



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2023/085264

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
(4)

SIGNATURE



DATE 19/09/2023

In the matter between:

ITS TIME GROUP (PROPRIETARY) LIMITED

Applicant

and

MAGCINABIWE XAMELA TYULU

First Respondent

VULA OIL (PROPRIETARY) LIMITED

Second Respondent

SETSHABA SEBEKO

Third Respondent

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fourth Respondent

JUDGMENT

PULLINGER, AJ

[1] This is one of the unusual cases where the costs of an urgent application are ventilated before the Urgent Court. I decided to hear this matter because I had read the papers and the issues are clear and straightforward. It is unnecessary to trouble another judge in due course. This would be waste of judicial resources and unnecessarily increase the costs.

[2] Before me were two intertwined questions, defined by Mr Antonie SC, who appeared with Ms Ndlovu for the applicant as follows:

[2.1] First, should this application have been brought as one of urgency?

[2.2] Second, should the respondent pay the costs of the urgent application considering that the substantive relief had been conceded?

[3] The material facts are as follows:

[3.1] Mr Khanya Solani ("**Mr Solani**") is the sole shareholder and director of the applicant.

[3.2] He is the non-executive chairman of the second respondent and, formerly an employee of the second respondent, an issue which has bearing on the outcome of this matter.

- [3.3] The applicant is the beneficial owner of 70% of the issued shares in the second respondent. It has advanced a shareholder loan of some R8 million to the second respondent.
- [3.4] The first respondent was the sole director of the second respondent, prior to the relief sought in this application being conceded by him (an issue to which I refer more fully below). He is also the owner of 30% of the issued shares in the second respondent.
- [3.5] There is a written agreement between the applicant, the first respondent and the second respondent styled "*Nominee Agreement*" which affords, in particular, the applicant the right to appoint directors to the board of the second respondent ("**the Nominee Agreement**").
- [3.6] On 31 July 2023, Mr Solani met with the first respondent to advise that the applicant would be taking over the day-to-day running of the second respondent's business. The context in which this conversation took place is comprehensively traversed in the applicant's founding affidavit, but is not material to the issue before me.
- [3.7] On 1 August 2023, Mr Solani transmitted an email to the first respondent proposing a turnaround plan for the second respondent's business. The email records:

"...

Attached is the process that I am going to be managing as part of the business turnaround efforts.

Your role and that of Sechaba we will discuss when we are in the office, like I stated to you last night I rather consult and engage with you rather than dictate what you should do.”

[3.8] Some ten days later, and on 11 August 2023, the first respondent replied to Mr Solani. The material parts of the email record:

“I am not in agreement with your proposal and how you have conducted things. As the managing director of Vula Oil I have decided to take the following steps in an attempt to save the business due to its financial woes.

1. Terminate your role as the Chief Financial Officer with immediate effect, unfortunately this is due to a lack of transparency in your role which is crucial and I do not agree with the plan you submitted to turn the business around. Please bare [sic] in mind as the sole director I have taken all the risk being surety for the company's debts and I am left exposed, therefore, I will handle the finances of the Company to ensure stability and mitigate my personal exposure to debt. You have stated that you cannot be a director due to conflict of interest and I remain the only director of the Company who is obligated to uphold the directors [sic] fiduciary duty to the Company.
2. ...
3. In an effort to save the business I have decided to commence with the process of putting the Company under business rescue with an aim to facilitate rehabilitation due to it being financially distressed.”

[3.9] On 19 August 2023, the first respondent held two separate meetings, the first one with the bulk tanker drivers, and the second one with the energy advisors at the second respondent's Randfontein depot.

[3.10] During these meetings, the first respondent advised the attendees that he would be restructuring the second respondent's business, and that there would be inevitable retrenchments effective as at 25 August 2023.

[3.11] The applicant states, in regard to the foregoing, that:

“[t]his naturally caused anxiety and unrest within the business of [the second respondent] and unnecessarily exposes [the second respondent] to legal reprisal as a consequence of [the first respondent's] failure to follow due process applicable to retrenchments. In my view, there was no basis to threaten staff retrenchments.”

[3.12] On 21 August 2023, the applicant called upon the first respondent to appoint a further director, one Mr Sibeko, to the second respondent's board.

[3.13] By virtue of the materiality of this letter to the issue before me, I reproduce the content of the letter. It provides:

“1 I refer you to the Nominee Agreement entered into with Its Time Group (Pty) Ltd (“**ITG**”), duly signed by you on 1 August 2021 (“**the Nominee Agreement**”).

