

SOUTH AFRICA / JUDGMENT

Luelle Consulting (Pty) Ltd and Another v Hamann and Another (2023-034510) [2023] ZAGPJHC 1310 (15 November 2023) [2023] ZAGPJHC 1310

COURT

South Gauteng High Court, Johannesburg

BEFORE

Malungana

CASE / FILE NUMBER

2023-034510

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023-034510

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

15/11/23

In the matter between:

LUELLE CONSULTING (PTY) LIMITED First Applicant LUSHIA BIANCA VAN BUUREN Second
Applicant And LIZELLE LEANDRE LEAH HAMANN First Respondent FIRSTRAND BANK
LIMITED Second Respondent

WRITTEN REASONS

MALUNGANA AJ

Introduction

- [1] This is an application for an interdictory relief in which the applicants sought an order on urgent basis for an access to the business bank account held by the first applicant (“Luella”) with the second respondent (“the Bank”). The first applicant brought the application in her capacity as an equal shareholder and co-director of the first applicant. This application was precipitated by the freezing of Luella’s bank account by the Bank pursuant to instructions issued to the latter by the first respondent, whom I shall call “the respondent”.
- [2] The application came before in the urgent court on 25 April 2025, and was opposed by the respondent, firstly on the ground that the first applicant (“the applicant”) failed to comply with the provisions of section 165(2) of the Companies Act of 2008, and Secondly on the basis of lack of urgency. The respondent also opposed the application on the merits.
- [3] Having heard argument, I granted an order for the applicant, restoring with immediate effect access and regular banking services to the applicant on the business accounts held with the Bank in the name of the first applicant.[1]
- [4] I have been requested to furnish my reasons for the above Order. These are my reasons.

The facts

- [5] At all relevant times the applicant and respondent, as co-directors and equal shareholders enjoyed unlimited access to the first applicant’s bank account. During March 2023 the first respondent instructed the bank to place a ‘hold’ on Luella’s business account. As consequence thereof the second applicant launched the current application.
- [6] It is apposite to have regard to the formulation of the relief sought by the applicant in the notice of motion in order to appreciate what laid at the heart of the application before me. The main relief sought by the second applicant is set out in paragraphs 3 to 5 of the notice of motion. It reads:

“3 That an interdict be granted mandating the Second Respondent to restore with immediate effect the regular banking services and access of the First and Second Applicants to the First Applicant’s banking accounts. i.e. Platinum Business Account number [...] and inContact Pro Investment account number [...], held with the Second Respondent.

4. That prayer 3 shall operate as an interim order, pending the finalisation and adjudication of the application instituted by the First Respondent for the liquidation of First Applicant on or about 22 March 2023 under case number 027691/2023 in the High Court of South Africa, Gauteng Local Division, Johannesburg.
5. That Ms Pamella Marlowe of DNM Consulting (Pty) Limited is appointed to process any payment on the bank accounts so held by the First Applicant.”

[7] The applicant's case as it emerges from the founding affidavit is as follows. The applicant averred that in March 2023, she realised that the respondent had transferred all available funds from the business platinum account to the investment money on call account. Consequently, she visited the Sunninghill branch of FNB to make enquiries. She then received an email correspondence from the fraud investigator informing her that payments were made to the respondent. She informed the accountant of the first applicant, Ms Pamela Marlowe that the platinum account had been blocked and that the running debit orders would not to be met. The resultant effect was that the employees and creditors of the first applicant ("the company"), will also not be paid. For some reasons the account in question was subsequently unblocked and creditors paid. On 3 March 2023, the applicant was informed by Mike of FNB that the account was blocked again on instructions given by the respondent. As shown in annexure "E3", the bank informed the applicant that it would require an updated mandate signed by the both directors as well

as the court order for it to uplift the hold on the account.[2]

[8] The applicant's attempt to resolve the matter through written communications addressed to the respondent did not bear any fruits.

