IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: **1372/2024**

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

MASIKILO FLORENCE SELESHO N.O. 1st Applicant

IZAK JACOBUS MARIUS VAN ZYL N.O. 2nd Applicant

[in their capacities as trustees for the time being of the **LEAGANG FAMILY TRUST**, **IT 000443/2015(B)**]

and

KELELLO MOROESI ALPHONSINA MANGOEJANE 1st Respondent

MAREMATLOU GROUP HOLDINGS (PTY) LTD 2nd Respondent

[Registration no.: 2015/448417/07]

JENN TRAINING AND CONSULTANCY (PTY) LTD 3rd Respondent

[Registration no.: 2016/002123/07)

MAREMATLOU TRAINING INSTITUTE (PTY) LTD 4th Respondent

[Registration no.: 2016/001856/07]

THE STANDARD BANK OF SOUTH AFRICA LTD 5th Respondent

[Registration no.: 1962/000738/06]

KELELLO MOROESI ALPHONSINA MANGOEJANE N.O 6th Respondent

[in her capacity as trustee for the time being of
the **MASEMO TRUST**, **IT 000007/2016(B)**]

Coram: DAFFUE J

Heard: 6 JUNE 2024

Delivered: 3 OCTOBER 2024

Summary: The applicants as trustees of a trust obtained an *interim* order to *pendente lite* prevent unlawful transactions on the bank account of a company (the third respondent) by its director (the first respondent). Prior to the order being granted, immediately before and after the death of the chief executive officer of the company, the first respondent unlawfully paid and/or withdrew millions of Rands from the third respondent's bank account. The trust is an equal shareholder in the second respondent, a related company which is the holding company of the third respondent. On the extended return date of the rule *nisi* the first and third respondents relied on several points of law without filing answering affidavits to contest the alleged unlawful payments.

Held that the rule *nisi* should be confirmed to enable the applicants to institute action, including a derivative action if so advised, whilst maintaining the *status quo* as set out in the rule *nisi*.

ORDER

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1. The rule *nisi* dated 11 March 2024 is confirmed with the exclusion of paragraph 2.3 and subject to the amendment of paragraph 3 thereof which shall read as follows:

‘3. Paragraphs 2.1 and 2.2 above shall serve as interim interdicts with immediate effect pending the institution, within 60 days from date of the finalisation of this application, of an action, application, or other legal relief against the 1st respondent and/or any of the other respondents.’

2. The first and third respondents shall pay the costs of the application, including the costs reserved on 18 April 2024, on the following basis: the first respondent on an attorney and client scale and the third respondent on a party and party scale, such costs to include the fees of two counsel to be taxed on scale C and A in respect of the senior and junior counsel respectively.

JUDGMENT

Daffue J

Introduction

[1] This is the return date of a rule *nisi* granted on 11 March 2024 on an ex parte basis. The applicants rely on alleged fraudulent and/or unlawful payments and/or withdrawals from a company’s bank account over a period of three weeks from 6 February 2024 to 1 March 2024 in a total amount of just less than R14 million.

[2] In *Bonifacio and Another v Lombard Insurance Company*[1] the Supreme Court of Appeal emphasised recently that ‘[n]o court will give effect to a fraud’, quoting in the process the well-known *dictum* of the Queen’s Bench in *Lazarus Estates Ltd v Beasley,*[2] to wit that fraud if established, ‘unravels everything’. In this judgment the court will consider whether this *dictum* may be applied to the facts presented to it.

The rule nisi issued on 11 March 2024

[3] The following order was issued on 11 March 2024:

‘1. The Applicants’ non-compliance with the Uniform Rules of Court relating to time frames, form, service, and Rule 41A is condoned and this application is heard as one of urgency in terms of Rule 6(12).

[1] (247/2023) [2024] ZASCA 86 (4 June 2024) para 18.
[2] [1956] 1 QB 702 at 712.

2. A *rule nisi* is issued calling upon the Respondents to show cause, if any, on **18 APRIL 2024** at **09h30** or so soon thereafter as the matter may be heard, why the following should not be ordered:

2.1 That the 1st Respondent be prohibited from making any payment from the bank account of the 3rd Respondent with **account number 0[...]** held with the 5th Respondent (hereafter "***the account***") without the prior written consent of the Applicants (represented by the 2nd Applicant), which consent will not be unreasonably withheld;

2.2 That the 5th Respondent be authorised forthwith to monitor all payments, withdrawals, disbursements, or transfers from the account by implementing a system or method of prior authorisation thereof by the Applicants to be represented for that purpose by the 2nd Applicant;

2.3 That the 1st, 3rd and 4th Respondents be prohibited from exposing Mr. Petrus Hendrik Herbst to any form of "occupational detriment", as defined in Section 1 of the Protected Disclosures Act 26 of 2000;

