

SOUTH AFRICA / JUDGMENT

Vic La Vic Group (Pty) Ltd and Another v Phele Mining Consulting and Projects (24445/2022)

[2024] ZAGPPHC 155 (16 February 2024)

[2024] ZAGPPHC 155

COURT

North Gauteng High Court, Pretoria

BEFORE

A Vorster

CASE / FILE NUMBER

24445/2022

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION,
PRETORIA)

Reportable:

No
Of
interest to other
Judges: No

Revised:

Yes
CASE

NUMBER:

24445/2022
In

the matter between:

VIC
LA VIC GROUP (PTY) LTD
1ST
APPLICANT
MMADIKGOSI
MARY-ANN
MATSHEGO
2ND
APPLICANT
And
PHELE
MINING CONSULTING
AND PROJECTS

RESPONDENT

Coram:

A
Vorster AJ

Heard:

18 April 2023

Delivered:

This
judgment
was
handed
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representatives by
email, by uploading the judgment onto
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and release to SAFLII. The date and time for hand-down is deemed to
be 10:00 on 16 February 2024.

ORDER

1.

The
application
is dismissed.

2.

The applicants
are ordered to pay the costs on the scale as between attorney and
client,
jointly
and
severally,
the
one
paying,
the
other
to
be
absolved.

JUDGMENT

A Vorster AJ

Introduction

1. The respondent is a private domestic company registered in 2017. Its sole director and shareholder, Mr. Israel Phejane, passed away on 25 June
2021. In terms of section 70(1)(b) of the Companies Act, No. 71 of 2008 ('the new Companies Act'), upon his demise, Mr. Phejane ceased to be a director, and a vacancy arose on the board of the respondent. Because shares in a company is regarded as an asset, Mr. Phejane's shares became, by operation of law, part of the aggregate of the assets and liabilities of his deceased estate.
2. Because a company can only act through its directors, the moment Mr. Phejane passed away, the respondent became incapacitated, and since Mr. Phejane was also the sole shareholder, there was no person who could immediately appoint replacement directors, since directors are generally appointed by shareholders.
3. Although not expressly stated, it would seem as if Mr. Phejane specified in his will that his wife, Ms. Margaret Phejane, be appointed as executor of his deceased estate, and the articles of association of the respondent ostensibly authorized the executor to appoint replacement directors. However, before Ms. Phejane could exercise this power, she had to wait for the Master to confirm her appointment.
4. At the time the respondent had a lucrative contract with Sibanye Stillwater, a multinational mining, metals, and processing Group. The respondent employed approximately 200 people whose salaries were paid from the proceeds of the contract.
5. Financial Institutions generally "freeze" bank accounts of companies when a sole director dies, causing the affected company to become unable to pay salaries or other operational costs until a replacement director is appointed. This happened to the respondent's business bank account when Mr. Phejane passed away. The bank restricted all outgoing transactions which resulted in the respondent being unable to pay its employees.
6. To deal with the imminent business continuity risks facing the respondent, brought about by the freezing of its bank account, which included defaulting on its contractual obligations towards Sibanye, Ms. Phejane took it upon herself to raise a loan to pay the employees' salaries until replacement directors could be appointed.
7. On 30 June 2021 Ms. Phejane approached a pastor in her church for financial assistance. The pastor introduced her to the 2nd applicant, Ms. Mmadikgosi Matshego, the sole shareholder and director of the 1st applicant. Ms. Matshego agreed to advance an amount of R1'000'000.00. There is a dispute of fact whether the money was advanced to Ms. Phejane, or

to the respondent, and whether the money was to be repaid to the 1st applicant, or to the 2nd applicant. As I will demonstrate In due course, it is not necessary to decide these disputes.

