IN THE HIGH COURT OF SOUTH AFRICA,

NORTHERN CAPE DIVISION, KIMBERLEY

Reportable/Not reportable

Case No: 1898/2019

In the matter between:

SAMUEL MOTLAPELE MODISE	**FIRST APPLICANT**
NTHABISENG JAQUELINE MASAO	**SECOND APPLICANT**
TEKO MORENENG SCHALK PADISHO	**THIRD APPLICANT**
JOHN LANDELLA	**FOURTH APPLICANT**

and

DANIËL MABE SEKGORO	**FIRST RESPONDENT**
THE COMMISSIONER: COMPANIES & INTELLECTUAL PROPERTY COMMISSION	**SECOND RESPONDENT**

Heard: **09 February 2021**

Delivered: **12 March 2021**

JUDGMENT: THE APPLICATION FOR LEAVE TO APPEAL

PHATSHOANE AJP

[1] This is an application for leave to appeal the whole of my judgment and order dated 30 October 2020 in terms of which:

1.1 Mr Daniël Mabe Sekgoro, the first respondent, was declared to have been duly appointed the director and shareholder of Kgaraga Investment Company, Registration No: 1998/000603/07, since 23 December 2015.

1.2 The Commissioner of Companies and Intellectual Property Commission (CIPC) was authorised and directed to do all things necessary to effect amendments to CIPC records by erasure of the names of Mr Samuel Motlapele Modise, Ms Nthabiseng Jaqueline Masao, Mr Teko Moreneng Schalk Padisho and Mr John Landella, the first to fourth applicants, as directors and shareholders of Kgaraga Investment Company.

1.3 The applicants were ordered to pay the costs of the application, jointly and severally, the one paying, the other to be absolved

[2] The Judgment and order is attacked on three primary grounds. It was contended for the applicants that I erred in finding that:

2.1 Mr Sekgoro had the necessary *locus standi* to bring the application and had followed correct procedures in vindicating his rights;

2.2 the non-joinder of the directors in their official capacity, the company and its shareholders was inconsequential to the order sought by Mr Sekgoro and in relying on *Hülse-Reutter & others v Gödde*[1] to justify the non-joinder of the company.

It was further argued that I erred in awarding costs against the applicants in their personal capacity in the circumstances where Mr Sekgoro represented himself.

[3] In the main application the present applicants, who were the respondents, filed seven-page-long heads of argument. In the current application the heads of argument run to 30 pages. They traverse several sections of the Companies Act, 71 of 2008 ("the Act") and canvass some questions of law which were never argued during the main application. I must also add that the heads deviate a bit to capture some additional evidence which does not address any of the grounds of appeal. I have pointed out in the primary judgment that Mr Sekgoro's melancholy that his company was hijacked by the applicants was met with bare denials. In submissions, a belated attempt is made by the applicants to amplify their unsubstantiated denials to argue that in terms of s 213 of the Act it is an

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[1] 2001 (4) SA 1336 (SCA) at 1346A-C.

offence to disclose confidential information concerning the affairs of any other person. This of course, has no bearing on any of their grounds of appeal.

[4] As captured in para 5 of the main judgment Mr Sekgoro lodged a complaint with the CIPC, concerning the takeover or hijacking of Kgaraga Investment Company, which issued an inspectors report on 24 February 2020. The report succinctly sets out the background as foreshadowed in the main judgment. It is important to detail the contents of the report. It reads in part:

> "On 30 August 2019 a letter (Annexure B) was written and sent to the directors of the company requesting them to provide copies of documents that were submitted to CIPC in the application for the removal of Mr Sekgoro as a director. A response from the directors was required by 6 September 2019 but no response nor acknowledgement was received by the inspector, the same letter was resent to the company on 13 September 2019 and still no response was received. On 13 September 2019 the inspector contacted one of the directors Mr. Landela to verify his email address, but he instead provided an alternative email address ...@gmail...for the inspector to send the letter. On 20 September 2019 Mr. Landela sent an email and attached documents that were submitted to remove Mr. [Sekgoro] as a director (Annexure C).
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> The documents that were submitted are:
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> - CoR Form dated 19/03/2019
> - A copy of the resolution of a meeting held on 11 March 2019 signed by John Landela Wilco Kaith, Peko Padisho, Nthabiseng J, Khomo, Allen Rhoda, Nomathemba Landela and Sam Modise.
> - A copy of an affidavit by John Landela
> - A letter authorising Mr. Chineme Ogu to submit forms to CIPC
> - Meriting Investments (Proprietary) Limited share certificate
> - Certified id copy of Ogu Chineme
> - Certified id copy of Samuel Motlapele Modise certified by Chineme Ogu
> - Certified id copy of John Landela
> - Certified id copy Padisho Schalk
> - Certified id copy Nthabiseng Masao
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> According to Section 71 of the Act a director may be removed by an ordinary resolution passed at a shareholders meeting and before the shareholders may consider such resolution, the director concerned must be given a notice of a meeting and the resolution, he must be given an opportunity to make a presentation in person or through a representative.
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> Section 71(8) states that if the company has fewer than three directors, the company must approach the Companies Tribunal for determination.

