

SOUTH AFRICA / JUDGMENT

Brand v Potgieter and Others (010361/2024) [2025] ZAGPJHC 561 (4 June 2025) [2025] ZAGPJHC 561

COURT

South Gauteng High Court, Johannesburg

BEFORE

N P Mali

CASE / FILE NUMBER

010361/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO:010361/2024

DOH:

29 May

2025

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

4

JUNE 2025

BRAND,

CHRISTOPHER JOHN

Applicant

and

CORIEN

POTGIETER

1st

Respondent

TARRYN

WITTER

2nd

Respondent

BRAND

POTGIETER INCORPORATED

3rd

Respondent

This

Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email

and shall

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JUNE 2025

JUDGMENT

MALI J

Introduction

[1] This application in terms of Rule 30 (1) of the Uniform Rules of Court is brought by the respondents in the main application against the applicant in that application. It is an application to declare the interlocutory application instituted by the applicant in terms of Section 163 (2) (1) of the Companies Act, 71 of 2008 (the Act) as irregular or improper. Secondly they seek an order for the setting aside the same interlocutory application.

[2] In the interlocutory application sought to be set aside, the applicant seeks relief in the following terms:

“That the main application be referred to trial, alternatively the hearing of oral evidence in terms of Section 163(2)(I) of the Companies Act (71 of 2008) relating to, inter alia, the following disputes:

1.1. The unauthorized retention of the sum of R851,222.00 as set out in paragraph 43 of the Respondents' answering affidavit;

1.2. The alleged "BPI) dividend policy" and the First and Second Respondents' refusal to purchase the Applicant's 42% shares held in the Third Respondent (which includes the calculation of the fair value of the shares);

1.3. The alleged abandonment by the Applicant of his shares;

1.4. The oppressive and prejudicial conduct of the First and the Second Respondents vis-à-vis the Applicant; and

1.5. The value of the Applicant's shares, the valuation method to be employed and the amount payable to the Applicant.

2. Insofar as the above issues are referred to trial:

- 2.1. The Applicant's notice of motion will stand as his simple summons;
 - 2.2. The Respondents' notice of intention to oppose will stand as their notice of intention to defend;
 - 2.3. The Applicant be directed to deliver a declaration within 20 (twenty) days from the date of the above Honourable Court's order; and
 - 2.4. Thereafter the normal Rules of Court applicable to trial matters will apply.
3. Alternatively and insofar as the issues referred to in paragraph 1 are referred to oral evidence, the provisions of Rules 21, 35, 36 and 37 of the Uniform Rules of Court shall apply mutatis mutandis to the oral evidence to be led as aforesaid.
 4. That the winding-up relief sought in the main application be postponed sine die.
 5. That the costs of this application be costs in the cause, alternatively and in the event of any of the Respondents opposing this application, that such opposing Respondent(s) be directed to pay the costs of this application, jointly and severally, the one or more paying the other(s) to be absolved.
 6. Such further and/or alternative relief as the above Honourable Court deems appropriate.”
- [3] Section 163 (2) (l) of the Act provides that: (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including-
- (l) an order for the trial of any issue as determined by the court.

Background

- [4] On 1 February 2024 the applicant instituted the main application in which he seeks relief encapsulating 7 prayers. Prayer 2 consists of 10 sub prayers. It is not necessary to overburden this judgment with all the prayers sought in the notice of motion. Relevant to this judgment is the relief set out in prayer 3 of the notice of motion which reads as follows:

“Alternatively to prayers 1 and 2, that an order be issued in terms of Section 163 (1)(l) (sic) of the Companies Act 71 of 1973 that the disputes in this matter be referred to trial for determination of the applicant’s entitlement to the relief in prayers 1, alternatively 2”.

- [5] In the main application the applicant’s main prayer reads as follows:

“1. That the first and second respondents be directed to purchase the 42% shares of the applicant in the third respondent in such ratio as they may decide between themselves, alternatively in the ratio of 43/100 in respect of the first respondent and 15/100 in respect of the second respondent and to take transfer thereof against payment to the applicant of the amount of R1,325,520.00, alternatively of the amount of R1,060,686.02, against the applicant handing a signed share transfer form in respect of his 42% shares in the third respondent to the first and/or second respondents.

10.....”

[6] On 22 March 2024 the respondents opposed the main application and delivered their answering affidavit, after which the applicant delivered his replying affidavit. Subsequently the applicant instituted an interlocutory application in terms of Section 163 (2)

(l) of the Act as stipulated above.

[7] It is to the above application by the applicant, that the respondents who are applicants herein launched the Rule 30 (1) application.

Rule 30 (1) application

[8] Rule 30 (1) of the Uniform Rules provides that: (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside. '

[9] It is submitted on behalf of the respondents that the step is irregular because the relief sought in terms of section 163 of the Act is already sought in the main application as an alternative. The applicant can therefore not seek relief by way of an interlocutory application. The main application needs to be heard in its entirety, including the alternative relief which is the same as the one sought by the applicant herein. In the result the relief sought in terms of the Act is superfluous and irregular, the respondents contend.

[10] It is further argued on behalf of the respondents that the interlocutory application as brought by the applicant is prejudicial to the respondents because, the court which will be seized with the application must first find out that the conduct of the respondents is abusive, oppressive and prejudicial. In this manner that court would be enjoined to consider subsection 1 of Section 163 which is the alternative relief in the main application. Thus, that aspect of the main application would become academic. The applicant seeks to prevent the argument that section 163 is not applicable at all. Furthermore, the respondents will be expected to incur costs twice, first in the interlocutory court and in the main court for the same relief.

