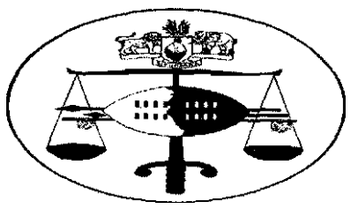


IN THE HIGH COURT OF SWAZILAND

HELD AT

MBABANE

CASE NO: 1470/09

In the matter between:

LISA EVANS — **Applicant**

And

GARETH WILLIAM EVANS

1st Respondent

GCWALISA CONVENIENCE CENTRE

2nd Respondent (PTY) LTD

Date of hearing: 30 April 2009
Date of judgment: 20 May, 2009

Mr. Attorney B. W. Magagula for the Applicant Advocate M.

van der Walt for the Respondent
(Instructed by Currie & Sibandze Associates)

JUDGMENT

MASUKU J.

[1] By way of an urgent application, the above-named Applicant approached this Court seeking the relief hereinunder set out:

(a) an Order declaring the 1st Respondent's unilateral suspension of the Applicant as director or employee of the 2nd Respondent, as unlawful;

(b) an Order directing the Respondents immediately to:

(i) recognize the Applicant as a director of the 2nd Respondent;

(ii) allow the Applicant full access to all financial statements, management accounts, business records and other information relating to the affairs of the 2nd Respondent;

(iii) restore the Applicant's signing powers on all bank accounts operated by the 2nd Respondent;

(iv) allow the Applicant full access to the premises of the 2nd Respondent and the right to obtain any information required by the Applicant concerning the business activities of the 2nd Respondent;

(c) an Order interdicting and restraining the 1st Respondent from:

(i) taking or implementing any actions to exclude the Applicant from the business of the 2nd Respondent;

(ii) withdrawing any fund for his own benefit, save an amount of E35 000 per month;

(iii) dissipating any of the 2nd Respondent's assets, transferring funds or making any payments without the Applicant's prior written consent;

(4) an order declaring that all cheques drawn on any of the 2nd Respondents' accounts must bare (sic) the signature of the Applicant and the 1st Respondent;

(5) an Order declaring that the Applicant and the 1st Respondent shall each continue to receive their monthly income from the 2nd Respondent in the sum of E35 000;

(f) an Order directing the Respondent to pay the costs occasioned by this application on the scale as between Attorney and own client, alternatively, an Order reserving such costs for determination at the hearing of the divorce.

[2] An Order condoning the Applicant's failure to comply with the forms and time limits prescribed by the provisions of the Rules of Court and allowing the application to be heard as one of urgency.

[3] An Order declaring that the relief in paragraphs 1 (b) -(e) will operate with immediate effect, pending the return duly or pending the finalization of the divorce action instituted under case number 368/09.

[4] The application is supported by founding affidavit of the Applicant, who sets out facts which in her view justify the granting of the above prayers. In response to the application, the Respondents filed a notice to raise points of law in terms of Rule 6 (12) (c) i.e. to raise points of law only.

[5] The points of law raised by the Respondents are the following:

(i) that the matter is not urgent and that the drastic abridgement of the time periods stipulated in the Rules of Court constitutes a gross abuse of the Court process;

(ii) **Prayer 1 (a**)-the Court has no jurisdiction to entertain an application appertaining to employment, this being the exclusive domain of the Industrial Court.

(iii) **re: prayers 1 (b) - (e)** - there is a deadlock between the Applicant and the 1st Respondent and that the Orders sought will constitute a *brutum fulmen,* the proper remedy being a winding up of the 2nd Respondent.

The Court will not lightly interfere in the management of internal affairs of a company and that the Applicant has not shown sufficient cause exists for such interference.

There is a material and foreseeable dispute of fact regarding the question as to whether or not the Applicant is a director of the 2nd Respondent.

The Applicant has no right to company information and has not alleged any basis for such access.

The Applicant has no right to prescribe to the 1st Respondent how the company should conduct its internal management affairs and no basis for such a right has been alleged in the papers.

