

SOUTH AFRICA / JUDGMENT

Jenkins v Davison and Others

(47321/2017)

[2017] ZAGPPHC 512 (17 August 2017)

[2017] ZAGPPHC 512

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius

CASE / FILE NUMBER

47321/2017

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

Case

number: 47321/2017

Date: 17/08/2017
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED
In

the matter between: KEVIN
BRIAN
JENKINS APPLICANT
And
JAMES
PHILIP
DAVISON FIRST
RESPONDENT
SQUIRREL
TRUST ADMINISTRATORS (PTY) LTD SECOND
RESPONDENT
THE
STANDARD BANK OF
SOUTH

AFRICA
LIMITED THIRD
RESPONDENT
WILNA
LUBBE FOURTH
RESPONDENT
MILILE
MPAMBANISO FIFTH
RESPONDENT
XOLA
STEMELA SIXTH
RESPONDENT

JUDGMENT

PRETORIUS J,

- (1) This is an urgent application in which the applicant requests that a rule nisi be issued pending the finalization of the proceedings that the first respondent be temporarily removed as a director of the second respondent, and alternatively, that an independent chartered accountant as nominated by the South African Institute of Chartered Accountants be appointed as a director of the first respondent who must report to the court within 45 days. Furthermore, that the independent auditor shall exercise a decisive vote should a deadlock arise between the applicant and the first respondent. The further orders requested are:

"2.4.1 That the first respondent be interdicted and restrained from withdrawing any funds from the bank accounts of the second respondent, held at the third respondent without prior authorisation from the applicant;

2.4.2 That the first respondent be interdicted and restrained from opening any further bank accounts for the second respondent, without prior authorisation from the applicant;

2.4.3 That the first respondent be ordered to immediately pay the amount of R10 248 439.32 to the trust account of the applicant's attorneys of record, and that such funds be held in the said trust account pending the outcome of the proceedings for final relief contemplated in Part B;

2.4.4 That the third respondent be authorised and ordered to impose the limitation on the first respondent's powers to deal with bank accounts and transfer funds from the second respondent onto its systems;

2.4.5 That the first respondent be ordered to provide to the applicant and/or his appointed forensic auditor, and in the event of prayer 2.1 not being granted, but prayer 2.3 being granted, then also to the independent CA,

2.4.5.1 Complete bank account statements of the Standard Bank accounts of the second respondent from May 2015 until 18 July 2017;

2.4.5.2 Complete general ledgers for the financial years 2016 and 2017;

2.4.5.3 Complete cash books for the financial years 2016 and 2017;

2.4.5.4 All court orders issued where the first respondent has been appointed as trustee in his capacity as director of the second respondent;

2.4.5.5 All financial information as requested by the applicant and/or his financial auditor."

- (2) Furthermore that the rule nisi be published in the Government Gazette and a newspaper and be served on the Master of the High Court.

THE PARTIES:

- (3) The applicant is a co-director and shareholder of Squirrel Trust Administrators (Pty) Ltd, the second respondent. The applicant is a 20% shareholder in the second respondent.
- (4) The first respondent is a co-director and 20% shareholder in the second respondent. He is currently holding the 6th respondent's shares on his behalf.
- (5) The second respondent is Squirrel Trust Administrators (Pty) Ltd.
- (6) The third respondent is Standard Bank of South Africa Ltd. No costs are sought against the third respondent.
- (7) The fourth respondent is an attorney and a 20% shareholder in the second respondent, although the first respondent alleges that she has no locus standi as she is not a shareholder.
- (8) The fifth respondent is a business person and 20% shareholder in the second respondent. The fifth respondent supports the first respondent in opposing the urgent application.
- (9) The sixth respondent is an advocate and a 20% shareholder in the applicant. The sixth respondent abides by any order the court should make.

BACKGROUND:

- (10) The second respondent was established in 2015 for the sole purpose of administering and managing certain trusts. These trusts were mostly created as a result of court orders granted in the Eastern Cape Provincial Division of the High Court, mainly in medical negligence matters. The only two directors of the second respondent are the applicant and the first respondent. The second respondent was used as a vehicle to administer the various trusts. The first respondent, was tasked to handle the financial affairs of the second respondent due to his expertise as an accountant.

