REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER:2035 /2017

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

DATE 5/12/19 SIGNATURE:

In the matter between:

PIERRE MALAN — **APPLICANT**

AND

CRIMSON KING PROPERTIES 281 (PTY) LTD — **FIRST RESPONDENT**
(IN LIQUIDATION)

MARIE PERLSER N.O — **SECOND RESPONDENT**

WILLIAM KEET HOFFMANN N.O — **THIRD RESPONDENT**

ILSE HOFFMANN N.O — **FOURTH RESPONDENT**

JOHAN FRANCOIS ENGELBRECHT N.O — **FIFTH RESPONDENT**

ZENZELE BONGANT AUBREY NGCOB N.O **SIXTH RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The applicant was employed by the first respondent. Later he became a director of the first respondent. According to the applicant he was a 40% shareholder of the first respondent even though a shareholder's certificate was not issued to him. As the working relationship was good, he did not worry about the shareholder's certificate that was not issued to him.

[2] Later his relationship with the respondents soured to the extent that he brought an *ex parte* application for the liquidation of the first respondent. The application was heard on the 7th March 2017 wherein he obtained a provisional order for the liquidation of the first respondent. The third respondent anticipated the application for the liquidation of the first respondent wherein the provisional order was set aside and the application was dismissed on the basis that the applicant did not have *locus stand in judicio* to bring the application.

[3] On the 30th March 2017 the applicant issued the present application. On the 11th April 2017 the first respondent was placed under voluntary liquidation by agreement. The applicant was a party to the proceedings and agreement in which the first respondent was placed under voluntary liquidation. The applicant's present application was served on the respondents on the 13th April 2017 and 21st April 2017.

[4] In the present application he is seeking an order that he be confirmed to be 40% shareholder in the first respondent; that financial statements for the year 2012 up to 2017, management account from February 2013 to March 2017, SARS returns for the period 2013 to March 2017, copies of all resolutions passed from February 2013 to March 2017, copies of minutes from February 2013 to March 2017, copies of the assets register for the year 2013, 2014, 2015, 2016 and 2017, and any other documentation required by the independent auditors be delivered to him in order to enable an independent auditor to calculate the fair market value of his shareholding in the first respondent; and that once the value of the shareholding is determined by an independent auditor, that the respondents be ordered to buy back the shares from the applicant at a fair market value determined by the independent auditors.

[5] As part of the annexures to his founding affidavit, the applicant has attached the first and third respondents answering affidavit in *ex parte* application which the provisional order to liquidate the first respondent has been set aside.

[6] The first to fourth respondents are opposing the applicant's application. The respondents in their answering affidavit have raised a point *in limine* stating that the applicant has launched the present application fully aware that his shareholding of the first respondent is disputed. It is the respondents' contention that the answering affidavit in the previous litigation which the applicant has annexed to his founding affidavit clearly and unequivocally stated why the applicant is not a shareholder, nor would he ever become a shareholder of the first respondent. The respondent submits that there is a dispute of fact which is *bona fide* and which will not be resolved by means of motion proceedings.

[7] The respondents submit that the applicant launched the present application knowing fully well that there were disputes of material fact which are irresolvable by means of a motion proceeding, and has therefore abused the process of the court. The respondents are asking for costs on a punitive scale.

[8] The liquidators of the first respondent were later joined to the proceedings as fifth and sixth respondents respectively. The liquidators have filed a letter stating that they will abide by any decision that the court makes.

[9] The respondents have raised a point *in limine* alleging that there is a material dispute of fact which could not be resolved on papers. In **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**[1] Hefer JA said:

> "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the facts averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averments. When facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence), if they be not true or accurate but, instead of doing so, rests his case on a bare denial the court will generally have difficulty in finding that the test is satisfied"

[10] It is the respondents' contention that the applicant has launched the present application fully aware that it is disputed that he is the shareholder of the first respondent, and that their grounds of disputing his shareholding appears on the annexure which the applicant has attached to his founding affidavit being the

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[1] 2008 (3) SA 371 (SCA) at 375 G-I

third respondent's answering affidavit in the previous litigation. The respondents still stand by those grounds.

