REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO

1/12/23 .....

DATE SIGNATURE

Case No: 008808/2022

In the matter between:

NEO-THANDO HOLDINGS (PTY) LTD	**APPLICANT**
and	
ELLIOTT MOBILITY (PTY) LTD	**FIRST RESPONDENT**
NEO-THANDO ELLIOTT MOBILITY (PTY) LTD	**SECOND RESPONDENT**

In re:

ELLIOTT MOBILITY (PTY) LTD	**PLAINTIFF**
and	
NEO-THANDO ELLIOTT MOBILITY (PTY) LTD	**DEFENDANT**

JUDGMENT

FRANCIS-SUBBIAH J:

[1] This matter involves the deadlock between directors and two shareholders in a company called Neo-Thando Elliott Mobility (Pty) Ltd (NTEM), the second respondent. The company was established by the applicant Neo-Thando Holdings (Pty) Ltd and the first respondent, Elliot Mobility (Pty) Ltd solely for the purpose of a joint venture to bid for a tender. The Department of International Relations and Cooperation of the Republic of South Africa (DIRCO) awarded the tender to the joint venture, NTEM, to provide for the removal and storage of household items and motor vehicles for incoming and outgoing ambassadors to and from South Africa. The applicant (Neo Thando) and the first respondent (Elliot) are the only shareholders in the company NTEM. Neo Thando holds 55% of the shares and Elliot the minority of 45%.

Background to the dispute

[2] NTEM has four directors. Each director has one vote. Elliot is represented by Ansley and Barker, and Joseph Morebudi and Sannah Morebudi represent Neo Thando. The dispute originally arose in 2018 and 2019 where the Morebudi's were accused of defrauding and impoverishing NTEM by creating entries to the benefit of Neo Thando's account in NTEM without authorisation. In 2020 Elliot gave notice to convene a meeting in terms of section 71 of the Companies Act 71 of 2008 (***herein "Companies Act, 2008"***) to table the removal of the Morebudi's as directors from NTEM. This followed by Neo Thando bringing an urgent application as Part A for an order interdicting the convening of the section 71

meeting pending the outcome of Part B to liquidate NTEM. Part A was granted and is appealed against. Part B was heard and dismissed on 19 April 2022 by Neukircher, J on the basis that a joint venture agreement of 16 February 2015 between the parties had barred the liquidation of NTEM at that stage, as all its mutual obligations were not fully discharged. Nonetheless, Neukircher, J granted leave to appeal her decision which is enrolled for hearing on 5 June 2024 before the Full Court.

[3] There are currently two interlocutory applications before this court. One is for the stay of the action proceedings and the other for leave to intervene. In 2022, Elliot as the plaintiff issued summons against the company NTEM for the recovery of an alleged debt owed by NTEM to Elliot under case number 2022/008808. The only defendant, NTEM has not defended the action and remains unrepresented. In response to this action proceeding Neo Thando applies to stay the proceedings pending the outcome of the liquidation appeal under case number A233/2022 and if unsuccessful to be granted leave to intervene in the action proceedings as a second defendant.

[4] Neo Thando's application to stay the proceeding and seeking leave to intervene is based on their interests as the majority shareholder, "quasi partners" and directors of NTEM and to protect the interests of the company NTEM.

[5] NTEM's minority shareholder Elliot, and Elliot's directors, Ansley and Barker will not support a resolution for NTEM to defend the action. Elliot maintains that there is no claim against Neo Thando and therefore it has no *locus standi* to be joined as a second defendant in the action proceedings instituted by Elliot for the recovery of the rental due to Improvon, NTEM's landlord.

[6] Elliott, entered into a rental agreement with Improvon on behalf of NTEM and remains responsible for the rental. Due to the deadlock between the directors, it is alleged that Mrs Morebudi refuses to release payments from NTEM's bank account to make payments to Improvon. In this regard Elliot has an oral agreement with NTEM for the rental and issued summons against NTEM for the payment of R16 942 765, 00 plus a further indemnity for R 7 598 690,80. Elliot submits that it has been sued by NTEM'S landlord, Improvon in an amount more than R10 000 000 for lease of the premises occupied by NTEM. In this regard Elliot paid R 3 000 000 to hold the action in abeyance pending its judgment by default against NTEM.

[7] Neo Thando argues that NTEM cannot defend the action and resist Elliott's claims because Elliot does not have to prove its claims. Elliott as a minority shareholder and equal director is determining whether there is a debt due and payable by NTEM and without NTEM being given an opportunity to defend itself. Elliot does not have to confront defences raised by Neo Thando and prove its claim because in NTEM'S inability to defend the action it can obtain

default judgment. NTEM finds itself in this position because of the deadlock and is therefore deprived of a basic right, the right to advance a defence. In excluding Neo Thando from the action, Neo Thando complains that Elliot seeking to obtain a judgment in its favour is unreasonable and unfair under the circumstances. While Elliot directors are bound to act in the best interests of NTEM they are in essence protecting the interests of Elliot the shareholder.

