IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 78914/2017

21/12/17

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

Signature Date 21 December 2017

Q4 FUEL (PTY) LTD — APPLICANT

and

RATUNE THABO STEPHEN — 1ST RESPONDENT

RATUNE ZELMA — 2ND RESPONDENT

JUDGMENT

KHUMALO J

Introduction

[1] The Applicant, Q4 Fuel (Pty) Ltd seeks on an urgent basis an interim relief,

interdicting and restraining Mr Thabo Stephen Ratune and Ms Zelma Ratune, the 1st and 2nd Respondent respectively, from:

[1.1] holding themselves out to be shareholders and or directors of the Applicant;

[1.2] publishing any defamatory allegations against the Applicant whether to its suppliers, customers, employees or any other third party;

[1.3] stating or imputing or implying that the Applicant has-

[1.3.1] contravened the provisions of the Petroleum Act 12 of 1977 as amended by, inter alia, engaging in a fronting practice as contemplated by section 1 of the Broad Based Black Economic Empowerment Act 53 of 2003;

[1.3.2] committed or has attempted to commit, any other crime;

[1.3.3] conducted itself in an unethical manner

Pending an application for a final interdictory relief to be launched within 30 days of the interim order being granted by this court.

[2] The Applicant, is a company that carries on the business of marketing, selling and distribution of petroleum products, based in Garsfontein.

[3] The 1st and 2nd Respondents are husband and wife. The 1st Respondent ("Mr Ratune") is an employee of the Applicant since 2009, employed as a procurement / sale officer. There is a dispute on whether he is one of either. Both Mr and Mrs Ratune were appointed as directors and shareholders of the Applicant since 2012, holding 15% and 11% shares respectively. The 2012 shareholders agreement was cancelled in February 2014 and the shares reissued in a new shareholders agreement signed in **June** 2014.

[4] The Applicant, prior to the appointment of the Ratunes constituted of two directors with equal shareholding, Mr Roelof Dreyer Van Niekerk ("Van Niekerk") and Mr Pieter Francois Du Preez ("Du Preez") (Both referred to as "original directors" in this judgment).

Factual background

[5] In order for the two directors to conduct the business of Applicant as a wholesaler, they were required to obtain a wholesale licence, which could only be obtained or renewed if Black Economic Empowerment (BEE) criteria is met.

[6] The appointment of the Ratunes as directors and shareholders was intended to comply with the BEE criterion. Mr Ratune who was previously employed at Afriq Oil as a Marketing Manager, had a marketing experience in the oil business, was appointed as an executive director. Mrs Ratune was appointed as a non-executive director and remunerated an amount of R20 000 per directors meeting she attended.

[7] Preceding their reappointment, in 2014, the Applicant secured a Sale and Supply of Petroleum Products Agreement with Sasol Oil (Pty) Ltd ("Sasol"). One of the provisions of the agreement requires the Applicant to furnish Sasol, annually, with a copy of its Broad Based Black Economic Empowerment ("BBB-EE") verification certificate and failure to do so constitutes a material breach of the agreement. The Applicant was able to comply annually,

by obtaining and filing confirmatory affidavits from the Ratunes.

Application

[8] Van Niekerk, deposing to the Founding Affidavit on behalf of the Applicant, alleges that: the Ratunes were removed as directors and shareholders of the Applicant on 28 September 2017, having lost their shareholding due to their failure to provide loan finance pro rata to their respective shareholding, when called upon to do so in compliance with the terms of the shareholders agreement. They were as a result called upon to sell their shares to the original directors for the value that was indicated by an independent registered auditor. **He alleges that the first instalment towards payment for those shares has been paid on 25 October 2017 to the Applicant's attorneys.**

[9] Furthermore Van Niekerk alleges that the decision to remove the Ratunes was taken after they **started accusing the original directors of fraud and corruption**, and **disrupting the day to day management of the Applicant** which resulted in the breakdown of the trust relationship between them and the original directors.

[10] In addition, he states that Mr Ratune wrote on the confirmatory affidavit to be submitted for verification purposes on 11 September 2017, **that as a black executive director he was not involved in the day to day management of the Applicant which led to the Applicant's verification rating dropped.** The change on the Applicant's verification, its ownership and management means that the Applicant is no longer B-EE compliant.

[11] On the date of their removal Mr Ratune had addressed an e-mail to Du Preez, Van Niekerk and Mrs Ratune accusing the Applicant of conducting its affairs fraudulently and threatening to make his complains known **to Sasol, the Department of Trade and Industry, the Black Empowerment Commission and the Competition Commission**. He also accused the original directors of having used him and Ms Ratune for **fronting purposes**, giving them an ultimatum to address his concerns or failing which he was going to arrange a meeting with Sasol. His letter was followed by that of Mrs Ratune. She also accused the original directors of having used them for fronting purposes and taken money out of the Applicant. Van Niekerk denies the accusations and points out that he warned them to not do it.

