REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 22-5166

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	NO
13 July 2022	**Judge Dippenaar**

In the matter between:

NCUBE XOLANI 1st Applicant

WARWICK LABORATORIES (PTY) LTD 2nd Applicant

And

HEALTH AND HYGIENE (PTY) LTD Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 13th of July 2022.

DIPPENAAR J:

[1] On 1 July 2022, the applicants launched urgent proceedings, seeking the following relief:

"*a) Prohibit and or stop the purported Warwick Pty Ltd shareholders' meeting scheduled to take place on the MS Teams on the 8th of July in that the signatory is not a shareholder nor the representative thereof in terms of law; b) Declare such a meeting illegal and unlawful, in that neither the Respondent nor the person who seeks to represent it in the purported meeting are not the shareholders; c) Declare that the applicant is the only director, incorporator and or member of the company, and no such meeting may be convened by anyone other than himself as the sole proprietor, director and or shareholder of the Second Applicant in terms of law and in fact e) that the respondent pays costs for this application".*

[2] It is common cause that the respondent is the erstwhile employer of the first applicant. The first applicant, a bio chemical scientist, was employed as its quality assurance manager from 2015 until February 2022, when he was dismissed. The relationship between the parties is acrimonious and the parties are litigating against each other on various fronts.

[3] It is further common cause that the genesis of the application lies in a meeting request sent by the first applicant to the respondent for a meeting on 22 June 2022, threatening legal action if the letter was not responded to, in which the first applicant is described as "*the founding director and sole owner*" of the second applicant. The respondent responded via its attorney of record by way of letter on 28 June 2022, in which it was. recorded that the second applicant remained dormant since inception and that no testing services were provided to the respondent. It was further stated that the respondent is the sole shareholder of the second applicant. Minutes of a shareholders meeting and a share certificate, both dated 11 July 2018 and signed by

the first applicant, were attached to the letter. The applicants were further notified that steps were being taken to remove the first respondent as director under s 71 of the Companies Act[1] ("the Act").

[4] By way of formal notification dated 27 June 2022, the first applicant was advised of a virtual meeting to be held on 8 July 2022 at 10h30 concerning:

> *"Removal of the current director, Xolani Ncube…in accordance with s71(1) and 71(2) of the Companies Act.*
>
> *a. This notice of meeting serves as notice to the above director to make representations at the meeting as to why he should not be removed as a director.*
>
> *b. The shareholders have tabled their resolutions for removal are as follows:*
>
> *1 (i) the company has not been operational since incorporation and serves no commercial purpose.*
>
> *(ii) the one shareholder Health and Hygiene Pty Ltd has decided to close the company and deregister it as the CIPC and SARS;*
>
> *2 Appointment of Ian Parkin Temperley…to oversee the closure of the entity with the CIPC and SARS".*

[5] The present application is aimed at preventing the shareholders meeting taking place. In addition, the applicants seek substantial declaratory relief pertaining to the shareholding of the second applicant.

[6] The respondent opposed the application on various grounds: first, it challenged the authority of the applicants' legal representatives by way of a r 7(1) notice and sought substantive relief against the applicants' legal representatives; second, the urgency of the application was challenged and third, it opposed the application on the merits.

[7] The application is characterised by various peculiarities, which in my view have a bearing on costs, an issue to which I later return. First, the application was issued as an ex parte application on Friday 1 July 2022 and was served electronically on respondent's attorneys late that night, calling upon the respondent to appear at an unspecified time on 4 July 2022 and providing it until 2 July 2022 to deliver

[1] 71 of 2005

answering papers. Service was effected pursuant to the directives of the court on 1 July 2022, that the application would not be enrolled as an ex parte application and that service was required. It is undisputed that during a telephonic conversation between the respondent's attorney and record and Adv Khumalo, the applicants' counsel on 2 July 2022, the respondent tendered an undertaking to postpone the shareholders meeting until 14 July 2022 to enable the applicants to enroll the matter for hearing on 12 July 2022. That tender was refused the following day, although it would have enabled the applicants to comply with the relevant practice directives. The applicants did not disclose the tender or their refusal to consent thereto to the court when it was approached to allocate the matter on 4 July 2022.