2.4 That the 1st Respondent be ordered to pay the costs of this application on a scale as between attorney and client, *alternatively* that the costs of the application be paid by any respondents opposing the application, jointly and severally with the 1st Respondent, the one to pay the others to be absolved;

3. Paragraphs 2.1, 2.2 and 2.3 above shall serve as interim interdicts with immediate effect pending the institution, within 60 days from date of the finalisation of this application, of an action, application, or other legal relief against the 1st Respondent (or, if needed, any of the other Respondents) for any damage suffered or to be suffered by the Applicants;

4. This application and order shall be served on the Respondents in terms of the Rules;'

The parties

[4] Masikilo Florence Selesho N.O. and Izak Jacobus Marius van Zyl N.O. (in their capacities as trustees of the Leagang Family Trust) are respectively the first and second applicants in these proceedings. I will herein later refer to them as the trustees and to the Leagang Family Trust as the Leagang Trust. Although Jacob Mohlouwa Selesho in his alleged representative capacity as trustee of the Leagang Trust is cited as the third applicant, this is an obvious mistake. He passed away a few days prior to the institution of these proceedings. More about this later.

[5] Kelello Moroesi Alphonsina Mangoejane in her personal capacity is cited as the first respondent. She is a major female and sole director of the second, third and fourth respondents and also the sole trustee of the Masemo Trust. She is cited as the sixth respondent in her representative capacity as trustee of the Masemo Trust. Although Jacob Mohlouwa Selesho is cited the seventh respondent, it being alleged that he is a co-trustee of the Malemo Trust, this is incorrect as he has passed away as mentioned above.

[6] The second, third and fourth respondents are private companies, to wit Marematlou Group Holdings (Pty) Ltd, Jenn Training and Consultancy (Pty) Ltd and Marematlou Training Institute (Pty) Ltd respectively.

[7] The Standard Bank of South Africa Ltd is cited as the fifth respondent, it being the financial institution where the third respondent's bank account is kept.

Court processes since the rule nisi

[8] The application is opposed by first and third respondents only. They decided not to file answering affidavits, but to rely on a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court. It is their case that the questions of law raised by them are dispositive of the application. I may just mention that, unlike as generally encountered, the notice relied upon by first and third respondents consists of 18 pages, containing much legal argument. Five points of law are relied upon which will be dealt with in due course.

[9] The notice in terms of rule 6(5)(d)(iii) was filed on 17 April 2024, a day before the return date of the rule *nisi*, although the notice of motion with annexures and court order had been served on all the respondents more than five weeks earlier, to

wit on 11 March 2024. The first and third respondents failed to utilise rule 6(8) which was available to them. They could have anticipated the return date with 24 hours' notice.

[10] As a direct consequence of the late filing of the aforesaid notice, the rule *nisi* was extended and the application postponed by agreement to the opposed roll of 6 June 2024, costs to stand over.

[11] Heads of argument were eventually filed and after considering oral argument, leave was granted to the parties to file supplementary notes.

Brief factual background

[12] It is apposite to deal with some preliminary issues before considering the factual background. Rule 6(5)(d)(iii) reads as follows:

'Any person opposing the grant of an order sought in the notice of motion must—

(i) …

(ii) …

(iii) if such person intends to raise any question of law <u>only</u>, such person must deliver notice of intention to do so, within the time stated in the preceding subparagraph, setting forth such question. (emphases added)

[13] It is an accepted practice that a respondent should file their answering affidavit on the merits at the same time they take preliminary objections on points of law. If this is not done, the court considering the application may be placed in a difficult position. If the legal points are dismissed, the court may consider the application on the merits without giving the respondent an opportunity to file an answering affidavit, alternatively, it could postpone the matter to enable the respondent to file an answering affidavit. The alternative approach often causes unnecessary delay in the proceedings and a piecemeal handling of the application. *In casu,* the first and third respondents made it clear, to my mind, that they were prepared to fall and stand by the points of law taken. In his supplementary note filed

with leave of the court after oral argument, Adv S Grobler SC suggested that the first and third respondents might have filed answering affidavits if the applicants clearly indicated in the founding affidavit that they intended instituting proceedings in terms of s 165 of the Companies Act 71 of 2008 (the Companies Act). Notwithstanding deliberations during oral argument dealing particularly with s 165 and the court's view in this regard, leave was not sought to file answering affidavits.

[14] In *Boxer Superstores Mthatha and Another v Mbenya*[3] the Supreme Court of Appeal held as follows:

'The employer's objection to the application challenges its viability in the forum the employee has chosen. As yet there is no answering affidavit, and we must at this stage take the allegations in the founding affidavit to be established facts, determining whether, if they are true, the high court has jurisdiction.'

