

SOUTH AFRICA / JUDGMENT

Talisman Compressed Air (Pty) Ltd and Others v Dykman and Others (43147/12) [2012] ZAGPPHC 151 (7 August 2012)

[2012] ZAGPPHC 151

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Byl

CASE / FILE NUMBER

43147/12

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NOT

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC

OF SOUTH AFRICA)

CASE

No. 43147/12

DATE:07/08/2012

In

the matter between:

TALISMAN

COMPRESSED AIR (PTY)

LTD.....First

Applicant

ROTSVAS

HOLDINGS (PTY)

LTDSecond

Applicant

ROTSVAS

TRADING (PTY)

LTD.....Third

Applicant

LOUIS

HENDRIK ALBERTUS

ERASMUS.....

Fourth Applicant

and

CATHARINA
FREDERIKA
DYKMAN.....First
Respondent
GERHARD
RENIER
COETZEE.....Second
Respondent
ERNO
DYKMAN.....Third
Respondent

JUDGMENT

Van der Byl, AJ:-

- [1] The First, Second and Third Applicants are all companies carrying on business at 160 Lynette Street, Koedoespoort, Pretoria.
- [2] The Fourth Applicant is -
- (a) the only shareholder and Director of the First Applicant;
- (b) the "operational manager" and one of the directors of the Second and Third Applicants;
- (c) a 49 per cent shareholder of the Second Applicant (and, possibly, also of the Third Applicant).
- [3] The Second Applicant is the holder of all the issued shares of the Third Applicant.
- [4] The First Respondent is a 51 per cent shareholder and, therefore, the majority shareholder of the Second Applicant (and, possibly, a director of the Third Applicant).
- [5] The Second Respondent is, as appears from the founding affidavit deposed to by the Fourth Applicant, cited in his capacity as
- "shareholder by proxy". (It is not clear what is meant by this expression, but seems to be an expression obtained from a notice, Annexure A3, record p. 53, to which I will refer below, in terms of which notice was given to the Fourth Applicant that it was resolved to remove him as a director of the Third Applicant and, possibly, also as director of the Second Applicant).
- [6] The Third Respondent, being the son of the First Respondent, is, together with the Fourth Applicant, the only other director of the Second Applicant.
- [7] The building on the premises at 160 Lynette Street, Koedoespoort, Pretoria, is shared by the First, Second and Third Applicants. The First Applicant is occupying the part marked A in Annexure RD 1 (record p. 99) and the Second and Third Applicants occupying the parts marked B in that Annexure. The evidence, furthermore, shows that the premises are fenced and that entrance can only be gained through a single gate which was at all relevant times

guarded by a security company. It is also apparent that entrance to the building on the premises can only be obtained through a single door which gains entrance to the part marked A in the aforesaid Annexure where, as already indicated, the First Applicant is conducting its business. From the part marked A entrance can be gained to the parts marked B where the Second and Third Applicants are located for purposes of their respective businesses.

- [8] The Applicants seek, as a matter of urgency, in addition to a punitive order of costs, an order in terms of which -
- (a) the Applicants' possession of the premises at 160 Lynette Street, Koedoespoort, Pretoria, be restored and that the status quo be restored (prayer 2);
 - (b) the three Respondents are prohibited by way of an interim interdict from withdrawing "any further unauthorized funds from the Second and Third Applicants' account and also an order interdicting the First Respondents account held with First National Bank", pending the finalization of an application to be made to the Companies Tribunal in terms of section 71(8) of the Companies Act, 2008 (Act 71 of 2008) (prayer 3);
 - (c) the First Respondent is prohibited by way of an interim interdict from interfering or taking part in the day to day running of the Second and Third Applicants or allowing any third party to do so, pending the finalization of an application to be made to the Companies Tribunal in terms of section 71 (8) of the Companies Act, 2008 (Act 71 of 2008) (prayer 4).
- [9] On the relief claimed in prayer 2, it is, briefly stated, the Applicants' case -
- (a) that, consequent upon an agreement and a shareholders' agreement concluded between the Fourth Applicant and the First Respondent (who was the owner of a business known as Project Sensation (Pty) Ltd which has, according to the Respondents, since been wound up), a business relationship existed between them since June 2011;
 - (b) that in place of Project Sensation (Pty) Ltd the Second Applicant was registered and incorporated on 1 October 2011 and that later the Third Applicant was also registered and incorporated as the "operational companf of the Second Applicant;
 - (c) that in terms of the shareholders' agreement the First Respondent was, as I already indicated, the holder of 51 of the Second

