



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 113228/2023

In the matter between:

THAPELO JOSIAH MOGOAI
WERNER BOUWER
Applicant
FRANCOIS LABUSCHAGNE
Applicant

First Applicant
Second
Third

and

DELETE WHICHEVER IS NOT
APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES:
NO
(3) REVISED

**MARRY-
LIZETTE WHITTLES**

ANNE
Respondent

JUDGMENT

NGALWANA AJ

[1] “*Machismo*” is how Counsel for the Respondent described the conduct of the Applicants. He elaborated by submitting that this is

an instance of white persons “*elbowing out a Coloured woman*”. For purposes of this judgment it is not necessary to make a finding on this characterisation of the Applicants’ conduct.

[2] This is an application to compel the Respondent to transfer 1,530 shares that she holds in the First Applicant to the Applicants or their nominees in terms of an Exit Agreement concluded on 15 May 2023. The Second and Third Applicants are the Respondent’s co-shareholders in the First Applicant. The Exit Agreement was triggered by the Respondent’s resignation from the First Applicant with effect from 30 June 2023. She tendered her resignation as director and employee of the First Applicant on 28 April 2023.

[3] The First Applicant is 51% black-owned with a level 2 broad-based black economic empowerment rating (“*BEE rating*”). It maintains that BEE rating and 51% black-owned status by reason of the Respondent’s shareholding. Its business, which is wholly depended on its BEE rating, comprises the provision of forensic investigation services including risk assessments, litigation support, business intelligence, lifestyle audits, due diligence investigations, policy drafting and reviewing, data analysis and cyber-crime services.

[4] The Respondent’s resignation was necessitated by her establishing her own business that would compete with the First Applicant. The untenable nature of the Respondent’s continued employment and directorship at the First Applicant in these circumstances is palpable.

[5] The Applicants contend that the matter is urgent because:

- 5.1 the Respondent's ongoing refusal to transfer her shares in compliance with her contractual obligations in terms of the Exit Agreement renders the First Respondent unable to structure its affairs to ensure compliance with BEE legislation;
- 5.2 the First Applicant's affairs must be structured before its next BEE audit to ensure compliance. This must be done before 27 March 2024, the date on which its current BEE level 2 certificate expires;
- 5.3 the First Applicant's failure to structure its BEE affairs before the next audit will result in its collapse and, with that, the loss of approximately 20 jobs;
- 5.4 all this points to the fact that the First Applicant will not be able to obtain substantial redress in a hearing on the merits of the value of the shares in due course, which is what the Respondent is holding out for.

[6] I am grateful to Counsel for the pithy submissions they have made. In the final analysis, however, the antecedent inquiry in urgent court must come down to whether the Applicants can obtain substantial redress in a hearing in due course. Whether the transfer of shares is, or is not, subject to a separate sale of shares agreement, and the attendant and necessary valuation of those shares, seems to me an interesting but ultimately irrelevant debate.

[7] The First Applicant maintains its BEE level 2 rating by reason of the Respondent's shareholding in it. That being so, it seems to me clear that her continued shareholding maintains that *status quo*. For as long as she, as a Black woman, remains a shareholder in the First Applicant, the First Applicant should be in no danger of not complying with BEE legislation, of "*collapsing*" under the weight of

non-compliance, and of shedding jobs. The imminent BEE audit should be a welcome opportunity to demonstrate its continued compliance to maintain its level 2 status. It would in my view be in a worse position if the Respondent were to transfer her shares to the Second and Third Applicants so close to the next BEE audit before the expiry of its current BEE certificate in March 2024 as it could thereby run the risk (and I place it no higher) that it may not find a suitable candidate (short of fronting) to take up the Respondent's shares. In the circumstances, it seems to me in the parties' interests to maintain the *status quo* until a suitable replacement shareholder for the Respondent has been found. Whether that happens before or after the next valuation becomes immaterial. The transfer of shares at this stage to the Second and Third Applicants so close to the next BEE audit may result in a scramble to find a replacement shareholder while the First Applicant has lost its level 2 rating. The Applicants have not said they already have one waiting in the wings. In the final analysis, the First Applicant is not suffering any prejudice on its BEE rating by the continued shareholding of the Respondent. Prejudice may lie elsewhere - most notably in having a competitor as its shareholder.

[8] In the result, none of the grounds advanced by the Applicants as urgency grounds avail them.

[9] Given that the First Applicant's BEE rating is in no way threatened by the Respondent's continued shareholding in the First Applicant, an application in the terms sought was unnecessary and much less so on an urgent basis. I am constrained to agree with Counsel for the Respondent that this constitutes abuse of court process. Consequently, costs on attorney and client scale must follow the cause.

Order

In the result, I make the following order:

1. The application is struck off the roll for lack of urgency.
2. The Applicants are to pay the costs of this application on attorney and client scale, including costs consequent upon the appointment of junior counsel.

V NGALWANA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 04 December 2023.

Date of hearing: 01 December 2023

Date of judgment: 04 December 2023

Appearances:

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