

SOUTH AFRICA / JUDGMENT

BDO Corporate Finance (Pty) Ltd and Another v BDO Tax Services Ltd and Others (2023-04186) [2023] ZAGPJHC 1232 (30 October 2023)

[2023] ZAGPJHC 1232

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

2023-04186

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE
NO: 2023-04186

DATE:

30th
October 2023
NOT REPOTABLE
NOT OF INTEREST TO OTHER
JUDGES
REVISED

In the matter between:

BDO
CORPORATE FINANCE (PTY) LIMITED
First
Applicant
LAZANAKIS,
NICOLAOS
Second
Applicant
And
BDO
TAX SERVICES (PTY) LIMITED
First
Respondent

BDO
SOUTH AFRICA INCORPORATED
Second
Respondent
BDO
INTERNATIONAL LIMITED
Third
Respondent

Neutral Citation: BDO Corporate Finance & Another v BDO Tax Services and 2 Others (2023-04186) [2023] ZAGPJHC --- (30 October 2023)

Coram: Adams J
Heard: 25 October
2023
Delivered: 30
October 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 30 October 2023.
Summary: Urgent
application – for interim interdictory relief pending arbitration – the applicants should demonstrate a prima facie right – dispute between parties to a shareholders' agreement – alleged breach by respondents of shareholders' agreement – applicants claiming damages in arbitration and specific performance – pending arbitration, applicants require compliance with agreement – requirements for interim interdict fulfilled – application succeeds.
ORDER
(1)
The application is urgent. The forms and service provided for in the Uniform Rules of Court are dispensed with and this matter is dealt with on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.
(2)
The first and the second applicants are granted leave to amend their notice of motion as per their intended amended notice of motion dated 19 October 2023 and the notice of motion is amended accordingly.
(3)
The first and the second respondents' application in terms of rule 6(15) to have struck out certain paragraphs, or parts thereof, contained in the applicants' answering affidavit, be and is hereby dismissed with costs.

(4)
Pending the final determination of the arbitration proceedings instituted by the applicants against the first respondent in terms of the referral attached as Annexure 'X' to the Notice of Motion, the first and the second respondents be and are hereby interdicted and restrained from in any manner stopping, restraining, infringing upon or frustrating the first applicant's

right to:

- (a)
Continued use of the BDO brand;
- (b)
Continued use of the @bdo.co.za email;
- (c)
Continued use of the BDO IT systems;
- (d)
Continued use of BDO Information technology;
- (e)
Continued access to BDO templates, toolkits and models;
- (f)
Continued access to BDO and BDOI experts and subject matter specialists;
- (g)
Continued payroll support and processing;
- (h)
Continued HR support and administration;
- (i)
Continued occupancy of BDO office space;
- (j)
Continued cooperation and collaboration with other BDO operating entities; and
- (k)
Continued pipeline generation through BDO and BDOCF customer base.

(5)
The second respondent is directed to and shall withdraw its request to the third respondent (referred to in the letter of the third respondent dated 26 September 2023, being Annexure 'FA21' to the Founding Affidavit) in writing and within twenty-four hours of the date of this order.

(6)
The first and the second respondents, jointly and severally, the one paying the other to be absolved, shall pay the first and the second applicants' costs of this urgent application, including the costs consequent upon the employment of two counsel, where

so employed.

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the first applicant (BDO CF) and the second applicant (Mr Lazanakis) for interim interdictory relief against the first respondent (BDO Tax) and the second respondent (BDO SA). Pending the final determination of arbitration proceedings instituted by BDO CF against BDO SA on the basis of a shareholders' agreement between Mr Lazanakis and BDO Tax in relation to the shareholding by them in BDO CF, the applicants in essence seek an order, on an urgent basis, interdicting and restraining the respondents from interfering with and infringing upon BDO CF's right to the use of the BDO brand and BDO supported information technology and operational systems. The BDO brand and its supported systems are an integral and an essential part of the business of BDO CF and without it the operations of BDO CF would grind to a halt.

[2]. In the arbitration proceedings, BDO CF and Mr Lazanakis ask for contractual damages of about R73 million against BDO Tax arising from the latter's alleged breach of the shareholders' agreement, which obligated BDO Tax, as a shareholder of BDO CF, to promote and market BDO CF and to refer all corporate finance work undertaken by the BDO Group to BDO CF. The applicants also seek specific performance in terms of the restraint provisions, namely, that BDO Tax was to ensure that all work undertaken by other entities in the South African BDO Group which falls within the definition of 'Business' in the shareholders' agreement, were to be referred to BDO CF.

