

SOUTH AFRICA / JUDGMENT

Sakhikusasa Construction and Projects (Pty) Ltd and Others v CNG Holdings (Pty) Ltd and Others (31804/2021;37732/2021) [2023] ZAGPJHC 67 (31 January 2023)

[2023] ZAGPJHC 67

COURT

South Gauteng High Court, Johannesburg

BEFORE

M A Makume

CASE / FILE NUMBER

31804/2021;37732/2021

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE NO: 31804/2021
CASE NO: 37732/2021
(1)
REPORTABLE: YES/NO
(2)
OF INTEREST TO OTHER
JUDGES: YES/NO
(3)
REVISED.

DATE:

SIGNATURE:

In the

matter between:

31804/2021
SAKHIKUSASA
CONSTRUCTION AND
1st
Applicant
PROJECTS
(PTY) LTD
JOHN
ZAZI DLADLA
2nd
Applicant
SESHUPO
THABISO MAGEZA
3rd
Applicant
And
CNG
HOLDINGS (PTY) LTD
1st
Respondent
INDUSTRIAL
DEVELOPMENT CORPORATION
2nd
Respondent
OF
SOUTH AFRICA LTD
REATILE
ENERGY (PTY) LTD
3rd
Respondent
STEVEN
ROTHMAN N.O.
4th
Respondent
On
behalf of LEE JANE TRUST
STEVEN
LEE ROTHMAN
5th
Respondent
XOLILE
LENNOX SIZANI
6th
Respondent
ALETA
JOVNER
7th
Respondent
THANDI
HILLIE
8th

Respondent
MARK
OTTO
9th
Respondent
MUSA
HLONGWA
10th
Respondent
TRUDY,
JANE ROTHMAN
11th
Respondent
THEOPHILOUS
TINTHEUS DE WET N.O.
12th
Respondent
37732/2021
JOHN
ZAZI DLADLA
1st
Applicant
SESHUPO
THABISO
MAGEZ
2nd
Applicant
SAKHIKUSASA
CONSTRUCTION AND
3rd
Applicant
CNG
HOLDINGS (PTY) LTD
1st
Respondent
XOLILE
LENNOX SIZANI
2nd
Respondent
MUSA
HLONGWA
3rd
Respondent
ALETTA
JOVNER
4th
Respondent
THANDI
HILLIE
5th
Respondent

STEVEN
LEE ROTHMAN N.O.
6th
Respondent
MARK
OTTO
7th
Respondent
SHAHEEM
SAMSODIEN ATTORNEYS
8th
Respondent
In re
SAKHIKUSASA
CONSTRUCTION AND
1st
Applicant
JOHN
ZAZI DLADLA
2nd
Applicant
SESHUPO
THABISO
MAGEZ
3rd
Applicant
CNG
HOLDINGS (PTY) LTD
1st
Respondent
REATILE
ENERGY (PTY) LTD
3rd
Respondent
STEVEN
ROTHMAN N.O.
4th
Respondent
STEVEN
LEE ROTHMAN
5th
Respondent
XOLILE
LENNOX SIZANI
6th
Respondent
ALET
JOVNER
7th
Respondent
THANDI

HILLIE
8th
Respondent
MARK
OTTO
9th
Respondent
MUSA
HLONGWA
10th
Respondent
TRUDY,
JANE ROTHMAN
11th
Respondent
THEOPHILOUS
TINTHEUS DE WET N.O.
12th
Respondent

JUDGMENT

MAKUME, J:

INTRODUCTION

- [1] This judgment is about two interlocutory applications. In the first application under case number 31804/2021 the Applicants seek an order allowing them to file a Supplementary Affidavit to their Founding Affidavit. The second is an application in terms of Rule 7(1) of the Uniform Rules of Court. In that application under case number 37732/2021 the Applicants seek an order declaring that the eight Respondent Messrs Shaheem Samsodien Attorneys have no mandate to act on behalf of the first to eighth Respondents.
- [2] Both applications are opposed. The parties having filed Answering and Replying Affidavits. In addition, the first to Eighth Respondents require an order of costs de boniis propriis against the Applicants' legal team in the Rule 7(1) application.

