

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: D703/2020

In the matter between:

DANIEL ARTHUR KNOTT

APPLICANT

and

RZT ZEPLY (PROPRIETARY) LIMITED

FIRST RESPONDENT

WORDSWORTH HAROLD NDLELA

SECOND RESPONDENT

RYSZARD KRZSTOF PALKOWSKI

THIRD RESPONDENT

HANS JORG KARL RIMENSBERGER

FOURTH RESPONDENT

CHRIS WINTERBACH

FIFTH RESPONDENT

COCO HAVEN 26 (PTY) LIMITED

SIXTH RESPONDENT

ORDER

1. The applicant, DANIEL ARTHUR KNOTT, is appointed as a director of the first respondent forthwith and the respondents are directed to sign all documents necessary for such appointment, which appointment as director is to be in addition to the existing directors presently in office.

2. The first respondent is ordered to produce and deliver to the applicant, within forty days of the grant of this order, signed financial statements in the form required by the Companies Act, Act 71 of 2008 for the financial years 2016, 2017, 2018, 2019, 2020, 2021 and 2022.

3. In event of non-compliance with paragraph 2, the applicant is granted leave, on papers duly supplemented, to approach court for further relief.

4. The second, third, fourth and fifth respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

5. The respondents are directed to pay the applicant's costs of the application for leave to file a supplementary founding affidavit.

6. The respondents' application for condonation for the late filing of the answering affidavit is condoned and the applicant is directed to pay the costs of that application.

7. The second, third, fourth and fifth respondents are directed to pay the costs of the application in terms of Rule 47.

8. The costs referred to are to include the costs of senior counsel where employed.

JUDGMENT

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[1] This is an application brought by the applicant against the respondents in terms of section 163 of the Companies Act, 71 of 2008. The applicant seeks orders that he be appointed as a director of the first respondent and that the first respondent ("the

company”) be directed to deliver to the applicant signed financial statements as required by the Companies Act. In the alternative, the relief sought by the applicant is that, in the event that there is not compliance with the order relating to the provision of financial statements, then the applicant be granted powers to take possession of the books of account of the company. The period to which the financial statements apply in terms of the relief sought is 2016 to 2019.

[2] Before dealing with the merits of the application, it is necessary for me to set out in some detail the background of the proceedings.

[3] The application was instituted on 28 January 2020. The first to fifth respondents (hereinafter referred to as “the respondents”) delivered their notice of intention to oppose on 20 March 2020 after the applicant delivered an amended notice of motion. No answering affidavit was delivered on behalf of the respondents within the time periods provided for in the Uniform Rules of Court.

[4] Instead, and on 23 March 2020, the respondents delivered a notice in terms of Rule 47(1) which the applicant responded to on 8 April 2020, setting out grounds of his opposition to providing security for costs. An application in terms of Rule 47 was instituted by the respondents and the applicant delivered an affidavit in opposition thereto. No replying affidavit was delivered on behalf of the respondents and the application for security was not persisted in by the respondents.

[5] No further steps were taken by the respondents in the main application and the applicant delivered a notice of set down on 22 June 2020 for hearing on 6 July 2020. On that date, the application was adjourned *sine die* with the respondents ordered to pay the wasted costs occasioned by the adjournment. Certain documents were delivered to the applicant on 6 July 2020 and / or shortly thereafter.

[6] On 9 December 2020, the applicant delivered a notice in which leave was sought to file a supplementary founding affidavit, the aforesaid affidavit having been deposed to

on 3 November 2020, and set the matter down for hearing on 23 February 2021. On 23 February 2021, the applicant was granted leave to file the supplementary founding affidavit and a further order was granted that any respondent opposing the application be ordered to pay the costs of the application. It does not appear that any costs order was made for that hearing.

[7] The respondents did not file an answering affidavit to the applicant's founding affidavit or supplementary founding affidavit and, on 20 May 2021, the applicant again delivered a notice setting the matter down for hearing on 24 May 2021. It was not until 24 May 2021 that the respondents delivered an answering affidavit along with an application seeking condonation for the late delivery of the aforesaid affidavit.

