

SOUTH AFRICA / JUDGMENT

Simotech (Pty) Ltd and Another v Bean (2608/2021) [2023] ZAMPMHC 20 (6 June 2023) [2023] ZAMPMHC 20

COURT

Middelburg High Court, Mpumalanga

BEFORE

Vukeya

CASE / FILE NUMBER

2608/2021

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****MPUMALANGA DIVISION-****MIDDEBURG [LOCAL SEAT]****CASE NO:**

2608/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED

DATE: 06/06/2023

SIGNATURE:**In the matter between:**

SIMOTECH (PTY) LIMITED

FIRST APPLICANT

DANIEL JACOBUS VAN DEN
BERG

SECOND APPLICANT

And

ERNEST RICHARD BEAN

RESPONDENT

JUDGMENT

VUKEYA J

Introduction

[1] In this judgment the court deals with the following applications:

- 1.1. An interlocutory application brought on behalf of the applicant for amendment of a Notice of Motion dated 5 August 2021;
- 1.2. An interlocutory application brought by the respondent to strike out certain parts of the applicant's replying affidavit; and
- 1.3. The main application in terms of which the applicant seeks an order for the preservation of certain monies, in the event that the court allows the proposed amendment.

The Parties

- [2] The first applicant is Simotech (Pty) Ltd ("Simotech") a private Company with limited liability. Its registered address is at [...] V[...] Street, Industrial Area, Middelburg, Mpumalanga and its main business is the distribution and installation of Siemens equipment and products.
- [3] The second applicant is Daniel Jacobus Van Den Berg, hereinafter referred to as Van den Berg, an adult male businessman residing at 5[...] B[...] Street, Aerorand, Middelburg.
- [4] The respondent is Ernest Richard Bean, hereinafter referred to as Bean, an adult male businessman residing at Kanonkop Middelburg. Bean served as a director of Simotech.

Background

- [5] These three litigants were involved in litigation under case number 1592/2018 in the South Africa Gauteng Division, Pretoria ("The High Court"), as it then was, wherein a court order dated 22 June 2018 was granted by agreement between them. Bean was the applicant in the matter, Simotech was the first respondent and Van Den Berg was the second respondent. Four more parties were cited in this litigation as the third up to the sixth respondents. I find it unnecessary to mention these parties as they have no interest in the current application.
- [6] For purposes of this judgment, I will confine myself to the terms of the court order granted by agreement on 22 June 2018 which are of relevance to this application. These terms are the following, in a nutshell:

"1. The second respondent [Van den Berg] will pay the applicant [Bean] an amount of R4 000 000. 00 in respect of the applicant's

[Bean's] 37% shareholding including any loan account held by the applicant in the first respondent [Simotech];

2. The amount of R4 000 000. 00 will be paid in monthly instalments of 60 months, in equal instalments of R66 666, 67 per month directly to the applicant in his bank account or any such nominee indicated by the applicant [Bean] in writing;
3. The first payment of R66 666, 67 must be paid before 7 July 2018 and monthly thereafter on/ or before the 7th of each subsequent month until the full outstanding amount is settled;
4. The outstanding balance of the amount in paragraph 1 will not bear interest unless the second respondent [Van Den Berg] fails to make payment timeously;
5. Should the second respondent [Van den Berg] fail to make any payment in terms of this court order timeously, interest will be payable on the arrear instalment at the rate of 10,5% per annum from due date to date of payment;
6. Should the second respondent [Van Den Berg] fail to pay any instalment on the due date therefore and remain in default, after

having received a notice from the applicant claiming payment of the said amount and so remain in default for seven days after receipt of the said letter from the applicant [Bean], the full outstanding capital together with interest at 10.5% per annum will become due and payable.

[7] In the application in consideration, the applicants are Simotech and Van Den Berg and the respondent is Bean. As already indicated above, the two applicants seek an order which tends to amend the order granted by the High Court on 22 June 2018 and will therefore have an effect on the above terms.

[8] I now deal with the application for the amendment of the applicant's Notice of Motion dated 5 August 2021.