[9] On urgency, the applicant contended as follows: The company's creditors are normally paid by way of debit orders and direct transfers between the 1st of the month to the 8th of the month. These debit orders are run through the company's bank account that had been placed on hold. The company has five employees. In addition, there are salaries and other regulatory payments such as UIF and PAYE shown in annexure "L" which ought to be paid but for the blockage. The survival of the business of the company was at stake. The first respondent reneged on the agreement that she would pay all the operational expenses.

[10] The applicant further contended that the company is involved in liquidation and the blocking of the account will exacerbate the situation plunging the company into further debts.

[11] On the lack of authority to represent the company, the applicant contended that due to the urgency of the matter, it is not possible to comply with section 165(2) of the Companies Act. The applicant also averred that as a director and shareholder in the company she sought leave to bring the application to prevent the company from suffering irreparable harm.

[12] In response to the applicant's contentions, the respondent has filed opposing papers. The relevant portions of the respondent's

answering affidavit read as follows:[3]

"7.1 On or about 15 December 2022, I made known my intention to liquidate Luelle Consulting (Pty) Ltd, through my current attorneys of record.

7.2 A shareholder's meeting was held on 22 February 2023 at the office of the Second Applicant's office the purpose thereof among other this was to establish if my intention to liquidate can be resolved amicably. Both my legal representatives and that of the Second Applicant were present at the meeting.

7.3 The Second Applicant made her intention to oppose the liquidation known though an answering affidavit has not been filed.

7.4 The Second Applicant has frustrated me and ensured that I do not enjoy any benefits from the company. She has done the following acts to frustrate the process and consequently make my life difficult.

7.5 Our financial year ends on February 2023. Normally dividends are paid to the directors at the financial year end, if the directors agreed that dividends must be paid. The Second Applicant sought to defraud me from the directors' dividends and wanted the dividends to be paid to her only.

Unilateral change of office locks

7.6 On or about 14 January 2023, the Second Applicant unilaterally then changed the locks and keys of the office premise and did not furnish me with the keys. I was locked out of access to the office premises...

Cancelling Cellphone plan

7.7 On or about 14 March 2023, the Second Respondent unlawfully cancelled my cell-phone plan with Vodacom from contract to prepaid. The contract plan was financed by the First Applicant. This was a benefit that me and the Second Respondent enjoyed equally.

7.8 On 23 March 2023, I tried to logon to my company emails and once again, I could not access my company e-mails.

Cancellation on LinkedIn

7.9 On or about 23 March 2023, the Second Applicant unlawfully cancelled my personal LinkedIn account. The subscription was financed by the company and the Second Applicant had protested the paying of my subscription even though the benefit was extended by the company to both of us."

[13] In regard to core issue before the Court, the respondent averred in her answering affidavit that on 24 March 2023 she attended to the bank to unfreeze the account so she could pay the salaries. Immediately thereafter the applicant withdrew cash amount of R5000.00. As consequence she instructed the bank to keep the account frozen, and that any transaction on the account to be made in the presence of both directors. She also instructed her attorneys to confirm the instructions in this regard in writing as shown in annexure "UAA2."

[14] On why the relief should not be granted, the respondent contentions are as follows:[4]

(a) The second applicant has not met the requirements of section 165(6) of the Companies Act, 71 of 2008. The respondent contended that the applicant had ample time to make the requisite demand in terms of s 165(1) of the Companies Act.

(c) The banking accounts at the centre of dispute were fraudulently opened by the applicant on 23 March 2023.

[15] In paragraph 9.5.2 of the answering affidavit the respondent avers that the applicant embezzled money from the company and attempted to steal money by opening a new investment account, and transferring over a million rand from old investment account into a new account that only provide her with notification relating to the transactions.

[16] In paragraph 9.5.5- 9.5.6 the respondent averred as follows:

“9.5.5 The shareholders agreement clearly states that a resolution is agreed on is 50% plus votes have been achieved. The Second Applicant and myself have equal shares in the company, therefore it means that to action in the company, we must both be in agreement.

