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SOUTH AFRICA / JUDGMENT

## Mboni Shatsane Joint Venture (Pty) Ltd v Khawuyeza Trading (Pty) Ltd and Others (26650/16) [2016] ZAGPPHC 1118 (11 November 2016) [2016] ZAGPPHC 1118

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COURT

North Gauteng High Court, Pretoria

BEFORE

N.P. Mali

CASE / FILE NUMBER

26650/16

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

11/11/2016

CASE

NO: 26650/16

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between: MBONI  
SHATSANE JOINT VENTURE (PTY) LTD  
Applicant  
and  
KHAWUYEZA  
TRADING (PTY)  
LTD  
First Respondent  
NEDBANK  
LIMITED  
Second Respondent  
NTSAKO  
LINCOLN CHABALALA  
Third Respondent  
FLOYD  
MAHORI  
Fourth Respondent  
BENNY  
MAKASANI  
Fifth Respondent  
VUSI  
GOODMAN  
MALUNGANI  
Sixth Respondent  
JEFFREY  
NDLOVU

## JUDGMENT

MALI J

- [1] This application originates from the urgent court where it was struck from the roll due to lack of urgency. It is an application for a final interdict to suspend and freeze the bank account of the respondent held by the second respondent under account number 1101433744. The application is also intended for the preservation of funds held by the second respondent in the abovementioned account; as well as to prevent the first respondent to transact from the said banking account.
- [2] The applicant is a Joint Venture ("JV") incorporated as a company. The shareholders and/or members are; Shatsane Systems Solutions Pty Ltd; ("Shatsane"), Mboni Business Enterprise CC ("Mboni") and Khawuyeza Trading Pty Ltd ("Khawuyeza"). The three members hold equal shares in the JV at 33.33% for each member. One Mr Silver Shalonga ("Mr Shalonga") the deponent in the applicant's founding affidavit is the representative of Shatsane in the JV.

- [3] It is apposite to reiterate that the first respondent, Khawuyeza is one of the members and or shareholders of the JV. The second respondent is Nedbank Limited, a banking institution where the first respondent's banking account is held. The third, fourth, fifth, 6th and 7th respondents are all directors of the first respondent.
- [4] All the respondents, but for the second respondent oppose the application. The applicant's basis for the relief sought is that the third respondent defrauded the applicant of an amount of R2, 723 000.00. It is alleged that he unlawfully transferred funds from the applicant's business banking account into his personal account and later transferred an amount of R2, 500 000.00 part of the abovementioned amount to the account of the first respondent.
- [5] According to Mr Shalonga the third respondent was employed as the applicant's Assistant Foreman to oversee construction of roads in the North West Province. He was paid a salary of R12, 500.00 per month. The third respondent was authorised to access the applicant's banking account held at First National Bank in order to check payments made into the applicant's banking account. He was not authorised to transact from the applicant's banking account.
- [6] The respondents submitted that the funds were not unlawfully appropriated rather they were transferred because of the partnership mandate arising from the joint venture. The respondents raised two

## issues

in regard to their point in limine

### POINT IN LIMINE

- [7] The respondents raised the issues of locus standi and lack of authority to act on behalf of the applicant.

### LOCUS STANDI

- [8] It is submitted on behalf of the respondents that the deponent to the founding affidavit, and the deponent to the confirmatory affidavit lack the requisite locus standi. They are not competent to act on behalf of the applicant and or even cause the applicant to be cited as an applicant. In fact they should have cited the applicant as a nominal respondent.
- [9] Mr Shalonga states in the founding affidavit: "I am the Managing Director of the applicant. I am authorised to depose to this affidavit.... I am a Director of the applicant together with Patrick Majiafela Ndlovu ('Ndlovu' who serves as a Financial Director and together Ndlovu and I form the management of the applicant).
- [10] The undisputed version of the respondents to the above is that Mr Shalonga is not a Managing Director of the applicant, he is a Contract Manager tasked with managing all contractual obligations of the applicant. Mr Shalonga and Mr Ndlovu fraudulently incorporated the JV and they are masquerading as the only directors of the JV Company. The

said deponents have not proved any authority to act on behalf of the applicant by way of resolution by other members of the JV. To this regard the argument tendered on behalf of the deponent is that the Memorandum of Understanding seeking to establish the JV is not signed by the parties to the JV.