[8] On 12 October 2021, the applicant delivered an affidavit in answer to the aforesaid condonation application and in reply to the answering affidavit in the main application. The respondents have not delivered a replying affidavit in this application for condonation.

[9] At the commencement of the hearing of this matter I suggested to counsel that, in order to ensure that the main application be disposed of without further delay, any condonation sought by the parties be granted and that I would make a ruling on costs in respect of those interlocutory applications according to my discretion.

[10] The applicant is a shareholder of the first respondent, holding 15% of its shares. The second, third, fourth and fifth respondents are the directors of the first respondent. The sixth respondent is a shareholder of the first respondent. No relief is sought against the sixth respondent.

[11] The sole income of the first respondent is the rentals obtained from tenants of its principal asset being a shopping centre based in Mqanduli in the Eastern Cape.

[12] In order to secure finance for the costs of the development of the shopping centre, a mortgage in favour of Investec Bank was secured. As at the time of deposing to the founding affidavit, which was January 2020, the balance due to Investec by the first respondent was approximately R35 million. The applicant bound himself as surety in favour of Investec for the sum of R11 million plus interest and costs.

[13] According to the applicant there was an understanding that the shopping centre would be sold once tenanted and that the applicant would be paid a share of whatever profits were made from the sale of the shopping centre or he would be paid out the value of his shares.

[14] It is the case of the applicant that the directors of the company failed to comply with the provisions of the Companies Act and its Regulations in that:

- (a) no properly signed and reviewed financial statements were presented by the directors on behalf of the company for the period 2016 to 2019;
- (b) the directors have failed to hold regular annual general meetings of shareholders as required by the Act.

[15] In addition to this, according to the applicant, the corporate governance of the company has been of concern in that:

- (a) the directors of the first respondent ("the company") had authorised loans to third parties in contravention of the Investec loan facility;
- (b) judgment had been taken against the company by its landlord;
- (c) a tax liability had been incurred in the name of the company, which liability remained unresolved; and

(d) the local municipality had a substantial claim in respect of unpaid rates against the company.

[16] The issues referred to by the applicant were raised at an annual general meeting held on 26 July 2018 and, according to minutes attached to the founding affidavit, annexure “DK5”, it was agreed that the company was to issue regular financial information to the directors and shareholders in accordance with the usual financial reporting requirements.

[17] In February 2019, the applicant, through his attorneys, addressed correspondence to the directors recording his concerns. In response thereto, the fifth respondent’s attorneys advised that it would take instructions and revert. A meeting was held in April 2019 between the applicant’s attorney, the first respondent’s attorney and the attorneys of the fifth respondent at which it was agreed that it was incumbent on the fifth respondent to provide the financial documents sought by the applicant. The fifth respondent’s attorneys responded that they would take instructions and revert.

[18] In May 2019, the fifth respondent provided to the applicant unsigned draft annual financial statement for the period ending 2018 and, in August 2019, the applicant, through his attorneys, called on the directors to convene a shareholders meeting. It was the intention of the applicant that the concerns previously raised by him would be discussed and certain resolutions would be tabled at that meeting.

[19] In November 2019 the company’s attorneys advised the applicant that, once the annual financial statements had been approved and signed by the board of directors, they would be presented at a shareholders meeting.

[20] On 2 December 2019 the applicant’s attorney, having been provided with a proxy by the applicant to do so, attended the shareholders meeting. Only two of the directors were present, being the second and fourth respondents, and the meeting could accordingly not proceed.