9.5.6 There is no resolution authorising the Second Respondent to act on behalf of the First Applicant.”

[17] In reply to the answering affidavit the applicant states in paragraph 23 as follows:

“23 The First Respondent then alleges that I have withdrawn money. This is quite correct and clearly the First Respondent has a very short memory. It has always been the practice that cash funds are withdrawn in order to make payment for “petty cash”. I annex hereto as annexure “A” a reconciliation of the cash withdrawals on:

23.1 2 March 2023 in the sum of R4 000.00;

23.2 6 March 2023 in the sum of R6000.00; and

23.3 23 March 2023 in the sum of R1 000.00.”

Submissions

[18] With regard to urgency, counsel for the applicant submitted that the application met the requirements set out in Rule 6(12)(b) of the Uniform Rules of Court for the matter to be heard on urgent basis in that creditors of the company were not paid; services to the company would be suspended and the applicant would not be tax compliant. See Case Lines 000000-5. Counsel further argued that the livelihood of the shareholder, employees and other dependents are at stake unless the matter is heard on urgent basis.

[19] On behalf of the respondent it was submitted that the applicant failed to comply with the provisions of s 165 of the Company’s Act, and as such has no authority to represent the company. According to respondent she was justified in freezing the account to avoid further embezzlement of the company’s finances by the applicant. This argument, in my view, is not well founded. In exceptional circumstances the shareholder or director can bring the

application with leave of the court in circumstances where the company is likely suffer irreparable if it were to comply with subsections 2-5 of the Company's Act.

Legal principles

- [20] The requirement for the granting of an interim interdict are trite: a prima facie right, though open to some doubt; a reasonable apprehension of irreparable harm and imminent harm to the right. The locus classicus which sets out the test for the granting of interdicts is *Setlgelo v Setlogelo*[5] .
- [21] I consider it to be clear on the whole affidavits, that at some stage the respondent had acknowledged that the company would most likely suffer some kind of harm if the bank account of the company remained frozen. She unblocked the account for the salaries of the employees to be paid, only to instruct the bank to put the account on hold afterwards.
- [22] The respondent argued very strenuously that the applicant in bringing this application failed to comply with the provisions of section 165 of the Company's Act. Given the circumstances of this application, the contention seems to me unsound. From a procedural perspective when a litigant approaches the urgent court he or she would in the ordinary cause seek an order to dispense with the normal rules of the court. The practical effect of the order condoning the non compliance with the normal rules of court implies that any other rule which imposes compliance with the time frame will fall under the ambit of Rule 6(12)(b) of the Uniform Rules of Court.
- [23] Furthermore, when the applicant approached this Court she sought amongst others prayers, that condonation for non -compliance with the normal rules of Court governing motion proceedings be granted. The problem which remained, however, was whether the applicant was entitled to bring the present application in the mane of the Luella. This is, of course a factual and legal issue.
- [24] Section 165(2) provides that:
- “(2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person*
- (a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;
 - (b) is a director or prescribed officer of the company or related company;
 - (c) is a registered trade union that represents employees of the company, or another representative of employees of the company, or
 - (d) has been granted leave of the court of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.”

[25] Contained within the proposition that the first applicant failed to comply with the provisions of s 165 of the Company's Act, is subsection (3), which must be given effect. The argument becomes hazy when regard is had to the subsection which provides that:

"A company that has been served with a demand in terms of subsection (2) may apply within 15 days to court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit."

[26] On a fair reading of section 165 (6) of the Act it is plain that "In exceptional circumstances, a person contemplated in subsection (2) may apply to a court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in the subsection, or without affording the company time to respond to the demand in accordance with subsection (4), and the court may grant leave only if the court is satisfied that –

- (a) the delay required for the procedures contemplated in subsections (3) to (5) to be completed may result in –
 - (i) irreparable harm to the company, or
 - (ii) substantial prejudice to the interests of the applicant or another person.
- (b) there is a reasonable probability that the company may not act to protect that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect."

Conclusion

[27] It appears from the papers and during argument that the respondent had brought an application to place Luella under liquidation. The merits of that application are not for this Court to decide, however, an inference can be reasonably drawn to the effect that it could not be reasonably expected of the respondent to accede to demand in terms of subsection 2 of the Act. Furthermore, again on inferential basis the respondent does not wish Luella to continue to exist as she had already concluded that its fate lies in the liquidation application.

