IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 010457/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
DATE	SIGNATURE
31 July 2023	**N V KHUMALO.**

In the *ex parte* matter between:

DOLF VAN DER MERWE **APPLICANT**

and

KINGDOM VET (PTY) LTD **FIRST RESPONDENT**

LEANDRI CLOETE **SECOND RESPONDENT**

JACOBUS CONRAD CLOETE **THIRD RESPONDENT**

KINGDOM INVESTMENTS INCORPORATED **FOURTH RESPONDENT**

NEDBANK LTD **FIFTH RESPONDENT**

'This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 31 July 2023

JUDGMENT

N V KHUMALO J

Introduction

[1] This is an Application in terms of uniform rule 6 (12) (c) for reconsideration of the order that was granted on an *ex parte* Application by Collis J on 8 February 2023 at the instance of the Applicant ("Mr Dolf Van der Merwe) against the Respondents. The Applicant brought the Application on the ground of extreme urgency. The papers were filed with the Registrar, uploaded on case line and set down to be heard on the same day at 14h00.

[2] The order granted was in the following terms:

2.1 Granting leave to the Applicant to apply for the liquidation of the 1st Respondent's liquidation on the basis of s 81 (1) (e) (i) of the Companies Act 71 of 2008 within 30 days of the granting of this order;

2.2 Pending the appointment of a Liquidator, the banking accounts of the 4th Respondent, and any banking accounts linked thereto, are frozen with immediate effect;

2.3 The 2nd and the 3rd Respondent are ordered to pay the costs occasioned by this Application on the scale as between attorney and own client.

2.4 That part B is postponed sine die

[3] The Respondents are seeking reconsideration of the matter and for the order granted to the Applicant to be set aside and replaced with an order dismissing the Applicant's application with costs on the scale as between attorney and client. The matter was also brought on an urgent basis.

The ex parte Urgent Application

[4] The Respondents pointed out the peculiar circumstances under which the order was obtained in the urgent court. The most significant peculiar circumstance that should have signaled red flags to the court is the bringing of the Application ex parte, a process that our courts had issued a directive that it should be discouraged or avoided, requiring rather service of the application on a party/ies sued or whose interest will be negatively affected, especially inter alia, on urgent matters and or whereupon an order for liquidation or sequestration is sought, seeing that the repercussions can be very dire. An order granted *ex parte* is as a result provisional.

[5] Moreover, the Practice Note filed by Ms Nortje, Counsel for the Applicant in the *ex parte* Application made no reference to an *ex parte*

application. Instead Counsel indicated that the note was served upon the Respondents, the facts and certain issues that included the history of the matter and the citation of the parties were common cause. Further, Counsel stated in her note that the Respondent's counsel is unknown, that the parties are however in agreement that the matter should be disposed of in the urgent open court, estimating the hearing duration to be 30 minutes.

[6] Furthermore, notwithstanding that the Applicant had in his Affidavit stated that he was going to serve the Application on the employees, master's office and SARS, no such service had taken place at the time the Application was heard. The application was neither served on the Respondents nor was any of them made aware of it at any relevant time.[1] The contents of the Practice Note and Founding Affidavit were therefore misleading. The Respondents pointed this out indicating that such representation could lead to confusion that might sway a court to grant an order in the belief that the Respondents and their attorneys were aware of the application. An assumption that cannot be made out due to absence of reasons for granting the condonation and the order, without directing service to take place.

[7] The court's duty is to give effect to the constitutional principles and requirements of equality, impartiality and fairness. It is as a result expected of a court in appropriate circumstances to require that an *ex parte* application be served or published, alternatively a court will issue such directions as are

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[1] Respondents' answering affidavit par 2.2 p 09-3

[2] Wijnen and Another v Mohamed and Others (16043/13) [2014] ZAWCHC 138 (1 September 2014)

necessary to safeguard the fairness of its processes, if it is of the view that a party not before it may suffer prejudice.[2]

[8] The rules of procedure nevertheless provide for reconsideration of a matter where an order was obtained in the absence of the other party. Rule

6(12) (c) of the High Court Rules provides that:

> "a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

[9] This procedure affords an aggrieved party a simple mechanism in terms of which an order granted *ex parte*, may be reconsidered by a Court.[3] More than any other reason, it is logical and in the interest of justice, that there be reconsideration, that being the essence of an *audi alteram parte* rule, that both parties be heard for a fair adjudication to take place. The principle is sacrosanct in our legal system[4]. In this matter obvious exploitation of the process occurred, intended or unintended. Consequently, looking at the ominous effect of the orders granted, reconsideration is inescapable and properly before court.

