

SOUTH AFRICA / JUDGMENT

Lerotholi and Another v Cebekhuli Construction (Pty) Ltd and Others (028122/25) [2025] ZAGPJHC 333 (20 March 2025) [2025] ZAGPJHC 333

COURT

South Gauteng High Court, Johannesburg

BEFORE

Manoim

CASE / FILE NUMBER

028122/25

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Policy

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case

No: 028122/25

(1)

REPORTABLE: No

(2)

OF INTEREST TO OTHER JUDGES: No

(3)

REVISED: No

DATE

SIGNATURE

In

the matter between:

MOPELI
LEROTHOLI
First Applicant
(Identity
Number: 9[...])
ORICRED
(PTY) LTD
Second Applicant
(Identity
Number: 2[...])
and
CEBEKHULU
CONSTRUCTION (PTY) LTD
First Respondent
(Registration
Number: 2016/532847/07)
RICARDO
MARCO WILLOUGHBY
Second Respondent
(Identity
Number: 7[...])
PHILANI
WISEMAN
Third Respondent
FIRST
NATIONAL BANK LTD
Fourth Respondent
THE
COMPANIES AND INTELLECTUAL
Fifth Respondent
PROPERTY
COMMISSION
This
Order is made an Order of Court by the judge whose name is reflected
herein, duly stamped by the registrar of the court, and
is submitted
electronically to the Parties / their representatives by email. This
Order is further uploaded to the electronic file
of this matter on
CaseLines by the Judge or his/her secretary. The date of this Order
is deemed to be Thursday , 20 March 2025.

JUDGMENT

Manoim J,

1. This case concerns a corporate funding relationship gone wrong. How wrong it got led to this urgent application in which the first applicant and his company, the second applicant, seek wide ranging relief against the first respondent and its two directors.
2. For convenience I will refer to the parties by name unless when I am referring to them collectively.
3. The source of the dispute is an agreement between the second applicant, Oricred (Pty) Ltd (Oricred) and the first respondent,

Cebekhulu Construction (Pty) Ltd (Cebcon) in terms of which the former would provide the latter with funding through what is known as a discounting mechanism. In brief Oricred would pay for some of the debtors book of Cebcon in turn for getting this at a discount.

Oricred would benefit from collecting the book on profiting on the difference between the invoiced price and the discount it paid to get the debt ceded to it. Cebcon would benefit from the cash flow it injected into its coffers.

4. The reason why Cebcon would enter into such an arrangement stems from the nature of its business. It is a construction company that has been in business for over 20 years. Its major clients are the public sector. This as the second respondent Cebekhulu explains comes with its own challenges particularly that of late payments. According to him at the time of this application it is involved in four major public sector construction projects. Cash flow is vital in such a business. Hence the agreement with Oricred.
5. Favourable as such an arrangement seemed to be to both parties, Oricred required some controls to be imposed on Cebcon to ensure its adherence to the arrangement. It did so by means of a contract between the two firms.
6. Since Oricred would be providing large sums of money to Cebcon (some R 153 million it says) it needed to ensure that financial controls were strictly adhered to and that it had full information of cash flows both into and out of the bank account. This account is held at First National Bank hence it is joined as the fourth respondent. The contract required all monies to be transacted through this account and provided for any expenditure to be approved by
7. Cebcon found experienced the strictures as grating and pushed back against them as I go on to explain. The question in this application is whether it did so lawfully . If not, the applicants are entitled to either all or some of their relief. But the legal questions in this case are not simply contractual – they also raise questions of company law and in particular the power of a shareholder under the Companies Act 71 of 2008 (the Act) to remove a director.

