

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 59836/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

In the matter between:

BONGANI CYPREAN GAMEDE

Applicant

v

PROCESS DESIGN AND AUTOMATION (PTY) LTD

First Respondent

BESISONKE NDABA

Second Respondent

DAVE BULLER

Third Respondent

JACOBUS SUTHERLAND

Fourth Respondent

PAUL BARNARD

Fifth Respondent

FRANCOIS VAN HUYSSTEEN

Sixth Respondent

REASONS FOR ORDER DATED 25.11.2020

BASSON J,

[1] This was an application brought on severe truncated times. The applicant (Mr Gamede) sought the following relief against the respondents.

- 1.1 That the applicant be declared as the rightful owner of 25% of shares of the first respondent.
- 1.2 That the applicant be recorded as a 25% shareholder in the first respondent's share register.
- 1.3 That the applicant be recorded as a 25% shareholder of the first respondent in the records of the Companies Intellectual Property Commission (CIPC).
- 1.4 That the shareholding be so recorded in the first respondent's Memorandum of Incorporation (MOI).
- 1.5 That the applicant be issued with the share certificate confirming his 25% share ownership of the first respondent.
- 1.6 That all the respondents, jointly and severally, pay the costs of the application.

[2] After having heard the parties, an order was made dismissing the application with an order that the applicant pays the costs on a punitive scale.

[3] Apart from the fact that the application is not urgent, the application is entirely without merit and falls to be dismissed, *inter alia*, on the following basis:

- 3.1 The applicant is not entitled to the relief sought: He does not have the requisite *locus standi* to institute the proceedings.
- 3.2 The matter is not urgent.
- 3.3 The application is replete with factual disputes that cannot be resolved in motion proceedings.

- 3.4 There exists no cause of action for seeking a declaratory and the relief sought is defective regarding the final interdictory relief that is sought.
- 3.5 The interdictory and/or final relief sought that the applicant should “*be recorded as a 25% shareholder of the first respondent in the records of the Companies Intellectual Property Commission*” is defective in various respects, such as the fact that the CIPC is not a party to the proceedings. The applicant has also not complied with the procedural requirements set out in the Shareholder’s Agreement and the MOI.
- 3.6 The Practice Directives have not been complied with nor has proper service of the matter been affected as required. The matter has also not been enrolled before the closing of the roll.

URGENCY:

[4] In the papers the applicant alleges that he has “*in consultation with my legal representative...*” and “*having been advised in this way by my legal representative*” realised that he “*urgently need to remedy the situation to have the rightful owner registered as the shareholder in the Company’s share register*”. Even if there was a case made out on the papers for this contention (of which no case has been made out on the papers as will be pointed out herein below), this can, on no conceivable basis, be urgent.

[5] The facts set out in the applicant’s founding papers do not constitute sufficient urgency for the application to be brought as an urgent application nor has a case been made out justifying the severe curtailment of the normal time periods referred to in Rule 6(5) of the Uniform Rules of Court. The applicant also does not explain to the court why this dispute cannot be heard in the normal course and why it is so urgent that he should become a shareholder on such an urgent basis. If anything, if regard is had to what the applicant states in his papers, he was offered shareholding (on his version) in the first respondent during January 2018. Why it then took the applicant more than two years to approach this court is, in any event, not explained on the papers.

NON-COMPLIANCE WITH PRACTICE DIRECTIVES:

[6] It is trite that a Notice of Motion in urgent applications (and in accordance with the Practice Directives) must stipulate that all three sets of papers, being the founding, answering and replying papers, must be filed of record before the roll closes at noon 12h00 on a Thursday preceding the hearing date on a Tuesday. This matter was set down for Tuesday 24 November 2020. That therefore meant that all papers (including the founding affidavit, the answering affidavit and the replying affidavit) must have been filed and uploaded by 12h00 the previous Thursday (therefore before 12h00 on Thursday, 19 November 2020). Failure to comply herewith, *“the application will not be heard”*.

[7] The Notice of Motion in the present matter directs the respondents to file their answering affidavit by the close of business on Thursday, 19 November 2020 and therefore not before noon. That meant that, in the present matter, the respondents had to file their answering affidavits no later than 16h30. This was obviously after the roll closed. The Practice Directive has not been complied with and the Notice of Motion is therefore defective.

[8] The applicant provides no explanation as to why the Urgent Court’s Practice Directives have not been complied with regarding the filing and/or uploading of all the papers after the closing of the roll at noon (the previous Thursday prior to the hearing set down for Tuesday). The applicant has also failed to properly explain why such severe truncated time periods were imposed on the respondents.

NO LOCUS STANDI:

[9] Apart from the fact that the matter is not urgent, the applicant does not have any *locus standi* and makes out no cause of action on the papers. The high watermark of the applicant’s case on the merits is that he is *“the rightful owner of 25% of shares of the first respondent”* and also claims he was entitled to purchase shares by *“agreement between our client (applicant) and Mr Dave Buller”* (Mr Buller is the third respondent).

[10] The applicant does not make out a case on the papers that he is indeed a shareholder as claimed. Only a shareholder of the first respondent will have *locus standi* to apply for the relief sought.

[11] Not only is the applicant not a shareholder, he also does not make out a case on the papers that he is entitled to become a shareholder. This is where the facts set out in the founding affidavit become unravelled: On the one hand the applicant contends that he had an agreement with the third respondent (Mr Buller) to the effect that he had purchased shares equivalent to 25% of the first respondent. Then he contends that he had another agreement with the second respondent (Ms Ndaba) to be his “*representative*” in respect of the shareholding and directorship to which he is ostensibly entitled to. This is confusing and it is simply impossible to ascertain from the papers exactly what is contended by the applicant: (i) whether he seeks to enforce the agreement between himself and Mr Buller (third respondent) concluded during 2018; or (ii) whether he seeks to enforce the “*representative*” agreement concluded with Ms Ndaba (second respondent).