[12] Mr Van Niekerk alleges that post their removal as directors, he was told **by Mr Makhanya, the Q4 Portfolio Manager from Sasol** that the Ratunes notwithstanding his warning, approached Sasol on 5 or 6 November 2017 and accused the original directors of **fronting,** in contravention of the Petroleum Act 12 of 1977. They told Mr Makhanya that they have already **opened a case with the BB-EEE Commission** and the matter was being investigated, **threatened Sasol that unless the agreement is cancelled with immediate effect they will make it publicly known that Sasol condone such practices (because despite Sasol knowing of such practices by Applicant, it elected to continue its association with Q4)**. They subsequently, at Sasol's request, put all that in writing and sent it to Sasol using Applicant's letterhead. He alleges to have seen the letter when he was at Sasol and recovered a copy thereof from Applicant's server.

[13] Van Niekerk alleges that in the letter to Sasol the **Ratunes have complained**:

> [13.1] **of being excluded from meetings, specifically with one particular Mr LA Lanfontein who does inspections to check if the Applicant's diesel is mixed with**

paraffin; when it was actually not necessary for them to be in that meeting. They were invited as directors to all the meetings and entitled to call meetings as well, which Mr Ratune had done, calling a few meetings. Both the Ratunes were actively involved and participated in the issues which any board ordinarily considers. He and Du Preez had an open door policy and Mr Ratune could walk in and discuss any business concern or **ask for any relevant documentation** pertaining to the Applicant.

[13.2] **of unlawfully declaring dividends**; when in fact the dividends were declared at the instance of the auditors and the payment of the Ratunes' dividends defrayed to pay for their various personal expenses, including holiday, car and renovations at their house. The Ratunes signed the financial statements of the Applicant for both 2015 and 2016 financial years.

[13.3] **that Du Preez ridiculed the Ratunes as the minority**; when that has come about due to the meeting being heated up and voices raised, in response thereto Du Preez reminded the Ratunes that they are in the minority.

[13.4] **that du Preez and himself asked them to sign backdated loan cession documents**; however it was due to the auditor's advise who indicated to them that the way in which Applicant's inter-company transfers were structured were indicative of loans and, that arrangement's had to be formalised and ratified, hence the loan cession documents to which Mr Ratune refers.

[13 5] **of fronting**; when the Ratunes have economically benefited from their holding of shares. Mr Ratune, through his employment by the Applicant, received a substantial financial package to the value of R3 058 389.00 which included the use of a motor vehicle, a cellular-phone, reimbursement of his daughter's University fees, his travelling costs, fuel, insurance, retirement annuity and medical aid. The Ratunes also received dividends for R780 000.00 declared on 2 November 2016. He denies fronting.

[13.6] **Mr Ratune as a procurement officer**, his position involved **procuring all supply arrangements with fuel suppliers** and the exercise of control over the drivers employed by the Applicant.

[14] Van Niekerk **alleges that there is no basis to support an allegation of fronting practices** since the Ratunes have been afforded an opportunity and encouraged to participate in the management of the Applicant. They have derived a significant economic benefit from such participation. **Therefore the various allegations they made are untrue and unfounded and made with an intention to damage Applicant's good name and reputation** and unlawfully interfere with Applicant's contractual relationships seeing that they are being paid their share value. He submits upon that ground that **it was clear that immediate action had to be taken to interdict and restrain the Ratunes from carrying their threat through**.

[15] Furthermore **Van Niekerk alleges that the Ratunes held themselves to be directors of the Applicant in the letter to Sasol when in fact they no longer are.**

[16] It is argued on behalf of Applicant that:

Clear Right

[16.1] Applicant has **a clear right to its dignity and good name** which has clearly been infringed by the Ratunes; or alternatively a primary right. and **a right not to be faced with unlawful interference in its contractual relationships with its trade partners**, including Sasol.

Irreparable Harm

[16.2] The Ratunes showed an intention to persist with their unlawful conduct when they threatened Sasol at the meeting that unless **Sasol terminates its agreement with Applicant they will go public with their allegations.** According to Van Niekerk, the Ratune's also imply that Sasol by not terminating the contract condone Applicant's complicit behaviour. The Ratunes conduct will not only be damaging on the Applicant but also to Sasol. The Applicant has therefore **a reasonable apprehension that the Ratunes will continue to defame it** and interfere with its contractual relationships unless ordered by the court to refrain from doing so.

