

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2023-042954

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

10 July 2024
DATE

SIGNATURE

ERIDANUS VC1 LTD

1st Applicant

HIGHVELD GRN (PTY) LTD

2nd Applicant

and

AFROPULSE 466 (PTY) LTD (In Liquidation)

1st Respondent

WERNER LATEGAN

2nd Respondent

GEOFFREY JOHN EVERY N.O.

3rd Respondent

JAKE ARRIS CROOKS N. O.

4th Respondent

WILLIAM LLOYD COLLETT N. O.

5th Respondent

JOE ALEXANDER HOBSON N.O.

6th Respondent

PETER MILES ELLIOTT N.O.	7 th Respondent
GREGORY PETER ELLIOTT	8 th Respondent
WILLIAM ROBERT MILES N.O.	9 th Respondent
THE MASTER OF THE HIGH COURT/JOINT PROVISIONAL LIQUIDATORS N.O.	10 th Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	11 th Respondent
THE AFFECTED PERSONS LISTED IN SCHEDULE 1	12 th Respondent

JUGDMENT

(This matter was heard in open court but judgment was handed down by uploading it onto the electronic file of the matter on CaseLines and circulated to the parties/their representatives by uploading into the electronic file onto CaseLines. The date of handing down the judgment is deemed to be the date of uploading thereof onto CaseLines).

Summary: An Urgent Application for contempt of court following a previous agreement made an order of court by the parties. The Applicant brought a follow-up application for re-opening of the application before judgment was finalized in the urgent application. The principles of re-opening considered but the court was not satisfied on the facts that there were any valid reasons to justify such re-opening.

BEFORE: HOLLAND-MUTER J:

[1] This matter has a long history and the circumstances, time frames and appearances ought to be mentioned to understand where the matter comes from and where it is probably heading to.

[2] The matter was enrolled as a special urgent application for Tuesday 30 May 2023, the papers exceeding the practice directive's prescript with regard to voluminous papers. The matter was enrolled with the consent of the Deputy Judge President and I received it with five days to prepare. The urgent application consisted of 926 pages (all annexures included). The matter was heard over two days (30 May and 1 June 2023) and judgment was reserved on the 1st of June 2023. I was on acting duty in The Johannesburg High Court until 18 June 2023. Returning to the Pretoria High Court I assumed urgent court duties in Pretoria on 23 June 2023.

[3] I received a message from the registrar who assisted me in Johannesburg during the week of 23 June 2023 that the Applicant ("**Eridanus**") requested that I should not to finalise judgment as the applicant was in the process of filing an application to re-open the matter. At that stage I was busy preparing judgment when the application for re-opening was filed. The application for re-opening was filed on 30 June 2023. It consisted of 806 pages (affidavit and annexures included by all parties), as counted on CaseLines. The two sets of papers consisted of 1 732 pages.

[4] Eridanus (the representatives of Eridanus) also requested my registrar that I should compel the respondents to file any answering papers within two days after receiving the application. I deemed it unnecessary to intervene. It is not the court's duty to become involved in the exchange of papers between the parties or to determine the time frames chosen by a party.

[5] The 3rd to 9th Respondents ("**JMT**") filed a Rule 35(12) request on 27 July 2023 resulting in that the JMT's answering affidavit was filed on 3 August 2023. The 2nd Respondent filed his answering affidavit on 15 August 2023. A belated replying affidavit by Eridanus was filed on 27 September 2023 and all parties'

supplementary heads of arguments were filed towards the end of October 2023. These dates are the dates when the documents were uploaded onto CaseLines.

[6] Several emails were exchanged between the parties and the registrar to arrange a suitable date when all counsel would be present in open court to argue the application to re-open the matter. No suitable date could be obtained from the parties during the fourth term of 2023 or following recess and the first date which suited all the parties and within the court's other assigned duties in Pretoria was at the end of the first term in 2024. The matter was enrolled and argued on 28 March 2024. The court had other duties as assigned on the Duty Roster. Judgment was reserved on 28 March 2024.

