

SOUTH AFRICA / JUDGMENT

Phiri v Mathopa and Other (50550/2019) [2019] ZAGPPHC 554 (1 November 2019)

[2019] ZAGPPHC 554**COURT**

North Gauteng High Court, Pretoria

BEFORE

H.J Fabricius

CASE / FILE NUMBER

50550/2019

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Policy**IN THE HIGH COURT OF SOUTH****AFRICA****(GAUTENG DIVISION, PRETORIA)****(1)****REPORTABLE:**

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

Case Number: 50550/2019

1/11/2019

In

the matter between:

EMMA
MOSILO
PHIRI
APPLICANT
(IDENTITY
NO.: [...])
And
PHENYO
MATHOPA
1ST
RESPONDENT
TRIVIRON
PROJECT MANAGEMENT (PTY) LTD
2ND
RESPONDENT
COMPANIES
AND INTELLECTUAL
PROPERTY
COMMISSION
3RD
RESPONDENT

JUDGMENT

Fabricius J,

Brief background facts:

- [1] Second Respondent conducts business in the area of development, construction and project management as well as in civil engineering and occupational health and safety. The Applicant and First Respondent are the only two shareholders in the Second Respondent's business. Applicant holds 10%, while the First Respondent obviously holds the balance of the 90% ordinary shares. Applicant and First Respondent concluded a shareholders' agreement on 17 October 2014, to regularize their relationship as shareholders and directors. Such is however subject to the provisions of s. 15 (7) of the Companies Act No. 71 of 2008 ("the Act"). By virtue of holding a minority shareholding in the Second Respondent, Applicant was appointed as one of the directors and thereafter became Head of the Second Respondent's Occupational Health and Safety Business Unit.
- [2] Various problems between the parties arose thereafter, details of which are not relevant for present purposes, but it appears that at some stage Applicant wished to be released from her directorship as well as offering her shares to the First Respondent on a basis which was not acceptable to him.

First Respondent alleges that the situation deteriorated to such an extent that various threats were issued by Applicant. Moreover, she wrote letters to Second Respondent's clients making enquiries which on the face of it, implied that the Respondents had somehow acted unlawfully in a number of respects.

- [3] The Second Respondent then sought an urgent interim interdict in the Gauteng Local Division of this Court, ordering the Applicant to force with cease and desist from sending letters or any other form of communication to its clients.
- [4] The urgent application was heard by Wanless AJ in Johannesburg on 25 and 26 June 2019. On 28 June 2019, an interdict pendente lite was indeed granted in favour of the Second Respondent, who was the Applicant in those proceedings. The order was granted pending the removal of the Applicant as director of the Second Respondent pursuant to the resolution of the shareholders' meeting held in terms of the provisions of s. 71 (1) of the Act.
- [5] The Second Respondent's notice to the Applicant inviting her to the shareholders' meeting scheduled for 2 July 2019 was personally served on the Applicant by the First Respondent on 14 June 2019.
- [6] On 8 July 2019, the Applicant brought an urgent application before the Gauteng Local Division for an interdictory relief seeking amongst others, that First Respondent be interdicted from removing her as director of the Second Respondent pending the finalization of certain declaratory relief sought in terms of Part B of the Notice of Motion. In terms of Part B, a declarator was sought that First Respondent is precluded in law from removing the Applicant as a director of the Second Respondent without a resort to the Companies Tribunal for Determination. This urgent application was dismissed for lack of urgency.
- [7] On 9 July 2019, the meeting of the shareholders which was postponed on 2 July 2019 proceeded. The Applicant attended this meeting and was granted an opportunity to make submissions why the relevant resolution for her removal as a director should not be passed. After consideration of her submissions, the Respondents voted that she be removed as a director of Second Respondent. They have this right, and on the present facts, this decision cannot be over-turned by me.

See: *Butler v Van Zyl* (554113) [2014] ZASCA 81.

- [8] The First Respondent has since filed a COR 39, which is the Notice of Change of Directors (removal), with the Companies and Intellectual Property Commission, which is cited in these proceedings as Third Respondent. Third Respondent has filed a notice abiding by the order of this Court.
- [9] In the proceedings before me, the Applicant sought the following relief:

Part A

1. That the First Respondent be interdicted from removing the Applicant as a director of the Second Respondent pending the finalisation of the declaratory relief sought in Part B below.
2. Directing the Third Respondent to take all steps that are necessary to ensure that the Applicant is not removed as a director of the Second Respondent pending the resolution of the dispute in Part B. To the extent that the Applicant has been removed as a director of the Second Respondent, directing the Third Respondent to immediately reinstate the Applicant as a director of the Second Respondent.
3. That the First Respondent be finally interdicted from making any unauthorised payments on behalf of the Second Respondent to any

persons including entities and individuals whose identities are more fully set out in Annexure "A" annexed to this notice of motion.

Part B

4. Declarator that the First Respondent is precluded in law from removing the Applicant as a director of the Second Respondent without a resort to the Companies Tribunal for Determination.
5. Costs of the application to be paid by the First and Second Respondents, jointly and severally, the one paying the other to be absolved."