Balance of convenience

[16.3] the balance of convenience favours the Applicant because the Ratunes will not be inconvenienced by the order**. They can make their allegations later if it is in due course found that there is merit in their complaints. Being ordered to desist from making** the statements now will not prejudice them. In contrast should they persist with their defamatory statements Applicant will suffer damages both reputational and also arising out of cancellation of the Sasol Agreement. Moreover once the allegations are in the public domain the damage will have been done and an interdict will not be practicable.

Absence of a satisfactory alternative remedy

[16.4] A claim for damages is notoriously difficult to quantify and the Ratunes may also not be in a position to satisfy a judgment for damages and therefore not a satisfactory alternative remedy.

Answering affidavit

[17] The Respondents' affidavit is deposed to by Mr Ratune. They insist that they remain shareholders of the Applicant, however deny that they are holding themselves as directors. They confirm that they have complained to the relevant authorities that the original directors, not the Applicant *per se,* are acting in a manner that contravenes the provisions of the Act, by engaging in a fronting practice as per BBB-EE Act 52 of 2003. What remains is for the two directors to prove to the authorities that it is not true.

[18] They submit that as persons with vested interest in the matter they are entitled to raise the complaints with the authorities so that they can be attended to and be resolved. The original directors have no right to interdict them from complaining and the court has no power to grant such relief as sought by the Applicant.

[19] **They allege to have been refused access to the payroll information of the employees** and therefore could not respond to allegations about the employees. They deny that Mr Ratune asked the Applicant for a job but state that he was recruited when the original directors heard that he was leaving Afriq Oil. They offered him a position of sales manager. He denies dealing with the drivers and allege that J Kombrick and J Goosen dealt with the drivers.

[20] They argued that they remain shareholders as the shareholders agreement has not been cancelled. They allege that the Memorandum of Incorporation and Purchase and Sale Agreement, say that they are directors and shareholders of Q4 Fuel (the Applicant), therefore they are not misleading the public by holding themselves as directors and shareholders. He denies Van Niekerk 's allegations that they were encouraged to participate substantially in the core activities of the Applicant and represented Applicant's clients and suppliers. **Ratune alleges that he was required and allowed to represent Applicant only at Sasol.** He was refused to represent the Applicant at the Rustenburg depot which the original directors claim to have bought for the Applicant. His attendance was only limited to that extent.

[21] The Ratunes **allege not to know the extent of income, expenditure and dividends declared** so therefore could not confirm if they are being well remunerated and received economic benefits.

[22] They point out that the Sale and Supply Agreement with Sasol is still in place but the complains, dispute relating to or arising out of the agreement and the BEEE component had to be known and submitted to the BEE Commission to ensure compliance. The agreement also had to be put before the Commission or courts in order for them to deal with the relevant disputes and adjudicate upon them. The Agreement therefore should have been placed before court.

[23] They explain that it was required for the first time on the verification form in 2017 that the BEEE partner comment on the day to day operations of the company, thus the comment was provided for the first time. **They allege that the 4 September 2017 minutes clearly corroborate their allegations of non- involvement in the day to day management** of the Applicant and the **meeting between the original partners from time to time taking unilateral decisions without their involvement.**

[24] They plead that the allegation that the Applicant's rating was dropped due to Ratune's affidavit and the alleged implication thereof are all hearsay because **no confirmatory affidavit or such certificate indicating the alleged rating has been attached**.

[25] They allege that the original directors met as majority shareholders not as a board of directors and proceeded to take an unlawful decision to remove them as directors. **They have not attached any document to indicate that they have informed Sasol of the change in its ownership and the circumstances under which the unlawful change has taken place**. The original directors have not tried to comply with **clause 10** of the agreement. No proof is attached of their allegations to have complied with clause 10 and of any notification to them in compliance with clause **5.2.1.**

[26] The original directors made their intention to remove them as early as March 2017,

long before 28 September 2017. They issued a Notice that they sent to them by email informing them of a meeting to be held on 12 April 2017 for the purpose of considering the passing of a resolution that they be removed as directors in terms of s 71 of the Companies Act, 2008. He then informed the original directors that they have not complied with s 71 they sought to rely on, whereupon they on 29 March 2017 sent them another email demanding that he pay an amount of R7 425 000.00 and Mrs Ranute pay R 5 396 000.000 within 5 days to the Applicant.