Procedure

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[3] Wijnen and Another v Mohamed and Others (16043/13) [2014] ZAWCHC 138 (1 September 2014)
[4] South African Airways SOC vs BDFM Publishers 2016 (2) SA 561 GJ

[10] Rule 6 (12) (c) is couched in wide terms allowing a party bringing the application to adopt a strategy that best advances his case in the most effective manner. The Respondents have elected to oppose the Application by filing an Answering Affidavit, rather than arguing the reconsideration on the Applicant's papers, seeking a dismissal of the Application. The issue to be determined is whether in reconsidering the matter, the Applicant's Application should still be granted.

Background Facts

[11] The Applicant, is a businessman and an investor, and the holder of a 50% share in a private company called, Kingdom Vet (Pty) Ltd. He and the 2nd Respondent, Leandri Cloete, formed and registered Kingdom Vet in July 2022. Cloete, who is a veterinarian holds the remaining 50% shares in Kingdom Vet. On 22 August 2022 Kingdom Vet (cited and hereinafter referred to as the 1st Respondent) purchased an immovable property situated at Greenhills on Kameels Street ("the property") by securing a bond for R1 300 000.00. The previous owner of the property also a veterinarian, conducted a veterinary/animal clinic business from the premises. The business was taken over by Kingdom Investments Incorporated, a separate entity run by the 2nd Respondent as its principal veterinarian, sole shareholder and director. The incorporated company is cited as the 4th Respondent. At its formation it was initially intended for the Applicant and the 2nd Respondent to be the directors but the Applicant shortly resigned due to the fact that he was not a veterinarian.

[12] The 4th Respondent is the holder of the Standard Bank business account that has been frozen as per the ex parte order. Standard Bank is for purpose of convenience cited as the 5th Respondent. No cost order is sought against it. Mr Jakobus Conrad Cloete, who is married to the 2nd Respondent, is cited as the 3rd Respondent.

Application

[13] The Applicant brought this Application as an urgent spoliation application, allegedly due to certain conduct of the 2nd and 3rd Respondent on the basis of which he sought the freezing of the 4th Respondent bank account, pending the appointment of a liquidator and leave to apply for the liquidation of the 1st Respondent. He alleged to have *locus standi* to seek the order against the 4th Respondent as he loaned an amount of R800 000 to the 4th Respondent. He argued that as the 4th Respondent's creditor, his investment was put at risk by the conduct of the 2nd and 3rd Respondent.

[14] According to the Applicant he made the loan of the amount of R800 000 to the 4th Respondent between June and December 2022 as a start- up capital investment for the veterinary/animal clinic business and as an equity loan. The agreed terms were that he was to remain on the board of the 4th Respondent not only as an equity investor, that funded the start-up capital and negotiated the sale of the property to the 1st Respondent at a greatly reduced value for the benefit of the 4th Respondent, but also as an administrative manager whose duties involved the day to day running of the 4th Respondent' veterinary business. The duties included book keeping

services, debtors and creditors allocations, payments and maintenance of the property, cash up, balances and security for the property.

[15] The 4th Respondent opened its doors in December 2022 and made a great profit, due to all his mentioned efforts and management. Suddenly, starting from 10 January 2023, the 2nd and 3rd Respondent put him under pressure to resign from the 1st Respondent. The two offered to pay him back his R800 000.00, in undecided instalments so that they can access and solely own the property vested in the 1st Respondent, which would then exclusively be to the benefit of the 4th Respondent. He refused to resign, and the 2nd and 3rd Respondent persisted to interfere and prevented him access to the property, stopping him from exercising his managerial duties notwithstanding having asked the 3rd Respondent to refrain from meddling in the business of the 1st and 4th Respondent.

[16] He subsequently became aware of the 2nd and 3rd Respondent's intention to plunder the 1st Respondent 's reserves and overrule his managerial performance by appointing without his knowledge and authority, the 2nd Respondent's friends as locums at a very exorbitant fee. Ignoring his highlighting that the 4th Respondent still new business and required to preserve its reserves. The 2nd Respondent continued in a reckless and irresponsible behaviour to also appoint plumbers and electricians to undertake repairs and improvements at the property and telling them not to tell him of their activities.

