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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Not reportable

CASE NUMBER:2026/044112

In the matter between:

MAGOSI LE BOGOSI PROJECTS (PTY) LTD	Applicant
and	
FIRST NATIONAL BANK LIMITED	First respondent
ISHMAEL MAGOSI KHUNWANE	Second respondent

Coram: Wessels AJ

Date of hearing :27 February 2025

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 15h00 on 2 March 2026.

Summary: **Summary:** Practice — Applications and motions — Urgent application — *Ex parte* — Rule 6(12) — Interim interdict — *Rule nisi* — Duty of disclosure — *Uberrima fides* — Procedural compliance — Rule 18(1) — Signature of process — Company law — Unauthorized fund transfers — Protection of corporate assets — Safeguards for *ex parte* relief — Anticipation of return day — Personal service

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JUDGMENT

Wessels AJ

Introduction

[1] This matter served before me as an ex parte urgent application. The applicant seeks interim relief to secure its corporate banking facilities following allegations of unauthorised conduct and the persistent misappropriation of corporate funds by the second respondent, a co-director of the applicant. The matter was initially adjourned to allow the applicant's legal representative the opportunity to address procedural irregularities regarding the signature of the application by the applicant's counsel.

Procedural compliance

[2] The irregularity was that an advocate with a trust account originally signed the notice of motion. As clarified in *Segole v Road Accident Fund*[1] (16923/2022) [2025] ZAGPPHC 725, regardless of the legislative introduction of a trust advocate as a separate genus of legal representative, the traditional separation of roles between attorneys and advocates remains extant[2]. In *Segole* the following was stated:

> ‘The role of an attorney is clearly defined in the Rules, and these set out and maintain the traditional separation of roles that existed before the LPA came into operation. If one has regard to the definitions contained in rule 1, it is readily apparent that the traditional separation of roles is maintained and is in harmony with section 34(2)(b). **There is simply no room to argue that a trust account advocate is entitled to assume the role of both an attorney and an advocate. Both the LPA and the Rules unequivocally prohibit such a course of conduct**.’ (emphasis added)

[3] The revised notice of motion has since been signed by an attorney of record, in compliance with the requirements of Uniform Rule 18(1). I am satisfied that the initial procedural defect concerning the signature of the notice of motion has been cured.

The authority to institute proceedings

[4] I am troubled by the authority (or lack thereof) under which these proceedings have been instituted. On the version before me, the board of the applicant consists of only two directors. The application is brought by the applicant, a private company, against one of its own directors. Ordinarily, the

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[1] *Segole v Road Accident Fund* (16923/2022) [2025] ZAGPPHC 725 para 14.
[2] *Cf Sithole v Road Accident Fund* [2025] ZAGPJHC 787.

authority of a company to institute legal proceedings is provided by the board of its directors as a management function in terms of s 66(1) of the Companies Act[3](‘the Companies Act’).

[5] There is no evidence before me of a board resolution or a specific provision in the applicant’s Memorandum of Incorporation that would authorise the deponent to the founding affidavit, a director and majority shareholder of the applicant, to institute this application in the name of the applicant against her co-director. In the absence of such authorisation, the applicant's locus standi is technically defective.

[6] While I can, in extraordinary circumstances, consider the matter through the lens of a derivative action under s 165 of the Companies Act or as a protective measure for corporate assets, the question of whether the institution of the application in the name of the applicant has been authorised remains a central issue that must be addressed on the return day.

Internal procedures

[7] Furthermore, the internal deadlock procedures, which are often central to resolving disputes in terms of s 163 of the Companies Act concerning oppressive or prejudicial conduct, appear to have been ignored. Generally, where a Memorandum of Incorporation or the Companies Act provides mechanisms for resolving a board deadlock, those procedures should be exhausted before approaching the Court for intervention.

