

SOUTH AFRICA / JUDGMENT

Zinyana v Smith and Others

(28764/2021) [2023] ZAGPJHC 827; 2023 (2) SACR 532 (GJ) (22 June 2023)

[2023] ZAGPJHC 827

COURT

South Gauteng High Court, Johannesburg

BEFORE

EF Dippenaar

CASE / FILE NUMBER

28764/2021

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REPUBLIC OF
SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

CASE NUMBER:

28764/2021
NOT REPORTABLE
OF INTEREST TO OTHER
JUDGES
NOT REVISED
In

the matter between:

BALESENG
MICHELLE PRISCILLA ZINYANA
APPLICANT
And
MARK
DOUGLAS SMITH
FIRST
RESPONDENT
ALEXANDER
ELIAS RODITIS
SECOND
RESPONDENT
VANESSA
CHUNGU
THIRD

RESPONDENT

NJM

HEAT TREATMENT AND NDE SERVICES (PTY) LTD

FOURTH

RESPONDENT

Summary: Application

for relief under section 163 of Companies Act – defence raised
that shareholders agreement was concluded solely
for purposes of

Eskom tender- deliberate misrepresentation – applicability of
Prevention and Combating of Corrupt Activities Act 12 of 2004 –
who has a duty to report under section 34 – persons in position
of authority including directors of companies - inherent duty on
judicial officers to uphold Constitution
and refer unlawful conduct

for investigation – merits settled between parties in terms of
consent draft order - factors to
consider when making a compromise an
order of court.

ORDER

(1)

The draft order dated 9 May 2023, attached
and marked “X” is made an order of court.

(2)

The directors of the fourth respondent are
directed to comply with their reporting duties under s 34 of the
Prevention and Combating
of Corrupt Activities Act 12 of 2004

(3)

The matter is referred to the Directorate
for Priority Crime Investigation for investigation under the
Prevention and Combating
of Corrupt Activities Act 12 of 2004;

(4)

The Registrar is directed to provide a copy
of this judgment and the application papers to the Commander,
Directorate for Priority
Crime Investigation, forthwith.

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties’ legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 22nd of June 2023.

DIPPENAAR J:

- [1] The application concerns relief under s 163 of the Companies Act. The applicant is a shareholder in the fourth respondent (“NJM”). The first to third respondents are its directors and shareholders in NJM, either in their personal capacities or corporate entities who are not parties to the application.
- [2] In essence the relief pertains to the first to third respondent’s refusal to disclose the financial information of the fourth respondent to her so that an independent forensic valuation of the fourth respondent’s financial position can be undertaken. Underpinning the application is the valuation of the applicant’s shareholding in the fourth respondent (“NJM”).
- [3] The central factual dispute between the parties is the validity of a shareholders agreement concluded between the shareholders of NJM dated 15 June 2017. The applicant relies on this agreement for her entitlement to the financial information forming the subject matter of the application.
- [4] The respondents challenge the validity of the shareholders agreement. In the answering affidavit, it is pleaded:
- “39. I deny that the shareholders agreement is binding on the parties and as I will show the applicant’s reliance on it is opportunistic and disingenuous.”*
40. In late 2017 the fourth respondents submitted a tender to Eskom. During early October 2017 it became apparent that the document representing a DRAFT shareholders agreement needed to be signed and dated to June 2017 for purposes of the tender only.
41. A copy of the email exchanges dated 4 October 2017 to this effect is annexed as AA6. The manifest intention of all signatories was thus not to be bound inter se by the document.
42. As appears from the applicant’s email of that date, she herself confirmed that “... I am only signing for tender purposes as a draft and will need a final copy to be signed.”
- [5] The version of the respondents is thus that they concluded the shareholders agreement for purposes of securing a tender that was issued by Eskom and that they did not intend to be bound by the shareholders agreement. Implied in their version is that there was an intentional misrepresentation made to Eskom in NJM’s tender bid regarding the shareholding agreement within NJM so that it could be a successful bidder in the tender. The version of the applicant is that the shareholders agreement is valid and binding.
- [6] The application thus raises novel issues. At the commencement of the hearing, I raised with the parties whether such conduct would bring the provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (“PRECCA”) into play, whether there was a duty on the court to report the matter under s 34 of PRECCA and whether it was open to the court in such circumstances to make any order on the matter.