Conclusion

When Samuel Modise resigned as a director on 6 February 2016, Daniel Mabe Sekgoro became the only director in the company.

Mr. Sekgoro was removed in a resolution passed at a shareholder's meeting where the majority of the current directors were also appointed as directors, effectively the company only had Daniel Sekgoro as a director. The Company should have followed the provisions of Section 71(8) in applying for the removal of Mr. Sekgoro.

Recommendations

It is recommended that: the Commissioner approves the inspector's report on Kgaraga Investments Company (Pty) Ltd.

It is recommended that copies of the report be given to Daniel Sekgoro and to the current directors of Kgaraga Investments Company (Pty) Ltd as required in terms of Section 170(2)(b) of the Act.

It is recommended that the company reverse the removal of Daniel Mabe Sekgoro as a director in Kgaraga Investments Company (Pty) Ltd and reinstate him as a director. The company after having complied with the provisions of Section 71 of the Act and the requirements for a removal of a director by CIPC, can consider filing a new application for the removal of Daniel Mabe Sekgoro."

[5] Section 170 of the Act deals with the outcome of the inspector's investigation referred to above as follows:

"(1) After receiving the report of an inspector or independent investigator, the Commission or Panel, as the case may be, may-

(a) excuse any person as a respondent in the complaint, if the Commission or Panel considers it reasonable to do so, having regard to the person's conduct, and the degree to which the person has cooperated with the Commission or Panel in the investigation;

(b) refer the complaint to the Companies Tribunal, or to the Commission or the Panel as the case may be, if the matter falls within their respective jurisdictions in terms of this Act;

(c) issue a notice of non-referral to the complainant, with a statement advising the complainant of any rights they may have under this Act to seek a remedy in court;

(d) in the case of the Commission, propose that the complainant and any affected person meet with the Commission or with the Companies Tribunal, with a view to resolving the matter by consent order;

(e) commence proceedings in a court in the name of the complainant, if the complainant-

(i) has a right in terms of this Act to apply to a court in respect of that matter; and

(ii) has consented to the Commission or Panel, as the case may be, doing so;

(f) refer the matter to the National Prosecuting Authority, or other regulatory authority concerned, if the Commission or Panel, as the case may be, alleges

that a person has committed an offence in terms of this Act or any other legislation; or

(g) in the case of-

(i) the Commission, issue a compliance notice in terms of section 171; or

(ii) the Panel, refer the matter to the Executive Director, who may, among other things, issue a compliance notice in terms of section 171.

(2) The Commission or Panel, as the case may be-

(a) in its sole discretion, may publish a report contemplated in subsection (1); and

(b) irrespective whether it publishes such a report, must deliver a copy of the report to-

(i) the complainant, or a regulatory authority that requested the initiation of the complaint;

(ii) any person who was a subject of the investigation;

(iii) any court, if requested or ordered to do so by the court; and

(iv) any holder of securities, or creditor, of a company that was the subject of the report, or any other person implicated in the report, upon payment of the prescribed fee."

[6] It can be safely assumed that the inspector's report was forwarded to the applicants, regard being had to its recommendations that they be furnished with copies. The applicants, as the purported directors of the company, on one hand, flatly refused to reverse the removal of Mr Sekgoro as a sole director of Kgaraga Investment Company and to reinstate him as recommended by CIPC. The CIPC, on the other, did not act in terms of s 170 of the Act. In the applicants own words: "it is unbeknown to us if indeed the commissioner approved the report." The CIPC appears to have faded in the background.

[7] In *Singh and Others v The Companies and Intellectual Property Commission and Others*[2] the Court held:

'[26] Whatever the situation may be with regard to a private action launched in the High Court concerning contractual disputes, the present dispute, which deals with the accuracy of company records, falls within the jurisdiction of the Commission, namely to investigate a complaint. This function, as indicated, goes to the heart of its mandate, namely to ensure the proper administration of the Act and compliance with the principles of good corporate governance.

[2] 2019 (5) SA 432 (SCA) at para 26-27

> [27] One would expect if there was an order of preference or priority in relation to the competing fora, the statutory regulator would enjoy preference. The share register is, after all, a document in which the world at large should have confidence. Thus, the Commission must be empowered to fulfil its obligations to ensure accurate records of companies under its jurisdiction, the fulfilment of which is manifestly in the public interest. It stands to reason that the Commission's powers to investigate a complaint concerning the accuracy of a company record must enjoy primacy over private litigation involving companies.'