[8] Second, the signature of the first applicant on his affidavits appears to differ substantially from the signature appended by him to various agreements and documents produced by the respondent in its answering papers. When challenged on the issue by the respondent in its answering papers, the first applicant adopted the stance that it is his prerogative to change his signature whenever he wants to and the replying affidavit was signed with a different signature.

[9] Third, the applicants' response to the respondent's notice under rule 7, challenging the authority of the applicants' legal representatives Gawujani Attorneys, is curious and raises more questions than answers. On the day of the hearing of the application on 7 July 2022, the applicants uploaded three documents. First, a special power of attorney in the name of Gujuwani Legal Consultancy authorising and appointing Advocate Khumalo to appear on behalf of its clients, signed by Adv Khumalo; second, a special power of attorney in the name of the first applicant appointing Gawujani Legal Consultancy as his agent dated 24 March 2022; and third, a brief cover instructing Adv Khumalo referencing his LPC number PN41504 to appear in court in an opposed urgent application. It is unclear who signed the document on behalf of Gawujani attorneys and Adv Khumalo did not disclose the name of the individual at the hearing, despite respondent's request to do so.

[10] Adv Khumalo argued that Gawujani Attorneys was the trading name of Gawujani Legal Consultancy, used to avoid confusion on the part of its clients. The matter stood down to afford the applicants the opportunity of obtaining an affidavit from the director of Gawujani Legal Consultancy, Ms Sihlangu. An affidavit was provided via email which did not include her Legal Practice number and addressed the issue of compliance with s34(7) of the Legal Practice Act[2], raised by the respondent, in broad terms. The respondents objected to the affidavit and its contents, which it argued did not properly address the challenge.

[11] I agree with Adv Blumenthal, who appeared for the respondent, that the true facts are anything but clear from the documentation provided and the submissions made by Adv Khumalo. The respondent stated that it intended to refer the matter to the Legal Practice Council for investigation. The respondent argued that I should grant an order interdicting Gujuwani Legal Consultancy from representing any clients until the position has been fully clarified.

[12] Reliance was further placed by the respondent on various authorities relating to striking off proceedings by the Legal Practice Council[3] setting out the duties of attorneys. I fully agree with the principles enunciated therein and the strict duties that rest on attorneys and counsel. However, those authorities are distinguishable as the various facts had been fully traversed between the parties in affidavits in formal striking off proceedings. That is not the context of the present case. In the present instance the legal representatives are not parties to the proceedings and no counter application was launched for such relief, nor have all the relevant facts been traversed on affidavit.

---

[2] 28 of 2014

[3] General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA) paras [126]-[127];and the unreported judgments in this Division and the Gauteng Division , Pretoria respectively in South African Legal Practice v Chalom under case number 18445/2020 (26 November 2020); paras 17-18; and South African Legal Practice Council v Van der Merwe case number 58532/2019 (18 December 2020) paras 41-42

[13] I am not persuaded to consider or grant the interdictory relief sought by the respondent, given that the applicants' legal representatives were not joined to the proceedings and no counter application was launched. A court can only grant relief which is properly before it [4], not based on an oral request from the bar during argument against parties who have not been joined to the proceedings.

[14] For those reasons I decline to make a definitive finding in this application pertaining to the applicants' legal representatives and whether Gujuwani Legal Consultancy is properly constituted to represent the applicants. A more in depth investigation is required before this issue can be resolved. I shall for present purposes assume, based on the response provided to the r7(1) notice, without deciding, that they are entitled to do so.

[15] The next issue to determine is that of urgency. The respondent argued that in light of the applicants' refusal of the tender of a postponement of the meeting, which alleviated the urgency of the application, the urgency was self-created, justifying the striking of the application from the roll.

[16] Despite the somewhat tenuous nature of the facts set out in the founding papers in support of urgency and the extremely abbreviated time periods selected in the notice of motion, I am persuaded not to strike the application from the roll as the shareholders meeting was arranged for 8 July 2022[5], but rather to determine it on its merits in the interests of justice. The conduct of the applicants however is a factor which has relevance in relation to costs.