- [7] The matter stood down to afford the parties an opportunity to consider these issues and make submissions. During that period, the merits of the application became settled between the parties and they provided a consent draft order particularising their settlement.
- [8] The consent draft order provides for the valuation of the applicant's shareholding in NJM on an agreed valuation basis and the sale of such shares to the remaining shareholders of NJM. As the shareholders of NJM were not all parties to the application, an affidavit was provided by the respondents' attorney of record, Mr Van der Watt, confirming that he was mandated and authorised to agree to the proposed draft order on behalf of the other shareholders of NJM who are not parties to the application. These shareholders are Thermo Jet (Pty) Ltd, Dasmair Engineering (Pty) Ltd and Mr Guy Phillip le Roux. Mr Van Der Watt further confirmed that he was mandated by the first to third respondents to conclude the settlement recorded in the proposed draft order.
- [9] The draft order envisaged that the agreement reached therein would be binding on the parties inter se in the event that the court declined to make the draft a formal order. The draft order provides:
- "The parties wish to make this agreement an order of court but in the absence thereof for any reason it will remain valid and binding to the parties and may be enforced by any party".*
- [10] After hearing oral argument from the parties I reserved judgment in order to consider the submissions made.
- [11] There are two issues which must be addressed: First the duty of a court to report, whether under s 34 of PRECCA or at all and whether the matter should be referred for investigation. Second, whether the draft order should be made an order of court.
- [12] The parties were in agreement that there is a duty on the court to report. Such duty rests not only on the court but also on the respondents. As pointed out by the applicant, prima facie there is a suspicion that the conduct of the respondents is an offence and contrary to section 13 of PRECCA, irrespective of whether such conduct would also be in breach of the fiduciary duties owed to NJM by its directors.
- [13] The parties were further in agreement that, considering the specific facts of the matter, there was nothing prohibiting a court from granting the proposed order, given that their agreement was aimed at a commercial resolution of the disputes which had arisen between them.

- [14] It must be considered that PRECCA is a criminal statute. Its long title provides:

"To provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; to provide for investigative measures in respect of corruption and related corrupt activities; to provide for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; to place a duty on certain persons holding a position of authority to report certain corrupt transactions; to provide for

extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities; and to provide for matters connected therewith.”

[15] The Preamble provides in relevant part:

WHEREAS the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;

AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights;

AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;”

[16] Certain of the definitions in s 1 are of relevance.

Gratification’ includes (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;”

‘Judicial officer’ means - (a) any constitutional court judge or any other judge as defined in section 1 of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001);

‘public body’ means-

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when-
 - (i) exercising a power or performing a duty or function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public duty or function in terms of any legislation;

‘public officer’ means-

any person who is a member, an officer, an employee or a servant of a public body, and includes-

- (a) any person in the public service contemplated in section 8 (1) of the Public Service Act, 1994 (Proclamation 103 of 1994);
- (b) any person receiving any remuneration from public funds; or
- (c) where the public body is a corporation, the person who is incorporated as such, but does not include any-
 - (a) member of the legislative authority;

- (b) judicial officer; or
- (c) member of the prosecuting authority;”

[17] In relevant part, s 2 provides: Interpretation

“2. (1) For purposes of this Act a person is regarded as having knowledge of a fact

if-

- (a) that person has actual knowledge of the fact; or
- (b) the court is satisfied that-
 - (i) the person believes that there is a reasonable possibility of the existence
 - (ii) the person has failed to obtain information to confirm the existence of that fact;

and “knowing” shall be construed accordingly.

2. (2) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both-

- (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
- (b) the general knowledge, skill, training and experience that he or she in fact has.

(3) (a) A reference in this Act to accept or agree or offer to accept any gratification, includes to-

- (i) demand, ask for, seek, request, solicit, receive or obtain;
- (ii) agree to demand, ask for, seek, request, solicit, receive or obtain; or
- (iii) offer to demand, ask for, seek, request, solicit, receive or obtain, any gratification”.

[18] Section 3 provides:

“General offence of corruption

Any person who, directly or indirectly-

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-
 - (i) that amounts to the-
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption”.

[19] Section 13 deals with offences in respect of corrupt activities relating to procuring and withdrawal of tenders. In relevant part it provides:

“13 (2) Any person who, directly or indirectly-

- (a) gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or the benefit of another person, as-
- (i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or ...”

[20] Section 34 of PRECCA enjoins any person who holds a position of authority and who knows or ought to reasonably have known or suspected any other person has committed an offence in terms of the relevant sections of PRECCA involving an amount of R1 000 000.00 or more, must report such suspicion to the police official in the Directorate for Priority Crime Investigation.