- (11) The court orders, in the normal course, stipulate that 7.5% of the trust monies received must be set aside for the establishment of the trusts as well as the administration of these trusts. The Master of the High Court, Eastern Cape Provincial Division had to supervise all the trusts managed by the second respondent. 2.5% of such fees were paid to the shareholders in advance and the 5% was to be kept in the second respondent's account for the administration of the trusts.
- (12) According to the applicant the first respondent was appointed in his personal capacity in some trusts as a trustee, in direct competition with the second respondent. In the Eastern Cape Provincial Division of the High Court three trustees are appointed when the trust is established in these matters.
- (13) During a shareholder's meeting in February 2017 the first respondent suggested that the shareholders should exit the company and transfer all the shares to him. That would enable him to be sole director and shareholder of the second respondent
- this was confirmed by him in an e-mail dated 30 March 2017. The applicant and other shareholders were not satisfied with these proposals and requested the financial affairs of the second respondent to be disclosed. Until March 2017 the financial statements of the second respondent had not yet been prepared. The applicant once more requested the second respondent's financial statements on 22 May 2017, after receiving no statements from the first respondent. This request was also ignored by the first respondent. When the applicant deposed to the affidavit the first respondent had not yet provided the applicant with any documents, e.g. court orders, trust deeds or financial statements.
- (14) The applicant and the first respondent are the only directors of the company and the applicant's complaint is that the first respondent is keeping him in the dark as to the financial affairs of the company. Despite repeated requests from the applicant on 24 April 2017, 25 April 2017, 22 May 2017 and 31 May 2017 the first respondent has failed to provide any documents to the applicant.
- (15) The applicant cited five examples of money being paid from the relevant trusts into the bank accounts of the first respondent,
- respectively into his Standard Bank account from 2 May 2017 to 6 April 2017 a total amount of R13 850. A total amount of R14 350 from four separate trusts was paid into his Investec account on 26 May 2017.
- (16) These monies should have been transferred to the second respondent. Should any fees have been due to the first respondent, it should have been paid from the second respondent's bank account to him, once he had invoiced the second respondent for services rendered. He could not pay any amount into his private bank accounts without properly accounting for these amounts.

- (17) During June 2017 the applicant became aware that the first respondent had used the second respondent's account to pay for some of his personal expenses, which included holiday accommodation, car rental and a cash withdrawal to an amount of R18 049.59 in total. These payments and transfers were never discussed and approved by the applicant, as the only co-director. The first respondent simply appropriated these payments without regard to bookkeeping principles. The applicant avers that all these payments, mentioned above, are unlawful and a misappropriation of the funds of the second respondent. Even if money was owing to the first respondent he had to invoice the second respondent for payment. This is a basic bookkeeping principle which he, as a qualified accountant, should have adhered to.
- (18) These actions of the first respondent lead to the applicant calling a shareholders meeting that was held on 31 May 2017. Two resolutions were passed at the meeting, namely that an independent auditor be appointed and that this auditor be provided by 30 June 2017 with all documentation to complete a forensic audit. A further resolution was that both the applicant and the first respondent "are entitled to full access to all the bank statements, bank records and internet banking of the company". At present the first respondent has only provided the draft financial statements to the applicant. The first respondent argues that the applicant had access to the second respondent's bank accounts at all times.
- (19) On 28 June 2017 the applicant became aware that the first respondent had transferred fees in advance from the second respondent's bank account into his own bank account. These amounts were paid from 28 June 2017 to 30 June 2017. The first respondent had paid certain amounts from various trust accounts to the first respondent on 6 April 2017, 2 June 2017 and 26 June 2017 in the amount of R10 248 439.32. All payments were paid from the second respondent's bank accounts, apart from seven payments totalling R28 200, which were paid directly from individual bank accounts belonging to various trusts to the first respondent personally. None of these payments had been discussed with the applicant at any stage.
- (20) The applicant's attorneys sent a letter to the first respondent's attorneys on 29 June 2017, placing on record that this large amount had been transferred without any permission and that the money should be re-transferred to the bank accounts. The amounts that had been transferred were almost all the money in the second respondent's bank account.
- (21) On 30 June 2017 the first respondent's attorneys indicated that the first respondent was complying with recognised legal and accounting principles. The first respondent alleged that this money was paid into the various trusts as it was illegal to keep the money in the second respondent's bank account. There is, however, no explanation as to why it was paid into the first respondent's bank accounts.

URGENCY:

- (22) The applicant launched the present application on an urgent basis to avoid further prejudice to the second respondent, the applicant and the shareholders.

- (23) It is quite clear, due to the facts set out above, that there is an irretrievable break-down between the applicant and the first respondent, the only two directors of the second respondent. There is no trust between the two directors and the shareholders are also in disarray as they do not all support the same director, as the fourth respondent supports the applicant and the fifth respondent supports the first respondent.
- (24) According to the first respondent there are presently 40 trusts which fall under the second respondent's administration. The first respondent argued that all services rendered to these trusts, as chartered accountant, were rendered in his personal capacity and not as representative of the second respondent. According to him there is no conflict of interest. It is clear that the first respondent acquired certain appointments as trustee excluding the second respondent, although he used the second respondent's account to pay the expenses incurred on behalf of these trusts.
- (25) The first respondent's explanation is that "neither the applicant nor the second respondent has any entitlement to any of the funds paid by me from the STA#2 Standard Bank account of the second respondent, to the bank accounts of the individual trusts - the funds belong to them". He does not explain why the money was first paid into his bank accounts.
- (26) I cannot agree with the first respondent that all the facts relied on by the applicant relates to a period prior to May 2017. The payment of "fees in advance" and the R108 500 payment to the first respondent caused the applicant to launch an urgent application as more than R10 million is involved for the period June 2017. The first respondent refers to transferring R10 million from the second respondent's bank account as "fees paid in advance".
- (27) In these circumstances I have to consider the provisions of Rule 6(12), dealing with urgent applications. In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[1] the court dealt with these provisions in paragraph 8:

"[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the applicant was attempting to settle the matter or collect more facts with regard thereto."

- (28) I find that the matter is urgent and that the applicant will not be able to receive substantial redress in due course as a large amount of money has been transferred without an adequate explanation. It is quite clear that the launch of the urgent application was prompted by the first respondent's actions when transferring R10 million from the second respondent's bank accounts under suspicious circumstances. The test as set out in *East Rock*[2] has been passed as I find that the applicant will not get substantial redress in due course as the first respondent has already transferred more than R10 million from the second respondent's account into his own accounts. It is common cause between the applicant and the first

respondent that this money belongs to the various trusts administered and managed by the second respondent.

MERITS:

(29) It is common cause between the parties that an impasse has been reached and that the trust between the directors of the company, the applicant and the first respondent is non-existent. The applicant alleges that the first respondent conducted the company affairs in an unlawful manner. He had paid personal expenses from the second respondent's bank account without the knowledge of his only

co-director; he had transferred funds from the second respondent's account as remuneration to himself once more without the applicant's

knowledge or authorization. He had transferred most of the funds in the second respondent's bank account, more than R10 million, to other accounts to which he has access and of which the applicant has no knowledge. The applicant has no control over these accounts and the first respondent did so without consulting the applicant before taking such a drastic step. In response to the allegation that he had utilized the second respondent's funds to pay for personal expenses, he replied that these expenses were "in pursuance of rendering my services and performing my duties, as trustee, to the relevant individual trusts in respect of which I was appointed". This is no explanation to justify using the second respondent's funds for private expenses.

(30) It is so that the money in the second respondent is moneys kept in trust for the most vulnerable members of society who had successfully claimed and received payment, mostly for medical negligence cases.

(31) Although a resolution by shareholders were passed on 31 May 2017 where the first respondent was instructed to appoint an independent

auditor to investigate the financial affairs of the respondent, an auditor was only appointed at a shareholders meeting on 26 July 2017

- more than two months after the resolution had been passed and whilst the matter was before court. According to the applicant this auditor was appointed to give effect to the resolution of 31 May

2017. He was not appointed to do a forensic audit.

(32) The first respondent paid several private expenses from the second respondent's bank account, but provided no explanation save to offer to repay the money. The first respondent contradicted himself by alleging that the payment of R108 500 was for trustee fees, although also mentioning that the money in the second respondent's bank account was not for trustee payment.

(33) The applicant requests the court to have regard to section 163 of the Companies Act[3] which provides:

"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-
 - (a) an order restraining the conduct complained of;"

The first respondent argued that section 163 of the Companies Act[4] is not applicable. The first respondent argued that the majority of the shareholders' decisions cannot be queried by the other

shareholders' decisions as it is bound by its contract by the decisions of the prescribed majority of shareholders. In this instance it is the other director, the applicant, who is alleging that the actions of the first respondent are prejudicial to the applicant, the second respondent and the shareholders, it is not only allegations by the shareholders.

- (34) In *Grancy Property Ltd v Manala and Others*[5] the application of section 163 was considered and the court dealt extensively with the applicable sections in foreign jurisdictions and came to the conclusion in paragraph 27:

"In concluding on this particular aspect of the case it bears mention that in determining whether the conduct complained of is oppressive, unfairly prejudicial or unfairly disregards the interests of Grancy, it is not the motive for the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company (see eg *Livanos v Swartzberg and Others* 1962(4) SA 395 (W) at 399)."

- (35) In the present application the court has to apply the principles as set out in *Grancy*[6] and to consider whether the manner in which the first respondent conducted himself was oppressive and prejudicial to the applicant and the shareholders.

- (36) If regard is had to the facts above and the first respondent's concession that he had transferred more than R10 million without his co-director's knowledge or authorization then I can come to no other conclusion, but that the first respondent has acted in an oppressive manner that is prejudicial, not only to the applicant, but to the other shareholders and the second respondent.
- (37) I find that the applicant, supported by the fourth respondent, have made out a case that the applicant has a prima facie right to the relief sought as the second respondent and shareholders will suffer irreparable harm should an interim interdict not be granted and the affairs of the second respondent not be investigated on an urgent basis by a forensic auditor.
- (38) In *National Council of the Societies for the Prevention of Cruelty to Animals v Openshaw*[7] the Supreme Court of Appeal found:

"[20] An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated...