[27] He again requested proof of compliance with clause 10.1 indicating how the board of directors determined the amount of funding required. He never received a response other than notification that the meeting would continue on 12 April 2017. On 10 April 2017 the meeting was cancelled without any explanation. Since then they have never received notification to sell shares. Instead on **3 October 2017 he received communication for put and sell as per clause 8.1 and 8.2 of the shareholders agreement**. It followed their persistent raising of issues regarding the running of the Applicant and their refusal to sign the 2017 financials. He denied that it was as a result of failure to provide the financial assistance on March 2017 as alleged by the Applicant. The original directors removed them in their absence, contrary to the shareholders agreement with no agenda or minutes of such a meeting, after the meeting that was called for that purpose was cancelled without any explanation.

[28] They received communication only on 5 October 2017, after the original directors' resolution on 28 September 2017 to remove them as directors, that they have actually without their knowledge instructed Ascor on 16 May 2016 to valuate Applicant. No certificate of such valuation is attached or explanation how the valuation took place. Adams and Adams also does not confirm if the money is in their trust account. Such valuation and alleged payment is hearsay evidence. There is no explanation what is the value now in 2017.

[29] On the 4th of September 2017 he indeed asked for the item on their removal to be added on the Agenda and it was discussed. However the Applicant attached only page 1 of the minutes when the full minutes give a clear picture of what was discussed and the next meeting was scheduled for 16 October 2017. Afterwards he was surprised when on 11 September 2017 he received a notice of a meeting to be held on 16 September 2017 as a meeting was already scheduled for 16 October 2017. The meeting did not take place anyway on 16 September 2017 and there was no explanation why. He was not invited to the meeting of the 28th September 2017 even though he was at work on that day.

[30] Mr Ranute admits that they accused Du Preez of fraud and corruption because Du Preez refused to take accountability and be transparent in their dealings with them. He says Du Preez and Van Niekerk had already started to try and remove him and Mrs Ranute in March 2017, irritated by their asking questions and requests for information which was construed as lack of trust and breakdown of relationships. Their minds were made up when they realised that they (the Ranutes) were not prepared to be just directors for show to maintain B-EE status and used underhanded methods to remove them.

[31] **According to Mr Ranute what finally led to their removal as directors was their refusal to sign backdated resolutions and extracts of minutes which formed part of the board pack of the 4th of September 2017 meeting and because of the serious questions they raised on the statement of comprehensive income and the 2017 financials which**

they also refused to sign.

[32] The extracts of minutes refer to meetings the directors supposedly held on 28 February 2017, 1 March 2016, No date and 9 May 2017. The backdated resolutions *inter alia*, were (1) a resolution giving authority to the financial manager to process necessary journals between the loan accounts to give effect to a special resolution to give financial assistance to directors, (2) a special resolution of 1 March 2016 to provide assistance to related parties in the amount of R20 000 000.00 and acknowledging that the board applied the solvency and liquidity test immediately after completing the proposed distribution, (3) a resolution that the loan to Central Lake Trading 103 CC of an amount of R1 120 500 be written off on 28 February 2017 due to its unrecoverable nature and financial manager to process. (4**) a resolution of 9 May 2017, that the directors and shareholders of the Applicant supposedly authorise the original directors to either jointly or separately sign and contract on behalf of the Applicant, any arrangements or contracts dealing with the provision of buy and sell, contingent liability- or key person agreement. They furthermore supposedly also ratify any application, contract or arrangement that might have already been signed by either of the original directors, before that date as valid and binding on the Applicant and all its directors and shareholders.** (5) Reference made to loans allegedly payable by the Applicant to various linked entities companies in the amounts of R32 092 036.92 and R50 350 866.92 and R4 104 000.00. Then again the first loan amount is changed to R19 838 256,92. (6) a directors' resolution supposedly taken in the meeting of 18 April 2017 to sell the company premises at Garsfontein to Q4 Commercial Properties (Pty) Ltd for the sum of R1 400 000.00 and authorising Du Preez to sign the documents necessary for registration of transfer. (6) an Addendum to an existing lease agreement (2014 November agreement) between the Applicant and Q4 Logistics. The lease agreement does not specify the monthly rental rand value which was to be inserted in the agreement and it reads: "the monthly rental will be equal to the monthly instalment payable to the relevant financial institution plus (sixty) 60 %". It was signed by Van Niekerk on behalf of Q4 Logistics and Du Preez on behalf of Applicant. (7) Another addendum included was to an existing contract of lease of motor vehicles by the Applicant from Q4 Admin (Pty) Ltd which were already signed by Du Preez and Van Niekerk. The Ratunes were required to ratify the documents with retrospective effect.

