

SOUTH AFRICA / JUDGMENT

# Matthews and Others v Ituba Holdings (RF) (Pty) Ltd and Others (81151/2017) [2022] ZAGPPHC 632 (22 August 2022)

[2022] ZAGPPHC 632

## COURT

North Gauteng High Court, Pretoria

## BEFORE

N.P Mali

## CASE / FILE NUMBER

81151/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

CASE

NO: 81151/2017

DOH:

16 FEBRUARY 2022

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

22

AUGUST 2022

ZOLANI

KGOSIETSILE MATTHEWS FIRST

APPLICANT

ZOLANI

KGOSIETSILE MATTHEWS,

NO

SECOND APPLICANT

VIMTHA

AMICHANO RAJBANSI,

NO THIRD

APPLICANT

and

ITHUBA

HOLDINGS (RF) (PTY) LTD FIRST

RESPONDENT  
CHARMAINE  
MABUZA SECOND  
RESPONDENT  
BOY  
ERICK MABUZA  
THIRD  
RESPONDENT  
NATIONAL  
LOTTERIES COMMISSION  
FOURTH RESPONDENT

## JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 22 AUGUST 2022.

MALI J.

1. Applicants seek a declaration that they are entitled to 1% share in the fourth respondent and in the event the order is granted; that the 1% share be transferred to the first applicant and later to be held by the third applicant.
2. The first applicant, Mr. Matthews is a businessman who is also cited as the second applicant in his official capacity a duly appointed trustee of the VK Family Trust ("the Trust"). The trust was the entity appointed by Mr. Matthews to hold the shareholding for him. The first applicant is married to the third applicant Ms Rajbansi, who is cited in her official capacity as a duly appointed trustee of the Trust. The three applicants seek the same relief therefore; they will be referred to as "the applicant". The second and third respondents hereinafter referred as Mabuzas are a married couple. Two of their companies Zamani Gaming (Pty) Ltd ("Zamani") and Paytronix (Pty) Ltd ("Paytronix") are shareholders in lthuba Holdings (RF) (Pty) Ltd ("lthuba").

## FACTS

3. The first respondent lthuba is a ring-fenced company as envisaged in section 15(2)(b) Companies Act 71 of 2008 in that there are restrictions and certain conditions contained in its Memorandum of Incorporation. Some of the restriction are as follows:
  - 3.1. The board of directors of lthuba is not permitted to issue any shares unless, among other things:
    - 3.1.1. The issue of shares is approved by Zamani (clause 3.1.2.2.2);
    - 3.1.2. There is no dilution of the government entities' 20% shareholding in lthuba (Clause 3.1.4.1).

4. On 11 June 2013, the Department of Trade and Industry ("the DTI") issued a request for proposal for the award of the third lottery license of the South African National Lottery ("the RFP"). The timeline for the RFP included the following:
  - 4.1. by 31 August 2013, the applicants had to submit "Fit and Proper details and declarations of interest"
  - 4.2. by 30 November 2013, the applicants had to submit their applications;
  - 4.3. by 30 June 2014, the adjudication of the applications would be completed;
  - 4.4. by 31 August 2014, the Minister would announce the successful applicants; and
  - 4.5. by 01 June 2015, the successful applicant would commence operating under the license.
5. As at 30 November 2013, when lthuba submitted its completed application having successfully completed the pre-screening process; Mr. Matthews and the trust were not included in the shareholding structure of lthuba. On 23 October 2014, the Minister issued a media statement in which he announced lthuba as a successful applicant for the license. As at 23 October 2014 the applicants were not listed as the lthuba shareholder. The Minister published that negotiations would be commenced with lthuba to conclude a license agreement that would "be finalized during the course of November 2014". The envisaged license agreement was concluded on 24 November 2014.
6. On 25 June 2014, Gidani the previous national operator challenged the decision of the Minister to grant the license in court. The outcome of the challenge was pronounced in November 2015 to wit, a court order by Tuchten J still granting the license to lthuba. By then the applicants were not listed as shareholders in lthuba. On 28 November 2018 the applicant launched this application.

#### ALLEGED ENTITLEMENT TO 1% SHARE

7. According to Mr. Matthews he is family friends with the Mabuzas. In March 2013, the Mabuzas who were representing lthuba verbally offered him a donation of 1% shareholding in lthuba. The donation was based on the hard work to be undertaken by Mr. Matthews, endeavors and efforts and to provide future assistance to lthuba to obtain license and operate the National Lottery. According to him he used his extensive international network with potential technical service providers in the bid process to facilitate the granting to lthuba to operate National Lottery. lthuba and Mabuzas failed to deliver the 1% shareholding to the him via the trust.
8. During the hearing of this application, Mr. Matthews later conceded that lthuba is a ring-fenced company as a result he seeks no relief from lthuba. Further concession on the part of the applicants is that the Mabuzas are not shareholders in lthuba. Mr. Matthews' case is that the court must pierce the corporate veil in Zamani and Paytronix who are not even joined in these proceedings in terms of Rule 10(3) of the Rules of Court. Rule 10 (3) provides:

"Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."

