estate of her deceased husband, the late Mr Vincenzo Barbaglia who died on the 10th of December 2020.
- [8] The fifth respondent is Charl Edward Anderson N.O., an adult male businessman cited herein in his alleged official capacity as the appointed executor of the deceased estate of the late Mr Vincenza Barbaglia.
- [9] It is common cause that the late Vincenzo Barbaglia was married to the third respondent in community of property in Italy on the 9th of May 1957 by proxy and their marriage was blessed with two sons, the applicant and the respondent. A bitter battle has arisen between the two siblings with regard to how the estate of their parents should devolve upon them.
- [10] It is undisputed that the deceased during his life time established Pabar as the main family business which was regarded as the treasury in the family, financing the establishment of other business interests for the family. At the time of his death, the deceased was a registered shareholder of Pabar holding eighty-four percent (84%) of the shares in Pabar. The remaining sixteen (16%) percent of the shares in Pabar were held by the first respondent who held fifteen percent (15%) which it is alleged he had acquired as a donation in 2012 and the remaining one percent (1%) is held by the third respondent. However, until February 2021 the deceased and the third respondent were the only directors in Pabar.
- [11] Both the applicant and the respondent worked for Pabar and from approximately 1994 the applicant scaled down his involvement in Pabar as he devoted most of his time in the other family businesses as the empire of the Barbaglias expanded and the family diversified. Although the applicant got involved in the other businesses of the family, he continued his involvement in the financial management and administration in Pabar. He continued to receive his salary from Pabar as he attended to the affairs and premises of Pabar on a daily basis. Although the directors of Pabar over the years remained to be the deceased and the third respondent, Pabar was run for the benefit of three parties and as a partnership amongst the three partners, i.e. the deceased and the third respondent as a unit, the applicant and the respondent as the other two individuals (the tripartite/
partnership relationship).
- [12] In July 2014 the deceased was diagnosed with mild dementia which diagnosis progressed to severe dementia in 2016. On the 26th of September 2019 Advocate Grace Goedhart SC was appointed Curatrix ad Litem for the deceased and on the 9th of October 2019 Advocate

Jenifer Cane SC was appointed Curatrix Bonis to the deceased. On the 19th of October 2019 the appointment of the curatrix bonis was extended to the joint estate of the applicant and the deceased. The Court recognised the marital regime of the deceased and the third respondent as that of a marriage in community of property – hence the appointment of the curatrix bonis to their joint estate.

- [13] During her period as the curatrix bonis of the joint estate, Advocate Cane SC advised the family that she did not intend on relying on documents signed by the deceased after July 2014 since the deceased was diagnosed with dementia as she regards them to be invalid. The deceased died on the 10th of December 2020 and this resulted in the termination of the curatorship of the joint estate. On the 14th of December 2020 the curatrix bonis addressed a letter to the three attorneys representing the applicant, the respondent and the third respondent respectively enclosing copies of five Wills of the deceased which she had in her possession.
- [14] The third respondent resigned as a director of Pabar when the curator bonis took charge of the joint estate and appointed the respondent and Mr Frank Pellegrini, an independent director, as directors in Pabar on the 31st of March 2020. The curatrix bonis directed that the directors of Pabar and Pabar should furnish the applicant with the financial information and records of Pabar so that he can have full insight into Pabar's financial position and wellbeing and that he should be given access to the premises of Pabar during working hours. The applicant was furnished with the financial documents of Pabar and given access to the premises during working hours until Mr Pellegrini resigned as director on the 13th of January 2021 after the death of the deceased.
- [15] During her tenure as curatrix bonis of the joint estate, Advocate Cane SC commissioned a valuation report on Pabar which report was compiled by the firm Strydoms Incorporated. The report found that the first respondent had expended a sum of more than R7 million to fund his personal legal fees from the coffers of Pabar. Furthermore, it was discovered that the respondent had paid a sum of R400 000 as security for costs from the coffers of Pabar in a case where Pabar was not cited as a party but involves the respondent and the applicant in the winding up of Noble Land which is one of their companies. Advocate Cane SC further directed that the respondent should reflect in the financial records of Pabar as to how much he owes Pabar in respect of moneys expended on his personal legal fees.
- [16] On the 22nd of March 2021 through a letter from its attorneys the respondent has shut out and denied the applicant access to Pabar's premises and has refused to furnish him with the financial records of Pabar saying that he is the sole director and shareholder in Pabar. The respondent has stopped and prevented Pabar from paying the monthly salary of the applicant which he has been receiving since he was working for Pabar and the other family businesses. It is this conduct of the respondent which galvanised the applicant into launching these proceedings to interdict and prevent the first respondent from continuing with his mission to disregard the interests of the other partners in Pabar.