[7] To say the least, it was some issue to find a date to have all counsel available to argue the application for re-opening.

A: THE URGENT APPLICATION (MAY 2023):

[8] The urgent application arose from a court order granted by Wilson J on 1 March 2023 (the March 2023 order). The **crux** of the order granted can be summarized as follows:

8.1 The court order interdicted and restrained the First Respondent (**Afropulse**) from directly or indirectly carry on with the business related to the disputed trade of the Rand Milk Trust and Share Milk Project, including the direct or indirect selling, disposing of, or encumbering any of the assets of it; opening of any further bank accounts with any financial institution without the prior written approval of the applicant or the court.

8.2 The Order further directed the first, second and eleventh to fifteenth respondents to pay over all funds payable to the first and second respondent,

the Rand Milk Trust or any person related to any of them, or in any way related to the Share Milk Project exclusively, into a new bank account in the name of the first respondent (Afropulse). This new account was *to be opened with FNB by the first respondent, in conjunction with the applicant*, in terms of which a representative of the applicant shall be a joint signatory.

8.3 The interdict further directed Eridanus (or its representatives) and Afropulse to approve the instruction to the JMT to pay over all funds payable to first and second respondents in any way related to the Share Milk Project into the said new account. No such “instruction” was sent to the JMT to date of the urgent contempt application. The JMT cannot be in contempt of this prayer in the order obtained on 1 March 2023 because no new bank account has been opened to date of the contempt application now before the court. The JMT continued making payments into the existing bank accounts as per agreement with the relevant third parties as envisaged in the prayer 2.1.3 of the order.

8.4 The order further compelled Afropulse, (and at that stage Lategan as a director of Afropulse), to deliver bank statements of Afropulse in the FNB account with account number 62790075058 from September 2021 to date of the order. It is not clear from the affidavits before the court that there has been non-compliance to this prayer by Afropulse (the provisional liquidator).

[9] The JMT, taken only into account the provisions of the order granted by Wilson J, is not in contempt of prayers 2.1.1 and 2.1.2 or any other prayer of the court order dated 1 March 2023 as will be set out below.

[10] With regard to prayers 2.1.3 and 2.1.4 of the said court order it must be remembered that there is no agreement between the Eridanus and the JMT. These prayers do not have any bearing on JMT. Similar as to regard of the first two prayers, JMT could not be in any contempt.

[11] Afropulse had to open a new bank account (in practice the second respondent as the representative of the first respondent until the provisional liquidator took control of Afropulse) in conjunction with a representative of the Eridanus, where the monies should be paid into. If no new account exists, no payments can be made into the account in terms of the court order. On its own version, the Applicants stated that no new banking account has been opened and nobody has instructed the JMT to make payments into the (currently non-existing) new banking account. The JMT cannot be in contempt in this regard, as it was not to be involved in the opening of such new banking account. There were attempts by Eridanus in this regard by requesting Afropulse about the new banking account to be opened. These attempts were between Eridanus and Afropulse. There was no time frame within which the new account had to be opened.

[12] The provisions of prayer 2.1.3 of the court order authorises the JMT to continue with payments to third parties if no agreement could be reached between Eridanus and Afropulse on the irrigation equipment. Any dispute in this regard between Eridanus and the JMT may be determined by way of legal proceedings in due course as set out in prayer 2.1.2 of the order. In the absence of any agreement between Eridanus and Afropulse to date of the urgent application, and taken into account that JMT continued with the said payments as envisaged in prayers 2.1.2 and 2.1.3 of the order, no finger can be pointed at the JMT regarding alleged contempt of court.

[13] The provisions of prayer 2.1.4 provides that in the absence of any agreement between Eridanus and Afropulse, the JMT may continue to make payments towards third parties on the same basis as set out in prayer 2.1.3 of the court order. JMT alleges it continued payment towards Afropulse. The prayer also provides for arbitration of disputes between the applicant and Afropulse and Lategan. To date no arbitration has taken place. It is not clear why no arbitration took place.

