

SOUTH AFRICA / JUDGMENT

Eslick and Another v ASI Financial Services (Pty) Ltd and Others (2024/112123) [2024] ZAGPJHC 1065 (22 October 2024)

[2024] ZAGPJHC 1065

COURT

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

2024/112123

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG.

Case

Number: 2024-112123

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

22.10.2024

In

the matter between:

MICHAEL
GERALD ESLICK
First
Applicant
REGINALD
WILLIAM BATH
Second
Applicant
And
ASI
FINALCIAL SERVICES (PTY) LTD
(Registration
No.: 2010/024437/07)
First
Respondent
ASI
WEALTH WESTERN CAPE (PTY) LTD
(Registration
No.: 2016/042040/07)
Second
Respondent
ANTHONY
GOVENDER
Third
Respondent
FINANCIAL
SECTOR CONDUCT AUTHORITY
Fourth
Respondent

JUDGMENT

Noko J

Introduction.

[1] The applicant launched urgent proceedings for an order directing the respondent to, inter alia, restore applicant’s access to the email account and all servers upon which first and or second respondents files and information are stored and accessed. In addition, that the second and third respondent be restrained from interfering with or preventing the first applicant from having access to second respondent premises at Unit 3[...], H[...] P[...] H[...], C[...] C[...], Cape Town (“Business premises”).[1]

- [2] The respondents contend, inter alia, that the application is bound to fail for want of urgency; that there are disputes of facts which cannot be resolved in motion proceedings; that spoliation proceedings as a remedy is not applicable; raised point in limine of non-joinder of other directors (viz, Michael Brent Ross and Naseema Banoo Ephraim - previously Nandkoomar) and finally that the first applicant has been properly suspended on the basis of his misconduct.

Urgency.

- [3] The parties made submissions with regard to urgency including the contention by the respondents that the application is an abuse of the court process. I made a determination that the lis warrant the audience of the urgent court.

Non-Joinder

- [4] This point is raised on the basis that the third respondent was cited in his personal capacity and as such he contends that that other directors should have been joined since the decisions were taken by all directors. The first applicant retorted that the other directors were correctly not joined and the third respondent has been isolated and cited as he is the brain behind the unlawful conduct perpetrated unto to the applicants including publication of defamatory statements against the first applicant and the fact that he uses the employees of the companies to advance his narrow personal interests.

- [5] The SCA held in Naude[2] that “The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the

litigation which may prejudice the party that has not been joined.”[3] The SCA referred with approval to the sentiments in Gordon[4] where it was held that “... if an order of judgment cannot be sustained without necessarily prejudicing the interests of the third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined”.[5]

- [6] The respondent has failed to demonstrate the basis for the alleged direct and substantial interest of the other directors and further in what way will the outcome of the adjudication in this lis negatively impact on their rights. To this end I find that no case has been made for the point in limine for non-joinder since the applicants have clearly set out the basis for not citing the other directors.

Dispute of facts.

- [7] The respondents alluded to the presence of disputes of fact but failed to set out explicitly which issues are in dispute which would become an insurmountable hurdle to adjudicate the relevant issues in this lis in motion proceedings. As will be set out below the issues serving before me are narrow and crystal and the determination has been made relative thereto. I conclude that this point is also unsustainable.