Applicant's shares (and possibly also of the Third Applicants' shares) whilst the Fourth Applicant held 49 of those shares, the

Fourth Applicant would be the operational manager and director of both the Second and Third Applicants, that the Fourth Applicant may

not be removed as "operational manager/director" without a 60 per cent vote of the shareholders, that the First Respondent will as director be responsible for sales, marketing and administration for both the Second and Third Applicants and that the directors will receive the same monthly gross remuneration, but in the event that the cash flow of the Second and Third Applicants would not be able to afford to pay their remuneration, the remuneration due to the Fourth Applicant must be credited against his loan account;

- (c) that the Fourth Applicant on 25 May 2012 addressed a letter to the Second Respondent in which it was brought to his attention that because of the Second and Third Applicants' tax liabilities monies will have to be set aside to satisfy any indebtedness to the Receiver of Revenue, with the result that no directors' remuneration would be paid for a couple of months;
- (d) that the First Respondent was not satisfied with the Fourth Applicant's decision in this regard;
- (e) that when the Fourth Applicant and personnel of the First Applicant arrived at work on 23 July 2012, they discovered that the security company which provided security services at the time (Eagle Eye Security) was removed and another security company, Boss Security, was performing the security services and that they were not allowed access to the premises through the outer gate to the premises by six men of Boss Security;
- (f) that he was at the same time handed an undated letter, Annexure A3, record p. 53, on the letterhead of the Third Applicant and signed by the Second Respondent in his capacity as 11 Proxy to shareholder and alternate Director¹ and the First Respondent in her capacity as shareholder, informing him that a "Special Shareholders resolution has been passed¹ on 17 July 2011 to the effect he be removed as Director in terms of section 71(1) of the Companies Act, 2008, that his shares, presumably in the Second and Third Applicants, have been cancelled with retrospective effect and that the First

Respondent will bring an application for the winding up of the Second and Third Applicants;

- (g) that, in doing so, the right afforded to the Fourth Applicant in terms of section 71 (8) of the Companies Act, 2008, was infringed "and to seek relief based on a counter application".

[10] On the relief claimed in prayers 3 and 4, it is, briefly stated, the Applicants' case -

- (a) that on 1 June 2012 the First Respondent, contrary to the mechanism that was in place in relation to "large amounts" of cash received at the sales point, took cash in an amount of R11 590 from the cash sales "loaf";
- (b) that thereafter the Third Respondent obtained a bank card for the Third Applicant's trading and money market accounts from FNB and then opened another FNB account in Potchefstroom, presumably in name of the First Respondent, and transferred moneys in an amount of R88 000 from Third

Applicant's account (which is an amount equal to the First Respondent's salary for June and July 2012) into this bank account on four occasions in June and July 2012 on the instructions of the First Respondent;

- (b) that, following these events, disciplinary proceedings were instituted against the First and Third Respondents on 12 and 15 June 2012, in which the First Respondent was removed as director and dismissed as employee;
- (c) that on 25 June 2012 an undertaking was sought from the First and Third Respondents that no further moneys would be withdrawn from the Third (or the Second) Applicant's bank account, but they refused to give such an undertaking.

[11] In the opposing affidavit deposed to by the First Respondent and confirmed by the Second Respondent, the Respondents raised the question of urgency, various points in limine and, apart from raising various allegations of a particularly acrimonious relationship, and apparent irreconcilable differences, between the Fourth Applicant and the Respondents, a brief response on the merits in so far as they relate to the relief claimed.

[12] I deal briefly with these issues.

[13] Firstly, there is the question of urgency. Although raised in the opposing affidavit, this issue was not seriously pursued in argument at the hearing of this matter. I am, considering the allegations contained in the founding affidavit, satisfied that the Applicants indeed established, in so far as it is their case that they are being refrained from gaining access to the premises where they are, with the assistance of their employees, conducting business, a case to be considered as a matter of urgency. I may mention that after having heard argument in this matter I granted an order by agreement between the parties in terms of which the Fourth Applicant, together with the employees of the First and Third Applicants, their service providers and clients, and, so it appears from the agreed wording, the Respondents, are all, pending this judgment, granted free and full access to the premises to fulfil their respective duties and obligations. Although I fail to understand why the Second Applicant is left out from this order, the order seems to have effectively removed the issue of urgency which more or less accords with terms tendered in the course of argument by counsel acting on behalf of the Respondents.