It is apparent that the court is entitled to accept the applicants' allegations in the founding affidavit and annexures thereto as established facts in the absence of a contradictory answering affidavit. Therefore, it is now appropriate to mention the facts presented by the applicants.

[15] At all relevant times the Leagang Trust was managed by three trustees, to wit the first and second applicants and the deceased, Jacob Mohlouwa Selesho who passed away on 26 February 2024. The second applicant has been appointed as executor in the deceased estate of Jacob Mohlouwa Selesho and his surviving spouse, Masikilo Florence Selesho, the first applicant.[4] It is not in dispute that the remaining two trustees are entitled to continue with the business of the Leagang Trust.[5]

[16] The second respondent is a holding company and sole shareholder of the third and fourth respondents.[6] The Leagang Trust and the Masemo Trust are equal shareholders of the second respondent.[7] It is the applicants' case that they as

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[3] 2007 (5) SA 450 (SCA) para 4.
[4] Record p 9 & Annexure FA1 to the founding affidavit, the letters of executorship, p 30.
[5] Record p 9 & Annexure FA2 to the founding affidavit, being the trust deed, p 31.
[6] Record p 14, para 23 & Annexures FA9 and FA10, pp 68&69.
[7] Record p 14, para 24 & Annexures FA11 and FA12, being the relevant share certificates, pp 70&71.

trustees of the Leagang Trust, it being a shareholder of the second respondent, have the necessary *locus standi* in these proceedings.

[17] The third respondent conducts a thriving business in the field of educational intervention and *inter alia* provides bridging courses for learners from grade 9 to 12 to prepare them for their school examinations. Third respondent's major clients are the Departments of Education of the Eastern Cape and Free State Provinces. The business income and expenses of the third respondent flow through its business account held at the Loch Logan Branch, Bloemfontein of the Standard Bank, the fifth respondent. The third respondent provides the services of teachers as well as meals, transport and study material for learners.[8]

[18] Before passing away, the deceased was the chief executive officer of the third respondent and oversaw its business affairs. He became critically ill to such an extent that by 11 February 2024 he did not communicate per email anymore.[9] Although the first respondent is the sole director of second and third respondents, she was not actively involved in the third respondent's aforesaid business.

[19] On 8 March 2024, Pieter Hendrik Herbst, an internal accountant of the fourth respondent, also responsible for the internal bookkeeping of the third respondent, compiled a report.[10] The accountant detected several alleged fraudulent and/or unlawful payments. Three payments in the total amount of R7.5 million were made by first respondent from the account of third respondent to Nestassest (Pty) Ltd (Nestassest), a company that is neither a supplier, nor a creditor of the third respondent. The first respondent is the sole director and shareholder of Nestassest. The three payments were made between 6 February 2024 and 27 February 2024.

[20] A further five payments were made from the third respondent's bank account pertaining to a construction project in respect of a property in Berg-en-Dal, Woodland Hills Estate, Bloemfontein, registered in the name of the first respondent. These payments were made between 27 February 2024 and 1 March 2024 in the total amount of R6 433 567.19.[11] It is the applicants' case that all these payments

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[8] Record p 16 para 32.
[9] Record p 74: Schedule B to annexure FA13.
[10] Record p 72: Annexure FA13.
[11] Record pp 19&20, paras 44&45.

coincided with the declining health and eventual death of the deceased and that first respondent acted in conflict with her fiduciary duties and abused her position as director to improperly advance her personal interests to the detriment of the second respondent as holding company and its shareholders, including the applicants in their aforesaid representative capacities.

[21] By the time the founding affidavit was deposed to, the third respondent's bank account still reflected a positive balance of R33 104 779,31.[12] The first respondent had free and unfettered access to these funds until the issue of the rule *nisi*. If her spending pattern over a period of less than a month is considered, much of those funds might have been channelled to other accounts to the detriment of the third respondent, its creditors, contract parties and shareholders. It is reiterated that the third respondent's business includes the provision of meals, transport and study material for learners.

[22] As mentioned, the first and third respondents decided not to file an answering affidavit, but to rely on points of law. Consequently, the allegations in the founding affidavit shall be taken as established facts. Repetitive averments are made by the applicants that the first respondent fraudulently and unlawfully made payments and/or withdrawals from the third respondent's bank account. It is trite that it is inappropriate and unwise during motion procedure to make findings of fraud or deceit on the basis of untested allegations which are denied on grounds that cannot be described as far-fetched or untenable.[13] This does not apply *in casu*, save insofar as it may be found that certain allegations were not based on fact, but incorrect conclusions have been drawn from the facts. However, I could not detect any incorrect conclusions.