[8] The facts in *Singh* (supra) are quite distinguishable from the present because in that case the CIPC's decision to actively investigate the complaint was stopped in its track through a review application. The same cannot be said here. Following a period of nine months of inaction on the CIPC and the applicants' side, since the CIPC inspector's report had been issued, Mr Sekgoro had no other recourse but to approach this Court to vindicate his right. The CIPC is a party to this litigation. To date it has not filed any response to any of the issues raised in the papers and did not give its perspective on the matter.

[9] Apparent from their written submissions the applicants are making inferences against themselves that CIPC may have issued a compliance notice against them in terms of s171 to comply with the recommendations of the inspector. If it is so that the CIPC has issued a compliance notice that they reinstate Mr Sekgoro as a sole director of the company, as recommended by the inspector, it is significant that a year later the applicants remain defiant. The whole spectrum of conjecture in respect of a compliance notice that may or may not have been issued does not take the applicants' case any further.

[10] Mr Sekgoro, as found in the main judgment, had a direct and substantial interest in the outcome of the litigation because the applicants took away his company from him. He was entitled to bring this application in the manner he did. He could not have brought it in terms of s 174 of the Act as the applicant sought to argue because the CIPC never issued to him a notice of non-referral in response to his complaint which would have entitled him to apply to a court for leave to refer the matter directly to the court.

[11] As regards the citation of the company, I stated in the main judgment that this was an unusual case. It concerned an amendment to the company records allegedly in a clandestine fashion and in complete disregard of the law. I have also stated in the main judgment that Mr Sekgoro may have cited the company as either an applicant or respondent merely as a prudent measure. I was not swayed that failure to join the company rendered the application fatally defective. Failure to cite the company could not have been prejudicial as no relief was sought against it. In view of the fact that the company had been hijacked, where would Mr Sekgoro have served its papers and upon whom would he have done so. He could have never cited the applicants as the official directors of the company or have served papers on them in that capacity because this would have perpetuated what he believed to be an incorrect factual position.

[12] What remains is the question of costs. The author AC Cilliers: Law of Costs[3] states the following on unrepresented persons seeking costs orders:

> "Where such a litigant employs an attorney to assist him or her with the preparation of an affidavit, the costs can be recovered as a disbursement. It has been held that, when granting an order of costs in favour of a lay litigant, the court should not simply use the word "costs" but should rather make an order in terms of which the lay litigant is awarded "costs limited to actual disbursements reasonably incurred"[4].

[13] In *Schwartz v Goldschmid* 1914 TPD 122 Curlewis J held:

> "I find that in the appeal of *Chester v Oldman* [1914 TPD 67], to which Mr *Blackwell* has referred, the appeal was upheld with costs, but the Court did not lay down what costs. The Registrar informs me that the usual practice is to allow, in a case of this sort, the costs of the litigant who appears in person, based on the scale of the costs of a witness. I think we ought to allow the respondent costs of appeal. His case has been before the Court on several occasions without being reached. The respondent will therefore be entitled to costs, based on the scale for witnesses' costs.'

[14] Mr Sekgoro was represented by a firm of attorneys, Elliot Maris, throughout the litigation. They filed all the pleadings on his behalf and withdrew on 11 August

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[3] Butterworths, Third Edition, 1-7 Issue 32 para 1.03C.

[4] *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia* Ltd 2008 (6) SA 75 (Nm) at 82.

2020, two days prior to the hearing of the main application before me. He is therefore entitled to his costs which the applicants have to bear jointly and severally, in their individual capacity, as I have determined in the main judgment. The order as to costs that I made does not lay down what costs. The courts have frequently corrected or supplemented their orders on matters appertaining to costs.[5] Mr Sekgoro's costs' are his actual disbursements or expenses reasonably incurred.

[15] There is no merit in the applicants' argument that the costs order should not have been made against them in their individual capacity. They were cited on that basis and opposed the application in the same way.

[16] In terms of s 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013, leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard. In my view, the applicants did not satisfy the threshold for granting leave to appeal. It follows that their application for leave should fail.

In the result, I make the following order:

<u>Order</u>

1. The application for leave to appeal is dismissed.

2. The first to the fourth applicants are to pay the costs of the application for leave to appeal limited to actual disbursements reasonably incurred, jointly and severally, the one paying the other to be absolved.

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[5] See Herbstein and Van Winsen: The Civil Practice of the High Courts and The Supreme Court of Appeal of South Africa, 5th Ed, 2009 ch35-p927 III The inherent power of the court to supplement, clarify or correct its own judgment.

MV Phatshoane AJP

Appearances:

For 1st to 4th applicants: Adv J.K Mongala

Instructed by: Althea Le Roux Attorneys

For the respondent *(in person)*: Mr DM Sekgoro