REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 11126/2021

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

.....
SIGNATURE **DATE: 5** April 2022

Applicant

Second Applicant

And

INVESTEC SECURITIES (PTY) LTD 1st Respondent

Reg No: 1972/008905/07

JUDGMENT

MANOIM J

Introduction

[1] This decision relates to two applications brought by Investec Securities (Pty) Ltd (Investec). The first, is a joinder application and the second, is an application for

security for costs. Both relate to what is termed the ‘main application’ and both are opposed by Nathan Hittler, the person Investec seeks to join in the joinder application and whose conduct it seeks to rely on, to justify the security of costs application, even though the costs are not sought against him personally but from the entities he purports to represent.

[2] It is impossible to understand why these applications are being sought without a brief digression into the history of a fifteen-year-old dispute between the Corwil stakeholders. Investec once a bystander to the litigation, has, it believes, been obliged to become actively involved.

[3] The saga starts with the second applicant Corwil Investments Limited. To avoid confusion with the first applicant, Corwil Investment Holdings Pty Ltd, I will refer to the former as ‘Investments’ and the latter as ‘Holdings’.

[4] Investments was a public company listed on the JSE until a bad investment in Zimbabwe led to its delisting in 2005. At that time, it was controlled by shareholders from the United Kingdom and had one Martin as one of its directors. It also had a share portfolio and equity held in accounts with Investec and RMB.

[5] Beset by this ill fortune, they approached Hittler and some of his colleagues to join them and become directors. Hittler; they were advised, was someone who could help turn around their fortunes. The marriage of interests did not last long. Hittler on their version hijacked the company using another vehicle, RZT Zelphy, which was renamed as Holdings, which he controlled, to do so. On the UK faction’s version, the Hittler faction was attempting to transfer Investment held assets into Holdings unlawfully.

[6] This led to litigation between the UK faction and Hittler’s and his colleagues, which I will from now on refer to as the Hittler faction. Since both factions claim agency over the applicant companies it is not useful to understand this case by referring to the applicants as the protagonists in this litigation; rather one needs to refer to the parties behind them.

[7] In 2007, at the behest of Martin on behalf of the UK faction , Investments obtained an interdict from Horn J. What led to that was the fallout with Hittler and

the fate of shares held in investment accounts held, *inter alia*, by Investec Securities.

[8] The Horn J interdict had two implications relevant now: First, the Hittler faction could not access the holdings with Investec (and also one with RMB but they are not party to the present litigation) and second, Investec was interdicted from transferring the shareholdings. The interdict was to apply until the applicants (the UK faction) had brought an application for final relief which had to be brought within 30 days of the Horn J order.

[9] The Horn J order made it clear that the interdict held until the “outcome” of this litigation and thus not its commencement.

[10] There is a dispute of fact in the present case as to whether the Horn J order is still in force. According to both Investec and the UK faction it is. In 2008 they say an application was brought by Martin and one Williams in which they seek to get repayment of the assets held by Investec and to prevent them going to Hittler. This application they state has not yet been concluded.

[11] Hittler maintains that this litigation has been concluded and the interdict is no longer in force. He has over the past years been trying to get Investec to transfer the holdings to another investment account, but Investec has refused, claiming it is still bound by the interdict. Hittler’s insistence led to him putting pressure on Investec’s staff to comply with his wishes which led to collateral litigation in this court at the behest of Investec. The upshot was that in December 2017, Baloyi AJ granted an order against Hittler from harassing, defaming and intimidating Investec staff. Whilst this litigation is collateral to the present, Investec relies on it to the extent that Baloyi AJ found that the Horn J order was still in existence, and thus contrary to the contentions of Hittler that it was not.

[12] In March 2020, Hittler then became the animating force behind what is termed the ‘main application’. But he did not bring it in his own name. Rather it was brought in the name of both Corwil companies, Holdings and Investment. He was thus not party to that application although its architect. It is by no means clear how Hittler has brought this litigation. Since the Horn J order he has suffered various setbacks. One that is pertinent to the current action is that he was sequestrated. He is presently, and he does not dispute this, an unrehabilitated

insolvent. This means he cannot be a director of a company. In the main application he purports still to be the chief executive of Holdings and hence his claimed authority to bring the litigation. However, the UK shareholders claim that he has long since been removed as a director. Hittler disputes that this was done procedurally, a fact the UK shareholders concede is correct when they first sought to remove him, but they now claim has been rectified, and that he has since been properly removed.

[13] This controversy has not prevented Hittler from bringing the main application What he seeks in the main application is to set aside the Horn J order so he can transfer the holdings with Investec to another account he holds with Nedbank.

[14] Investec's response to the litigation has been three-fold. It has brought the application to join Hittler, it has sought security for costs and it has brought a counter application. In the counter application it seeks an order from the court to place Hittler in contempt of court and to impose a one-month jail term on him suspended for two years. It explains that it does not seek a fine since he is insolvent.

[15] Investec justifies having this relief form part of a counter-application, rather than bringing a separate application for relief for the contempt, as it says the issues for determination are the same as those in the main application as they go to the question of the lawfulness of Hittler's actions.