It is now opportune, having set out the respective parties' positions, to give a brief historical background that gives rise to this *lis.* I will largely rely on the Applicant's papers for this exercise as her depositions are, at the moment, the only ones before Court. The Applicant and the 1st Respondent are a married couple. They jointly run a company in the person of the 2nd Respondent, of which they are the sole directors and shareholders. The latter appears to be contested from the Respondents' papers. The Applicant and the 1st Respondent are presently engaged in a divorce which has all the hallmarks of being acrimonious.

The Applicant deposes that she and the 1st Respondent started running the business in 2002. They ran the business on an equal footing and having an equal say in making decisions appertaining thereto and were further to equally share in all benefits. Due to the fact that the Applicant received her Swazi residence permit later than

> the 1st Respondent, the initially became the only director. That notwithstanding, the Applicant took an active part in the running of the company and management of its business. She eventually became a director in January, 2004, after receiving her residence permit.

[8] Towards the end of 2008, the matrimonial relationship of the parties became severely strained and in fact acrimonious. This acrimony appears to have gravitated into the realm of the business because on 5 February, 2009, the Applicant went to work at the premises of the business and found all passwords and codes had been changed and that her access to a First National Bank speed point account had been changed. This, she was to later gather, was done at the 1st Respondent's instance.

[9] She further deposed that on 6 February, 2009, she went to the company and found the accountant doing the job she usually carried out and was refused access to the documents by the said accountant, who, on the 1Respondent's instructions, also removed the cheque books. She states further that she was refused an amount of money she required from the business. On 9 February, she received a notice which purported to suspend her as an employee and since receipt of that letter, she further deposes, she has been denied access to her office; company files and documents; her director's remuneration; authority to sign documents; and withdrawal of funds, to name but a few.

[10] On 22st
nd April, the Applicant states that she reported for work and was asked to leave the premises upon the 1st Respondent's order. When the Applicant wanted to gain access to her office as a director and shareholder, she was aggressively pushed away by some security personnel and she was effectively denied access to the office. The above constitutes a fairly accurate picture of the Applicant's assertions although not every detail of her complaint has been recorded.

[11] At this juncture, I presently address the points of law-raised *vide* the Rule 6 (12) (c) notice. I shall first deal with the issue of urgency. The criticism leveled at the Applicant is that the Respondent was served with the application on 28 April, 2009; required to file a notice to oppose and answering affidavits on the same day. This was done, it is contended, notwithstanding that the papers served by the Applicant, were fairly bulky. This, it was contended, amounts to an abuse of the Court process.

[12] The test to be applied in determining whether a matter is or not urgent or sufficiently urgent, is provided by Rule 6 (25) (a) and (b) of the Rules of this Court. The said Rule reads as follows:-

> "(a) In urgent applications, the court or judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the court or judge, as the case may be, seems fit.
>
> (b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

In the celebrated case *Humphrey H. Henhood v Maloma Colliery and Another* Case No. 1623/1993, Dunn J. correctly held that the provisions cited above are peremptory. I fully agree.

[13] In dealing particularly with the requirements of the Rule 6 (25) (b), I stated the following in *Megalith Holdings v R.M.S. Tibiyo* Case No. 199/2000, (which remarks I still stand by) at page 5 thereof:

> "The provisions of Rule 6 (25) (b) above exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant shall in the affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly the Applicant is enjoined, in the same affidavit or petition to state reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear *ex facie* the papers and may not be gleaned from surrounding circumstances brought to the Court's attention from the bar in an embellishing address by the Applicant's counsel."

[14] In determining the issue of urgency the Court must have regard to whether the requirements of Rule 6 (25) (b), in particular, as enunciated above, have been complied with by the Applicant. In this regard, the present Applicant has fully stated that the matter is urgent; has stated facts in the affidavit as to why she contends that the matter is urgent and why she claims that she cannot be afforded substantial relief at a hearing in due course.

