

SOUTH AFRICA / JUDGMENT

Equistock Properties 8 (Pty) Ltd and Another v Oosthuizen and Others (738/2023; 739/2023) [2025] ZASCA 6 (29 January 2025) [2025] ZASCA 6

COURT

Supreme Court of Appeal

BEFORE

Dambuza, Hughes, Coppin

CASE / FILE NUMBER

738/2023; 739/2023

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 738/2023

and 739/2023

In the matter between:

EQUISTOCK PROPERTIES 8 (PTY) LTD

FIRST APPELLANT

HENDRIK ANDRE COETZEE SECOND

APPELLANT

and

WILLEM NICOLAAS SAAIMAN OOSTHUIZEN

FIRST RESPONDENT

KAREN OOSTHUIZEN

SECOND RESPONDENT

LADUMA BISCUITS (PTY) LTD

THIRD RESPONDENT

ALI IFTIKHAR t/a PAN AFRICAN FURNISHERS FOURTH RESPONDENT

BANANA WORLD (PTY) LTD FIFTH RESPONDENT

LUCAS VAN VUUREN t/a MFG

SIXTH RESPONDENT

GERHARDUS MARTINUS OOSTHUIZEN

t/a DC MOTORS

SEVENTH RESPONDENT

Neutral citation: Equistock Properties 8 (Pty) Ltd and Another v Oosthuizen and Others (738/2023 and 739/2023) [2025] ZASCA 06 (29 January 2025)

Coram: DAMBUZA and HUGHES JJA and COPPIN AJA

Heard: 21 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date for hand down is deemed to be 29 January 2025 at 11h00.

Summary: Civil Procedure – the requirements of a final interdict restated – authority to bring an application not established – personal costs order properly made – appeal dismissed with costs.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Diamond AJ, sitting as a court of first instance):

1 The appeal is dismissed.

2 The second appellant is to pay the costs of the appeal, including the costs of two counsel, where so employed.

Hughes JA (Dambuza JA and Coppin AJA concurring):

[1] This is an appeal against the order by Diamond AJ in the Limpopo Division of the High Court, Polokwane (the high court): Firstly, dismissing an application (the application) by the first appellant, Equistock 8 (Pty) Ltd (Equistock): (a) directing the fourth, fifth, sixth and seventh respondents to pay rentals in respect of their occupation of Equistock's properties into Equistock's banking account; and (b) interdicting those respondents from paying any such rentals to the first, second or third respondent, or negotiating with those respondents concerning the rental or renting of Equistock's properties. Secondly, granting a personal punitive costs order against Hendrik Coetzee (Mr Coetzee), who had deposed to the founding affidavit of Equistock in the application. The appeal is with the leave of the high court.

- [2] Only the first respondent, Laduma Biscuits (Pty) Ltd (Laduma), the second respondent (Willem Oosthuizen) and the third respondent (Karen Oosthuizen) (collectively referred to as 'the Oosthuizens') opposed the application and filed an answering affidavit in those proceedings. At the time of the application, the properties were let to tenants, who are cited as the fourth to seventh respondents. These respondents opted not to take part in any of the proceedings.
- [3] Equistock was registered as a company in South Africa in 1999. On 20 January 2000, the following persons were appointed as its directors: Willem Oosthuizen, Karen Oosthuizen, and her father, Mr Coetzee Senior (the deceased). Mr Coetzee is the son of the deceased and the brother of Karen Oosthuizen.
- [4] It is not in issue that prior to his death, the Oosthuizens concluded an oral arrangement with the deceased, in terms of which he (the deceased), through his entities, AP Coetzee Trust and Passer Domesticus Trust, would loan money to Laduma, a company owned by the Oosthuizens. According to the Oosthuizens, as security for the repayment of these loans, the AP Coetzee Trust held the Oosthuizens' shareholding in Equistock as security. The Oosthuizens assert that, in terms of the arrangement, it was agreed that once the loans were paid up, the shares would be transferred to Karen Oosthuizen, to be held in a separate trust account, the Eagle Trust, or any entity nominated by the Oosthuizens.
- [5] During 2000 and 2002, Equistock purchased two commercial properties in Groblersdal, Limpopo. The first, a property situated at 9 Industrial Road, was purchased on 7 January 2000 and the second, situated at 1 Linbri Street, was purchased on 15 May 2002. According to the Oosthuizens, in terms of their arrangement with the deceased, Laduma would collect the rental derived from the two properties and pay all the expenses relating to them. Equistock would merely be the property holder, as no business was conducted through it. And, in accordance with that arrangement, over the years Laduma effectively managed Equistock. It collected the rentals and paid the instalments of and all the expenses relating to the two properties.
- [6] The Oosthuizens contend that the deceased, who was an accounting expert with a doctorate in accounting, was content with the aforesaid arrangement, which extended from 2000 to 2013. The deceased did not actively take part in the business of Laduma and any affairs relating to the two properties. During 2013, the Oosthuizens contend, they established that the deceased had misrepresented to them certain facts regarding the repayment of the loan they had taken from him. They say that they discovered that they had overpaid the deceased by R358 709.18. Consequently, they instituted an action in the Gauteng Division of the High Court, Pretoria (the Pretoria high court), against, amongst others, the deceased and the trusts, claiming the transfer to them of their shareholding in Equistock, which was held as security, as well as the repayment of the amount they allege they overpaid (the pending action).

