

SOUTH AFRICA / JUDGMENT

Ngonyama and Another v Ntsimbintle Holdings (Pty) Ltd and Others (21/5779) [2021] ZAGPJHC 31 (26 February 2021) [2021] ZAGPJHC 31

COURT

South Gauteng High Court, Johannesburg

BEFORE

T P Mudau

CASE / FILE NUMBER

21/5779

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES / NO

26 February 2021

CASE NO: 21/5779

In the matter between:

LULAMA SMUTS NGONYAMA

1ST APPLICANT

THUNDERCATS INVESTMENTS 92 (PTY) LTD

2ND APPLICANT

AND

NTSIMBINTLE HOLDINGS (PTY) LTD

1ST RESPONDENT

REGISTRATION NO. 2004/003269/07

(FORMERLY NTSIMBINTLE MINING (PTY) LTD)

BOSASA YOUTH DEVELOPMENT 2ND RESPONDENT

CENTRES (PTY) LTD (IN LIQUIDATION)

MASTER'S REFERENCE G163/19

RALPH FARREL LUTCHMAN N.O.

3RD RESPONDENT

CLOETE MURRAY N.O.

4TH RESPONDENT

OFENTSE ANDREW NONG N.O.

5TH RESPONDENT

TSHEPO HARRY NONYANE N.O.

6TH RESPONDENT

JARED WATSON N.O

IN HIS CAPACITY AS EXECUTOR OF THE ESTATE LATE

GAVIN WATSON 7TH RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] This application has been brought as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court. The rule reads:

“(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules, and may dispose of such matter, at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

- (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.

- (c) ...”

- [2] The applicants seeks urgent relief to interdict the first respondent from making payment to the second respondent of dividends which the applicants claim should be paid to them, and which dividends were initially, on the applicant's version, likely to be declared on Friday, 19 February 2021. The application served before Lamont J on 16 February 2021, who dismissed

it. Primarily, Lamont J was concerned that there was no certainty that the first respondent would declare a dividend on 16 February 2021. Subsequently, on 19 February 2021, the first respondent declared a dividend for R400 000 000-00. Payment to the beneficiaries, including the applicants, was due on Tuesday, 23 February 2021. Consequently, on 19 February 2021, the applicants launched the current application with notice to the respondents by way of email communication, commensurate with the prevailing lockdown practice directive in this division because of the Covid 19 pandemic.

- [3] The respondents were given until 12 midday, Saturday, 20 February 2021 to indicate their intention to oppose and to file answering papers, if any, by 12 midday, Sunday 21 February 2021 to accommodate the filing of a replying affidavit, if necessary. The matter was set down for Monday, 22 February 2021 at 14h00 hrs. The second to sixth respondents who filed answering papers oppose this application. The first and the seventh respondents filed notices to abide. After hearing submissions on the merit of the application, I issued an interim order that payments due, the subject of dispute regarding this matter, should be held over pending delivery of this judgment.
- [4] In this application, the applicants pray for an order directing the first respondent to hold and retain, in a separately designated interest-bearing account, such dividends as it would, but for the applicants' claim to such dividends, have paid to the second respondent pending the final outcome of the seventh respondent's appeal to the Supreme Court of Appeal against the judgment of this court (per Kathree-Setiloane J) or, a timeously noted and prosecuted appeal, if any, to the Constitutional Court against the decision of the Supreme Court of Appeal in the same matter. The applicants also seek an order directing the first respondent to cause the dividends and all interest earned thereon to be paid to the second and/or the first applicant if the outcome of the last of the above events be determined in the applicants' favour with attendant costs.
- [5] The application has its genesis on the strength of a judgment and order by Kathree-Setiloane J, referred to above, in their favour but presently under appeal, to the SCA. The background facts that led up to the present urgent application are of some importance. Briefly, the applicants laid claim to beneficial ownership^[1] regarding the shares held by Bosasa Youth Development Centres (Pty) Ltd, in liquidation ("Bosasa Youth"), the second respondent in the issued share capital of Ntsimbintle Holdings (Pty) Ltd ("Ntsimbintle Holdings"). Kathree-Setiloane J concluded that Watson's misrepresentation to the first applicant, and to a certain Macingwane, as relating to the structure and beneficial shareholding of Bosasa Youth, had induced them to donate 8,33% of their shares to Bosasa Youth. Essentially Kathree-Setiloane J found that the first applicant is the beneficial owner of 1/3 third of the shares held by the second applicant in the first respondent. This finding has not been appealed against, the second respondent having withdrawn its leave to appeal the judgment and order.

