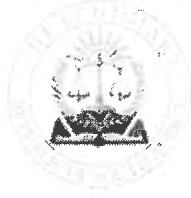


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29859/2015

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
3/9/18	
Date:	WHG VAN DER LINDE

In the matter between:

Naidoo Indrani

1st Applicant

Hlano Investments (Pty) LTD

2nd Applicant

and

Hlano Financial Services (Pty) LTD

1st Respondent

Rakitzis Constantine

2nd Respondent

Beck Bradley Elan

3rd RespondentCompanies & Intellectual Property
Commission4th Respondent

Investec Bank Limited

5th Respondent

Judgment on first, second and third respondent's application for dismissal of the main application on the grounds of no cause of action alternatively foreseeable factual disputes.

Van der Linde, J:

Introduction

- [1] The first applicant ("Naidoo") was dismissed as an employee of the first respondent ("HFS"), and challenges that dismissal in another court. She was also a director and removed as such but disputes that removal. The second applicant ("HI") is the sole member of the first respondent ("HFS"). The second ("Rakitzis") and third ("Beck") respondents are directors of HFS. The applicants ask that this court declares Rakitzis a delinquent director in terms of s.162(2)(a) and (b)(i), read with s.162(5)(c)(i), (iii), (iv)(aa) and (iv)(bb), alternatively in terms of s.163(1)(a), 163(1)(b) and s.163(2)(f)(ii) of the Companies Act 71 of 2008 (the "Act"). They also ask that Surenda Naidoo and Tantaswa Fubu be appointed as directors of HFS in the place of Rakitzis and Beck in terms of s.163(2)(f)(i) of the Act.
- [2] The fourth respondent was joined for its official interest, and the fifth respondent ("Investec") for its commercial interest. The latter is a substantial creditor of HFS but, although represented in the proceedings described below, did not participate actively in them. The fourth respondent did not appear.
- [3] The applicants ask for the relief indicated above in their notice of motion. They initially gave notice however that before this court they would ask for a referral of the main application to oral evidence. Investec does not oppose a reference to oral evidence. The first three respondents' position is different; they resist a referral on the basis that the application should be dismissed for foreseeable factual disputes and because, in any

event, the applicants do not in their affidavits establish a case. They rely on *Valentino Globe BV v Phillips & Ano*, 1998(3) SA 775 (SCA) at 779 for the entitlement to adopt this latter procedure.

- [4] In that case Harms, JA (then) recognised the validity of such a procedure, pointing to the fact that it was seen as akin to exception procedure but of course not identical to it, because evidence was included, whereas that did not apply in a summons. Harms, JA explained the procedure thus (emphasis supplied):

*“Initially the appellant wished to argue the first point with reference to the allegations contained in the founding affidavit only as was done in the court below. There are a number of cases which recognise the right of a respondent, in spite of having filed an answering affidavit, to argue at the outset that the founding affidavit does not make out a prima facie case for the relief claimed. They for two reasons suggest that the procedure is akin to an exception based on the ground that a summons or similar initiating process does not disclose a cause of action: The founding affidavit alone falls to be considered, and the averments contained therein must be accepted as true. An important difference with an exception is, however, that the application contains evidence and not only allegations of fact, and what might be sufficient in a summons may be insufficient in a founding affidavit (see eg *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D), *Pearson v Magrep Investments (Pty) Ltd and others* 1975 (1) SA 186 (D), and latterly, *Hubby’s Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd* 1998 (1) SA 295 (W) 297A–E). The usual object of the procedure is to enable a respondent to meet an application for referral to evidence or the like and relieve the court of considering the conflicting allegations of fact (cf. *Bader and another v Weston and another* 1967 (1) SA 134(C) 136F–G).”*

- [5] The point is, the argument is by definition limited to the applicants’ papers. Harms, JA went further. The learned judge said (emphasis supplied):

“It seems to me to be wrong to permit the use of this procedure in a court of first instance where there is no real conflict of fact on the papers, as is the case here. But having used the procedure unsuccessfully at that level, does not mean that an appellant is entitled to use it again on appeal. In any event, it seems to me that the analogy with the exception procedure may be inappropriate and that the comparison should rather be with an application for absolution from the instance in a trial action. Having lost an application for absolution, a defendant cannot thereafter lead evidence and on appeal argue that absolution should have been granted at the end of the plaintiff’s case. A court of appeal no doubt will consider all the evidence on record. Likewise, having lost an exception, it can hardly be reargued after completion of the trial.”