[15] As stated earlier, she contends that she is a director but has been "dismissed" from "employment" and that she is being denied access to her office and company records, yet she has a stake in the 2nd Respondent. The result would be that without access to the records, particularly the financials, the 1st Respondent may dissipate the funds to her prejudice. I am accordingly satisfied, in view of the

aforegoing, that the matter is indeed urgent within the meaning of Rule 6 (25) (b) above.

[16] That finding in the Applicant's favour notwithstanding, it is my considered view that although urgency is established on the papers, a proper balance necessarily has to be struck by any applicant in redesigning the Rules relating to the time limits so to speak, between that applicant obtaining the urgent relief he or she seeks in order to forestall any damage, injury or prejudice to him or her on the one hand, and the right of the respondent to adequate notice in the circumstances, so as to consider the application, instruct an attorney (who depending on the circumstances, complexity and importance of the matter, may have to instruct Counsel) who can adequately prepare to fulfil the twin solemn duties to his client and the Court.

[17] The present practice, where respondents are routinely given little or no notice or in any event an unreasonable length of time to deal with urgent matters, is obnoxious and certainly has a negative effect on their right to access the Court and to meaningfully exercise the right they have at law to be heard. The instant matter is an example *par excellance,* where the Respondents were served with a voluminous application with many annexures and obscure legal issues on 28 April, 2009. They were required to file a notice to oppose and to file answering affidavits on the same day. This was, in my view, grossly unreasonable. Happily, I set the matter for 30 April,

2009 in order to afford the Respondent, as far as possible, a fair chance to present its case in Court.

[18] Having said the above though, it cannot, in my view be said as I understood Ms. Van der Walt to argue, namely that where an applicant has, as the one present has done, fully complied with the dictates of Rule 6 (25) (a) and (b) that the matter should be declared not urgent because the Applicant has not afforded the respondent sufficient time to file its papers in the circumstances. That cannot be correct. As the Court exercises a discretion in these matters, and which should be exercised judicially and judiciously too, it may, in exercise of its discretion and in view of the attendant circumstances afford the Respondent more time and/or show its disapproval of any serious negation of the Respondent's right to be heard, by mulcting the Applicant with some costs or ordering the latter to forfeit a portion thereof if it is successful at the end of the day.

There may be leveled against the present Applicant some understandable criticism that she did not launch the present proceeding as early as she should have. In an anticipatory fashion, the Applicant gave a full and satisfactory explanation as to why she delayed, which delay I observe, was not in the circumstances, inordinate. Part of the Applicant's explanation, apart from other difficulties posed by the stand-off between her and the 1Respondent, is that she tried to have this issue resolved without a rash recourse to the Court.

In this regard, the Supreme Court of Appeal of the Republic of South Africa, has had the following to say regarding this issue in *Transnet Limited v Rubenstein* 2006 (1) SA 591 (S.C.A.) in the headnote:-

> "The costs order granted by the Court of urgent first instance was based on the assumption that the application was brought on an urgent basis only because of delay on the part of the respondent. That was not the case, however, because the respondent has been attempting to settle the matter. When his attempt proved fruitless, the application was urgent, because the date for cancellation was looming. The appellant could not legitimately be criticized for attempting to settle the matter before resorting to litigation."

In view of the foregoing, I come to the conclusion and rule that this matter may be enrolled as one of urgency but strongly caution practitioners of this Court to follow the strictures stipulated in paragraph 17 and above.

Court's jurisdiction to grant prayer 1 fa)

[21] The Respondents further contend *in limine* that this Court does not have the jurisdiction to determine and to pronounce on prayer 1 (a) for the reason that it involves a dispute between an employer and an employee. In this regard, it is contended that this is a matter within the exclusive jurisdiction of the Industrial Court. Is this contention sustainable?

[22] I should mention that for present purposes, the Respondents have not assisted the Court with any authority in support of the proposition contended for, not even the relevant legislation. This necessarily required the Court, in the circumstances, to argue a case

for the party in the judgment and to thereafter pronounce judgment thereon. This is an unfair and improper burden to place on the Court. Even in cases of urgency, such as the present, whatever legal submissions are made should find support in authority to which the Court is referred for its own analysis and conclusions. The Court expects its officers, even under stringent circumstances, to perform their solemn duty to assist the Court to reach the correct and just decision, hopefully in their clients' favour. This should not be departed from under any circumstances.

