

SOUTH AFRICA / JUDGMENT

Briers and Another v Dr J Bruwer and Assoc. NO. 78 Inc. and Others (19726/2023) [2024] ZAWCHC 145 (30 May 2024) [2024] ZAWCHC 145

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

19726/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case No: 19726/2023

In

the matter between:

DR
PIETER FRANCOIS MELCHIOR
BRIERS
First Applicant
DR
PRANAV
RAMKILAWAN
Second Applicant
and
DR
J BRUWER AND ASSOC. NO. 78
INC.
First Respondent
DR
ANDRE JACOBUS
MAREE
Second Respondent
DR
ELSKE MARGUERITE FERREIRA
Third Respondent
DR
JASPER MICHAEL

SMIT
Fourth Respondent
DR
MARSHA
HERMANUS
Fifth Respondent
DR
SHARMISTHA
HEERALAL
Sixth Respondent
DR
REINETTE VAN DER
WESTHUIZEN
Seventh Respondent
DR
SEAN DANIEL
Eighth Respondent
DR
YOLANDA
VINK
Ninth Respondent
THE
COMPANIES AND INTELLECTUAL
PROPERTY
COMMISSION
Tenth Respondent
Coram: Justice J
Cloete
Heard: 24 April
2024, supplementary notes delivered on 29 April 2024 and 3 May 2024
Delivered
electronically: 30 May 2024

JUDGMENT

CLOETE J:

Introduction

and relevant background

[1] This is an opposed application for leave to amend the applicants’

notice of motion. The applicants and all but the first and tenth respondents are medical doctors. The first respondent operates a medical practice under the name of Medicross Table View, administered by Medicross Healthcare Group (Pty) Ltd. The tenth respondent has not participated in these proceedings thus far.

- [2] The applicants previously concluded similar consultancy agreements with the first respondent on 14 May 2008 and 25 August 2021 respectively. Each consultancy agreement contained a clause to the effect that it would continue indefinitely subject to the right of either party to terminate it by giving the other 30 days written notice of termination. One of the consequences of termination was that each applicant would be deemed to have sold his 10% shareholding in the first respondent to any other shareholders nominated by the first respondent for a purchase price of R1 per share.
- [3] The remaining shareholders of the first respondent are the second to fourth and sixth to ninth respondents and the fourth respondent is its sole director (from what I could gather the fifth respondent left

the practice and is no longer a shareholder). Where necessary I refer to these respondents collectively as “the respondents”.

Various disputes arose between the applicants and predominantly, it would seem, the fourth respondent. Invoking the termination clause in each consultancy agreement, the first respondent gave written notice of termination to the second applicant on 18 August 2023 (effective 17 September 2023) and the first applicant on 19 October 2023 (effective 18 November 2023).

- [4] On 6 November 2023, after the second applicant’s notice period expired but before expiry of that of the first applicant’s, the applicants approached this court for relief in two parts. Part A was brought on an urgent basis pending determination of Part B. In Part A the applicants asked the court to interdict the first respondent, alternatively the respondents:

‘...from implementing the decision by the First Respondent dated 19 October 2023 in terms of which:

2.1 The First Applicant’s right to continue practising as a consultant, alternatively a partner, of the First Respondent at the First Respondent’s business premises had been terminated with thirty days’ notice; and

2.2 The First and Second Applicant are being forced to sell their shares in the First Respondent against a nominal par value.’

