

SOUTH AFRICA / JUDGMENT

Ebersohn and Another v Golden Dividend 35 (Pty) Ltd (8886/2018) [2019] ZAGPPHC 555 (1 November 2019)

[2019] ZAGPPHC 555

COURT

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

8886/2018

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

Case

number: 8886/2018

Date

of hearing: 29 October 2019

Date

delivered: 1 November 2019

In the matter between: GIDEON
 LODEWIKUS EBERSOHN
 First Applicant/First Plaintiff
 SALOME
 EBERSOHN
 Second Applicant/Second Plaintiff
 And
 GOLDEN
 DIVIDEND 35 (PTY)
 LTD
 Respondent/Respondent
 and
 JACOBUS
 MARTHINUS VAN STADEN
 Third Applicant/Third Party

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

- [1] This is an application in terms of subrule 33 (4) of the Uniform Rules of Court, for the separation of two specific issues from the remainder of the issues arising from the pleadings.
- [2] On 9 February 2018 first and second applicants (plaintiffs in the action) instituted an action against respondent (defendant in the action) claiming payment of R 1 500 000.00 and R 1 000 000.00 in respect of two loans allegedly granted by them jointly to respondent. In addition, second applicant claims R 455 000.00 from respondent in a third claim, also based upon a loan agreement.
- [3] On 23 February 2018 respondent entered an appearance to defend. The notice to defend cites Machobane Kriel Inc. ("respondent's attorneys") as respondent's attorneys of record. The notice to defend was followed by an application for summary judgment which has no bearing on this application. Respondent subsequently delivered a third party notice to third applicant in which it is alleged that third applicant had defrauded the respondent. Respondent seeks an order against the third applicant that, in the event of respondent being ordered to pay applicants as claimed in the action, then third applicant should pay respondent the sum of R 1 669 356.07.
- [4] On 5 June 2018 applicants filed a notice in terms of rule 7 (1) in which they disputed the authority of respondent's attorneys to act on behalf of respondent. They furthermore sought a copy of the power of attorney authorizing respondent's attorneys to so act, as well as a copy of the company resolution taken by the respondent authorizing respondent's attorneys to defend the action. On 6 August 2018 respondent's attorneys delivered a reply to the rule 7

(1) notice. Attached thereto was a special power of attorney dated 6 June 2018, which was signed by one Gideon Phillipus Net on behalf of respondent, and which ostensibly authorized respondent's attorneys to act for respondent in the action brought by the applicants.

- [5] Applicants dispute that Net was authorized by respondent to sign the special power of attorney. They also deny that the board of directors of the respondent was ever called upon to vote on a resolution to defend the action, or to appoint respondent's attorneys to act for respondent. The dispute has resulted in this application.

BACKGROUND

- [6] Respondent has four directors, Messrs. Kriel, Net, Gricia and Fourie. Mr. Kriel is also the attorney representing respondent in this matter. It is common cause that three directors of the respondent constitute a quorum at board meetings. Decisions of the board of directors are taken by majority vote. It is customary for the directors to meet at respondent's attorney's offices on a Wednesday morning in order to discuss the business of the respondent.
- [7] Respondent alleges that at the Wednesday meetings the decision was taken that applicants' action should be defended, and that respondent's attorneys should be instructed to act for respondent in the action. In support of this contention, respondent has referred to the minutes of four meetings. The first minute relates to a meeting held on 28 March 2018 at which the summary judgment application was allegedly discussed. Respondent wants the Court to infer from this minute that the directors were aware of the decision to defend the action and to appoint defendant's attorneys. Unfortunately for respondent, the minutes do not refer to the case at all.
- [8] Respondent also relies on the minutes of the meeting of 4 April 2018 to support its contention that the directors were aware that the action had been defended. Again, the minutes do not refer to the action at all. The minutes of the meeting of 16 May 2018 do refer to the summary judgment application. However, they are not signed and even though the answering affidavit states that the document is a true copy of the minutes of the meeting, the opposite seems to be true, as the document is heavily redacted.
- [9] Finally, respondent alleges that on 18 June 2018 a meeting was held during which Mr. Gricia remarked that Kriel had been involved in the matter for some time, and that he may as well continue representing defendant. The minutes of that meeting were partially attached to the answering affidavit. Page 2 was omitted, and the rest of the document

did not disclose such a remark. The missing page only came to light at the last minute, as an annexure to a supplementary affidavit. It does contain the statement which is alleged to have been made by Gricia. However, the minute seems also to be redacted and is not, as alleged by respondent, a true copy of the minutes of that meeting.