9. First I deal with the issue of prescription as raised on behalf of lthuba and the Mabuzas. Section 12(3) of the Prescription Act 68 of 1969, provides:

"(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."
10. The issue to be determined is, when did the applicants became aware of their claim or at least had minimum facts to institute the claim. According to Mr. Matthews debt commenced to exist from the date of the license having been granted in June 2015. This date is subsequent to the judgment of Tuchten J as alluded above. On his own version per annexures "D" and "E" of the founding affidavit

in 2014 the Mabuzas were supposed to transfer the share. When the shares were not transferred, he did not take action.

11. At paragraph 9 of the founding affidavit Mr. Matthews avers that he had reminded the second respondent by electronic message that the Mabuzas had given him the shareholding. At paragraph 10 he states that the second respondent confirmed by WhatsApp message on 25 October 2014 that he deserved the shareholding. It transpires from paragraph 11 of the founding affidavit, that their combined efforts proved successful and the licence to operate the National Lottery was granted as from 1 June 2015. In the founding affidavit Matthews is silent as to what happened between 25 October 2014 and 1 June 2015.

From the background facts it is not in dispute that between 25 October 2014 and 1 June 2015 lthuba was embroiled in litigation with Gidani.

12. Submissions made on behalf of the respondents are that all share- holders of lthuba should have been in place by 31 August 2013, as part of the tender pre-screening process. Secondly, lthuba was announced by the Minister as a successful applicant on 23 October
2014. Furthermore, the Mabuzas do not dispute that they had identified Mr. Matthews as a potential shareholder in lthuba among various other persons. During early August 2013 due to the pre -screening not process and various disclosures per tender requirements Mr. Matthews could qualify. The reason advanced by the respondents for his disqualification is

because he was politically connected. The trust was also politically connected as Mr. Matthews and Ms. Rajabansi's parents and were once Parliamentarians as result of their membership of political parties.

13. For the very first time in the replying affidavit, Mr. Matthews refers to the legal challenge and/or court battle which ensued from October 2014 to June 2015. The resultant court order referred the matter back to the Minister for reconsideration, as a result the finalisation of the successful bid process was only confirmed in June
2015. Furthermore, the issue of suspensive conditions only arises in the replying affidavit. The suspensive condition is that the entire allocation of the share was subject to final approval of the bid by the Minister. Mr Matthews does not allege that he did not know before the impugned decision of the granting of the license that he was not a shareholder in lthuba. It is apparent he always knew of his and/or the trust's status pertaining to lthuba.
14. Regarding the above, it is trite law that the party stands and fall by the founding affidavit in application proceedings. In the result, this late submission cannot assist him. Of significance in the present matter is that, on his own version on 25 October 2014 his entitlement to the share was confirmed by the second respondent when she told him he deserved it. He did not seek to enforce his claim at that stage. This then brings me to Mr. Matthews's defence pertaining to the legal challenge of the granting of the license. Even if the defence was raised in the founding affidavit; see,

"In Minister of Finance and Others v Gore NO, this Court said: 'This Court has in a series of decisions emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights ..

..' (My own emphasis.)

In Claasen v Bester, this Court had to consider the same issue. It referred to its previous decisions in Truter and Another v Deyse and Gore, and said that these cases: made it abundantly clear that knowledge of legal conclusions is not required before prescription

begins to run The principles laid down have been applied in several cases in this court, including most recently Yellow Star Properties 1020 (Pty) Ltd v MEG, Department of Development Planning and Local Government, Gauteng [2009] 3 All SA 475 [2009 (3) SA 577 (SCA)] para 37 where Leach AJA said that if the applicant "had not appreciated the legal consequences which flowed from the facts" its failure to do so did not delay the running of prescription."[1]

15. On Mr Matthews's own admission he had acquitted himself very well in assisting lthuba to win the license. Nothing prohibited him, having played his role and knowing very well he was entitled to a 1% share because of his hardwork in lthuba, to not launch the proceedings. From the above, it is apparent that the applicants and Mr. Matthews had no legal basis to wait for conclusions of the court case concerning the challenge of the issue of license. It is therefore concluded that the applicants' claim had already prescribed at the time of

launching this application. In the result the plea of prescription is upheld.

## ORDER

1. The application is dismissed with costs of two counsel.

N.P MALI

JUDGE OF THE HIGH COURT

## APPEARANCES:

For the Applicant: Adv.

S Cohen

Instructed by Taitz

and Skikne Attorneys

For the 1st to 3rd Respondents: Adv. CE Watt-Pringle SC

Adv. MCJ Van Kerckhoven

Instructed by Roodt

Inc

- [1] Johannes G Coetzee & Seun and Another v Le Roux and Another (969 of 2020) [2022] ZASCA 47 (08 April 2022); paras 12 and 14.

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