[14] There is no basis for any claim by Eridanus to require the JMT to “explain” or to produce documents sought by Eridanus. The undisputed fact is that Eridanus withdrew an earlier application against the JMT with a tender to pay the legal costs of the JMT in respect of similar relief sought (see the first notice of motion annexed as **annexure ‘JMT-3’ on CaseLines 05-102.**) The question/request of producing documents should be made in the pending action instituted by Eridanus, and only if such action is instituted against the JMT. In my view the “request” for documentation is nothing more than a call to discover.

[15] The earlier application issued before the March application, was withdrawn at court together with the tender by Eridanus to pay JMT’s costs. The JMT thereafter forewarned Eridanus that there was no “*lis*” between Eridanus and the JMT prior to the launching of the present urgent application in letters dated 23 December 2022 and 10 February 2022. See **annexure “JMT-6”- CaseLines 05-124 and Annexure “JMT-7” on CaseLines 05-129.** Despite these warnings, Eridanus continued with the present urgent application against the JMT. The present application in my view has no effect on JMT in view of the failure by Eridanus and Afropulse (represented then by Lategan) to open the new bank account and to approve any instruction to the JMT to make future payments of aforesaid monies into the new account.

[16] The question of lack of urgency as raised by the JMT, can only be found in favour of the JMT. There is no ground for any relief sought against the JMT in the urgent application. The court will deal with any urgency below.

[17] The court now turn to the position of the First (Afropulse) and Second Respondent (Lategan) regarding any contempt of court they may have committed taken into account the Court Order date 1 March 2023.

[18] The First Respondent, Afropulse, did not file any opposing papers with regard to the urgent application or the later application to re-open the urgent application. Afropulse was placed in voluntary winding-up during April 2023 and Lategan as director played a role herein. Since the voluntary winding-up of Afropulse the provisional liquidator has locus standi to represent Afropulse. No case is made that the provisional liquidator is in contempt of the court order. Any further litigation against Afropulse should include the provisional liquidator.

[19] The Second Respondent (Werner Lategan- referred to as "Lategan") opposed both the urgent and re-opening applications.

[20] Turning to Lategan's opposition to the urgent application, it is common cause when the order of 1 March 2023 was granted (after agreement by the parties involved), Lategan was still a director of Afropulse. He ought to have had the necessary knowledge of the financial predicament of Afropulse at that stage resulting in voluntary winding-up step taken shortly thereafter.

[21] Lategan should have realised, although no time frame for the opening of the new account was stated in the order, that the new bank account should have been opened within a reasonable time. His failure to have such account opened in conjunction with the nominated representative of Eridanus, raises some doubt about his willingness to comply the order. Lategan should have at least directed Eridanus to the provisional liquidator in re the opening of the bank account and other related litigation.

[22] Lategan, as director of Afropulse, should have realised that the placing Afropulse in voluntary winding-up, could be seen as an attempt to side step the court order. The timing of the voluntary winding-up is by coincidence almost the day on which the purported action was instituted against Afropulse and Lategan by Eridanus. The conduct of Lategan in my view is not all above

board but I am reluctant to find that this amounts to wilful and deliberate conduct by Lategan to find that he was in contempt of court. I am aware that wilfulness or intent is a criterion to determine whether the conduct of a person justifies a conviction of contempt of court. **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 SCA par [42]**. I am not convinced that Lategan's conduct justifies such finding.

[23] I am of the view that this aspect could be an issue to be dealt with by way of oral evidence, but taking into account that Eridanus launched action procedure against Afropulse and Lategan under **GJ case number 2023-033416**, no need exists for this court to remit the matter for oral evidence. When considering the application for re-opening below, it may shift the balance to find any contempt by Lategan in favour of Eridanus. The aspect of **mala fides** on behalf of Lategan may be addressed in the pending action.