[33] Mr Ratune points out that he did not hide the fact that he will be lodging a complaint with inter alia, Sasol and the Commission and therefore was not doing anything clandestine or unlawful but the reaction of the Applicant shows that they do not want the truth to come out. **They wanted to prevent him from pursuing his rights, instructing him not to lodge his complain but on the other hand not addressing his concerns. The instruction formed part of the charges in the notice of disciplinary hearing that was brought against him.** He however gave them an opportunity to deal with his concerns which they failed to do, probably persuaded by the fact that they had had already signed the resolution to remove them on 28 September which he was not aware of at the time. The original directors dismissed as 'utter nonsense' his letter of the 28 September2017. Their allegations are against the original directors not the Applicant, due to the manner in which they were treating by them.

[34] On the issue of the Applicant's fleet of trucks, after being told that as part of the restructuring, Applicant would sell the fleet to Q4 Logistics, the agreement was concluded

by the original directors however, **in terms of clause 8 thereof, Q4 Logistics (that is wholly owned by the original directors) did not have to pay any consideration to Applicant (it was therefore created just to house the Applicants fleet and eventually to own it)**. The original directors had then without his and Mrs Ratune's knowledge concluded a lease of the fleet of vehicles agreement with Q4 Logistics, which now is leasing the vehicles back to the Applicant for a monthly rental equal to the instalment payable to the relevant financial institution plus 60 % (sixty percent). They (the Ratunes) reckon this to be an elaborate scheme to divest assets from the Applicant to benefit the original directors in their subsidiary entities which Ratune was not allowed to be involved in or in any of their subsidiaries.

[35] The aforementioned agreements also involved flatbeds trucks which were costing the Applicant R8 795 285.80. Although they were sold to Q4 Logistics and then leased back to Applicant, the trucks were however working on an Afgri contract and earning an income for the original directors as owners of Q4 Logistics, yet Applicant running the costs that includes fuel and the drivers monthly rental. The Ratunes allege that when they raised all this they were removed as directors and shareholders and a disciplinary hearing instituted. If the agreements as alleged did not require a board resolution he questions why the original directors made the resolution part of the board pack of the meeting of 4 September 2017 and required them to sign it and why they would not accept their refusal to sign it. The Ratunes allege that it is disingenuous of Van Niekerk to suggest that because he was a director he could make such a financial decision without the approval of the board, a concern raised in Mr Ratune's e-mails that was regrettably ignored. He was concerned that they were creating expenses for the Applicant and the subsidiaries getting all the benefit.

[36] Mr Ratune states that on hindsight these intra- group transactions were schemes in which Applicant would generate income but the benefits would go to the original directors through their subsidiaries. **He alleges that no board meeting took place to decide on the sale of the business premises either, even though the agreement refers to a resolution of 18 April 2017. The original directors decided between themselves and thereafter in the meeting held on 9 May 2017 sought ratification from them to cure the defect which they refused to do. He argues that the Applicant would not require funding were not for the intra-group transactions which were nothing more than schemes designed to take the money out of the Applicant to their various subsidiaries where the Ratunes had no shareholding.**

[37] They point out that in the minutes of 4 September 2017, they were told that Q4 Depot one of the subsidiaries owes Standard Bank R35 Million, a loan it will not be able to repay. They had used the money to build garages at Hammanskraal and 3 other places which are fully operational but the garages are not servicing the debt, instead Q4 is and the original directors have failed to explain why the Applicant needed the loan and why the loan cannot be paid from the proceeds of the garages.

[38] Mr Ratune admits to the contents of his letter dated 9 November 2017 and points out that Van Niekerk does not elaborate as to in what manner were the allegations in his letter untruthful and the allegations unfounded. **On the allegations about Sasol, specifically about what is alleged was said by Makhanya, he avers that all is hearsay that is inadmissible.**

[39] He argues that the Applicant cannot want to interdict him from co-operating with a process he has already initiated and must prove that there has not been a contravention of the Petroleum Act and BEE Act, not just simply deny it. He denies that they have any intention to damage the reputation of the Applicant or unlawfully interfere in its contractual relationships in complaining about the breaches of the law to Sasol and BEE Commission. He points out that their dispute is not with the Applicant but the original directors whom they intend pursuing for the monies appropriated from the Applicant.

[40] The Ratunes welcome the opportunity to deal with the matter at any forum. He alleges Van Niekerk is unable to deal with specific allegations because he knows them to be true. Mr Ratune allege to be under pressure now as the original directors, on 13 November 2017, issued him with a Notice of Suspension and Disciplinary Hearing to be heard on 23 November 2017 without furnishing him with a response on the enquiry made by his attorneys on the Hearing.