- [6] The relevance of these remarks for present purposes is that whether the applicants make out a case ought to be considered on all of their evidence, meaning all of their affidavits, as if after the close of their case as plaintiffs in a trial action. As it happens, counsel for the first three respondents accepted the challenge on those terms.
- [7] Pursuant to the parties' opposing positions, the Deputy Judge President, after hearing them in chambers, issued directions for the further conduct of the case. These included the exchange of further affidavits and of witness statements, and that the matter would be heard during the period Wednesday 29 August 2018 to Friday 7 September 2018.
- [8] Further, it was envisaged that the argument of the first to third respondents would be raised at the commencement of the hearing; if the argument was upheld, that would be the end of the matter. If the argument was dismissed, the hearing of oral evidence would proceed forthwith, the implication being that there was no scope for further resistance to such a referral.
- [9] Matters took a different turn. When the case was called on Wednesday morning 29 August 2018, I was informed by Mr Eloff, SC for Naidoo that the first to third respondents had filed further witness statements which came to his knowledge only on Sunday evening 26 August 2018. He was consequently not ready to proceed to deal with the matter and would, save for the two issues to which next I refer, ask that the main application be postponed. Mr Mundell, SC appearing for HI made common cause with that position.
- [10] The two issues were the first to third respondent's argument that the application should be dismissed and, if that argument was dismissed, Naidoo would apply for a separation and prior adjudication of an issue that can be decided on the papers; and argument would – if the separation was granted – be presented on that issue.
- [11] None of the parties, including Mr Van Nieuwenhuizen, SC who appeared with Mr Heher for the first to third respondent, and Mr Fine, SC who appeared with Messrs Antonie, SC

and Iles for Investec, had objection to me hearing the first to third respondents first, and the course to be followed after judgment will have been given on their application, to be reserved for determination thereafter. That is the basis on which the matter commenced on Wednesday morning until after lunch on Thursday 30 August 2018, when I reserved judgment until Monday 3 September 2018 at 10h00. This then is that judgment.

Application by first to third respondents: introduction

[12] In the main application the parties filed sets of affidavits beyond the normal three sets envisaged by the rules. Some of these were filed late, and condonation would in the ordinary course be required before they were admitted into the court record. After some initial uncertainty, it was agreed that I could proceed to hear the first three respondents' application on the basis of all the affidavits that had been filed by the applicants. As indicated, this agreement fits the notion that the first three respondents' application is akin to an application for absolution from the instance at the close of a plaintiff's case in a trial action.

[13] This concession by the first three respondents, fairly made, impacts really only the cause of action point, because foreseeable factual disputes raised in the applicants' subsequent affidavits after their first (founding) sets would have come too late for motion proceedings not to have been engaged upon in the first place. I therefore start with the foreseeable factual disputes point.

Foreseeable factual disputes

[14] The fact that logically only the initial founding affidavits must count against the applicants in considering whether they should initially have engaged *rouw actie* procedure rather than motion procedure, does not, as I see it, have as its logical corollary

that the applicants' subsequent affidavits must be wholly ignored when considering whether – assuming foreseeable factual disputes – the main application should now be dismissed.

[15] This is so because it would be sacrificing substance at the altar of form to ignore – in the context of the present debate - the resources and time, including the DJP's directive, that have since been invested in the matter. That is relevant, I believe, because this court must make an order now that is relevant now. I return to this issue below.

[16] A further consideration that is here relevant, is that these applicants have not set out first to attempt to persuade the court that relief should be granted on the affidavits. They have accepted final relief does not avail on the affidavits. This consideration is relevant, because it seems to me that notionally only two purposes could conceivably be served by sweeping aside now the judicial material that has since been created and requiring of the parties to start afresh.

[17] The first is that the applicants should be punished for not adhering to the strictures of the rules. This was not put to Mr Van Nieuwenhuizen but knowing him, I suspect he would have eschewed any reliance on such a proposition. The second purpose is prejudice - prejudice suffered by the first three respondents in having had to answer a case that has been unpleaded from the get-go and has since Topsy-like grown exponentially as the affidavits have grown.