[24] In the absence of any allegations against the provisional liquidator it is not possible to find that the provisional liquidator is in contempt of the order. It is however to be noted that the liquidator at present may have in its possession certain or all documentation requested for by Eridanus. I am of the view that Eridanus should interact with the liquidator to determine what is outstanding and as creditor of Afropulse, what Eridanus should do.

[25] Questions may arise from the application for re-opening of the matter about the conduct of Afropulse when agreeing to the order of 1 March 2023 while knowing of the alleged agreement entered into on or about the same day when the order was granted and the dragging of feet to open the new bank account and the following voluntary winding-up of Afropulse. It is not clear whether Lategan represented Afropulse in reaching the agreement which was made an order of court on 1 March 2023. This question whether Lategan could be found to have acted deliberately in breach of the court order should be addressed during the pending action.

B: RE-OPENING APPLICATION:

[26] There are certain principles concerning the re-opening of a case to be adhered to before a court will allow a re-opening. These factors were considered in **Mkwanazi v Van Der Merwe and Another 1970 (1) SA 609 (A) at para 926A - G** and **Barclays Western Bank Ltd v Gunas and Another 1981 (3) SA (D) at 95C-95E**. These factors are the reason why the evidence was not led timeously; the degree of materiality of the evidence; the possibility that the matter may have been shaped to '*relieve the pinch of the shoe*'; the balance of prejudice to either the parties whether the re-opening is granted or refused; the stage when the re-opening is sought; the issue of costs to '*heal*' any prejudice; and the general need for finality of proceedings.

[27] The re-opening concerns an agreement reached between Afropulse, JMT and TBB Enterprises (12th respondent) regarding certain agricultural land provided by Afropulse to JMT and certain rights of the irrigation permits on the agricultural property held by TBB to be made available to JMT. This agreement was entered into on 1 March 2023, the same day the Wilson court order was granted. Eridanus was not aware of this agreement before the hearing of the urgent application on 30 May and 1 June 2023. It only became aware thereof late June 2023 resulting in the re-opening application.

[28] In terms of the agreement, JMT shall utilise the agricultural property of Afropulse and the irrigation pivots from TBB. There is nothing in the March order restraining JMT, in the absence of any new bank account opened, to continue payments into the account of Afropulse. The provisional liquidator would be able to confirm this.

[29] The March order does not prohibit JMT to contact with third parties or with Afropulse in the normal scope of business. The question to answer is whether Lategan's action, by entering into the agreement on behalf of

Afropulse if it was he who represented Afropulse, does not amount to the disposing or encumbering of the assets of Afropulse? If the answer is in the positive, the action may amount to contempt of the court order by at least Afropulse and Lategan. The evidence does not clarify any finding that what happened was to the detriment of Afropulse. No evidence was obtained from the provisional liquidator whether Afropulse was prejudiced at all and that the contracting parties did not honour the agreement to the detriment of Afropulse. Both JMT and Lategan averred making the agreed payments towards Afropulse in terms of the agreement.

[30] Eridanus alleges that the JMT's silence on when the agreement was entered into, and whether it was an oral or written agreement, constitutes contempt on behalf of JMT. I am not convinced that this is correct. JMT has as far back as 23 December 2022 informed Eridanus that *"has no interest in Afropulse save for the lease agreement in respect of certain arable land"*. JMT continued making monthly rental for the property onto Afropulse's banking account. JMT further stated that it made the payments with regard to the irrigation equipment and that it did not dissipated any of Afropulse's funds.

[31] The later agreement provides for total amount payable by JMT towards Afropulse and how Afropulse will use the monies. It is clear that Afropulse was to use the money and that JMT had no input as to the use thereof. There is nothing indicating that JMT did not honour its contractual obligation. I am not convinced that this evidence advances any finding for contempt by the JMT. I am not convinced of that the re-opening application should be allowed. It is not possible to partly allow and partly disallow the re-opening application.

[32] The evidence contained in the re-opening application is necessary for the court to understand the overall position in the action procedure regarding all those involved. The court is however not convinced that the evidence takes the issue of contempt any further.