The Application for Amendment of the Notice of Motion

[9] In their original Notice of Motion the applicants seek an order as follows:

"1. That paragraph 2, 3, 4, 5, and 6 of the order granted /under case number 1592/2018 on 22 June 2018 be suspended with immediate effect:

1.1. Pending an action for damages to be instituted by the first and second applicants against the respondent within 20 days from date of this order,

1.2. Pending the final adjudication of the said action and any subsequent appeal thereof.

2. That the second applicant be ordered to effect the remaining monthly instalments as provided for in terms of paragraph 2 and 3 of the order into the trust account of Strydom Inc. with immediate effect, which monies must be preserved and safely kept until the final adjudication of the action referred to under paragraph 1 hereof which include any subsequent appeal.”

[10] Briefly, the applicants first sought an order for the suspension of the second to the sixth terms of the court order previously granted by the High Court under case number 1592/2018 and the preservation of the proceeds payable in terms of that court order. According to the applicants’ proposed amendment, they no longer seek the suspension of any part of the court order granted on 22 June 2018 under case number 1592/2018. The applicants now seek an order for the preservation of funds pending the final adjudication of the damages action which the first applicant instituted against the respondent.

[11] The applicants structured their first proposal and sought to amend the Notice of Motion as follows:

“1. By deleting prayer 1 of the Notice of Motion in its entirety and substituting same as follows:-

1. That the second applicant be ordered to effect the remaining monthly instalments as provided for in terms of paragraph 2 and 3 of the order issued on 22 August 2018 under case number 1592/2018 into the trust account of Strydom Inc. with immediate effect, which monies must be preserved and safely kept until:

1.1. The final adjudication of an action to be instituted by the first applicant against the respondent within 20 days from date of this order;

1.2. The final adjudication of any appeal process arising from the action contemplated under paragraph 1 above.

By deleting prayer 2 of the Notice of Motion in its entirety and substituting it for the following:

2. Alternatively to Prayer 1, the second applicant be ordered to effect the remaining monthly instalments as provided for in terms of paragraphs 2 and 3 of the order issued on 22 August 2018 under case number 1592/2018 into the trust account of Altus Nel, Wlthagen & Geldenhuys Inc. with immediate effect, which monies must be preserved and safely kept until:

2.1. The final adjudication of an action to be instituted by the first applicant against the respondent within 20 days from date of this order;

2.2. The final adjudication of any appeal process arising from the action contemplated under paragraph 2.1 above.

By inserting the following as prayer 3:

3. In the alternative to prayers 1 and 2, that the respondent is ordered to:

3.1. Pay the monthly amounts received from the second applicant as set out in the order of 22 August 2018 under case number 1592/2018, immediately upon receipt thereof, into the trust account of Strydom Inc. alternatively, Altus Nel, Welhagen & Geldenhuys Inc.

3.2. Retain the amounts in trust with Strydom Inc. alternatively Altus Nel, Welhagen & Geldenhuys Inc pending the finalization of any action to be instituted by the first and/or second applicants against the respondent within 20 days of this order;

3.3. Retain the amounts in Trust with Strydom Inc. alternatively Altus Nel, Welthagen & Geldenhuys Inc pending the finalization of any appeal emanating from the contemplated action under paragraph 3.2

3.4. Immediately transmit proof of payment to the applicants' attorneys of record to wit, Strydom Inc at j[...] and a[...] by no later than the 10th of each and every month.

2. By numbering the existing prayer "3" as prayer "4" and prayer "4" as prayer "5".

[12] At the hearing of the application Counsel for the applicant informed the court that the suspension of the orders is no longer sought by the applicants and it is abandoned. What they now seek, seeing as only a few instalments are remaining, is an amendment as follows:

"In the alternative to prayers 1 and 2 that the respondent is ordered to pay the monthly amounts received from the second applicant as set out in the order of 22 August 2018 under case number 1592/2018, immediately upon receipt thereof, into the Trust Account of Strydom Inc. alternatively Altus Nel, Welthagen & Geldenhuys Inc."

[13] The application to amend the Notice of Motion is opposed by the respondent on the following grounds:

13.1. The proposed amendment to prayers 1 and 2 seeks to introduce new relief in that the applicant now seek an amendment and/or variation of the court order granted under case number 1592/2018 whereas the current notice of motion seeks an order for suspension of the order;

13.2. The proposed amendment to prayer 1 and 2 will be prejudicial to the respondent;

13.3. The proposed amendment to prayer 3 seeks to introduce a new cause of action being an order for payment against the respondent. This relief, according to the respondent, was not previously included in the notice of motion and neither were any facts stated to suggest that such relief will be sought;

13.4. The proposed amendment to prayer 3 will further be prejudicial to the respondent.

[14] It is the respondent's contention that the applicants came to the realization subsequent to the filing of the respondent's answering affidavit that the suspension relief they were seeking was defective.