- [17] It is contended by the respondent that the applicant is neither a director nor a shareholder in Pabar and therefore he is not entitled to the financial records of Pabar. He is not entitled to gain access into the premises of Pabar for he is not even an employee of Pabar. Furthermore, so the argument went, the respondent denies that there is a family partnership involving Pabar and that whatever monies that were paid to the applicant by Pabar were through the generosity of their parents. It is further contended that in the alternative, the partnership has been dissolved and therefore the applicant is not entitled to receive any salary for he is no longer rendering any services to Pabar.
- [18] The respondent contended further that the partnership action under case number 8931/2020 has not yet been determined since the cause of action has come to an end. The applicant did not receive the financial records of Pabar over a period of thirty-four years as contended, but only in December 2020 when the valuation of Pabar was done in order to determine the amount the respondent was to pay in order to buy the interest of the applicant from Pabar. The breakdown of the partnership started in 2011 and the partnership was dissolved in 2013. The respondent contended therefore that the cause of action of the applicant arose in 2013 when the partnership was dissolved or the latest on the 15th of January 2018 when the respondent made a settlement proposal to the applicant. The cause of action has therefore, so it was argued, become prescribed on the 14th of January 2021.
- [19] It is trite that the purpose for an interdict pendente lite is the preservation of the status quo ante or the restoration thereof pending the final determination of the parties' rights; it does not affect or involve the determination of such rights. Furthermore, it has long been established and decided in a number of judgments that the requirements for an interim interdict are; (a) a clear or prima facie right even if it is open to some doubt; (b) a well-grounded apprehension of irreparable and imminent harm if the interim relief is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other or adequate remedy in the circumstances.
- [20] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18 the Constitutional Court stated the following:
- "Paragraph 50 Under the Setlogelo test, the prima facie right a clamant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."*
- [21] It is urged upon this Court not to concern itself with the determination of whether a partnership existed between the parties or not for that is a matter for determination by the trial court. However, since the first hurdle the applicant has to jump is whether he has a prima facie right which deserves the protection of this Court, the Court is urged to consider

certain facts which are pertinent in the manner in which the family businesses are conducted of which Pabar forms part. There is no dispute between the parties that negotiations in an attempt to settle the dissolution of the partnership have been ongoing for a considerable time but has not yielded any results.

[22] I do not understand the respondent to be disputing that the applicant has been for a considerable time attending to the financial management and other administrative work at Pabar and that his monthly salary was paid by Pabar for his services in the family businesses. The respondent does not deny that the applicant was enjoying access to the premises on a daily basis. However, he avers that since the partnership has been terminated the applicant is not entitled to gain access to the financial records of Pabar and to its premises for his services are no longer required. I do not agree with the contention of the respondent for it ignores the fact that the partnership assets which include Pabar have not been distributed accordingly as the dissolution of the partnership has not yet been finalised. Therefore, the applicant could only have managed the finances and attended to the other administrative work at Pabar by accessing the books of account or financial records of Pabar.

[23] I am unable to agree with the respondent that Pabar is company and that it is run strictly in accordance with the company laws of the Republic and was not a party to any partnership agreement nor that it formed part of the assets of the partnership as alleged by the applicant. On the document titled the 'Road Map Agreement Between Michael Barbaglia ("Mike") and Gregory Barbaglia ("Greg")' attached to the letter from the attorneys of respondent dated the 15th of January 2018, the following is stated:

"Paragraph 1: The parties have agreed to part ways and divide and share all the Barbaglia assets equally and fairly on the basis that they will become the equal beneficial co-owners of all the Barbaglia assets including Pabar, Cronos, Stand 31, Primoris, Boble Land, Baglios, GM Brothers and Douglasdale (or its proceeds),

