IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES~~ / NO	
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO	
(3) REVISED ✓	
DATE 15/5/17	SIGNATURE

CASE NO: 30718/2017

DATE: 15/5/2017

IN THE MATTER BETWEEN

MATUKANE AND ASSOCIATES (PTY) LTD (REGISTRATION NUMBER 2009/008424/07)	APPLICANT
AND	
MBANGWA LUCKY NKWASHU (ID NUMBER: 700624 5479 084)	1ST RESPONDENT
FIRST NATIONAL BANK LIMITED	2ND RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This matter came before me in the urgent Court on 9 May 2017.

[2] Mr Labuschagne appeared for the applicant and the first respondent, Mr Nkwashu, appeared in person. The second respondent, the Bank, did not oppose the application or enter the fray and there was no appearance on behalf of the Bank.

Brief notes about the papers exchanged and the procedure followed during the hearing

[3] The applicant filed a comprehensive notice of motion, founding affidavit and annexures.

[4] The first respondent, who, if I understand submissions by counsel correctly, was legally represented at an earlier stage, but parted ways with his attorneys and acted in his own personal capacity. He did not file an opposing affidavit but a document styled "Notice of Motion to Defend". The document, which was not attested to under oath, is a relatively concise affair, running into two and a half pages.

[5] Mr Labuschagne argued that the applicant refrained from filing a replying affidavit on purpose, in view of the fact that there was material non-compliance on the part of the first respondent with the requirements of Rule 6(5)(d) dealing with the filing of an opposing affidavit. It was argued by Mr Labuschagne that, in the circumstances, no opposing papers were effectively filed. Technically, this argument appears to me to be sound. The first respondent also did not deal with the allegations in the founding papers, or most thereof, but the "notice of motion to defend" consisted more of a summary of the facts of the case as contended for by the first respondent.

[6] Nevertheless, I studied the "notice of motion to defend", and had regard thereto. In some instances, the allegations contained in this document do indeed reflect on some of the allegations contained in the founding papers.

[7] The first respondent addressed the Court at some length and I attempted to guide him by explaining the motion procedure and indicating that, generally, submissions made ought to fall inside the ambit of the facts stated in the papers by the respective parties. The first respondent is well-spoken and clearly well-educated and I paid due regard to what he had to say during his lengthy address.

[8] Thereafter Mr Labuschagne offered his submissions on behalf of the applicant to which I gave the first respondent another opportunity to answer and, in the end, Mr Labuschagne was given a final opportunity to reply, as counsel for the applicant.

Brief notes about the background of the case

[9] On a general reading of the papers, including the "notice of motion to defend", it seems to me that the following points can be identified by way of a summary:

- At times relevant to the occurrences forming the subject of this dispute, the first respondent was a director of the applicant company. The fellow directors were H Pretorius, A Matukane and T Ngoepe, who also deposed to the founding affidavit.

  According to the founding affidavit, the applicant had the following four shareholders at times relevant to this dispute:

  Wes Pretorius Trust

Kgomo Africa (Pty) Ltd

Alson Matukane Consulting

Blue Apple Global Resources (Pty) Ltd.

In a letter written to the first respondent's then attorneys by the applicant's attorneys on 10 March 2007, the structure of the applicant company was, *inter alia*, recorded and it was mentioned that each of the four shareholders had 25% of the shares. This is common cause. The shareholders were listed in the letter as -

Wes Pretorius Trust

Kgomo Africa (Pty) Ltd

Low Flow (Pty) Ltd

Blue Apple Global Resources (Pty) Ltd.

The third shareholder, Low Flow, is different from the third shareholder, Alson Matukane Consulting listed in the founding affidavit. The first respondent emphasised this discrepancy. Counsel for the applicant pointed out that according to his instructions, the letter contained an error and that Alson Matukane Consulting was indeed the third shareholder. He added that this is a company and that the "(Pty) Ltd" was omitted in error.

During his address, the first respondent confirmed that Mr Alson Matukane was the Managing Director of the applicant company. He did argue, however, in his opposing document, that the name Alson Matukane Consulting does not appear in official company documents and argued that this company or

concern has no *locus standi* to bring the application. In response, Mr Labuschagne argued, correctly in my view, that, for the reasons mentioned, there is indeed a company Alson Matukane Consulting (Pty) Ltd (which was not disputed by the first respondent) and the argument offered by the first respondent is of no consequence because the relevant question is whether the applicant company itself had the necessary *locus standi*. That this was so, was not disputed by the first respondent. Included amongst the founding papers is also a resolution passed on 10 April 2017 by the applicant company authorising Mr Ngoepe to depose to the founding affidavit and to launch the proceedings which came before me.