- [7] In retaliation, during July 2014, the deceased appointed Karen Oosthuizen's sister-in-law, Wanda van der List and her husband, Robert van der List (the Van der Lists), as additional directors on Equistock's board and he unsuccessfully sought to remove the Oosthuizens as directors of Equistock. The Oosthuizens launched an urgent interim application to interdict the deceased from doing so and causing an encumbrance on the assets of Equistock. This culminated in an order being granted by agreement on 3 September
2013. Significantly, the status quo that existed prior to 2013 remained in place until the deceased passed away on 21 September
- 2018 and is still in place. Thus, Laduma continued to manage Equistock, as it did prior to the order of 3 September 2013.
- [8] After the death of the deceased, the Passer Domesticus Trust, who had as trustees the Van der Lists, and Karen Oosthuizen's mother, Mrs Cynthia Yvonne Coetzee, surreptitiously obtained an order for the winding-up of Equistock in the Western Cape Division of the High Court, Cape Town. This was short-lived, as on 30 June 2020, on application by the Oosthuizens, the winding up order granted in favour of Passer Domesticus Trust was duly rescinded.
- [9] The family feud brought about attempts to have the original directors of Equistock changed. Mr Coetzee had been incarcerated for eight years for a transgression involving SARS and was only released in 2004. Until the application, or shortly before that, he had had not been involved with Equistock at all. After the death of the deceased, he set out to continue the battle with the Oosthuizens for the control of Equistock. According to a resolution produced in the pending action, following the deceased's death, and specifically on 17 May 2021, a special shareholders meeting was purportedly held, where Mr Coetzee purportedly allocated 'the sole sharehold[ing] of 100% of all the legally issued share in Equistock' to himself. As the self-appointed sole shareholder, Mr Coetzee purported to resolve on his own, amongst other things, to change Equistock's address, to change its board of directors, by removing the Oosthuizens and by adding new directors, namely, Cynthia Yvonne Coetzee (the deceased's wife and mother of Karen Oosthuizen), and Christine Coetzee (Mr Coetzee's spouse).
- [10] Following the change in its directorship, another resolution was passed on 21 May 2021 by the newly appointed board, whereby Equistock purportedly resolved to bring the application and authorised Mr Coetzee to take all the necessary steps in that regard. According to the resolution, amongst other matters, the board of Equistock consisted of six directors of which four were executive and two were non-executive directors. The four executive directors were said to be the Van der Lists, Mrs Cynthia Yvonne Coetzee and Christine Coetzee. And the non-executive directors were said to be the Oosthuizens.
- [11] Mr Coetzee, presenting himself as a director of Equistock, deposed to the founding affidavit in the application. The Oosthuizens, who opposed the application, in their answer placed the appointment of Mr Coetzee as a director in issue as well as his authority to institute the

application on behalf of Equistock. They contended that he had no shareholding in Equistock. Other than contending that despite his conviction he could be a director, Mr Coetzee did not explain how he came to own the shares, or how he became a director. The high court found that 'no weight can be attached' to Mr Coetzee's version. And that '[t]here is no indication that [Mr Coetzee] possesses any personal knowledge of the nature of the relationship' between Equistock, the Oosthuizens and the deceased. Having found that no case for an interdict had been made out, and that Mr Coetzee had not shown on the papers that he was a shareholder of Equistock and entitled to represent it as director, the high court dismissed the application and granted a punitive costs order against Mr Coetzee personally. That costs order is also a subject of this appeal.