The Law

[8] The application for stay of proceedings is premised on section 358 of the Companies Act 61 0f 1973 (herein "***Companies Act, 1973***") which provisions have not been repealed and continue to apply in terms of item 9 of schedule 5 of the Companies Act, 2008. Section 358 of the Companies Act, 1973 provides as follows:

> "*At any time after the presentation of an application for winding up and before a winding up order has been made, the company concerned or any creditor or member thereof may-*
>
> *(a) where any action or proceeding by or against the company is pending in any court in the Republic, apply to such court for a stay of the proceedings; and*
>
> *(b) where any other action or proceeding is being or about to be instituted against the company, apply to the court to which the application for winding up has been presented, for an order restraining further proceedings in the action or proceedings,*

and the court may stay or retain the proceedings accordingly on such terms as it thinks fit."

[9] The court is not bound to stay the proceedings but in exercising a discretion considers what is equitable in the given circumstances. In ***Absa Bank Limited v Indwe Project Managers CC and Others*** (CA 128/2016) [2017] ZAECGHC 125 (12 December 2017) at para 14, it was held as follows:

> "*As to the discretionary power of a Court to which an application in terms of s358(b) is made to grant a stay of execution the learned authors of Henochsberg point out at 755 that the Court's discretion is a narrow one and that a stay or restraint should be granted only in special circumstances rendering its grant equitable."*

[10] The court considering the matter on appeal dismissed the stay of execution on a few grounds, one of which included the applicant having another satisfactory remedy. In the present matter a stay of the action proceedings is sought and likewise addressing the issue of equity arising from the surrounding circumstances is key. There remains a myriad of disputes between the parties. The history of the litigation and disputes have been canvassed in these applications by both parties that runs into thousands of pages. Some of which briefly relate to:

a) was a resolution passed in respect of the lease agreement,

b) is the working capital, loans, rentals, insurance all forming part of the monies now claimed in the action proceedings,

c) the contributions made to NTEM,

d) which parties had to obtain insurance and how would the parties indemnify each other,

e) should the parties decide to make loans to the joint venture and should it be on a *pro rata* basis,

f) was there a justification for the loan account,

g) did Elliot provide working capital to NTEM,

h) Elliot's officials have prepared the financial records of NTEM and Neo Thando complains that it does not reflect the true position.

i) does some of this working capital constitute loans which were not paid *pro rata* by the shareholders,

j) a reconciliation of the indebtedness is required,

k) which entity received the benefit of a reduced tax liability,

l) what were the permissible deductions in calculating the taxable income,

m) is Neo Thando being a shareholder of 55% liable for its 55% portion of the loan to be paid to NTEM.

n) Mrs Morebudi has not signed the audit certificates relating to loans owing to Elliot. There remains a dispute in this regard.

[11] It is evident that the parties are at loggerheads with one another. Each financial issue requires debatement and resolution for the parties. The alternate dispute resolution process provided for in the joint venture agreement is appropriate for setting a firm structure to protect and hold the space for justice to enable the process to unfold in assisting the parties reaching resolution.

[12] A consideration of the liquidation application therefore becomes relevant as it was dismissed on the basis that the obligations of the joint venture agreement were not complete at the time. It is however, submitted by the parties that the term of the DIRCO contract has come to an end. The contract now proceeds on a month-to-month basis for the storage of motor vehicles and brings in an income of approximately R350 000 per month, whereas NTEM's lease agreement is in excess of R100 600 per month. It is common cause that NTEM's claims against DIRCO is more than R54 million. It is, therefore, clear that a proper accounting of the finances of NTEM be undertaken, which is deemed to happen in the event that the appeal succeeds and NTEM is placed in liquidation and a liquidator will attend to the winding up process.

[13] In this regard Section 348 of the Companies Act, 1973 provides that a winding up of a company by the court is deemed to commence at the time of the presentation to the court of the application for winding up. Accordingly, if the appeal is successful and the winding up application is upheld, the commencement

of the winding-up date will be retrospective and will be deemed to have commenced on the 9 April 2020 and will affect all litigation relating to NTEM.

[14] The facts in the appeal are common cause. The legal issues pertain to whether the joint venture agreement precludes the parties from invoking section 81(1)(d) of the Companies Act, 2008. In this respect whether the statutory provisions of section 88 are absolute or could the parties' contract out of the statutory provisions. A consideration of the legal consequences of a contractual provision in the context of a company which is analogous to a partnership and in the circumstances where the directors and shareholders are locked into a relationship which has irretrievably broken down will form the basis of the appeal.