[21] According to the applicant's supplementary affidavit, subsequent to the hearing on 6 July 2021 and prior to the respondents having delivered an answering affidavit, the company provided financial statements to the applicant's attorneys for the period 2016 to 2020 (inclusive). The 2016, 2017 and 2018 annual financial statements are headed "Annual Financial Statements" whereas the statements for 2019 and 2020 were headed "Management Financial Statements". Furthermore, the report submitted by the company's auditors as part of the 2016, 2017 and 2018 financial statements was headed "Report of the independent auditors" whereas the 2019 and 2020 statements were headed "Practitioner's compilation report".

[22] It is the contention of the applicant that the management accounts presented by the company for the 2019 and 2020 financial years do not comply with the minimum requirements of the Companies Act as they have not been independently reviewed.

[23] Further concerns raised by the applicant about the 2019 and 2020 management accounts relate to the manner in which the loan accounts were recorded and the fact that there was a significant jump in the values of the loan accounts from the 2018 annual financial statements to the 2019 and 2020 management financial statements which appears to have been due to interest having accrued on the shareholder loans. It is the contention of the applicant that this resulted in a significant increase in the liability of the company in terms of short-term loans payable to the applicant and to two independent companies who had loaned funds to the company. According to the applicant, the directors hold a beneficial interest in the aforesaid independent companies.

[24] A further concern raised by the applicant in his supplementary affidavit is that the 2019 and 2020 management financial statements reflect no loan owed to an independent company known as Riverbend. This means, according to the applicant, that the loan to Riverbend was settled by the company in 2019 and this would accordingly be in breach of the Investec Facility Agreement. According to the applicant,

the 2018 annual financial statements reflect that the loan account of Khutula Russet, a second independent company, was reduced in an amount of approximately R900.000. The Investec facility agreement provides that all loans by the company are subordinate to the Investec loan. The applicant contends that, as the Riverbend loan was settled by the company, the company is in breach of the agreement with Investec and the company, and all those who stood surety on its behalf, including the applicant, are at risk of being called upon by Investec to settle the full balance outstanding on the Investec loan. It is the case of the applicant that he was not aware of any shareholders meetings at which approval was sought to repay loans due to the independent companies.

[25] In the opposition to the application, the respondents contend, firstly, that the applicant has failed to set out facts to establish any of the circumstances referred to in section 163(1) of the Act, alternatively, that the applicant has failed to set out facts in support of the remedies sought by him in terms of section 163 (2) of the Act.

[26] The respondents confirm that the 2019 and 2020 management statements are not the annual financial statements and that they were not audited and contend that the AFS for 2019 and 2020 have since been provided to the applicant and are in the process of being independently audited.

[27] The respondents contend that the business of the shopping centre, the sole asset of the company, is being conducted well and that the company is profitable. As at May 2021, the company had reduced the loan balance due to Investec to approximately R29 million. According to the respondents the judgment granted against the company was erroneously granted and has been rescinded and there is no unresolved tax liability. It is the respondents' further contention that the company is entitled to claim an allowance in respect of expenditure incurred by the company, as lessee, in effecting improvements to leased property in an amount equivalent to 4% of the total expenditure incurred by the company pursuant to its obligations to affect the aforesaid improvements. Furthermore, the company is entitled to a rates rebate for the reasons

set out in the answering affidavit and that this issue is as yet unresolved. In any event, so say the respondents, the company has sufficient financial resources to pay the amount claimed by the local council for rates and this is not an issue which supports a claim as envisaged by section 163(1).

[28] The respondents admit that an agreement dealing with the sale of the applicant's shareholding and payments of his loan accounts was concluded. However, it is contended on their behalf that the parties had not agreed on the time on the time when the shopping centre would be sold.

[29] The respondents admit that an annual general meeting was held on 26 July 2018. It is contended on their behalf that the company has provided financial statements to the applicant and they have undertaken to provide to the applicant independently audited annual financial statements for 2019 and 2020.

[30] The respondents admit that subsequent meetings were held but they deny that the issues raised by the applicant were not constructively addressed.

