IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 2024/101102

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

27 September 2024
DATE

[redacted]
SIGNATURE

In the matter between:

XEON HOLDINGS (PTY) LTD	Applicant
And	
PUBLIC INVESTMENT CORPORATION SOC LIMITED	First Respondent
MEDIPOST HOLDINGS (PTY) LTD	Second Respondent
WILLEM ADOLPH JOUBERT	Third Respondent
EMMERENTIAL FREDERKIKA MYBURGH	Fourth Respondent
MARTHA SOPHIA JOUBERT	Fifth Respondent
WILLEM ADOLPH JOUBERT NO	Sixth Respondent

EMMERENTIAL FREDERKIKA MYBURGH NO Seventh Respondent

MARTHA SOPHIA JOUBERT NO Eighth Respondent

(in their capacities as Trustees of the Kawari and Medipost Management Trust)

JUDGMENT

NEUKIRCHER J:

1] This application came before me in the urgent court on Wednesday 18 September 2024. In it, the applicant (Xeon) seeks, inter alia, the following urgent relief:

> *"2. The first respondent is interdicted and restrained from giving effect to the sale of equity comprising 30% of the issued shareholding of Medipost Holdings (Pty) Ltd ("the shares") to any of the remaining shareholders pending the final determination of legal proceedings to be instituted by the applicant, within 30 days from the date of this order, to enforce the sale of shares to the applicant..."*

2] The crux of the issue is whether or not the 3rd to the 8th respondents - who are the minority shareholders in the second respondent (Medipost) - exercised their pre-emptive rights in respect of clause 16 of the Shareholders Agreement (the Shareholders Agreement) irregularly and whether the suspensive condition in Xeon's offer to purchase was fulfilled.

3] The respondents[1] have taken several points, of which one is that this application is not urgent and the other that Xeon has failed to meet the threshold

[11] There was no appearance for second respondent

required for the grant of an interim interdict. In order to ventilate these, the background of the matter is important. The facts that gave rise to the application are uncontroversial and common cause.

4] Medipost is an integrated pharmaceutical carrier group in respect of which the Government Employees Pension Fund (GEPF) is an equity shareholder. This shareholding is managed on behalf of the GEPF by the Public Investment Corporation (PIC). The PIC is listed as a public entity under schedule 3 of the Public Finance Management Act, 1999 (PFMA), is a financial services provider in terms of the Financial Advisory and Intermediary Services Act, 2002 (FAISA) and is an asset management company, and a principal asset management vehicle, for the public sector of South Africa.

5] The PIC handles the investment needs of about 30 public sector pension, provident, social security, development and guardian funds including the GEPF and Compensation Fund. The latter has investments in Medipost Holdings and the PIC acts as authorised agent and representative for the GEPF.

6] At present, the GEPF - through the PIC as its agent - holds an 80% equity shareholding in Medipost.

7] In May 2023, the PIC commenced a competitive and confidential bidding process for the sale of Medipost shares by issuing a written notification titled “Expression of Interest in Acquiring Shares in Medipost Holdings Proprietary Limited”

to each participating bidder. The Xeon emerged as the preferred bidder at the conclusion of the process.

8] On 17 November 2023, Xeon then made what it terms a "binding offer" in a two phased approach to purchase 80% of the business interest in Medipost:

a) the first phase would inter alia see Xeon acquiring 30% of the shares held by the GEPF with the 'first right of refusal' on the sale of the remaining 50% disputed shares. The purchase consideration of the 30% was R58,8 million;

b) the second phase would see the acquisition of the remaining 50% shares held by the GEPF – these shares are presently the subject matter of litigation.[2]

9] According to Xeon the offer was accepted on 22 March 2024 – Xeon calls the offer a 'binding offer' which they say was subject to a suspensive condition that the remaining shareholders of Medipost waive their pre-emptive rights over the shares.

