

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Magistrates: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

CASE NO: UM 146/2020

In the matter between:

**SIYAKHULA SONKE EMPOWERMENT
CORPORATION (PTY) LTD**

Applicant

And

**SARAHNI PRINS
GOOD PROGNOSIS CENTRAL (PTY) LTD**

1ST RESPONDENT

2ND RESPONDENT

REASONS FOR ORDER

DJAJE J

Introduction

[1] On **6 May 2021** the applicant brought an urgent application for an interim interdict pending the application for leave to appeal which was to be heard on **28 May 2021**. The application was argued and the following order granted.

“1. That condonation be granted to the Applicant for non-compliance with the forms and service and time periods provided for in the Rules and same is dispensed with, and the application is heard in terms Uniform Rule 6(12)(a).

2. *The First Respondent is restrained and interdicted from transferring, dissipating, disposing of, encumbering, or alienating 21% of her shareholding held in the Second Respondent to any other party, save for the Applicant;*
3. *The First and Second Respondents are restrained and interdicted from:*
 - 3.1 *Transferring, dissipating, disposing of, encumbering, or alienating any of the Second Respondent's assets, save in the normal course of business;*
 - 3.2 *Transferring or making payment of funds held in the Second Respondent's bank account(s) to the First Respondent directly or indirectly, save in the normal course of business, including but not limited to the bank account held by the Second Respondent with Nedbank Limited under account number 43252754;*
 - 3.3 *Declaring and making payment of any dividends to any shareholder(s) of the Second Respondent, including the First Respondent;*
 - 3.4 *Transferring, selling, disposing of, alienating, or restructuring the Second Respondent's business, or transferring the Second Respondent's employees, or ceding or assigning any of its rights or obligations in law, directly or indirectly to the First Respondent or to any other party, save with the prior written agreement of the Applicant, or if such agreement is unreasonably refused, the leave of this Court upon application by the Second Respondent; and*
 - 3.5 *Divert the Second Respondent's current customers and business opportunities which came to the First Respondent or an entity on her behalf, or to any other party.*
4. *That the relief sought in prayers 2 to 2.5 above operate as interim interdictory relief with immediate effect, pending:*
 - 4.1 *The adjudication and finalisation of the First and/or Second Respondent's application for leave to appeal against the whole of the judgment and order of the Honourable Madam Justice Djaje dated **26 February 2021** granted in favour of the Applicant in the proceedings in this Court under case no. UM 146/2020; and pending*
 - 4.2 *The adjudication and finalisation of any subsequent appeal to the full court of this Division, and/or any further application(s) for leave*

to appeal and/or appeal(s) to the Supreme Court of Appeal and/or Constitutional Court, as the case may be.

5. *The First Respondent is ordered to pay costs occasioned by the opposition to prayer 3.5 of the Notice of Motion.*

[2] On **21 May 2021** the first respondent filed a request for reasons of the order which was only brought to my attention by the office of the Registrar on **10 June 2021** after the leave to appeal had been heard and disposed of. It is for that reason that I am only providing the reasons for the order of **6 May 2021** now.

[3] In this application the applicant sought an interdict to safe guard its rights in relation to the judgment granted. The following relief was sought in the notice of motion:

“1. That condonation be granted to the Applicant for non-compliance with the forms and service and time periods provided for in the Uniform Rules of Court and that same be dispensed with, and that this application be heard and finalised as an urgent application as contemplated in Uniform Rule 6(12)(a) read with this Court's Practice Directives;.