BACKGROUND

FACTS

- [3] The interlocutory applications are a product of an application launched on the 5th July 2021 under case number 31804/2021 in which the Applicants therein seek various orders the main ones being an order declaring the termination of the second and third Applicants employment as Executive Directors of the first Respondent unlawful and setting same aside. Secondly to declare all resolutions of the Board of Directors of the first Respondent adopted

as from the 19th November 2020 to date of this court order invalid and of no force and effect. In the alternative the Applicants seek an order in terms of Section 344(h) of the 1973 Companies Act winding up the first Respondent. This is the main application.

- [4] On the 6th August 2021 the Applicants in case number 37732/2021 launched a review application in which they seek an order calling upon the Respondents to show cause why the decision of the Board of the first Respondent taken on the 16th July 2021 in which the first and second Applicants were removed as directors should not be reviewed or set aside. This application will henceforth be referred to as the review application.
- [5] A common factor in both the main and the review applications is that the Applicants argue that the composition of the board that took the impugned decisions was not in terms of the Memorandum of Incorporation as well as the Shareholders Agreement of the first Respondent thus rendering the decisions null and void.
- [6] John Zazi Dladla (Dladla) and Seshupo Thabiso Mageza (Mageza) who are second and third Applicants in case number 31804/2021 and first and second Applicants in case number 37732/2021 are the sole members and directors of Sakhikusasa Construction and Projects (Pty) Ltd (Sakhikusasa).
- [7] During or about the year 2012 Sakhikusasa concluded a transaction which resulted in Sakhikusasa acquiring a 29% stake in the first Respondent (CNG). As part of that transaction Dladla, Mageza and Stephen Lee Rothman became the three Executive Directors of CNG Holdings.

THE FIRST RESPONDENT'S MEMORANDUM OF INCORPORATION (MOI) AS WELL AS THE SHAREHOLDERS AGREEMENT (SHA)

- [8] A fall out took place amongst the three Executive Directors. They could not work together in the interest of the Company. This led to a resolution being adopted at a special meeting of the Board held on 11th February 2021 at which it resolved to terminate the employment contracts of not only Dladla and Mageza but also that of Rothman who was the CEO. It is that decision that is being challenged in the main application. Dladla and Mageza occupied position as Sales and Marketing in the Company.
- [9] The relevant portion of the MOI of the first Respondent which is relied upon by the Applicants in their application to supplement their Founding Affidavit is clause 11.1 of the MOI which reads as follows:

DIRECTORS AND OFFICERS

11.1 Composition of the Board of Directors.

11.1.1 The Board shall consist of a maximum of five (5) Executive Directors and a minimum of two (2) non-executive directors.

10.1 BOARD OF DIRECTORS

The Shareholders Agreement at 10.1 is a replica of the clause 11.1 of the MOI it reads as follows:

“10.1 The parties agree that the Board of Directors shall consist of a maximum five (5) Executive and two (2) Non-Executive Directors and that the IDC shall be entitled to appoint at least two Directors which may be Non-Executives to the Board and that the parties shall be entitled with regard to Directors appointed by them and subject to the Act, to remove or replace such Directors and to nominate replacements for any Director so removed at their own discretion.”

ARE THE APPLICANTS ENTITLED TO FILE A SUPPLEMENTARY AFFIDAVIT TO THEIR FOUNDING AFFIDAVIT?

- [11] It is trite law that the ordinary rule is that three sets of affidavits are allowed in motion proceedings namely (i) Founding and Supporting Affidavits (ii) The Answering Affidavit together with its Supporting Affidavit and lastly (iii) The Applicants Replying Affidavit. However, a party who feels that a further Affidavit or Affidavits are warranted may do so either by consent of the other party or by leave of the Court. Such leave may only be granted in exceptional circumstances as set out in various decisions (See: Transvaal Racing Club vs Jockey Club of South Africa 1958 (3) SA 599 (W) at 604) or in special circumstances as set out in Joseph and Jeans vs Spitz 1931 WLD at page 48 and Stark vs Filter 1935 SCA 44.
- [12] In order to succeed in such application where consent has been denied by the opponent the Applicant must satisfy the Court that:
- There was something unexpected in the Applicants Replying Affidavit.
 - Where new matter has been raised.
 - The material or evidence sought to be raised in the Supplementary Affidavit must be relevant to the issues for determination of the main application or claim.
 - The Applicant must satisfy the Court that the information or evidence was not available when the Founding Affidavit was filed.
- [13] In this application the Applicant seeks an order to supplement their Founding Affidavit dated the 30th June 2021 filed in support of the Notice of Motion dated the 5th July 2021. Dladla the deponent says that the Supplementary Affidavit is being filed to address the further actions of the Respondents more particularly that of the first Respondent (CNG Holdings) which actions occurred since the date of the filing of the Applicants Replying Affidavits.
- [14] Dladla maintained further that leave is being sought to supplement the Founding Affidavit in order to place pertinent information before this Court to enable this Court to ensure a proper ventilation of the dispute between the parties.