[10] In a letter by the attorneys acting for Messrs. Gricia and Fourie to respondent's attorneys, dated 19 June 2018, it was specifically denied that respondent's attorneys had a mandate to act for the respondent. It is strange that Mr. Gricia would have agreed on 18 June 2018 to appoint Kriel to act for respondent, only to have his attorneys record the following day that respondent's attorneys did not have a mandate. Messrs. Gricia and Fourie have denied under oath that there was ever a resolution taken to defend the action, nor to appoint respondent's attorneys to act for respondent.

[11] Applicants seek to separate the following issues for separate determination:

[11.1] Whether a board meeting was held at which a vote was called to decide:

[11.1.1] That the action under case number 8886/2018 ("the action") should be defended;

[11.1.2] That Machobane Kriel Inc. should be appointed to act for respondent in the action;

[11.1.3] That Gideon Nel be elected as chair of the meeting in accordance with the provisions of section 73 (8) of the Companies Act.

[11.2] Whether the directors of the respondent resolved by a majority of votes as contemplated by section 73 (5) (d) and/or 75 (5) (e) of the Companies Act to defend the action, and to appoint Machobane Kriel Inc. to act for Respondent in the action.

[12] Applicants contend that the issue relating to the resolution by the board of directors is a discreet issue, which stands apart from the remaining issues relating to the alleged loans. They argue that should the issue sought to be separated be decided in applicants' favour, then the action would proceed on an unopposed basis and applicants would not be exposed to prolonged and costly litigation. The notice to defend and the plea would then be void and the counterclaim against them would fall away. The third party notice against third applicant will also fall away.

[13] Respondent's main concern is that, should the separation be granted, then Kriel would be required to testify regarding the directors' meetings and the decisions taken there. He would then be open to cross-examination on the merits of the fraud allegation against third applicant under the guise of testing his credibility. It is alleged that this would result in applicants gaining an unfair advantage in that they would be able to explore the fraud allegation in advance of the trial on the remaining

issues.

Respondent also alleges that should the separation issue be decided in its favour, the separation would result in the matter being unnecessarily prolonged and it would become appreciably more expensive.

SUBRULE 33 (4) OF THE UNIFORM RULES OF COURT

[14] Subrule 33 (4) of the Uniform Rules of Court reads as follows:

"(4) If, in any action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall, on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[15] In its present guise, the subrule obliges the Court to make an order separating the questions where such an application is brought, unless the Court is of the view that the questions cannot be conveniently decided separately (See: *Edward L Bateman Ltd v CA Brand Projects (Pty) Ltd* 1995 (4) SA 128 (TPD) at 132 (C to DJ)). The party who opposes the application must satisfy the Court that the order should not be granted (See: *Berman & Fialkov v Lumb* [2002] 4 ALL SA 432 (CJ at 437 F)). Furthermore, the issue sought to be separated must be one that arises from the pleadings. (See: *Firststrand v Clear Creek Trading 12 (Pty) Ltd* and another 2018 (5) SA 300 (SCA) at 305 D). Applicants have specifically denied in their replication that defendant has filed a plea, and they do so on the grounds that it is denied that respondent's directors resolved to defend the action or to appoint respondent's attorneys to act for respondent.

[16] In my view, the question of authority to defend and authority to act for respondent, are completely distinct from the other questions that will arise in respect of the loans and in respect of the alleged fraud. The fraud is alleged to have occurred during or about 2009, while the meetings were held in 2018. The two issues are far removed from one another in time. As far as the facts underlying the question of authority are concerned, they are completely distinct from the facts relating to the loans and the alleged fraud. The question sought to be separated, therefore, stands independent from the remaining issues in the action.

[17] A more pertinent question is whether the questions can be conveniently separated. I take heed of the dictum in *DeneL (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 484 J to 485 B:

"Rule 33 (4) of the Uniform Rules - which entitles a Court to try issues separately in appropriate circumstances - is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always

achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter."

- [18] The circumstances should therefore be carefully considered, and one should not simply accept that differing questions might not impact upon one another. The Supreme Court of Appeal has repeatedly cautioned against the piecemeal adjudication of a case. (See: Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and another 2010 (3) SA 382 (SCA) at 408 H).
- [19] Where a matter is complex, where the question of onus is complex, and where the evidence on the different issues may overlap, separation should not be granted (See: Internatio (Pty) Ltd v Lovemore Brothers Transport CC 2000 (2) SA 408 (SECLD). However, in this matter I am of the view that the question of authority is far removed from the question of liability for the alleged loan, and from the allegations of fraud against third applicant. The evidence on the issues sought to be separated cannot overlap with the evidence on the merits of the matter.
- [19] In The City of Tshwane Metropolitan Municipality v Blair Athol/ Homeowners Association 2019 (3) SA 398 (SCA) the Court quoted D E Van Loggerenberg Erasmus Superior Court Practice (2016) 2ed at D1-436 with approval as regards the meaning of 'convenient' within this context:

'The word "convenient" within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any of the parties or of the court, but the convenience of all concerned that must be taken into consideration.'