- [6] At paragraph 45 of the judgment, Kathree-Setiloane J specifically held that although the shares that were donated to Bosasa Youth were registered in the name of Thundercats, the second applicant, the first applicant and two others, “were the beneficial owners of the mining shares that were donated to Bosasa Youth and the principal actors in the Investment Company” created for that purpose. Consequently, she made the following order, which is the subject of appeal in the SCA by Jared N.O, the seventh respondent:

“The first respondent is ordered to immediately take whatever steps are necessary to restore to the second applicant the shares in

Ntsimbintle (being 1.7% which is equal to 33.3% of the 5.1% (550) shares) that were substituted for the shares donated by the first

applicant to the second respondent, together with all dividends earned and interest thereon at the rate of 10% per annum from the

date when the shares were donated (i.e., first registered in the name of the second respondent)”.

- [7] The applicants are concerned that the dividends that ought to flow to the applicants in the event of the appeal being dismissed by the SCA, will be paid to the second respondent (represented by its liquidators - the third to sixth respondents), or to a person or persons unknown who may claim to be paid such dividends by reason of some or other transaction with the second respondent, represented by the third to sixth respondents. The applicants aver they face the imminent danger of losing millions of rands, approximately R6 800 000-00, unless the relief herein be urgently granted before the dividends are paid out by first respondent.
- [8] On the applicants’ version, there is no other alternative that will afford them substantial relief in the ordinary course. The reasons which the applicants claim they could not be afforded substantial redress at a hearing in due course are, inter alia, that the persons to whom the moneys would be paid are liquidators of an insolvent company; the liquidators have had their powers extended to institute and defend proceedings; the liquidators were found to have litigated “aggressively”; the liquidators do not deny the allegation that they are using company funds for legal fees; and that the liquidators were found to have acted “unlawfully” in relation to this estate - the BOSASA Group, renamed the African Global Group by De Villiers AJ, in a separate matter, also the subject of appeal to the SCA.
- [9] The applicants are concerned that the dividends will, in all probability, be irrecoverable by the time an action in the ordinary course is instituted and prosecuted to finality.
- [10] As indicated from the onset, Bosasa Youth and the joint liquidators strenuously oppose this application. As indicated, they did so before Lamont J on the basis that the applicant failed to establish that the declaration of dividends would be done on Friday, 19 February 2021, an event that can only be triggered by a directors’ resolution in terms of section 46 of the Companies Act. It is common cause that the event has since been triggered, and a declaration to that effect made. The respondents point out that, since Kathree-Setiloane J

granted the order on 25 July 2019, the first respondent paid dividends to Bosasa Youth on no less than three occasions, these being on 18 February 2020, 28 May 2020, and 7 September 2020, which the applicants failed to disclose. For this consideration, urgency, if any, is self created, so they argument went.

- [11] The applicants' allegations of irreparable harm are, on the respondents' version, ill founded. If there was any real fear of irreparable harm being suffered, the applicants would have either, instituted section 18 (3) proceedings, alternatively,

instituted a similar application to the current one for interdictory relief. It was submitted by counsel on behalf of the respondents that the liquidators are only provisionally appointed and no L& D account has been drawn up and for that reason, are precluded by law from making distributions to the second applicant and other creditors.[2]

- [12] In terms of section 359 of the Old Companies Act, any person, who intends to institute legal proceedings for purposes of enforcing any claim against Bosasa Youth, which arose before the commencement of its (Bosasa Youth) winding- up, is obliged, within 4 weeks after the appointment of the liquidator, to give the liquidator not less than 3 weeks' notice in writing before commencing with the proceedings. In this regard, the respondents contend that the liquidators herein have been provisionally, not finally, appointed, and for that reason, the application is premature.

