

SOUTH AFRICA / JUDGMENT

Ferreira and Another v Ferreira and Others (866/2021) [2021] ZAMPMHC 10 (23 March 2021) [2021] ZAMPMHC 10

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

866/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION, MIDDELBURG (LOCAL SEAT)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

23

MARCH 2021

CASE NO: 866/2021

In

the matter between:

LIZELLE
FERREIRA
First Applicant
MICHAEL
ALLAN WOOD
N.O
Second Applicant
and
MARGARET
THERESA FERREIRA
First Respondent
ABSA
TRUST
Second
Respondent
SUID-OOS
BELTSPLICING
CC
Third Respondent
WONDERWHEEL
BELT AND SPLICING (PTY) LTD
Fourth
Respondent
CIPC
Fifth Respondent

JUDGMENT

BRAUCKMANN AJ

1. The first applicant ("the applicant") applies for an urgent order that the First Respondent be compelled to sign documentation authorising the transfer of the First Respondent's membership interest and shareholding in the Third and Fourth Respondents to the Applicant.
2. The Applicant seeks the relief on the basis of membership and shareholder agreements entered into between the Applicant, the First Respondent and the deceased husbands of the Applicant and First Respondent.
3. The terms of the two agreements effectively state that in the event that the husbands of either the Applicant or the First Respondent passed away then and in that event the membership interest and shareholding of the deceased husband and that of his wife transfer to the remaining member or shareholder. The Applicant's now deceased husband was the remaining member and shareholder and NOT the applicant.

4. There is a tender by the First Respondent to sign the necessary documentation to transfer the membership interest and shareholding subject to her suretyships being expunged. The tender to sign the documents is accepted by the first applicant however she states that she can only expunge a suretyship if the creditor agrees, and accordingly tenders an indemnification.
5. It is common cause that the applicant have been in total control of the third and fourth respondents since October 2020 and had access to all the documentation including the agreement with Sasol.
6. Applicant alleges that the third and fourth respondent (and by implication the first applicant) will suffer losses of “millions of rands” if the resignations are not done and the contracts that are apparently up for renewal cannot be tendered on. This is an unsubstantiated averment, and also a ground pertaining to the third and fourth respondents and not the first applicant.
7. The law regarding urgency is well settled.
8. In *Democratic Nursing Organisation of SA and Another v Director General: Department of Health and Others* 2009 (30) ILJ 1845 LC at para

19 it was held:

“As a general principle, financial hardship or loss of income cannot be regarded as grounds for urgent relief. For the applicant to succeed when relying on financial hardship or loss of income he or she must show the existence of exceptional circumstances justifying the granting of an order on an urgent basis and on the ground of financial hardship. In the present instance the applicants have not shown that there are special circumstances for the granting of the relief sought.”

9. In *Jiba v Minister: Department of Justice and Constitutional Development & Others* 2010 (31) ILJ 112 LC at paragraph 18 held as follows:

“Rule 8 of the rules of this Court requires a party seeking urgent relief to set out the reasons for urgency and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules.”

10. During the course of February 2021, it came to the attention of the Applicant that there were two main contracts of the Third Respondent which were having to be re-tendered on by the end of March 2021. Up until this stage, the parties, and more specifically the Applicant, were negotiating oblivious of the impending date.