[17] On 6 February 2023, he discovered that he has been blocked from accessing the 4th Respondent's on line banking system on the instruction of the 2nd Respondent, thus spoliated from his duties and legitimate interest in the 4th Respondent. His demand to be reinstated was ignored. He also alleged that by refusing him access to the premises, undertaking unauthorised improvements to the property at great costs, the 2nd and 3rd Respondent hijacked the 4th Respondent. They did all this to run the company dry so as to force him to negotiate on their own terms the selling of his 50% share in the 1st Respondent at a great loss.

[18] As a result he no longer has means to prohibit the exhaustion of the capital interest of the 4th Respondent by the 2nd and 3rd Respondents. He also has no doubt that they have no intention of repaying the equity and the capital invested by him in the 4th Respondent, but intend to plunder the capital funds held in the 4th Respondent by their conduct of appointing locums at grave expense of the 4th Respondent**,** alternatively to destabilise the 4th Respondent to such an extent that his 50% in the 1st Respondent is at risk.

[19] He as a result sought the freezing of the bank account of the 4th Respondent and any other banking accounts that might be linked to it, as he has a well -grounded apprehension due to their malicious conduct, that the 2nd and 3rd Respondent will attempt to conceal or dispose of the funds of the 4th Respondent and that of the 1st Respondent to his detriment, hence his failure to give notice. Also due to real apprehension of imminent and irremediable

harm of losing his equity in the 1st and 4th Respondent, he had asked for an order freezing the banking accounts.

[20] The Applicant's submission on the liquidation of the 1st Respondent, whether or not the order sought should be granted it's a matter that does not have to be decided as yet. Although Applicant reckons it will result in the liquidator taking charge of the 1st Respondent and ensuring that all its creditors are protected. He argued that given the conduct of the 2nd and 3rd Respondent the only reasonable conclusion that one can arrive at is that the 1st Respondent in the hands of the 2nd and the 3rd Respondent is the very real and imminent danger to the public. It will accordingly be just and equitable that the 1st Respondent not be allowed to continue to do business and it be wound up as soon as possible.

[21] The liquidation Application of the 1st Respondent was to be brought as part B of the Application on the basis that it is just and equitable under s 8 (1) © (ii) and 8 (1) (d) (iii) and 8 (1) (e (1) in that the persons in control of the company are acting in a manner that is fraudulent and illegal. The Applicant further sought costs on attorney and client scale alleging to have been justified to have approached the court on an extreme urgency due to the fact that the 2nd and 3rd Respondent may squander the funds in the 4th Respondent.

Respondents answer

[22] The 2nd Respondent confirmed that she conducts the veterinary practice which is the 4th Respondent's business from the 1st Respondent's property paying rent to the 1st Respondent by paying off the monthly instalment on the mortgage bond and also rates and taxes. She but disputed that the Applicant has any interest in the 4th Respondent and that there is any agreement to that effect. In terms of the Veterinary Rules and Para-Veterinary Professions Act 19 of 1982, as amended (the Act) the Applicant who is not a veterinarian may not have an interest in or enter into a partnership with a veterinary practice. A fact that the 2nd Respondent alleges the Applicant is duly aware of.

[23] The 2nd Respondent disputes that the Applicant invested the amount of R800 000.00 in the 4th Respondent but allege that it was a contribution by the Applicant to the 1st Respondent. The 2nd Respondent also denies that the Applicant was an employee of the 4th Respondent nor a manager to protect his interest of R800 000 as he alleges, as the money was for the 1st Respondent not for the 4th Respondent. The amount was paid into the Standard bank account of the 1st Respondent and used for upgrading the property. She alleged that Applicant even cannily asked for the same salary as hers, which could not be done as they were not in a partnership, making the situation untenable.

[24] She further ''pointed out that the contentions made in the Applicant's founding affidavit do not amount to a spoliation. The only reference to spoliation is that the Applicant was blocked from the 4th Respondent`s bank

account. The Applicant has not applied for the relief that would have been available to him in that instance if he was the shareholder of the 4th Respondent.

[25] The allegation by the Applicant of plundering of the 4th Respondent's assets is solely premised on the 2nd Respondent`s appointment of a *locum* without his consent and the appointment of contractors to improve the premises of the 1st Respondent. According to 2nd Respondent she has full authority to conduct her practice and to appoint locums to assist her so that the practice can run smoothly and generate income and profit as she could not operate it alone on a full time basis. The appointments can therefore not be the squandering of money.