2 The Nominee Agreement prescribes, *inter alia*:

- 2.1 "Its Time shall be the owner of 70% (seventy) of the issued shares in [Vula]" **clause 4.2.2**;
 - 2.2 "Magcinaviwe shall, on behalf of Its Time hold the Its Time shares in a nominee capacity. The Its Time shares shall be held by Magcinaviwe on behalf of Its (**clause 4.2.3**).
 - 2.3 In the event that Its Time is required to appoint a director or directors to represent the Its Time shares, Its Time shall on the written notice to Magcinaviwe undertake to forward the details and secure the appointment of any person nominated by Its Time to the board of directors of [Vula]" (**clause 5.1**).
- 3 ITG is most concerned, having regard to various factors, including your recent conduct, that you are no longer acting in the interests of ITG nor in accordance with your duties to ITG. ITG now requires that a director be appointed to represent its interests on the board, whilst also acting in the best interests of Vula as a company.
 - 4 ITG has identified Mr Setshaba Sibeko (Identity number 8110015830085) ("Mr Sibeko") as a suitable candidate to be appointed as a director of Vula. Mr Sibeko has agreed to and has accepted the proposed appointment.
 - 5 ITG hereby gives its notice (as per **clause 5.1 of the Nominee Agreement**) for you to take the necessary steps to formalize the appointment of Mr Sibeko as a director of Vula within 3 (three) business days of receipt of this notice.
 - 6 I attach for your ease, the necessary documentation required by CIPC, duly signed by Mr Sibeko and Mr Solani (where applicable). Should Vula and/or CIPC require any further documentation from Mr Sibeko or ITG to give effect to the above, please let us know prior to the above-mentioned deadline. Should you fail to do so, the attached will be considered to be sufficient and ITG will await your timeous compliance with this notice.
 - 7 Please note that your recent emails to Mr Solani have been forwarded to our attorneys for their comment and advice. You can expect to receive a substantive response to your mails from our attorneys in due course.
 - 8 In the interim ITG's and Mr Solani's rights remain reserved."

[3.14] On 23 August 2023, the first respondent replied to the aforesaid letter stating:

“I acknowledge receipt of your correspondence.

I shall revert regarding the directors appointment next week, latest 30 August 2023.”

[3.15] In response to the foregoing, the applicant’s attorneys wrote to the first respondent. Again, and given the materiality of this letter, it is reproduced in full. It records:

- “1 We represent Its Time Group (Pty) Limited (“**our client**”).
- 2 We refer to our client’s letter to you dated 21 August 2023 in which our client exercised its rights under clause 5 of the Nominee Agreement and gave you notice to take the necessary steps to formalize the appointment of Mr Setshaba Sibeko (“Mr Sibeko”) as a director of Vula Oil (Pty) Limited within three business days.
- 3 You have refused to comply with our client’s instruction. Instead, in an email addressed to our client on 23 August 2023, you advised that you would only revert on this issue by latest 30 August 2023.
- 4 Our client is of the view that your refusal to appoint Mr Sibeko constitutes a dispute or disagreement (“the dispute”) as contemplated in clauses 8.1 and 8.2 of the Nominee Agreement which states that:
 - 4.1 “8.1 Any dispute, disagreement or deadlock that may arise between the parties, shall be referred to an independent mediator, who is an expert in the field pertaining to the dispute, and who shall resolve such dispute within 48 (forty-eight) hours of the dispute arising.”; and

4.2 “8.2 *The decision of the mediator shall be final and binding on the parties subject to the following:*

8.2.1 *The mediator shall only be empowered to adjudicate on matters which do not pertain to remuneration and/or monetary consideration;*

8.2.2 *The mediator shall be impartial and shall have an unfettered discretion in making any ruling or adjudication.”*

5 Clause 8.2.1 does not apply to the dispute and the mediator must be an expert in the legal field given the nature of the dispute.

6 Having regard to the time constraints within which the dispute must be resolved in terms of the Nominee Agreement, we propose that one of the undermentioned senior legal experts be approached to conduct the mediation proceedings:

6.1 Advocate Azhar Bham SC;

6.2 Advocate Nazeer Cassim SC; or

6.3 Advocate Terry Motau SC.

7 Please advise us of the order of your preference so that we may approach them in such a manner as to ascertain their respective availability. Please advise us of your choice in this regard within three hours of receipt of this letter.

8 Our client’s rights remain reserved.”

[3.16] In the interim, the second respondent terminated Mr Solani’s employment.

[3.17] The first respondent did not respond to the applicant’s request for a mediation.

