<u>IN THE HIGH COURT OF SOUTH AFRICA</u>
<u>FREE STATE DIVISION, BLOEMFONTEIN</u>

Case No.: **3091/2022**

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

ORGANO GOLD HOLDINGS LTD (H.K.) (S.A.R.) P.R.C.	First Applicant
OG SOUTH AFRICA (PTY) LIMITED (Registration number: 2017/652639/07)	Second Applicant
and	
PHILIP HENRY HARTSLIEF	First Respondent
BLUE LAWN ENTERPRISES (PTY) LTD (in liquidation)	Second Respondent
SAVANNAH LODGE 65 (PTY) LTD	Third Respondent
THE MASTER OF THE HIGH COURT : **JOHANNESBURG**	Fourth Respondent

<u>JUDGMENT BY:</u> VAN RHYN, J

<u>HEARD ON:</u> 15 SEPTEMBER 2022

DELIVERED ON: 14 OCTOBER 2022

INTRODUCTION.

[1] On 5 July 2022 the applicants brought an urgent application for an order authorising the Sheriff to attach and place into safekeeping any and all of the second respondent's assets in the possession or under the control of the first respondent pending the appointment of a liquidator or provincial liquidator to the second respondent and interdicting the first respondent from disposing of the second respondent's assets.

[2] On 5 July 2022 the court granted the rule *nisi* on an urgent ex parte basis. The first respondent is the only party who is an active participant in this application. He does not oppose the substantive relief sought by the applicants, but has filed an answering affidavit and joins issue with the applicants solely in order to argue the costs.

THE PARTIES.

[3] The first applicant, Organo Gold Holdings Ltd (H.K.) (S.A.R.) P.R.C is a company incorporated and registered in accordance with the laws of Hong Kong in the People's Republic of China. The second applicant was incorporated in South Africa for the purposes of operating the Organo Group's business in South Africa. The Organo Group is a global company that markets its premium products in the luxury consumables industry to clients and to authorised distribution partners. During 2018 the first applicant appointed the first respondent as its local managing director responsible for developing the Organo business in South Africa.

[4] The first respondent is Phillip Henry Hartslief ("Mr Hartslief"), a major business man of Parys in the Free State Province. Mr Hartslief is the former sole shareholder and sole director of Blue Lawn Enterprises (Pty) Ltd (in liquidation), the second

respondent (“Blue Lawn”). Blue Lawn has its registered address at Honeydew, Gauteng.

[5] The third respondent is Savannah Lodge 65 (Pty) Limited (“Savannah Lodge”), cited because execution of the order granted in terms of the urgent application on 5 July 2022 had to occur at its premises at Parys. Mr Hartslief is also the director of the third respondent. No costs are sought against the third respondent unless it opposes the relief sought, which it did not.

[6] The fourth respondent is the Master of the High Court, Johannesburg (the “Master”) The Master is cited as an interested party, representing the interests of Blue Lawn as the Master had not yet appointed a provisional liquidator at the time when this application was issued. At the time of the hearing on the return day, this court was informed that a final certificate of appointment had been received.

BACKGROUND.

[7] On the 5th of July 2022 Van Zyl J granted the order sought by the applicants and issued a rule *nisi* with return day the 4th of August 2022 calling upon the respondents to advance reasons why the order set out in paragraph 3 of the Notice of Motion, which consists of paragraph 3.1 to 3.9, should not be made final. Only Mr Hartslief opposes this application. On behalf of Mr Hartslief it is argued that he has complied with, not only the provisions of Part A of the applicants’ Notice of Motion, but has also complied with Part B of the relief sought by the applicants.

[8] Mr Lamplough SC on behalf of the applicants therefore contends that the only issues that require a pronouncement by the court, is whether an application by the applicants was necessary and the question relating to costs. The applicants are moving for a punitive costs order against Mr Hartslief.