Rule 28 (4) of the Uniform Rules of Court

[15] Rule 28(4) prescribes the procedure to be followed where an objection has been lodged and it is summarily as follows: if a party files a notice to amend in terms of rule 28(1) and an objection complying with rule 28(3) is filed and delivered within the required time period in terms of sub-rule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend. If no objection is lodged, the opposing party is deemed to have consented to the amendment and the amendment may therefore be effected in terms of sub-rule 28 (7).

[16] In this application, the applicants duly filed their notice to amend in terms of rule 28 (1) and an objection

complying with rule 28 (3) was accordingly filed by the respondent. Because an objection was filed by the respondent, the applicants had to bring their application to court for consideration. All that the court has to determine is whether the application to amend is made bona fide and that there is an absence of prejudice. (See *Krische v Road Accident Fund* 2004 (4) SA 358 W at 363).

[17] In *Moolman v Estate Moolman* 1927 CPD 27 , Watermeyer J stated as follows: “the principal rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such an amendment will cause an injustice to the other side which cannot be compensated by costs...”.

[18] The most relevant cases where principles relating to amendments of notices of motion are properly expressed are *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006

(3) SA 247 (CC) at 261C–D or *Just Agronomics Group (Pty) Ltd v Afropulse 466 (Pty) Ltd* (unreported, GJ case no 24535/2020 dated 8 January 2021) at paragraphs [11] to [13]). The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is made in bad faith or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'.

[19] The court has discretionary powers to either grant or refuse an amendment but such discretion must be exercised with due regard to certain principles like, prejudice to the party objecting to the amendment; whether such an amendment will cause an injustice to the objecting party which cannot be compensated by a cost order; whether the amendment will facilitate the proper ventilation of the dispute between the parties; and other factors which in the opinion of the court will be just and fair to both parties.

[20] The applicants' proposed amendments are based on the nature of the order they finally request in their main application and it is based on the fact that there are a few instalments left to be paid into the respondent's account by the second applicant. Furthermore, the proposed amendments were structured to accommodate the applicants' need to capture the funds belonging to the respondent in order to preserve them pending the final adjudication

of an action which, as the court was informed at the hearing of the application, has already been instituted against the respondent.

- [21] The relief sought under these heads does not introduce a new cause of action as contended by the respondent. If one looks at the applicant's founding affidavit, the proposed amendment does not differ materially from the order that the applicants originally sought. The applicants were originally seeking an order for the partial suspension of a court order and the interim preservation of payments which are due by the second applicant to the respondent. What they are requesting the court to do is to allow them to now abandon their prayer for partial suspension of the order and to permit that the funds be preserved for future use by the first applicant in the event that the first applicant is successful in a pending litigation.
- [22] What the applicants have done was to abandon one part of the relief they seek in terms of the notice of motion and they elected to pursue the other. It is my considered view that the proposed amendment is not made mala fide by the applicants and that the respondent will not suffer any prejudice if the amendment is granted. The respondent has been able to plead his case in terms of the part of the founding affidavit dealing with the prayer for interim preservation of the remaining instalments and in my view, he will not suffer any injustice if the proposed amendment is permitted.

[23] The proposed amendment is therefore permitted and effected as follows:

23.1. By inserting the following prayer as prayer 3:

"23.1.1. The respondent be ordered to pay the monthly amounts received from the second applicant as set out in the order of 22 August 2018 under case number 1592/2018, immediately upon receipt thereof, into the Trust Account of Strydom Inc. alternatively Altus Nel, Welthagen & Geldenhuys Inc."

[24] This then brings me to the application to strike out some paragraphs in the applicant's replying affidavit.

The application to strike out

- [25] The respondent brings an application to strike out certain parts of the applicants' replying affidavit on the grounds that they contain new matter, are scandalous, vexatious and/or irrelevant.
- [26] Applications to strike out are regulated in terms of Rule 6 (15) of the Uniform Rules of Court which provides as follows:

"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted."