[12] The applicant also provides no particularity regarding the conclusion of the alleged agreement with the third respondent (Mr Buller) and, in any event, Mr Buller expressly denies the alleged agreement ostensibly concluded with him. The applicant also alleges that he would make periodic/instalment payments “*over a period from 2018 to 31 December 2021*”. Upon this version of the applicant, the applicant will only become owner subsequent to making payment thereof at “31 December 2021”. On this construction, the applicant has, in any event, no *locus standi* to insist on becoming a 25% shareholder before “31 December 2021”.

[13] Similarly, the applicant provides no particularity of the “*representation*” agreement allegedly concluded with the second respondent.

FACTUAL DISPUTES:

[14] The papers are replete with substantial and real dispute of fact that cannot be resolved on the papers. The applicant ought to have foreseen this

but nonetheless forged ahead with this application. One of the central issues in dispute is whether or not a written Sale of Shares Agreement had been concluded. This is not an issue that can be decided on the papers. See in this regard: *National Director of Public Prosecutions v Zuma*¹:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.”²

[15] I am in agreement with the respondents that the various factual disputes are insurmountable and that the application should therefore be dismissed.

Non-compliance with statutory requirements

[16] The applicant faces numerous difficulties with his contention that he is entitled to become a shareholder. It falls outside of the scope of this brief judgment to deal with these difficulties in detail. Suffice to point out that his insistence to become a shareholder is in direct conflict with section 15(7) of the Companies Act.³ Section 15(7) stipulates:

¹ 2009 (2) SA 277 (SCA).

² See also *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 (SCA) at paras [21] – [23].

³ Act 71 of 2008.

“The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, that any such agreement must be consistent with the Act and the company’s Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company’s Memorandum of Incorporation is void to the extent of the inconsistency.”

[17] The applicant does not, for example, deal with the first respondent’s MOI and the requirements set out therein. Similarly, the applicant also does not deal with the written Shareholder’s Agreement and the provisions contained therein. Briefly, the applicant’s insistence to become a shareholder is in direct conflict with the Shareholders’ Agreement. In terms of the Shareholder’s Agreement, the second respondent (the deponent to the answering affidavit), the third and the fifth respondents are the shareholders of the first respondent. In terms of the Shareholder’s Agreement, the purchase of shareholding must be tabled in an agenda, agreed to whereafter the purchase transaction will be reduced to a written resolution. This has not been done according to the respondents. There is also nothing in the applicant’s founding affidavit that confirms this process. Moreover, in terms of the MOI and the Shareholder’s Agreement, the remainder of the shareholders have a right of first refusal should any existing shareholder wish to sell or otherwise offer their shareholding to be sold to another person. In summary, having regard to the MOI and the Shareholders’ Agreement, various formalities will have to be complied with before the transaction insisted upon by the applicant may occur. There is nothing in the papers to show that there has been compliance with the formalities prescribed in the Shareholders’ Agreement.

[18] Having regard to the MOI, read with the Shareholders’ Agreement and the Act, the applicant has thus failed to allege, prove, plead and produce a written instrument which will entitle him to become a shareholder. As already pointed out, the applicant has also failed to allege, prove or plead that the prescribed process to purchase has been followed or complied with. Failure to do so, the applicant has therefore failed to prove that he has *locus standi* to prosecute this application.

[19] The applicant's contention that he is entitled to transfer of the second respondent's 25% shareholder in the first respondent is likewise without any foundation.

NON-JOINDER:

[20] There are also issues with non-joinder. A certain Mr Venter is also a director of the first respondent, yet he has not been cited as a respondent. As already pointed out, CIPC has likewise not been joined as an interested party to this application.

REMOVAL FROM THE ROLL:

[21] A day before the matter was enrolled for hearing (23 November 2020), the applicant's erstwhile attorneys unilaterally filed a notice removing the matter from the roll. On the same day the applicant's attorneys filed a Notice of Withdrawal of Attorneys of Record. By that time the respondents have already spent considerable time drafting their papers in this matter. The respondents have also by that time filed their Heads of Argument and their Practice Note.

[22] Counsel on behalf of the respondents informed the court that the applicant did indicate to them that he is aware of the fact that the matter will proceed. The applicant indicated to them that he is available to argue the matter. The applicant did in fact appear and argued the matter.

[23] The circumstances in which a matter may be withdrawn are trite: It may only be done either by consent of the parties or leave of the court. Rule 41 reads as follows:

“41 Withdrawal, settlement, discontinuance, postponement and abandonment

(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events

he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

[24] The respondents objected to the withdrawal at such a late stage (without a tender for the wasted costs for such removal and the fact that it was not done by agreement between the parties) and argued that the matter should proceed. I agreed that the withdrawal was irregular and that the matter had to proceed.

COSTS:

[25] Costs should follow the result. The respondents argued that the applicant should pay the costs on a punitive scale. I am in agreement. This application, for the reasons referred to hereinabove, clearly constitutes an abuse of process. For these reasons I have decided to dismiss the matter and to impose a punitive costs order.

[26] The following order was made:

1. The matter is dismissed;
2. The applicant is ordered to pay the costs on attorney and client scale.

AC BASSON
JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 January 2021.

Case number: 59836/2020

Matter heard on: 25 November 2020

For the Applicant: In Person

For the Respondent: Adv J De Beer

Instructed by: GP Van der Merwe Attorneys