

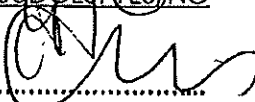
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REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 18291/2013

(1)	REPORTABLE: YES / <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="radio"/> YES / <input type="radio"/> NO
(3)	REVISED.
	12/11/2013
	DATE
	
	SIGNATURE

In the matter between:

AMABUBESI INVESTMENTS (PTY) LTD

APPLICANT

And

MAXWILL 146 CC
 MATSIE JACKIE
 KEPADISA GASEITSIWE WILLIAM
 SEBELEGO MORUTINYANE GEORGE
 SEBELEGO GEORGE
 SERUE TSIETSI BEN
 MLOTOYA ZANZI LAZARUS
 TSIOLA BOTHATA WILLIAM
 VAN WYK WILLEM
 DU PLOOY SARELE
 MOITSI SAM

FIRST RESPONDENT
 SECOND RESPONDENT
 THIRD RESPONDENT
 FOURTH RESPONDENT
 FIFTH RESPONDENT
 SIXTH RESPONDENT
 SEVENTH RESPONDENT
 EIGHT RESPONDENT
 NINTH RESPONDENT
 TENTH RESPONDENT
 ELEVENTH RESPONDENT

In re:

MAXWILL 146 CC

FIRST PLAINTIFF

0117229031

2

MATSIE JACKIE
 KEPADISA GASEITSIWE WILLIAM
 SEBELEGO MORUTINYANE GEORGE
 SEBELEGO GEORGE
 SERUE TSIETSI BEN
 MLOTOYA ZANZI LAZARUS
 TSIOLA BOTHATA WILLIAM
 VAN WYK WILLEM
 DU PLOOY SARELE
 MOITSI SAM

SECOND PLAINTIFF
 THIRD PLAINTIFF
 FOURTH PLAINTIFF
 FIFTH PLAINTIFF
 SIXTH PLAINTIFF
 SEVENTH PLAINTIFF
 EIGHT PLAINTIFF
 NINTH PLAINTIFF
 TENTH PLAINTIFF
 ELEVENTH PLAINTIFF

And

MANHATTAN OPERATIONS DOUGLAS (PTY) LTD
 CRYSTAL RESOURCES (PTY) LTD
 AMABUBESI INVESTMENTS (PTY) LTD
 DU RAAN JOHANNES DAVID

FIRST DEFENDANT
 SECOND DEFENDANT
 THIRD DEFENDANT
 FOURTH DEFENDANT

J U D G M E N T

COLLIS AJ:

Introduction

[1] This is an opposed interlocutory application in terms of which the Applicant (*Third Defendant in the main action*) seeks security for its costs in the amount of R 500 000 or for such other amount and within such time as may be determined by the above Honourable Court from the First to Eleventh Respondents (*First to Eleventh Plaintiffs*).

[2] The Applicant further requested the Court, in the event of it being successful, to order the stay of the action pending the payment of such security. In the event of the First to Eleventh Respondent's failure to pay such

0117229031

security once ordered to do so, to be permitted to apply to the Court for the dismissal of the Plaintiff's action.

The basis for the demand of security

[3] The demand for security was sought on the basis that the Plaintiff's action was instituted vexatiously and recklessly as against the Applicant. It is also contended such action amounts to an abuse of the process of Court.

[4] Uniform Rule 47(1) states out as follows:

"A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded."

[5] As per the action so instituted; the following relief was sought against the Third Defendant (Applicant):

- "1. An order declaring the first and second defendants unlawful shares alienations void *ab initio*;
- 2. An order directing the First and Third Defendants to forthwith transfer to the First Plaintiff 15% of the issued shares in the Second Defendant;
- 3.....
- 4. That the First to Third Defendants and/or any of their agents and/or officials and/or employees be prohibited from selling and/or alienating and/or transferring and/or ceding any of the 15% issued shares that are to be

0117229031

transferred to the First Plaintiff's in terms of the first shareholders agreement and/or this order, without:

4.1 the written consent of (a) the First Plaintiff and (b) the Plaintiff's attorneys of record in this matter;

4.2 an order from a Court with the necessary jurisdiction to grant an order for such relief;

5.....

6.....”

The Applicant's contention

[6] In answer thereto the Third Defendant had pleaded that it no longer held any shares whatsoever in the Second Defendant. The Third Defendant alleged on 19 December 2006, that it entered into a sale of shares agreement with the First Defendant in terms of which it sold 40% of its shares in the Second Defendant to the First Defendant. Following upon that, on 31 March 2007 it had signed a transfer of shares form in favour of the First Defendant for all of the 40% shares which the Applicant held in the Second Defendant. As it was no longer the holder of the 40% shares in the Second Defendant the relief sought by the Plaintiffs was no longer competent and was but for academic interest and of no legal consequence.

The First to Eleventh Respondents contention

[7] The Respondents contend, that the Applicant has a material and substantial interest in the matter by virtue of the fact that the sale of shares in the Second Defendant, which included 5% of the First Plaintiff's shares in the

0117229031

5

Second Defendant, was unlawful as it had been done without the knowledge and/or consent of the First to Eleventh Plaintiff's.

