IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 6010/2015

In the matter between:

TDS BELEGGINGS CC T/A KOPANO NOKENG LODGE AND CONFERENCE CENTRE — Applicant
(Registration Number: (1………….)

And

JOHANNES CRONJE — First Respondent
(Identity Number: 7…………..)

DANIELLE CRONJE — Second Respondent
(Identity Number: 7……………)

NEDBANK LIMITED — Third Respondent
Registration Number: 1…………..)

SAMBA CO-OPERATIVE LIMITED — Fourth Respondent
(Registration Number: (2………..)

HEARD ON: 11 FEBRUARY 2016

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 25 FEBRUARY 2016

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[1] On the 18th of December 2015, the Applicant approached this court on an urgent basis, on the strength of which application the following order was granted:

"1. Non-compliance with the Uniform Rules of the Court relating to forms, service and time periods are condoned an the matter is heard as an urgent application;

2. Leave be granted to the applicant to serve this application on the first and second respondents via electronic mail, namely henk@paco.co.za and cronje@dbdgroup.co.za

3. The Honourable Court will grant a *rule nisi* which calls upon the first and second respondents to give reasons, if any, on 28 January 2016 at 09h30 why the following orders will not be granted:

3.1 To direct and order the third respondent to freeze and/or block the credit card held in the name of the applicant with the third respondent under card number [5…………];

3.2 To direct and order the third respondent to cancel all access, including all electronic banking transactions and withdrawals, by the first and/or second respondents on cheque account number [1…..….] held in the name of the applicant with the third respondent;

3.3 To direct and order the fourth respondent to freeze and/or block the SAMBA card held in the name of the applicant under membership number [8…….];

3.4 To direct and order the first and second respondents not to make/effect any withdrawals and/or transactions and/or purchases on/from the credit card mentioned in paragraph 3.1 supra, the bank account mentioned in paragraph 3.2 supra and the SAMBA card mentioned in paragraph 3.3 supra;

3.5 To direct and order the third and fourth respondents to cancel/block all access by the first and/or second respondents to the accounts mentioned in paragraphs 3.1 to 3.3 supra;

3.6 To direct and order the third and fourth responds to cancel all bank and automatic transmission cards linked to the accounts mentioned in paragraphs 3.1 to 3.3 supra;

3.7 To order and direct the third and fourth respondents to block/cancel all authorizations held by the first and/or second respondents to conduct electronic funds transactions/payments from/on the accounts mentioned in paragraphs 3.1 to 3.3 supra;

3.8 To order and direct the third respondent to maintain/authorise the current access to the account mentioned in paragraph 3.2 supra by the applicant and Mrs Wilma Potgieter;

3.9 To order and direct the third respondent and the fourth respondent to authorise access to the accounts mentioned in paragraphs 3.1 to 3.3 supra by Mrs Julia Helen van Wyk (Identity number: 4………) a forensic investigator at JGL Forensic Services, for the sole purpose only to investigate the past transactions on the said accounts;

3.10 To order and direct the first and/or second respondents not to sell and or dispose any of their immovable assets pending finalisation of this application.

3.11 The first and the second respondents be ordered to pay the costs of this application.

3.12 The third and/or the fourth respondents be ordered to pay the costs of this application if opposed.

4. That the orders in the aforementioned paragraphs 3.1 to 3.10 serve as an interim interdict with immediate effect pending finalisation of the application."

[2] The founding affidavit is signed by Jeremia Daniële Edward Cronje who, briefly stated the following:

"That he is a co-member of the applicant with his son, the first respondent and he holds 60% member's interest and his son holds the remaining 40% interest in the applicant. The agreement was that the first respondent would manage the business of the applicant and the second respondent, being the wife of the first respondent, would be involved in the marketing of the applicant. He could himself not run the business of the applicant as he was running his own medical practice. He suspected for some time that everything is not what it is supposed be at the applicant, as the latter was doing business, but it does not make any profit. He, at various times tried to discuss the affairs of applicant with the First Respondent but his requests were ignored and brushed off. He also tried in vain to obtain financial information of the applicant from the applicant's auditors. He ultimately engaged the services of JGL Forensic Services to do a forensic investigation into the dealings of the applicant on his behalf, which investigation started on 17 December 2015. During the morning of 18 December 2015 he received information that the first respondent made an electronic funds transfer in the amount of R25 000.00 from the Applicant's cheque account into his (first respondent's) own account. It was upon this information that he brought the application that led to the order as set out above, to be granted. It is common cause that when the said order was granted, both the first and second respondents were out of the country, on holiday.

Upon their arrival in the country, the first and second Respondents anticipated the return date to 14 January 2016. The first respondent stated that he took the business over after the death of his mother in 2003. His mother died during a shooting accident in which his father was wounded whilst the two of them were in their bedroom. That since 2008, his father completely detached himself from the applicant's affairs and he was solely responsible in the running of the affairs of the applicant. He further stated that the R25 000.00 which was transferred from the Applicant's cheque account into his account was a re-imbursement or loan repayment for the amounts which he had expended into the applicant. All the expenses which his father claimed to be suspicious were business expenses."