The relevant legal provision, and this is according to my own research, is section 5 (1) of the Industrial Relations Act, 1 of 2000, which provides as follows:-

> "The Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of any matter properly brought before it including an application, claim or complaint or infringement of any of the provisions of this Act, an employment Act, a workers compensation Act, or any other legislation which extends jurisdiction to the Court in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employers' association and industry union, between an employers' association, an industry union, an industry staff association, a federation and a member thereof."

[24] The predecessor to the above section, i.e. section 5 (1) of the Industrial Relations Act 1 of 1996, came up for decision in *Sibongile Nxumalo and Others v Attorney General and Others* Appeal cases no.25, 28, 29 and 30 of 1996. The Court of Appeal came to the conclusion that properly interpreted, the jurisdiction of the Industrial Court is exclusive only in relation to matters which have run the

gauntlet of the disputes procedure and to the issues arising from other legislations therein mentioned. The Court held that in these cases, the jurisdiction of the High Court was not affected.

[25] In *Secretary to Cabinet and Three Others v Ben M. Zwane* Appeal case No.2/2000, the Court noted that the Industrial Relations Act, 2000, which repealed the 1996 Act, which was the subject of the Nxumalo case *[op cit)* deleted certain words and that the said deletion may well have implications on this Court's jurisdiction to hear industrial disputes but found it unnecessary or inadvisable for it to comment on the effect of amendment. I am not aware of any later judgment on the amended section.

[26] Properly construed, I find nothing that can be said to render this matter subject only to the jurisdiction of the Industrial Court. I say so for the reason that it does not appear that the entire gauntlet of disputes procedure set out in the Industrial Relations Act has been traversed; not even the first step, from all indications. All that the Applicant seeks is not the determination of a dispute between an employer and an employee or the correctness of the dismissal of the Applicant at law. She contends that she is not and was never an employee of the 2st
nd Respondent and to that end seeks an order setting aside her purported unilateral suspension as unlawful. This is, in my view, a matter that this Court can and should deal with.

[27] I interpose to state that if the contention of the Respondent was to be upheld, it would lead to grave and manifold inconveniences in that the Applicant would have been necessarily required to

prosecute prayer 1 (a) before the Industrial Court and the balance of the prayers before this Court. Such a course can hardly be said to be just or convenient. In sum, I find that this Court does have the jurisdiction to deal with prayer 1 and the contention to the contrary is hereby dismissed.

Propriety of granting prayers 1 fb) - fe)

[28] Regarding the above issue, the Respondents contend figuratively speaking, that this is a case where angels would fear to tread and so should the Court. It is said that the terrain the Applicant seeks the to Court traverse is infested with landmines for the reason that it is clear that there is a deadlock between the Applicant and the Respondent and if the Court were to issue the prayers requested of it, the Court's order of judgment may be rendered a *brutum fulmen.* The Respondents contend further that the proper course to adopt in the circumstances, is for the Applicant to apply for liquidation of the 2nd Respondent.

It is the Respondents' further contention that the Court should be slow to interfere in the internal affairs of a company and that in any event, no sufficient cause has been established by the Applicant to warrant such interference. The further argument is that there is a foreseeable dispute regarding the Applicant's status as a director of the 2nd Respondent. There is, in any event further runs the argument, a question whether the Applicant is entitled to the 2nd Respondent's information and documents.

It is abundantly clear that in the main, the Applicant seeks an interim interdict restraining the Respondents from engaging in or continuing to engage in conduct which is detrimental to her interests in the 2Respondent. These types of conduct perpetrated by or at the behest of the 1nd
st Respondent are well documented. Before I can deal with the major question regarding whether this Court can properly interfere in the 2nd Respondent's affairs in the manner asked of it, it is my opinion that it would be proper, at this juncture to consider whether the Applicant has, in the first instance, made out a case for an interim interdict.