[23] I am satisfied, in the absence of an affidavit to dispute the serious allegations referred to above, that the first respondent acted *mala fide* and could not provide a sensible and legally tenable explanation for these withdrawals. There is really no reasonable explanation that she could possibly present pertaining to the Herbst report and the withdrawal of nearly R14 million from the third respondent's bank account in the three weeks prior to and just after the deceased's passing. I accept for

[12] Record p 21, para 51, read with schedule F of annexure FA13, p 96.
[13] *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others* 2021 (5) SA 115 (SCA) para 39.

purposes of adjudication of this application that it is common cause that the aforesaid payments and/or withdrawals were fraudulently and unlawfully made. The first three payments were made to Nestassest who is not a supplier or creditor of the third respondent. The next five payments were made to an architect, quantity surveyor and a building contractor in respect of the first respondent's personal property project.

[24] Having indicated that the facts presented by the applicants should be accepted as correct, it is now an opportune moment to deal with the points of law raised by the first and third respondents. I shall deal with them in the order as pleaded.

Points of law

<u>First point of law</u>

[25] It is the first and third respondents' case that the relief sought and obtained by the applicants constitutes final and not *interim* relief. This point of law should be dismissed without further ado. Although the *interim* order was granted with immediate effect, there can be no doubt that this court order is susceptible of alteration by the court. I accept that it is not merely the form of the order that must be considered, but also and predominately, its effect. Although the order can be regarded as a restraint order, it makes provision for the first respondent to conduct the affairs of the third respondent, subject to the terms of the order. The court has not been told in which manner the third respondent's business activities have been or will be curtailed or negatively affected. In my view, the facts *in casu* are totally different from those in *Metlika Trading Ltd and Others v Commissioner, SARS*[14] where the court dealt with an order for the return of an aircraft to South Africa with immediate effect.

[26] The first and third respondents' submission that the *ex parte* order could not be revisited, for example in terms of either rule 6(8), or rule 6(12)(c), or on the return date, is untenable. Instead of anticipating the return day with 24 hours' notice in terms of rule 6(8), or utilising the rule 6(12)(c) process in seeking a reconsideration of the order, the first and third respondents elected to waive reliance on these

[14] 2005 (3) SA 1 (SCA) para 24.

express rules which have been created for the benefit of a respondent confronted with an order granted in their absence.

[27] The submission that the applicants as shareholders would remain in control of the finances with the ability to transact on the third respondent's bank account is rejected as false. Nothing prohibits the first respondent as sole director to conduct the business of the third respondent and to transact on its bank account for legitimate purposes. No interpretation of the wording in paragraph 2.1 could lead to the conclusion presented by the first and third respondents. The business of third respondent will continue as usual, but the first respondent is not allowed to take from the cookie jar to which she is not entitled.

Second point of law

[28] This is not really a point of law insofar as it is submitted that the applicants have failed to establish a clear right, that they have suffered harm or a reasonable apprehension of harm and that there was no other suitable alternative remedy available. These are requirements for final interdicts, which is not the situation *in casu*, but nevertheless, it could not be raised as a point of law. It should have been properly dealt with in answering the applicants' allegations, where after their counsel would be entitled to make the necessary legal submissions why interdictory relief should not have been granted. I shall deal with the requirements for an *interim* interdict and whether these have been met during my final evaluation of the parties' submissions.

Third point of law

[29] It is submitted that the order is unintelligible, lacking in clarity and unenforceable in law. Mr Grobler relied on *Eke v Parsons*[15] in this regard. Reliance is also placed on the management powers and functions of directors and s 66 of the Companies Act. It is trite, as confirmed in s 66, that the business and affairs of a company must be managed by or under the direction of its board of directors. The same principle applies *in casu* insofar as the first respondent as the sole director must manage the affairs of the third respondent. More will be said later about the fiduciary duties of directors and the first respondent's obvious lack of understanding these. Much is made of the fact that it is expected of the Standard Bank as fifth

[15] 2016 (3) SA 37 (CC) para 64.

respondent to monitor all payments, withdrawals, disbursements or transfers from the third respondent's bank account, whilst the method is not explained in the order. The Standard Bank did not object and/or respond to explain that the order is unintelligible. Also, the first respondent did not explain under oath that she had experienced any problems in her management of the third respondent's business or its bank account for proper business purposes since the order on 11 March 2024. No complaint was raised by the first and third respondents that the second applicant precluded them from conducting business as well as the bank account efficiently. If there was indeed a problem, I would have expected these respondents to state this under oath. A period of nearly three months has lapsed since the rule *nisi* was issued till the hearing of the application on the extended return date.