11. A letter was sent to First Respondent's attorney of record wherein it was put on record that the Applicant, employees of the business and the Third Respondent itself would suffer irreparable harm should it not be allowed to re-tender for the contracts it has been servicing for the last 20 years. The First Respondent was requested to sign the necessary documents. Without an accurate CIPC the Third Respondent cannot tender for the two contracts.
12. On 5 March 2021, the Applicant again demanded that the First Respondent sign the necessary documentation failing which an urgent application will be launched.
13. Only at that stage, so goes the applicant's argument, did the clock began running for the urgent application (if it was necessary). The court is not in agreement with the applicant.
14. The applicant was the person who signed the contract between the third respondent and Sasol during May 2018 and she therefore should have knowledge that the contract is running to an end in the middle of 2021.
15. In a letter dated 8 February 2021, which was sent to the attorney for the applicant on 10 February 2021, the first applicant states that she learned that the third respondent need to tender, which tender needs to be submitted at the end of March 2021 and that she will proceed with an urgent application should the necessary documentation not be signed. The customer referred to us Sasol. There is no explanation for the delay of 5 weeks.
16. She have been in control of the third respondent since October 2020 and had access to all the documentation including the agreement with Sasol.
17. The first respondent denies that sufficient evidence was placed before the Court to prove that the tender will indeed open soon and that it will close again at the end of March 2021. The documents the first respondent dates as far back as 2018 without any confirmation that the tender will be opened any day soon.
18. From the facts set out herein above, it is also clear that the first and second applicants created their own urgency. The first applicant states in a letter dated 8 February 2021 that she learned that the tender needs to be made at the end of March 2021. Despite this she waits 5 weeks before she approaches Court. This well-knowing what the stance of the first respondent is regarding the signature of the documentation.
19. In the case of *Mogalakwena Local Municipality vs The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63 to 64 in which the court stated:

"I proceed to evaluate the respondent's submission that the matter is not urgent. The evaluation must be undertaken by an analysis of the applicant's case taken together with allegations by the respondent which the applicant does not dispute. Rule 6(12) confers a general judicial discretion on a court to hear a matter urgently. It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent."

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to):

Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

20. First respondent disputed the applicant's attorneys' mandate on behalf of the second applicant. A notice in terms of rule 7 of the Uniform rules of Court was served on applicant's attorneys shortly after the application was served on first respondent. To date hereof there was no response of the notice in terms of Rule 7. The affidavit by the second applicant in the court file have not been signed nor commissioned. The purpose of a power of attorney (in terms of rule 7) is to establish the mandate of the attorney concerned and to prevent a person whose name is being used throughout the process from afterwards repudiating the process altogether and saying he had given no authority and to prevent persons bringing an action in the name of a person who never authorized it. There is simply no compliance with the request and there is no certainty that the second applicant is properly before the Court.
21. The First Respondent cannot identify the creditors with whom she signed surety. The applicant proffers this argument, as a reason why the release of the first respondent could to date hereof not be achieved or attempted. The applicant is in control of the third and fourth respondent's business. She can hardly hide behind this flimsy excuse. If the tender-date really loomed as alleged, she would have established which creditors holds suretyships signed by first respondent and would have at least been able to communicate with these creditors.
22. On the proper interpretation of the membership agreement as well the death of the mentioned member, will pass to the other mentioned member. This is evident from clause 11 of the membership agreement and clause 16.2 of the shareholders agreement. The membership and the shareholding of the first respondent can therefore only be transferred to the second applicant, applicant's deceased husband's executor. The first applicant's claim to the membership in the third respondent and the shareholding in the fourth respondent is allegedly found in the last will and testament of her deceased husband, which document

was only attached to the applicant's replying affidavit. An applicant must make his/her case in the founding affidavit and

cannot add flesh to the founding "skeleton" in a replying affidavit. (See: Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another 1980 (1) SA 313 (D) at 15H – 316A.

23. She merely requires a vested right (dies cedit) as against the executor for payment, delivery or transfer of the property comprising the inheritance. The right is enforceable (dies venit) only when the executor has drawn the Estates Act, 66 of 1956 has been complied with. The shares and interests must first be transferred to her deceased husband's estate and thereafter, and upon approval of the final liquidation and distribution account, will the shares and interest be transferred to her, if she is the heir thereof. The applicant therefore also lacks locus standi to claim transfer of the shares and interests to her.
24. In all respects she put the cart before the horses.
25. The application is not urgent and is therefore struck off the roll, and first applicant is ordered to pay the costs.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANT: ADV BROOK STEVENS

INSTRUCTED BY: BLR ATTORNEYS – info@jlerouxattorneys.co.za; vicky@vjvnattorneys.co.za

REPRESENTATIVE FOR THE FIRST RESPONDENT: ADV NADIDNE ERASMUS

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