[3]. The issue to be considered in this urgent application is whether the applicants have made out a case for the interim relief sought. That issue is to be decided against the factual backdrop of the matter as per the facts set out in the paragraphs which follow and which are, in my view, by and large common cause. For the reasons which become apparent during the discussion of the merits of the urgent application, I find that the applicants' application is indeed urgent. The submissions to the contrary on behalf of the respondents are without merit.

[4]. BDO is a world-wide international network of independent public accounting, tax and advisory firms ('the BDO network'), which perform professional services under the name of BDO. In effect, BDO is the brand name for the BDO International network and for each of the BDO Member Firms. In South Africa, the 'Voting Member Firm' of the BDO network is BDO SA. BDO SA is the custodian of the BDO network of companies in South Africa. As the 'Voting Member Firm', BDO SA decides which firms can be admitted into the BDO network and on what terms. BDO SA's business development strategy has always been the acquisition of existing audit, tax, advisory and accounting firms in South Africa, with the aim of growing the brand in South Africa.

[5]. During the course of 2010, BDO SA approached Mr Lazanakis and one Mr Naude with a view to amalgamating the successful business of Messrs Lazanakis and Naude into the BDO Group. Thus came into existence BDO CF, which became a member of the BDO network and which was entitled to exclusively provide corporate finance services in South Africa. BDO Tax, as BDO SA's nominee, became 98% shareholder in BDO CF and Mr Lazanakis presently owns the remaining two percent shareholding in the said entity. The exclusivity and autonomy provisions were reflected in the shareholders' agreement concluded between Messrs Lazanakis and Naude, on the one hand, and BDO Tax, on the other.

[6]. The exclusivity provisions contained in the shareholders' agreement is unequivocal: it is a two-pronged obligation: (i) enjoining the entire BDO network in South Africa to refer all corporate finance business to BDO CF; and (ii) prohibiting any company in the BDO network in South Africa from providing corporate finance services in competition with BDO CF. The business of BDO CF has been built, in the main, by Mr Lazanakis, who in 2014 also took over Mr Naude's one percent equity. BDO Tax is in all respects controlled by BDO SA. Mr Lazanakis is the Chief Executive Officer and the engine behind BDO CF, which has been recognised as a market leader in its field for the past five consecutive years. The success of BDO CF is credited by Mr Lazanakis precisely to the exclusivity and autonomy provisions of the shareholders' agreement.

[7]. BDO CF is fully integrated into the BDO network of companies. It operates from the same premises as BDO SA; it utilises the software, network and IT servers controlled by BDO SA in South Africa; it relies on the BDO network's precedent and forms; all engagements with all its clients are governed by the terms and conditions dictated by the BDO network and the salaries of the employees of BDO CF are paid via the payroll system controlled and operated by the BDO network. In short, without the ability to continue as part of the BDO network, the business of BDO CF will meet its demise: it would essentially be 'cut off' from its business and it would lose all its goodwill built up over the past twelve years.

[8]. The controversy in the matter relates to the proposed expulsion of BDO CF from the BDO network in the following circumstances. Since 2018, BDO SA pursued an acquisition strategy of accounting firms which also incorporate a corporate finance division. Specifically, BDO SA merged into the BDO network the Grant Thornton ("GT") businesses in Cape Town and Port Elizabeth, both of which carried on some corporate finance work. Despite Mr Lazanakis' insistence that these streams be incorporated into BDO CF (which is the only manner of honouring the exclusivity provisions of the Shareholders Agreement), BDO SA refused to do so.

[9]. Instead, what BDO SA did was to establish its own division, BDO Corporate Finance Advisory Services ("BDO CFAS"), which actively competes with the business of BDO CF in direct contravention of the exclusivity provisions of the shareholders' agreement. BDO CFAS competes with BDO CF by providing the very same services to the very same market.

[10]. The alleged ongoing breach of the shareholders' agreement by BDO Tax has led to the souring of relations between the parties. Since 2021 this escalated, and the parties engaged in mediation in an attempt to resolve the disputes. The mediation failed. All the while BDO SA, so it

is alleged by BDO CF, continued to compete with it through its BDO CFAS division. The applicants have calculated their loss at about R73 million, representing the revenue billed by BDO CFAS over the period between 2019 to March 2023. With mediation failing in early 2023, the parties continued in an uneasy relationship.

[11]. The respondents, however, remained resolute to terminate the relationship and the shareholders' agreement. And on 4 September 2023, BDO Tax dispatched correspondence to the applicants advising them of its decision to sell, alternatively abandon its equity in BDO CF. According to the applicants, these actions by BDO Tax and BDO SA are designed to extricate BDO Tax (and, by extension, the remaining BDO network of companies within South Africa) from the exclusivity provisions which bind them in terms of the shareholders'

agreement.