[15] Neo Thando further submits that Elliots current claim was sought in the arbitration matter and it was made up of various separate items falling under and constituting Elliot's loan accounts. Elliot at that stage was not able to produce all the documents in the arbitration to support its claim. Neukircher, J in her judgment at paragraph 31 held that:

> "*the respondents have always known that their claims are disputed by the applicants – it is for this very reason that they referred the matter to arbitration where evidence could properly ventilate the dispute.*"

[16] Neukircher, J further held that the issues are wide-ranging and have substantial factual enquires. Therefore, referring the matter to oral evidence or trial was not appropriate since the arbitration proceedings was not discontinued but merely postponed and the issues remain *lis pendens*.

[17] On the principle off the court's inherent discretion to avoid injustice and inequity, the case of ***Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd Investments (Pty) Ltd and Others*** 1979 (3) SA 1331 is apposite. In this case Nicholas J said at 1340B-D:

> *"The courts do not however act on abstract ideas of justice and equity. They must act on principle."*

[18] In that matter, the court having the power to grant a stay of proceedings on equitable grounds found that a case was not made out for a stay because it could not be assumed that the defences raised in the pleas were entirely without merit. In a similar vein, Neo Thando is desirous to raise defences to the particulars of claim of Elliot and is confronted with a lack of standing.

[19] A case dealing with the principle of *locus standi* is ***South African Riding for the Disabled Association v Regional Land Claims Commissioner and others***, [2017] ZACC 4. In this case, the Constitutional Court confirmed that it is

settled law that an applicant for intervention must meet the direct and substantial interest test in order to succeed and held the following at para 9:

> *"...What constitutes a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to justify the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, it proved, would entitle it to relief."*

The right to compensation, had given rise to a direct and substantial interest.

[20] In the case of ***Trinty Asset Management (Pty) Ltd v Investec*** 2009 (4) SA 89 (SCA) at para 38, the court held that shareholders are allowed to intervene in the matter where the validity of the loan agreement would be a triable issue. As such the applicants will have the necessary *locus standi* demonstrating direct and substantial interest in the matter having a right to question the loan account.

[21] An opposing view was taken in ***Goldrush Group (Pty) Ltd v North West Gambling Board and Others*** (648/2021) [2022] ZASCA 164; 2023 (3) SA 487 (SCA) (28 November 2022), where the court held that the interest of Goldrush, as a shareholder was purely financial and therefore could not find standing on that fact. In addition, a legal interest would have tipped the scales in its favour. The

court however in referring to ***Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*** [2012] ZACC28, 2013 (3) BCLR 251 (CC) acknowledged that each case depends on its own facts and no general rule covers all cases. The necessary interest in an infringement or a threatened infringement must be shown with a measure of pragmatism.

[22] On this practical note, Neo Thando is a 55% shareholder, but also holds directorship at NTEM, (as members of NTEM) have an interest in the action proceedings of Elliot. A debt owed by a company to a shareholder by means of a shareholder loan and a debt arising out of a company's contractual obligation to a third party for invoices issued by the shareholder to the company confirms a financial interest of the second shareholder.

[23] Where Elliot is entitled to legitimate claims against NTEM, it should prove its claims that arise from the oral lease agreement not in the absence of members who are both directors, shareholders and *quasi* partners. As in ***Trinity***, Neo Thando as shareholder will have the right to question the oral lease agreement. Questions relating to the resolutions passed about the lease agreements, the payment of interest and entitlement to the monies, the question of the loan accounts and debatement of the accounts are triable issues. These, I am satisfied give Neo Thando the necessary *locus standi* demonstrating direct and substantial interest in the matter.

[24] In ***Zelbree Investments (Pty) Ltd and Another v Discovery Life Investment Services***, (07903/11) [2011] ZAGPJHC 13 (15 March 2011) at para 15, the court also held that *locus standi* can be established where a party will stand to suffer prejudice if the intervention is not allowed. It is the legal interest in the subject matter of the litigation that may be prejudicially affected by the judgment of the court. Neo Thando contends that it will be prejudiced by NTEM paying a loan that is not due, this will reduce the equity of both NTEM and Neo Thando, as profits in NTEM are shared by the shareholders in proportion to their shareholding. This threat of infringement; may give rise to a legal claim of unjust enrichment. Harm will likely be suffered by being ordered to pay by default that which is not due. Neo Thando although desirous to defend the action, is precluded from authorising NTEM to defend the proceedings.

[25] A court in exercising its discretion is entitled to have regard to the likelihood of the winding up order being in due course granted and to the nature of the proceedings sought to be continued or begun as considered in ***Niagara Ltd v Bension*** 1912 WLD 46. In the event the appeal is granted the commencement of the winding-up date will be retrospective and will be deemed to have commenced on 9 April 2020 and will affect all litigation relating to NTEM. For these reasons an intervention application will become fruitless and tantamount to wasted expenditure and resources.