10] The Shareholders Agreement provides for the manner in which the shareholders may exercise their pre-emptive rights in Clause 16, which states:

"16.2 If a Shareholder ("Offeror") intends to sell any of its Shares ("the Sale Shares") to any Third Party, the Offeror shall first offer the Sale Shares to the other Shareholder ("Remaining Shareholders"), by giving written notice of its intention to transfer the Sale Shares ("Transfer Notice"). The Transfer Notice shall:

[2] Which is not relevant for purposes of the present application

16.2.1 include a copy of the written offer referred to in clause 16.2;

…

16.3 the offer in the Transfer Notice shall be irrevocable and shell, subject to clauses 16.5 and 16.8 the unconditional;

…

16.5 the Offeror shall be entitled to stipulate in the Transfer Notice that if not all of the Sale Shares are purchased in accordance with this clause 16, he shall not be obliged to sell any of the Sales Shares;

…

16.7 the Remaining Shareholders who gives notice of acceptance ("the Accepting Remaining Shareholders") must accept all or none (but not some only of the shares offered to it and may, in its notice of acceptance, notify the Offeror that it wishes to accept more than its due proportion of the shares on the terms offered. If acceptances in terms of this clause 16.7 together constitute acceptances for more than the total number of shares, the shares shall be allocated amongst the Accepting Remaining Shareholders in proportion to their shareholding in the Company inter se or in such other proportions as the Accepting Remaining Shareholders may agree in writing;

16.8 the Accepting Remaining shareholder(s) who wished to accept the offer ("Accepting Shareholders") may give written notices of acceptance of the offer within 45 (forty five) Business Days after receiving it or, if the cash equivalent of the offer is to be determined by the Independent Auditors under clause 16.6, within the later of (i) 45 (forty five) Business Days after receiving the offer or (ii) 20 (twenty) business days after being notified of such determination, in which event a sale of the Sale Shares and proportionate Claims shall be deemed to have been concluded with effect from the date of such acceptance."

11] Importantly, clause 16.3 provides that the offer "shall, subject to clauses 16.5 and 16.8 be unconditional" - it is clear that Xeon's offer was not.

12] On 23 March 2024, PIC notified the minority shareholders (the third to the eighth respondents) of Xeon's offer and gave them the first right to acquire the shares on the following terms:

a) the remaining shareholders had to take up all the shares, i.e. all 30%, for not less than R58.8 million;

b) their acceptance must be communicated within 45 days of the transfer notice;

c) "5.5 the shareholders who give their written acceptance to acquire all the sale shares must accept to acquire all the sales shares and not some of the sale shares..." (My emphasis)

13] Importantly, in paragraph 5.6 of the same letter, the PIC states:

"To the extent that the offer to the Shareholders as detailed in this Transfer Notice is not accepted timeously, or is for whatever reason of no force or effect due to the non-fulfillment of any conditions in clause 16.5 of the Shareholders Agreement (and such fulfillment is not waived in writing by the PIC (acting on behalf of the GEPF) , the PIC (acting on behalf of the GEPF), shall be entitled for a period of 45 (forty five) business days after the offer contained in this Transfer Notice has lapsed or is deemed to be of no force or effect, to sell all the Sale Shares and associated claims to Xeon Holdings Proprietary Limited on terms not more favourable to Xeon Holdings Proprietary Limited than those offered to the shareholders."

14] In paragraph 6 of the same letter the PIC states:

"Should the Shareholders not wish to acquire the Sale Shares, we kindly request that the Shareholders waive the rights contemplated in clause 16 of the Shareholder Agreement by signing the attached Waiver Letter."