[3.18] Thus, by 25 August 2023, when this application was launched, the factual scenario facing the applicant was the following:

[3.18.1] Mr Solani's employment had been terminated summarily and without any process being followed;

[3.18.2] The second respondent's employees had been advised that a restructuring of the business would take place, and that there would be retrenchments;

[3.18.3] The first respondent had failed to respond to the demand that there be a mediation; and

[3.18.4] The first respondent had, for no apparent reason, told the applicant that he would revert on the appointment of a further director to the board of the second respondent's business by 30 August 2023.

[4] It is in the context of these facts that the applicant, on 25 August 2023, launched this application by way of an urgent application. The application was one for specific performance of the first respondent's obligations under the nominee agreement. I find, in the context of what I have recorded above, that the applicant was entitled to an urgent hearing.

[5] The application was served on the first respondent by a candidate attorney in the employ of the applicant's attorneys at 18h08 on 25 August 2023.

[6] On 28 August 2023, at 17h56, the first respondent transmitted an email to the applicant's attorneys. The email provides, *inter alia*:

"Please note that Setchaba has been appointed as director this morning, as requested"

[7] The first respondent's email was met with a letter from the applicant's attorneys on 29 August 2023, recording that:

"1 ...

2 You allege in your email that you have now appointed Mr Sibeko as a director of [the second respondent] in belated compliance with our client's demand dated 20 August 2023 and in capitulation to the relief sought in the urgent application.

3 As the aforementioned will have a material impact on the urgent application and serve to obviate the necessity for the parties to incur any costs of opposition, please furnish us with the necessary documentation evidencing the appointment of Mr Sibeko as a director as well as the appropriate confirmation from CIPC with regard thereto.

4 Please note that until such time as we have received satisfactory confirmation of your allegation, the urgent application will proceed as per the notice of motion and be heard on 5 September 2023.

5 ..."

[8] On 30 August 2023, the applicant's attorneys received a letter from the first respondent's attorneys, dated 28 August 2023, providing the necessary documentary evidence of Mr Sibeko's appointment as a director of the second

respondent. The two material annexures to that letter are the resolution of the second respondent's board dated 28 August 2023 and the COR 39 form of the same date.

[9] Unbeknown to the applicant, the reason that the first respondent had indicated that he would revert by 30 August 2023 was his alleged uncertainty as to the validity and binding effect of those provisions of the nominee agreement empowering the applicant to nominate a further director to the board of the second respondent's business. The first respondent appointed attorneys and sought the opinion of counsel in relation to the validity and binding effect of those provisions. Regrettably, this was not conveyed to the applicant's attorneys.

[10] The first respondent, ably represented by Ms Chanza, resisted the hearing of this matter before the urgent court and any order that would require the first respondent pay the costs of the application.

[11] I have already addressed the reason that the costs argument was entertained by me. The incurrence of further costs in the context of what I stated above is unjustifiable. Similarly, I have already addressed the facts that rendered the relief claimed by the applicant urgent at the time that this application was launched.

[12] Ms Chanza raised four discrete points in opposition to an order that the first respondent be directed to pay the costs of the application:

[12.1] First, Ms Chanza argued that the applicant could have waited until 30 August 2023 before launching the application;

[12.2] Second, that the applicant's attorneys could have replied to the first respondent's email of 23 August 2023 enquiring as to the reasons why he wanted to wait until 30 August 2023 to revert to the applicant's demand;

[12.3] Third, it was argued that the demand for mediation was premature in circumstances where there was no dispute between the parties; and

[12.4] Fourth, that the applicant's conduct in launching the urgent application was unreasonable in the circumstances.

[13] I do not agree with Ms Chanza's submissions.

[14] The first respondent, as the sole director of the second respondent, stands in a fiduciary position *vis-à-vis* the second respondent directly and the shareholders indirectly. In *Corporate Governance, An Essential Guide for South African Companies*¹, the authors state the proposition thus:

"Shareholders' interests have traditionally been granted primacy in the management of a company. Thus, the principle duty of directors, it has been contended, is the maximisation of shareholder returns (profit). The board is elected by shareholders to

¹ Ramani Naidoo *et al*, Lexis Nexis, 3rd edition, 2018

represent their interests, and directors remain accountable to shareholders collectively for the results produced during their tenure.”²

[15] It was, therefore, in the context of this application, impermissible for the first respondent to not address the reasons for his failure to immediately comply with the Nominee Agreement and make the applicant wait for some future date before he would revert on the question of whether he would act upon the contractual obligations in the Nominee Agreement.

[16] Any doubts that the first respondent may have had regarding his obligations under the Nominee Agreement could have been resolved expeditiously under the mediation clause. It is noteworthy, in this context, that the first respondent signed the Nominee Agreement without demur on 15 December 2021 and therefore agreed to any remedial measures which could have been taken before the launching of any court proceedings.