[11] Paragraphs 7.15.3, 7.15.4 and 18.4 of William Keet Hoffman (third respondent's answering affidavit in previous litigation) read as follows:

"7.15.3. Clause 6 and 7 have already been referred to but it is necessary to reiterate that the required *quid pro quo* by the applicant further shareholding at a ridiculously low price of R 10.00 per share was that he accepted a *pro rata* responsibility for the liabilities of the first respondent. To date hereof, and since 2009 when it became a requirement, he has studiously refused and/or failed to provide the *quid pro quo* for his shareholding. His attempt to justify the failure to commit himself to be liable *pro rata* to his shareholding for the debts of the first respondent on the basis of events which only occurred this year (i.e. 2017), is simply dishonest. The abortive attempt fails to cater for the period between 2009 and 2017.

7.15.4. Most importantly, the applicant's failure to commit himself as a surety in respect of the debts of the first respondent is the reason why, until date hereof, he has still not been issued any share certificates and is not recorded as a member in the share register of the first respondent.

18.4. It is denied that the applicant had a 40% shareholding for the reasons advanced above. He simply never complied with the *quid pro quo* requirements. "

[12] Based on the third respondent's answering affidavit in the previous litigation, the provisional order that the applicant had obtained *ex parte* was set aside and his application for liquidation of the first respondent was dismissed. The issue of the applicant's shareholding in the first respondent is not new. It has already been thoroughly entertained by the third respondent in the previous litigation. The applicant launched the present application well aware that his shareholding in the first respondent is been disputed and on what basis.

[13] In **National Director of Public Prosecutions v Zuma**[2] Harms DP said:

> "Motion proceedings unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can only be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be difficult if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on papers. "

[14] The applicant has launched the present application with the full knowledge of the third respondent's answering affidavit in the previous litigation as he had also attached it to his founding affidavit as an annexure. In that answering affidavit in the previous litigation, the third respondent did not make bald denials. He had substantiated the basis of his denials. That explains why the provisional order was set aside and the liquidation application was dismissed. Since the dismissal of the liquidation application in the previous litigation, nothing has changed regarding the dispute of the applicant's shareholding in the first respondent. The respondents are still standing by the facts as stated by the third respondent in his answering affidavit in the previous litigation.

[15] It is trite that an applicant who elects to proceed by way of motion proceedings despite being aware that a serious dispute of fact was bound to develop, runs the risk that the application may be dismissed with costs. It is not proper that an applicant should commence proceedings by way of motion procedure with full knowledge that the dispute of fact might arise. **(See Room Hire Co (Pty)**

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[2] 2009 (2) SA 277 (SCA) at 290 D-F

Ltd v Jeppe Street Mansion (Pty) Ltd[3]). I agree with counsel for the respondent that there exist a real, genuine and *bona fide* dispute of fact which cannot be resolved on the papers as they stand.

[16] Turning to costs, the respondents are asking for a punitive costs order. The respondents have submitted that the application was unnecessary and that it amount to abuse of the court processes.

[17] In **Limpopo Legal Solution and Another v Eskom SOC Ltd**[4] the court said:

"In Nel the then- Appellate Division held:

'The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which gives rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigant"

[18] The applicant when he launched his application was aware that the respondents dispute his shareholding in the first respondent, and therefore a material dispute of fact was bound to arise which could not be resolved by means of motion proceedings. The applicant was party to the settlement agreement that was made an order of court voluntarily placing the first respondent under liquidation. Even though by the time the first respondent was placed under liquidation, the applicant has already issued his application, it was not yet served on the respondents. However, despite being aware that the first respondent has been liquidated and that its affairs will be placed in the hands

[3] 1949 (3) SA 1155 (T)
[4] [2017] ZACC 34 at Para 35

of liquidators, he proceeded to serve the application. In my view, proceeding with the application whilst the applicant was part and parcel of the parties who placed the first respondent under voluntary liquidation was unwarranted and constitute abuse of court processes. For that it justifies costs on a punitive scale on attorney and client scale.

[19] In the results I make the following order:

19.1. The applicant's application is dismissed with costs on attorney and client scale which costs will include the costs of employment of a senior counsel.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPLICANT : ADV VAN DEN EENDE

INSTRUCTED BY : LEWIES & ASSOCIATES

COUNSEL FOR 1ST TO 4TH RESPONDENTS: ADV T.A.L.L POTGIETER S.C

INSTRUCTED BY : EY STUART INC

DATE OF HEARING : 06TH NOVEMBER 2019

DATE OF JUDGEMENT : 5TH DECEMBER 2019