[3] Section 42 of the close corporations Act, 69 of 1984 states as follows:

"42. **Fiduciary position of members.** –

(1) Each member of a corporation shall stand in a fiduciary relationship to the corporation.

(2) Without prejudice to the generality of the expression "fiduciary relationship", the provisions of subsection (1) imply that a member –

(a) shall in relation to the corporation act honestly and in good faith, and in particular –

(i) Shall exercise such powers as he may have to manage or represent the corporation in the interest and for the benefit of the corporation; and

(ii) Shall not act without or exceed the powers aforesaid; and

(b) shall avoid any material conflict between his own interests and those of the corporation, and in particular-

(i) shall not derive any personal economic benefit to which he is not entitled by reason of his membership of or service to the corporation, from the corporation or from any other person in circumstances where that benefit is obtained in conflict with the interests of the corporation;

(ii) shall notify every other member, at the earliest opportunity practicable in the circumstances, of the nature and extent of any direct or indirect material interest which he may have in any contract of the corporation; and

(iii) shall not compete in any way with the corporation in its business activities.

(3) (a) A member of a corporation whose act or omission has

breached any duty arising from his fiduciary relationship shall be liable to the corporation for –

(i) any loss suffered as a result thereof by the corporation; or

(ii) any economic benefit derived by the member by reason thereof.

(b) Where a member fails to comply with the provisions of subparagraph (ii) of paragraph (b) of subsection (2) and it becomes known to the corporation that the member has an interest referred to in that subparagraph in any contract of the corporation, the contract in question shall, at the option of the corporation, be voidable: Provided that where the corporation chooses not to be bound a Court may on application by any interest person, if the Court is of the opinion that in the circumstances it is fair to order that such contract shall nevertheless be binding on the parties, give an order to that effect, and may make any further order in respect thereof which it may deem fit.

(4) Except as regards his duty referred to in subsection (2) (a) (i), any particular conduct of a member shall not constitute a breach of a duty arising from his fiduciary relationship to the corporation, if such conduct was preceded or followed by the written approval of all the members where such members were or are cognisant of all the material facts."

This section is the basis upon which a member of a close corporation can be excluded or prevented from running the affairs of a close corporation.

[4] I take liberty to quote in full what the first respondent states in his opposing affidavit, which paragraph has a direct bearing on the said section:

> "The Honourable Court will find no evidence in Applicant's papers that:
>
> 49.1 We breached the fiduciary duties that we owed the Applicant;
>
> 49.2 We failed to carry on the business of the Applicant to the degree of care and skill that may have been reasonably expected of us;
>
> 49.3 We committed unfairly prejudicial conduct;
>
> 49.4 We misappropriated or were in the process of misappropriating Applicant's funds."

In its response to the said paragraph the applicant states as follows:

> "25.1 The contents thereof are denied in as far as it does not correspond with the facts stated in the founding affidavit.
>
> 25.2 It is respectfully submitted that a proper case has been made out for the relief sought."

[5] I cannot agree with the first respondent more. The allegations made by the applicant against the first and second respondents are suspicions that are without any factual basis. The allegations are further speculative in nature in that the applicant avers that the forensic investigation, after it has been concluded, will

determine whether the suspicious are true or not. The applicant states the following in its replying affidavit:

> "54.1 The main reason why **JGL Forensic Services** was instructed to conduct a forensic investigation was to investigate the financial position of the Applicant and furthermore to establish <u>if any</u> unlawful activity has occurred since the Respondents took over control of the Applicant."

[6] It is clear that, based on the said shortcomings, it would not be possible for any court to grant a final interdict against the respondents. Mr Lubbe, on behalf of the applicant, submitted that the *rule nisi* must be extended pending the finalization of the forensic investigation. Mr. Van Aswegen, on behalf of the first and second respondents, submitted, correctly in my view, that such an order would not be competent because the said investigation is not a judicial process. More importantly, however, is his submission that the outcome of the investigation may not be acceptable to the first and second respondents, which may lead to further disputes. I therefore hold that in the circumstances, such an order would not be competent. Whilst it is understandable that Dr. Cronje was not in a position to approach the court with concrete evidence to divest the first respondent of his powers to run the applicant, because of his non-involvement in the affairs of the applicant for so long, I cannot on the facts before me find that the applicant has made out a case for the granting of a final interdict against the first and second respondents.

6.1 In the premises, I order that the *rule nisi* must be discharged, and the application for a final interdict is dismissed.

6.2 The next question to be dealt with is the one of costs. It is clear that the costs in this matter should follow the result. It will, however, not be just and equitable that the respondents' costs be paid by the applicant. This will simply mean that the first respondent, as a co-member of applicant, is also liable to pay the costs of the respondents. In the premises, I order that the costs of the respondents be paid by Jeremia Daniële Edward Cronje personally.

N.W. PHALATSI, AJ

On behalf of applicant: Adv. J Lubbe SC with Adv. JJ Buys
Instructed by:
Willie J Botha Inc.
Bloemfontein

On behalf of 1st & 2nd respondent: Adv. W.A. Van Aswegen
Instructed by:
Lovius Block Attorneys
Bloemfontein

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