[26]. With regard to the freezing of the 4th Respondent's banking account pending the liquidation of the 1st Respondent, the 2nd Respondent denied that the Applicant is a corporate investor or has acquired an interest in the 4th Respondent. She pointed out that the 1st Respondent does not utilize the account of the 4th Respondent, neither is it entitled to do so nor does the 1st Respondent have any interest in respect thereof. The 1st Respondent just happens to be the owner of the property that is rented and utilized by the 4th Respondent. The 4th Respondent commenced its operations on the 1st Respondent's property on an agreement that it will be liable to service the 1st Respondent's bond by way of payment of rental for the premises and the municipality utility bills. The bond amount payable in monthly instalments is approximately R15 000.00.

[27] According to the 2nd Respondent it is the Applicant that unilaterally asked for the 1st Respondent to pay him back the money as a loan due to the Applicant having no interest in the 4th Respondent. Further, the Applicant obtained a 50% undivided share in the property with the prospects of future passive rental income, without a vesting contribution, risk free. It is for that reason that there was no agreement entered into prior the receipt of the money into the 1st Respondent's account. Her personal contribution in the 1st Respondent vis a vis Applicant's R750 000 + R50- 000 was to take sole responsibility for the bond by signing surety for it. Applicant believed that due to his R800 000 contribution he did not need to sign for surety. She as a result carries the full risk of the property whilst the Applicant receives repayments of his loan from her through the funds she generates through the 4th Respondent. The 1st Respondent does not generate any income. Her suretyship therefore provides ample security of any risk in respect of the Applicant's contribution, who has left her under no doubt that if he does not receive payment of his loan the 1st Respondent will be liquidated. The liquidation will have a negative impact on the business of the 4th Respondent as they will have to look for new premises and again go through the registration process with the South African Veterinary Council (SAVC).

[28] She pointed out that the 1st Respondent indeed used the R800 000 for renovations of the property, including painting, plumbing, cleaning and electricity, transfer fees and duties. She however denied that any of the money was used as a start- up of the veterinary business, buying stock and

other things, as alleged by the Applicant. According to her, the business had acquired a 30- day payment plan from the suppliers, whilst all costs, salaries, startup expenses were paid from the income generated from the 4th Respondent. There were existing systems and clients in place from the previous veterinary business therefore easier to generate an income. Also it was as a result of nearby businesses not working during the December 2022 period when she worked herself very hard.

[29] Furthermore, the accounting is not done by the Applicant's company but by a different company. Security is through the ordinary monitoring system provider as per ordinary agreement with security providers. The maintenance is done by the 3rd Respondent for free, like fixing the geyser, that has never interfered with the administrative duties of Kabili.

[30] She denied that there was an agreement to appoint the Applicant as a manager at 4th Respondent but confirmed the existence of a verbal agreement due to Applicant having offered and she accepted that the Applicant render his services as an experienced representative in the medical field by assisting with the pay roll, HR management and sourcing of stock. It was agreed the 4th Respondent was to be invoiced for Applicant's services through his company, Kabili International Trading (Kabili). However, the entity's asking of R57 000 per month for such services, when seeing that the 4th Respondent was doing well, without performing any of the administrative duties properly or at all, charging also for travelling and cellphone, which costs were supposed to be part of the invoice, plus for profit sharing on the

gross profit which she refused, led to the termination of Kabili services. It is this existing conflict that caused the present breakdown between them. She also alleged that Kabili did not sufficiently render the services it was supposed to perform, with Applicant attending the premises once or twice a week, 2 to 3 hours at a time. She decided on termination of its expensive services.

[31] The Applicant had access to the 4th Respondent's bank account due to Kabili's administrative duties. The access was then withdrawn. The Applicant did not appreciate the termination and demanded a profit share he was not entitled to. The Applicant threatened to make her miserable by applying for liquidation, even though she tried to settle the matter and offered him his R800 000 if he wished to leave the 1st Respondent. She denied threatening the Applicant or requesting the Applicant to resign from the 1st Respondent but instead had offered him his R800 000 to settle the dispute.

[32] The Respondent pointed out that it was clear that both parties tried to settle the matter and agreed in principle to the valuation of the 1st Respondent's assets. There is therefore no basis for which the Applicant can allege to have been spoliated. She points out that the Applicant does not ask that his access to the banking account be restored nor does he require to be granted access to the premises but instead requested a relief that could not be granted.