[11] The argument proffered on behalf of the applicant is that the respondents in the main application vehemently oppose the application and have raised material disputes of fact which are not capable of being resolved in motion proceedings. According to the applicant this is the reason he instituted the interlocutory application. Reference is made amongst others, to the unauthorised retention of the sum of R851,222.00; the alleged BPI dividend policy, etc as issues which require referral to trial or for oral evidence.

[12] Another complaint by the applicant is the oppressive conduct of the first and second respondents. Now that the applicant has discovered from the answering affidavit that there are disputes of fact he avers that he has brought the application as a proactive measure in order to refer the issues to trial. In this regard, it is noteworthy that in the main application, the applicant seeks relief in the alternative for referral of the issues to trial. It is therefore improbable that the applicant did not foresee that disputes of fact might arise.

- [13] It is further submitted on behalf of the applicant that the interlocutory application is brought both in terms of section 163 (2)
- (l) and Rule 6 (5) (g) of the Uniform Rules of Court. In support of the averment that the application is interlocutory in nature, the applicant states that the general rule provides that a matter must be referred to evidence at the outset, and not after the parties have advanced arguments on the merits. Again this is despite the applicant having not done so at the outset.
- [14] The applicant placed reliance on various cases including *Law Society, Northern Provinces v Mogami (Mogami)*[2010 (1) SA 186 (SCA) [4] paras 23 -24.] in support of his averment that the issues should be referred to trial. In *Mogami* the court held:

“applications for the suspension or removal from the roll required a three-stage inquiry. First the court has to decide whether the alleged offending conduct has been established on a balance or preponderance of probabilities. This is said to be a factual inquiry, Second, to consider whether the person concerned was ‘in the discretion of the court’ not a fit and proper person to continue to practice. That involves weighing -up of the conduct complained of against the conduct expected of an attorney and, to that extent was a value judgment. And third, the court had to inquire whether, in all the circumstances, the person in question was to be removed from the roll of attorneys....”

Analysis

- [15] It is not correct that the applicant brought the application in terms of Rule 6(5)(g). The notice of motion and the founding affidavit in the interlocutory application make it clear that the application is brought only and only in terms of section 163 (2) (l) of the Act.
- [16] Section 163 (2)(l) of the Act envisages that there must be consideration in terms of Section 163 (1). Section 163 (1) provides that: “(1) A shareholder or a director of a company may apply to a court for relief if- (a) any act or omission of the company, or a related

person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; - (b).....”

- [17] The relief sought by the applicant in the interlocutory application engages a two-stage process (i) The court must first find that there is an oppressive or prejudicial conduct or form of abuse. This is a factual enquiry (ii) then the court may make an interim or final order, amongst the orders referring the matter to trial. Put differently, there is a need for the court to first establish the facts. It is for the court hearing the main application to decide whether there are disputes of fact after hearing arguments

in the main application, including the conduct complained of. Thereafter, the court may then decide to refer the matter to trial.

- [18] In *Parry v Dunn-Batch and Others*[1] the court held:

“It is evident from the discussion in the preceding paragraph that the court’s jurisdiction to grant the relief envisaged in s 163 only arises once all specified criteria set out in that provision have been satisfied. I have already alluded to the existence of factual disputes on material issues. Such disputes are incapable of resolution on the papers and could only have been decided after oral evidence had laid bare all the circumstances under which the alleged oppression, unfair prejudice and unfair disregard of interests are based. In my view, these disputes were foreseeable, given the acrimonious e-mail exchange both before and after the conclusion of the licence agreement in 2015. These factual disputes pose an insurmountable hurdle for the granting of an order on the papers.”

- [19] An interlocutory application is an urgent request made to court to compel compliance with procedure and time periods in order to secure some end and purpose necessary and essential to the progress of a case. The applicant’s interlocutory application in terms of section 163 of the Act does not implicate any procedural issues needed to be complied with.
- [20] Applicant’s approach in seeking the interlocutory court’s intervention to refer the disputes or issues to trial is a conflation of the Court Rules and the substantive law. As indicated above the steps envisaged by section 163 of the Act as relied upon by the applicant are statutory substantive provisions and are not intended to circumvent the rules of court.
- [21] Having regard to the above it is concluded that the step taken by the applicant is irregular. In the result the application to set aside the interlocutory application as an irregular step must succeed. The following order ensues:

Order

1. The interlocutory application made by the Applicant in terms of section 163(2)(1) of the Companies Act 71 of 2008 on 30 April 2024 is set aside as an irregular step.
2. The Applicant is ordered to pay the First, Second and Third Respondents costs including the costs of counsel on Scale B.

N P MALI

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of Hearing:

29 May 2025

Date Judgment reserved: 29 May 2025

Date Judgment delivered: 04 June 2025

Appearances

Legal Representatives for the

Applicant

(Respondent in the Rule 30(1) Application): Adv. JW Steyn

Instructed by:

CJ Brand Attorneys Inc

First, Second and Third Respondents

("the Respondents")

(Applicants in the Rule 30(1) Application): Adv. P Bosman

Instructed by:

RNK Incorporated

[1] (394/2022)

[2024] ZASCA 19 (28 February 2024) at paragraph [49]

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Prepared on 12 October 2026 · Esheria