8. Whatever the agreement was, it is common cause that on 30 June 2021 an amount of R1'000'000.00 was transferred from the 1st applicant's bank account to Ms. Phejane's personal bank account. Ms. Phejane used the money to pay the respondent's employees' salaries directly. On 4 July 2021 Ms. Phejane repaid the full amount. It is not clear what the source of these funds was, but the money was transferred from Ms. Phejane's personal bank account to the bank account of the 1st applicant.
9. Between 4 July 2021 and 31 July 2021 Ms. Phejane requested a second loan from Ms. Matshego. On 31 July 2021 the sum of R1'000'000.00 was paid from the 1st applicant's bank account to Ms. Phejane's personal bank account. There is again a dispute of fact whether the agreement was that the money would be advanced to Ms. Phejane, or the respondent, and whether the agreement was with the 1st or 2nd applicant. As is the case with the first loan, it is not necessary to decide these disputes.
10. Ms. Phejane transferred the money from her bank account to the respondent's bank account. The bank allocated the entire amount to the respondent's overdraft and immediately thereafter terminated the facility.
11. On 5 August 2021 two replacement directors were appointed. The directors acknowledged that the respondent was indebted to Ms. Phejane in the sum of R2'000'000.00. The company resolved not to repay her immediately because the termination of the respondent's credit facility by the bank resulted in the company experiencing cash flow problems.
12. Between 14 October 2021 - 1 February 2021 Ms. Matshego sent various threatening WhatsApp text messages to Ms. Phejane, demanding that she repay the R1'000'000.00 which remained outstanding. Screenshots of these text messages are attached to the founding affidavit. What is striking from the text messages is that Ms. Matshego refers to the money owed as 'my money', and no allegation is made that the respondent in fact owes the money. All demands were that Ms. Phejane repay the money to Ms. Matshego. On several occasions Ms. Phejane acknowledged that she owes the money.
13. On 1 February 2022 Ms. Matshego attended at the offices of the respondent, accompanied by police officers, and demanded that Ms. Phejane execute a written acknowledgement of debt. After initially refusing, Ms. Phejane relented and executed an acknowledgement of debt, which, although slovenly drafted, seems to denote that the respondent was indebted to the 1st applicant in the sum of R1'000'9000.00. The two replacement directors signed the acknowledgement of debt as witnesses. It is not clear in what capacity Ms. Phejane executed the acknowledgement of debt. At the time she was neither a shareholder, nor a director of the respondent.

14. On 4 April 2022 Ms. Matshego caused a letter of demand to be served on Ms. Phejane by sheriff. In the letter Ms. Matshego records that she agreed to advance an amount of R1'000'000.00 to Ms. Phejane. In the letter Ms. Matshego does not allege that the 1st applicant advanced the money to the respondent. There is also no reference to the respondent owing the 1st applicant money. In the letter Ms. Phejane is threatened with sequestration proceedings If she fails to repay the debt to Ms. Matshego.
15. On the same day Ms. Matshego caused a letter of demand to be served on the respondent, also by sheriff. In this letter the allegation is made that the respondent owes the money to Ms. Matshego, not the 1st applicant. According to the applicant, although not expressly stated, the demand served on the respondent was a statutory demand in terms of Schedule 5, Item 9 of the new Companies Act, read with sections 344(f) & 345(1)(a) of the Companies Act, No. 61 of 1973 (the old Companies Act').
16. On 11 May 2022 the applicants issued out the current application for an order that the respondent be placed under provisional winding-up. The application is based on:
 - 16.1. the respondent's alleged inability to pay its debts which the applicants attempt to demonstrate through a demand for payment that had not been met; and
 - 16.2. the first applicant is a creditor of the respondent for a sum of not less than R100.00, then due and payable; and
 - 16.3. service on the respondent's registered office of a demand requiring payment of the sum had been effected; and
 - 16.4. the respondent neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the first applicant.
17. The respondent opposes the application on the basis that the debt is disputed on bona fide grounds. It is the respondent's case that the loan agreement was between Ms. Matshego and Ms. Phejane, and not between the respondent and the 1st applicant. The respondent deems itself to be indebted to Ms. Phejane based on enrichment but disavows any liability towards the applicants. In the answering affidavit the allegation is made that the respondent already repaid Ms. Phejane R1'500'000.00.
18. In argument Counsel for the applicant also relied on the applicant's failure to provide security as provided for in section 346(3) the old Companies Act, and to effect service as provided in sections 346(4) and 346(4A)(b), as bases upon which the application should be refused.