[33] She confirms that the Applicant wanted to be part of the veterinary business that is how the 1st Respondent came into being and got to purchase

the property but could not be because of the restrictions. They therefore agreed that the Applicant would contribute towards the renovations of the proeprty. The 2nd Respondent alleges to have secured the sale of the property which was found by the 3rd Respondent.

[34] In respect of Applicant's citing of the 3rd Respondent, she argued that the 3rd Respondent cannot be a party to this litigation as he has no interest in the 1st Respondent or 4th Respondent. He is also neither employed nor contracted in any capacity by the two entities. She reckons that Applicant's citing of the 3rd Respondent was for malicious and hurtful intent to her family in case she does not adhere to his request. She denies that a corporate agreement exists between the 1st and 4th Respondent as it is not allowed by the Act.

[35] The Applicant in his reply reiterated that he was the director of the 4th Respondent as he and the 2nd Respondent had undertaken to work together on a 50/50 basis as partners. He argued that their partnership agreement was not terminated by the amendment as per the Veterinary Council's requirement. He was as a result reappointed as a SARS registered representative of the 4th Respondent through the auditors. He argued that the remuneration he received was agreed upon between the parties.

[36] In addition, that the 2nd Respondent blocked his access, contrary to the 50/50 profit sharing agreement in the 4th Respondent. He persists in his argument that he provided the funds for purchasing the immovable property, negotiated and facilitated the sale of the business the basis of which was to become a shareholder in the veterinary business. He did not want the 2nd Respondent to buy his share in the business as he deems the business to be profitable and would want to keep his investment therein. He then again

stated that it is undisputed that he invested the R800 000 in the 1st Respondent.

[37] He further disputed having ever wanted to leave the business alleging that it was the 2nd Respondent that attempted to force him to do so. He reiterated that as an investor in the 4th Respondent business he has a direct and substantial interest in the financial affairs of the business. He persisted that he holds a financial and administrative interest in the business and undisputed that he invested the money in the 1st Respondent. He also agreed that the grounds for the liquidation are not a matter for this court to decide.

Legal framework

[38] The following provisions of the Veterinary and Para Veterinary Professions Act 19 of 1982 form a substantial barrier to entry to the veterinary business and practice:

[38.1] Section 24 (4) reads:

> (4) Notwithstanding the provisions of subsection (1) a corporation shall be registered in terms of this Act only if—
>
> (a) the principal business of that corporation is the practising of a veterinary profession or a para-veterinary profession, as the case may be;
>
> (b) that corporation has nominated one of its members as the manager thereof for the purposes of this Act;
>
> (c) the manager which has been so nominated—
>
> (i) resides in the Republic; and
>
> (ii) is a person who is registered in terms of this Act to practise a veterinary profession or the para-

veterinary profession concerned, as the case may be;

(d) the members' interest in that corporation are held, subject to the provisions of section 28 (1A) (a), solely by natural persons who are registered in terms of this Act to practise a veterinary profession or the para-veterinary profession concerned, as the case may be. [Sub-s. (4) added by s. 7 (c) of Act No. 19 of 1989]

[38.2] Section 24 (5) reads:

"5 (a) Notwithstanding the provisions of subsection (1) a private company shall be registered in terms of this Act only if-

(i) The principal business of that private company is the practising of a veterinary profession or para veterinary profession, as the case may be;

(ii) All the shareholders of the company are registered in terms of this Act to practice a veterinary of a para veterinary profession;

(iii) The name of the company has been approved by the Council;

(iv) Every shareholder of the company is a director and only a shareholder shall be a director thereof; and

(v) Its memorandum of directors provides that its directors and past directors shall be liable jointly and severally together with the company for such debt and liabilities of the company as are or were incurred during their periods of office."

(b) If a private company ceases to conform to any requirement of paragraph (a), it shall forthwith cease to practise and shall. as from the date on which it ceases to conform. not be recognised to practise the veterinary or para-veterinary profession. as the case may be.”.

[39] In terms of the Rules relating to the practising of the Veterinary Professions as amended, the following is provided-

[39.1] Rule 8 provides that on - Covering

(1) A veterinary professional may not enter into a partnership or allow any shareholding or interest in his/her practice with another person, unless that person is registered with Council as a veterinary professional or para-veterinary professional.