[24] It is clear from this Road Map document that the respondent acknowledged the existence of partnership between the parties which included Pabar as an asset of the partnership. It is therefore incorrect for the respondent to say that there is no partnership that existed or that Pabar as a company was not part of the partnership agreement nor does Pabar form part of the assets of the partnership. There is no merit in the argument that if there was a partnership which involved Pabar, the applicant must establish if it is a partnership which is in relation to the ownership of shares in Pabar and would be entitled to those shares or its value but not in Pabar as a company or business entity for Pabar was not part of the partnership agreement nor was it part of the assets thereof.

[25] The Road Map document continues on paragraph 2 thereof to set out the steps to be taken in order to facilitate the division of the Barbaglia assets as soon as reasonably possible as follows:

“2.1 STEP 1

2.1.1 the joint valuation commenced by Shaun Coetzee and Carlo Lotter is to be continued with, and be completed, without delay and on or before Friday, 26 January 2018. The valuations are to be conducted on the basis of valuing two primary lots and the remaining assets being sold as follows –

2.1.1.1 Lot1: being Pabar Proprietary Limited, Cronos Investment Proprietary

Limited, Stand 31 Chamdor Proprietary Limited and Primoris Properties CC; Lot 2:

[26] It is therefore my considered view that it is of no moment that the applicant was not a director or shareholder in Pabar which would entitled him to bring this action. The conduct of the parties created a partnership relationship and Pabar was listed as one of the assets of the partnership. However, the respondent raises the issue that in the alternative the applicant’s cause of action had become prescribed since the partnership was terminated in 2013 alternatively, on the 14th of January 2021 since the last negotiations were on the 15th January 2018 based on the letter from the attorneys of the respondent addressed to the applicant which enclosed a proposed road map or mechanism to resolve the partnership dispute between the parties.

[27] It is now opportune to discuss the provisions of the Prescription Act, 68 of 1969. In terms of s10(1) ‘a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt’. Section 10(2) provides that when a principal debt is extinguished by prescription, so are any subsidiary debts such as suretyships. Section 11 lists the periods of prescription – ranging from three to thirty years – for a variety of types of debts. Section 12 (1) provides that prescription begins to run as soon as the debt is due, however subject to certain exceptions.

[28] Section 13 of the Act sets out a number of circumstances that delay the running of prescription as it provides as follows:

“Section 13. (1) If –

- (a)
- (d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or
- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

- (2)

[29] Section 14 of the Prescription Act provides the following:

“14. (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due.”

[30] In *Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd and Others* (410/2019) [2020] ZASCA 104 (16 September 2020) the Supreme Court of Appeal quoted with approval from the case of *Cape Town Municipality v Allie* NO 1981 (2) SA (C) wherein the Court identified what it described as a number of self-evident aspects of the s14 of the Act as the following:

“Firstly, I do not think the acknowledgment of liability need amount to a fresh undertaking to discharge the debt. ‘I admit I owe you R100’ is manifestly an acknowledgement of a liability to pay R100 but it is not a fresh or new undertaking to pay it ...

Secondly, full weight must be given to the Legislature’s use of the word ‘tacit’ in s 14(1) of the Act. In other words, one must have regard not only to the debtor’s words, but also to his conduct, in one’s quest for an acknowledgment of liability. That, in turn, opens the door to various possibilities. One may have a case in which the act of the debtor which is said to be an acknowledgment of liability, is plain and unambiguous. His prior conduct would then be academic. On the other hand, one may have a case where the particular act or conduct which is said to be an acknowledgment of liability is not as plain and unambiguous. In that event, I see no reason why it should be regarded in vacuo and without taking into account the conduct of the debtor which preceded it. If the preceding conduct throws light upon the interpretation which should be accorded to the later act or conduct which is said to be an acknowledgment of liability, it would be wrong to insist upon the later act or conduct being viewed in isolation. In the end, of course, one must also be able to say when the acknowledgment of liability was made, for otherwise it would not be possible to say from what day prescription commenced to run afresh.....