Fourth point of law

[30] It is submitted that the applicants as shareholders of the second respondent (Marematlou Holdings) have no suitably close legal interest necessary to confer *locus standi* in court proceedings pertaining to the proper management and/or financial position of the third respondent. Marematlou Holdings, the second respondent, has an interest in the management of third respondent as its holding company, so it was submitted, and not the applicants. Marematlou Holdings is the sole shareholder of the third respondent. Consequently, so it was submitted, only Marematlou Holdings has *locus standi* to apply for relief in terms of s 77 or any other statutory remedy contemplated in the Companies Act and/or s 424 of the 1973 Companies Act (the 1973 Act). Chapter 14 of the 1973 Act, which includes s 424, still applies.

[31] The relevant portion of s 77(2) of the Companies Act reads as follows:

'(2) A director of a company may be held liable-

(*a*) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) *(a)* or *(b)*; or *(b)* in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of- ….'

[32] It is accepted, as Mr Grobler submitted, that the relief in s 77 is not available to the applicants *in casu.* Nothing more needs to be said in this regard. In his heads of argument and during oral argument Mr Grobler accepted that the applicants would be entitled to rely on s 165 of the Companies Act although he emphasised that this 'is a notional remedy only'. Derivative actions are now regulated by s 165. I shall deal with such possible action hereunder when I evaluate the parties' submissions.

Fifth point of law

[33] It was submitted that the applicants do not have *locus standi* to apply for any relief in favour of Mr Herbst on the basis that the information disclosed by him constitutes a protected disclosure within the ambit of the Protected Disclosures Act 26 of 2000.

[34] The fourth respondent is Mr Herbst's employer. It did not oppose the application and it is accepted that it abides this court's decision. Mr Herbst is clearly a whistle-blower who came to the assistance of the applicants. He is not cited as an applicant. Adv P Zietsman SC submitted that the court should come to the aid of the applicants and confirm the rule *nisi*, also in respect of paragraph 2.3 thereof, bearing in mind the circumstances of this case. I considered whether there could be any prejudice to the respondents if *interim* relief is granted to protect the whistle-blower from disciplinary measures and even dismissal. Eventually I came to the conclusion that it would be legally untenable to grant relief in favour of a person who is not cited as an applicant.

Evaluation of the parties' submissions

[35] I have already dealt to an extent with the five points of law relied upon by the first and third respondents. I shall now deal with the submissions in more detail. I reiterate that the application will be adjudicated based on the accepted facts and having regard to the legal submissions made by the parties. It is appropriate to consider the applicants' *locus standi*. Mr Grobler strenuously submitted, relying on

the judgment of *Du Bruyn v Steinhoff International Holdings NV and Others*[16] *(Du Bruyn)* that the applicants do not have *locus standi*, either in the present proceedings, or in any proceedings they intend to institute against the first respondent. He is mistaken. First, paragraph 3 of the rule *nisi* is perfectly clear and unambiguous. It refers to 'an action, application, or other legal relief against the 1st Respondent (or, if needed, any of the other Respondents) for any damage suffered or to be suffered by the Applicants.' Second, *De Bruyn* is distinguishable on the facts from the present factual matrix. In *De Bruyn* the shareholders intended to launch a class action against the directors of Steinhoff as well as its auditors, alleging that they were liable for the shareholders' losses caused by the fallen value of Steinhoff's shares. Reliance was *inter alia* placed on s 22 pertaining to reckless trading, ss 28 to 30 pertaining to financial information, s 76 pertaining to the directors' standards of conduct, as well as s 218(2) and s 20(6) of the Companies Act.

[36] In *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others*[17] *(Hlumisa)* the shareholders filed proceedings against the directors and auditors of African Bank. The principal issue was whether s 218(2) of the Companies Act permitted their claims against the directors. This in turn raised the applicability of the rule against recovery of reflective loss which prevents shareholders from bringing claims where their loss merely reflects the company's loss. In such case the company is the proper entity to claim the loss. The Supreme Court of Appeal made the point that derivative claims were not an issue in that appeal, but made the following comment:[18]

'We pause to note that *Novatrust* also dealt with derivative claims. In a situation <u>where wrongdoers themselves control the company, so that they can prevent the taking of the necessary steps, any one or more of its members may bring what is known as a derivative action, that is, an action by an individual shareholder, in own name</u>, against the wrongdoers for relief to be granted to the company, <u>the action being one on the company's behalf</u>. In England and Wales derivative actions are comprehensively regulated by part 11 of ch 1 of the Companies Act, 2006. In South Africa it is regulated by s 165 of the Companies Act. In both statutes there are

[16] 2022 (1) SA 442 (GJ).
[17] 2020 (5) SA 49 (SCA).
[18] *Ibid* para 32.

requirements that must be met before such a claim may be brought. Derivative claims are not at issue in this appeal.' (emphasis added)