- [11] It is further submitted that the applicant should have acted in terms of section 163 of the Companies Act, 71 of 2008. Section 163 of the Companies Act deals with unfair or oppressive conduct of any shareholder or director. According to the applicant the respondents' argument is misplaced because they are not shareholders in the JV.
- [12] The deponents to the applicant's affidavit do not dispute the existence of the JV. They even acted on it. For example on 1 April 2015 Mr Shalonga addressed a letter of acceptance, marked as NCL 2.1 at page 86 of the paginated papers to the client of the JV.
- [13] The following extract is significant: "Pursuant to your appointment letter dated 10 March 2015 we as Mboni Business Enterprise JV Shatsane System Solutions/ Mboni Shatsane Joint Venture hereby accept the appointment for the above project. All expected compliance documents shall be supplied to you in due course.... (my emphasis). The above acknowledgment by Mr Shalonga is more than enough conduct confirming the first respondent's equity in the JV.
- [14] It therefore follows that the applicant should have instituted the proceedings in terms of section 163 in the event that the applicant is not satisfied with the conduct of the first respondent, a 33% shareholder in the JV.
- [15] It was further submitted on behalf of the applicants that their argument is based on the authority of *Ganes and another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624 G-1. It is stated only the institution of the proceedings that need to be authorised and that the authorisation to depose the affidavit is irrelevant.
- [16] In *Tattersal and Another v Nedcor Bank Ltd*, [1995] ZASCA 30; 1995 (3) SA 222 (A), wherein the authority of a bank manager to launch proceedings on behalf of the bank was challenged The court held (at 228 G-H)

"A copy of the resolution of a company authorising the bringing of an application need not always be annexed. Nor does s 242 (4) of the Companies Act 61 of 1973 (to the effect that a minute of a meeting of directors which purports to be signed by the chairman of that meeting is evidence of the proceedings at that meeting) provide the exclusive method of proving a company's resolution. (*Pool quip Industries (Pty) Ltd v Griffin and another* 1978 (4) SA 353 (W). There may be sufficient aliunde evidence of authority *Mall (Cape) (Pty) Ltd Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 352 A)."

- [17] In *Corplo 358 Close Corporation v Michael Henry Charters* unreported EC 844/2011 at paragraph 7 it is stated "...while this case may differ on the facts it seems to me that the principle to be extracted from this passage applies. The respondent's denial of authority may be somewhat more than bare, in the sense that it points to clear deficiencies in LC 1.

However, there is no positive averment that Mr Wicks actually lacks authority, or that he was not in fact authorised to bring the application. While the respondent was entitled to raise the point it appears have been raised "tactically ...".

[18] On the facts of the present matter the respondent's complaint is not a bare complaint, there are positive averments to the deponents' lack of authority. The respondents' complaint involves pertinent issues regarding the formation of the JV. As I have found above that some of the respondents are shareholders to the JV, the respondents' complaint is not a bare complaint. Secondly in the event that it is incorrect to conclude that the respondents are shareholders in the applicant, on the facts there is no sufficient evidence aliunde of authority on the part of the deponent.

[19] Having regard to the above, I find that the applicant lacks the locus standi to bring this application. In the result the respondents' point in limine is upheld.

[20] In the result I order as follows:

20.1 The application is dismissed with cost.

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N.P. MALI

JUDGE OF THE HIGH COURT

Counsel for the Applicant:

Adv R. Baloyi

Instructed by:

MPHOKE P.K. MAGANE ATTORNEYS

Counsel for the 1st 2nd 3rd 4th 5th & 7th

Respondents:

Adv P. W. Makhambeni

Instructed by:

NKOME INCORPORATED

MATTER HEARD ON:

28 July 2016

DATE OF JUDGMENT:

11 November 2016

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