The contract

8. As part of their arrangement Cebon and Oricred had entered into a suite of contracts which included suretyships. But the one relevant to the present application is the Invoice Discounting Agreement. This contract entitled Oricred to several oversight rights. One of which was to have its nominee appointed to the board of Cebcon for the duration of the agreement. In terms of this, the first applicant, Mopeli Lerotholi, was appointed as a director. At the relevant time, the only other director of Cebcon was Ricardo Willoughby who is the second respondent. There is some dispute between the parties as to whether Philani Cebekhulu the third respondent is also an appointed director or whether he merely holds out to be a director, but nothing turns on that for present purposes as his role in this dispute is qua shareholder of Cebcon of which, it is undisputed, he is the majority shareholder.
9. The contract also entitled Oricred to appoint a person as an administrator in respect of Cebcon's finances. This was a key function. The administrator inter alia had signing powers on the Cebcon FNB bank account which meant that no payment could be made from the account without this person's authorisation. Since payments from this account included those to be made to Oricred, by way of the agreement, but also needed to be paid to third parties, it is not hard to see why conflict would arise over prioritising the making of payments in a company that regularly experienced cash flow problems.
10. Thus, Lerotholi accuses Cebcon and its directors of not adhering to the contract and proper corporate governance whilst Cebekhulu accuses Lerotholi qua director of a conflict of interest, favouring those of Oricred over Cebcon's.
11. The trigger event for this application and the one justifying its urgency occurred in January 2025 when a deposit of R 9 909 734.62 was deposited into Cebcon's account. Immediately thereafter R7 917 68.00 was withdrawn from the account. In terms of the contract the withdrawal could only be made with the prior written consent of Lerotholi. He never gave his consent and considers the withdrawal unauthorized. Oricred which is in reality the alter ego of Lerotholi since he is its sole director, then instructed its lawyers to write a letter of demand to Cebcon demanding that the funds be restored. Cebcon refused. Oricred then contacted Cebon's bank First National and persuaded them to put a hold on Cebcon's bank account.
12. Letters were exchanged between the parties and there were discussions. Nothing came of this. Instead, the respondents took their own form of action. Cebekhulu who is the – shareholder of Cebcon convened a general meeting at which he sought, qua shareholder, to remove Lerotholi as a director. Lerotholi's lawyer wrote to the respondents to advise that there were several reasons why this action would be unlawful. He referred to this as a breach of the agreement, brought for an ulterior purpose and based on incorrect facts.
13. Nevertheless, the meeting went ahead on 24 February 2025. It was convened in terms of section 61(3) of the Act which meant it was a shareholders meeting. A resolution was passed to remove Lerotholi as a director. Once the resolution was passed the chairperson of the

meeting opened the meeting to the floor. Lerotholi's lawyer was present during the meeting (it was held on the Teams platform), and he proceeded to address the meeting on why the removal was unlawful. The chairperson remained unpersuaded, and he then confirmed the passing of the resolution, and the meeting ended.

14. In the meantime, there was another application in this saga also brought by way of urgency this time at the behest of Cebcon, with Oricred the respondent. Cebcon sought repayment of certain moneys and an accounting of other moneys allegedly withdrawn by Oricred. The application was dismissed on the grounds of urgency and has not since been revived.
15. The respondents had to respond to two issues in the answering affidavit. Whether Lerotholi had been unlawfully removed as a director and whether they were otherwise complying with the other terms of the agreement. Insofar as the directorship issues is concerned the respondents case in the answering affidavit is a simple one. Lerotholi was removed in compliance with section 71(3) of the Companies Act. He was given notice of the meeting and his lawyer attended to represent him. Cebekhulu is the majority shareholder and he voted to remove Lerotholi. He had acted in compliance with section 71(3). To the extent that the contract gave Oricred rights in the agreement that conflicted with this section, section 71(3) "notwithstanding..." provision must prevail.
16. In the course of this case however the legal challenge to the removal has now evolved from what appears in both the papers and in the heads of argument. The applicants now accept that the agreement between the companies did not operate to prevent the shareholder (Cebekhulu) exercising his rights to remove Lerotholi as a director at a shareholder's meeting. The challenge now turns on a procedural issue. The contention now is that the resolution was adopted before the Lerotholi via his legal representative was given a chance to address the meeting. Section 73(2)(b) states that the director in question or his representative must be given a chance to address the meeting before the resolution is put to the vote. However, this was not the central contention in the application albeit the facts underlying might have been stated they were not pleaded as the point of law on which the outcome of the case should turn.
17. The respondents were not alerted to the fact that the sequencing of the vote was now the issue. Indeed, they did not place in issue the factual issues concerning the way the meeting ran and what was said. Had they been alerted to this point as the crucial one relied on, they may have had a response both on the pleaded facts and on the law. The new point came up in a subsequent submission from the applicant's counsel after the hearing was concluded. Whilst I had allowed both parties to make further submissions on the issue of whether a contract between a company and another could override section 73(1) (and I received these submissions) this came later as a further submission; was neither requested by me nor indicated that it would be forthcoming by the applicants at the time of the hearing.