[17] I turn to consider the application on its merits. The applicants seek declaratory and interdictory relief. Seen in context, the applicants seek final relief as no interim

[4] City of Cape Town v South African National Roads Authority Ltd and Others ("SANRAL") paras 9 and 10 and the authorities quoted therein; Fischer v Ramahlele 2014 (4) SA 614 (SCA) paras 13 and 14 as quoted in SANRAL para 10

[5] Pursuant to the extensive argument presented by the parties it was necessary to reserve judgment to deal with those contentions and the respondent's undertaking that no meeting would be held pending delivery of the judgment was made an order of court on 8 July 2022.

interdictory relief is sought pending other proposed legal steps to be taken by the applicants. It is well established that the so-called Plascon Evans[6] rule applies.

[18] The case made out in the founding papers is in broad terms and supported only by the *ipse dixit* of the first applicant, the deponent to the affidavits. It is contended that the first applicant is the sole director and "*sole incorporator and member*" of the second applicant. It is alleged that the resolutions to be adopted at the proposed shareholders meeting to be held on 8 July 2022, would effectively take the second applicant out of business and render all the other contracts that it has null and void, to the detriment of its owner, the first respondent. According to the applicants, the second applicant was incorporated and registered by the first applicant and started trading and grew under his watch.

[19] The applicants contended that the meeting was illegal as the respondent is not the shareholder of the second applicant and the first applicant's electronic signature, which was in possession of the respondent, was fraudulently manipulated to create his signature on the minutes of the 11 July 2018 meeting and the share certificate issued in favour of the respondent. The first applicant further averred that he did not insert the dates on the aforesaid documents. According to the first applicant he never sent any notice to invite the respondent to sell his entire shareholding to it, nor did he hand over ownership nor sold shares in the second applicant to the respondent.

[20] The only documents produced in support of those averments are a memorandum of incorporation[7] and a registration certificate reflecting the registration of the second applicant on 18 September 2017. Both these documents reflect the first applicant as director of the second applicant, but no more. No share certificate or scintilla of documentary evidence was produced by the first applicant, supporting his contention

[6] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C;
[7] Obtained from the CIPC website on 20 June 2022

that he is the shareholder of the second applicant or ever acquired any shareholding in the second applicant.

[21] The only document produced by the applicants in support of the contention that the second applicant traded, was a document evidencing testing results of one of the respondent's products, dated 29 November 2018, signed by one TB Mtshangani BSC Hons. No confirmatory affidavit was provided by this person. No documentary evidence was produced that the second applicant has a banking account, any financial records, contracts or assets as would be expected of an actively trading company.

[22] The respondent's version raises substantial factual disputes regarding the applicants' version. Its version is supported by documentary evidence and cannot be rejected as far-fetched or untenable on the papers[8]. Primarily these disputes pertain to the shareholding of the second applicant and whether the second applicant traded.

[23] The respondent's version is that it is the shareholder of the second applicant, which is a dormant company which is not trading. It does not have any assets and has no banking account. The applicants did not dispute that no payments for any services were made to the second applicant by the respondent, nor did they produce any controverting evidence in reply.

[24] The respondent's version was already set out in its letter to the applicants' legal representatives on 28 June 2022 namely, that it is the sole shareholder of the second applicant and had acquired the 100% shareholding in the second applicant pursuant to a shareholders meeting on 11 July 2018, pursuant to which the entire authorised shareholding of the second applicant was issued in favour of the respondent on 11 July 2018. In support of that contention, a share certificate dated 11 July 2018 and minutes of a shareholders meeting on the same date were

[8] Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) paras 12-13

produced. The applicants were thus fully aware of the factual disputes which would arise prior to the launching of the application.

[25] When challenged by the applicants to produce the originals of those documents, the respondent did so at the hearing. The signatures affixed to the documents were in pen and not electronic. This puts pay to the applicants' contention that his electronic signature was manipulated and inserted on the said documents. The share certificate produced, supports the respondent's version. The minutes of the shareholders meeting of 11 July 2018, are signed by the first applicant as chairman of the meeting. Under s73(8) of the Act:

> *"any minutes of a meeting, or a resolution, signed by the chair of the meeting, or by the chair of the next meeting of the board, is evidence of the proceedings of that meeting, or adoption of that resolution, as the case may be".*

[26] If the applicants wished to illustrate that the first applicants' signatures on the aforesaid documents were falsifications, it was incumbent on them to do so. No expert evidence was produced to support the applicants' bald assertions of fraud.