Thirdly, the test is objective. What did the debtor’s conduct convey outward? I think that this must be so because the concept of a tacit acknowledgment of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed, by claiming ex post facto to have had a subjective intent which is at odds with his outward conduct.....

Fourthly, while silence or mere passivity on the part of the debtor will not ordinarily amount to an acknowledgment of liability, this will not always be so. If the circumstances create a duty to speak and the debtor remains silent, I think that a tacit acknowledgment of liability may rightly be said to arise

Fifthly, the acknowledgment must not be of a liability which existed in the past, but of a liability which still subsists.”

[31] Given that the negotiations to finalise the dissolution of the partnership continued between the parties and a road map or mechanism was proposed or suggested by the respondent on the 15th of January 2017, it is my respectful view that the applicant’s cause of action did not become prescribed in 2016 nor on the 14th of January 2021 as contended by the respondent. By making the proposal towards the finalisation of the dissolution of the partnership and that a valuation of the assets of the partnership should occur, it is my respectful view that the debt has not become due and owing and therefore prescription has not started to run. I hold the view that the parties had not yet determined the amount that

is owing and therefore the debt has not been determined and cannot be said to have become due and owing.

[32] Furthermore, even if I were to accept that the debt has been determined and prescription has started running, it is my considered view that the cause of action of the applicant did not become prescribed on the 14th of January 2021 as contended by the respondent since the debt between the parties arose from a partnership relationship. This is so because according to the provisions of s13 of the Act debts between partners which arose in a partnership relationship become prescribed a year after the three-year period of prescription has expired.

[33] It follows irresistibly therefore that there was a partnership between the three parties being the deceased and the third respondent on the one hand and the applicant and the first respondent as individuals. Because of the partnership relationship which in other court papers is called a universal partnership, the applicant enjoyed access to the premises of Pabar and attended to the financial management and did administrative work at Pabar and earned a monthly salary for his work not only at Pabar but in the other businesses of the family. It is therefore my respectful view that the applicant has succeeded in establishing that he has a prima facie right although it is open to doubt as it is a subject of a dispute in other proceedings

in this court.

[34] The respondent does not dispute that Pabar has expended a sum of more than R7 million in legal fees on behalf of the respondent. What he avers is that part of that money was paid because Pabar had an interest in those proceedings. However, the difficulty is that the respondent does not disclose how much has been expended on behalf of Pabar from the amount in excess of R7 million. It is on record that the curatrix bonis in the joint estate of his parents, Advocate Cane SC instructed him to disclose the legal fees paid for by Pabar on his behalf in the loan account but he has failed to populate the legal fees in the financials of Pabar. It is also on record that the overdraft facility of Pabar has been increased to over R11 million without consulting the third respondent who has signed personal surety for Pabar.

- [35] Furthermore, it seems the respondent has no concern that Pabar is currently experiencing financial strain. This is borne by the fact that the respondent took an unauthorised loan in the sum of about R110 000 from the account of Noble Land and avers that it was to assist Pabar to pay staff salaries or wages. However, the respondent did not hesitate to pay R400 000 out of the coffers of Pabar as the security for costs in a litigation matter that went on appeal although Pabar was not a party that action.
- [36] I am unable to disagree with the applicant that the respondent is denuding Pabar as an asset of the partnership for his own benefit and at the expense of the applicant and the third respondent who may find an empty shell when the respondent conduct is not prevented or prohibited. Worse of all, the respondent refuses the applicant and the third respondent access to the financial records of Pabar and up to this day they don't know what is going on with an asset of the partnership. It is on record that there are several litigation proceedings going on between the respondent and the applicant and the third respondent. The applicant and the third respondent do not know as things stand as to who is paying the legal fees for the respondent in all these proceedings for he has insulated himself from the other partners.
- [37] I find myself in disagreement with the respondent's contention that the applicant should approach the CCMA to claim his monthly salary for he is no longer employed at Pabar. Furthermore, that the payments which the applicant had received from Pabar were not meant to be a monthly salary as an employee but were gratuitous payments which were made through the generosity of their parents. It is on record that the applicant was not only doing work for Pabar to earn the monthly salary but was working in the other businesses of the partnership as well but his monthly salary was carried by Pabar since it was an agreement between the partners that they will all draw monthly salaries from Pabar.
- [38] There is no merit in the argument that the partnership has been terminated and therefore the applicant is not entitled to receive a salary for he is no longer rendering any services to the partnership. The fact of the matter is that the dissolution has not yet been finalised and the partnership asset is being used and continues to generates an income not only for the respondent but for all the partners until the dissolution is completed. It is not open to the respondent to unilaterally decide to terminate the monthly amount that Pabar has been paying the applicant for years without consulting the other partners about it.
- [39] In August 2018 the applicant launched urgent application proceedings against the first and second respondents wherein it demanded payment of his monthly salary after his salary was stopped by the two respondents. These proceedings culminated in a settlement agreement being concluded between the parties. For the purposes of the discussion that will follow, it is now necessary to consider the terms and conditions of the agreement as contained in the letter from the respondent's attorneys dated the 5th of September 2019 which offer was accepted by the applicant under cover of a letter from his attorneys dated the 6th of September 2019.