[33] It may be argued that the JMT should have been aware of the alleged underhanded activities of Lategan but in my view this is not sufficient to hold the JMT or Lategan in contempt.

[34] I am not convinced that there is any real factual dispute to consider referral for oral evidence. Application procedure is by nature robust when applying the ***Plascon-Evans rule*** and the court has to be convinced that a real, genuine bona-fide dispute of facts exists which cannot be adjudicated on affidavit alone. ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*** and ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)***. The court has considered all the evidence and is satisfied that the matter be heard on affidavit as it stands. No referral for any oral evidence is necessary.

[35] The next question to answer is whether the respondents will suffer any prejudice should the court allow the re-opening application. The court should evaluate whether such introduction would result in a party to suffer irreparable harm which could not be addressed by way of a suitable cost order.

[36] The re-opening application amounts to an indulgence sought but the court has to evaluate all relevant aspects to find whether the re-opening should be allowed. This court is not convinced that the re-opening will take the contempt application any further.

[37] The court, after considering all evidence in the re-opening application, is of the view that although the further evidence may be relevant and material to the pending action, but it does not warrant any finding of contempt against Lategan or JMT. See ***Oosthuizen v Stanley 1938 AD 322 at 333***. The court is of the view that it is not fair and just to grant the re-opening order. ***Mkwanazi v Van Der Merwe and Another 1970 (1) SA 609 (A) at 616 B-G***.

THE FURTHER EVIDENCE:

[38] It is clear that the agreement entered into by the respondents on 1 March 2023 impacts on the relationship between the parties. Eridanus argues that the agreement is a deliberate attempt to prevent Afropulse being placed under supervision and business rescue.

[39] Eridanus avers that JMT does not disclose the material details of the agreement and it may be that JMT's conduct amounts to undermining of the administration of justice. Taken into account all the evidence produced in the affidavits, the court is not convinced that this is the only reasonable inference to be drawn from the evidence.

[40] Although application procedure is normally robust of nature, the court is not convinced that the reasonable court will be able to find that the version of Eridanus should be accepted and that it warrants a finding of contempt.

[41] The failure of TBB to file any answering affidavit despite filing a notice to oppose the application, cannot be construed underscoring its contempt of the court order. Again, the evidence is not of such to warrant any finding of contempt against any of those participating in the later agreement.

BUSINESS RESCUE:

[42] Eridanus further moves for an order to have the voluntary liquidation of Afropulse converted into business rescue. The respondents opposed such relief.

[43] When applying to have a company placed under supervision and commencing business rescue procedure, the person applying for the relief must adhere to the provisions of **section 131(2)(b) of the Company Act, act 71 of 2008**.

[44] The provisions of the Act are that the applicant must inform all effected persons of the application in the prescribed manner, including other known creditors and any provisional liquidators (if already appointed). Eridanus did not comply with these provisions. The provisional liquidator was not given the opportunity to exercise his duty or the give any opinion whether such proposed business rescue carried any prospect of success.

[45] Eridanus further failed to annex any proposed business rescue plan resulting that the court did not have any facts to consider the conversion. This relief cannot succeed.

POINTS IN LIMINE BY SECOND RESPONDENT:

[46] Lategan averred that the failure of Eridanus to institute action within 30 days after the March 2023 order was granted resulted in the order to have lapsed. The order was granted on 1 March 2023 and the action was instituted on 17 April 2023. Lategan argues that any action should have been instituted within 30 days and not 30 court days.