15] On 6 June 2024 the third respondent (Joubert) wrote to PIC to exercise his pre-emptive rights[3] as follows:

"1. Willem Adloph Joubert, Martha Sophia Joubert, Emmerentia Frederika Myburgh and the Trustees for the time being of the Kawari and Medipost Management Trust (hereinafter the remaining shareholders") have resolved as follows:

1.1 I, Willem Adloph Joubert, will exercise the pre-emptives, (the other shareholders having abandoned their rights in my favour), and hereby give notice to you the PIC, that I exercise the right pursuant to the provisions of clause 16.8 of the shareholders agreement. The remaining shareholders have resolved that I should do so in consortium with Xeon Holdings (Pty) Ltd which company will purchase 27% of the issued share capital in Medipost, and the balance of 3% in my name.

1.2 I will procure that both Xeon and I pay the price of R58 800 000.00 for the portion of 30% issued share capital of Medipost Holdings into the GEPF's designated account against delivery of the 30% of the issued shares offered in the letter of offer dated 22 March 2024.

1.3 There are no further conditions, other than as set out in the shareholders agreement, attached to the offer."

[3] It appears from the papers that Joubert represents 20% of the remaining shareholders. Thus, according to the papers, his offer would, at the very least, have to have been for 6% of the sale of shares and not the 3% indicate in this letter

16] But it is clear, given the terms of clause 16 of the Shareholders Agreement, and the PIC's letter of 22 March 2024, that Joubert's exercise of his pre-emptive rights was not in accordance with clause 16 and was therefore not accepted by the PIC.

17] On 11 July 2024, Xeon – via its attorneys of record – wrote to the PIC informing it of this and stated "accordingly, the time period[4] has lapsed for the remaining shareholders to exercise their pre-emptive rights."

18] The response from Joubert on 16 July 2024 was clear: he intended to hold Xeon to their agreement which was set out in his letter of 6 June 2024 and on 16 July 2024, Xeon clarified that issue:

> "5. Our client, in the representation that Mr Joubert had correctly exercised his pre-emptive rights confirmed that they were still willing to acquire the balance of the shares on offer. There was never an agreement between the parties to *collectively* acquire the 30%. This much is clear from the correspondence. Simply, Mr Joubert purported to exercise his pre-emptive rights and our client was prepared to purchase the balance thereof.
>
> 6. The fact of the matter is, it is not for our client to circumvent the provisions of the shareholders agreement and our client maintains that Mr Joubert's exercise of his pre-emptive rights is irregular."

19] On 8 July 2024 the PIC again engaged with the minority shareholders and Xeon. It emphasized that:

a) the proposed joint acquisition does not accord with clause 16 of the shareholders agreement;

[4] Ie the 45 days

b) despite the 45 business days set out in clause 16 having expired, PIC extended a further three business day period to Joubert to take up the entire 30% on offer.

20] It bears emphasizing that Joubert had, throughout, expressly indicated that he did not intend to waive his pre-emptive right. However, it is quite clear that Xeon took exception to the extension of the time period within which the minority shareholders were given to exercise their pre-emptive rights, and in a letter dated 30 July 2024 demanded not only that PIC retract this extension, but that it proceed with the sale of the 30% shares to it. Unfortunately for Xeon, it appears that Joubert subsequently, and in the three day extension period, elected to exercise his pre-emptive right in full compliance with the provisos set out in clause 16.

21] On 2 August 2024, Xeon then demanded that the PIC give it an undertaking by 6 August 2024 that it would not proceed with the sale of the shares to Joubert pending the outcome of proceedings it intended to institute by 30 August 2024. That letter concludes as follows:

> "3. Should you fail to provide our client with the aforesaid undertaking as `requested, then we hold instructions to bring an urgent application to interdict you from transferring the shares to the remaining shareholders, pending the outcome of the action to be instituted by our client.
>
> 4. We trust that such urgent proceedings will not be necessary and await your undertaking as set out above."

22] But instead of providing the requested undertaking, on 6 August 2024 the PIC's attorney informed Xeon that the timeline was "unreasonable" as they still needed to

consult and obtain instructions. They therefore sought an indulgence which Xeon granted until 16 August 2024 under the following conditions:

> "... However, notwithstanding the indulgence offered, please confirm that in the interim, and pending your response, your client will not conclude any sale agreement with the remaining shareholders."

