

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11/33767

DATE: 23/09/2011

REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

EAST ROCK TRADING 7 (PTY) LTD

First Applicant

DESPOTUSIC; VJEKOSLAV

Second Applicant

and

EAGLE VALLEY GRANITE (PTY) LTD

First Respondent

VAN OVERBERGHE; DERK GHISLAIN MAUIRCE

Second Respondent

VANERNEWYCK; PHILIPPE VICTOR ROBERT

Third Respondent

PHANA INVESTMENT 95 (PTY) LTD

Fourth Respondent

JUDGMENT

NOTSHE AJ:

- [1] The Applicants brought a two part urgent application. Part A seeks an interim relief pending the finalization of Part B of the application.

- [2] Part A seeks to stop the holding of a meeting of the Board of Directors of the First Respondent scheduled to be held in Brits at 10h00 on 14 September 2011 and also any other meeting of Board of Directors of the First Respondent in which certain resolutions were to be tabled.

- [3] The Respondents opposed the application on the grounds that the matter was not sufficiently urgent to be heard as an urgent application. The Respondents also dispute that the Applicants have satisfied the requirements for the granting of an interim interdict.

URGENCY

- [4] In a nutshell the Respondents aver that the Applicants have delayed in instituting the proceedings. They aver that the Applicants have known of the intended meeting for some time. It is then argued that as a result thereof they created their own urgency.

- [5] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of 6(12) of the Uniform Rules. The aforesaid sub rule allows the court or a Judge in urgent applications to dispense with the forms and service provided for in the

rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as to it seems meet. It further provides that in the affidavit in support of an urgent application the applicant “... *shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.*”

[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.

- [8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.¹
- [9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.

¹ See: Nelson Mandela Metropolitan Municipality v Greyvenouw 2004 (2) SA 81 (SE) at 94C–D; Stock v Minister of Housing 2007 (2) SA 9 (C) 12I–13A.

- [10] In this matter the Applicants have explained that despite receiving the notice of the meetings the Second Applicant was travelling and no one else could depose to the affidavit. An attempt was even made for their attorney to meet him in some other countries outside South Africa.
- [11] In addition thereto, despite the delay, it is clear that the matter remains urgent. The Respondents intend to hold a meeting whereby important decisions are to be discussed. It is clear that if the Applicants were to wait and bring the matter in the normal course they will not be able to be afforded substantial redress at a hearing in due course. The horse would have bolted out of the stable by then.
- [12] In the circumstances I am satisfied that the matter is sufficiently urgent to be enrolled and heard as an urgent application.

INTERIM INTERDICT

- [13] An interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In this regard the Constitutional Court said the following:²

“An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of

² In National Gambling Board v Premier, Kwa-Zulu Natal and Others 2002(2) SA 715 CC

*the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo."*³

[14] The requirements for the granting of an interim interdict are well known. The decisions are legion. The requirements are the following: a *prima facie* right, a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favors the granting of an interim relief, and that the applicant has no other satisfactory remedy.⁴ In this regard Holmes JA⁵ said the following:

"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are –

³ At 730 - 731[49]

⁴ See: Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another 1973(3)SA 685 (A) Knox D Arcy Ltd v Jamison and Other 1996(4) SA 348 (A) at 361

⁵ In Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another, *supra*, at 691.

- (a) *a right which, 'though prima facie established, is open to some doubt';*
- (b) *a well grounded apprehension of irreparable injury;*
- (c) *the absence of ordinary remedy.*

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

*The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see *Olympic Passenger Service (Pty.) Ltd. v Ramlagan*, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."*

- [15] Where the right is clear "... *the remaining questions are whether the applicant has also shown:*

(a) *an infringement of his right by the respondent; or a well-grounded apprehension of such an infringement;*

(b) *the absence of any other satisfactory remedy;*

(c) *that the balance of convenience favours the granting of an interlocutory interdict.*"⁶

[16] In this case the Applicants seek an interim interdict pending the determination of an application seeking to declare the Second and Third Respondents as delinquent directors and removing them and replacing them as directors. They also seek alternative remedies thereto. The interim relief that they seek is that the Respondents should not proceed with the directors' meeting that was to be held at Brits on 14 September 2011 or arranging for a board of directors of the First Respondent to take certain resolutions.

[17] There is a dispute about whether the First Applicant has a right to nominate a director to fill in the vacancy. It cannot be said then that it has established a clear right.

[18] The question therefore is whether it has established a prima facie right. The approach to be adopted in considering whether an applicant has established a prima facie right has been stated to be the following:⁷

⁶ Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W) at 592 – 593.