[9] The background relating to this matter is as follows: Blue Lawn was placed into voluntary liquidation by Mr Hartslief on 17 January 2022. The second applicant is a creditor of Blue Lawn and is the sole authorised distributor of Organo Gold Products in South Africa. On 26 January 2022 the Johannesburg High Court granted

an order by agreement between the parties declaring, *inter alia*, that Mr Hartslief is, and has been since 1 February 2019 the registered shareholder of the shares in Blue Lawn as nominee for and on behalf of the first applicant. The first applicant is therefore the sole beneficial shareholder of all the shares in Blue Lawn

[10] On 7 February 2020 the parties agreed that the stock belonging to Blue Lawn be placed in a locked cage in a warehouse at Honeydew, which warehouse was leased by Mr Hartslief and/or one of his affiliated entities and being the registered address of Blue Lawn. The agreement was that the keys to the cage would be handed to the applicants' attorneys of record, ENSafrica as custodian. The stock would be kept in the cage pending a court order in relation thereto or the registration of the transfer of the shares to the first applicant or pending any agreement between the parties.

[11] On 8 February 2020 an inventory was prepared of to the stock to be preserved and the cage was locked. The keys to these locks were handed to the applicants' attorneys as agreed. Some 8 months later, on 7 October 2020, a second inspection of the stock was arranged. On preparing the second inventory the first applicant became aware that some of the stock were missing. The applicant's attorneys addressed correspondence to Mr Hartslief and informed him of their findings to which Mr Hartslief's attorney replied stating that he, Mr Hartslief "has not sold nor traded in any Organo products and will continue to do so". Mr Hartslief's attorney furthermore confirmed that an embargo on the sale of the stock is in place pending the outcome of the shareholding dispute.

[12] Towards the end of May 2022 authorised distribution partners of the second applicant complained that expired stock, or soon to be expired stock, was being sold on the South African market at greatly reduced prices. These sales were being conducted by unauthorised sellers. An investigation conducted by the applicants indicated that the goods being sold on the market were stock belonging to Blue Lawn and which was supposed to be in the locked cage in the warehouse at Honeydew. On 28 June the applicants ascertained that the warehouse at Honeydew was empty.

[13] Subsequent to the order being granted on 5 July 2022, the sheriff attended at the premises of Savannah Lodge and a significant amount of the stock that was kept in the cage at Honeydew was found at the premises. A trailer and a 14-ton truck were required to remove the stock for safekeeping. Mr Hartslief on his arrival at the lodge, pointed out stock not already removed by the sheriff. However, the sheriff also found additional stock at another shed and had to use a bolt cutter to cut the lock and gain access to the shed.

[14] Mr Hartslief deposed to two affidavits and in the second affidavit, deposed to on 19 July 2022, he stated that he caused the stock to be removed from Honeydew to Savannah Lodge at Parys. He furthermore provided an explanation how some of the stock was sold at a market and some of the stock were consumed by visitors and guests at Savannah Lodge. Mr Hartslief thus, in principle had no objection to the stock being removed from his premises and held by the liquidator of Blue Lawn as prayed for by the applicants in the Notice of Motion.

[15] Even though Mr Hartslief, to a great extent, complied with the interim order granted on 5 July 2022 in that he disclosed the location of the stock and goods listed in the inventories to the sheriff and stated under oath the whereabouts of Blue Lawn's stock listed in the inventories, he nonetheless decided to oppose the application with the result that the return day of 4 August 2022 had to be postponed to the opposed roll, Mr Hartslief to pay the wasted costs including the actual travelling costs of the applicants' legal representatives. In his answering affidavit he does not challenge the substantive relief sought but confines his evidence to attempts to justify and explain why the stock was moved to Savannah Lodge to avoid being ordered to pay the costs.

<u>COSTS</u>

[16] The applicants seek the following costs orders against Mr Hartslief:

16.1 that he reimburses the applicants for the vouched costs incurred by it in respect of the sheriff's costs of attaching, removing and storing Blue Lawn's goods and stock; and

16.2 that Mr Hartslief pays the applicants' costs of the application on the scale as between attorney and client.

[17] It is well established that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale.[1] The purpose of an award of costs to a successful litigant is to indemnify him for the expenses to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be. However, due to the process of taxation, the award is usually not a complete indemnity.