[17] The first respondent failed to respond to a request for mediation on the ostensible basis that there was no dispute between the parties. But, it is plain that where a director is required to act positively in accordance with an agreement, but remains silent and ignores the demand, there is a dispute.

[18] *En passant*, it appears that the first respondent doubted the enforceability of the clause 5 of the Nominee Agreement, thus and in his mind, there was an impasse between the parties. This is the apparent reason that he sought legal advice.

² *Supra* at 164/5

[19] This position must be distinguished between an "*arbitral dispute*" and a dispute as contemplated in the mediation clause. The mediation clause is far wider. It contemplates that any impasse should be resolved expeditiously between the parties and a three hour time limit for the appointment of a mediator is set.

[20] It is difficult, in these circumstances, to agree with the proposition that the demand for the mediation and then the subsequent launching of the urgent application was premature.

[21] But, not only did the first respondent not give reasons for his conduct as aforesaid, he proceeded to advise the second respondent's employees of his plans for restructure and retrenchments. This is strongly indicative that the first respondent would not accede to the demand to comply with his contractual obligations. This inference is supported by the intimation that he would, as sole director of the second respondent, pass a resolution placing the second respondent under supervision and in business rescue as contemplated in Chapter 6 of the Companies Act, 2008.

[22] It is, in the totality of these circumstances, clear that the applicant was constrained to approach the Court for the relief sought. His application was neither premature nor unnecessary.

[23] This gives rise to the question of reasonableness. Ms Chanza, on behalf of the respondent, advanced the proposition that the (un)reasonableness of the

applicant's expeditious launch of its urgent application is a reason to deprive it of costs in circumstances where it had been successful.

[24] It is long established that, as a general rule, a successful party is entitled to a costs order.³ The general rule will only be departed from where there are good grounds to do so.⁴ Good grounds have been considered to be, *inter alia*, unconscionable or excessive demands, nominal damages, failure to limit or curtail proceedings and costs of misconduct or improper conduct. None of these considerations apply in this case.

[25] In supplementary heads of argument filed on behalf of the first respondent, reliance is placed on **Laggar**⁵ for the proposition that this matter ought not to have been argued before the urgent court, and **Mancisco**⁶ for the proposition that a successful litigant may be deprived of its costs.

[26] In relation to **Laggar**, Cleaver J's rationale for hearing a costs argument in the urgent court is substantially the same as mine.⁷ As previously mentioned, this is an unusual case which departs from the norm on grounds of pragmatism. It would seem to be a waste of judicial resources and unnecessarily increase the parties' costs to have held a further hearing regarding the costs.

³ **Vassen v Cape Town Council** 1918 CPD 360 at 370-371; **Society for the Prevention of Cruelty to Animals v De Swart** 1969 (1) SA 655 (O) at 659 (D)

⁴ **Niewoudt v Joubert** 1988 (3) SA 84 (SE) at 88H; **Joubert t/a Wilcon v Beacham and Another** 1996 (1) SA 500 (C) at 502 D – F, citing **Demolition and Construction Co Ltd v Kent River Board** [1963] 2 Lloyd's LR 7 at 15

⁵ **Laggar v Shell Auto Care (Pty) Ltd and Another** 2001 (2) SA 136 (C)

⁶ **Mancisco & Sons CC (in liquidation) v Stone** 2001 (1) SA 168 (W)

⁷ *Supra* at [4]

[27] Turning now to the majority decision in **Mancisco**.

[28] The judgment may be difficult to follow because the learned Deputy Judge President referred to “*applicant*” and “*respondent*” (in the manner in which they were referred to a *quo*), and the judgment read without being mindful of this fact can lead to an incorrect understanding of the decision.

[28.1] The appellant (i.e. the respondent *a quo*) appealed against the merits of the judgment and order of the court of first instance.⁸ It did not succeed on appeal. The appeal court varied the terms of the costs order granted by the court of first instance⁹ to accord with its findings on the merits.¹⁰ In this regard, no controversy arises as this is, in effect, an application of the “*costs follows the event*” principle.¹¹

[28.2] The appellant argued that its opposition before the court *a quo* was reasonable, and it ought not pay the respondent’s costs on various grounds.¹²

[28.3] But, as the learned judge pointed out, the appellant was incorrect in that belief and unnecessarily put the applicant to costs, in circumstances

⁸ At 172 A – D

⁹ At 185 F

¹⁰ At 180 C – D and 179 F

¹¹ At 180 G/H

¹² At 180 H – I

where it must have been foreseen that the respondent would have been successful in the court *a quo*.¹³

[29] The decision in **Mancisco** does not assist the respondent in this case.

