

SOUTH AFRICA / JUDGMENT

Shane v Schoub and Others (17182/13)

[2013] ZAGPJHC 207 (3 June 2013)

[2013] ZAGPJHC 207**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Weiner

CASE / FILE NUMBER

17182/13

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IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

In the matter between:

CASE NO: 17182/13

DATE: 03/06/2013

In the matter between

BRYAN GARETH SHANEApplicant

and

PETER KEVIN SCHOUB.....1st Respondent

INTEGRATED RADIOLOGY SERVICES CC.....2nd Respondent

RENELOR (PTY) LIMITED.....3rd Respondent

J U D G M E N T

WEINER, J:

1] The applicant (“Shane”) and the first respondent (“Shoub”) are shareholders in the third respondent, a company styled Renelor (Pty) Ltd (“Renelor”). Shoub is the sole member of the second respondent Integrated Radiology

Services CC (“Interad”).

2] Renelor, in terms of a management agreement, carried out certain administrative and management services for Interad from February 2010 (“the agreement”). The agreement was to endure for a period of five years. There are certain disputes about the agreement which are not relevant to the present dispute.

URGENCY

3] Shane applied, as a matter of urgency, for a spoliation order alleging that Shoub and/or Interad has spoliated Renelor’s equipment.

4] The first issue to be decided is whether or not this matter is urgent and whether or not Shane has complied with the practice manual in regard to the setting down of the matter.

5] Shoub and Interad contend that Shane has not made out a case for urgency as, inter alia, the alleged spoliation of the equipment took place on 1 May 2013 and Shane has created his own urgency. However, thereafter, there was certain discussion between the parties; mediation was proposed, but there was no resolution.

6] The dispute between the parties appeared to turn on various aspects of the agreement. But, as stated above, these are not relevant to the spoliation proceedings. Shoub and Interad allege that on 23 April 2013, an initial spoliation occurred when Shane blocked

access to the FNB account of Renelor. However, that seems to have been resolved. On 30 April 2013, Shoub complained that Shane had removed the server that was used to administer Interad’s practice from Renelor’s office. Shane had contended that there was water damage in the office and that was the reason for the server being moved. On 1 May 2013, Shoub wrote a letter to Shane stating that, as Shane had moved the server from Renelor’s premises, he and Interad were removing all of the administration equipment and staff to Interad’s premises.

7] The server was apparently reinstated at the offices of Renelor a day later. On 2 May 2013, a letter was addressed to Shoub by Shane stating that the property of Renelor, being certain equipment which is set out in an annexure, had been unlawfully removed from the premises of Renelor and should be returned thereto. Shoub responded to the email by admitting the removal but denying that Renelor had been unlawfully dispossessed. He stated that his actions:

“have at all times been intended to protect the staff and the business of Renelor”.

8] On 6 May 2013, Shane consulted his attorneys and they addressed a letter to Shoub dated 7 May 2013. Shane again demanded the return of the spoliated equipment. On 8 May 2013, a third letter was sent detailing an itemised description of the spoliated equipment.

9] On 8 May 2013, Shoub’s attorneys replied. They appeared to rationalise the spoliation through the non-payments of salaries and the prior removal of the server by the applicant.

10] On 9 May 2013, the applicant's attorneys advised that they had consulted with their client and they intended to bring an urgent application. It was stated that the application would only be delivered on the 17 May 2013 due to the fact that Shane observed the Sabbath on 11 May 2013 and that there were also two Jewish Holidays falling on 15 and 16 May 2013 which were observed by Shane. On the afternoon of Friday 17 May 2013, at approximately 16:00, the application was emailed to the Shoub and Interad's attorneys. A candidate attorney of Shane's attorney also attempted to deliver the papers that afternoon but found the offices of the first and second respondents' attorneys had closed.

11] The application was issued on 20 May 2013. The application was set down for 28 May 2013. The respondents were given until Monday 20 May at 13:00 to file a notice of intention to oppose and were required to deliver their answering affidavit by Tuesday 21 May 2013. Shane intended to serve a reply on 23 May 2013. These actions by Shane have been criticized by the respondents. In my view, Shane has established that there is an element of urgency in this matter. The time periods that were allocated were truncated but Shoub and Interad only filed their affidavit on 24 May 2013. The replying affidavit was also filed on 24 May 2013. The matter then came before the court on the week of the 28th of May 2013.

12] Shoub and Interad have not pointed to any prejudice. Spoliation proceedings, do, in the main, encompass an element of urgency. In the result, I find that Shane has displayed sufficient urgency and compliance for the matter to be heard.