[12]. Then, on 21 September 2023, BDO International, the offshore company in which BDO SA is the 'Voting Member', at the instance of BDO SA, issued a termination notice to BDO CF, explaining that '[t]he Voting Member has submitted a written request to the CEO of BDOI, asking for the membership of BDO CF of BDOI to be terminated'. It is clear, contrary to the suggestion otherwise by the respondents, that BDO SA is the driver of the purported expulsion of BDO CF from the BDO network. Moreover, it has the power to decide when the proposed expulsion would take place and that it has already determined that it (and not BDOI) would take any steps to disrupt BDO CF's business before 31 October 2023.

[13]. On 3 October 2023, the applicants' attorney sought undertakings from BDO SA and BDO Tax in the following terms:

'To ensure that the parties are not required to apply to Court for any interim relief pending the final determination of the current

disputes, our client requests an undertaking from your client that it will maintain the status quo pending the outcome of those proceedings. In particular, our client requires confirmation that: (i) BDO Tax, BDO SA and any other related parties will continue to respect the terms of the Shareholders Agreement; (ii) no adverse actions affecting the business or rights of Mr Lazanakis, BDO CF or its employees will be taken; (iii) your clients will do all that is necessary to ensure that BDO CF can continue trading under the BDO brand (as has been the case) pending the finalisation of the arbitration proceedings.'

[14]. In response to this correspondence, on Friday, 6 October 2023, the attorneys for BDO SA and BDO Tax stated that they do not hold instructions to provide the undertakings sought. The attorney for the applicants attempted to contact the respondents' attorney, but was unable to reach him. On the following Monday, 9 October 2023, BDO Tax issued an application in terms of section 163 of the Companies Act, and on 10 October 2023 responded with a draft arbitration agreement which did not reflect the terms discussed between the attorneys.

[15]. It accordingly became apparent to the applicants on 10 October 2023, that BDO Tax and BDO SA were not intending to furnish the requested undertakings, and, accordingly, this urgent application was then served on the respondents on 13 October 2023. This application has been brought on truncated time periods due to the fact that an order is required before 31 October 2023, failing which, BDO CF will be ‘cut-off’ from the BDO group, and it will suffer devastating consequences, including the decimation of its business. It is for this reason that I find that the application is urgent. There can be no doubt that the application is urgent. The test for urgency is simply whether the applicants can obtain relief in the ordinary course. In casu, I think not.

[16]. BDO Tax and BDO SA, in their opposition to the applicants’ application, contend that the relief sought cannot be given effect to, because BDOI has ‘already terminated’ BDO CF’s participation in the BDO network since the end of September

2023. Mr Fine SC, who appeared on behalf of the applicants, together with Ms Milovanovic-Bitter contends that there is no merit in that contention. BDO CF has in fact carried on as usual since the end of September, so the argument goes, on the basis of the undertaking provided by BDO SA that it would not take any steps to terminate and ‘disrupt’ the business of BDO CF until ‘at least’ 31 October 2023. In fact, BDO SA has in the intervening period even approved contracts for BDOCF’s new hires and has had a hand in finalising their employment contracts. This is in line with BDOCF’s normal operations (demonstrating just how deeply they are embedded in the BDO network’s processes).

[17]. I agree with these submissions. What is more is that, when faced with the evidence put up in response to their version, the respondents’ reaction was to issue a strike out notice, on the basis that the material in reply was new and prejudicial. As contended by the applicants, the notice is misplaced. The evidence, which the respondents seek to have struck out, is in response to the assertion in the answering affidavit that the termination is already of effect and all that remains is a ‘physical separation’. The application to strike out therefore stands to be refused.

[18]. Secondly, the respondents contend that they (BDO Tax and BDO SA) are unable to give effect to the orders sought because the participation by BDO CF in the BDO network of companies is dependent on BDO CF’s membership in BDOI, as well as its continued contractual relationship with various offshore entities. There is no merit in this contention. The point is simply that the applicants do not ask of the Court to exercise jurisdiction over BDOI, which plainly does not consider itself to be part of the dispute. The respondents have confirmed, in as many words, that BDO SA is the decision-maker and, moreover, that BDO SA ‘facilitated certain practical aspects of the business of BDO CF, such as providing it with office space, internet and email connectivity and support services’.