- [12] Two main issues arose for decision in the high court and need to be considered in this appeal, namely, first, whether the application for the interdict was authorised by Equistock, and second, whether a case for the interdictory relief was made out. The costs order made against Mr Coetzee depends on the outcome of the first enquiry. The high court held him liable for the costs, after finding that the resolutions passed purporting to authorise the bringing of the application were invalid and a nullity, and that 'no legal consequences could flow' therefrom. It is important to note that the respondents never utilised the procedure in rule 7(1), of the Uniform Rules of Court, to challenge the authority of the appellant's attorneys to act on its behalf and institute the proceedings for an interdict in the name of Equistock.[1] For that reason, the high court did not find that it had been established that the attorneys for the applicant were not authorised

to act accordingly in this matter.

- [13] Regarding the authorisation, the high court found that Equistock did not authorise the application, essentially, because Mr Coetzee was not a shareholder or a director of Equistock and the purported resolutions of 17 and 21 May 2021 were invalid and a nullity, and no consequences flowed from them. Those findings of the high court cannot be faulted. Even though Mr Coetzee averred in the purported minutes or resolution of 17 May 2021 that he was the sole shareholder of Equistock, that was false. In the replying affidavit in the application Mr Coetzee concedes that the shares in Equistock have always been held by the AP Coetzee Trust. Even though Mr Coetzee represented in the founding affidavit that he was a director of Equistock, he did not show how and when he was appointed as such. He did not even show that he could be considered as a de facto director of Equistock. No case was made out at all that he actually managed Equistock.
- [14] The version of the Oosthuizens, who are directors of Equistock, that Mr Coetzee was neither a shareholder nor director of Equistock, must prevail, in terms of the Plascon-Evans rule.[2] It is also the most probable or feasible version on the papers. It is apparent that the application was the 'brainchild' of Mr Coetzee, who primarily wanted access to the rental income from Equistock's properties. The application was, on close analysis, ultimately based on falsehoods concocted by Mr Coetzee. The purported minutes or resolution of 17 May 2021 is the most blatant of these. It appears from that document that Mr Coetzee held a

‘Special General shareholders’ meeting by himself where he resolved that certain things be done concerning the affairs and management of Equistock. At the outset, he falsely claims to be ‘the sole shareholder of 100% of all the legally issued shares in Equistock’. He then delusionally proceeds to dictate what must be done. Amongst other things, he purports to instruct ‘the board of directors to meet immediately or as soon as possible but within 4 days, to give effect to these legal resolutions of the 100% shareholder of this company’. As he conceded the shares are still held by AP Coetzee Trust, Mr Coetzee was never a shareholder, let alone a sole, or 100% shareholder of Equistock. Thus, this ‘meeting’ and his ‘resolutions’ were clearly not legally valid.

- [15] The purported meeting of 21 May 2021, where new directors were added, is a perpetuation of the charade of 17 May 2021. It is as legally invalid as the latter. This very document, which purportedly authorised the bringing of the application, does not include Mr Coetzee as a director. Yet he avers in the first paragraph of the founding affidavit in the application that he is a director of Equistock. He does not say when or how he came to be appointed as a director. The Oosthuizens contend that he had no shares in Equistock and that his appointment as director was void from the outset. The only signatories of this invalid resolution that were indeed directors of Equistock are the Van der Lists. But their signature to the purported resolution of 21 May 2021 cannot be regarded as that of the actual legally constituted board, and their signatures most definitely did not regularise or validate the ‘resolution’, or the process initiated by Mr Coetzee.
- [16] Besides those defects, there is no proof that before any of the purported meetings were held and purported resolutions were adopted that each properly appointed director of Equistock, including the Oosthuizens, had been given and had received the requisite notice of the issues to be decided thereupon, as is required by section 74 of the Companies Act 71 of 2008. Another noteworthy aspect is that the deceased himself, who had a first-hand knowledge of the facts, including the rent collection arrangement, did not, during his lifetime, seek to do what Mr Coetzee, purported to do. Given all the above, the high court cannot be faulted for concluding that it had not been proved that Equistock authorised the bringing of the application and that the facts show that it was actually Mr Coetzee himself who brought it purportedly in the name of Equistock. On that basis alone, the appeal on the merits must fail.
- [17] Regarding whether a case for an interdict was in any event made out – the requirements for obtaining a final interdict are trite. The following must be shown: (a) a clear right on the part of the applicant; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[3] As for a clear right, it is established that an applicant must prove the right it seeks to protect on a balance of probabilities. Whether an applicant has such a right is a substantive law question, but whether it has been established is an evidential question. Where the point is genuinely in dispute in opposed application proceedings, the applicant can only succeed if the facts averred by the respondent, together with the facts in the applicant’s affidavits, which the respondent admits, establishes that