- The main business of the applicant is to render training and consulting services in engineering in the environmental sector (water and sanitation) to, *inter alia*, the Government of the Republic.

- During or about August 2016 the applicant concluded a project for a private company Boinkgantso Consulting & Events CC earning a fee of just under R1,7 million.

- It is common cause that a dispute developed between the parties which, in the end, gave rise to these proceedings. On the weight of the evidence, it appears that the first respondent insisted on a division of the profits earned from the project aforementioned (after expenses) on the basis of 25% for each shareholder. I add that the first respondent was a director, with one of his brothers, of the fourth shareholder, Blue Apple Global Resources (Pty) Ltd.

- The other shareholders and directors were not in favour of such a "dividend" and it is alleged in the founding affidavit that the payment flowing from the project "was so decided to be utilised to be used by the applicant in respect of liquidity and application for future projects".

- The dispute also gave rise to Blue Apple, at the insistence of the first respondent I must assume, withdrawing as a shareholder, and a "share buy-back" arrangement was made between Blue Apple and the remaining shareholders resulting in a cash payment being made to Blue Apple. This is not disputed on the papers.

- It is alleged that the first respondent resigned as a director, because of this dispute, "which resignation was accepted, together with the offer in respect of the share buy-back". It is alleged in the founding affidavit that the first respondent, despite resigning, refused to sign the necessary documentation to effect his formal removal as Director at the Commission for Intellectual Property and Companies ("CIPC").

- It was submitted on behalf of the applicant that the first respondent resigned on 10 January 2017 and, upon his refusal to sign the papers, a proper procedure was followed to remove him as a director which culminated in such removal on 10 April 2017.

- During his address the first respondent denied that he resigned. On a general reading of the papers, I have difficulty in accepting this submission given the fact that it is common cause that his company, Blue Apple, surrendered its shareholding and entered into the "buy-back" arrangement. That much is common cause.

- It is clear, from a reading of the papers, and from the details supplied by the first respondent during his lengthy address, that the dispute soured the relations between the parties.

- It is also common cause that the first respondent requested the applicant for a loan, *inter alia* to pay for his children's school fees, and although he asked for R100 000,00 he was given some R45 000,00. There is no indication that the money was repaid.

- Importantly, after the parting of ways, the first respondent embarked on a campaign to discredit the applicant. This is also clear from the first respondent's address during the hearing. Essentially, on his own version before me, and in his opposing document, the grievances of the first respondent are two-fold:

  (i) the dispute about the required "dividend"; and

  (ii) allegations by the first respondent that declarations made by the applicant company's officials to the Department of Water and Sanitation, in order to get tenders, to the effect that the first respondent was 85% black owned, were false: the percentage black ownership is

relevant to obtain a BEE certificate which, in turn, enables a prospective tenderer to launch his tender application. Somewhat vaguely, the allegation is made that although Director Ngoepe and Mr Pretorius and his wife were connected to the shareholder Kgomo Africa, there was a further individual, one Stefaan Pretorius, whose identity was kept a secret in some or other way and if his presence were to be recognised in Kgomo Africa, if I understood the argument correctly, the purported 85% black ownership would be reduced. Consequently, so the first respondent argues, some seven tenders obtained from the Department of Water and Sanitation were, in fact, secured on a fraudulent basis because of this alleged misrepresentation.

- Armed with these grievances, he did, *inter alia*, the following:

(i) he sent an e-mail to Treasury (linked to the Department of Water and Sanitation) alleging that the tenders were obtained on the basis of misrepresentation and "fronting". This happened in April 2017. The e-mail message reads as follows:

> "Good day
>
> I want to bring to your attention that I have informed Mr Steven Marais and Jeritta from the Department of Water and Sanitation regarding appointments (7) to a panel of service providers of the above-mentioned company which was based on misrepresentations and fronting. This is a company named after Alson Matukane for the purposes of getting tenders from the

> Department because Alson used to be a Chief Director in the same Department. There is currently a case being investigated in this regard (case 462/1/2017) by the DPCI (my note: the so-called "Hawks") and my reason for informing the said officials was because I was used as a signatory in all these tenders but when I realised that actually we were used by Erik Pretorius and his brother Stefaan Pretorius who are co-owners of WETCON and AEGES I sent a letter to inform the Department of my intention to withdraw as a signatory. These two companies are shareholders to Matukane & Associates (Pty) Ltd but Stefaan operates as a silent partner in WETCON that we were not aware of his existence until money got stolen from our bank account."

An official at the Department forwarded this e-mail to the applicant's attorney and this, *inter alia*, inspired the applicant to launch the application.