[27] The paragraphs the respondent seeks to strike out from the applicant's replying affidavits on the basis that they contain new matter are the following:

27.1. Paragraph 4.4.5 to 4.4.6;

27.2. Paragraph 4.5.2 to 4.5.4.

[28] The following paragraphs are said to contain matter that is scandalous, vexatious and/or irrelevant:

28.1. Paragraphs 4.6.3 and 4.7.2;

28.2. Paragraph 4.12.1 and 4.23.2 to 4.23.4.

[29] It is important to mention at this stage that there is no dispute regarding the application to strike out as the applicants' Counsel conceded that the application stands to be granted. I am inclined to agree with the respondent that the listed paragraphs are to be struck out of the applicant's replying affidavit. The above mentioned paragraphs are therefore struck out of the applicants' replying affidavit for reasons of it containing new matter, being scandalous, vexatious and irrelevant.

The Main Application

[30] Having granted the application to amend the notice of motion, I now deal with the application in terms of which the applicant seeks an order that the respondent be ordered to pay the monthly amounts received from the second applicant as set out in the order of 22 August 2018 under case number 1592/2018,

immediately upon receipt thereof, into the Trust Account of Strydom Inc. alternatively Altus Nel, Welthagen & Geldenhuys Inc. The purpose of this application against the respondent is to ring fence the respondent's assets to be able to recover loss suffered as a result of a theft or fraud allegedly perpetrated by the respondent against Simotech.

[31] It is alleged that the respondent siphoned off some funds from Simotech to a company called Profitek while using as an instrument, his fiancé Helga van der Merwe. The amount involved in these allegations is the amount of R3 981 207.63 as investigated and calculated by Ms Stuart an accountant who was instructed to investigate the alleged fraud. It is further alleged that there was collaboration between the respondent and Ms van der Merwe to defraud Simotech and steal the funds.

[32] Bean has denied these allegations and has stated in his answering affidavit that the financial affairs of Simotech were under the control and management of Van Den Berg and that he (Bean) never participated in the transaction involving Profitek. Relying on the case of Knox D'Arcy v Jamieson [1996] ZASCA 58; 1996 (4) SA 348 (A) the respondent argued that the applicants had a duty to first show that Bean was getting rid of funds or that he was likely to do so with the intention to defeat the claim of creditors. It was denied that Simotech was Bean's creditor and therefore it was argued that Simotech did not have the necessary locus

standi to bring this application against Bean.

- [33] At the hearing of the application only two instalments remained to be paid by the second applicant to the respondent and at the time of the handing down of the judgment, there will be only one instalment remaining to be paid. Applicant's Counsel argues that a case has been established and made out for the preservation in terms of the main application. It is the applicant's submission that the respondent got himself involved in acts of fraud and theft committed against the first applicant and benefitted from such conduct. According to the applicants, the respondent received benefits from the fraudulent acts and will therefore not be prejudiced if a preservation order is granted in favor of the applicants for the remaining instalments.
- [34] The applicants contend that without the interim preservation order, the first applicant will be left stranded with an empty judgment and after it has already suffered great loss, an empty judgment will not serve the interests of justice. They are therefore seeking interim interdictory relief that the monthly payments payable by the second applicant to the respondent be ring-fenced.
- [35] According to the respondent the first applicant has no locus standi to ask that the money be preserved, he contends that that will infringe upon the payment by second applicant being made. The respondent

further submits that there is no nexus between the payment of the second applicant and what the first applicant seeks to preserve. It is the respondent's contention that the order granted for sale of the shares by virtue of a settlement agreement was made between Van Den Berg and Bean and not between Bean and Simotech and therefore Simotech is not entitled to seek an amendment of the order to allow preservation of the money.

[36] In *Knox D'Arcy Ltd. and Others v Jamieson and Others*

[1996] ZASCA 58; 1996

(4) SA 348 (SCA);

[1996] 3 All SA 669 (A); (29 May 1996), the court stated that:

"Much the same happened in Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A) At page 691 C Holmes JA, who delivered the judgment of the court, stated that "[the] granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court". He then (at p691D-E) set out the requisites for an interim interdict (on the authority of Setlogelo v Setlogelo 1974 AD 227 at page 227) as follows:

- a) a right which, though prima facie established, is open to some doubt
- b) a well-grounded apprehension of irreparable injury;

the absence of ordinary remedy.