- [15] It is common cause that after Dladla and Mageza had been relieved of their positions as Executive Directors of CNG Holdings they both remained as non-executive Directors of CNG Holdings by virtue of their shareholdings through the first Applicant.
- [16] The existing Directors of CNG proposed various resolutions which the second and third Applicants have not approved of. Dladla and Mageza content that the Respondents have revealed a stratagem to swell the board of the subsidiary companies so as to have them removed from their positions of control. They allege that the appointment of the extra non-Executive Directors to the Board of CNG is unlawful as such Directors have not been approved by a lawfully constituted board of CNG Holdings.
- [17] In the original notice of motion dated 5th July 2021 which they now want the supplement Dladla and Mageza at prayer 3 seek an order declaring all resolutions of the Board of Directors of the first Respondents (CNG Holding) adopted as from the 19 November 2020 to date of this Court order (referring to the main application) invalid and of no force and effect.
- [18] It is because Dladla and Mageza maintain that all resolutions are null and void they should thereafter be allowed to supplement their prayers by an additional prayer that first Applicant Sakhikusasa be afforded the first option for a period of ten (10) days after the determination of the fair value of the shareholdings in the first Respondent within which to purchase the shares held in CNG by the third Respondent (Reatile Energy) at the fair market value so determined and failing the exercise of such option buy Sakhikusasa then Zazi (Dladla) and Thabiso (Mageza) be directed to purchase Sakhikusasa's 29% shareholding in CNG as envisaged in prayer 8 of the Notice Motion.
- [19] It is so that an application must stand or fall by it or his/her Founding Affidavit. The Founding Affidavit must accordingly disclose facts that would make out a case for the relief sought so as to sufficiently inform the other party of the case it is required to meet.
- [20] In this matter IDC the second Respondent are shareholder in CNG Holdings. It has nominated director (non-Executive) to serve on that board. Such director owes a duty of good faith to CNG and not to IDC or anyone else.
- [21] The meetings at which the impugned resolution is being attached and sought to be set aside were meeting of the Directors of CNG and not IDC. It is therefore logical to conclude that IDC as a shareholder has never acted in a manner unlawful, oppressive or prejudicial towards the Applicants.
- [22] In the main application which the Applicants now seek to bolster by a further affidavit the Applicants seek an order declaring the termination of their employment by the first Respondent (CNG Holdings) unlawful and that they be re-instated to their former positions as Executive Directors of CNG Holdings with full pay and statutory benefits from 5 March 2021. The further prayers relate to declaring resolution from the 19th November 2020 invalid. The balance of the relief sought related to operational issues about acquiring of shareholding in the event the Applicants are successful in its main application.

- [23] The desired amendment to the Founding Affidavit is to be found in the new prayer 8A which seeks to grant the Applicants the first right of refusal to purchase shares held in the first Respondent (CNG) by the third Respondent (Reatile Energy (Pty Ltd)).
- [24] The amended prayer is pleaded in the alternative to the main prayer
8. There is in my view nothing new in the further affidavit to support this intended new prayer 8A. Everything and all the evidence is based on whether or not the Board that took the various resolution were properly constituted and thus had the authority to pass the impugned resolution. This includes the conduct which the Applicants say took place after their filing of the Replying Affidavit.
- [25] Furthermore all the Respondents Answering Affidavits in the main application did not raise any new matter that requires the Applicants to be entitled to a further affidavit. The material or evidence sought to be raised in the Supplementary Founding Affidavit is not new it has already been covered in the existing affidavit.
- [26] In the result the application to file a further affidavit by the Applicants is hereby dismissed with costs.