[14] Secondly, the Respondents contend, byway of a point in limine, that the Fourth Applicant is not entitled to bring this application on behalf of the Second and Third Applicants because, particularly, there is no indication that a proper resolution has been taken by the Second and Third Applicants for the relief sought. It is trite that the directors of a company, as in the case of the Second and Third Applicants, must authorise the institution of legal proceedings by, and in the name of, the company (Henochoberg on the Companies Act 71 of 2008, p. 249). It is clear from the papers that the Fourth Applicant was not authorized by the directors to institute these proceedings on behalf of the Second and Third Applicants. It must therefore follow that those Applicants have no locus standi in these proceedings. This does, however, not mean that the Fourth Applicant is not entitled to bring any application in his capacity as

director and shareholder in relation to any actions by any other person or entity affecting his rights as such a director or shareholder. As is apparent from what I have already indicated in relation to the Applicants' case, the Fourth Applicant, as the deponent to the

founding affidavit, is clearly aggrieved by the fact that he and the First Applicant's employees are allegedly deprived of their right of access to the premises to perform their functions in respect of the First, Second and Third Applicants.

[15] Thirdly, the Respondents contend, likewise by way of a point in limine, that the Fourth Applicant should have cited the Second and Third Applicants as respondents as they might have, for their continued existence, opposed the relief claimed in prayers 3 and 4. The relief claimed in prayers 3 and 4 is, as I have already indicated, aimed at preventing money being transferred from the Second or Third Applicant's banking account to any banking account other than the banking account of the Second or Third Applicant. I accept that, in so far as the allegations made in this regard may be duly proved, the Fourth Applicant has, as a director and shareholder, the right to bring an application preventing the Second or Third Applicant from suffering damages. This contention was, as I understood the submissions raised in the course of the hearing of this application, not seriously pursued. I am in any event unpersuaded that this issue has been well-founded.

[16] Fourthly, the Respondents contend, also by way of a point in limine, that it is not clear why the Second Respondent was cited as a respondent as the Fourth Applicant allegedly failed to show any participation by the Second Respondent in the actions complained of. It would appear, if regard is had, amongst other considerations, to the resolution passed on 17 July 2012 in terms of which the Fourth Applicant is removed as a director of the Third Applicant (and possibly also as director of the Second Applicant) which in turn seems to be the reason why, according to the Applicant, the Fourth Applicant and the employees of the First Applicant have been denied access to the premises, that the resolution was co-signed by the Second Respondent. I accordingly fail to see how the Applicants can be faulted for having cited the Second Respondent as a respondent in these proceedings.

[17] Fifthly, the Respondents contend, again by way of a point in limine, that the Fourth Applicant failed to indicate when he intends to launch an application in terms of section 71 (8) of the Companies Act, 2008, which is the basis on which the interim orders sought in prayers 3 and 4 are to remain in tact.

A scrutiny of section 71(8), read with subsections (3), (4), (5) and

(6) of that section, as they are relevant for present purposes, shows in my opinion that a shareholder or director of a company who alleges, inter alia, that another director of that company has neglected, or been derelict in the performance of, the functions of director, may, after having complied *mutatis mutandis* with the provisions of subsections (3), (4) and (5) relating to notice and the *audi alteram partem* rule, to the Companies Tribunal for the determination on such directors neglect and derelict, subject to the right of any party, as provided in subsection (6), to review the determination by a court of law.

Upon a proper interpretation of these provisions, it accordingly seems to be correct, as contended on behalf of the Applicants, that the First Respondent, being a director and shareholder of the First Applicant who seems to be of the view that the Fourth Applicant has neglected, or been derelict in the performance of, his functions of director, may apply to the Companies Tribunal, for the removal of the Fourth Applicant as the director. I also fail to see how the Fourth Applicant can approach the Companies Tribunal in so far as prayers 3 and 4 do not seem to be based on allegations of neglect or derelict of the functions of any of the Respondents in their capacities as directors.