Discussion

17. Properly construed, the applicants allege that in procuring the loans Ms. Phejane 'acted on behalf of' the respondent, which is clearly an allegation of agency[1]. Even if it is accepted that Ms. Phejane purported to act on behalf of the respondent, the applicants must still prove agency[2]. The respondent denies that Ms. Phejane had authority to act on behalf of the respondent when she secured the loan[3].
18. It is accordingly necessary to first establish whether Ms. Phejane had the necessary authority to act on behalf of the respondent as a matter of fact, which may be evidenced by proof of express authorization or by inference[4]. The applicants provided no proof that Ms. Phejane had the necessary authority to act on behalf of the respondent. There are also no primary facts[5] capable of being used to draw an inference that she had the necessary authority. The founding affidavit is further devoid of any allegation that the respondent, as opposed to Ms. Phejane, created an appearance that she had the power to act on its behalf, i.e. that she acted with ostensible authority[6].
19. In terms of the South African common law acts committed by agents with defective authority is generally invalid, and a person who acts without another's express or implied authority cannot bind the principal to any contract or transaction in whose name the agent acts. These common law principles seems to be unaffected by the new Companies Act.
20. Apart from the fact that the applicants failed to prove authority, whether it be actual, Implied, or ostensible authority, as an incidence of law, at the time when the loans were procured, Ms. Phejane could not have had authority to act on behalf of the respondent. The respondent had no directors and in terms of section 66(1) of the new Companies Act 'the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise'. Ms. Phejane did not have the power to conduct the affairs of the respondent since there were no directors who could grant her the necessary authority to bind the respondent to the loan agreements.
21. The relationship between Ms. Phejane and the respondent can best be described as that of negotiorum gestio. Ms. Phejane voluntarily managed the affairs of the respondent without the consent or knowledge of the latter[7]. Ms. Phejane's rights vis-a-vis the respondent include the right to be reimbursed for necessary and useful expenses, which in this instance may be the R1'000'000.00 which was used to pay the respondent's employees' salaries, and the R1'000'000.00 which was paid into the respondent's bank account. Her claim will be limited to the extent of the unjustified enrichment of the respondent because it can be accepted that she knowingly managed the respondent's affairs with the intention of benefiting herself[8]. She stood to inherit her husband's shares in the respondent and the preservation of the respondent was almost exclusively for her own benefit.

22. The applicants do not rely on a general enrichment claim or, for that matter, even on an extension of any recognized *condictio*. They rely exclusively on an oral loan agreement concluded between the 1st applicant, represented by the 2nd applicant, and the respondent, represented by Ms. Phejane. Such a claim cannot be sustained for the reasons set out above. It is in any event doubtful whether the applicants will succeed with an enrichment claim against the respondent.
23. The respondent disputes the applicants' claim on the basis that Ms. Phejane lacked authority to bind the respondent. The respondent does not have to establish, even on the probabilities that it would as a matter of fact succeed in defending any action which the applicants might bring to enforce the disputed claim. The court needs merely to be satisfied that the grounds upon which the claim is disputed are not unreasonable, and to do that, it is not necessary that the actual evidence which would be relied upon at a trial be adduced on affidavit or otherwise. It is sufficient, provided it is done *bona fide*, to allege facts which, if proved at a trial, would constitute a good defense against the claims made against the respondent[9].
24. It is not necessary to deal with the applicant's failure to provide security as provided for in section 346(3) the old Companies Act, and to effect service as provided in sections 346(4) and 346(4A)(b) because I intend to dismiss the application on substantive grounds.