- [21] The test in regard to the second requirement is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable apprehension' was quoted with approval in *Minister of Law and Order and Others v Nordien and Another*:

A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."

- (39) Any further large withdrawals by the first respondent will have disastrous consequences both for the second respondent, the only co-director, and the shareholders. A forensic auditor will be able to ascertain whether the transfer of money and dispensing of trust money to pay personal expenses were done according to the relevant principles and whether any of the money should have been dealt with in a different manner.
- (40) In the present application I find that due to the fact that the first respondent has acted in transferring money from the second respondent without adequate explanation, has used money from the second respondent to pay personal expenses and not immediately appointing an auditor as the cause for a reasonable apprehension of prejudice.

(41) I further find that the balance of convenience favours the applicant as the first respondent failed to set out any harm or prejudice he would suffer, should the order be granted. The interests of the trusts will be adequately safeguarded by the grant of a rule nisi. Furthermore, the Master of the Eastern Cape High Court will be furnished with the order to guard against any wrongdoing by any party

in these circumstances.

(42) It is quite clear that the disputes between the parties have reached a deadlock, which can and will not be resolved as the animosity between the parties prevents any resolution thereof. There is no other remedy under these circumstances.

(43) According to the available records the fifth respondent was paid R100 000 from the second respondent's account for which there is no explanation on the papers. The applicant submits it is the reason for the fifth respondent supporting the first respondent in opposing the relief sought. This payment will also be investigated and clarified by the appointment of a forensic auditor.

(44) I have read the papers, listened to all the arguments, considered all the heads of argument by all the parties and am of the opinion that an order should be granted. I was furnished with a draft order by the applicant, but have amended it as I think fit. Costs are reserved pending the report by the forensic auditor and the finalization of this application.

(45) In the result I make the following order:

1. This application is adjudicated upon as an urgent application and the ordinary forms and time periods, otherwise provided for in the Uniform Rules, is dispensed with in terms of Uniform Rule of Court 6(12)(a);
2. A rule nisi is granted with immediate effect and operation with return date 10 October 2017 calling upon all interested parties to show just cause why this order should not be made an interim order pending Part B:

2.1 An independent chartered accountant as nominated by the South African Institute of Chartered Accountants (SAICA) must be immediately

appointed in terms of the provisions of the Companies Act, 71 of 2008 ("the Act") to conduct a forensic investigation into the financial affairs of the Second Respondent and to report to this Court, within 45 days from the date upon which he received the documentation and information from the first respondent, as alluded to in paragraph 2.5, on any of the issues as contemplated in section 163(2) of the Act;

2.2 The reasonable costs to be incurred, which includes a reasonable deposit which may be required by the independent consultant, as the case may be, in relation to his appointment, report and duties in terms of this order, must be paid on demand by the second respondent and, should the second respondent be unable to do so, by the applicant, first, fourth, fifth and sixth respondents in equal parts;

2.3 The first respondent is interdicted and restrained from withdrawing any funds from the bank accounts of the second respondent, held at the third respondent, without prior authorisation from the applicant;

2.4 The first respondent is interdicted and restrained from opening any further bank accounts for the second respondent, without prior authorisation from the applicant;

2.5 That the first respondent be ordered to provide to the auditor within 10 days of this order:

2.5.1 Complete bank account statements of the Standard Bank accounts of the second respondent from May 2015 until 18 July 2017;

2.5.2 Complete general ledgers for the financial years 2016 and 2017;

2.5.3 Complete cash books for the financial years 2016 and 2017;

2.5.4 All court orders issued where the first respondent has been appointed as trustee in his capacity as director of the second respondent;

2.5.5 All financial information as requested by the auditor or independent consultant.

3. Nothing in this order should be construed on the basis that any provision thereof is to the prejudice of the beneficiaries of the trusts.

4. A copy of this order must be served on the Master of the High Court, Eastern Cape.

5. Part B of the Notice of Motion is postponed sine die.

6. Costs are reserved.

Judge C Pretorius

Case number

: 47321/2017

Matter heard on :26 July 2017

For the Applicant : Adv J Cilliers SC

Adv A Mare

Instructed by

: Tintingers Inc.

For the 1st Respondent : Adv P Lourens

Instructed by

: Pierre Marais Attorneys

For the 4th Respondent : Adv M Coetzee

Instructed by

:

Date of Judgment : 17 August 2017

[1] 2011 ZAGPJHC 196.

[2] Supra

[3] Act 71 of 2008

[4] Supra

[5] 2015(3) SA 313 (SCA) at 324

[6] Supra

[7] 2008(5) SA 339 SCA at 347 8-E

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