I may add that, in so far as the issue concerns the cancellation of the Fourth Applicant's shares, I have been unable to find (and have not been referred to) any authority in terms which a member's shares may be cancelled as has purportedly been done by means of the resolution passed by the First and Second Respondents on 17 July 2012.

[18] Sixthly, the Respondents contend, in another point in limine, that prayer 3 is too vaguely framed and can, therefore, not be granted. This is an issue to be considered in the event of me holding that the Applicants are entitled to the relief claimed in prayers 3 and 4.

[19] This brings me to the Respondents' contentions on the merits.

[20] In relation to the relief claimed in prayer 2, it is the Respondents' case -

- (a) that the business of the First and Third Applicants are not in any way impeded by any actions of the Respondents and that there is no embargo on the business of the Second Applicant and that the First and Third Applicants are fully operative whilst the Second Applicant is a holding company and not an operational entity;
- (b) that the Fourth Applicant was, however, obviously consequent upon the decision to remove him as director of the Second (or Third)

Applicant, denied access to the premises of the Second and Third Applicants.

[21] I am unpersuaded for at least two reasons that any of the Respondents' contentions constitute a proper defence to the allegations made by the Applicants.

[22] In the first place the Respondents' opposition which is little more than a bare denial is contradicted by clear, substantive and conclusive evidence that, not only the Fourth Applicant, but also the employees of the First, Second and Third Applicants, were effectively denied through a new security company appointed, access to the premises.

[23] In the second place it would appear that, in so far as it is contended that the Fourth Applicant is denied access because of the resolution to remove him from office as a director of the Second Applicant and, perhaps, also as director of the Third Applicant, the Respondents clearly resorted to self-help.

It is trite that in a spoliation application an applicant must comply with two requirements, namely, firstly, peaceful and undisturbed

possession and, secondly, wrongful deprivation of such possession (LAWSA, volume 11, para 342 at p. 304). Wrongful or unlawful

deprivation refers to the dispossession without the applicant's consent or without due legal process (Harms, Amler's Precedents of Pleadings, seventh edition, p. 358)

It is equally trite that the merits of an applicant's possession and the respondent's rights to dispossess are, subject to at least one exception (which is not applicable here), not justiciable in a mandament van spolie application (Harms, *supra*, 358).

In so far as the Respondents rely on a right to dispossess in terms of the controversial resolution to remove the Fourth Applicant from office as a director, the Respondents' justification is not justiciable as a justification for them denying the Fourth Applicant

(and the relevant employees) access to the premises.

I am accordingly satisfied that the First and Fourth Applicants are, in so far as they were together with their employees denied access to the premises to perform their functions relating to the business of the First, Second and Third Applicants, entitled to the relief claimed in prayer 2.

[24] This brings me to the relief claimed in prayers 3 and 4.

[25] As I have already indicated, the Applicants' case in support of the relief claimed in these two prayers is based on two contentions -

(a) firstly, that on 1 June 2012 the First Respondent, contrary to the mechanism that was in place in relation to "large amounts"

of cash received at the sales point, took cash in an amount of R11 590 from the cash sales ufloat and that thereafter the Third

Respondent obtained a bank card for the Third Applicant's trading and money market accounts from FNB and then opened another FNB account in Potchefstroom and transferred moneys in an amount of R88 000 (which is an amount equal to the First Respondent's salary for June and July

2012) into this bank account on four occasions in June and July 2012 on the instructions of the First Respondent (record pp. 24 and 25, para 10.2 to 10.5); and

(b) secondly, that, as set out in the Applicants' replying affidavit, referring to a notice, Annexure B2, record p. 255, customers of the Third Applicant received notices "pointing out that the bank accounts have changed and any moneys owing to the 3rd Applicant must now be paid to another, different bank account" (record p. 245, para 2.7).

[26] The allegations made in the Applicants' replying affidavit constitute no proof or at least constitutes insufficient proof that any of the Respondents has effected a situation that moneys owing to the Third Applicant be paid into the banking account of any of the Respondents. As a matter of fact Annexure B2 purports to be a notice from Stone Sensation (Pty) Ltd (which seems to have wound up) informing some unknown persons of the change

of its banking details. This allegation does not constitute proof that any of the Respondents are withdrawing "any further unauthorized funds" (whatever it may mean) from the Second and Third Applicants' account. It is also not clear what is meant by the order claimed of "interdicting the First Respondent's account. In so far it may have been the allegation that the account of the First Respondent and the account of Stone Sensation (Pty) Ltd are the same account, no such proof has been rendered.