- [13] It is convenient to deal with this aspect at this point as it is, in my view, without merit. On 28 February 2019, the applicants' attorneys issued to the third to sixth respondents, a notice in terms of section 359(2) in terms whereof the said respondents were advised that the applicants were proceeding with their application that was set down for hearing on 18 March 2019. This much is common cause. The fact that the applicants make this averment in reply is promoting substance over form. To my mind, there was the requisite compliance with the statutory requirements of giving notice. The respondents further contend that the reference to "liquidator" in section 359 of the Old Companies Act is to a final liquidator. Reference is made to the

following authorities for this proposition: Henochsberg on the Companies Act 71 of 2008, Volume 2, APPI-115.[3] Nevertheless, the court is duty-bound to promote the injunction of the Constitution[4] in relation to access to courts in particular where the disputes are protracted.

- [14] As for the allegations in relation to the shares, the respondents point out that the relief sought by the applicants before Kathree-Setiloane J, was amended to only seek an order that Mr Watson, since deceased (Jared N.O), take whatever steps are necessary to restore to Thundercats the shares in contention. Effectively, on the respondent's version, the applicants abandoned a claim to ownership of the shares and for that, substituted an order only against Mr Watson that he take steps to "restore" the shares in contention. The applicants are criticized for seeking to obtain a final order against the second respondent that the dividends be paid to them while they are neither the owner of the shares concerned nor do they seek any relief against the second respondent, which would entitle them to

become owners of the shares. The respondents argue that the applicants seek to obtain, by the backdoor, what they abandoned in the first application. However, this aspect need not be resolved in the current application for the obvious reason that it awaits determination in the SCA.

- [15] Significantly, counsel on behalf of the applicants contended that the funds the respondents would receive, would be the proceeds of the crime of fronting as defined in the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended by the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013, (“the BBBEE Act”).[5] The objectives of the BBBEE Act are set out in section 2 and include, achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.[6]
- [16] A “fronting practice” is defined in the BBBEE Act as meaning “a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives

of this Act or the implementation of any of the provisions of this Act”. Counsel for the respondents based on authorities such as *Danielz NO v De Wet & Another*[7] and *Graham v Park Mews Body Corporate & Another*[8] as derived from *Hollington v F Hewthorne & Co Ltd*[9] urged me to disregard findings of other courts in these proceedings as they amount to nothing more than inadmissible opinions.

- [17] However, allegations of criminal conduct and the commission of offenses in violation of any law requires serious consideration and cannot simply be ignored by any court since it is an affront to the promotion of the rule of law. It is conduct that attracts public interest. The interests of private entities and persons pale in significance to any matter in the interests of the greater public because of alleged criminal activities. The founding provisions and values of our Constitution, in terms of section 1(c), not only provides for the supremacy of the Constitution, but also for the rule of law. In this matter, the respondents did not seriously address the allegations.

- [18] In terms of section 130 of the BBBEE Act:

“[3] Any person convicted of an offence in terms of this Act, is liable-

- (a) in the case of a contravention of subsection (1), to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment or, if the convicted person is not a natural person, to a fine not exceeding 10 per cent of its annual turnover; or

...

- [4] For the purpose of determining a fine to be imposed for an offence in terms of subsection (1), the court must take into account the value of the transaction which was derived from, or sought to be derived from, the commission of the offence.”

Also, in the interpretation section of the BBBEE Act, it is provided in section 3 (2) that “[i]n the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act.” It is understood that it would apply to the New Companies Act of

2008. To the extent that there is any such conflict, the BBBEE Act prevails. The language of the statute as well as the intention of the legislature in this regard is clear.