[26] It is evident that the element of trust has broken down between the parties. Elliot alleges that without the cooperation of Neo Thando's directors an approximate amount of R 29 million sits in a bank account that is not invested in an interest-bearing account and this results in financial loss for NTEM. Directors and members of a company owe a duty of utmost good faith in terms of their dealings in the company. A fiduciary duty in terms of section 76 of the Act requires directors to act in the best interest of the company in exercising their powers. For approximately five years the directors and shareholders have been deadlocked and to break the deadlock, a stay of litigation pending the liquidation appeal is the correct and a pragmatic solution. This would be in the best interests of NTEM. It will further be equitable for both parties considering their deadlocked circumstances.

[27] To stay legal proceedings between the parties will proverbially 'calm the waters down' and cease hostilities. Elliot will still maintain its right to pursue its action whether NTEM is liquidated or not. The possible prejudice of delay is compensable by interest earned on the alleged debt if it succeeds in establishing its claim. A truce between the parties may have the further benefit of proceeding with the postponed arbitration.

[28] Elliot approached the court for judicial case management in response to the ongoing litigation and fray between the parties. Neo Thando further requested

that the new action of Elliot under case number 2023/017339 form part of the judicial case management together with case number 2022/008808 to protect the interest of all three entities, since the new action appears to be based on the same cause of action as the 2022 matter. This issue has not fully been canvassed by the parties. It would be in the interests of the parties where the factual issues overlap that this matter is also case managed and stayed pending the finalisation of the liquidation application.

[29] In requesting judicial case management, I accept that the parties envisage an effective disposal of the defended matters. It is therefore appropriate for the judge case managing the matter to make an order disposing of the issues concerned in such a manner as he or she deems fit and may order that litigation proceedings may be stayed until certain issues have been disposed of. As the judge case managing this case, I had the benefit of reflecting on the many disputes between the parties and in my view justice and equity will best be served in granting a stay of the litigious proceedings because of the upcoming determination on the liquidation application. The stay will provide an adequate solution, considering the particularity and factual disputes in this matter.

[30] The issue that is left to consider is the submission made by Elliot that Neo Thando had failed to comply with provisions of section 165 of the Act. Elliot submits that the provisions of section 165 (2), (3) and (4) have not been satisfied and complied with and therefore it is not open to Neo Thando to invoke the

provisions of section 165 (5). Neo Thando only referred to a possible application reliant on section 165 in Part A of its notice of motion in the stay application. When the matter came before Court, Neo Thando sought relief in Part B of the stay application. That is that the application for default judgment in the action be stayed pending finalization of the liquidation appeal in case no A233/2022. In the alternative, it sought a stay pending the finalization of its application to intervene as second defendant in the action. The application to intervene was, however not based on section 165 as a derivative action, on behalf of the company, but the right to be joined as a defendant on the basis that the joint venture in NTEM was a "quasi-partnership" and that it therefore had a direct and substantial interest in that action. It therefore did not need, nor did it seek an application as contemplated in section 165(5) of the Companies Act, 2008. Additionally, I therefore do not find that the application for a stay is *mala fide*, dilatory, frivolous and vexations in this context.

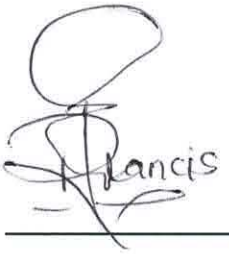
[31] In respect of the award of legal costs, the court in exercising a judicial discretion gives due consideration to the interests and conduct of all the parties affected by its costs order. As both applications were heard at the same hearing and in effect dealt with the same facts although addressing different legal principles. I find that the applicant was successful and therefore should be awarded its costs in accordance with the general rule that costs follow the result.

[32] For these reasons I make the following Order:

32.1 The default judgement application under case number 008808/ 2022 is stayed pending the finalization of the appeal under appeal case number 8233/2022 against the dismissal of the application for the defendants winding up which appeal is enrolled for hearing on 5 June 2024.

32.2 In the event that the appeal under case number 8233/2022 is dismissed the applicant is directed to file a plea as second defendant within 20 days of the appeal order.

32.3 Costs of the application on an attorney and client basis to include the cost of senior counsel.



R. FRANCIS-SUBBIAH

Judge of the Gauteng High Court

Pretoria

APPEARANCES:

FOR THE APPLICANT:	Adv. E Furstenburg
INSTRUCTED BY:	VZLR Inc.
FOR THE RESPONDENTS:	Adv. B Swart SC
INSTRUCTED BY:	Farah and Parker Attorneys
DATE OF HEARING:	31 August 2023, 21 November 2023 -case management meeting
DATE OF JUDGEMENT:	01 December 2023

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date for the delivery is 01 December 2023.