- [5] As far as prayer 2.2 above is concerned there is no evidence that any decision was taken in respect of the second applicant on 19 October 2023. In their answering affidavit one of the grounds of opposition raised by the respondents was that no relief was sought, nor indeed any case made out, for the setting aside of the termination notices themselves. It was submitted that since the termination notices thus stood, and were issued in terms of the consultancy agreements (which were also not attacked on any contractual basis) the relief sought in Part A was not competent. After hearing argument in the urgent court Bishop AJ dismissed Part A with costs. No reasons were provided, and nor were they subsequently sought.[1]

[6] Part B was also postponed by Bishop AJ for hearing on 24 April 2024 (on the semi-urgent roll) when the matter was allocated to me. On 8 April 2024, after obtaining advice from senior counsel (who subsequently also appeared at the hearing) the applicants delivered a notice of intention to amend the Part B relief which was followed by a notice of objection, resulting in this application for leave to amend. In the original Part B the applicants essentially sought an order directing, in terms of s 163 of the Companies Act,[2] alternatively the common law, that the first respondent, alternatively the respondents, are obliged to acquire the applicants'

respective shares at fair market value. In their notice of intention to amend the applicants sought to introduce three further prayers, each in the alternative.

[7] These were: first, that the first respondent, in terms of s 163(2)(g), repay to the first applicant his original purchase consideration of R210 000 adjusted with inflation; second, that the 'Respondents', in terms of s 163(2)(i), compensate the applicants 'in the amount of R800 000 or such an amount which the Court considers just'; and third, and 'to the extent necessary' in terms of s 163(2)(h), setting aside the consultancy agreements concluded between the applicants and first respondent.

[8] On 12 April 2024 the respondents delivered an objection that the applicants no longer had locus standi since their shares had been sold and distributed to the first respondent's remaining shareholders on 14 December 2023, which was also when each applicant received payment of R10 directly into their respective bank accounts. It was the stance of the respondents that this was a perfectly acceptable course of action since, following the dismissal of Part A and absent any attack on the termination notices themselves, no impediment existed in respect of the sales and transfers of the applicants' shares. In addition the share register had been updated accordingly and the applicants' attorney notified thereof on 5 March 2024 when the respondents' attorney wrote to the applicants' attorney as follows:

'1. I refer to the above matter.

2. I annex hereto the following documents:

2.1 Proof that your clients were paid their respective R10... in respect of their shareholding in accordance with the forced sale provisions of their respective consultancy agreements; and

2.2 A copy of the current share register of the incorporated practice as at 31 January 2024. You will note that this demonstrates that your clients no longer hold any shares in the incorporated practice. This is resultant from the transfer of the shares owing to the forced sale provision... previously mentioned.

3. Your clients are therefore no longer shareholders of the incorporated practice. It is also common cause that your clients left the incorporated practice.

4. By virtue of the aforesaid we are of the view that your clients no longer have any basis to persist with the relief sought in part B of the application set down for 24 April 2024. In this regard specifically, your clients can no longer assert any rights, be it that as previously contended for or any other basis, owing to the fact that they have left the practice and are no longer minority shareholders of the incorporated practice. Your clients simply do not possess the requisite locus standi to pursue the relief sought in the application.
5. Resultant from the above, we await your clients' notice of withdrawal of the application together with [a] tender for costs...

[9] On 13 March 2024 the applicants' attorney responded that:

'3. It is our clients' argument that they have the necessary locus standi to pursue the relief sought. Accordingly our clients have instructed us that they intend to proceed with the hearing of Part B set down for 24 April 2024...'

[10] The aforementioned letters were also contained in a supplementary affidavit of the respondents deposed to on 11 April 2024. On 18 April 2024 the applicants launched the current application. Although not contained in their notice of intention to amend, the third further alternative which they sought to introduce now read as follows:

'3A In terms of Section 163 of the Companies Act 71 of 2008 setting aside the termination of the First and Second Applicants' consultancy agreements and subsequent sale of their shares.' (my emphasis).

[11] In their affidavit filed in support of the application for leave to amend the applicants alleged that:

'5. On Friday, 12 April 2024, the Respondents delivered an objection to the proposed amendment aforesaid on the basis that following a purported sale of the Second Applicant and my shareholding in the First Respondent, which the Second Applicant and I did not participate in but which sale was actioned in terms of deeming provisions contained in our respective consultancy agreements, the Applicants, so it is contended, no longer have the necessary standing to prosecute the relief sought in the main application...