[41] The Ratunes refute Van Niekerk's allegations that in their 28 September 2017 letter they seek to create an impression that their shares were held ransom until Mr Ratune had negotiated the contract with Sasol, requiring him to negotiate the deal first in order for them to acquire the shares. He avers that **he signed the Sasol Contract on behalf of the Applicant on 13 May 2014 and on 23 June 2014 a shareholder agreement, (**the 2012 agreement **having been** cancelled) **was signed in terms of which the 26 % shareholding in the Applicant was reissued to them.**

[42] He admits that on their appointment as directors they initially agreed to the R44 000 000.00 believing that the original directors were entitled to it since they started the company. But they have continued to remove assets as well and money from the Applicant to their subsidiaries. The vehicle he was provided with, the holiday and the fees for his daughter were never given to them as part of their loan accounts, even when he was reimbursed the money he paid for the electric fence. On the other hand the original directors pay from Applicant salaries of their domestic workers, flat bed drivers contracted to Afgri and Tutuwedzo staff. Their wives and parents all use a Q4 Fuel.

[43] Regarding the determination by the auditors they have never met with the auditors or shown any correspondence from them therefore doubt that such communication or determination exists. Nothing has been attached to prove such determination.

[44] They do not have any idea what the package of the original directors is and could only make out from the ledger the payments made to them in 2017. Instead of 4 meetings they are supposed to hold yearly they only held 1. After the dividends were allegedly declared at the instance of the auditors their share was defrayed against their substantial loan account. They therefore never received the money.

[45] On request for information from an Applicant employee, Ranute says he was told off by du Preez that managing the Applicant was not his job but Du Preez's . Du Preez accused him of creating chaos and confusion and wasting an employee's time who will not know whose instructions to follow. Du Preez never furnished him with a copy of the information he was seeking. Instead he got a letter from Van Niekerk on 31 March 2017 telling him that it is a waste of time if he feels they must update him on everything that is going on as du Preez is the CEO and makes all the decisions. That Ranute's conduct of checking up on all

decisions he makes unnecessary and causing confusion. Van Niekerk later furnished him with the financials however demanded to know why Ranute needed profit calculations.

[46] The Ratunes argue that the Applicant has no right in fact or in law to seek to interdict them from pursuing their right as shareholders and B-EE component of the Applicant. They also allege to have given the Applicant an opportunity to rectify the situation, who instead opted to proceed with a disciplinary action against them. They assert that they have a right in terms of the Shareholders Agreement, read with the BEE Act and the Companies Act, to raise the kind of issues or concerns in their e-mails to the original directors with the relevant bodies.

[47] They further argue that in so far as the Applicant complains that the statements made in e-mails defamatory, only seven months after they have been made, the interdict is not appropriate because the Applicant can await and have an adequate alternative satisfactory relief in the action it contemplates to institute in due course.

[48] According to the Ratunes, if the relief sought by the Applicant is granted, their rights to benefit from the objective of economic empowerment and transformation through the BEE will be undermined to their detriment, therefore Applicant's argument that the balance of convenience favours him without merit. They argue that the Applicant has failed to make a case for the relief sought.

Replying Affidavit

[49] In the Applicant's replying affidavit Van Niekerk refutes the Ratunes' allegation that they are still shareholders of the Applicant arguing that they had an opportunity to raise an objection to their removal and because they didn't, their allegation raised only now is not only factually unsupportable but also spuriously raised at a very late stage.

[50] Van Niekerk alleges that the issue of shareholding does not require immediate resolution given the limited nature of the interim relief that is sought in this application. He argues that the Ratunes are at liberty to pursue whatever remedies they may deem appropriate to their claims but in the meantime may not hold themselves out to the public as shareholders.

[51] Even though they allege not to have held themselves as directors of the Applicant the letter to Sasol indicates that they did, notwithstanding knowing that they have been removed. They argue that under the circumstances the Applicant is entitled to the relief sought (interdicting the Ratunes from doing so).

[52] It is persisted on behalf of the Applicant that being accused of fronting is defamatory. Furthermore that the Applicant has no issue with the reporting of the issues by the Ratunes to any appropriate authority for investigation but there is no need for the Ratunes to repeat the allegations to other third parties.

[53] It is argued further that there is proof of the Ratunes ventilating their concerns not only to the authorities but to their suppliers as well, that is Sasol with an objective of strong arming Sasol to cancel the agreement which would then damage the business of the Applicant. The Ratunes are therefore not doing it to vindicate their rights. Van Niekerk alleges that the ultimatum to Sasol was clear that is "***cancel the agreement with Q4 or we***

will go public with these allegations."

[54] The Applicant now argues that it does not want to prevent the Ratunes going to the authorities who might have an interest in learning about the complaints but is against the harassment of the Applicant's suppliers and placing untenable demands on them that they cancel the agreement with Applicant.