23] But there was no response from the Pic by 16 August 2024. Instead, the PIC sort and indulgence of a further weak, which Xeon granted on 19 August 2024.

24] By 26 August 2024, there was still no response from the PIC. Instead, on two September 2024 - a week later – the PIC informed Xeon that it would not be providing the undertaking sought and stated that it would give effect to the offer made by Joubert as:

> "8. Given its contractual commitments under clause 16 of the Medipost Shareholders Agreement (read together with clause 17.1 of the Medipost Memorandum of incorporation), PIC unfortunately has no choice and must give effect to the transaction with Mr Joubert with respect to the offered sale equity.
>
> 9. The current sale process is terminated owing to the Sale of Shares Agreement's condition of waiver of pre-emptive right not being fulfilled."

25] On 4 September 2024 Xeon then again sought an undertaking that PIC would not proceed with the sale of shares by 6 August 2024, which PIC refused on the same date.

26] This urgent application was launched on 6 September 2024. The Notice of Motion allows the respondents until 9 September 2024 to file their notice of intention

to oppose and directs them to file their answering affidavits by 12h00 on 11 September 2024. Given that 6 September 2024 was a Friday, this afforded the respondents just over 2 court days to file their affidavits.

URGENCY

27] The respondents all argue that Xeon has known since 25 July 2024 that the minority shareholders had been given an extra three days within which to exercise their pre-emptive rights, and that when the retraction of this offer was not forthcoming[5], this urgent application should have immediately been launched. The fact of the matter is that it took Xeon five days to demand that PIC retract the letter affording the minority shareholders an extra 3 days to exercise their pre-emptive rights - and in this letter Xeon fails to provide a deadline to the PIC. At the very least, when Xeon alleges that it stands to suffer irreparable harm should its main relief not be granted, one would expect that it would have exercised a measure of the urgency with which it now approaches this court. But it does not appear that, at least at that stage, it was much motivated by any such sense of urgency.

28] Three days later, when no response was forthcoming, Xeon then sought the undertaking from the PIC and threatened with an urgent application. On 6 August 2024 when PIC says it will "revert in due course", Xeon inexplicably gives the PIC another 10 days effectively to respond. But when no response is forthcoming, instead of launching the threatened urgent application, on 19 August 2024 it affords the PIC another week within which to respond – by then an entire month had passed since it was notified that the PIC intended to accept Joubert's offer. To compound this, on 4

[5] As demanded in the letter of 25 July 2024

September 2024, Xeon then again sought an undertaking – and this when it was clear already that none would be forthcoming.

29] As stated, this application was launched on 6 September 2024 in circumstances where the respondents were afforded very little time to respond. Given that, by then, Xeon had waited some five weeks (at best for it) to launch these proceedings, it is astonishing. Xeon makes a general and - in my view given the extraordinary time it took to initiate this application - bald allegation that it would not be afforded substantial redress in due course were the sale of share agreement between Joubert and the PIC to be finalized. But by 18 September 2024 when the application was heard some seven weeks had passed since 25 July 2024. Xeon has failed to set out why the proverbial horse has not yet bolted.

30] Xeon then argues that their efforts to secure an undertaking, and to obviate the necessity of this application, should not be construed as dilatory. It argues with reference to *Nelson Mandela Metropolitan v Greyvenouw CC*[6] (Greyvenouw), that Xeon did not drag its feet - it acted in a responsible manner by seeking to persuade the PIC to provide an undertaking and only when it refused to do so did it approach the court.