⁷ In Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA).

*“The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.”*⁸

[19] It is common cause that the First Applicant is the shareholder in the First Respondent. The Second Applicant is one of the directors of the First Respondent. The meetings that the Applicants seek to be stopped from being held intend to discuss issues relating to the directorship of the Second Applicant, the change of the offices and use of a certain accounting system. The Applicants seek to deal with the conduct of the Second and Third Respondents and also remedy the situation which occurred when one of the directors nominated by the First Applicant resigned.

[20] The allegations made by the Respondents do not throw serious doubt upon the case of the Applicant. They aver that at the time of coming into operation of the Companies Act, 71 of 2008, there was no vacancy in the board of directors of the First Respondent. They then aver that as a result thereof it is only a general meeting of the shareholders

⁸ At 228;

See also Webster v Mitchell 1948 (1) SA 1186 (W) at 1189, Manong & Associates (Pty) LTD v Minister of Public Works and Another 2010 (2) SA 167 (SCA) at 180.

which has the power to decide whether the number of directors should be increased. On the other hand the Applicants aver that there is no inconsistency between the First Respondent's shareholders' agreement and the Act. They further allege that a Court has the power to appoint or remove a director.

[21] I do not have to decide the right of the parties at this stage. I leave that for determination in the second leg of the application.

[22] At this stage I am satisfied that the Applicants have a *prima facie* right as a shareholder and a director of the First Respondent to have the Second Respondent remain a director of the company until lawfully removed. They have a right to institute the proceedings they seek to institute. It cannot be disputed that the Respondents are threatening the aforesaid right. It cannot be denied that if the Applicants are not granted the relief that they seek the Respondents will hold a meeting and the results will interfere with the rights of the Applicants. I am also satisfied that if the aforesaid meeting goes ahead and decisions are taken the Applicants will suffer irreparable harm. It will be like attempting to unscramble a scrambled egg to reverse the decisions that will be taken. I am also satisfied that the balance of convenience favors the granting of the interim order. The Applicants will suffer prejudice if the interim interdict is not granted and the meeting takes place and decisions are taken. On the other hand the Respondent will suffer a mere delay if the interim interdict is granted.

[23] It is important to note that the proceedings that the Applicants seek to institute will include the decisions that the Respondents seek to take at the meeting that is sought to be interdicted. There are strong prospects of succeeding in getting a director appointed into the board of the First Respondent to represent the First Applicant. The Applicants have no other remedy except the interim relief that they seek.

[24] The Respondents further urge that this Court has a discretion to refuse to grant an interim interdict even if the Applicants have satisfied the requirements for the granting of such relief. I do not agree. The discretion referred to by the courts in relation to granting of an interim relief is not the wide discretion in its true sense. It is a limited discretion in relation to the question of the balance of convenience. The Supreme Court of Appeal explained this issue as follows⁹:

“That a Court has a discretion whether or not to grant a temporary interdict has often been said. We were, however, not referred to any case in which an appeal in respect of an interim interdict was dealt with on the basis that the Appeal Court could not interfere except on the restricted grounds suggested by the respondents. As far as the Appellate Division is concerned, the authority which I have been able to find goes the other way. Thus, in Messina (Transvaal) Development Co Ltd v South African Railways and Harbours 1929 AD 195 at 215-16 Curlewis JA said:

⁹ Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A)

'In an application for an interim interdict pending action, the Court has a large discretion in granting or withholding an interdict. Where there is merely a possibility, not a practical certainty, of interference or injury, as in the present case, the Court will be reluctant to grant an interdict, especially if the party seeking the interdict will have other means of redress and will not suffer irreparable damage. And the Court is entitled to and must regard the possible consequences, both to the applicant and to the respondent, which will ensue if an interdict be granted or withheld.'

It is significant that, despite emphasising the discretionary nature of the relief claimed, the learned Judge did not, in the result, decide the case on the limited basis contended for in the present case. In fact he did not even consider the question whether the trial Judge had properly and judicially exercised a discretion. Curlewis JA decided the matter according to his own views of the merits of the application and came to the conclusion that 'no sufficient case for an interdict has been made out' (at 216). Similarly, in Goldsmid v The South African Amalgamated Jewish Press Ltd 1929 AD 441 Curlewis JA, on this occasion enjoying the concurrence of three of his Colleagues, went into the merits of an appeal against the refusal of an interim interdict and concluded that 'the lower Court acted correctly in dismissing the application' (at 446).