THE RULE 7(1) INTERLOCUTORY APPLICATION TO THE REVIEW APPLICATION

- [27] The provisions of Rule 7(1) read as follows:

“Subject to the provisions of sub-Rule (2) and (3) a power of attorney to act need not be filed but the authority of anyone acting on behalf of a party may within 10 days after it has come to the notice of a party that such person is so acting or with the leave of the Court on good cause shown at any time before judgment be disputed where after such person may no longer act unless he satisfies the Court that he is authorised so to act and to enable him to do so the Court may postpone the hearing of the action or application.”

- [28] During August 2021 the Applicants Dladla, Mageza and Sakhikusasa issued the review application against the first to the seventh Respondents.
- [29] On the 6th August 2021 the Applicants attorneys addressed an email to Attorneys Shaheem Samosdien which reads as follows:

“Dear Shaheem,

I refer to the recent discussions held with your and confirm that by agreement, we may serve our clients review application on all the Respondents care of your offices.

Please advise if you wish us to physically serve any hard copies on your good offices and we will arrange for same to be served early next week.

Please may we take the liberty of requesting that you confirm that your clients condone the non-compliance of the Rules and the service by way of Sheriff and that your good offices will accept service as arranged.”

- [30] On the 13th January 2022 the Applicants attorneys addressed an email to Respondents attorneys raising an objection to the inadequate review record that Samsodien Attorneys had sent to this.
- [31] On the 11th February 2022 Samsodien Attorneys responded to the query. On the 23rd February 2022 the Applicants attorneys filed a notice in terms of Rule 7(1) challenging the authority of Samsodien Attorneys to act on behalf of the Respondents secondly challenging the authority of the Board of Directors of CNG Holdings to Act for and on behalf of the first Respondent. The Rule 7(1) notice was served per email on Samsodien Attorneys on the same day.
- [32] On the 12th May 2022 Messrs Samsodien Attorneys in response to the Rule 7(1) notice furnished the Applicants attorneys with the following documents to prove their mandate to act namely:
- 32.1 Extract of minutes of a meeting dated 21 July 2021.
- 32.2 Extract of minutes of a meeting dated the 24 March 2022.
- [33] On the 20th June 2022 Applicants filed this application seeking an order that Messrs Samsodien Attorneys who they have now cited as the eight Respondent be declared not to have requisite authority to represent the first Respondent (CNG Holdings).
- [34] The Applicants seemingly not happy with the responses given by the Respondent attorneys decided to launch this application challenging the authority of Samsodien Attorneys to act. The Applicants say that the minutes referred to taken on the 7th July 2021 and the 24th March 2022 are invalid because the Board that the resolution was not properly constituted.
- [35] In the first Respondent Answering Affidavit deposed to by Ms Aletta Jovner a duly authorised Director of CNG Holdings (Pty) Ltd. She confirmed that Samsodien Attorneys have been duly appointed to act on behalf of CNG Holdings Ms Jovner also makes reference to the fact that Samsodien Attorneys have been acting for CNG Holdings since the main application was filed and that their mandate has never been terminated. Ms Jovner further adds that CNG the first Respondent has no intention of disputing the authority given to Samsodien.
- [36] Rule 7(1) clearly provides that it is the Court that must be satisfied that a party has the necessary authority to act. It does not say that the opposing party must be satisfied.
- [37] In this matter not only has Samsodien Attorneys been acting for CNG Holdings since the institute of the “forced sale of shares” application namely the main application it is also correct that it was Applicants attorneys who approached Samsodien to accept service on them of the review application secondly it took them five months before they decided to raise the Rule 7(1) objection. In the matter of *Chopra v TransAvalon (Pty) Ltd* 1973 (4) SA 369 W it was held that failure to raise the objection of lack of authority may amount to waiver of the right to do so.