[55] In order to illustrate that Mr Ratune derived a significant monetary benefits from his participation at the Applicant, Van Niekerk attached a statement of Ratune's remuneration as a director and copies of his IRP5 for the years, 2015-2018, even though he is alleged to have been dismissed by the end of September 2017. He also attached a letter that was sent by the Applicant's attorney of record to Sasol that allegedly puts the version of the Applicant to Sasol in the whole saga.

[56] As a departing submission the Applicant represented by C Whitcutt, amended its Notice of Motion, seeking now the interim relief as follows:

1. The First and Second Respondents are interdicted and restrained from-

1.1 holding themselves out to be shareholders and / or directors against the Applicant whether to its suppliers, customers, employees or the media;

1.2 publishing any defamatory allegations against the Applicant whether to its suppliers, customers, employees or the media;

1.3 stating, imputing or implying to the media that the Applicant has-

1.3.1 contravened the provisions of the Petroleum Act 120 of 1977 as amended by, inter alia, engaging in a fronting practice as contemplated by s 1 of the BBB-EE Act 53 of 2003

1.3.2 committed, or has attempted to commit any other crime; or

1.3.3 conducted itself in an unethical manner.

Legal framework

[57] An Applicant seeking an interim relief of an interdict, has to establish the following:

[57.1] a prima facie right;

[57.2] a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

[57.3] that the balance of convenience favours the granting of an interim interdict; and

[57.4] that the Applicant has no other satisfactory remedy.

[58] In determining whether the Applicant has established a prima facie right, more is required to be done by the court, other than only looking at the allegations of the Applicant. The court is required to exercise something short of a weighing up of the probabilities of the conflicting versions. The manner of approach that is appropriate is explained in *Webster v*

Mitchell 1948 (1) SA 1186 (W) 1189-1190 as follows:

> "The proper manner of approach I consider is to take the facts as set out by the Applicant," together with any facts set out by the Respondent, which the Applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the Applicant could on those facts obtain final relief at a trial. **The facts set up in contradiction by the Respondent should then be considered. If serious doubt is thrown in the case of the Applicant, he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to "some doubt."** But if there is mere contradiction, or an unconvincing explanation, the matter should be left to trial and the right protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief." (my emphasis)

[59] In the instance where there is mere contradiction, or unconvincing explanation by the Respondent, it is recommended that the matter should be left to trial and the right protected in the meanwhile, subject to the **respective prejudice in the grant or refusal of interim relief**: see *Webster supra; L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (276 E - G)*. Respective prejudice is a very important factor to be considered in deciding whether or not to grant or refuse the relief sought.

[60] Fear or anxiousness about the harm being irremediable if interim relief not granted should be a well grounded fear. There being credible evidence from which such apprehension resides. In *Beecham Group v B M Group (Pty) Ltd* the court said with regard to various factors, which must be considered:

> "I consider that both the question of Applicant's **prospects of success in the action** and the question whether he would be **adequately compensated by an award of damages** at the trial are factors which should be taken into account as part of a general discretion to be exercised by the court in considering whether to grant or refuse a temporary interdict. Those two elements should not be considered separately or in isolation, but as part of the discretionary function of the court which includes a consideration of the **balance of convenience and the respective prejudice** which would be suffered by each party as a result of the grant or refusal of a temporary interdict."

Respondents holding themselves out as directors and shareholders

[61] The Applicant seeks first to interdict the Ratunes from holding themselves as directors and shareholders of the Applicant, alleging that due to their failure to pay their pro- rata share of the loan account when they were called upon to do so and a resolution taken on 28 September 2017 to remove them as directors they cannot hold themselves as such. The Respondents have indicated in contradiction of Applicant's allegations that there was a defect in the process of their removal as shareholders, which was pointed out to the original directors and was not rectified. Their purported removal as shareholders was intended to have taken place in April 2017 but it is alleged to have ultimately taken place in October 2017 following their alleged removal as directors. In the latest removal, the Applicant alleges that their shareholding was lost through a call option sale which is now in contradiction to their initial allegation.

[62] Furthermore on the allegation of their removal a shareholders, it is alleged by Van Niekerk that a payment has been made towards this sale by payment of an amount into the trust account of the Applicant's attorneys. A point that the Ratunes have challenged,

pointing out that there is no confirmation by the attorneys and therefore those allegations are hearsay. Even though the Applicant had a benefit of filing a replying affidavit which it did, no response was given to that challenge when it would have been prudent to file a confirmatory affidavit. So not only is there a serious challenge to the allegation of their removal as shareholders but also the facts as presented in the parties affidavit, the Applicant does not show a prospect of success, the information to substantiate the allegations being inadequate.