[28] From what have been set out above, if the court arrived at the conclusion that the interests of the first applicant needed to be protected from irreparable harm caused by the freezing of its account, that finding dispenses with the proposition that there was non-compliance with the provision of subsections 2 to 5, and therefore subsection 6 was triggered. In any event the applicant had already sought leave to bring the application in the on behalf Luella.

[29] What is clear from the facts of this case is that there is a tension and friction between the co-directors of Luella, which affect the smooth running of the corporation. On 06 April 2023 the respondent's attorneys addressed a correspondence to the applicant's legal representatives. The relevant portion of the said correspondence reads:

"4.7 On or about 24 March 2023, our client attended to the bank to unblock the bank account so that payment for salaries can be made and thereafter gave the instructions that any request or transaction on the business bank account must be made in the presence of both directors."

- [30] In my opinion by unblocking the business account as aforesaid, the respondent had recognised the fact that the company could not run effectively without the accessing the funds held in the account, for the simple reason that salaries of the employees and other expenses needed to be paid. As contended by the applicant, the Court cannot simply accept the mere ipse dixit allegation that the applicant has defrauded the company. I therefore hold that the applicant has sufficiently established, at least at a prima facie level she is entitled to an order which I granted on 25 April 2023. There is no logical reason why a company would continue to operate without funds or bank account. The balance of convenience favours the applicant. Clearly the company would continue to suffer irreparable if employees of the company are not paid their salaries.
- [31] To sum up the position. The issue of urgency in the current case is somewhat bound up with factual issues canvassed at the hearing. The Court found that the respondent has failed to provide sound reasons why the 'hold' placed on the company's bank account should not be uplifted, and why the applicant's right to transact on the account could not be reinstated. To my mind no business can effectively conduct its business without a bank account or funds to meet its day to day operational requirements. In the circumstances it seems to me that the convenience of the parties was served by appointing the accountant of Luella, Ms Pamela Marlowe, to pay all the reasonable necessary operational expenses of the business pending the outcome of the liquidation proceedings.

Order

[32] In the result the following order was granted:

1. The second applicant is authorised in terms of section 165(6) of the Companies' Act of 2008, to bring proceedings in the name and on behalf of the first applicant;
2. An interdict is granted mandating the second respondent to restore with immediate effect the regular banking services and access of the first and second applicants to the first applicant's banking accounts, i.e. Platinum Business Account number [...];
3. The prayer 2 shall operate as an interim order, pending the finalisation and adjudication of the application instituted by the first respondent for the liquidation of the first applicant on or about 22 March 2023 under case number 0278691/2023 in the High Court of South Africa, Gauteng Local Division, Johannesburg;
4. That Ms Pamela Marlowe of DNM Consulting (Pty) Limited is appointed to process any payment on the bank accounts so held by the first applicant;
5. That the second applicant and the first respondent are to remain the inContact persons with the second respondent and that the bank cards so held by the second applicant and the first respondent be cancelled;
6. That Ms Pamella Marlowe is authorised to make payment of the monthly operational expenses of the first applicant;

7. That the first applicant's benefits relating to the petrol benefit for the second applicant and the first respondent be reinstated;
8. That the first respondent is to make payment of the first and second applicants' costs.

P.H. MALUNGANA

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 25 April 2023

Judgment:

25 April 2023

Written Reasons: 15 November 2023

APPEARANCES

For Applicant: JW Kloek

Instructed by: Minnie du Plessis Incorporated

For First Respondent: N. Morwasehla

Instructed by: Morwasehla Attorneys.

- [1] Court Order Case Lines 00001-1
- [2] Case Lines 001-17 para 32 of the Founding Affidavit.
- [3] Case Lines 005-4 para 7 of the Answering Affidavit.
- [4] Case Lines 005-10 para 8 of the Answering Affidavit
- [5] Setlogelo v Setlogelo 1914 AD 221. "An interdict may only be granted if otherwise irreparable injury would ensue to the applicant."

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