[40] The paragraphs that are of relevance in setting the terms of the agreement are paragraph 3 which provides as follows:

“3. We have now had an opportunity to take instructions from our client in respect of the revised proposal terms set out in your letter and, with a view to reaching a resolution without the need to approach the urgent court, our client’s revised proposal is as follows –

3.1 solely in terms of the relief sought in paragraph 1.1. and 1.2 of your client’s notice of motion in his urgent application, and without admitting any fault or liability on our client’s behalf or part, or for that matter that there is any merit whatsoever in your client’s application (be it in respect of the issue of urgency and/or the merits of the application and/or otherwise), we are instructed to record that our client hereby tenders, on a without prejudice basis, payment of the monthly amount of R150 000 (less PAYE) including the amounts for July and August 2018 together with your client’s additional amounts as set out in Annexure A to the founding affidavit (collectively the “monthly payment”), subject to the terms and caveats set out below. This tender is made in good faith, with full reservation of our client’s rights and

without admitting any liability whatsoever on the part of our client to make such payments, but in order to amicably resolve, on an interim basis at least, inter alia the present impasse and the alleged need for your client to seek urgent relief on 11 September

2018;

3.2 the tender for the monthly payment(s) in 3.1 above is subject to the following terms and caveats:

3.2.1 the monthly payment(s) will endure until a final determination is made in the action proceedings referenced in paragraph 1.3 in his notice of motion alternatively unless otherwise agreed in writing by the parties and/or ordered by a Court;

3.2.2 your client must launch and serve the action proceedings threatened in paragraph 1.3 of his notice of motion within 70 (calendar) days of 11 September 2018 – the 90 day period set out in paragraph 1.3 in the notice of motion is, on any score unreasonable and too long;

3.2.3

3.2.4 should your client not launch and serve the threatened action proceedings within the said 70 day period, then the payment undertaking in 3.1 above will ipso facto, and without more, lapse.”

[41] The applicant’s complaint is that the payment of his monthly salary was terminated by the respondent on the basis of a letter from his attorneys dated the 22nd of March 2021. This is after Mr Pellegrini had resigned as director of Pabar and the respondent had appropriated the hundred percent (100%) shareholding in Pabar to himself and became a sole director without any consultation with the other partners of the family business. The respondent contended that he had given the applicant six months’ notice that the monthly salary is to be terminated and this notice was contained in the respondent’s plea in the action proceedings

instituted by the applicant as agreed upon on the 6th of September 2018.

[42] It is a trite principle of our law that the privity and sanctity of a contract should prevail and the Courts have been enjoyed in a number of decisions to enforce such contracts. Parties are to observe and perform in terms of their agreement and should only be allowed to deviate therefrom if it can be demonstrated that a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy or that the interests of justice dictates otherwise.

[43] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176 (1 December 2017) the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of the contract and stated the following:

“paragraph 23 The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.”

[44] The Court continued and quoted with approval a paragraph in *Wells v South African Alumenite Company* 1927 AD 69 at 73 wherein the Court held as follows:

“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.”

[45] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others* CCT 109/19

[2020] ZACC 13 also had an opportunity to emphasized the principle of *pacta sunt servanda* and stated the following:

“paragraph 84 Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

Paragraph 85 The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.”