[8] Furthermore, the transfer of shares to the Third Defendant was also in contravention of the provisions of the first shareholders agreement concluded on or about 8 December 2003 between the Second to Eleventh Plaintiff's, the First Defendant and the Fourth Defendant in that:

8.1 the Second Defendant would be entitled to increase their shareholding of 5% to a maximum of 30%; and

8.2 if a shareholder wishes to sell any of its shares in the Second Defendant or receives an offer for purchase of its shares, it shall first offer those shares and its loan account to the remaining shareholders in proportion to their respective shareholding in the Second Defendant at the time. See in this regard Particulars of Claim as per paragraphs 37.5

[9] As a consequence the Respondents further contend, as there existed no intention to transfer the First Plaintiff's shares held in the Second Defendant to the Third Defendant, such a transfer of shares is *void ab initio* as there was never consensus in respect thereof.

[10] At the hearing of the application counsel for the Applicant submitted; that the Applicant no longer persisted with the seeking of security for costs against the Respondents. The basis for the withdrawal of the request for security stems from the impossibility of the Applicant to comply with the orders sought against it as per prayers 2 and 4 of the particulars of claim. It was further

0117229031

6

argued, that as the Applicant is no longer in possession of those shares in question having transferred them to the First Defendant as early as 19 December 2006; then the action of the Respondents would not be sustainable as against it. As a consequence it requested an order for the withdrawal of the application and for this court to reserve the costs for determination by the trial court.

[11] In opposition the Respondents argued that, the application brought against it was ill-considered in that any order which the Plaintiff may obtain in the main action in terms of prayer 1 of its particulars of claim may prejudicially affect the Third Defendant's interest. Furthermore, the basis for seeking costs from the Respondents was premised on the fact that the Plaintiff's action is vexatious. A claim can only be considered to be vexatious, if it appears as a certainty, not merely on a preponderance of probability, that an action is obviously unsustainable. As the relief sought against all remaining Defendants will have a direct and substantial effect on the rights of the Third Defendant, it cannot be suggested that the plaintiff's claim as against the Third Defendant is unsustainable.

[12] Rule 41(1) of the Uniform Rules of Court state as follows:

"(a) A person instituting any proceedings may at any time before a matter has been set down, and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

0117229031

7

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

[13] To the matter at hand, no notice of withdrawal of the application was served on any of the Respondents prior to the set down of the application seeking security, nor was such withdrawal made with any of the Plaintiff's consent or accompanied with a tender for costs as is provided for in the rule quoted above. At best the applicant was approaching this Court for leave to withdraw the application and it follows for this Court to determine the issue of costs.

[14] In the decision *Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccarri Interested Party) 2003 (2) SA 590 (W)* at 597A, it was held "*the general principle is that the party withdrawing is liable, as an unsuccessful litigant, to pay the costs of the proceedings*". It therefore follows that a Court should not be astute to deprive a successful litigant of any of his costs and that this discretion is one that a Court would ultimately retain.

[15] As mentioned in paragraph 10 above, the Applicant requested this Court, upon the withdrawal of the application to reserve the awarding of costs. In support for this contention, counsel for the Applicant submitted that the trial

0117229031

9

would be required to give notice of his intention to oppose the application within the time period stipulated in the notice of motion and upon doing so, within fifteen days be required to file an Answering Affidavit. As per the Notice of Motion, the Respondents were given no time period within which they were required to file their intention to oppose the application. They were merely given a date by when they were required to file their Answering Affidavits. It is significant to note that, the said Notice was only served on them on 17 September 2013. The Respondents were required to file their Answering Affidavit by no later than the 30th September 2013 in less than eight (8) court days. It as a result was argued, as no basis for urgency was contended for on the papers, the behaviour of the Applicant smacks of an attitude of being obtuse and should be frowned upon by the Court, by the awarding of a punitive costs order against the Applicant.

[21] To the matter at hand, the relevant sub rule of Rule 6 applicable would be sub rule 11. In terms of the latter sub rule, all interlocutory applications may be brought on notice, supported by affidavits and set down at a time assigned by the registrar or as directed by a judge. The provisions of Rule 6(5)(d) in the strictest sense would thus not find applicability, but it clearly is the sub rule in terms of which the Applicant had elected to proceed.

[22] As correctly pointed out, no basis for urgency was disclosed in the Founding Affidavit and as a result I cannot but accede to the request for the awarding of a punitive costs order.

0117229031

10

Order

[23] In the result the following order is made:

23.1 The application in terms of Rule 47(3) is hereby withdrawn.

23.2 The Applicant is ordered to pay the costs occasioned by such withdrawal on an Attorney and Client scale.

DATED AT JOHANNESBURG ON THIS 12th DAY OF NOVEMBER 2013.



COLLIS AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

APPLICANT: Adv. V.P. NGUTSHANE

Instructed by Tshisevhe Gwina Ratshimbilani Inc.

RESPONDENTS: Adv. H.P. VAN NIEUWENHUIZEN