[21] In relevant part, it provides:

“34 Duty to report corrupt transactions

- (1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed-
- (a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or
- (b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.
- (2) Subject to the provisions of section 37

(2), any person who fails to comply with subsection (1), is guilty of an offence. [Date of commencement of sub-s. (2): 31 July 2004.]

- (3) (a) Upon receipt of a report referred to in subsection (1), the police official concerned must take down the report in the manner directed by the National Commissioner, and forthwith provide the person who made the report with an acknowledgment of receipt of such report.
- (b) The National Commissioner must within three months of the commencement of this Act publish the directions contemplated in paragraph
 - (a) in the Gazette.
- (c) Any direction issued under paragraph (b), must be tabled in Parliament before publication thereof in the Gazette.
- (4) For purposes of subsection (1) the following persons hold a position of authority, namely-
 - (c) any public officer in the Senior Management Service of a public body;
 - (e) the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act 69 of 1984);
 - (h) any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;
 - (i) any other person who is responsible for the overall management and control of the business of an employer; or
 - (j) any person contemplated in paragraphs (a) to (i), who has been appointed in an acting or temporary capacity”.

[22] The applicant argued that in terms of s 1 of PRECCA a public officer is defined inter alia as any person who is a member, officer, employee or servant of a public body and includes any person contemplated in s 8(1) of the Public Service Act, 1994. [1]

[23] It is further argued that judicial officers form part of the persons in the public service as contemplated in s 8(1). In s 1 of PRECCA, ‘public officer’ is defined as follows:

[24] Judicial officers are thus expressly excluded from the definition of “public officer”. It is thus doubtful whether that section applies.

[25] The same does not apply to the first to third respondents, the directors of NJM. Under s 34(4) (e) of PRECCA they have an express duty to report. There is no indication on the application papers that they have done so.

- [26] Although there is no express duty on judicial officers to report under s 34(1) of PRECCA, there is an inherent duty on judicial officers to uphold the Constitution and not to condone unlawful conduct.
- [27] In those circumstances, I conclude that it is appropriate to refer the application papers to the relevant authority for investigation.
- [28] The next issue which arises is whether the proposed consent draft order should be made an order of court. In Eke [2], the Constitutional Court set out three considerations for determining whether it is competent and proper to make a compromise an order of court. They are: First, whether the compromise relates directly or indirectly to the settled litigation. Second, whether the terms of the compromise are objectionable. Third, whether it would hold some practical or legitimate advantage to give the compromise the status of a court order.
- [29] The parties sought their consent draft order to be made an order of court and were in agreement that there was nothing objectionable in making the consent draft order an order of court. Inasmuch as not all the shareholders of NJM were parties to the application, the affidavit of their attorney of record confirms that they consent to the order being made.
- [30] Applying the relevant principles enunciated in Eke, I am persuaded that it would be competent to do so. The compromise directly addresses the issue which underpins the present litigation and there is nothing objectionable in its terms. It would also hold a legitimate advantage to give the compromise the status of a court order.
- [31] The granting of the order should however in no way affect the proposed investigation.
- [32] If the merits of the application had however not been settled, it would not have been appropriate to make any determination of the application until the necessary investigations have been concluded.
- [33] I grant the following order:
- [1] The draft order dated 9 May 2023, attached hereto and marked “X”, is made an order of court.
- [2] The directors of the fourth respondent are directed to comply with their reporting duties under s 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004
- [3] The matter is referred to the Directorate for Priority Crime Investigation for investigation under the Prevention and Combating of Corrupt Activities Act 12 of 2004;
- [4] The Registrar is directed to provide a copy of this judgment and the application papers to the Commander, Directorate for Priority Crime Investigation, forthwith.

EF DIPPENAAR

JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING : 08 May 2023

DATE OF JUDGMENT : 22 June 2023

APPLICANT'S COUNSEL :

Adv. Phillip Mokoena SC

Adv. Musatondwa Musandiwa

APPLICANT'S ATTORNEYS :

RS Madzivhandila Attorneys

RESPONDENT'S COUNSEL :

Adv. Jonathan Blou SC

RESPONDENT'S ATTORNEYS:

Knowles Husain Lindsay Inc.

[1] Section 8(1) of the Public Service Act provides: "The public service shall consist of persons who are employed-(a) in posts on the establishment of departments; and(b) additional to the establishment of departments."

[1] Section 8(1) of the Public Service Act provides:

"The public service shall consist of persons who are employed-(a) in posts on the establishment of departments; and(b) additional to the establishment of departments."

[2] Eke v Parsons 2016 (3) SA 37 (CC) paras 25-26

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