18. I consider it would be unfair to decide this new point without the respondents being given the opportunity to be heard on it. This issue of the first applicant's removal as a director is no longer urgent, given the relief sought in respect of the contract which I am granting the applicants. I have therefore separated the relief on this aspect. The director relief is accordingly in terms of my order struck off.

The contract basis

19. It is not denied that the contract between the parties is still extant. This contract gives the Oricred certain rights even if its right to appoint a director to the board of Cebcon cannot be enforced by contract. During the hearing, the respondents counsel conceded that the contract could still be enforced. At my suggestion both parties agreed to draft a set of conditions which emerged from the contract which would in interim allow the Cebcon to continue to run whilst permitting Oricred to exercise its oversight rights.
20. Thus, what I sought to have the parties achieve was a temporary via media which would allow Oricred to exercise its other oversight functions whilst at the same time not strangling Cebcon from performing its day-to-day operations without disruption.
21. Not surprisingly after the hearing the parties advised they could not completely agree on all terms, and they produced separate drafts. I then asked for a marked up version based on the version of the applicants. I was duly provided for this. For the most part I consider the version as amended by the respondents is preferable simply because it reads more clearly, and I cannot umpire a drafting

dispute which goes into this length of detail. I have however retained certain of the features in the applicants' draft that

they had deleted. In particular I have made it clear that this is interim relief. The most important features are that it retains the oversight role of the administrator whilst allowing as a first preference for what are listed as the business operation expenses to be paid.

22. As far as costs are concerned since neither party has been completely successful each party can bear its own costs.

ORDER

IT IS ORDERED THAT:

1. The application is enrolled as an urgent application and that the forms and serviced provided for in the Rules of Court, are hereby dispensed with, in terms of Rule 6(12)(a) and
- (b) Of the Uniform Rules of Court subject to paragraph 1.1 below.

1.1. Prayers 2- 4 of the Amended Notice of Motion are struck off the roll for lack of urgency.

1.2. In respect of the remaining prayers the following alternative relief is granted as set out in paragraphs 2 -12 below.