The requirements to be satisfied by a litigant in the Applicant's shoes in order to obtain the said interdict are now trite. They were stated in *Dorbyl Vehicle & Finance Co. (Pty) Ltd v Northern Cape Tour and Charter Services* CC [2002] 1 All SA 118 (N.C.) as being:-

(i) a *prima facie* right, although open to some doubt;

(ii) a reasonable apprehension of harm;

(iii) a favourable balance of convenience; and

(iv) no alternative remedy. See also C.B. Prest, Interlocutory Interdicts, Juta & Co at page 55.

[32] In the context of the instant case, it is clear that the Applicant's entitlement to the grant of an interdict in her favour is mainly predicated on her establishing her directorship in the 2nd Respondent for most of the relief she seeks is tied to that status. What appears to be contended by the Respondents, who it must be said, have not yet filed answering affidavits, is that there is a factual dispute

regarding her status as a director. It would appear to me that if the Applicant can establish that she has a *prima facie* right, although open to some doubt, she may well be entitled to an interim interdict, provided of course she can overcome the balance of the contentions raised on the Respondents' behalf.

[33] How should the Court approach this issue in taking the matter forward, especially in light of the dispute alleged that appears and looks set, if the Respondents' contentions are anything to go by, to loom large? The proper approach was set out in *Townstend v Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C.P.D.) at 40, where Erasmus J said:

> "In an application for an interim interdict the correct approach in deciding whether the Applicant has established entitlement to relief, especially where there are disputes of fact is to take facts set out by the Applicant, together with any facts set out by the Respondent which the Applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the Applicant should on these facts obtain final relief at the trial of the main action."

It would appear that this approach has, like the majestic Baobab tree, taken root in the legal soils Southern Africa, as evidenced and exemplified by the following cases; *Stellenbosch Farmed Winery v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (c) at 235; *Plascon - Evans Paints Ltd v Van Reibeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A); and *Cape Town Municipality v L.F. Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 at 267. This approach is sensible and commends itself to me and I shall therefore apply it in the instant case.

[35] What are the facts that the Applicant has set out and which serve to point in the direction of the averments that she is a director of the 2nd Respondent? The Applicant deposed that (i) she and her husband jointly started the business; rendered equal services to the business with the 1st Respondent; equally managed the business; received equal remuneration; had equal benefits of the business; she states when and how she became a director, with reasons why she took up directorship of the company later than the 1st Respondent when she had been present from inception. In that regard, she filed a Form J, reflecting her as a director from 1 January, 2004.

[36] Against the Applicant's depositions above, the Court must look at the Respondent's contentions regarding these issues. It is common cause that the Respondents chose to file a notice in terms of Rule 6 (12) (c), which provision clearly states that it is filed by a party who intends to raise points of law only, without descending into the arena to deal with factual issues by filing an answering affidavit. There are consequently no facts set out by the Respondents at this stage. The result is that the facts set out by the Applicant, and the absence of facts by Respondents tilt the interest probabilities in the Applicant's favour. She has, in my judgment therefore established a *prima facie* right. It is on the basis of some factual allegations deposed to by a respondent that some doubt could have been cast on the Applicant's right.

I therefore come to the conclusion that the Applicant has accordingly satisfied the first requirement regarding the *prima facie* right, as described above. She has also shown in her papers that she has a reasonable apprehension of harm. I say this in the light of the Applicant's depositions in paragraph 19 of her founding affidavit where she quotes the 1st Respondent threatening to ensure that she gets nothing if she continues with the divorce. Ms. van der Walt argued that the apprehension of harm alleged by the Applicant was nothing but speculative in the circumstances. Regard being had to the fact of her exclusion from the business and denial of access to the records of the business, considered *in tandem* with the contents of paragraph 19 referred to above, it is my considered view that viewed objectively, the apprehension of harm is certainly reasonable and I so hold.

It is also my view that the balance of convenience favours the Applicant regard being had to her depositions that she has been excluded from the running of the company's affairs and that her rights, including remuneration, have been interfered with. She therefore, on that version, stands to suffer and there would be little or no harm to the Respondents if the *status quo ante* was restored.