[47] The court was referred to the case of **Bosveld Hotel (Pty) Ltd v Nissen JM and Another 1979 (2) SA 746 T** with regard to computing of days and that where the parties' agreement was made an order of court, reference to the 30 days should be calendar days and not court days. This view was not followed in **Ex Parte Venter and Spain NNO; Fordom Factoring Ltd and Others Intervening 1982 (2) SA 94 D at 100 A-C** and in **Pierre Cronje (Pty) Ltd v Desiree Cheryl**

Adonis (unreported case no20466/2009 in Western Cape High Court) judgment delivered on 2 December 2029. It was held that **Rule 1 of the Uniform Rules of Court** defines that only court days be taken into account when computing “days” in a court order as “court days” when computing the days as set out in a court order. These judgments disagreed with the Bosveld Hotel case and I am of the view that the latter is correct. Only court days is taken into account when computing “days” in a court order. Public holidays and Saturdays and Sundays are not taken into account in computing the “days”. In my view the action instituted on 17 April 2023 was well within time.

[48] The argument that the order has lapsed is rejected.

[49] The issue of converting the voluntary liquidation into *business rescue* has been dealt with supra.

[50] The issue of *lis pendens* as raised by Lategan concerns the action instituted on 17 April 2023. The action is pending and deals with the disputes between the parties, but there is nothing preventing a party to approach a court with an interlocutory application whilst the action is still pending for certain relief pertaining to inter alia contempt by one of the parties related to issues agreed upon such as in the 1 March 2023 order. It has been discussed supra why on the facts before the court no contempt order is justified.

[51] The court is not convinced that any contempt has taken place and therefore no order is granted. The application in the main application for contempt of court as well as the application to re-open the matter is refused.

URGENCY:

[52] The issue of urgency has become academic in view of the application for re-opening of the matter and the court decided on the merits of the application. There ought to be no sanction on the issue of urgency.

COSTS:

[53] The court has a very wide discretion in awarding costs to any of the parties. The normal rule is that cost will follow the result. Different counsel appeared on different times. The *appearances* were as set out below.

[54] There is no reason why the court should depart from the normal rule in that costs are to follow the successful party. **Rule 67A(3)(b)** the court is vested with a further discretion having awarded costs in terms of **Rule 67A(2)**; it is awarding the costs on the appropriate scale. In exercising this discretion the court will have regard to the complexity of the matter and the relief claimed.

[55] I am of the view that the matter is not the ordinary run of the mill kind and that the appointment of two counsel where necessary was appropriate. Eridanus appointed two counsels (one a senior counsel) for the first appearances although the senior counsel had other commitments on the first two days and Mr Pullinger appeared alone. Mr Woodrow had a junior on the first two days.

[56] On the last day in March 2024 Mr McNally appeared alone because Mr Pullinger had other commitments. Me Van Niekerk (substituting Mr Woordow) had the junior, Mr Mathee who appeared with Mr Woodrow on the first two days.

[57] The appointment of two counsels was warranted under the circumstances. With regard to the scale to be awarded I am of the view that **Scale B** in the appropriate scale. The volume of the papers can be criticized because in my view a large number of unnecessary annexures were annexed by all the parties. All the parties were guilty thereof and this was one of the factors considered in awarding costs on **Scale B**.

ORDER:

1. The Urgent Application as heard on 30 May 2023 and 1 June 2023 is dismissed with costs, the Applicant to pay the costs of all the Respondents as set out below.
2. The Application to re-open as heard on 28 March 2024 is dismissed, the Applicant to pay the costs of all the Respondents as per appearances set out below.
3. The scale on which the costs are to be paid is that of **Scale B**.

Signed at Pretoria on 10 July 2024.



APPEARANCES:**On 30 May 2023 and 1 June 2023 (Urgent Application):**

On behalf of the Eridanus: Adv A Pullinger

On behalf of Afropulse: No appearance

On behalf of Lategan: Adv H P Van Staden

On behalf of JMT: Adv C Woodrow SC and Adv J D Mathee

On behalf of TBB (12th Respondent): Adv B Manning

On 27 March 2024 (Application to re-open):

On behalf of Eridanus: Adv J P W McNally SC

On behalf of Afropulse: No appearance.

On behalf of Lategan: Adv B S Steyn

On behalf of JMT: Adv U Van Niekerk and Adv J D Mathee

On behalf of 12th Respondent: No appearance.

Judgment electronically delivered on 10 July 2024.