[26] In relation to the first of the grounds on which the Applicants rely in support of the one or the other or both of prayers 3 and 4, it would appear to be the contention that amounts of R11 800 and R88 000 were merely, respectively, taken and transferred by or on behalf of the First Respondent. According to the First Respondent these amounts were so taken and transferred as her director's remuneration to which she is entitled. Apart from a letter by the Fourth Applicant that no remuneration will be paid to directors for a few months is no proof that the First Respondent is entitled to her remuneration. As I have already indicated there is ample evidence in the papers that there are irreconcilable differences between the Fourth Applicant and the Respondents. In so far as it is the Fourth Applicant's case that the First Respondent is not entitled to her remuneration in the terms of the shareholders' agreement, it may be a matter to be referred to arbitration as provided in that agreement.

I am unpersuaded that the payment of the First Respondent's remuneration constitutes "unauthorized funds" and that the

evidence according justify an order in terms of prayer 3.

[27] The Applicants, furthermore, failed to show that any of the Respondents are unlawfully interfering in the day to day affairs of the Second and Third Applicants. The evidence adduced on behalf of the Applicants does not show in what respects the

Respondents are interfering in those affairs. As a matter of fact the First Respondent is not only a majority shareholder in the Second and Third Applicants, but is also a director of those two companies and is in my view, in so far as she is in terms of the shareholders' agreement responsible for sales, marketing and administration of the companies, entitled to involve herself in the affairs of the companies. I do not think that the Applicants are entitled to the relief in so far as they rely on the disciplinary proceedings in which she was discharged as director and employee. The validity of these proceedings are highly dubious since there is no basis, bearing in mind the provisions of section 71(8) of the Companies Act, 2008, to which I have already referred to and the fact that she was never employed as an employee of any of the companies.

[28] The Applicants' claims in terms of prayers 3 and 4 can accordingly not succeed.

[29] This brings me to the question of costs.

As I have already indicated, there is a particularly acrimonious relationship, and irreconcilable difference, between at least the

Fourth Applicant and the First Respondent, the details of which I need not to deal with in any particularity. What is, however, clear from the papers, is that what had given rise to the institution of this application is to be found in controversial and, perhaps, unlawful actions on both side. On the one hand there is the resolution by at least the First and Second Respondents that the Fourth Applicant be removed as director of the Third Applicant (and possibly also of the Second Applicant) and that his shares be cancelled. This seems to have been the reason why the Fourth Applicant was denied access to the premises. On the

other hand there is the like controversial and, perhaps, unlawful actions by the Fourth Applicant to institute disciplinary proceedings against the First Respondent in terms of which she was discharged as "employee" and director of the Second and Third Applicants. This in turn seems to have given rise to the resolution in terms of which the Fourth Applicant was removed as director.

It is, therefore, clear to me that both parties approached this Court with dirty hands and, together with the mixed successes each party achieved in this matter, and that they should accordingly in my view not be entitled to the costs they occurred in bringing and opposing this application.

[30] For the reasons set out in this judgment the following orders are made:-

1. THAT the Respondents be ordered to forthwith restore free and undisturbed access to, and possession ante omnia of, the premises at 160 Lynette Street, Koedoespoort, Pretoria, to the Fourth Applicant and all employees of the First, Second and Third Applicants.
2. THAT the Applicants claims set out in prayers 3 and 4 of the Notice of Motion be dismissed.
3. THAT no order be made as to costs.

P C VAN DE BYL

ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANTS: ADV G T KYRIAZIS

On the instructions of: S ROUX INC

Monument Office Park cnr Elephant & Syeenbok Street Monument Park

PRETORIA

Ref: LSBotha/HB2116/12

Tel: 012 460 0666

ON BEHALF OF RESPONDENTS: ADV. T P Kruger

On the instructions of: WIESE & WIESE ATTORNEYS

311 Eastwood Street Arcadia

Ref: Hein Wiese COE6/0001/HW

Tel: 012 343 1268

DATE OF HEARING: 26 July 2012

JUDGMENT

DELIVERED: 7 August 2012

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