- [38] The Applicant has not explained why they did not raise objection in September 2021 shortly after Samsodien had entered appearance to oppose. In my view they did not because they had long accepted Samsodien's authority to act for CNG otherwise why did they invite Samsodien to accept service of review application on behalf of all the Respondent.
- [39] The issue is this interlocutory application is whether the Board of Directors of CNG validly appointed the eight Respondent Samsodien Attorneys to act for and on behalf of CNG in the review application. The Applicants content that they could not because clause 11.1.1 of the MOI provides that "Only a maximum of 2 non-Executive Directors were entitled to participate in the meetings that adopted the resolution.
- [40] The Applicants are in this interlocutory disingenuously seeking to shortcircuit the issues that arise and are awaiting determination in the main and review application. Section 66 (11) of the Companies Act 71 of 2008 puts the issue complained of by the Applicant out of consideration by this court and seemingly also in the two main and review applications. The section reads as follows:
- "Any failure by a company at any time to have the minimum number of Directors required by this Act or the Company's Memorandum of Incorporates does not limit or negate the authority to the Board, or invalidate anything done by the Board or the Company."*
- [41] There is sufficient evidence before me in this Court that Samsodien Attorneys have been authorised to represent the first Respondent in these proceedings. Watermeyer J as he then was in (Mail Cape (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C) at 352 concluded that
- "while in motion proceedings the best evidence would be an affidavit by an officer of the Company annexing a copy of the relevant resolution of the Board such evidence is not "necessary in every case." Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the company which is litigating and not some unauthorised person on its behalf."*
- [42] In conclusion I also agree that the point in limine as regards lateness of the Rule 7(1) application is sufficient to dismiss this application with an appropriate costs order.
- [43] The Board of Directors of CNG Holdings as well as CEO have informed this Court under oath that it authorised the eight Respondent to represent CNG Holdings against all legal proceedings instituted by the Applicant. This was done on two occasions and furnished power of attorney duly signed and witnessed.

COSTS

- [44] The first to seventh Respondents gave notice that in the event of they being successful in their opposition to the Rule 7(1) application they will seek a punitive costs order de bonis propriis against the Applicants legal representatives.

- [45] The basis of that application is firstly that the Applicants filed voluminous papers mostly quoting the King 4 Report vibration dealing with Corporate governance and transparency which the Respondent say are irrelevant in the adjudication of the Rule 7(1) interlocutory application. Secondly the Respondent argues that the Applicants legal representative and Counsel used unacceptable language and maliciously attached Respondents Counsel in their heads of argument by using words such as “Superficial and incorrect understanding of the issues” “Total misunderstanding of the position and the requirements appearing in the MOI.”
- [46] It is trite law that the award of costs is a matter wholly within the discretion of the Court (See: *Graham v Odendaal* 1972 (2) SA 611 (A) at 616). This principle is also applicable even where the general rule says that costs follow the event in other words a successful party may under appropriate circumstances be deprived of costs.
- [47] In *Webb v Bothma* 1980 (3) SA 666 (N) at 673 D-F the Court granted costs de bonis propriis against an attorney who obstructed the interest of justice by delaying the final determination of an action and this caused parties to incur unnecessary costs. In *Washaya vs Washaya* 1990 (4) SA 41 (ZH) a legal representative was ordered to pay costs de bonis propriis where he had acted in an irresponsible and grossly negligent or reckless manner, misleading the Court and causing prejudice to the other party.
- [48] In this matter it is clear that it is the choice of words in the head of argument by Applicants Counsel which the Respondents say are offensive and unacceptable. The question is whether this has caused the Respondents prejudice or not.
- [49] I accept without reservation that the terminology used by Applicants Counsel in the heads of argument is not proper and should be frowned upon. Counsel in an endeavour to put up a case for his client must always keep within the bounds of professionalism and collegiality. Having said so I do not think that there is an appropriate case to sanction the legal representatives with a punitive costs order.

CONCLUSION

[50] In the result I make the following order:

- i) The application to admit a supplementary affidavit to the Founding Affidavit in the case number 31804/2021 is dismissed.
- ii) The application in case number 37732/2021 to declare that the law firm Shaheem Samsodien has no authority to act for and on behalf of the first Respondent CNG Holding is dismissed.
- iii) The Applicants in both applications are ordered to pay the Respondent's taxed costs on party and party scale which shall include the costs of two Counsel wherever employed.

Dated at Johannesburg on this 31 day of January 2023

M A MAKUME

JUDGE OF THE HIGH COURT

Appearances:

DATE OF HEARING : 28 NOVEMBER 2022

DATE OF JUDGMENT : 31 JANUARY 2023

FOR APPLICANT : ADV JK BERLOWITZ

INSTRUCTED BY : MESSRS AARONS ATTORNEYS INC

FOR RESPONDENT : ADV NA CASSIM SC

With ADV A VORSTER

INSTRUCTED BY : MESSRS

FOR PLAINTIFF : ADV HAVALA (FOR IDC)

INSTRUCTED BY : MESSRS DLAMINI ATTORNEYS

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