At p 691E he reverted to the court's discretion. In exercising its discretion, he said, a court weighs inter alia the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted (the balance of convenience).”

[37] Since the preservation order sought by the applicants is in a nature of an interim interdict, the requirements

for an interim interdict need to be satisfied as stated in *Knox D'Arcy* (supra). To begin with, it is important to establish whether there is a link between the property sought to be preserved and the cause of action for which it is preserved to be able to find whether the applicants have managed to show that they have a prima facie right on the respondent's property. In this matter the cause of action for which the instalments are to be preserved lies on allegations of fraud and theft which according to the applicants was committed by Van der Merwe being used as an instrument by the respondent to appropriate monies from Simotech.

[38] The installments the applicants seek to preserve are in respect of Bean's 37% shareholding in Simotech and these are monies owing to Bean as a result of an agreement which was made an order of the court involving Bean and Van Den Berg. The money to be paid to Bean does not accrue from the proceeds of the fraud and theft allegedly committed by the respondent against the first applicant and therefore, I find that the first respondent has no prima facie right over the money as it is for a debt owing to Bean by Van Den Berg for which an agreement was reached by these two parties which agreement was made an order of the court.

[39] I am inclined to agree with the respondent that the applicants have not established a prima facie right in bringing their application for the preservation order. Having found that the applicant has failed to establish a prima facie right, my view is that this finding should bring an end to the whole application. However, I will proceed to deal with the fact whether they have been able to establish that they will suffer irreparable harm if the interim interdict is not granted.

[40] The applicants aver that the respondent has disposed of his private aircraft and it no longer constitute an asset in his estate and that this is proof that the respondent is dissipating his assets. The court cannot rely on this one allegation to conclude that the respondent is dissipating his assets. The applicants have, in their founding affidavit, listed the number of assets owned by the respondent and out of all of them, the respondent is alleged to have sold only one. There is no sufficient evidence that this was done with the intention to dissipate his assets.

- [41] The applicant's belief is, in my view baseless. My view is that if Bean indeed sold the aircraft to dissipate his assets, the court would have evidence of the fact that he has been attempting to sell more of his assets. There is no such evidence on record. This allegation is therefore insufficient to prove that the applicant will suffer irreparable harm if the interim interdict is not granted as there are other assets owned by Bean. The court cannot, on the basis of these allegations conclude that Bean is a man of straw.
- [42] The balance of convenience favors the dismissal of the application because, in my considered view, the respondent will be prejudiced if the application is granted. The respondent is entitled to the full amount due to him in terms of the court order. It is common cause that this amount accrues from the sale of his shares to the second applicant. The second applicant has been enjoying the proceeds of the full 37% shareholding to the first applicant while the respondent who has been receiving repayments from the applicant should be deprived of the right to enjoy the proceeds from the sale of his shares in full, as per agreement. The respondent is entitled to the full payment of the amount agreed upon in terms of the court order.
- [43] As already mentioned above, the instalments the applicants seek to preserve are for a sale of shares by Bean to Van Den Berg. The applicants have not shown that they are entitled to the money except by making allegations of theft and fraud. It is imperative that I should mention that these allegations are merely allegations which have not been proven by the applicant in a court of law.
- [44] I am therefore of the view that the applicants have failed to make out a case for the granting of either a preservation order or an anti-dissipation order and that they are not entitled to the relief that they seek.
- [45] In the result, I make the following orders:
- 45.1. The application to amend the Notice of Motion is granted;
- 45.2. The application to strike out the applicant's replying affidavit is granted;
- 45.3. The main application is dismissed, with costs

VUKEYA LD

JUDGE OF THE HIGH COURT

For the Applicant: Adv F Lamprecht Attorneys for the Applicant: Strydom Inc. Pretoria C/O GFT Pretorius Middelburg Ref: J Strydom / Tanya / L3438 Email: j[...]; a[...] For the respondent: Adv J de Beer Attorneys for the respondent: Altus Nel, Weldhagen & Geldenhuys INC. Middelburg Ref: JC Geldenhuys / TR AN 6756 Heard: 13 April 2023 Delivered: 06 June 2023

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