[16] The counter-application is not before me to decide but it provides the context for the first application for me to decide which is the joinder application. Since Hitler in his personal capacity is not a party to the main application it follows that Investec cannot proceed against him in the counter application for a contempt order without joining him.

[17] At this stage it must be mentioned that although Hittler was originally represented by attorneys, when he filed the main application, his attorneys have since withdrawn and in these proceedings he represents or at least purports to represent, the Corwil companies and himself.

[18] Hittler does not oppose the joinder on his own behalf, except for one point which I will get to later. But he does oppose on behalf of Corwil who he says he represents.

[19] When Corwil's prior attorneys withdrew in November 2021 they were not substituted by any other firm.

[20] Investec argues that he cannot represent Corwil. It argues he is not an attorney or advocate and hence he cannot represent them. Hittler is also not a director of Corwil because despite the dispute over his removal, given his sequestration, he cannot hold the position of a board director.

[21] Thus the legal position is quite clear. He cannot, since he is not a legal practitioner, nor a director represent Corwil in resisting the joinder application and I ruled to this effect at the beginning of argument.

[22] He can however represent himself in opposing the joinder. In his personal capacity Hittler raised only one legal point in opposition to the joinder. He argued that a Ms Howard, Investec's deponent to the joinder application, had not deposed to her affidavit in accordance with regulations. Since the affidavit was defective, so he argued, this meant that the joinder application was as well.

[23] The relevant regulations are the Regulations Governing the Administration of an Oath or Affirmation, which were published under GN R1258 in GG3619 of 21st July 1972.

[24] According to regulation 3(1), a deponent must sign the declaration in the *"presence of"* the Commissioner of oaths. What Howard the deponent did on two occasions was to depose virtually to the Commissioner. She justified having done so because the regulations that applied in terms of the Disaster Management Act at the time, made attending physically before the Commissioner of oaths either not possible, or difficult, given health concerns. Nevertheless, says Howard, all the necessary steps that would have been followed in an in-person taking of the oath were taken in her virtual appearances. The same format followed both. She was visible to the Commissioner, showed her identity document and then initialed and signed each page in the Commissioner's virtual presence and took the necessary oath.

[25] For obvious practical reasons the Commissioner and the deponent could not sign the document at the same time.

[26] But both Howard and the respective Commissioners have since deposed in a consistent manner how they went about this process.

[27] Hittler claims that the deposition is defective as the Rule requires strict compliance.

[28] As Mr. Herholdt, who appeared for Investec argued, this point is not novel. The prerequisites of the regulations are directory not mandatory. Because they are only directory the courts have held that substantial compliance suffices. More recently since courts have been dealing with the effects of the Coved pandemic on physical attendance, it was held in *Knuttel N.O. and Others v Bhana and Others* that a virtual commissioning of the oath suffices for compliance with the regulations..[1]

[29] Relying on an earlier authority of *S v Munn*[2] the court affirmed the approach that the regulations were directory only. Mr Hittler then argued that there was no suggestion that Howard had any such health concerns. I do not think this makes any difference; concern about infection is as legitimate a reason for precautions to be taken by both the deponent and the Commissioner.

[30] Nor is there any violence done to the notion '*of in the presence of*' as contemplated in the regulations, by having a virtual rather than a physical presence. As the court explained in the *Munn* case "…the purpose of obtaining the deponent's signature to an affidavit is primarily to obtain irrefutable evidence that the relevant deposition was indeed sworn to." That purpose is equally ascertainable by a virtual deposition in the manner conducted by Ms Howard. The Commissioner could see and hear her in the same way as he could had she been physically present.

[31] This point of objection is rejected and accordingly the joinder application succeeds. The order in this matter is set out below together with the order in the security for costs application.

---

[1] GLD Case no. 38683/2020 (27 August 2021), paras 50 to 54.
[2] 1973 (3) SA 736 (NCD).

Application for security for costs.

[32] A further technical point is raised by Hittler in relation to the security of costs application. He challenged the title of Investec's attorneys to represent Investec in these proceedings. This despite the continuous presence of this firm acting for Investec throughout the various skirmishes over the years, to his knowledge.

[33] The first point he argued was that there is no power of attorney from Investec authorising the attorneys to act. This point is easily disposed of. As Mr. Herholdt for Investec argued, a power of attorney is only required for the purpose of an appeal. This is not an appeal

[34] The second point Mr. Hittler argued was that there had not been a proper authorisation by resolution from Investec for the conduct of the litigation. This point too was answered. There has been proof of an authorisation by the board given to Howard and one other, to brief attorneys. The paperwork is all there. Granted one director's signature was missing earlier, but he has since confirmed his authorisation.

[35] This point too must fail.

[36] Finally, with these technicalities disposed of, I now turn to the merits of the application for security of costs. Note Investec does not ask for security of costs against Hittler. The security is only sought against the Corwil companies.

[37] The Corwil companies are *incolas* of this court. The legal position of whether incola companies are required to furnish security for costs has been set out in the *Boost Sport* case. Here the court after a detailed discussion of the case law in the past held as follows:

[38] "Accordingly, even though there may be poor prospects of recovering costs, a court, in its discretion, should only order the furnishing of security for such costs by an incola company if it is satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse"[3]

[39] Is the conduct vexatious

[3] *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at paragraph 16.