[62] The Ratunes have also indicated that they were removed in a board meeting that they being members of the board of directors did not attend, as they were not invited. So as to what influenced the decision and how it was to be implemented was unilaterally decided upon by the two original directors. It is however evident from the common cause documents and e-mails annexed to the affidavits exchanged between the parties that during that period, there was a serious contention about the manner in which Applicant was being managed, accountability of the original directors and the Ratunes access to information. Both parties alluded to that, hence the reason of their removal had become an issue.

[62] In addition to the aforementioned difficulty posed by the existing disputes between the parties, the Applicant has also not shown if or how it will suffer irreparable harm or negatively be affected by the Ratunes holding themselves as directors or shareholders during the existence of the dispute, which the Applicant intends to sought out by instituting an action within 30 days of the order of the court.

[63] The Applicant has failed to make a case for the granting for an interim relief that prohibits the Ratunes from holding themselves as directors and shareholders of the Applicant.

publishing any defamatory allegations against the Applicant to its suppliers, customers, employees or the media

[64] The Applicant has complained that the Ratunes have as a result of what has transpired approached its supplier, specifically Sasol and made defamatory statements against them accusing them of fronting, fraud and corruption and threatened to go public with the allegations if the contract was not cancelled. What the Ratunes are accused of is according to Applicant constituted in a letter dated 9 November 2017 that Mr Ratune wrote at the request of Sasol and what Van Niekerk alleges one Mr Makhanya, the Applicant's portfolio manager at Sasol, told him. The Applicant alleges that Mr Ratune demanded that the contract procured at his behest be cancelled immediately, failing which he will publicly let it be known what Sasol is doing. As a result, the Applicant wants the Ratunes to be interdicted from carrying out its threat, defaming it to the media, its supplier Sasol, customers and employees.

[65] Notwithstanding the Applicant not attaching a confirmatory affidavit from Mr Makhanya to confirm the conversation during which the demand and the threat was made and upon which the Applicant's apprehension of irreparable harm is alleged to have arisen, reading the entire letter reliant upon, I could not find the threat complained about that **'threatened Sasol that unless the agreement is cancelled with immediate effect they will make it publicly known that Sasol condone such practices' or** letting it be known what is in the letter. I repeatedly read the recommendations made by Mr Ratune, as was pointed out

by the Ratunes' counsel, Mr Phala, there is no threat to publicise the contents of the letter to anyone except a recommendation made three times that the contract must be cancelled. Also there is no demand for immediate cancellation.

[66] In respect of publishing or making it known to Sasol, the allegations have already been made, a complaint on the status quo lodged with Sasol. The Applicant has indicated to have responded to the allegations in a letter dated 15 November 2017, it would be unfair and prejudicial to the Respondents to interdict them when the Applicant is already engaging Sasol on the issues raised to counter Mr Ratune's allegations. The balance of convenience looking at respective prejudices favours the refusal of the interim relief.

[67] I have also perused the letter of the 28th September 2017 to which Applicants Counsel referred during argument. The last paragraph reads "Francois and Dreyer you can go ahead and remove us directors because you both said your are removing us because we can't provide finance to the company and be informed that with help of SASOL, DTI, BLACK EMPOWERMENT COMMISSION AND COMPETITION COMMISSION we will this this case." Applicant's Counsel has conceded that these are not suppliers but relevant authorities with whom the Respondents are entitled to lodge a complaint. No mention is made of the media or of general suppliers and customers of the Applicant. As indicated there should be well grounded reasons of apprehension of harm. The Applicant has failed to establish any reasonable grounds. There is no case made for an interim relief in that regard.

[68] This goes to confirm that Applicant's prayer seeking to interdict the Respondent from stating, imputing or implying to the media that the Applicant has-

> 1.3.1 contravened the provisions of the Petroleum Act 120 of 1977 as amended by, inter alia, engaging in a fronting practice as contemplated by s 1 of the BBB-EE Act 53 of 2003
>
> 1.3.2 committed, or has attempted to commit any other crime; or
>
> 1.3.3 conducted itself in an unethical manner.

is not rational as it is indicated that the alleged threat was never a fact. The forums that were to be approached were repeatedly mentioned being the BBB-EE and Competititon Commission and the DTI. There is no ground upon which the Applicant can be interdicted from interacting with these bodies.

[69] Under the circumstances I make the following order

> [1] The Application for an interim relief is dismissed with costs.

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Applicant:	C WHITCUTT SC
	& C de Witt
Instructed by:	Adams and Adams Tel: 012 432 6316 Fax: 012 432 6599
For the Respondent:	
Instructed by:	M R PHALA C/O K.P. SEABI & ASSOCIATES Tel: 012 351 6700 Fax: 012 421 3742
Heard:	7 December 2017