[18] This is a more serious consideration. In civil proceedings in our accusatorial system of litigation courts have power only to decide issues that are properly placed before them by the parties; and parties are only able properly to place matters before courts when the issues will have been defined, and proper discovery in regard thereto will have occurred.

[19] Is this object achieved by dismissing the applicants' case and sending them back to the drawing board? I do not believe so. The parties have invested substantially in setting out

their respective versions on affidavit and witness statement, and this investment should be harvested rather than debunked. And it seems to me this can be achieved when the court hearing the application for referral is addressed on the identification of the issues that will be referred for determination.

[20] With these introductory remarks out of the way, one can now turn to the specifics of the submissions put up by the parties.

[21] The first three respondents did not in their attack distinguish between the foreseeable disputes issue and the no cause of action issue, but it will be necessary to do so here. Their argument began by taking the court through the heads of argument prepared on their behalf on 28 September 2017, from paragraph 11 onwards. The first section of those heads, up to paragraph 28, deals with Naidoo's alleged lack of locus standi, and the next section, up to paragraph 34, with HI's alleged lack of locus standi. Paragraphs 35 to 44 deal with the submission that no case is made out for the relief sought by HI.

[22] Section G, consisting of paragraphs 45 to 58, deal with the request for a referral. In three paragraphs there are submissions that the application should be dismissed for foreseeable factual disputes: 45; 48; and 51. Those paragraphs are in general terms and do not identify any specific factual assertion by the applicants in respect of which it is said that a bona fide and real dispute of fact was foreseeable.

[23] The first three respondents then dealt with their heads of argument dated June 2018. Those heads of argument do however not deal with the applicants' original founding affidavits and, as I have pointed out, there is no logical scope to submit that because the applicants' subsequent affidavits raise foreseeable factual disputes, the original application should not have been issued: by then, the fact that the original application will have been issued was a fait accompli.

[24] The first three respondents then moved to their supplementary heads of argument dated August 2018. Those heads attack the second applicant's replying affidavit for

having been filed out of time, and for containing new matter in reply. The first point, the lateness, was not persisted in. I return to the issue of the new matter, but would point out en passant that if an application is en route to oral evidence for determination of defined issues, the rule in motion proceedings that an applicant should make out its case in its founding affidavit and not in reply, loses its applicability, because the witnesses will be called respectively to support the applicants' cause or destroy it, as the case may be. This third set of heads of argument on behalf of the first three respondents do not however, address the point about dismissal for foreseeable factual disputes at all.

[25] In the course of oral submissions counsel was asked to specify the points they were relying on. Two points were indicated: that it was foreseen that the non-production of annual financial statements had an exculpatory version, and that the nature of the allegations against the second and third respondents was such that they would obviously be disputed.

[26] It seems to me the answer must be, that it is one thing to anticipate that a response of sorts will be put up, but quite another to anticipate that real, bona fide disputes of fact will be put up. After all, as Cameron, JA (then) said in *Fakie NO v CCII Systems (Pty) Ltd*, 2006 (4) SA 326 (SCA) (footnotes omitted):

"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

[27] I refer to this case to make the point that a litigant is generally well-advised to commence litigation by means of motion proceedings, precisely because courts have become more robust in looking through put-up versions in answering affidavits. So, it is not a straight-forward endeavour to predict in advance whether the version that will come with the answering papers will be capable of being rejected on paper.

[28] I accept that there are cases where a litigant must clearly see that a version will come that can only ever be decided on viva voce evidence, but where a case is concerned, as is this one, not with uncomplicated facts but with nuanced facts, the call is far more difficult to make.

[29] Accordingly, taking into account the point made at the outset of this section about resource investment, the point about the lack of specificity of the first three respondents' attack, and now the point about the difficult call to be made in cases such as this, I do not believe that it is interests of the administration of justice to dismiss the application for foreseeable factual disputes.

No cause of action

[30] The first three respondents' submissions were again set out in the three sets of heads of argument to which I have referred. Two initial remarks are necessary. The first is that this part of their argument conceded that the issue concerning the annual financial statements could potentially found a cause for the relief claimed. The second is that it was accepted, rightly so, that if the application is not dismissed for foreseeable factual disputes, then all the substantive affidavits of the applicants must be considered.

