Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

DATE SIGNATURE

CASE NO: 14413/2022

In the matter between:

JOHANATHAN LOTRIET First Applicant

NICOLE MEGAN HAYWOOD Second Applicant

and

MARCUS PAULUS OOSTHUIZEN First Respondent

(Identity no. […])

SAREL RUDOLF OOSTHUIZEN Second Respondent

(Identity No. […])

PARK BOULEVARD TRADING 171 CC t/a

AANDKLAS HATFIELD Third Respondent

BARLENTI (PTY) LTD t/a THE BLOCK 22 Fourth Respondent

PESTOUSIS PROPERTY INVESTMENTS (PTY) LTD Fifth Respondent

JUDGMENT

MBONGWE, J

INTRODUCTION

[1] This opposed application was initially brought on urgency and placed on the roll of the urgent court for hearing on 8 April 2022, but was removed by the court on the ground that the papers exceeded 500 pages. Costs were reserved.

[2] The matter was again set down in the opposed motion court for hearing on 4 August 2022. In the application, the applicants, who are minority shareholders in the third respondent, seek an order in terms of Section 49 (2) of the Close Corporation Act, No 69 of 1984, a slew of interdictory orders and directives against the first, second and third respondents and costs. No relief is sought against the fifth respondent.

FACTUAL MATRIX

[3] In February 2019 the first and the second applicants acquired a 20% interest each in the third respondent, an entity owned by the first and second respondents who, as a result of the acquisition, held a 30% each in the third respondent. The third respondent operated as a restaurant and bar catering for Afrikaans speaking people and played mainly Afrikaans music

[4] Subsequent to their acquisition, the first and second applicants worked in the third respondent. The second respondent resigned, however, in November 2020. The first respondent was later dismissed following an inquiry on

allegations that he had been found with his fingers on the till. The running of the business remained in the control of the first and second respondents.

[5] Issues of accountability arose resulting in the first and second applicants demanding information on the business on an ongoing basis. The applicants appeared not to have been satisfied alleging that certain information had not been provided and they were kept in the dark on the performance and financials of the business, including its liabilities to SARS.

[6] Matters appear to have come to a head on 1 December 2021 when the first and second respondents did not renew the lease of the premises which was due to expire on 31st December 2021. The third respondent is alleged to have been in arrears with its rental and owed an amount in the order of R400 000 to the owners of the building, the fourth respondent. The latter is alleged to have communicated its intention not to renew the lease. The first and second respondents took the decision not to continue with the business of the third respondent, but to start another business of a similar nature, but catering for a wider market–one of the deviations from the business of the third respondent.

[7] There were ongoing discussions and an exchange of correspondent between the legal representatives of the parties, including a meeting on the 17 December 2021 in which the applicants were advised that the first and second respondents will not proceed with the business of the third respondent beyond 31 December 2021.

[8] In view of the fact that the owners of the premises had a lean on the movable property of the third respondent, the first and second respondents paid a larger portion of the rental owed and called on the first and second applicants to pay their share of the debt. Nothing had come out of this and the first and second respondents commenced their new business on the premises on 1 January 2022. First and second respondents further took the decision to rent the assets of the third respondent for an amount of R10 000 per month. The employees of the third respondent were retained in the new entity called Block 22. The signage of the third respondent was removed and replaced by that of Block 22.

[9] The applicants are alleged to have collected their personal belongings from the premises on 30 December 2021 – a day before the lease was due to expire.

[10] Prior to the lease expiring, the first and second respondents had invited the applicants to make an election to pay them off or for the third respondent to buy the interests of the applicants. The applicants had then demanded details of the financial status of the business and its liabilities, particularly to SARS. The applicants were also provided with a list of the remaining stock and the value thereof. The first and second respondents had also deducted from the value of the stock the amount they had paid towards the rental owed to the third respondent.

[11] The applicants allege to have become aware of the operation of the new business of the first and second respondents on the 14 February 2022. This set in motion the current proceedings which the applicants brought on urgency against the first, second and third respondents on 9 March 2022 and seeking relief in terms of section 49 (2) of the Close Corporation Act, 69 of 1984. The applicants allege that the purpose of the application is *"to prevent the unfairly prejudicial, unjust and inequitable consequences of the first and second respondents' breach of their fiduciary duties towards applicants (in their capacities as co – members) and the third respondent.''*

THE RELIEF SOUGHT

[12] The applicants sought the following relief in the urgent application:

12.1 an order in terms of Section 49(2) of the Close Corporation Act 69 of 1984 that regulates the future conduct of the affairs of the third respondent;

INTERDICTS

12.2 an order interdicting the first and second respondents from:

12.2.1 continuing to unlawfully compete with the third respondent and making use of its goodwill, physical assets and intellectual property;

12.2.2 advertising and or promoting the fourth respondent on the third respondent's Facebook page;

12.2.3 using the third respondent's website;

12.2 4 concluding a rental agreement with the fourth respondent on behalf of the third respondent in respect of the movable goods;

12.2.5 selling any of the third respondent's movable goods to the fourth respondent or anyone else;

FURTHER ORDERS

12.2.6 an order that the first and second respondents place movable goods of the third respondent in the care of the applicants;

12.2.7 an order that the first and second respondents account and compensate the third respondent for all trading stock that stood to the credit of the third respondent as at 1 January 2022;

12.2.8 an order that the first and second respondents are not allowed to participate in the management of the third respondent and that places the applicants in control of the third respondent;

12.2.9 an order that compels the first, second or third respondents to release the SARS E-filling profile of the third respondent to the applicants;

12.2.10 that the first and second respondents be ordered to pay the costs of this application on an attorney and client scale.

