



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

CASE NO: 53810/2021

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| <p><u>DELETE WHICHEVER IS NOT APPLICABLE</u></p> <p>(1) REPORTABLE: NO</p> <p>(2) OF INTEREST TO OTHER JUDGES: NO</p> <p><u>03/12/2021</u> _____</p> |
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In the matter between:

EQUITY DIAMOND CUTTING WORKS (PTY) LTD

Applicant

and

QUANTUM LEAP INVESTMENTS 706 (PTY) LTD
MBOWENI, JACQUELINE NOLWANDLE

First Respondent
Second Respondent

MBOWENI, LINCOLN FAITH JOHANNES

SECOND RESPONDENT

Third Respondent

THIRD RESPONDENT

KHOSA, MGIYI THOMAS

Fourth Respondent

GREG FOURIE SC N.O.

FOURTH RESPONDENT

Fifth Respondent

CORRIE FOURIE N.O.

FIFTH RESPONDENT

Sixth Respondent

SIXTH RESPONDENT

JUDGMENT

YACOOB J:

1. The applicant seeks an order in terms of section 18 of the Superior Courts Act, 10 of 2013 (“the Act”) for the immediate operation of the order of a Full Court in this matter, under case number A5052/2020 on 31 August 2021, pending the determination of the first to fourth respondents’ application for special leave to appeal to the Supreme Court of Appeal and any resulting appeal.
2. For convenience I shall refer to the second, third and fourth respondents collectively as “the directors”.
3. The application is obviously urgent.

4. The Full Court declared that the second, third and fourth respondents have failed to meet the fiduciary standards required of directors in conducting the affairs of the company and that they are unfit to hold the office of director of the first respondent (“the company”), removed them as directors of the company and declared them delinquent for seven years in terms of section 163(2)(f)(ii) of the Companies Act, 71 of 2008 (“the Companies Act”). It then made consequential orders regarding the further running of the company and investigations into its affairs.
5. The lodging of the application for special leave suspends the operation of the order, meaning that the directors are free to continue to act as directors despite the findings of a number of courts, unless this court orders otherwise.
6. Subsection 18(1) of the Act permits the court to make such an order “in exceptional circumstances”. In terms of section 18(3), a court may order the execution of a decision subject to an application for leave “if the party who applied to the court to order otherwise, in addition [to exceptional circumstances] proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.”
7. Section (3) does not ask the court to consider the balance of convenience between the parties. The applicant in this instance must prove on a balance of probabilities (a) irreparable harm to itself if the order is not granted *and* (b) that there will be no irreparable harm to the respondents if the order is granted. It is not for the respondents to prove they will suffer irreparable harm if the order is

granted, but for the applicants to prove the respondents will not suffer irreparable harm if the order is granted.¹ This is in addition to satisfying the court that there are exceptional circumstances.

8. If the statutory requirements are met, the court has a discretion to grant the application. If the statutory requirements are not satisfied, then the court's does not have a discretion to exercise and the application must be dismissed.²
9. Before bringing this application, the applicant sought certain information and undertakings from the directors:
 - 9.1. a dividend shortly expected to be paid to the company would be paid into the applicant's attorneys' trust account;
 - 9.2. the directors issue instructions to SPG (the company paying the dividends) to pay the dividend into the trust account;
 - 9.3. the directors give a written undertaking not to withdraw any funds from any of the company's bank accounts, including investment accounts, without the applicant's written consent;
 - 9.4. the directors undertake to provide monthly statements of all bank accounts at the end of every month, and
 - 9.5. the directors give a written undertaking to disclose all bank accounts and provide all historical bank statements from 2005.
10. The directors failed to provide an undertaking as requested and instead proposed that a share of the dividend due which corresponded to the applicant's shareholding would be placed in the applicant's attorneys' account

¹ *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at [10]

² *Knoop NO* (above) at [50]

and the remainder in the directors' attorneys' account. No information was offered. These proceedings were then instituted.

11. The application is opposed by first to fourth respondents, although the answering affidavit is apparently only on behalf of the first to third respondents. I will refer to the opposing respondents as "the respondents". Although no notice was filed withdrawing the fourth respondent's opposition, it appears that Mr Notshe also in the hearing only represented the first to third respondents. I will refer to this anomaly when dealing with costs.
12. In the answering affidavit a tender is made that the dividend from SPG and any future dividends be paid into the respondents' attorneys' trust account and that no funds will be withdrawn from any of the company's bank accounts without the applicant's written consent.
13. It is on this basis that it is submitted by Mr Notshe for the respondents that there is no harm to the applicant. He suggests also that the lack of a tender to provide the requested information can be cured by a less severe order by this court, simply ordering the providing of that information.
14. The applicant contends that the failure to provide the undertakings, and in particular accurate information about bank accounts, taken with the findings of dishonesty and less than fiduciary actions on the part of the director constitutes the exceptional circumstances required by the Act, and that there is an obvious irreparable harm that would result if the directors are continued to act as

directors, without any accountability and no way of making sure that any other assets of the company are still safe.

15. The applicant avers that there is no conceivable harm to the directors if they do not continue to act as directors. If the investigation finds that they did not do wrong, they will come back to court and be reinstated. The company is merely an investment vehicle and no prejudice would ensue by the directors being temporarily replaced by the interim directors. The respondents do not dispute these allegations nor do they suggest any other harm that may ensue to themselves.

16. To my mind it is obvious that, in circumstances where it is not even known what bank accounts there are and what is in them, and where there is a history of directors at the very least failing to share information and not accounting accurately for funds, there are exceptional circumstances and that irreparable harm will ensue if the directors are entitled to continue to act as directors with no oversight or accountability.

17. I am satisfied that the applicants have established the statutory requirements for an order.

18. The question then is costs. Mr Hopkins submits that the costs should be against the directors in person since their opposition to this application is on their own behalf and that the company cannot be expected to bear the costs.

19. Mr Notshe on the other hand submitted that there is no basis on which to make an order against the directors personally.

20. I agree that the only benefit in opposing this application would be to the directors.

Having been removed as directors they then took advantage of the benefit of the suspension to make a decision that the company would oppose this application. It is clear that the decision was made with their own interests in mind and not that of the company. Considering that only the second and third respondents participated actively in this application, and not the fourth, no order will be made against the fourth respondent.

21. For these reasons, I make the following order:

21.1. The application is urgent and, to the extent necessary, any non-compliance with the forms and manner of service are condoned in terms of rule 6(12).

21.2. The operation of the order handed down by the Full Bench of this court per Ngalwana AJ, Lamont J and Yacoob J on 31 August 2021 under Appeal Case No. A5052/2020 (“the Full Bench order”) is not suspended in terms of section 18(1) of the Superior Courts Act pending the finalisation of the first to fourth respondents’ application for special leave to appeal to the Supreme Court of Appeal or of the appeal itself if leave is granted.

21.3. In terms of section 18(3) of the Superior Courts Act, the Full Bench order is immediately effective and implementable.

21.4. The costs of this application are to be paid by the second and respondents in their personal capacities.

**S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances

Counsel for the applicant: K Hopkins
Instructed by: Glyn Marais Inc

Counsel for the first to third respondent: V S Notshe SC
Instructed by: G Nkomo Inc

Date of hearing: 30 November 2021

Date of judgment: 03 December 2021