

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: ✓

Date: **24th August 2023** Signature: _____

CASE NO: 072648/2023

DATE: 24th August 2023

In the matter between:

NKAMUHAYO, RWACUMIKA KIHURA NKUBA

First Applicant

WILLIAMS, RANDALL MERVYN

Second Applicant

and

BUTLER, HOWARD DION

First Respondent

LANCASTER GOLD MINING COMPANY (PTY) LTD

Second Respondent

ROX SA MINING (PTY) LTD

Third Respondent

Neutral Citation: *Nkamuhayo and Another v Butler and 2 Others*
(079845/2023) [2023] ZAGPPHC --- (24 August 2023)

Coram: Adams J

Heard: 23 August 2023

Delivered: 24 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to *SAFLII*. The date and time for hand-down is deemed to be 09:30 on 24 August 2023.

Summary: Urgent application – suspension of other directors by Chairman – refused access to and prevented from entering the business premises of company – application for an order declaring the Chairman as a delinquent director in terms of section 162 of the Companies Act – also application for an order declaring invalid ‘precautionary suspension notices’ – case not made out to declare director delinquent – however, applicants entitled to other relief – suspension unlawful –

Applicants entitled to some relief – application granted with costs.

ORDER

- (1) The ‘precautionary suspension notices’ issued against the first and the second applicants by the first respondent, purportedly on behalf of the third respondent, on 21 May 2023 be and are hereby declared to be invalid and of no force and effect.
- (2) The first respondent be and is hereby interdicted from obstructing, in any way, the first and the second applicants from performing and carrying out their functions and duties as directors and employees of the third respondent.
- (3) The first respondent shall pay the first and the second applicants’ costs of this urgent application.

JUDGMENT

Adams J:

[1]. The first and the second applicants are directors of the third respondent (‘Rox SA Mining’), as is the first respondent. The first applicant and the first respondent are equal shareholders (50% each) in the said company. On 21 May 2023, the first respondent sent to the first and the second applicants ‘precautionary suspension notices’ advising them that, effective immediately,

they were suspended presumably as directors and/or employees of Rox SA Mining. The suspension notices bizarrely indicated that the reason for their suspension was the fact that they had both supposedly contravened the provisions of the Protection of Personal Information Act 4 of 2013 ('the POPI Act') in that they had discussed the salary of an employee of another company.

[2]. In this opposed urgent application, the first and the second applicants, who have since 21 May 2023 or thereabout been refused access to and prevented from entering the business premises of the third respondent, apply for an order declaring the first respondent as a delinquent director in terms of section 162 of the Companies Act 71 of 2008 ('the Companies Act'), as well as for an order declaring invalid the aforesaid 'precautionary suspension notices'. In the alternative, the applicants seek an order interdicting the first respondent from obstructing them in any way from carrying out their functions as employees and directors of the third respondent.

[3]. In a nutshell, the applicants' case against the first respondent is that he should be declared a delinquent director because, so the applicants contend, he has made himself guilty of gross abuse of his position as director, intentional or grossly negligent infliction of harm on the company and gross negligence, and wilful misconduct or breach of trust in relation to the performance of his director's functions within, and duties to, the company, as envisaged by section 162(2) and (5) of the Companies Act.

[4]. In support of these legal conclusions, the applicants aver *inter alia* that the first respondent, despite a valid and binding written agreement between him and the first applicant for the sale of 50% shares in Rox SA Mining, has failed to transfer the acquired shares to the first applicant.

[5]. As regards the POPI Act complaint, this related to salaries paid by the second respondent to some of its employees and the fact that it transpired that there was a discrepancy between salaries paid to different individuals. Closely related to the foregoing was the fact that first applicant took issue with the fact that the third respondent had embarked on a 'feeding frenzy', as the first applicant puts it, after he had paid into the account of Rox SA Mining the amount he

invested in the said company. The applicants also make allegations of the misappropriation by the first respondent of the assets of the third respondents, in particular gold extracted by Rox SA Mining. Moreover, during March 2023 the first respondent inappropriately held himself out as the 'sole director' of the third respondent, when he knew full well that that was not the case. This, so the applicants contend, is a further breach by the first respondent of his fiduciary duty as a director of Rox SA Mining.

[6]. In light of the foregoing and the proven misconduct on the part of the first respondent, I am persuaded that the applicants have made a case for the order setting aside the 'precautionary suspension notices'. The issue of those notices was, in my judgment, ill-advised and premised on a contrived basis and motivated by *mala fides*. What is more is that the said notices were clearly aimed at sidelining the applicants so as to clear the way for the first respondent to continue the operations of Rox SA Mining for his own benefit and too the advantage of his other companies. Those notices should therefore not have been issued.

[7]. This then means that the applicants are entitled to an order setting aside the said notices.

[8]. As regards the request for an order that the first respondent be declared a delinquent director, I am not persuaded that the applicants have made out a case for that relief. Whilst the conduct of the first respondent leaves much to be desired and, by all accounts, borders on gross misconduct, I do not believe that it goes far enough as to entitle the applicants to have him declared as a delinquent director.

[9]. As for urgency, I have no difficulty in accepting that, in the circumstances of this matter, the applicants were entitled to approach this court on an urgent basis. The simple fact of the matter is that the applicants were being severely prejudiced as a result of the unlawful conduct on the part of the first respondent. They could not possibly delay much longer approaching the court for the relief sought.

[10]. For all of these reasons, the applicants' urgent application should succeed and they should be granted some of the relief sought by them.

Costs

[11]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹.

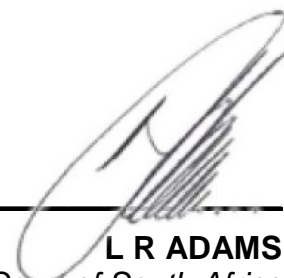
[12]. I can think of no reason why I should deviate from this general rule.

[13]. Accordingly, I intend awarding costs in favour of the first and the second applicants against the first respondent.

Order

[14]. Accordingly, I make the following order: -

- (1) The 'precautionary suspension notices' issued against the first and the second applicants by the first respondent, purportedly on behalf of the third respondent, on 21 May 2023 be and are hereby declared to be invalid and of no force and effect.
- (2) The first respondent be and is hereby interdicted from obstructing, in any way, the first and the second applicants from performing and carrying out their functions and duties as directors and employees of the third respondent.
- (3) The first respondent shall pay the first and the second applicants' costs of this urgent application.



L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Pretoria

¹ *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

HEARD ON:	23 rd August 2023
JUDGMENT DATE:	24 th August 2023 – judgment handed down electronically
FOR THE FIRST AND THE SECOND APPLICANTS:	Attorney Michael Wagener
INSTRUCTED BY:	Michael Wagener Attorneys, Cape Town
FOR THE FIRST, THE SECOND AND THE THIRD RESPONDENTS:	Advocate Juliana Kamffer
INSTRUCTED BY:	Carmia Greyvenstein Attorneys, Rietfontein, Pretoria