2. That the First Respondent be restrained and interdicted from transferring, dissipating, disposing of, encumbering, or alienating 21% of her shareholding held in the Second Respondent to any other party, save for the Applicant;

3. That the First and Second Respondents be restrained and interdicted from:

3.1 Transferring, dissipating, disposing of, encumbering, or alienating any of the Second Respondent's assets, save in the normal course of business;

3.2 Transferring or making payment of funds held in the Second Respondent's bank account(s) to the First Respondent directly or indirectly, save in the normal course of business, including but not limited to the bank account held by the Second Respondent with Nedbank Limited under account number 43252754;

- 3.3 *Declaring and making payment of any dividends to any shareholder(s) of the Second Respondent, including the First Respondent;*
- 3.4 *Transferring, selling, disposing of, alienating, or restructuring the Second Respondent's business, or transferring the Second Respondent's employees, or ceding or assigning any of its rights or obligations in law, directly or indirectly to the First Respondent or to any other party, save with the prior written agreement of the Applicant, or if such agreement is unreasonably refused, the leave of this Court upon application by the Second Respondent; and*
- 3.5 *Diverting the Second Respondent's current or potential business, opportunities and/or clients directly or indirectly to the First Respondent or an entity on her behalf, or to any other party.*
4. *That the relief sought in prayers 2 to 3.5 above operate as interim interdictory relief with immediate effect, pending:*
- 4.1 *The adjudication and finalisation of the First and/or Second Respondent's application for leave to appeal against the whole of the judgment and order of the Honourable Madam Justice Djaje dated 26 February 2021 granted in favour of the Applicant in the proceedings in this Court under case no. UM 146/2020; and pending*
- 4.2 *The adjudication and finalisation of any subsequent appeal to the full court of this Division, and/or any further application(s) for leave to appeal and/or appeal(s) to the Supreme Court of Appeal and/or Constitutional Court, as the case may be.*
5. *That the First and/or Second Respondents be ordered to pay the costs of this application on a scale applicable as between attorney and client, jointly and severally, the one paying the other to be absolved, only in the event of the First and/or Second Respondents opposing any of the relief sought herein;*
6. *Further and/or alternative relief.”*

[4] In **February 2021** a judgment in favour of the applicant was handed down in the main application as follows:

“1) *THAT:*

1.1 *The First Respondent’s notice of termination of the Sale of Shares*

*Agreement dated the 7th day of **APRIL 2017** (“the contract”) between the Applicant and the First and Second Respondents, is invalid and of no force or effect; and*

1.2 *The resolution by the First Respondent on the 14th day of **JULY 2020** to remove Mr Frederick Sam Arendse as a director of the Second Respondent, is in breach of the contract between the parties, invalid and of no force or effect.*

2. *THAT:Mr Frederick Sam Arendse is reinstated as a director of the Second Respondent.*

2.1 *The Third Respondent be and is hereby directed to amend its records to reflect such reinstatement and appointment.*

3. *THAT:The First Respondent be and is hereby directed to forthwith provide the Applicant’s nominated director, Mr Frederick Sam Arendse, with access to all bank accounts of the Second Respondent as provided in clause 8.10 of the contract.*

4. *THAT:The Second Respondent be incorporated as part of the Applicant’s group of companies (the SSC Group of Companies), and that the Second Respondent be subject to the same governance and organisational structures as that of the SSC Group of Companies as provided in clause 8.15 of the contract.*

5. *THAT:It is directed that the 21% of the First Respondent’s shareholding in the Second Respondent be sold to the Applicant at fair value as provided in clause 6.1 of the contract, such fair value to be determined in accordance with paragraphs 5.1 to 5.4 below, alternatively to be determined at such further court proceedings as may be instituted by the Applicant.*

5.1 *The First Respondent be and is hereby ordered to provide a full account to the Applicant in respect of a current and fair valuation of her 21% shareholdings in the Second Respondent, supported by all relevant documents, financial records and vouchers, and including (but not limited to) the financial records listed below, within ten (10) days from the date of this Court’s Order:*

5.1.1 *External, audited annual financial statements in respect of the Second Respondent for the last five financial years, i.e for the financial periods ending on the 29th day of **FEBRUARY 2016**, 28th day of **FEBRUARY 2017**, 28th day of **FEBRUARY 2018**, 28th **FEBRUARY 2019** and 29th day of **FEBRUARY 2020**.*

5.2 *The parties are directed to debate the First Respondent's aforesaid valuation within seven (7) days from the date of the valuation and supporting documents being provided;*