Background

- [8] The factual background set out herein is limited to what is identified as the crux of the dispute between the parties. Such issues exclude those which fall within the province of the arbitrator as set out in the arbitration clause in the agreement entered inter partes.
- [9] The first and second applicants were originally 100% shareholders of the second respondent. They entered into a sale of share agreement in terms of which 51% shareholding was sold to the first respondent. The first and second applicants then remained being 25% and 24% shareholders of the second respondent respectively. The first applicant remained the managing director of the second respondent and also occupies the position of a Key Individual appointed in terms of the provisions of the Financial Advisory and Intermediary Services Act[6] ("FAIS Act").
- [10] The sale of shares agreement was subject to the second respondent paying the first respondent a perpetual right (referred to as Right-To-Income) to 20% of the total monthly revenue of the second respondent alternatively amount of R151 417.000 whichever is the greater. The second respondent settled amounts due as invoiced by the first respondent for the said perpetual right over a period of time till March 2024 and subsequently failed to keep up with payments despite several undertakings to do so. The first respondent demanded that the applicants to personally settle the outstanding amounts in accordance with suretyship agreement inter se. At some stage the first applicant stated that he was going through an acrimonious divorce and requested indulgence to effect payment which was duly granted.
- [11] The applicants stated that they subsequently consulted legal representatives with regard to the clause on the Right to Income and
- were advised that the clause in the shareholders' agreement was unlawful. They were also advised that the claim against the
- applicants personally is unsustainable as the parties did not sign suretyship agreements. To this end a decision was made by the
- applicants not to make payments in accordance with the impugned clause.[7]
- [12] As a result of failure to effect payment the respondents notified the applicants that the said refusal to pay amount to a breach of the agreement between the parties. The respondents then disabled first applicant's connection / access to the emails and server of the second respondent; suspended the first applicant pending shareholder's meeting intended to remove him as a director and also attached the shares of the first applicant. All these were set out in an email which was forwarded to the first applicant on 28 September 2024. The respondents further instructed the first applicant on 1 October 2024 to hand over the keys to the second respondent's business premises and also to return company's equipment.

[13] The first applicant then launched these proceedings for a remedy, which has not been neatly crafted, for an order restoring or reinstating access to his email address and also the company servers. Further that the court should order that the suspension is unlawful and interdict the respondent from interfering with his access to the business premises.

Contentions by the parties.

[14] The first applicant contended that he is a managing director of the second respondent and in that capacity, he has duties to discharge imposed on him in terms of the Companies Act[8]. Further that the conduct of the second respondent in disabling the access to email address and the server amount to self-help which is proscribed by the law. The first applicant has also since been unable to communicate with the second respondent's and his client whose details are on the server of the second respondent.

[15] In addition to the foregoing the first applicant is also appointed as a Key Individual in terms of the FAIS Act and has rights and obligations which, the applicant contend, cannot be wished away on the whims of the respondents.

[16] Also predicated on the above statutory provisions the first applicant contended that the attempt by the second respondent to suspend him is therefore ineffective for want of compliance with their provisions. Firstly, suspension of a director is not provided for in the Companies Act. Secondly, the decision to suspend him was not authorised by a resolution of the company through its shareholders. This applies mutatis mutandis to his position as a Key Individual as contemplated in terms of the FAIS Act which provides for the process to be followed to disbar a Key Individual. The first applicant contended that since the agreement signed by both parties in terms of which he was appointed as a Key Individual specifically provided that he is not an employee of the second respondent the applicant can therefore not be suspended as he is an employee.

[17] In retort the respondents contended that in view of the infractions unleashed by the first applicant, including siphoning of the companies' funds and applying the resources for personal use it was found to be prudent that access to email and functionality should be suspended. The third respondent stated that this should not be construed as self-help since the second respondent "... and I were on the contrary, obligated in terms of the FAIS Act and Companies Act to act swiftly and decisively to avoid personal liability by acquiescing to Eslick's misconduct".[9] In any event, the counsel for respondents continued, mandament van spolie is not available in instances the rights sought to be exerted by a litigant are personal in nature and specific performance would be a competent redress to embark upon.

[18] With regard to the suspension the respondents contended that the first applicant is an employee of the second respondent and as an employer the second respondent is legally entitled to suspend him. Where such an employee is suspended recourse is found in the labour relations regulatory framework and related for a should be approached. It would therefore, the argument continued, be incompetent for this court to adjudicate over the dispute between an employer and employee.

[19] In retort to the argument that the first applicant is not an employee the counsel for the respondent submitted further that in terms of section 213 of the Labour Relations Act[10] (“LRA”) the finding whether a party is an employee is not exclusively dependent on what the employment agreement between the parties

provides for but factors outside such an agreement may give a proper view of whether there is an employment agreement or not. In this instance one of the factors is that the first applicant identified some of the withdrawals of funds from the second respondent as his salary. To this end the respondents contend that the applicants case is unsustainable and falls to be dismissed.