[27] The second applicants' Memorandum of Incorporation ("MOI") attached to the papers, authorised the issuing of no more than 1000 shares of a single class of shares as described in article 2. The MOI attached by the applicant does not appear to have been adopted by the incorporator in accordance with s13(1)(a) of the Act by affixing his signature, although the first applicant's name is reflected thereon as the incorporator.

[28] No proof, documentary or otherwise was provided that the authorised shares of the second applicant were ever issued prior to 11 July 2018 when the share certificate was issued in favour of the respondent.

[29] S35 of the Act sets out the legal nature of company shares and requirements to have shareholders. In terms of s 35(1), an issued share is movable property,

transferable in any manner provided for or recognised by the Act or other legislation. In terms of s 35(4), an authorised share of a company has no rights associated with it until it has been issued. In argument, the applicants appeared to conflate the concepts of authorised and issued shares. Section 36 of the Act regulates authorisation for shares. S 38 on the other hand regulates the issuing of shares. In terms of s38(1):

"*the board of a company may resolve to issue shares of the company at any time, but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's Memorandum of Incorporation, in accordance with section 36".*

[30] In reply, the applicants contended that the second applicant is not permitted to make an offer to the public of any of its shares, relying in argument on article 2.1 (2) of the MOI. However, that article in its terms refers to *"an issued share [that] must not be transferred"* and contemplates secondary offerings of issued shares, which does not assist the applicants.

[31] In argument, Adv Khumalo sought to overcome his difficulties in an elaborate argument raising various sections[9] of the Act and the Competition Act[10] in support of his interpretation of the law pertaining to offers of shares in private companies and small mergers. No authority was advanced in support of those submissions and it is not necessary to deal with these arguments in any detail. Based thereon the submission was advanced that "the first applicant has sufficient proof that he is the only incorporator, member and director of the second applicant".

[32] That the first applicant was the incorporator and is the director of the second applicant, is common cause. What is strikingly absent, is a factual and cogent legal basis for the contention that the first applicant is a shareholder of the second applicant, even more so in light of the bona fide factual dispute on the issue. The applicants did not seek the referral of the application to trial or oral evidence.

[9] Sections 1, 38, 39, 40, 47, 66, 67 and 69
[10] 89 of 1998, sections 4, 12 and 13

[33] Absent proper proof that the first applicant is a shareholder of the second applicant, and in light of the various bona fide factual disputes on the papers, it follows that the applicant has not made out a proper case for the declaratory relief sought.

[34] In respect of the interdictory relief sought, the requirements are trite[11]. The applicants in terse terms addressed the requirements for interim interdictory relief in their founding papers. The applicants rely on the first applicant's shareholding in the second applicant as the basis for entitlement to the relief sought. For the reasons already advanced, the applicants have not illustrated such a shareholding and any clear right to relief. The applicants thus fail at the first hurdle. Suffice it to state that I am further not persuaded that the applicants have on the facts, illustrated either an apprehension of irreparable harm, given the dormant and inoperative state of the second applicant or the absence of an alternative remedy, given the available remedies under s71(4) and s71(9) of the Act.

[35] It follows that the application must fail. There is no basis to deviate from the normal principle is that costs follow the result.

[36] The respondent sought a punitive costs order based on the applicants' conduct in relation to the matter. The respondent further sought a *de bonis propriis* costs order against the applicants' legal representatives. For the reasons already advanced, I am not persuaded that it would be appropriate to consider doing so, given that they have not had a proper opportunity to be heard on those issues.

[37] I am however persuaded that the conduct of the applicants in relation to this application, including the intemperate language used, justifies the granting of a punitive costs order. Given the facts and that the application was solely aimed at protecting the interests of the first applicant, it would be appropriate to direct the first applicant to pay the costs of the application on the scale as between attorney and client.

[11] Setlogelo v Setlogelo 1914 AD 221

[38] I grant the following order:

[1] The application is dismissed;

[2] The first applicant is directed to pay the costs on the scale as between attorney and client.

_____

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 07-08 July 2022
DATE OF JUDGMENT	: 13 July 2022
APPLICANTS COUNSEL	: Adv. M. Khumalo
APPLICANTS ATTORNEYS	: Gawujani Legal Consulting / Gawujani Attorneys
RESPONDENTS COUNSEL	: Adv. R. Blumenthal
RESPONDENTS ATTORNEYS	: Brittan Law