5.3 *In the event that the parties agree as to the correctness of the foresaid valuation, the Applicant is directed to make payment of the amount equal to the value of the First Respondent's 21% shareholding in the Second Respondent within seven (7) days from the date of such agreement, into the First Respondent's bank account.*

5.4 *Should a dispute exist as to the correctness of the First Respondent's aforesaid valuation, the Applicant is authorised to approach this Court on the same papers, duly supplemented, for the determination of the fair value of the First Respondent's 21% shareholding in the Second Respondent.*

6. *THAT: The counter-application be and is hereby dismissed;*

7. *THAT: The First Respondent pay the Applicant's costs of the application and the counter-application including the costs occasioned by the removal of this Court's Urgent Motion Roll of the 1st day of **SEPTEMBER 2020**;*

8. *THAT: The First Respondent pay the Second Respondent's costs of the application and the counter-application."*

[5] The first respondent only opposed prayer 3.5 of the notice of motion and as such argument was only heard in respect of prayer 3.5 of the notice of motion. In the main the applicant argued that the first respondent had resigned as a director and appointed a third party to replace her in the second respondent. However, the applicant had a reasonable suspicion that the first respondent was still in control of the second respondent and not allowing the applicant to participate in the second respondent pending the hearing of the leave to appeal or any subsequent appeal. It

was submitted that the aim of this application was not to restrain the first respondent from competing with the second respondent but to interdict her from diverting current or potential business opportunities of the second respondent to herself or any other entity.

[6] In contention the first respondent in opposing prayer 3.5 of the notice of motion argued that the applicant is seeking an order for the first respondent not to pursue current or potential clients of the second respondent. In essence the applicant is seeking an order to stop the first respondent from competing with the second respondent. Further that the applicant does not have the *locus standi* to act on behalf of the second respondent in seeking the said relief. The first respondent tendered that prayer 3.5 of the notice of motion should rather be worded differently and state as follows: “ *the first respondent be interdicted from diverting the second respondent’s existing customers and corporate opportunities which came to the first respondent’s attention while she was a director of the second respondent.*”

[7] As indicated above the first respondent only opposed prayer 3.5 of the notice of motion and even tendered an alternative to the said prayer. I will not deal in this judgment with the other prayers including that of urgency. The urgency of the other prayers cannot be separated from the one applicable to prayer 3.5 especially that the first respondent went as far as tendering an alternative thereto.

[8] During argument the first respondent’s counsel referred me to the decision of **Da Silva and Others v CH Chemicals (Pty) Ltd 2008 (6) SA 620 (SCA)** where the following was said: “ *But if the opportunity is not of such a kind or if it is an opportunity which , although within the scope of the company’s business activities, only arose after the resignation or was one of which he was unaware prior to his resignation, he is at liberty in the absence of explicit contractual restraints to exploit it to the full.....*”

[9] In this application there was no evidence of a restraint of trade contract signed by the first respondent as a director of the second respondent. As such the first respondent cannot be interdicted from competing with the second respondent after her resignation. She can however be interdicted from diverting existing business or

clients of the second respondent or those that she became aware of whilst she was a director of the second respondent. I am in full agreement with the decision in **Da Silva (supra)** and it was for that reason that prayer 3.5 of the notice of motion was altered to exclude potential business as that would be tantamount to interdicting the first respondent from competing with the second respondent when no such restraint exists.

Costs

[10] Costs are in the discretion of the court and it is trite that costs follow the result. The applicant was successful in this application. In my view the alteration of the one prayer as had been suggested by the first respondent does not take away the success of the applicant. The applicant was forced to bring these proceedings against the first respondent as a result of the conduct of the first respondent. There is no reason why the first respondent should not pay the costs of the application as far as the opposition of prayer 3.5 is concerned.

J.T. DJAJE

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF REQUEST FOR REASONS : 21 May 2021

DATE OF REASONS : 18 June 2021

COUNSEL FOR THE APPLICANT : ADV SPILLER

COUNSEL FOR THE RESPONDENT : ADV BOONZAAIER