[39.2] Rule 8 (2) that was amended by the substitution for sub rule (2) with the following sub rule reads:

“2. Subject to rule 8 (3) a veterinary professional shall not-

(a) place his/her professional knowledge at the disposal of a member of the public or a lay organisation; or

(b) be involved in co-operation or collaboration with a member of the public or a lay organisation;

if unlawful or irregular practices are or may be encouraged thereby or it may adversely affect a veterinary professional."

[39.3] Rule 37 on general procedural requirements (previously Rule 42) reads:

(1) Only a veterinarian may have a financial interest in and own a veterinary shop.

(2) No staff employed at a veterinary shop that are not qualified as a veterinary professional or para-veterinary professional, may give any advice whatsoever regarding the products on sale, unless they have completed a minimum training course acceptable to Council to ensure that they are adequately and appropriately trained and qualified to offer a professional service to the public;

Analysis

[40] It is accordingly clear, reading from the statutes that governs the operation of a veterinary business, that the Applicant cannot be a shareholder or a director of the 4th Respondent and therefore his claims to be a 50/50% profit sharing partner with the 2nd Respondent in the 4th Respondent business is refutable. Likewise, his claim based on that allegation that he therefore has a *locus standi* to bring the Application for the relief that he sought and obtained against the 4th Respondent is unsustainable.

[41] The Applicant also alleged that he paid an amount of R800 000 as a contribution towards the 4th Respondent veterinary business's start-up capital. He therefore reasoned that he rather has an interest in the business as an investor with equity which entitles him access to its bank account and to seek the relief ordered. It is clear from Rule 8 that the 2nd Respondent as a veterinary professional may not enter into a partnership or allow any shareholding or interest in his/her practice with another person, unless that person is registered with Council as a veterinary professional or para-veterinary professional. Further that she is also prohibited as a veterinary professional to be involved in co-operation or collaboration with a member of the public or a lay organisation. Whilst the Act stipulates that only the shareholders and directors will hold equity, they will also and be liable jointly

and severally together with the veterinary company for such debt and liabilities of the company as are or were incurred during their periods of office. On that note the 2nd Respondent correctly disputes the Applicant's *locus standi* on that basis.

[42] According to the 2nd Respondent the Applicant's R800 000 was invested in the 1st Respondent, which was utilised in the buying of the property which was then leased to the 4th Respondent. Furthermore, it was also used by the 1st Respondent to renovate the property to meet the requirements of a veterinary clinic business that was to be conducted at the premises and to which the property was to be rented. A plausible scenario under the circumstances. The factual disputes will have to be determined on the basis of the *Plascon-Evans* principle, there being no suggestion that the 2nd Respondent's version is far-fetched or otherwise untenable. The allegation has actually been confirmed by the Applicant in his replying Affidavit wherein he persisted in his argument that he provided the funds for purchasing the immovable property, albeit alleging that the reason for that was to become a shareholder in the veterinary business.

[43] The Applicant was aware when he approached the court that he could not be either of all these things he was alleging to be in relation to the 4th Respondent, as he came to know of the statutory bar before the veterinary business commenced its operations in December 2022. As a result, he had to resign on 2 September 2022 and get his name removed from the incorporated company's registration documents. It is therefore disingenuous of him to approach the court and still insist that he is a 50/50 shareholder not only in the 1st Respondent but also even in the 4th Respondent, the veterinary business. Also not mentioning that he had to resign and the circumstances that led to such resignation.

[44] The Applicant could also not legally be an investor or a partner in the 4th Respondent's with an entitlement or expectation of a return as the 2nd Respondent may not enter into a partnership or allow any shareholding or interest in his/her practice with another person, unless that person is

registered as a veterinary practitioner. He consequently does not carry the risk of liability for the 4th Respondent's debts and liabilities nor can he profit from the operations of the 4th Respondent's veterinary business as a result of any collaboration or partnership with the 2nd Respondent. His claim of working with the 2nd Respondent on a 50/50 basis as partners notwithstanding the prohibition by the law is refutable. He therefore failed to make a case on the alleged locus *standi* for the relief sought against the 4th Respondent. The granting of the order therefore freezing the 4th Respondent bank account was therefore improper, and bound to be set aside.