[37] Mr Grobler relied heavily on the rule against claims by shareholders for reflective loss. He submitted that on a proper interpretation of the founding affidavit no other deduction can be made other than that the applicants intended to claim damages from the first respondent only. This according to him, is not legally tenable. According to him the legal principle in this regard was set out in *Hlumisa* in the following *dictum*:[19]

'A good starting point in considering whether the exceptions were correctly upheld, is a revisiting of the rule against claims by shareholders for reflective loss. In *Itzikowitz* this court restated, with reference to the prevailing authorities, the following established principle:

'The notion of a company as a distinct legal personality is no mere technicality — a company is an entity separate and distinct from its members and property vested in a company is not and cannot be regarded as vested in all or any of its members…. A shareholder's general right of participation in the assets of the company is deferred until winding-up, and then only subject to the claims of creditors.''

It should be noted that the court continued on the topic in the remainder of the judgment.

[38] As mentioned, Mr Grobler submitted that the applicants' intended claim is based on reflective loss and therefore untenable. Their intended action is worthless according to him. I do not agree. I am satisfied that paragraph 3 of the rule *nisi* is wide enough for the applicants to also rely on a derivative action. It should be mentioned that the applicants specifically pleaded that they intend to institute legal proceedings against the first respondent and if needed, any other respondent, to protects the shareholder's rights, including but not necessarily limited to an action in terms of s 77 of the Companies Act, or s 424 of the 1973 Act, or alternatively for damages under the common law.[20]

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[19] *Ibid* para 24; see also para 25 and further and para 37 in particular.
[20] Record: para 48 of the founding affidavit.

[39] The applicants have a right to ensure that no further funds of the third respondent are misappropriated by the first respondent. This court cannot close its eyes and ignore the millions of Rands which have been siphoned by the first respondent. I rely on the following *dictum* of the Appellate Division (now the SCA) in *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others,*[21] confirming the court's inherent jurisdiction to grant *interim* relief to avoid injustice and hardship. It held that:

'[a]n inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless …'

I am not prepared to send the applicants home without a remedy. It cannot be expected that they should sit and observe how the third respondent's funds are siphoned by the first respondent in a situation where either second or third respondent refuses to prevent that. It cannot be forgotten that the first respondent is the controlling mind and sole director of these respondents.

[40] It is an established principle that a company is a legal entity distinct from its shareholders and that the property owned by a company is its property and not that of the shareholders. The same principle applies when a company is a subsidiary or even a wholly owned subsidiary of another company. In terms of s 66(1) of the Companies Act the board of directors of a subsidiary independently manages and directs the business and affairs of that company, the effect being that the board of directors of a holding company could not dictate the decisions of the subsidiary's board of directors.[22] Insofar as it was submitted that the rule *nisi* interferes with the rights and obligations of the first respondent as director, I am satisfied that if the order is considered in perspective and bearing in mind the common cause facts, the submission is not justified.

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[21] 1986 (2) SA 663 (A) 676A-D.

[22] *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others* 2021 (5) SA 115 (SCA) paras 43&44; confirming the principles laid down in *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) paras 17&24.

[41] Mr Grobler pertinently submitted, without any factual foundation, that the evidence does not indicate any misappropriation or fraudulent transactions by the first respondent. He submitted that directors are entitled to use company funds to pay for their personal expenses, an occurrence that often takes place which is then recorded as director's loans in the records of the company. That is indeed so, but it is apparent from the founding affidavit that this is not what happened *in casu*. Again, it is emphasised that the applicants' allegations were not contested and must be accepted as common cause. A company director must act *bona fide* and in the best interests of the company. Although directors do not owe fiduciary duties to company shareholders individually, it is trite that they owe such duties to their companies. The first respondent enriched herself and failed her fiduciary duties towards the third respondent in the process. First, at least three payments were made to the company, Nestassest, of which the first respondent is the sole director and shareholder and which is not a supplier or creditor of the third respondent. Second, huge amounts of money were paid over in a period of about three weeks immediately prior to and after the death of the deceased which payments had nothing to do with the third respondent's business and without any of these payments being reflected as loans made by the company to the first respondent as its director. Third, these payments relate to the payment of professional people in respect of the personal housing project of the first respondent, totally unrelated to the business of the third respondent.