[19]. BDO SA procured the supposed termination of BDO CF’s membership with BDOI. BDOI does not have any interest in whether or not BDO CF is a member of the BDO network in South Africa and have left it to BDO SA to regulate these matters. Moreover, the rights conferred upon BDO CF over the past twelve years were conferred upon it by virtue of the existence of the shareholders agreement, which not only guaranteed its participation in the BDO network, but did so on an

exclusive basis, and with the undertaking by BDO Tax (qua co-shareholder) to procure that it would not, and also that all of its associated entities would not, compete with BDOCF in the carrying out of corporate finance work, and that BDO Tax (and all of its associated entities – which translates to the entire BDO network) – would refer all BDO corporate finance work to BDO CF.

[20]. As correctly contended by the applicants, the right to operate within the BDO network and under its brand forms part and parcel of the agreement contained in the shareholders' agreement. The attempted termination of the continued participation in the BDO network is no more than a transparent attempt to avoid and circumvent the obligations of not only BDO Tax in terms of the shareholders'

agreement, but also of all 'associates' which pertains to the broader BDO network of companies in South Africa.

[21]. The avoidant stance adopted by BDO SA that it cannot give effect to the orders sought in the notice of motion, the applicants amended the notice of motion by seeking that the Court directs BDO SA (to the extent this is necessary to give effect to maintaining the status quo as particularised in the notice of motion) to withdraw its request for the cancellation of BDO CF's membership in the BDO network. The respondents' objection to the amendment to the notice of motion on the basis that it introduces a new cause of action, is misdirected. The amendment is premised on the respondents' version, and the facts underpinning the relief sought are in any event contained in the founding affidavit. There are no valid grounds for the objection. BDO SA holds the right to utilise the BDO brand and the IT system utilised by all companies operating within the BDO network, including BDO CF. BDO Tax is controlled by BDO SA, which conducts business via BDO Tax and which is the entity that imposes the terms of participation on BDO CF. And importantly, BDO SA procured the provision of the termination notice by BDOI.

[22]. The foregoing, in my view, demonstrate that it is BDO SA that is the entity which controls the strings, and that it is BDO SA which has the power to give effect to the relief sought. To the extent that this might require the formality of a withdrawal of the request to BDOI to terminate BDOCF's membership, this does not constitute 'a new cause of action' but a practicality necessary in order to prevent BDO SA from hiding behind a corporate structure. There is no prejudice to any respondents in the amendment to the notice of motion being granted and the applicants should be granted leave to amend.

[23]. For all of the foregoing reasons, the applicants should be granted the relief sought by them. A proper case has, in my view, been made out for same.

[24]. There is also no merit in any of the other technical 'defences' raised by the respondents, such as those relating to locus standi and joinder. BDO CF and Mr Lazanakis both have the necessary standing to participate as applicants in these proceedings. Mr Lazanakis is the sole executive director of BDO CF and Mr Lazanakis is charged, in this role, with managing the business of BDO CF, including business development and revenue generation – both of which will be fundamentally affected if the relief is not granted. Indeed, Mr Lazanakis has a fiduciary duty

to protect the interests of BDO CF in this regard. As such, Mr Lazanakis clearly meets the threshold for 'direct and substantial' interest.

[25]. The foregoing also takes care of the alleged lack of authority to institute these proceedings. Both BDO CF and Mr Lazanakis have the necessary locus standi to bring these proceedings. Insofar as Mr Lazanakis is concerned, he has provided the necessary power of attorney in favour of the applicants' attorneys of record to launch these proceedings on their behalf. Factually, the board minutes and board resolution demonstrate that the board of BDO CF approved the appointment of the said attorneys to institute proceedings against the first respondent, including all actions ancillary to or necessary for the conduct of the proceedings, on 5 August 2021.

[26]. For all of these reasons, I am of the view that the applicants' application for interim relief should succeed.

Costs

[27]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[1].

[28]. I can think of no reason why I should deviate from this general rule.

[29]. Accordingly, I intend awarding costs in favour of the first and the second applicants against the first and the second respondents.

Order

[30]. Accordingly, I make the following order: -

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 25th October 2023 JUDGMENT DATE: 30th October 2023 – judgment handed down electronically FOR THE FIRST AND THE SECOND APPLICANTS: Advocate Dennis Fine SC, together with Advocate Ana Milovanovic-Bitter INSTRUCTED BY: Herbert Smith Freehills, Rosebank FOR THE FIRST AND THE SECOND RESPONDENTS: Adv F H Terblanche SC, together with Adv H Struwig INSTRUCTED BY: Jacobs Roos Coetzee Incorporated, Lynnwood Manor, Pretoria FOR THE THIRD RESPONDENT: No appearance INSTRUCTED BY: No appearance

[1] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

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