7. While the Second Applicant and I have no intention to object to the filing of the further supplementary affidavit by the Respondents, the evidence introduced in the said affidavit necessitates a further amendment to the Applicants' Notice of Motion in the main application.'

[12] After I raised certain queries with applicants' counsel in argument, they amended their application for leave to amend to make their primary relief the setting aside of the termination of their respective consultancy agreements and subsequent sales and transfers of their shares, with the other relief as alternatives. The parties' arguments thus focused on the newly crafted primary relief with the pivotal issue being whether or not the applicants still have locus standi. Counsel were given the opportunity to file supplementary notes in

this regard as well.

Discussion

[13] The relevant part of s 163 of the Companies Act provides as follows:

‘163. Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company.---(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) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or

unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised

in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including---

(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder

paid for shares, or pay the equivalent value, with or without conditions;

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;

(i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;...’

(my emphasis)

[14] The primary relief which the applicants seek to introduce is based, as their counsel put it, on “wide relief” in terms of s 163. In respect of the alternative prayers sought to be introduced based on “the common law” and specific subsections of s 163, it was not suggested that the common law can override the peremptory terms of a statutory provision. It follows that if the applicants fail on locus standi under s 163 all of the relief sought to be introduced will not be competent.

[15] The applicants accept that only a shareholder (or director, which is not relevant for present purposes) has locus standi to seek relief under s 163. The “oppressive conduct” identified by the applicants in their founding papers in the main application included the following:

‘44. I [the first applicant] was becoming increasingly concerned about the First Respondent’s conduct in terms whereof they [sic] assumed the right to unilaterally terminate a shareholder’s Consultancy Agreement without reason and to force a sale of a shareholder’s share for a nominal value of R1.00.’

[16] It is not disputed that this “concern” pre-dated the notices of termination of each applicant’s consultancy agreement. In response to this allegation the respondents answered as follows:

‘94.1 I do not understand the concern raised. Herein the position was always clear: upon termination of the consultancy agreement a deemed sale provision will operate and the share will be bought at a value of R1.00 for the share...’

[17] Accordingly at the time of deposing to their answering affidavit in the main application the respondents were aware, on their own version, of the alleged oppressive conduct upon which at least the first applicant relied (other complaints of oppressive conduct were included in the founding affidavit but they are not relevant for present purposes and I accordingly do not deal with them). It is therefore not a case of the applicants attempting to introduce relief not foreshadowed in the founding affidavit in the main application.

[18] That being said however the second applicant clearly had no locus standi to apply for relief under s 163 when the main application was launched on 6 November 2023 because he was no longer a shareholder, his termination notice period already having expired on 17 September 2023. The later ‘purported’ sale and transfer of his shares did not deprive him of locus standi; instead his failure to take timeous steps to protect himself whilst still a shareholder had that result.[3]

[19] As I see it the first applicant’s position is different. When the main application was launched he was still a shareholder and thus had locus standi for purposes of s 163. He was still a shareholder when Part A was dismissed on 17 November 2023 and Part B was postponed for hearing on the semi-urgent roll on 24 April 2024. In terms of the termination clause in his consultancy agreement with the first respondent he was only deemed to have sold his shares (and thus ceased to be a shareholder) upon expiration of the 30 day notice period, i.e. 18 November

2023.

[20] It appears beyond dispute that save for payment of the sum of R10 into his bank account on 14 December 2023 with the annotation ‘refund’ (this is what appears in the first respondent’s records and it is thus reasonable to assume the same was reflected on the first applicant’s bank statement) the first occasion he was made aware of the ‘purported’ sale and transfer of his shares was when the attorney for the respondents wrote to his attorney on 5 March 2024.