[42] The relevant portions of s 165 of the Companies Act read as follows:

'165 Derivative actions

(1) …

(2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person-

(a) is <u>a shareholder</u> or a person entitled to be registered as a shareholder, <u>of the company or of a related company</u>;

(b) is a director or prescribed officer of the company or of a related company;

(c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or

(d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

(3) A company that has been served with a demand in terms of subsection (2) may apply within 15 business days to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

(4) …

(5) A person who has made a demand in terms of subsection (2) may apply to a court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if-

(a) …

(6) <u>In exceptional circumstances, a person contemplated in subsection (2) may apply to a court for leave to bring proceedings in the name and on behalf of the company without making a demand</u> as contemplated in that subsection, or without affording the company time to respond to the demand in accordance with subsection (4), and the court may grant leave only if the court is satisfied that-

(a) the delay required for the procedures contemplated in subsections (3) to (5) to be completed may result in-

<u>(i) irreparable harm to the company; or</u>

(ii) <u>substantial prejudice to the interests of the applicant or another person</u>;

(b) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect; and

(c) that the requirements of subsection (5) *(b)* are satisfied.' (emphasis added)

[43] It is also apposite to quote the following exposition of the Supreme Court of Appeal in *Hlumisa*, dealing with the well-known *Foss v Harbottle* rule:[23]

'The approach taken in *Giles v Rhind* was, of course, to mitigate the inflexible proper plaintiff rule set out more than 175 years ago in *Foss v Harbottle*. *Prudential Assurance* set that case, which is the genesis of the rule against claims for reflective loss by shareholders, in historic perspective and in relation to derivative claims. In *Prudential Assurance* (at 210 – 212) the Court of Appeal stated the following:

'A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B for to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence. The rule in *Foss v Harbottle* also embraces a related principle, that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs if the irregularity is one which can be cured by a vote of a company in general meeting.

The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066 – 7 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority

[23] *Hlumisa loc cit* para 34.

confirms the transaction, *cadit quaestio*; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is *ultra vires* the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of the greater majority. (5) <u>There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company.</u> In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, <u>if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.</u>'' (emphasis added)

[44] Mr Grobler relied on *Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality (Featherbrooke)*[24] in support of his submission that the applicant is indeed seeking final relief. It is evident that the relief is couched in the form of relief *pendente lite.* However, he submitted that the third respondent is prohibited on a permanent basis to freely conduct its banking affairs with the Standard Bank insofar as ongoing obligations and/or restrictions are placed on that company. He submitted, relying on *Jacobs v Baumann N.O.,*[25] that it is not merely the form of the order, but predominately its effect that must be considered. I do not agree that the effect of the order is permanent. The facts in this case are clearly distinguishable from the facts in *Featherbrooke.* I quote from paragraph 24 in *Featherbrooke*:

'[24] It is perhaps opportune at this stage to comment on the nature of the order granted by the High Court against Mogale City. It is based on the relief sought by Featherbrooke, which was framed as an application for an interim interdict. But in substance, it was for a final interdict. This is borne out by the nature of the order it granted against Mogale City. <u>Almost everything that Mogale City has been ordered to do is permanent, and imposes on-going obligations on it. No court would be able</u>

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[24] (1106/2022) [2024] ZASCA 27 (22 March 2024) para 24.
[25] 2009 (5) SA 432 (SCA).

to reverse any of those in a subsequent hearing. The High Court failed to grasp this rudimentary conceptualisation, and erred by applying the test for an interim interdict, instead of one for a final order. The order is, in substance, final. This rendered nugatory, the envisaged hearing in part B.' (emphasis added and footnote omitted)

[45] The order *in casu* is clear insofar as it is intended that paragraphs 2.1, 2.2 and 2.3 shall serve as *interim* interdicts pending institution of the legal processes mentioned in paragraph 3 thereof. Obviously, if the intended action or application is not instituted timeously, or eventually dismissed, the rule *nisi* will be discharged automatically. I mentioned above that the rule *nisi* in respect of paragraph 2.3 thereof shall not be confirmed.

[46] I am satisfied that the applicants have proven a *prima facie* right. Mr Grobler submitted both in his written heads of arguments and orally during the hearing that s 165 of the Companies Act presents an available remedy. He conceded that s 165(6) is wide enough to be relied upon, but submitted that the applicants did not seek *interim* relief pending an application in terms of s 165. They indicated nowhere in their papers, so he submitted, that they would be relying on a derivative action. This may be so, but I have referred earlier to the allegation in paragraph 48 of the founding affidavit. Also and as stated earlier, in my view paragraph 3 of the rule *nisi* is wide enough to rely on a derivative action. It is reiterated that s 165(2) provides that appropriate relief may be sought by a shareholder of the company or of a related company. No doubt, the Leagang Trust is a shareholder of the second respondent, the holding company of the third respondent. Obviously, the second respondent is a related company of the third respondent. Consequently, the Leagang Trust falls squarely within the parameters of s 165(2). Section 424 of the 1973 Act deals with the liability of company directors and others for the fraudulent conduct of the company's business. The aim is to declare the person who was knowingly a party to fraudulent conduct personally liable. It is doubtful whether the applicants could have obtained *interim* relief against the third respondent in order to seek relief against the first respondent in accordance with s 424, but it is not necessary to make any finding in this regard.[26] It is recognised that the first respondent as sole director of the third respondent, and no one else, is responsible for the fraudulent transactions relied

[26] The same applies to s 77 of the Companies Act quoted partially above; in terms of this section it is for the company to hold its director liable for the breach of fiduciary duties.

upon by the applicants. On the uncontested version of the applicants the first respondent used the third respondent's bank account as her personal purse.