[30] In the course of considering the question of “*reasonableness*” as a ground to deprive a successful litigant of its costs, I found some authority in support of this proposition. Courts have deprived successful litigants of their costs but, in very specific contexts, as the brief survey that follows demonstrates.

[31] In **Pilot Freight**¹⁴, Kairinos AJ held:

- "74. The application for the winding up of the Respondent on the merits can therefore not succeed since the Respondent has set out defences, which if proved at trial would constitute good defences in law and I cannot on the fact set out in the affidavits find that they are not *bona fide*.
75. Lastly there is the issue of the costs of the application. Ordinarily the costs would follow the result and this would mean that the Applicant would pay the Respondent's costs occasioned in opposing the application.
76. However in the present matter, **the Respondent appears to have played its cards very close to its chest and from its conduct lured the Applicant into launching an ultimately unsuccessful application for liquidation**. I say this since it appears that when the Applicant launched the application for the winding up of the Respondent, it did so in the belief that the capital amount outstanding and interest thereon had been settled at the meeting on 9 October 2012. Indeed the Respondent appears to have made payments of R50 000.00 per month thereafter, apparently in accordance with such agreement. When the payments were no longer made, the Applicant sent a demand in terms of section 345(1)(a) of the old Act to the Respondent affording the

¹³ At 182 F

¹⁴ **Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd** 2015 (2) SA 550

Respondent twenty-one days to appropriately respond thereto. **The Respondent did not at that stage or at any stage prior to the delivery of its answering affidavit raise the issue that the parents of the deponent to the answering affidavit, who purportedly had represented the Respondent at such meeting, had not been authorised to conclude the purported settlement agreement. No doubt had this issue been raised the Applicant would not have proceeded by way of a liquidation application.** In the circumstances it would be appropriate to order that the Applicant pay the Respondent's costs in opposing the application from the date when the Respondent delivered the answering affidavit and each party to bear its own costs in respect of all costs occasioned by the application prior to the date that the answering affidavit was delivered. To avoid any confusion the costs prior to the delivery of the answering affidavit are also to include the costs occasioned by the preparation of the answering affidavit." (Emphasis added)

[32] No such similar considerations of the applicant not being completely open with the first respondent arise in this matter.

[33] In **Zhongji**¹⁵ the Supreme Court of Appeal dismissed an appeal without ordering the unsuccessful respondent to pay the costs of the appeal under peculiar circumstances concerning jurisdiction in an arbitration. The court said:

"[38] The process of arbitration must therefore be respected. Zhongji Construction's application to the high court was accordingly premature and perhaps unnecessary. In **Geldenhuys and Neethling v Beuthin Innes**, CJ said:

'Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely that a declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.' (My emphasis.)

¹⁵

Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl 2015 (1) SA 345 (SCA)

Kamoto came perilously close to infringing Zhongji Construction's right to arbitration under the main agreement. **Nevertheless, the relief which Zhongji Construction sought in the high court related to an abstract or 'academic' question of the kind to which Innes CJ referred. The application ought to have been dismissed for this reason alone. The arbitration must first be given the opportunity to have run its course before the court considers any application relating thereto.**

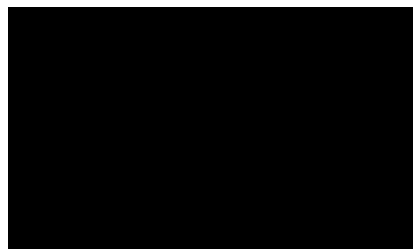
[39] In all the circumstances of the matter, it is inappropriate to mulct Zhongji in the costs of this appeal." (Emphasis added; footnotes omitted)

[34] As I have already found, the applicant's application was neither premature nor unnecessary given the facts known to the first respondent at the time it was launched. There was nothing abstract about the relief claimed, nor was its importance to the applicant as the majority shareholder in the second respondent. Accordingly, the principle in **Zhongji** does not find application in this matter.

[35] In the circumstances, there is no reason to depart from the ordinary rule that the successful party is entitled to the costs of its application.

[36] In the result, the following order is made:

"The first respondent is to pay the applicant's costs of the application, including the costs consequent upon the employment of two counsel."



A W PULLINGER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 19 September 2023.

DATE OF HEARING: 5 September 2023

DATE OF JUDGMENT: 19 September 2023

APPEARANCES:

**COUNSEL FOR THE APPLICANT: M M ANTONIE SC
N NDLOVU**

ATTORNEY FOR THE APPLICANT: WERKSMANS, JOHANESBURG

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