Legal principles

[20] The principles underlying the remedy of mandament van spolie is intended to proscribe self-help. The requirements are that a party should demonstrate that such a party was in ‘peaceful and undisturbed possession’[11] and secondly that such a party was unlawfully deprived of that possession’[12]. Ordinarily the remedy is not available where the rights sought to be exercised by a party arise from a contract in which case recourse should be a claim for specific performance.

[21] The determining question is whether the first applicant was in possession of the property (either being movable, immovable or incorporeal[13]) and secondly whether he was unlawfully dispossessed. The first applicant has correctly argued that for him to discharge his functions as a director and as a Key Individual it is required that he has access to the emails, companies’ server and the business

premises. In the alternative, it can also be validly argued that access to the premises or emails/ server is an incident of the

possession or occupation of the positions the first applicant is holding.[14] The conduct of the respondents just to suspend access to emails and the server without recourse to the courts amount to self-help and cannot be countenanced at any level.

[22] It was stated in Unpacking Kapsimalis NO[15] that under these circumstances spoliation proceedings are an appropriate recourse to take. The court stated that:

“The first, second and fourth respondents are therefore liable to the applicant for the costs incurred in launching the spoliation application under case number 9624/2011. Clearly, the applicant was entitled as managing director of the third respondent to have access to the offices he utilized on behalf of the third respondent in his capacity as managing director and that the first, second and fourth respondents conduct in preventing him access to such offices was unlawful.”

[23] To this end I find that the relief for spoliation is sustained.

[24] With regard to the suspension, it is axiomatic that a person may occupy a position as a director making him an officer of the company and the same person may be an employee of and appointed by the company. In his capacity as a director the first applicant participates in the meetings of directors which take resolutions in the interest of the company. Such a person may also be a manager (employee) of the company who would be implementing the resolutions taken by the board of directors.

[25] The email sent to the first applicant on 28 September 2024 had several headings and one of them is crafted as follows:

“YOUR ROLE AS A DIRECTOR AND REPRESENTATIVE WITHIN ASI WEALTH WC AND MYFIN.

6. You are hereby notified that, due to your misconduct and bringing the ASI brand into disrepute, you are immediately suspended and relieved of your duties and functions, in all aspects, within ASI Wealth WC and Myfin. This is the reason for your email access and functionality being suspended this morning.”[16]

[26] The respondents’ counsel contends that on proper interpretation of the contents of the email the message was addressed to him in all the capacities he holds in relation to the second respondent. The approach for interpretation is crisply enunciated in *Endumeni*[17] which requires that “from the outset one considers the context and the language together, with neither predominating over the other”. [18] The Constitutional Court, though in the context of statutory interpretation, held that it is now the settled approach to interpretation, is a unitary’ exercise.[19]

[27] The headings makes specific reference to the first applicant as a director and makes no reference to the first applicant as an employee alternatively as a Key Individual. The contention that it is mentioned in the sentence that he is suspended in all aspect then all his capacities were implicated cannot itself meant that it extends to his capacity as an employee or Key Individual.(underlining

added). One would have to venture into the realm of conjecture to conclude that it was meant to the first applicant as a director or other capacities as an employee or Key Individual. It would have been different if instead of stating in all aspect the respondent should have stated in all capacities.

- [28] With the acknowledgement by the second respondent that the first applicant's capacities as a director or Key Individual are regulated by different legislative framework the heading should have clearly stated that the first applicant is suspended as an employee as the suspension of a director, if possible, would have to comply with the statutes or constitutive documents of the company and comply with FAIS Act in respect of a suspension or debarment of a Key Individual.
- [29] The counsel for the respondent failed to comprehensively argue that the first applicant is an employee of the company besides having mentioned that he paid himself salary. In any event, determination of whether the first applicant is an employee is not within my province and I am not invited to make such a determination.
- [30] The question before me is whether a director or a Key Individual can be suspended without invoking the relevant empowering instruments. In casu the respondents have failed to demonstrate to this Court that there is an empowering instrument which has been complied with alternatively that there are no legal requirements to suspend the first applicant as a director and or as a Key Individual. To this end their arguments which do not address this issue have been raised to be rejected.
- [31] The facts set out in this list are almost similar to those set out in Unpacking Kapsimalis NO where it was stated that ordinarily a director as the officer of a company may not be suspended like it could be the case with an employee.[20] The court stated that the director would not be suspended without a proper resolution to that effect by the shareholders.
- [32] The managing director in Unpacking Kapsimalis NO was also instructed to return, inter alia, the laptops and the court ordered that spoliation proceedings were properly instituted. It was stated that:
- "It is clear therefore that the respondents prevented the applicant from having access to his offices subsequent to the posting of the notice annexure "SK19" to him. That conduct was likewise unlawful in view of the fact that the first and second respondents could not have taken any decision on behalf of the third respondent in the absence of a validly constituted meeting or resolution to suspend him or prevent him from having access to his offices at Westville."*[21]
- [33] As was argued by the first applicant the intermediary agreement[22] which preceded his appointment as a Key Individual clearly states that he would not be regarded as an employee of the second respondent.