[47] A proper case has been made out to show a well-grounded apprehension of irreparable harm. It would be a fruitless exercise to continue with legal action against any of the respondents if the third respondent's bank account is not managed as contained in the rule *nisi*. The third respondent's business should be allowed to continue without being handicapped by an unscrupulous director, siphoning its funds for her personal use. The Leagang Trust as shareholder of the second respondent, who in turn is the sole shareholder of the third respondent, stands to suffer irrevocably if the rule *nisi* is discharged. The bank account needs to be protected to ensure that the third respondent remains in a position to continue with its business activities for the benefit of its shareholder and ultimately the Leagang Trust.

[48] The third respondent's bank account is not frozen. The first respondent as director is allowed to continue transacting on the account in order to lawfully conduct the third respondent's business. The monitoring of the bank account has not caused any friction or problems. If it was the case, either the Standard Bank would have complained, or the first respondent would have recorded any problems experienced in an affidavit. Neither of this occurred. The balance of convenience favours proper monitoring of the account in the interest of the third respondent, its sole shareholder and eventually the Leagang Trust. On the other hand, there cannot be any prejudice or inconvenience for the first respondent if she is prevented from continuing her fraudulent course of action. I have considered the harm to be endured to the applicants in their representative capacities as trustees of the Leagang Trust if the rule *nisi* is to be discharged and they eventually succeed, compared to the harm borne by the first and third respondents if the applicants ultimately fail. In my view this is a clear case where the court should not give effect to fraud.

[49] There is no alternative satisfactory remedy available to the applicants. The first respondent has shown that she cannot be trusted.

Conclusion

[50] I am satisfied that the applicants have a right to obtain an *interim* interdict to maintain the *status quo* pending finalisation of legal action to be instituted, including

if so advised, a derivative action. I agree with Mr Zietsman that if an interdict is not granted, the remedy provided for in s 165 would be rendered nugatory as this case illustrates. Consequently, I am satisfied that the first and second applicants, the present trustees of the Leagang Trust, are entitled to the relief claimed. The rule *nisi* shall, except for paragraph 2.3 and subject to the amendment of paragraph 3, be confirmed. Paragraph 3 should be amended, as requested by the applicants during oral argument, to delete the reference to 'damage suffered or to be suffered by the applicants'. Such an amendment is of a technical nature and cannot prejudice the respondents.

[51] There is no reason not to grant the applicants the costs of the opposed application. In the notice of motion they sought punitive costs on an attorney and client scale against the first respondent and the usual costs order against any respondents that might oppose the application. Mr Zietsman submitted during oral argument that first respondent should pay the costs on an attorney and client scale and that third respondent be ordered to pay applicants' costs on a party and party scale which is in line with the notice of motion. The first respondent's actions reminded me of an unscrupulous person - having no morality or conscience - just waiting for a convenient opportunity to commit gross mismanagement in a culture of self-indulgence. Furthermore, counsel's fees shall be taxed on scale C and A in respect of the senior and junior counsel respectively. Both parties employed two counsel and novel arguments were raised. Therefore, the costs of two counsel are warranted.

Order

[52] Consequently, the following order is issued:

1. The rule *nisi* dated 11 March 2024 is confirmed with the exclusion of paragraph 2.3 and subject to the amendment of paragraph 3 thereof which shall read as follows:

'3. Paragraphs 2.1 and 2.2 above shall serve as interim interdicts with immediate effect pending the institution, within 60 days from date of the finalisation of this application, of an action, application, or other legal relief against the 1st respondent and/or any of the other respondents.'

2. The first and third respondents shall pay the costs of the application, including the costs reserved on 18 April 2024, on the following basis: the first respondent on an attorney and client scale and the third respondent on a party and party scale, such costs to include the fees of two counsel to be taxed on scale C and A in respect of the senior and junior counsel respectively.

JP DAFFUE J

On behalf of the applicants:	Advv P Zietsman SC and
	HJ van der Merwe
Instructed by:	Symington & de Kok
	BLOEMFONTEIN
On behalf of the 1st&3rd respondent:	Advv S Grobler SC and
	R van der Merwe
Instructed by:	Stander & Associates
	BLOEMFONTEIN