right.

- [18] Even though it could be argued, as a general proposition, that the owner of property is entitled to collect the rental derived from the property, that does not follow axiomatically. In terms of a contractual or other arrangement, or law, the actual collection of the rent might well be the right and duty of another entity or person. In this matter, besides the fact that it was not proved that it was Equistock that sought to assert such a right, there are at least two other factors that stoically stand in the way of such assertion. That is the binding nature of the arrangement that applied from the outset and in terms of which Laduma was to collect the rental and pay all the expenses, which Mr Coetzee had no knowledge of and could not dispute. Second, there is no proof that Equistock, through its properly appointed board, cancelled the long-standing arrangement and was legally entitled to do so.
- [19] Regarding proof of an injury committed or reasonably apprehended – there is no case made out in that regard. The arrangement dates back to when the properties were acquired, and there is no suggestion, let alone proof, that Equistock has suffered any injury because of it, or that an injury is reasonably apprehended if the arrangement was to continue. And in respect of the availability of an alternative remedy – the fact of the pending action in the Pretoria high court, in which the question of the shareholding of Equistock is to be resolved, presents as a remedy that would also resolve the issue of the collection of the rentals. In sum, no case for interdictory relief was made out and the application should also have failed for that reason, as found by the high court.
- [20] Lastly, I address the issue of the punitive costs order against Mr Coetzee. First, this is consistent with the high court's finding that he instigated the proceedings without the requisite authority. Second, since the matter of costs was in the discretion of the high court, this Court may only interfere with a decision on the costs if that discretion was not exercised judicially. In this matter, it has not been demonstrated that the high court had exercised its discretion irregularly or injudiciously. On the contrary, the award was properly made and there is no justification to interfere with the high court's decision on the costs. Since the appeal is a continuation of those proceedings, with Mr Coetzee driving it, he personally, and not Equistock should bear the costs of the appeal.

[21] The following order is issued:

1 The appeal is dismissed.

2 The second appellant is to pay the costs of the appeal, including the costs of two counsel, where so employed.

W HUGHES

JUDGE OF APPEAL

Appearances

For the first appellant: T P Krüger SC and C D'Alton Instructed by: Cilliers & Associates, Mossel Bay Rossouws Attorneys, Bloemfontein For the second appellant: H P Wessels Instructed by: Hurter Spies Inc, Centurion Rossouws Attorneys, Bloemfontein For the first to third respondents: J F Moolman Instructed by: Pratt Luyt & de Lange Incorporated, Polokwane Phatsoane Henney Attorneys, Bloemfontein

[1] Ganes and Another v Telecom Namibia Ltd

[2004] 2 All SA 609 (SCA); 2004 (3) SA 615 (SCA); (2004) 25 ILJ 995 (SCA) para 19; Unlawful Occupiers of the School Site v City of Johannesburg

[2005] 2 All SA 108 (SCA); 2005 (4) SA 199 (SCA) para

14. Rule 7(1) provides that '... the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable

him to do so the court may postpone the hearing of the action or application'.

[2] Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).

[3] Sanachem (Pty) Ltd v Farmers Agri- Care (Pty) Ltd and Others

[1995] ZASCA 2; 1995 (2) SA 781 (A); [1995] 2 All SA 268 (A) at 789C.

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Prepared on 12 October 2026 · Esheria