SECTION 165(2) OF THE COMPANIES ACT, 71 OF 2008 (THE COMPANIES ACT)

- 1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.
- 2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person-

is a shareholder or a person entitled to be registered as a shareholder, of the company or of the related company;

is a director or a prescribed officer of the company or of the related company

...

...

- 3) A company that has been served with the demand in terms of subsection (2) may apply within 15 business days to a court to set

aside the demand only on the grounds that it is frivolous, vexatious or without merit.

- 4) If a company does not make an application contemplated in subsection (3) or the court does not set aside the demand in terms of

that subsection, the company must:-

- a) Appoint an independent and impartial person or committee to investigate the demand and report to the board
- 5) ...
- 6) In exceptional circumstances, a person contemplated in subsection (2) may apply to court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that subsection, or without affording the company time to respond to the demand in accordance with subsection(4), and a court may grant leave only if the court is satisfied that:
 - a) the delay required for the procedures contemplated in subsections (3) to (5) to be completed may result in-

Irreparable harm to the company; or

Substantial prejudice to the interests of the applicant or another person.

- b) There is a reasonable probability that the company may not act to prevent that harm or prejudice; or act to protect the company's

interest that the applicant seeks to protect; and

- c) ...”

14] Shoub and Interad argued that no demand was served on the company in accordance with subsection (2) and (3) and that accordingly Shane has no locus standi.

15] It is clear that the court can, in exceptional circumstances which are set out in subsection (6) grant leave to a party to bring proceedings in the name of and on behalf of the company; if the delay would cause prejudice to the interest of that party or the company and there is a reasonable probability that the company would not act to prevent that harm or prejudice. It is quite clear, in this case, that Shane would be unable to obtain the consent of Shoub to institute these proceedings in view of the fact that Shoub and Interad are the parties against whom Shane wishes Renelor to take action.

16] Accordingly, Shane has established that it is entitled to bring the application in terms of Section 165(6) without making prior demand or without affording the company time to respond to the demand.

THE SPOLIATION

17] On the facts before the court, it appears that Shoub, either on his own or on behalf of Interad, entered the premises of Renelor with his wife and removed equipment of Renelor to continue the operations of Renelor at Interad's premises. Shoub admits removing the equipment but states that his actions were in the best interest of Renelor and were done in response to Shane removing the server upon which Interad's data was contained. Shoub acted without the necessary

authority on behalf of Renelor. The two parties are in the same position in that neither of them, without the leave of the court, can act on behalf of Renelor unless they have a resolution by the two directors and or shareholders in regard to actions of Renelor.

18] Accordingly, the removal of the equipment by Shoub to the premises of Interad, where he alleges Renelor is now operating, is a spoliation of Renelor's peaceful and undisturbed possession of the property and equipment situated 8 Arnold Road Rosebank. Shane has submitted that the requirements for a spoliation order are clearly satisfied and that unless the urgent relief is provided for, the spoliation would be come a settled fact which would become difficult to reverse.

19] The argument of Shoub, that he removed the equipment of Renelor because of Shane's prior act of "spoliation" is not legal justification for Shoub's actions. In this regard, see *Stockhousing Cape Pty Ltd v Chief Executive Director, Department of Education and Culture Services* 1996 (4) SA 231 (C) 240 C – D, where Rose-Innes J states the following:

"The element of unlawfulness of the dispossession which must be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was to deprive thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by stealth, deceit or theft, but in all cases spoliation is unlawful when the dispossession is without the consent of the person deprived of possession, since consent to the giving up of the possession of the property, if the consent is genuinely and freely given, negates the unlawfulness or the dispossession".

20] The Court is accordingly satisfied that a case for a spoliation has been made out.

21] In the result, an order is granted in the following terms:

1. The applicant is authorised, pursuant to the provisions of Section 165(6) of the Companies Act, 71 of 2008 to bring proceedings in the name of and on behalf of the third respondent to protect the legal interest of the third respondent.
2. The first and second respondents are ordered to, forthwith, restore possession of the equipment referred to in annexure A to the notice of motion (including all the electronic data, proprietary information and software stored thereon) to the third respondent at its premises situated at 8 Arnold Road Rosebank Johannesburg.
3. The first and second respondents are to pay the costs of this application jointly and severally.

It is so ordered.

Weiner J

Dates of hearing: 28 May 2013

Date of Judgment: 03 June 2013

Counsel for the Applicant: Adv. G. Rome

Attorneys for the Applicant: Edward Nathan Sonnenbergs

Counsel for the Respondent: Adv. W. Bezuidenhout

Attorneys for the Respondent: Shaban Clarke Coetzee

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