(ii) He laid a criminal charge at the Lyttelton Police Station on the basis of these alleged offences and this was, on a general reading of the papers, referred to the DPCI or the "Hawks" for investigation. The case number is the one mentioned in the e-mail quoted above. The applicant's attorneys contacted the

Lyttelton Police Station in order to obtain the docket but the request was declined. There is no indication as to when this investigation, such as it may be, is scheduled to be completed.

(iii) He wrote a letter to the applicant's bank (the second respondent) by e-mail on 15 March 2017 which reads as follows:

> "There is a case opened with the DPCI (Director of Priority Crime Investigation) involving account number 62572676967 and 62572676975 which belong to Matukane & Associates of which I am a director and a signatory to the initial account (my note: this is after the January resignation alleged by the applicant). The latter has been unknowingly to us opened by Sonja Pretorius for the purpose of channeling money from the main account to various other accounts which was done in collusion with her husband Erik Pretorius with the blessing of the other two directors Alson Matukane and Thabo Ngoepe. This is a matter which is *sub judicare* (*sic*) and therefore not at liberty to get too much into. There is a hold placed on all accounts while being investigated, a section 205 has been obtained by SAPS Commercial Crime to establish what happened to the money which evaporated into thin air and there seems to be blaring of lines between attorney client privilege and colluding with the client to perpetuate a criminal

conduct which I am busy dealing with at the Law Society of the Northern Province as far as this matter and the accounts is concerned."

The upshot of this was that the Bank closed the applicant's account. Part of the relief sought in the founding affidavit is aimed at ordering the Bank to "unfreeze" the account because the applicant is not able to conduct any business under these circumstances.

(iv) It is not clear, from the papers, whether the first respondent also proceeded to lay a charge with the Law Society.

[10] There were other communications as well, of a similar nature.

[11] It is the case of the applicant that it is being seriously prejudiced by what it terms completely false allegations as illustrated in the e-mails. The allegations are not only injurious to the reputation and dignity of the applicant, but prejudicial in the sense that they resulted in the applicant being placed in a bad light with its client (the Department and the Treasury) and the Bank (resulting in the account being frozen) as well as the police authorities.

[12] Against this background, the applicant decided to approach this Court for relief on an urgent basis.

The relief sought

[13] It is convenient to quote the relevant prayers as they are contained in the notice of motion:

"2. That an interim interdict be issued against the first respondent as follows:

2.1 interdicting and restraining the first respondent from approaching existing and/or past clients of the applicant and/or making representations to existing and/or past clients of the applicant which are *sub judice* any legal proceedings against the applicant and/or its directors and/or from making any misrepresentations in respect of the applicant and/or the applicant's business and/or the applicant's directors which are not based on fact and/or legal basis and/or which are *sub judice* any legal proceedings;

2.2 point 2.1 shall operate as an interim order pending the finalisation and adjudication of criminal proceedings instituted against the applicant by the first respondent under case number 462/1/2017 and/or legal proceedings, to be instituted by the first respondent in respect of the recovery of any alleged liability to the first respondent; (my note: there is no indication that the first respondent has resorted to institute any action against the applicant, eg to recover its alleged fair share of the profits from the training project);

2.3 granting leave to the applicant to approach the above Court on the same papers, supplemented as the circumstances may require, for further relief;

2.4 that the costs of this application be paid by the first respondent;

3. that an interdict be issued against the second respondent as follows:

3.1 mandating the second respondent to restore with immediate effect regular banking services and access of the applicant to the applicant's bank account under number 62572676967, held with the second respondent;

3.2 costs, only in the event of opposition hereto; such costs to be paid jointly and severally by the first and/or second respondents, the one paying the other to be absolved;

3.3 granting leave to the applicant to approach the above Court on the same papers, supplemented as the circumstances may require for further relief."

Requirements for interim relief

[14] It is clear, in my view, that the applicant has a *prima facie* right to the relief sought for the reasons mentioned. The communications addressed by the first respondent to the various entities, as I briefly illustrated, are not disputed in the opposing document neither were they disputed in the address before me offered by the first respondent. The first respondent submitted that he was entitled to behave in the way that he did because, as a law abiding citizen, he was only reporting what he considered to be criminal conduct to the relevant authorities. In my view, on the overwhelming probabilities, there is no merit in the allegations of the first respondent and, in any

event, the fact that he reported a perceived offence to the police, does not give him licence to dispatch injurious and defamatory communications to the clients and the Bank of the applicant. The proper approach would be for the first respondent to await the outcome of the criminal charges he had laid. The prayers in the notice of motion are also crafted along the lines of the interim interdict being granted pending the outcome of those investigations, and/or legal proceedings the first respondent may institute against the applicant for recovery of what may be due to him as alleged.