Much the same happened in Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A). At 691C 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 691D-E) set out the requisites for an interim interdict (on the authority of *Setlogelo v Setlogelo* 1914 AD 221 at 227) as follows:*

'(a) a right which, "though prima facie established, is open to some doubt";

(b) a well grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy'.

At 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). He then continued (at 691F):

'The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities. . . .'

Despite the stress placed on the discretionary nature of the Court's function, Holmes JA proceeded to deal with the appeal by giving effect to his own view on the merits of the application for an interdict. His final conclusion (at 696E-F) was that 'the affidavits do not warrant the remedy of an interim interdict' and that the Judge a quo 'was right in discharging the rule nisi'.

See also Cassim and Others v Meman Mosque Trustees 1917 AD 154.

It would seem to follow from the above cases that the word 'discretion' was not used in a strict sense. That this word is capable of different meanings appears from Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) at 796H-I and 800C-G. In the present context the statement that a Court has a wide discretion seems to mean no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision. This is also the sense in which, I take it, Schreiner J used the word 'discretion' in the following oft-quoted passage from Transvaal Property & Investment Co Ltd and Reinhold & Co v SA Townships Mining & Finance Corp Ltd and The Administrator 1938 TPD 512 at 521:

'No doubt the remedy by way of interdict has been said to be unusual, . . . it is also described as discretionary. . . . It seems to me, however, that, apart from cases of interim interdicts, where

considerations of prejudice and convenience are of importance, the question of discretion is bound up with the question whether the rights of the party complaining can be protected "by any other ordinary remedy" (Setlogelo's case, 1914 AD 221, at 227).'

The Courts have not defined the considerations which may be taken into account in exercising the so-called discretion, save for mentioning the obvious examples such as the strength or weakness of the applicant's right, the balance of convenience, the nature of the prejudice which may be suffered by the applicant and the availability of other remedies. Whilst this list is not exclusive, it does indicate what the relevant features are in an application of this sort. I find it difficult to imagine that considerations which are entirely unrelated to these features could be accorded weight in granting or refusing an application for an interim interdict.

Finally, in regard to the so-called discretionary nature of an interdict: if a Court hearing an application for an interim interdict had a truly discretionary power it would mean that, on identical facts, it could in principle choose whether or not to grant the interdict and that a Court of appeal would not be entitled to interfere merely because it disagreed with the lower court's choice (Perskor case at 800D-F). I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this Court seem to refute it.

*In some Provincial Divisions a different view has been adopted. See, for example, Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T) at 58G-H and 60H-61A.”*¹⁰

[25] The doubt raised by the Supreme Court of Appeal in the abovementioned dictum has not been found to have been misplaced. On the contrary it seems to have been accepted as authority that the discretion referred to in previous cases is not the discretion in its strict sense.¹¹ I also agree with this view. A discretion requires the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate conclusion. If an applicant has satisfied the requirements of the granting of an interim interdict there is no room for a court to exercise a value judgment. In other words a court has no discretion but to grant the relief sought.

[26] In this case the Applicants have satisfied the requirements for the granting of an interim relief. I do not have a discretion but to grant the relief that they seek.

[27] The relief sought is directed mainly against the Second and Third Respondents. It would be unfair to saddle the First Respondent with the costs of the application. The Second and Third Respondents should pay those costs.

[28] In the result I make the following order:

¹⁰ At 360 – 362.

¹¹ Giddey NO v J C Barnard and Partners 2007 (5) SA 525 (CC) at 534 – 535.

1. Pending the final determination of the application in Part B of the Notice of Motion dated 6th September 2011, the Second and Third Respondents are interdicted and restrained from:
 - 1.1 Proceeding with the directors' meeting of the First Respondent which had been convened to be held at Brits at 10h00 on 14 September 2011 and whether at the time appointed therefore or at all;
 - 1.2 Requisitioning a meeting of the Board of Directors of the First Respondent ("*the company*") in which any resolution is to be tabled which impacts in any manner whatsoever on:
 - 1.2.1 the Second Applicant's directorship of the company;
 - 1.2.2 the use of the company of the Navision Accounting System;
 - 1.2.3 the location of the registered and administrative offices of the company; and
 - 1.2.4 signatories on the bank account of the company.
 - 1.3 The Second and Third Respondents are directed to pay the costs of this part of the application jointly and severally the one paying the other to be absolved.

V.S NOTSHE
ACTING JUDGE OF THE HIGH COURT

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Date of the Hearing: 13 September 2011

Date of Judgment: 23 September 2011