[31] The applicants' initial notice of motion was for relief only in terms of s.163 of the Act, that being for relief from oppressive conduct, known as s.252 relief under the previous Act, Act 61 of 1973. The amended notice of motion now includes, in the first place, relief under s.162 of the Act, that being for delinquency relief, obtainable under s.219 of the old Act.

[32] Naidoo deposed to her founding affidavit in her capacity as director of HFS on 21 August 2015. On 17 September 2015 she deposed to a supplementary founding affidavit. In it she says that pursuant to her application, HFS represented by Rakitzis purported to dismiss her as employee and contended that her directorship was terminated because she was an ex officio director. She does not accept the legal validity of this conduct. On 9 September 2016 she deposed to a replying affidavit. It runs to 193 pages without annexures, and joins issue with the respondents' answering affidavits.

[33] In her founding affidavit her case for the relief claimed is, in broad outline, that Rakitzis and Beck served on HFS's board in a manner that unduly preferred the interests of Investec; that Rakitzis and Beck were remunerated directly by Investec at an unknown number, and debited to HFS; that Rakitzis was wont to bullying, intemperate, vitriolic attacks on her, shutting down her ability as an independent director to serve the interests of HFS; that Rakitzis and Beck procured the appointment of Matusson & Associates to assume daily managerial control of HFS, without board approval; that this appointment stripped Naidoo of her executive functions as employee and executive director; that Rakitzis claimed at a board meeting that Investec could dismiss the whole board and replace it with directors of its choosing; that Rakitzis forced the resignation of Meiring as director at Investec's behest; that Rakitzis claimed that Investec had perfected its security cession and pledge of the issued shares in HFS and had thus become its sole shareholder; that there were substantive examples of lack of proper

corporate governance; that there were substantive examples of mismanagement; and that there were substantive examples of victimization.

[34]The supplementary founding affidavit mentions also a case of alteration of board minutes, and the replying affidavit is, as I have indicated, comprehensive.

[35]It bears stating what to lawyers may be self-evident: that this court is not concerned at this stage with the merits of these assertions, and in fact not even with their truth or otherwise. It is only concerned with whether they make out a prima facie case for the relief claimed.

[36]I hope I do their helpful argument no disservice if I say that in the course of the first three respondents' submissions, there was a recurring tendency to assess the applicants' factual allegations in the light of the explanations given for them by the respondents. That approach then formed the plank for the conclusion that it would serve no purpose referring the application, certainly not all of it, for the hearing of oral evidence.

[37] Examples of this approach are the contentions that Naidoo had no locus standi; that HI had no locus standi; that HFS's answering affidavit explains that HI seeks to circumvent the effect of the cession of shares in favour of Investec; that Rakitzis explains in his answering affidavit that he was aware of his fiduciary duties and discharged them properly; that HFS's answering affidavit Govender sets the facts right concerning the financial position of HFS; that – in the context of the alleged victimization – Rakitzis explains in his answering affidavit that in fact he found himself in direct opposition to Investec at times; and that – in the context of the Nimble agreement – Rakitzis reinforces the difference between "balance" and "value" by setting out the legal opinion HFS obtained as to the complexities of the legal enforceability of the ROU Housing Loan portfolio against government.

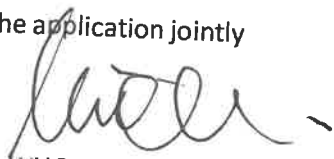
[38]As has been pointed out, it is impermissible to take into account the respondents' version if what one is attacking is whether the applicants' assertions make out a case. It is precisely because the respondents' version potentially disables the applicants' case that the applicants are now applying for the matter to be referred to oral evidence for the truth to out.

[39]Relief under s.162 and s.163 are of the most complex civil cases that come to our courts. This is because hardnosed commercial calls are often judged from a slightly removed, perhaps anodyne perspective. All factors are taken into account and weighed before what is often a value judgment is made. It is not possible at this juncture to call out the applicants' case as being without substance.

Conclusion

[40] It follows that the first three respondents' application must fail. I make the following order:

- (a) The application by the first, second and third respondents for the dismissal of the applicants' application for foreseeable factual disputes, alternatively for failure to make out a prima facie case, is dismissed.
- (b) The first, second and third respondents are to pay the costs of the application jointly and severally.


 WHG van der Linde
 Judge, High Court
 Johannesburg

Date argued: 29, 30 August, 2018
 Date judgment: 3 September, 2018

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