FIRST TO THIRD RESPONDENTS' OPPOSITION

[13] The first to the third respondents oppose the application on the grounds that;

13.1 The matter is not urgent;

13.2 This application is an abuse of Section 49(2) of Act 69 of 1984;

13.3 Non-compliance with the requirements of the said Section 49(2).

[14] It has to be stated that the urgent application was removed from the roll merely on the ground that it consisted of more than 500 pages. And was subsequently placed on the opposed roll of the motion court.

PAUSE

[15] I pause to state that according to the first and second respondents the applicants addressed a letter to them in March 2022 demanding that they deposit on amount just over R1 900 000 into the account of the third respondent ostensibly as their compensation. The applicants are yet to institute action to recover the amount they demanded. Furthermore, an application for the liquidation of the third respondent launched by the applicants and a counter-application by the first to third respondents in terms of section 36(1)(d) of the Close Corporation Act under case number 15145/2021 are still pending.

[16] In their counter - application the first to third respondents seek in the main a termination of the applicants' membership of the third respondent against payment of the applicants' interest therein based on the valuation of the third respondent.

ANALYSIS

THE DELAY

[17] While the aspect of urgency of this matter was not determined, it is necessary to consider it in this judgment in light of the opposition on urgency and the reserved costs. Further, it will equally be necessary to look into the delay in bringing this application and whether the delay has been fully explained by the applicants as required by the rules.

ABSENCE OF ALTERNATIVE RELIEF

[18] The relief sought by the applicants on urgency in terms of Rule 6(12) requires, *inter alia*, that the applicants demonstrate absence of alternative relief that they may obtain at a later stage in ordinary proceedings. The applicants'

demand for the deposit of R1 900 000 as compensation is unambiguously an indication of the existence of alternative relief open to them against the first and second respondents. The demand, consequently, waters down the alleged urgency and was fatal to the application in the urgent court. In its judgment in *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd and Others* (11/33767 [2011] ZAGPJHC 196, the court stated, with regard to urgency, that:

> *"[7] It is important to note that that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.*
>
> *[8] In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not urgent as the applicant would want the court to believe. On the other hand a delay may have been caused by the fact that the applicant was attempting to settle the matter or collect more facts with regard thereto.*
>
> *[9] It means that if there is some delay in instituting proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact that the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an*

Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.''

[19] The Applicants allege to have become aware on 14 February 2022 that the first and second respondents were operating a new business and using the movable assets of the third respondent, but only launched the urgent application on 9 March 2022. The delay of just over three weeks to launch the application has not been explained in an application for condonation. This was fatal. In my view, and from a letter addressed to the applicants dated 17 December 2021, the applicants became aware on that date that the first and second respondents will not continue with the business of the third respondent. Their assertion that they became aware of the imminent closure of the third respondent on 14 February 2022 is devoid of the truth. On 30 December 2021 the applicants collected their personal belongings from the business premises of the third respondent. Neither the delay from 17 December 2021 nor 14 February 2022 has been unexplained. This would have been fatal in the urgent court.

[20] The applicants' demand for the deposit of compensation into the account of the third respondent is an indication that there exists alternative relief that the applicant could obtain in an ordinary hearing of the matter – this also would have been fatal for a matter brought on urgency.

MOOTNESS OF THE RELIEF SOUGHT

[21] Despite being aware, on their version, on the 14 February 2022, that the first and second respondents were operating a new business on the premises previously occupied by the third respondent and that the third respondent no longer existed, the applicants seek orders that suggest that the third respondent still exists and its future management be directed by an order of the court. That the third respondent no longer exists means that the orders sought will serve no practical purpose. The provisions of Section 16(2)(a)(i) of

the Superior Courts Act 10 of 2013 precisely address the situation in this case and read thus:

> *"When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."*

In *National Coalition for Gay & Lesbian Equity and Others v Minister of Home Affairs* 2002 (1) SA (CC), where the Court held that case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.

CONCLUSION

[22] The applicants have not made out a case warranting the granting of the orders sought. Consequently, the application stands to be dismissed.

[23] It appears from the findings in this judgment that the applicants had no reasons to launch this application as the relief sought is moot, to their knowledge. The application stands to the dismissed in the result.

ORDER

[24] Resulting from the findings and conclusion in this judgment, the following order is made:

1. The application is dismissed.
2. The applicants are ordered to pay the costs of the application, which costs shall include the costs in the urgent court.

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MPN MBONGWE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON ……. MAY 2023.