It has been held that term ‘vexatious’ has many meanings including that it is unsustainable. In *African Farms and Townships Ltd v Cape Town Municipality* at 565D – E, Holmes JA observed:

> “*An action is vexatious and an abuse of the process of court inter alia if it is obviously unsustainable.”*

[40] Although Holmes JA in that case went on to say that the test for unsustainability was certainty, he was dealing with a case to strike out a claim. In a later case of *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 454E, the court held the test could be less stringent in an application for security for costs:

> *'It may well be that, in applications for security for costs, the test should be somewhat different. Where, in an application for dismissal of an action, the Court without hearing evidence on the merits will require moral certainty alone that the action is unsustainable, in an application for security for costs the merits test should be somewhat less stringent, and other factors, which are irrelevant in a dismissal application, should be taken into account.”*

[41] In this case Investec argues that the action is vexatious because Hittler does not represent the Corwil companies. His entitlement to do so is contested by the UK shareholders. He is an unrehabilitated insolvent and not a director of either. In the main application he seeks to thwart the relief sought in the 2008 action brought by Wiliams and Martin. It is thus an attempt to pre-empt them in an as yet uncompleted action. It is according to Investec an attempt as well to circumvent the existing Horn J order that Hittler has been attempting to get it to not comply with for years.

[42] I agree when we take into account the litigation history, the lateness of the hour in bringing the main application, and the serious contest to Hittler’s title to represent the interests of the Corwil companies; all suggest that the action is, at the very least unsustainable.

[43] I now turn to the question of whether Investec would be able to recover the costs of the action from the Corwil companies. The first consideration is that this is very much in doubt given that Hittler has at best a challenged title to represent them. Since this is placed in issue by way of the second counter application, at

the behest of the UK shareholders, this alone suggests Investec would have little prospect of covering its costs from the Corwil companies and since Hittler is an insolvent, certainly not from him.

[44] But even if he were to succeed in establishing that he can act on their behalf (a fact in serious doubt) neither company is able to or likely to be able to fund the costs of the litigation if unsuccessful.

[45] Let us first take Holdings first.

[46] Holdings is the company whose assets are presently held by Investec. However, in late August 2020, Goliaths, a firm of attorneys then acting for Holdings, wrote a letter to SARS regarding an outstanding tax liability. Goliaths indicated that Holdings would be unable to pay the debt for so long as it did not have access to the assets held by Investec.

[47] Holdings in the current litigation (this again through the mouth of Hittler) alleged it had other assets in subsidiaries. But as Investec argued if it has these assets it has not provided any details of them.

[48] It is not clear from the record how much Holdings owes SARS. But as Mr. Herholdt for Investec argued, if the amount was small one would presume that Holdings would have settled it but it has not. If the amount was large then it would illustrate its financial difficulties.

[49] The situation of Investment is equally difficult. Investment is an “indirect majority” shareholder allegedly of Holdings. Assuming that this is correct (since nothing in this case is absent a dispute) then Holdings resources for the reasons given earlier can be of no additional assistance to proving the financial viability of Investment.

[50] More fruitful perhaps is the allegation that Investments holds a 15% equity in a United Kingdom based firm called Willoughby Consolidated PLC.

[51] This investment may be worth enough to satisfy an adverse costs order against the Corwil companies. However, whether Hittler has access to this asset has also been placed in doubt. The UK shareholders who hold a majority of the shares allege he will not have access to these holdings. Against this view held by

the majority, it is difficult to see how he would. The standing of Hittler to act on behalf of the Corwil companies in this dispute is so precarious, it is difficult to conclude that he will be able to sustain the action through the assets of two companies.

[52] I conclude that Investec has made out a case for the furnishing of security.

ORDERS

It is ordered that:

A. JOINDER APPLICATION

1. Nathan Lindsay Hittler is joined as the counter-respondent in the counterapplication, under case 11126/2021.

2. All the papers in the main application and counterapplication filed of record are to be served upon NATHAN LINDSAY HITTLER within 10 days of the date of this order.

3. The costs of the application are reserved.

B. SECURITY FOR COSTS APPLICATION

1. The first and second applicants, jointly and severally, are directed to furnish security for the respondent's costs in the main application.

2. The form, amount, and manner of security to be provided by the applicants shall be determined by the registrar of the above Honourable Court on application by the respondent to that office.

3. In the event that the applicants fail to provide security as determined by the registrar within 10 days of the registrar's determination, the main application shall be stayed forthwith and the respondent is granted leave to apply on the same papers, amplified as necessary, for the dismissal of the main application.

4. The applicants are directed to pay the costs of the application for security for costs.

N MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 5 April 2022.

Date of hearing:	9 March 2022
Date of judgment:	5 April 2022

Appearances:

Counsel for the plaintiff:	Adv G Herholdt
Instructing Attorney:	ENS Africa
For the Respondent:	Mr. N. Hittler (In person)