Conclusion

- [34] In conclusion I am persuaded that the conduct of the second respondent to suspend access to email and the server is unlawful. The suspension of the first applicant as a director and Key Individual is also not sanctioned by the relevant statutes. Absent compliance with the said instruments ergo cadit questio.

Costs.

[35] The general rule that the costs follows the results shall apply.

Order.

[36] The following order is made:

1. The applicant's non-compliance with the Rules is condoned and the matter to be heard as one of urgency in terms of Rules 6(12) of the Uniform Rules of Court.
2. The respondents are ordered to immediately restore first applicant's access to his email account with the address m[...] and to all serves in which client's files of the first applicant's and second respondent's files and information

is stored.

3. The respondents are interdicted or restrained from interfering with or preventing the first and second applicants access to Unit 3[...], H[...] P[...] H[...], C[...] C[...], Cape Town.
4. The respondents are ordered to pay the costs of the application, including costs for two counsel, where so employed, jointly and severally the one paying the others to be absolved.

M V NOKO

JUDGE OF THE HIGH COURT,

Dates:

Hearing: 10 October 2024.

Judgment:

22 October 2024.

Appearances:

For the Applicant: Adv Williams SC, with E Malherbe.

Instructed by Alhadeff Attorneys

For the Respondent: Adv Roux SC with Ms Fourie.

Instructed by Gerhold & Van Wyk Attorneys.

- [1] The applicant further sought to interdict the meeting of shareholders scheduled for 11 October 2024 and since the said date has been changed to 28 October 2024 the applicants are no longer pursuing the said relief.
- [2] Absa Bank Ltd v Naude NO and Others 2016
- (6) SA 540 (SCA).

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- [3] Id at para [10].
- [4] Gordon v Department of Health, KwaZulu -Natal (2008)
- (6) SA 522 (SCA)
- [5] Id at para [9].
- [6] Financial Advisory and Intermediary Services Act 37 of 2002.
- [7] The parties are in agreement that the dispute about payment is subject to the arbitration clause.
- [8] Companies Act 71 of 2008.
- [9] See para 53.1 of the Respondent's Answering Affidavit at CL 27-22.
- [10] Labour Relations Act 66 of 1995.
- [11] Kgosana and Another v Otto 1991
- (2) SA 113 (W).
- [12] Lau v Real Time Investments 165 CC (GP) (50134/2019) 313 ZAGPPHC (23 July 2019).
- [13] Telkom SA Ltd v Xsinet (Pty) Ltd [2003] ZASCA 35, where the SCA held that the remedy can be invoked even where incorporeal rights are violated.
- [14] Eskom Holdings SOC Ltd v Masinda 2019
- (5) SA 386 (SCA). JC Impellers (Pty) Ltd v Erven 176/177 Wadeville Proprietary Limited (107540/2024) [2024] ZAGPJHC (02 October 2024). Simons v The City of Johannesburg Forensic DPT 2019 JDR 2664.
- [15] Unpacking Kapsimalis NO v van Tonder [2011] ZAKZDC 40.
- [16] See Respondents' email of 28 September 2024 at CL 02-63q.
- [17] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) S 593 (SCA)
- [18] Id at para [18].
- [19] Chisuse v Director General, Department of Home Affairs 2020
- (6) SA 14 (CC) at para [52].
- [20] Id at para 9.
- [21] Id at para 12.
- [22] Incorporating FAIS Act and Code of Conduct) see para 42.1. of the AA at CL27-16

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