Costs

25. As far back as 1918, In *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 69 Innes CJ said:
"the rule of our law is that all costs - unless expressly otherwise enacted - are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission. "
26. In *Public Protector v South African Reserve Bank* 2019
(6) SA 253 (CC) at para 8, Mogoeng CJ in the majority judgment noted that '[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.' In the minority judgment Khampepe J and Theron J further noted that 'a punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke'. Both judgments referred to *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2815 (LAC) at para 46, in which the Labour Appeal Court stated:

"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium. "

27. The court will not grant an order where the predominant motive or purpose^[10] is something other than the bona fide bringing about the company's liquidation for the company's sake. This application is a classic

example of insolvency proceedings being used as a weapon in terrorem to enforce a disputed debt In *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956

(2) SA 346, Hiemstra AJ as he was then, stated the following:

"A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented extensively for a winding-up order, but really to exercise pressure will be dismissed and under the circumstances may be stigmatized as a scandalous abuse of the process of court. "

28. An application which is brought for this purpose constitutes an abuse of court. The court is vested with inherent jurisdiction to prevent the abuse of its processes. The history of the matter clearly indicates that the applicants all along held Ms. Phejane liable for the debt. This application clearly is an abuse of process and a thinly veiled attempt to extort payment of a disputed debt from the respondent. The application is prima facie vexatious and punitive costs are justified.

Conclusion

29. For these

reasons

I propose to make the following orders:

29.1. that the application be dismissed;

29.2. that the applicants be ordered to pay the costs on the scale as between attorney and client, jointly and severally, the one paying, the other to be absolved.

A. VORSTER AJ

Acting Judge of the High Court

Date of hearing: 18 April 2023 Date of judgment: 16 February 2024 Counsel for the applicants: Advocate V. T. Seboko Instructed by: Gardee Godrich Incorporated Heads of argument for respondent: Advocate C. Zwiegelaar Appearance for respondent: Advocate A. Coetsee Instructed by: Grabler Malope Incorporated

[1] *Lind v Spicer Bros (Africa) Ltd* 1917 AD 147.

[2] *Van Niekerk v Van den Berg* [1965] 2 All SA 367 (A), 1965 (2) SA 525 (A)

- [3] Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) & Tuckers Land and Development Corporation (pty) Ltd v Perpellief [1978] 1 All SA 629 (T), 1978 (2) SA 11 (T)
- p. 16.
- [4] Inter-Continental Finance & Leasing Corp (Pty) Ltd v Stands 56 and 57 Industria Ltd 1979 (3) SA 740 (W).
- [5] Die Oros (Pty) Ltd v Telefon Beverages CC 2003
- (4) SA 207 C, para 28.
- [6] Makate v Vodacom (Pty) Ltd 2016
- (6) BCLR 709 (CC), 2016 (4) SA 121 (CC) paras 46-47.
- [7] A company's knowledge means with respect to any statement made to the knowledge of the company, that the statement is based upon the actual knowledge of the executive officers of the company having responsibility for the matter or matters that are the subject of the statement after reasonable investigation. Company consent means a written request, order, or consent, respectively, signed in the name of the company by its directors. Since the respondent did not have directors at the time it could not have had knowledge or granted consent.
- [8] Odendaal v Van Oudtshoorn [1968] 3 All SA 482 en, 1968
- (3) SA 433 en p. 438 & Standard Bank Financial Services Ltd v Taylam (Pty) Ltd [1979] 4 All SA 1 (C), 1979 (2) SA 383 (C).
- [9] Holser- Reitter and another versus HEG Consulting Enterprises (Pty) Ltd (Lain and Fray NNO Intervening) 1998
- (2) (SA) 208 (C).
- [10] Truckers Land and Development Corporation (Pty) Ltd v Soya (Pty) Ltd 1980
- (3) SA 253 at paragraph 256 G-257A.

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Prepared on 10 October 2026 · Esheria