31] But in my view, *Greyvenouw* is vastly different: there, the issue was an ongoing noise complaint filed against a business that was being conducted contrary to zoning conditions. The Municipality undertook efforts to resolve the issue "by notifying owners of non-compliance with the law, by attending a meeting in an effort to resolve the problem and

[6] 2004 (2) SA 81 (SE) at para 34

when that failed, by requiring an undertaking. When that was not forthcoming, it investigated further so that it had evidence of the level of noise coming from the Crazy Zebra. In my view it approached its statutory duty of safeguarding the rights and interests of ratepayers in a responsible manner by seeking to persuade the respondents to comply and only then approaching the court for relief."

32] This position, says Zeon, was confirmed in *SA Informal Traders Forum v City of Johannesburg*[7] (SA Informal Traders). But, in my view, both cases are distinguishable. In *Greyvenouw*, the City sought to enforce ordinances. It was obliged to act within the confines of its legislated mandate and to comply with the rules of natural justice - this it did. In SA Informal Traders the city had evicted the applicants from their trading areas or stalls and refused to allow them back, even though they had been verified and reregistered at the behest of the city. In fact, the city evicted the traders while failing to follow the processes sit out in the Business Act and, in those circumstances, the court stated:

> "[37] I find nothing dilatory in the efforts of the applicants to engage the city and persuade it to restore them to their trading positions in their inner city. The return to the trading stalls remained urgent throughout the engagements or negotiations attempted before an urgent application was launched. Even by the time they approached this court, the claims were self-evidently urgent, and so we concluded"

33] As a final quiver to its bow, Xeon argues that the fact that the subject matter of this urgent application is its commercial interests should not militate against it on the

[7] 2014 (4) SA 371 (CC) para 38

issue of urgency. For this argument it relies on the judgment of Bester AJ in *Avis Southern Africa Limited and Others v Porteous and Another*[8] in which he stated:

> "[19] Whether the commercial interests justify and urgent hearing will always depend on the facts of each case, with reference to whether substantial redress can be secured at a hearing in due course. Volvo does not signal that the bar has now been heightened to require evidence of the existence of a crippling commercial lost before a commercial matter can be said to be urgent, nor should courts decline to hear matters that implicate commercial interest because judicial resources may be strained in a particular week in the urgent court."

34] In this application the basis upon which the urgency is founded in the founding affidavit is the following:

a) that, if set down on the ordinary opposed motion rule, by the time the matter is heard "in approximately 28 weeks", the sale of the shares to the remaining shareholders would have occurred;

b) and, under "balance of convenience" Xeon states that its right to purchase the shares at the purchase consideration will be lost;

c) furthermore, under "absence of any other satisfactory remedy" it states

> "57. If it is later found that the remaining shareholders waived the pre-emptive rights, Xeon would have lost the shares it was lawfully entitled to purchase. It is not a satisfactory remedy to be given a second opportunity to purchase another 30% of the issued share capital of Medipost auto purchase the 30% from the remaining shareholders at another time and another price."

[8] 2024 (2) SA 386 (GJ)

35] As Xeon has simply made this bald allegation without substantiation, little reliance can be placed on it. In argument, Xeon argued that any potential damages claim[9] maybe impossible to calculate, but this is allegation is neither explained nor substantiated. At the very least, it is cast in stone that the purchase consideration that Xeon would be willing to pay based on Medipost's 2023 draft audited financial statements, was R58.8 million. It is unlikely that a similar exercise cannot be conducted in respect of future financial statements in order to value the shares at that stage. In any event, the words of Fagan J in *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets and Another*[10] must be considered as well:

> "…[T]he fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. On the other hand, where a person's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, the Court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants. The reason for this differential treatment is that the Courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those advanced by the applicants in these two matters were allowed to dictate the priority they should receive on the role. It is, in the nature of things, impossible for all matters to be dealt with as soon as they are ripe for hearing. Considerations of fairness require litigants to wait their turn for the hearing of their matters. To interpose at the top of the queue a matter which does not warrant such treatment automatically results in an additional delay in the hearing of others awaiting their turn, which is both prejudicial and unfair to them."