[31] Much of what is contained in the applicant's founding and supplementary affidavits is not disputed by the respondents. The primary basis of the opposition to the application may be summed up as follows:

- 1 The applicant has not complied with the statutory requirements to support his relief sought;
- 2 The respondents are opposed to the applicant being appointed as a director of the company;
- 3 The financial statements for the period 2015 to 2018 had been provided to the applicant at the time that the application was instituted;

4 The financial statements for the period 2019 to 2020 were subsequently provided to the applicant and these were in the process of being independently reviewed;

5 The respondents have convened shareholders meetings when called upon by the applicant to do so;

6 The issues relating to the company's rates liability, rentals due and the company's tax liability had been resolved, alternatively, were in the process of being resolved and Investec Bank is 'content' with the company's financial situation.

[32] The issue for determination in this matter is whether or not the applicant has satisfied the jurisdictional requirements for relief under section 163 of the Companies Act, 2008. In order to be successful, the applicant must establish the following:

1 That a particular act or omission has been committed, or the affairs of the company have been conducted in a dubious manner and the effect of the conduct complained of is unduly (or unfairly) prejudicial, unjust or inequitable to him;

2 The nature of the relief sought will bring an end to the matters complained of, and

3 That is just and equitable that such relief be granted.

The court's jurisdiction to make an order in terms of section 163 does not arise until the specified statutory criteria have been satisfied¹. The applicant bears the onus of satisfying the court that the particular act or omission has been committed.

¹ *Louw and others v Nel* 2011 (2) SA 172 (SCA).

[33] The jurisprudence which has been developed over the years as to what constitutes oppressive or unfairly prejudicial conduct is aptly and comprehensively dealt with by the SCA in *Grancy Property Ltd v Manala and others*². Oppressive conduct denotes conduct which is 'burdensome, harsh and wrongful' and includes conduct which lacks good faith and fair dealing in the affairs of a company³.

[34] I find that there have been repetitive breaches by the respondents of their statutory duties. The respondents have not complied with the statutory requirements relating to the provision and presentation of annual financial statements. There has, furthermore, been a consistent failure on behalf of the respondents to convene general meetings. The papers are replete with instances of attempts on behalf of the applicant to obtain responses from the respondents to his queries. The respondents either failed to respond or failed to respond in a meaningful way.

[35] As a result of these breaches of statutory requirements, the applicant, as a shareholder, is deprived of access to properly valued and reviewed information as to the value of his investments. It was submitted by Mr Harcourt SC on behalf of the applicant that this is, per se, shareholder oppression. I agree with that submission. A further indication of prejudice is found in the failure of the respondents to deliver proper financial statements in accordance with the requirements of the Companies Act and its regulations.

[36] In my view the applicant has been excluded from participating in the conduct of the company's business in circumstances where it is alleged that its affairs have been conducted inappropriately and that such conduct constitutes minority oppression which is prejudicial to the applicant.

[37] The applicant's shareholder loan funding is being utilised by the company and the security that he has provided to Investec enabled the company to secure its loan

² *Grancy Property Ltd v Manala and others* 2015 (3) SA 313 (SCA).

³ *Grancy Property Ltd supra* at para 24.

finance from Investec. Despite this the respondents have not included the applicant in any meaningful way in decisions relating to the management of the company or to provide him with financial documents to show that his investment is secure. I agree with the submission of the applicant that, as a shareholder of the company, he has essentially been left in the dark as to its financial status.

[38] In all the circumstances, I am satisfied that the applicant has made out a case for the relief that he seeks.

[39] The court has a wide discretion to grant relief that it considers equitable in all the circumstances of the case⁴. The respondents have exhibited an attitude which lacks bona fides and fairness towards the applicant and it is apparent from the affidavits that this situation has been going on for some time. I accordingly grant the relief that the applicant is to be appointed as a director forthwith. In paragraph 2 of the notice of motion, the applicant seeks an order that the financial statements be provided for the period 2016 to 2019. I can see no reason why I should not grant an order that financial statements are to include those relating to the financial years 2020, 2021 and 2022, regard being had to the fact that the application was argued in August 2022. In the event that the respondents do not provide the financial statements within the period provided for, then the applicant is permitted to approach court for relief.