[18] The determination of an appropriate costs order is in the discretion of the court which discretion is based on a number of factors in order that such discretion be exercised judiciously. These factors include consideration of the facts of each case, weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.[2]

[19] Mr. Lamplough SC argued that Mr Hartslief had no right to deal with Blue Lawn's assets whilst it is under the control of the Master and acted in flagrant breach of the agreement regarding the safekeeping of the stock. Mr Hartslief did not inform the applicants that he intended to or had removed the stock from the cage kept in the warehouse at Honeydew and had relocated same to Savannah Lodge at Parys.

[20] The answering affidavit filed by Mr Hartslief are in excess of fifty pages with significant portions containing entirely irrelevant information, unsubstantiated facts and hearsay evidence. He failed to establish any possible justification for his actions and has put the applicants to costs they ought not to be required to bear.

[21] Me Van der Sandt, counsel on behalf of Mr Hartslief contended that a punitive cost order is not justified on the basis that the applicants proceeded with an *ex parte* application on 5 July 2022, while they could merely have asked Mr Harslief where the stock was prior to launching the urgent application. This matter could have been

[1] Maloney's Eye Properties v Bloemfontein Board Nominees 1995 (3) SA 249 at 257 F-G.
[2] Erasmus Superior Court Practice D5 -6.

settled without the need for the court's intervention and the resultant costs implications.

[22] On 29 June 2022 the applicants' attorney of record addressed correspondence per email to the attorney acting on behalf of Mr Hartslief requesting confirmation by close of business that all the stock kept under lock and key remains at the warehouse. To date of hearing the application no response had been received from Mr Hartslief or his attorneys.

[23] I therefore agree with the contention on behalf of the applicants that Mr Hartslief's deceptive conduct necessitated the application by the applicants on an *ex parte* basis. Mr Hartslief acted in bad faith. The dishonest and deceptive conduct by Mr Hartslief is deserving of censure by this court and constitutes exceptional circumstances justifying a punitive cost award. On 4 August 2022, the return day set in the order granted on 5 July 2022, only Me Nieuwoudt, junior counsel on behalf of the applicants appeared for the postponement. I furthermore agree with the argument raised by Mr Lamplough SC that the application, with annexures amounting to 376 pages, appears to be one of importance and of substance and I am satisfied that the costs of two counsel who are based in Johannesburg are justified.

[24] **ORDER**:

In the result the following order is granted:

1. Pending the duly appointed liquidator (or provisional liquidator) to the second respondent taking possession and control of the assets of the second respondent:

1.1 The first respondent is interdicted from disposing of any of the second respondent's assets including any products forming part of the stock listed on the inventory lists attached to the founding affidavit of Cornelia Johanna van Graan as FA 9 and FA 10.

1.2 The Sheriff of the High Court is directed to hold in safekeeping the goods removed from the premises of the third respondent and/or the residential address of the first respondent situate at Savannah Lodge, Woolridge 65, Parys, Free State Province on 6 July 2022 until such goods can be surrendered to the liquidator appointed to the second respondent.

1.3 The Sheriff of the High Court is authorised to enter onto any premises where the goods of the second respondent, including the products listed in FA 9 and FA 10 to the founding affidavit are situated, to take possession of such goods, and to place the goods in safekeeping.

1.4 The Sheriff's costs of attaching, removing and storing the goods arising from orders 1.2 and 1.3 above, shall be paid by the applicants.

2. The first respondent is ordered to reimburse the applicants the vouched costs incurred by it under paragraph 1.4 above.

3. The first respondent is ordered to pay the applicant's costs of this application on the scale as between attorney and client, such costs to include the costs of two counsel, where so employed and the actual travelling costs of the applicants' attorneys and counsel who are based in Johannesburg.

VAN RHYN, J

On behalf of the Applicants:	ADV. A. LAMPLOUGH SC ADV M H NIEUWOUDT
Instructed by:	MCINTYRE VAN DER POST ATTORNEYS BLOEMFONTEIN
On behalf of the First Respondent:	ADV. N VAN DER SANDT

Instructed by:	SPANGENBERG ZIETSMAN & BLOEM ATTORNEYS BLOEMFONTEIN