- [21] I thus disagree with the submissions made by counsel for the respondents that: (a) they have been taken by surprise; and (b) if the court seized with Part B finds in favour of the first applicant it will be onerous and thus prejudicial to the affected respondents to have to transfer back their extra 2.5% shareholding, which is how the first applicant's shares were distributed when regard is had to the share register.
- [22] It is trite that a court may allow a material amendment in the absence of prejudice or injustice to the other party, and that tardiness is not of itself a ground for refusal. The question then arises whether the first applicant "lost" locus standi by failing to seek to amend his relief before the effective date of termination of the consultancy agreement and after Part A had been dismissed. In a supplementary note it was submitted on behalf of the applicants that the (alleged) transfer of shares occurred between 14 December 2023 and 31 January 2024, by which time the applicants' replying affidavit in the main application had been delivered. This, it was contended, brought about *litis contestatio*, thereby "freezing" their standing.
- [23] *Litis contestatio* was placed in proper context by Sutherland J (as he then was) in *JA v DA*[4] as follows:
- '[16] *Litis contestatio* is an archaic label for a banal event: the moment when no more pleadings may be filed. It is the moment when the formulation of the contending propositions have all been put on record. A trial or an argument is then possible. (See CJ Claassen Dictionary of Legal Words and Phrases (Butterworths, 1977); Erasmus Superior Court Practice B1-187 on rule 29).
- [17] In my view it is precisely because this event is purely procedural that it has no bearing on the definition of or identification of any alleged right which is the subject of litigation, nor has it any bearing on the determination of when, by operation of law, or upon any given facts, any right comes into being. It is indeed plain that at this moment the issues are "fixed" for the purpose of forensic combat, but this relates merely to the articulation of the issues, and not to what the issues are.'
- [24] This passage was cited with approval by the Supreme Court of Appeal in *Brookstein v Brookstein*.^[5] In the present matter the first applicant took steps to enforce what he considered to be his rights prior to expiration of the notice period when he was still a shareholder. The only reason why he is no longer a shareholder is the deeming provision of the consultancy agreement itself which is the very issue in the main case. The respondents were well aware this was the issue when they took steps to sell and transfer his shareholding in the full knowledge that Part B was pending and would be heard a few months later.

[25] I take the respondents' point that the applicants had in fact been aware since 5 March 2024 of the alleged sale and transfer of the shares despite subsequently alleging in this application that the amendments were necessary (only) as a result of developments contained in the notice of objection and supplementary affidavit. But this can be addressed by a costs order. In this regard counsel were agreed that whatever the result the scale should be higher than scale A. To my mind scale B would be appropriate in the circumstances.

[26] Two other aspects bear mention. First, I have not dealt with authorities provided by counsel which enter into the terrain of the merits in the main application since it is not before me. Second, given the order that follows, the first applicant may have to amend other existing prayers in the notice of motion which pertain to the second applicant, but that is also not an issue I have been asked to determine.

[27] The following order is made:

1. The first applicant is granted leave to amend Part B of the notice of motion in the respects underlined and highlighted in the notice handed up at the conclusion of argument, save that any reference to the second applicant must be deleted;
2. The second applicant's application for leave to amend is dismissed; and
3. The first and second applicants shall bear the costs of the application for leave to amend jointly and severally, the one paying,

the other to be absolved, on scale B (party and party).

J I CLOETE

For the applicants: Adv C Joubert SC Instructed by: Van Zyl Scheepers Attorneys (Mr J H Scheepers) For first to ninth respondents: Adv I Posthumus Instructed by: Whalley & Van der Lith Inc. (Mr B Van der Lith) For tenth respondent: no opposition and no appearance.

[1] Practice Directive No 21 of this Division provides that: 'The Judge hearing opposed matters in Third Division may, after hearing the legal representative(s), make an order with or without

reasons.

Parties may apply for reasons in terms of Rule 49(1)(c).'

[2] No 71 of 2008.

[3] See also *Smyth and Others v Investec Bank and Another* 2018 (1) SA 494 (SCA) at para [54].

[4] 2014 (6) SA 233 (GJ).

[5] 2016 (5) SA 210 (SCA) at para [18], cf *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [15].

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