[10] Before I turn to the argument presented to me by Counsel, I must immediately note, as I did in Court, that in the context of prayer 1 and the first portion at least of prayer 2, an interim interdict would not be a competent order inasmuch as an interdict is meant to prevent future conduct and not decisions already made.

See: *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 CC at 237 [par. 50].

[11] Applicant's Counsel suggested that prayer 4 could stand alone inasmuch as it was differently worded. It is in the form of a final interdict and in my view, can also not be granted for the same reason mentioned above. In any event, no case for a final interdict is in my view made out in the Founding Affidavit.

[12] On behalf of the Respondents it was in addition contended that prayers 1, the first part of prayer 2 and prayer 4 had become moot for the reason that the Applicant had already been removed as a director in accordance with the provisions of s. 71 (1) and (2) of the Act. It was submitted that once the removal in terms of this section has been effected, it takes effect immediately, and this process has been completed according to law. The Third Respondent would not be empowered to reverse the removal of Applicant as director.

Furthermore, the Act does not prescribe any grounds for the removal of a director by shareholders.

[13] As far as prayer 3 was concerned, it was contended that in the context of the so called alleged financial irregularities, it had always been the case that First Respondent was responsible for financial transactions on behalf of the Second Respondent. Applicant was never involved in any financial processing. When Applicant seized to be a director, she lost any locus standi to institute legal proceedings on behalf of the Second Respondent in terms of the provisions of s. 165 (1) of the said Act only by virtue of being a shareholder.

[14] In the Founding Affidavit, Applicant states that she is entitled to final relief in terms of the provisions of s. 163 of the said Act Her allegation is that she has a right and a duty to rely on the provisions of this section for two

reasons:

1. Because she was unfairly removed as a director; and
2. As part of her duty to protect the juristic personality of the Second Respondent from being abused from criminal and other nefarious activities.

[15] In my view the Founding Affidavit fails to make out any case in the context of the provisions of s. 163 whatsoever. It is also noteworthy

that on 28 June 2019, Wanless AJ issued an order pending the final determination of Part B (which is prayer 4 in the present proceedings) interdicting her and restraining her from sending letters and/or any form of communication unless specifically authorized in writing, to do so by the Applicant, to any of the Applicant's clients and furthermore, the Respondent in those proceedings (the Applicant herein) was ordered to comply with her fiduciary duties towards the Applicant and was interdicted and restrained from harming the Applicant in any manner whatsoever.

[16] It is clear in my view that the allegations made in these proceedings do not support the granting of a final interdict sought in prayer 3. It is clear from the Answering Affidavit, which I must accept for present purposes, that the applicant was aware of all payments made by First Respondent on behalf of Second Respondent. It appears to me that allegations now raised in regard to possible criminal conduct, are not only an afterthought, but appear to be wholly vindictive and without foundation. It is clear from the affidavits that Applicant demanded R7 million for her 10% of the shares and when this offer was

rejected, she turned to threats of blackmail and extortion which the Respondents deal with in the Answering Affidavit. It is also clear that Applicant herself took no steps, such as she was obliged to if there was reasonable cause, in terms of the provisions of s. 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. It is my view therefore, that a final interdict in the context of prayer 3 is totally unjustified and wholly inappropriate and incompetent relief.

- [17] It would have become apparent that Applicant made certain allegations in the Founding Affidavit and in the Replying Affidavit relating to the said Prevention and Combatting of Corrupt Activities Act. Applicant holds no position of authority in the company and has no right to lodge any such complaint having regard to the provisions of s. 34 (4)
- (e) thereof. It is in my opinion clear that such allegations were made as a result of failed negotiations concerning her demand for R7 million for her shares. No facts relating to any alleged criminal conduct by the Respondents were ever presented to any Court that previously heard this matter or before me.
- [18] It is furthermore clear from the shareholders' agreement concluded between the parties on 17 October 2014, as per par. 17 thereof, that a dispute resolution mechanism was provided for which obliged parties to refer any dispute for resolution firstly through negotiation, failing which by mediation and then arbitration. Applicant has never followed this route which in my opinion is another reason why I should exercise any discretion that I have in the context of the relief sought, against her.
- [19] The result of all of the above is the following:
1. Applicant's allegations in par. 90.1 and 91 in the Founding Affidavit and par. 63, 64, 65, 67 and 102 in the Replying Affidavit, are struck out as being irrelevant, vexatious and scandalous.
 2. The application is dismissed with costs, including the costs of the proceedings before Wanless AJ on 28 June 2019 under case no.

20201/19.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 50 550 / 2019

On behalf of the Applicant:

Adv S. Alcock

Instructed by: Zikhali Inc.

Counsel for the 1ST & 2nd Respondents:

Adv T. Tshabalala

Instructed by: Thejane Attorneys

Date of Hearing: 29 October 2019

Date of Judgment: 1 November 2019 at 10:00

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