- [46] The agreement between the parties is clear, plain and unambiguous that the payment of the monthly amount or salary of the applicant shall endure until a final determination is made in the action proceedings unless otherwise agreed upon in writing by the parties or ordered by a court. None of the three conditions have been met. It is therefore not open to the respondent to say he has given notice to terminate the payment of the monthly salary of the applicant for the proceedings envisaged in the agreement are taking long to be finalised since the applicant is not prosecuting the action with any zest or enthusiasm.
- [47] It is my considered view therefore that, as long as there is no agreement between the parties to terminate the monthly amount or salary of the applicant or a court order to that effect, the applicant is entitled to payment of his monthly salary and the respondent must pay the monthly salary until the conditions as agreed upon have been met. The respondent cannot simply resile from the agreement by giving notice when the terms of the agreement clearly provide for the mechanism to be followed if payment of the monthly salary of the applicant were to be terminating.
- [48] It is disconcerting that the respondent has appointed himself as the sole director and appropriated to himself hundred percent of the shares in Pabar without discussing it or consultation with his other partners in the business. He has expended more than R7 million from the coffers of Pabar for his personal legal fees and has failed to reflect the full extent of his legal fees in the loan account. He has shut out and insulated himself, refused and denied his partners in the business any access to its financial records or information and to its premises. It is of no comfort to the applicant that the respondent would not run down Pabar for it is his life and livelihood. The respondent has demonstrated that he can destroy and is currently denuding the value of Pabar as he is increasing its overdraft facility to more than R11 million without even informing and or consulting the person who signed personal surety for such facility. On the other hand, he obtained an unauthorised loan from the other partnership business to provide for salaries of staff.
- [49] I am of the respectful view therefore that the applicant has met the requirements for an interim interdict in that he has established that he has a clear right although it is subject for determination in a dispute before this court. He has demonstrated the reasonable apprehension of harm to his right being that the respondent is denuding the value of the asset of the partnership which is Pabar and that he does not have a satisfactory remedy in due course for nothing will left of Pabar if the respondent is not prevented from his conduct. There is no prejudice to be suffered by the respondent since he will remain part of Pabar as long as he accounts to the applicant by furnishing him with the financial records and information and gives the applicant access to the premises of Pabar as it has been the case for more than three decades.
- [50] In the circumstances, I make the following order:
1. That an interim interdict is issued against the first and second respondents in terms of which they are:

1.1 interdicted from disposing of, alienating or encumbering any of the second respondent's, that is, Pabar (Pty) Ltd's, assets other than in circumstances where the disposition, alienation or encumbrance is required in the ordinary course of business; and

1.2 compelled to furnish the applicant on a monthly basis with Pabar's following records:

1.2.1 the general ledger;

1.2.2 bank statements;

1.2.3 payment breakdowns;

1.2.4 turnover reports;

1.2.5 income statements;

1.2.6 cash flow projections; and

1.2.7 management accounts.

1.3 compelled to respond to any of the applicant's queries relating to the financial records and business activities of Pabar within 5 working days of receipt of the query;

1.4. compelled to permit the applicant access during normal business hours to the business premises of Pabar in order for the applicant to exercise the rights in 1.1.2 and 1.1.3 of this order;

1.5 interdicted from using pabar's funds to pay for the first respondent's personal legal fees and expenses and or legal fees and expenses which are rendered directly or indirectly for the first respondent's personal benefit.

2. That the interim interdict will operate with immediate effect pending the final determination of the relief sought under case number 8931/2021;
3. That the first respondent desists from preventing Pabar to comply with the terms of the settlement agreement concluded between Pabar and the applicant on 5 September 2018 in terms of which Pabar is to pay the applicant his monthly salary pending the final determination of case number 2018/42568;
4. That Pabar complies with the terms of the settlement agreement concluded between it and the applicant on 5 September 2018 in terms of which Pabar is to pay the applicant his monthly salary pending the final determination of case number 2018/42568;
5. The first respondent is to pay the costs of this application, such costs shall include the costs consequent upon the employment of two counsel.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing:

21st and 22nd February 2022

Date of Judgment: 4th of April 2022

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