(See also: Minister of Agriculture v Tongaat Group Ltd 1976 (2) SA 357 (D. &C.L.D) at 362 F; Braaf v Fedgen Insurance Ltd 1995 (3) SA 938 CPD at 940 C)

- [20] As far as the applicants are concerned, a separation of issues is clearly convenient. They correctly point out that, should they be successful, the matter is over, obviating the necessity of an extended trial. As mentioned above, the notice of appearance to defend would be void, and the plea would fall away as would the counterclaim and third party notice. Applicants would be able to take judgement by default.
- [21] As far as respondent's convenience is concerned, respondent's main complaint is that Kriel would be required to testify twice, which would give applicants a strategic advantage in that they will be able to cross-examine on the merits of the fraud allegation. I have taken note of instances where separation of issues has been denied due to the fact that, if the issues were separated, a witness would have to testify twice about the same facts (See: Tudoric-Ghemo v Tudoric-Ghemo 1997 (2) SA 246 (WLD). However, Tudoric-Ghemo can be distinguished on the facts. In that matter, a divorce action, the questions to be determined, and which the parties wanted to separate, were firstly, forfeiture of benefits arising from the matrimonial regime, and secondly, custody of the minor children. The plaintiff's conduct during the marriage would have had a bearing on both questions. It was thus held that it would be inappropriate to expect witnesses to testify twice on essentially the same facts.

[22] I cannot find authority to the effect that the mere fact that a witness would have to testify twice (on completely different issues), constitutes a ground for the refusal of separation. The issue of the alleged fraud would not be relevant at all to the issue of authority, and any questions about the fraud would be of a collateral nature with no direct relevance to the separated question. I believe that it is unlikely that applicants will be allowed to cross-examine Kriel in depth on the fraud issue. In my view there is nothing unfair about requiring Kriel to possibly testify twice about two completely separate

issues.

[23] I was addressed at length on the prospects of success of the respective parties on the question sought to be separated. Respondent contends that applicant has little prospect of success. I cannot make that finding, simply because there is a substantial dispute of fact which can only be determined after oral evidence is heard. I can say, however, that I find it strange that Gricio would agree to the continuation of respondent's attorneys as attorneys of record on 18 June, only to deny their authority on 19 June. The minutes of the meetings on which respondent relies are also not indicative of a clear resolution by the directors to defend the matter, nor to appoint respondent's attorneys. If anything, the facts before me favour a finding that there was no such resolution.

However, I do not have to decide that issue, and I do not do so.

[24] A consideration which weighs heavily on my decision is the fact that, should applicants be correct that respondent never resolved to defend the action, nor to appoint respondent's attorneys to represent it, then it would be inappropriate to allow the matter to proceed on the merits with a defence that was unauthorized, with attorneys who are not authorized to act for their supposed client. I do not believe that it is in the interests of justice to allow a full trial to proceed with the possibility that it may be found at the end that the matter should never have been defended in the first place. I therefore believe that it is convenient to separate the question regarding the authority to act from the remaining issues.

COSTS

[25] The final issue is that of costs of this application. If I were to award costs against respondent, and it is determined later that respondent did not resolve to defend the action and to appoint respondent's attorneys, the costs order may well be of no force and effect. It may also, depending on what is decided regarding the separated issue, be appropriate to award costs against one or more of the directors de bonis propriis. I therefore intend to reserve the issue of costs for later determination.

[26] In the premises I make the following order:

[26.1] The following questions are to be determined separately from the remainder of the questions arising from the pleadings:

[26.1] Whether the respondent/defendant's directors held a board meeting in terms of section 73 of the Companies Act, 2008 at which it was voted upon, and resolved by majority vote:

[26.1.1] To defend the action by applicant/s/ plaintiffs under case number 8886/2018; and/or

[26.1.2] To appoint Machobane Kriel Inc. as respondent/defendant/s attorneys of record to defend the aforesaid action; and/or

[26.1.3] To appoint Gideon Phillipus Nel as chair of the meeting as contemplated by section 73 (8) of the Companies Act, 2008.

[26.2] The remainder of the questions arising from the pleadings are stayed pending the determination of the separated questions.

[26.3] The costs of this application are reserved.

Swanepoel AJ

Acting Judge of the High Court,

Gauteng Division, Pretoria

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Prepared on 11 October 2026 · Esheria