2. The First Respondent will not remove the Second Applicant's representative as an Administrator on the First Respondent's banking profile held with the Fourth Respondent.
3. The Second Applicant and First Respondent, and their duly authorised representatives, shall not transact and/or release any funds held with the Fourth Respondent under "FNB Account number: 62668533899" without the prior written consent of the Second Applicant and First Respondent.
4. Save for what is stated in paragraph 2 above, the Second Applicant and the First Respondent shall ensure that the business operations of the First Respondent are protected and in this respect guarantee that the following expenses (further particularity provided as per paragraph 4 below) shall, as first preference, be paid without delay:
 - 4.1. Salaries and Wages;
 - 4.2. Sub-Contractors;
 - 4.3. Suppliers of Materials;
 - 4.4. Suppliers of Plant equipment;
 - 4.5. Statutory obligations, including SARS and COIDA.
5. In order to give effect to prayer 4 above, the details of the obligations named in paragraphs 4.1 to 4.5 are attached hereto marked as "S1", and may be subject to change as required by the operational requirements of the First Respondent. The Second Applicant's administrator shall have full access to view, approve, and monitor all transactions, statements, and payment records in real time.
6. The following process shall be followed for the approval and execution of payments of service providers (those set out in prayers 3 and 4 above) and creditors from the First Respondent's bank account:
 - 6.1. The First Respondent's signatory to the FNB account, or an authorised representative, shall submit a payment request to the Second Applicant, or its duly authorised representative, via email, with a copy to the relevant director(s) of the First Respondent.
 - 6.2. All payment requests shall be submitted via email to the designated email address of the Second Applicant, or duly authorised representative, with a copy to the relevant director(s) of the First Respondent.
 - 6.3. The payment request shall be accompanied by:
 - 6.3.1. An invoice of the service provider, unless if it is the payment of employees in which case the recent payroll schedule will be provided.
 - 6.3.2. Proof of materials and or plant equipment delivered or to be delivered on the project site.

6.3.3. In the case of a subcontractor – the relevant agreement and payment certificate duly signed by the First Respondent's representative.

6.4. The First Applicant or the duly authorised representative of the Second Applicant shall, if the request is received before 14:00, review and respond to the request before close of business on the same day alternatively if the request is received after 14:00, review and respond to the request before close of business on the following day.

6.5. If further information is reasonably required for review, the First Applicant or the duly authorised representative of the Second Applicant shall, if the request was received before 14:00, notify the requesting party of the specific further information required for review in writing before close of business on the same day alternatively if the request was received after 14:00, notify the requesting party of the specific further information required for review in writing before close of business on the

following day – whereafter the same periods as set out in 6.4 will apply for review and approval.

6.6. Once the payment is approved, a representative of the First Respondent will load the payment instruction on the relevant FNB Online Banking platform and notify the duly authorised representative of the Second Applicant.

6.7. The Second Applicant's Administrator shall authorise the payment via the banking system once the necessary joint signatory from the First Respondent has confirmed their approval via email. Such confirmation shall be provided within the same response periods set out in clause 6.4 above.

7. If the payment is disputed or not approved, written reasons shall be provided within the same periods set out above for review and response.
8. If a payment is not approved due to a dispute or delay, the parties shall engage in good faith discussions within 48 hours to resolve the issue. If the dispute remains unresolved, it shall be escalated within 24 hours thereafter to either:

8.1. An independent mediator agreed upon by the parties; or

8.2. An independent auditor, being a registered auditor appointed by agreement between the parties, or failing such agreement, appointed by the South African Institute of Chartered Accountants (SAICA), to verify the validity and necessity of the disputed payment.

9. If the dispute remains unresolved after 48 hours of it arising, it shall be referred to arbitration under the Arbitration Foundation of Southern Africa (AFSA) Expedited Rules, with an arbitrator appointed by agreement, or failing agreement, by the Chairperson of the Johannesburg Bar Council within five (5) days of referral.

9.1. the ruling of the arbitrator shall be final and binding upon the parties.

10. All approved and rejected payment requests shall be recorded and retained for audit and compliance purposes.
11. Monthly reconciliation statements shall be provided to the parties by the 7th day of each month to ensure transparency and financial oversight.
12. The above interdict will stand until such time as the contractual claim and action in this Honourable Court is finalised, which action is to be issued by either or both of the applicants out of this Honourable Court within 20 days of the granting of this Order failing which the Order shall lapse.
13. Each party to pay its own costs in relation to this application.

MANOIM J

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicants: R.F de Villiers instructed by Cilliers and Gildenhuys Attorneys.

For the Respondents: N. Mahlangu & C. Beukes instructed by DM5 Attorneys.

Date of hearing: 14 March 2025.

Date of Judgement: 20 March 2025.

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Prepared on 9 October 2026 · Esheria