[19] As to the requirements of interdictory relief, the requirements for a final interdict are usually stated as being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy.[10] The test requires that an applicant that claims an interim interdict must establish a *prima facie* right, even if it is subject to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is

not granted; and the balance of convenience must favour the granting of the interdict. The position of our law in this regard is trite.[11]

[20] Against the background alluded to above, and taking into account the relevant facts and prevailing law, I am satisfied that the balance of convenience, which is a determinative criterion in such matters, weighs in favour of the granting of the order sought. If the liquidators prove to be entitled to the dividends issued by the first respondent no harm will have been suffered by the liquidators if they have to wait for the appeal(s) to be decided before they can lay claim to the funds.

[21] The relief sought, to my mind, is interim in nature. Essentially, what is sought is the preservation of the money until the disputes between the parties are laid to rest by the process of appeal. By contrast, if the funds are disbursed to the liquidators, they are clearly in far less safe hands than the first respondent. I am satisfied from the papers that if these dividends are paid to the liquidators, the prospects of the applicants being able to get them back without long and costly litigation, if at all, is vanishingly small. The balance of convenience favours granting the order as prayed and leaving the funds in the hands of a neutral and financially sound party, the first respondent, which as I understand, has agreed to perform the role of keeping the funds in terms of the order. This conclusion is consistent with the general purport of the BBBEE Act, which is a purposive approach to statutory interpretation as required by the Constitution.[12]

[22] I make the following order:

1. The matter be heard as one of urgency in terms of Rule 6(12) and that deviations herein from the provisions of the Rules of Court be condoned;
2. Interdicting and restraining the first respondent from paying one third of any dividend to the second respondent pending the outcome of:

2.1 the seventh respondent's appeal to the Supreme Court of Appeal against the judgment of this Court under case number 2018/26205; or

2.2 a timeously noted and prosecuted appeal, if any, to the Constitutional Court against the decision of the Supreme Court of Appeal in the same matter;

3. Directing the first respondent to hold and retain, in a separately designated interest-bearing account, one third of such dividends as it would, but for this order, have paid to the second respondent ("the dividends"), pending the final outcome of the last of the events referred to in para 2 above;
4. Directing the first respondent to release the dividends and all interest earned thereon to the second and/or the first applicant should the outcome of the last of the events listed in para 2 above, be determined in the applicants' favour; and
5. Directing such of the respondents as oppose this application to pay the costs hereof.

T P MUDAU

Judge of the High Court

Date of Hearing:

22 February 2021

Date of

Judgment:

26 February 2021

APPEARANCES

For the Applicants:

Adv. L J Morison SC

Instructed by:

Knowles Hussain Lindsay Inc.

For the 2nd to 6th Respondent: Adv. D M Leathern SC

Adv. A Marques

Instructed by:

VFV Attorneys

[1] Section 56 of the New Companies Act 71 of 2008.

[2] Sections 403-409 of the Old Companies Act 61 of 1973.

- [3] Strydom NO v MGN Construction (Pty) Ltd And Another: In Re Haljen (Pty) Ltd (In Liquidation) 1983
- (1) SA 799 (D); Ronbel 108 (Pty) Ltd v Sublime Investments (Pty) Ltd
- [2010] 1 All SA 338 (SCA) at 340.
- [4] Section 34 of the Constitution of the Republic of Africa, 1996.
- [5] The broad objectives of the act are set out in the preamble, which, inter alia, includes the promotion of the achievement of the constitutional right to equality; increase in broad-based and effective participation of black people in general (Black, Coloured, and Indian) in the economy; and promote a higher growth rate, increased employment, and more equitable income distribution.
- [6] Section 2(b) of the BBBEE Act.
- [7] 2009
- (6) SA 42 (C).
- [8] 2012
- (1) SA 355 (WCC).
- [9] 1943 KB 587 (CA) ([1943] 2 ALL ER 35.
- [10] Setlogelo v Setlogelo 1914 AD 221 at 227.
- [11] Joubert NO and Others v Maranda Mining Company (Pty) Ltd and Others [2010] 2 All SA 67 (GNP).
- [12] Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others 2010 (2) SA 181 (CC) at para 21.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2021/31.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ngonyama-and-another-v-ntsimbintle-unknown-topic-agpjhc-2021>

Prepared on 11 October 2026 · Esheria