[45] The Applicant also alleged that the agreed terms were that he was to remain on the board of the 4th Respondent not only as an equity investor, that funded the start-up capital and negotiated the sale of the property to the 1st Respondent at a greatly reduced value for the benefit of the 4th Respondent, but also as an administrative manager of the business whose duties involved the day to day running of the 4th Respondent' veterinary business. Also that his employment by the 4th Respondent as a manager was with specific tasks, that included, *inter alia*, access to its bank account of which he has been prevented to fulfill.

[46] The 4th Respondent, meaning the veterinary business, bound by the provisions of the Act, could only nominate one of its members as the manager who is supposed to be a person who is registered in terms of the Act to practise a veterinary profession or the para-veterinary profession concerned, as the case may be. Moreover, the members' interest in that corporation is to be held solely by natural persons who are in terms of this Act registered to practise a veterinary profession or the para-veterinary profession concerned. The Applicant is registered as neither of the two professions. According to the Respondents the Applicant was employed through his company Kabili Holdings (Pty) Ltd as a provider of specific services. The Applicant did not disclose in his Founding Affidavit that he rendered his services through Kabili, but only alleged to have been a manager. It was only after the answering affidavit that he confirmed the rendering of his services through Kabili which services were then simply terminated.

[47] The Applicant has also claimed to seek the relief against the 4th Respondent on the legal basis that he is a creditor of the 4th Respondent having loaned the business the amount of R800 000. He alleges to consequently to have a financial and an administrative interest. Such an allegation has been proven not to be correct by the averment Applicant made in the Founding Affidavit. He confirmed that the money was paid into the account of the 1st Respondent intended for the purchasing of the property. The Accountant's document DVMD2, that the Applicant annexed to his Founding Affidavit confirmed that the R800 000 investment was made in the 1st Respondent during the period June to November 2022. He further in his Replying Affidavit also flip flops stating that it is undisputed that he invested the R800 000 in the 1st Respondent. He therefore besides being prohibited by law to be an equity investor, factually did not invest the R800 000 in the 4th Respondent. His claim of any financial interest in the 4th Respondent therefore unsustainable. He nevertheless did not apply for leave to liquidate the 4th Respondent but the 1st Respondent, the relief therefore for freezing the 4th Respondent's account inappropriate without a correlating demand in relation thereto.

[48] The Applicant alleged that by refusing him access to the business premises so as to fulfill his duties, undertaking unauthorized costly improvements, the 2nd and 3rd Respondent spoliated him from his duties and legitimate interest in the 1st Respondent, and blocking his access to the 4th Respondent bank account, hijacked the 4th Respondent. He nonetheless did not seek reinstatement of that agreement or his access to the premises or bank account to be restored (which he knew it could not be done) but instead sought the freezing of an account of a business in which he does not or cannot have an interest in its finances or operations and nothing to do with spoliation.

[49] The Applicant has mischievously equated such conduct with spoliation, (and relied on the *Nino Bonino v De Lange*[5] judgment) which is ill-advised because there is no spoliation nor does he have a legitimate interest in the 4th Respondent or its bank account. Besides, to the extent that the Applicant may have felt aggrieved by the conduct of the 2nd and 3rd Respondents, in relation to the rendering of his services and access to the business operations and bank account, the relief sought was not an appropriate remedy. That did not entitle him the order to freeze the 4th Respondent's account. As a result the objection raised that the allegations in his founding papers do not support the relief claimed, is sound.[6]

[50] Moreover, it is inexplicable that the freezing of the 4th Respondent bank account is coupled with an order for leave to apply for liquidation of the 1st Respondent, a separate entity, and that the freezing is to remain pending the appointment of a liquidator. An occurrence that does not make sense since it is not clear if the appointment of the liquidator mentioned is to be for the 1st Respondent or 4th Respondent. Except for the fact that the 1st Respondent owns the property from which the 4th Respondent' business is operated, the liquidation of the 1st Respondent has got no bearing to the bank account of the 4th Respondent and its operations. It can only affect the operations of the 1st Respondent.

[51] What is also worryingly notable of the relief is that not only the circumstances and reasons under which it was obtained inexplicable, it is a final interdict, granted pending the appointment of a liquidator. In the meantime, the 4th Respondent is not under liquidation, the occasion upon which the liquidator may be appointed. In the same instance, leave is granted to apply for liquidation of the 1st Respondent, a separate entity. The soundness in law of granting such a relief of freezing the account of the 4th Respondent pending a non- existent liquidation or that of another company

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6 Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999(2) SA 279 (T) at 323 G - J.)

was correctly labelled by the Respondent's Counsel as ambiguous since it infers either that the 4th Respondent company is liquidated or that liquidation a mere formality which is extra ordinarily vague and confusing.