[15] It is clear, for the reasons mentioned, that the applicant is suffering real harm as a result of the conduct of the first respondent.

[16] There is no doubt that the balance of convenience favours the applicant. If the relief is granted there will be no prejudice to the first respondent if he is restrained from continuing with his conduct by addressing injurious communications to all and sundry, whereas, if the relief is not granted, the wrongs and prejudice suffered by the applicant will continue.

[17] There is no alternative remedy available to the applicant.

[18] As to the final interdict requested against the Bank to re-open or "unfreeze" the bank account, the applicant clearly has a clear right to do so. The Bank has also chosen not to oppose the application. This is noteworthy. As far as the relief sought against the Bank is concerned the requirements for a final interdict, relating to injuries suffered and the absence of an alternative remedy are clearly present.

[19] In conclusion, I mention that during his address, the first respondent briefly, and almost in passing, mentioned a lack of urgency in respect of this application. If I understood it correctly, he made this submission on the basis that the substratum of the application had fallen away because he cannot be blamed for merely reporting on what he considers to be criminal conduct. I have dealt with this argument. I took this up with the first respondent to make sure that I understood his limited argument on urgency correctly and he confirmed that my conclusion was correct. He offered the same argument, namely that there was no basis left for the application to be granted because of his innocent reporting on the perceived criminal conduct, when it came to his opposition to the main application.

[20] At the conclusion of his address, the first respondent asked for the following relief:

1. the application is to be dismissed;
2. costs should be granted against the remaining directors Pretorius, Matukane and Ngoepe, jointly and severally, in their personal capacities;
3. the bank accounts should remain frozen pending finalisation of the criminal investigation;
4. the applicant is to provide documentary proof of all expenses incurred by it in the relevant training project referred to (also "BCE project") to determine the amount of the profits earned in the process and to decide whether there is money to be shared or not;
5. the contribution made by Blue Apple to the starting capital of the applicant company must be refunded as well as the value of the 25% shares (my note: I have mentioned that there was a share buy-back arrangement and the refund was made);

6. the first respondent confirmed that he was seeking a costs order. I explained to him that, as a lay person, he would probably not be entitled to tax a bill of costs. He did not argue with this proposition.

[21] In his address, Mr Labuschagne made the following submissions:

- The "relief" claimed cannot be entertained because there is no counter-claim. I agree with this submission, quite apart from the fact that I do not consider that there is any merit in the relief sought.
- The argument on *locus standi*, such as it may be, is bad in law. For the reasons mentioned, I agree.
- The application is clearly urgent. For the reasons mentioned, I agree. In any event the argument offered on urgency, such as it may be, does not go to the root of the question of urgency at all.

Conclusion

[22] In all the circumstances, and for the reasons mentioned, I have come to the conclusion that a proper case was made out for the interim relief sought against the first respondent and the final relief sought against the Bank.

Costs

[23] There is no reason why the costs should not follow the result in the normal manner.

The order

[24] I make the following order:

1. An interim interdict is issued against the first respondent as follows:

2.1 interdicting and restraining the first respondent from approaching existing and/or past clients of the applicant and/or making representations to existing and/or past clients of the applicant which are *sub judice* any legal proceedings against the applicant and/or its directors and/or from making any misrepresentations in respect of the applicant and/or the applicant's business and/or the applicant's directors which are not based on fact and/or legal basis and/or which are *sub judice* any legal proceedings;

2.2 prayer 2.1 shall operate as an interim order pending the finalisation and adjudication of criminal proceedings instituted against the applicant by the first respondent under case number 462/1/2017 and/or any legal proceedings which may be instituted by the first respondent in respect of the recovery of any alleged liability to the first respondent.

3. The applicant is granted leave to approach this Court on the same papers, supplemented as the circumstances may require, for further relief.

4. An interdict is issued against the second respondent as follows:

4.1 mandating the second respondent to restore with immediate effect regular banking services and access of the applicant to the applicant's bank account under number 62572676967 held with the second respondent;

4.2 granting leave to the applicant to approach this Court on the same papers supplemented as the circumstances may require for further relief.

5. The first respondent is ordered to pay the applicant's costs.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

30718-2017

HEARD ON: 9 MAY 2017
FOR THE APPLICANT: ADV LABUSCHAGNE
INSTRUCTED BY: LEN DEKKER ATTORNEYS
THE 1ST RESPONDENT APPEARED IN PERSON, AND NO INSTRUCTING ATTORNEYS WERE INVOLVED