Costs

[40] The applicant has been successful and there is no reason why costs should not follow the result.

[41] The costs of various proceedings in the litigation between the parties need to be addressed.

[42] The respondents contend, in their affidavit in support of the application for condonation for the late filing of their answering affidavit, that they furnished to the

⁴ Louw *supra* at para 21.

applicant financial statements in an effort to avoid further litigation. Subsequent thereto the applicant delivered a supplementary affidavit which necessitated the respondents to respond thereto. The applicant opposed the respondents' application for condonation for the late filing of the answering affidavit primarily on the basis that there was an unreasonable delay in filing the answering affidavit.

[43] I have had regard to the reasons for the necessity for the applicant to deliver a supplementary founding affidavit and to the reasons set out in the respondents' application for condonation for the late delivery of the answering affidavit for the purposes of making a costs order in each of these interlocutory applications.

[44] In my judgment, and in both cases, there has been a satisfactory explanation for the delay, alternatively, for the need to file a further supplementary affidavit.

[45] In deciding whether to grant condonation, a court may, on good cause shown, grant condonation. A full and reasonable explanation for the default must be given and the applicant for condonation should satisfy the court on oath that he has a *bona fide* defence or claim. An additional consideration involves the broad assessment of whether it is in the interests of justice to grant condonation. It was my view that it was in the interests of justice to grant condonation for the late filing of the answering affidavit and for the filing of the supplementary founding affidavit.

[46] There were no grounds for the applicant reasonably to object to the application for condonation for the late filing of the answering affidavit and so the respondents are entitled to the costs of that application. Similarly, I find that the respondents have not reasonably objected to the application by the applicant to supplement his founding affidavit. The reasons set out by the applicant in support of his application for leave to file a supplementary affidavit are reasonable in the circumstances where he dealt with issues that came about subsequent to him deposing to his founding affidavit. The applicant is accordingly entitled to his costs of that application.

[47] An application for security for costs in terms of rule 47(3) was delivered on behalf of the respondents on 22 December 2020 with the applicant delivering his answer thereto on 3 February 2021. The respondents have not replied and have abandoned this application. According to Mr Harcourt SC, on behalf of the applicant, there has been no tender made by the respondents for the costs of this application. The respondents conceded that they were not persisting with the application for security. I accordingly find that the applicant is entitled to the costs incurred by him in opposing the application for security for costs.

Order

[48] I accordingly grant an order in the following terms:

- 1 The applicant, DANIEL ARTHUR KNOTT, is appointed as a director of the first respondent forthwith and the respondents are directed to sign all documents necessary for such appointment, which appointment as director is to be in addition to the existing directors presently in office.
- 2 The first respondent is ordered to produce and deliver to the applicant, within forty days of the grant of this order, signed financial statements in the form required by the Companies Act, Act 71 of 2008 for the financial years 2016, 2017, 2018, 2019, 2020, 2021 and 2022.
- 3 In event of non-compliance with paragraph 2, the applicant is granted leave, on papers duly supplemented, to approach court for further relief.
- 4 The second, third, fourth and fifth respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved.
- 5 The respondents are directed to pay the applicant's costs of the application for leave to file a supplementary founding affidavit.

6 The respondents' application for condonation for the late filing of the answering affidavit is condoned and the applicant is directed to pay the costs of that application.

7 The second, third, fourth and fifth respondents are directed to pay the costs of the application in terms of Rule 47.

8 The costs referred to are to include the costs of senior counsel where employed.

SMART AJ

DATE OF HEARING: 11 AUGUST 2022

DATE OF JUDGMENT: 16 FEBRUARY 2023

APPEARANCES

For the applicant:

MOONEY FORD & PARTNERS

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UMHLANGA

Ref: IG King/Nikki/K2314

For the first to fifth respondents:

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MR HOAR

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LA LUCIA

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