[52] The Respondents' counsel has correctly pointed out that the relief sought by the Applicant is also not based on a spoliation as alleged by the Applicant but an application to decide the grounds for liquidation of the First Respondent, to freeze the account of another entity pending the appointment of a liquidator as if the 4th Respondent is already liquidated and to confirm the period within which the liquidation proceedings will be instituted. What has been put before me is obviously not sufficient to enable me to exercise my discretion in the applicant's favour. The Applicant has failed dismally to make a case for any of the reliefs sought and for the process followed.

[53] In addition, the liquidation of and or appointment of a Liquidator for the 1st Respondent can never justify the freezing of another Company's bank account or operations, unless a collaboration or partnership can be proven between the companies and both alleged to be guilty of the alleged illegal or fraudulent conduct. The liquidation of the 1st Respondent had nothing to do with the 4th Respondent.

Costs

[54] The Applicant also referred to having a well- grounded apprehension of his equity in the 1st Respondent being at risk due to the malicious conduct of the 2nd and 3rd Respondent that they will attempt to conceal or dispose of the funds that he invested in the 4th Respondent to the detriment of the 1st and the 4th Respondent, hence his failure to take the necessary steps of giving notice when approaching the court. Also due to real apprehension of imminent and irremediable harm of losing his equity in the 1st and 4th Respondent. However the conduct he complained about is far from indicating any risk of concealment or disposal of any funds, or irremediable harm. He has mentioned the procurement of services of a plumber to fix the geyser, an electrician and of standby locums plus the security. He argued based on an

invalid assertion that he has a direct and substantial interest in the 4th Respondent as an investor which entitles him a say in the running of the 4th Respondent.

[55] The Application was certainly an abuse of the court process. There is no good enough reason for the Applicant not to have served the Application considering the severity of the order he was seeking. The lack of diligence and prudence by Counsel in filing a practice note with misinformation regarding the awareness and participation of the Respondents also exacerbated the situation and cannot be excused. It created a potential situation of a court being misled, seeing that the Applicant also confirmed that the Application was to be served on the Respondents and all interested parties.

[56] In addition, the Applicant continued perpetuating the abuse of the process by seeking of a punitive cost order considering the flimsy reasons proffered for having failed to serve the Application and the relief sought. The 1st Respondent owns a property and the 4th Respondent's business remains operational and the incurred expenses were for enabling its operations. The conduct he complained about can hardly be regarded as squandering the reserves of the entities or risking his alleged shares in them. The Applicant has failed to demonstrate a right to the relief sought or a well- grounded apprehension of irremediable harm to his alleged shares due to disposal or concealment.

[57] He furthermore did not make a full disclosure of all relevant facts when he launched his *ex parte* Application, a fact the court would be justified to also consider on the costs to be ordered in case of the order being set aside and or dismissal of Application. As it is indeed trite law as submitted by Respondents in argument that an Applicant who applies to court to obtain an order on an ex parte basis must in his / her or its conduct be beyond reproach. Such an Applicant is required to place all relevant facts before the court and the Applicant may not furnish incorrect information to the court. Due to the nature of, and consequences of such Applications our courts

have made it clear that in cases where the incorrect information is furnished to the court carelessly, and not recklessly or deliberately, the court is entitled to discharge the rule nisi on that ground alone,[7] with an appropriate costs order.

[58] Under the circumstances

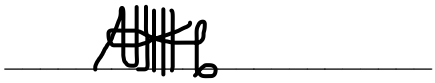
It is ordered that:

1. Non- compliance of the Respondents with the rules and forms prescribed and service thereof is condoned in terms of Rule 6 (12);

2. The order granted to the Applicant on 8 February 2023 under the abovementioned case number is hereby set aside;

3. The Applicant's Application is dismissed with costs;

4. The Applicant to pay the costs of the Application on an attorney and client costs



N V KHUMALO J
Judge of the High Court
Gauteng Division, Pretoria

On behalf of the Applicant: **Adv A J Swanepoel**
Instructed by: **M C Schoeman Attorneys**

[7] *Hall and Another v Heyns & Others 1991(1) SA 381 (C) at 397 B – C*

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