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[9] The suitable alternative remedy put forward by the respondents

[10] 1981 (4) SA 108 (C)

36] The respondents have argued that Xeon's approach has been dilatory, that it rested on its laurels and that any alleged urgency was self-created.[11] They argue that it is incumbent upon Xeon to set out clearly the facts upon which urgency is founded in the founding affidavit and to explain why it cannot be afforded substantial redress in due course.[12]

37] The first respondent argues that Xeon has employed "an old trick" - when it failed to approach the court expeditiously, when it became aware of the PIC's decision on 25 July 2024, it sought an undertaking "in order to champion a non-existing urgency."

38] In *Fair Trade Independent Tobacco Association NPC and Others v Commissioner for the South African Revenue Service*[13] the court stated:

> "[17] Where an applicant sits on its hands or takes its time to bring an urgent application, such urgency is self-created, unless an acceptable explanation is provided for the full. Applicable to the urgency of the application...
>
> [18] Litigants cannot ignore impending infringements in the hope that it will not be implemented and then, when reality knocks on the door, rush to the urgent court for relief. Where an application has become agent owing to circumstances for which the applicant is to blame, the court should not assist such an applicant with urgent relief... Self-created urgency should not be countenanced."[14]

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[11] Roets NO and Another v SB Guarante Company (RF) (Pty) Ltd and Others (36515/2021) [2022] ZAGPHJHC 754 (6 October 2022) para 26

[12] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

[13] 2024 JDP 0248 (GP)

[14] Case references removed. See also Public Servants Association of SA v Minister of Home Affairs (J1673/16) [2016] SALCJHB (11 November 2016) para 17

39] As was so aptly submitted by Mr. Mokoena, on behalf of the first respondent, “here, there is no blood on either the wall or the floors.”

40] In my view:

a) Xeon has known since 25 July 2024 what the PIC’s stance in respect of its offer was;

b) it sought to render the application urgent by insisting that the PIC retract its extension of time, and when that did not work it began setting the stage for this application by seeking undertakings;

c) it allowed over a month to pass between the initial undertaking sought and its final demand - this, in my view, amounts to no more than window dressing;

d) and when it finally launched this application, instead of affording the respondents reasonable time within which to file their answering affidavits, it afforded them less than three court days to do so. Given that it took so long to commence these proceedings, this cannot be considered to be reasonable.

41] This all being so, I find that the application is not urgent.

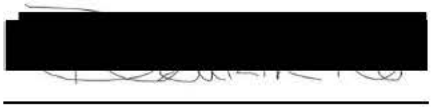
42] The respondents seek costs on a punitive scale given the manner in which the application was brought. However, I am of the view that this is not warranted. I am however of the view that the cost of two counsel, to be taxed in accordance with scale C, is appropriate: the matter is nuanced and the facts not run-of-the-mill. All parties employed two counsel being a senior counsel and a junior. The amount involved is large and all the parties regard the matter as one of great importance and, given what

is involved and the intricacies of the merits (which I have not decided upon), the scale of costs is appropriate.

ORDER

43] The order I make is the following:

1. The application is struck from the role due to a lack of urgency.
2. The applicant is ordered to pay the 1st, 3rd, 4th, 5th, 6th, 7th and 8th respondent's costs, including the costs of two counsel of which one is a senior counsel, to be taxed in accordance with scale C.
3. The application may be enrolled for hearing in the ordinary course upon compliance with the uniform rules and directives of this court.



NEUKIRCHER J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment 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 27 September 2024.

For the applicant	:	Adv N Cassim SC, with him Adv LF Laughland
Instructed by	:	Adams Attorneys
For 1st respondent	:	Adv P Mokoena SC, with him Adv T Seroto
Instructed by	:	Goitseona Pilane Attorneys Inc
For 3rd to 8th respondents	:	Adv BH Swart SC, with him Adv JA Booyse
Instructed by	:	MacRoberts Attorneys Inc
Date of hearing	:	18 September 2024
Date of judgment	:	27 September 2024