[8] The failure to follow such procedures usually militates against the granting of urgent relief, as it suggests the urgency may be self-created or that

[3] Companies Act 71 of 2008.

alternative satisfactory relief was available. However, in this instance, the deponent has placed evidence before this Court regarding persistent transfers of the applicant's funds into the personal account of the second respondent. There is a *prima facie* case made out for the ongoing dissipation of corporate assets, in which case the necessity for immediate intervention to preserve the *status quo* outweighs the procedural requirement first to exhaust internal deadlock mechanisms.

[9] It would be remiss of me not to point out that, substantively, the applicant's reliance on the doctrine of 'piercing the corporate veil' is legally untenable. The power of a court to disregard a company's separate juristic personality is found in s 20(9) of the Companies Act. In *Centaur Mining South Africa (Pty) Ltd v Cloete Murray N O and Others*[4], the Supreme Court of Appeal clarified that an order in terms of Section 20(9) is appropriate where the incorporation of the company, or any use of the company, constitutes an 'unconscionable abuse' of its juristic personality.

[10] The doctrine is intended to address instances in which the corporate form is used as a sham or to perpetrate fraud. It is not a tool to be wielded by a majority shareholder to resolve internal management deadlocks or to bypass the statutory procedures for the removal of directors. Such an approach ignores the applicant's separate legal identity and the specific remedies provided by the Companies Act for resolving deadlocked boards.

The ex parte nature of the application

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[4] *Centaur Mining South Africa (Pty) Ltd v Cloete Murray N O and Others* (1334/2022) [2024] ZASCA 34 (28 March 2024).

[11] The application remains ex parte, requiring strict adherence to the *audi alteram partem* principle. As emphasised in *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others*[5], relying on the judgment of *Schlesinger v Schlesinger* 1979 (4) SA 342 (W), the right to be heard is a cornerstone of our legal system. In such proceedings, the applicant is enjoined to exhibit the utmost good faith to disclose all material facts.

[12] The failure to provide full disclosure regarding the internal management deadlock and the potential defences of the second respondent constitutes a risk of exposing this Court's process to possible abuse. Nevertheless, it is clear, at least prima facie, that the actions of the second respondent militate against the principles of sound corporate governance. The evidence of persistent and unauthorised fund transfers provides a basis for at most an interim order to protect the applicant's financial integrity.

Conclusion

[13] Reluctantly, I am of the opinion that the interim order should be granted to prevent the further dissipation of the applicant's assets. However, given the *ex parte* nature of the relief and the concerns regarding the applicant's locus standi and the bypass of deadlock procedures, robust safeguards are necessary.

[14] Although it follows *ex lege* from the nature of the relief granted herein, I deem it necessary to include a specific provision in my order that the second respondent may anticipate the return date on not less than 24 hours' notice. Furthermore, this judgment and the interim order should be served on the

[5] *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* (2015/33205) [2015] ZAGPJHC 293; [2016] 1 All SA 860 (GJ); 2016 (2) SA 561 (GJ) (17 December 2015).

second respondent personally to ensure he is fully apprised of these findings and his right to approach this Court if he wants to anticipate the return date.

Order

[15] Resultantly, the order set out at the commencement of this judgment is made.

1. A *rule nisi* is issued calling upon the respondents to show cause, if any, to this Court on 24 March 2026 at 10h00, or as soon thereafter as the matter may be heard, why an order in the following terms should not be made final:

1.1. The second respondent is restrained and interdicted from accessing, controlling, or performing any transactions on the applicant's bank account held with the first respondent under account number 6[…].

1.2. The first respondent is directed to vest sole administrative access and permissions for the aforementioned account in, Naledi Mekgoe, in her capacity as director of the applicant.

2. The relief set out in paragraphs 1.1 and 1.2 above shall operate as an interim interdict with immediate effect pending the return day.

3. The second respondent may anticipate the return day of this application on not less than 24 hours' notice to the applicant's

attorneys, in accordance with the provisions of the Uniform Rules of Court.

4. This judgment and the interim order shall be served personally on the second respondent by the Sheriff of the High Court.

5. The costs of this application are reserved for determination on the return day.

M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Appearances

Counsel for applicant	:Adv KP Mputle
Instructed by	:Makgale Ngwasheng Attorneys
	:Mahikeng