[39] Viewed from this angle i.e. the Applicant *prima facie* being a director, there would then be need to deal with whatever allegations are leveled against her by the 1st Respondent, in terms of the articles and memorandum of the 2nd Respondent. I am of the view that the balance of convenience favours her in that regard. If left otherwise, the 1st Respondent would be at large to do so as he pleases with the

2nd Respondent's assets. This may affect the Applicant's interests enormously at the end of the day.

[40] As to whether there is a suitable alternative remedy, it is at this juncture that I shall address the Respondents' contention that this is a proper case for the grant of an order for liquidation, in light of the deadlock. The grant of an interim interdict, they contend is inimical to the company's interest in the running of its affairs and that the granting of the latter would in any event, constitute a *brutum fulmen.*

[41] The Applicant's Counsel referred the Court to *Nel v De Necker and Others* 1948 (1) SA 884 (W.L.D.) at 887, where Ramsbottom J. said the following circumstances where the Applicant has been excluded from board meeting and his name removed from the company's letterheads though being a director according to his version:-

> "Whether the relief asked for is the appropriate relief in a case of this kind is a matter which will have to be considered later; it is sufficient to say, at this stage, that a director who is prevented by his co-directors from discharging his duties has a personal right of action against such co-directors to restrain his continued exclusion. *Robinson v Imroth* (1917 W.L.D. 159). If the applicant is a director of the company, admittedly the second, third, fourth and fifth respondent's are preventing him from performing his duties and he is entitled to relief; if he is not a director the respondents are not injuring him."

[42] In the *Robinson v Imroth* case *(supra),* Robinson, who was a director and shareholder in Randfontein Central Gold Mining Company Limited, sued his co-directors and prayed for an order directing his co-directors to allow him to exercise his duties and functions and to discharge his responsibilities as a director of the said company. He also sought an order restraining the committee from giving effect to a resolution passed which detrimentally affected his interests. De Villiers J.P. in dealing with the matter, quoted with approval the following words that hell from the lips of Lord Davey in *Burland v Earle* (1902) A.C. 83 at 93:

> "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of a companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, the action should *prima facie* be brought by the company itself."

[43] Speaking for himself in the circumstances, Lord de Villiers J.P., had the following trenchant remarks to make:

> "My own view is that when a director is prevented from discharging his duties as a director the company always has a right to complain. For in accepting the position of director he undertook to discharge certain duties and if he is prevented from doing so, a wrong is done to the company through its agent. On the other hand the director also acquires certain rights, the ....individual has a personal right to discharge his function as a director, and to prevent him from doing so is a personal wrong to him".

The above cases, establish the principle that where a director has been unlawfully removed, or has been wrongfully prevented from exercising his right and performing his duties as a director, he has a right to restrain his

exclusion and it would appear that this is the very type of relief sought by the Applicant herein. The contention of the Respondents is that this Court should not be at large to interfere in the management of 2nd Respondent and that if the Applicant has any ought regarding the manner in which the company is being run and I can say that one can *prima facie* reasonably conclude that the manner in which the company is run appears to run counter to the Applicant's interests, is she not entitled to run to Court to seek the protection of her rights? Is the route of applying for liquidation the only avenue open to her?

[45] It would also appear to me from reading the *Imroth* case, that the contention advanced by the Respondents that the Court may not interfere in the internal management of a company appears to apply where the company is acting within its powers. This would suggest that if the company or its agent acts outside the perimeters of the powers given to it, the Court may, on application by an affected party, necessarily have to interfere.

[46] Interpolate to observe that in the Republic of South Africa, the Legislature promulgated section 252 which provides for the remedies open to a member in the case of oppressive or unfairly prejudicial conduct. In terms of that section, the affected member may make application to Court within six weeks of the passing of the relevant resolution required in connection with the particular act concerned. If it appears to the Court that, there is substance to the complaint, and if satisfied that it is just and equitable to intervene, it

may make such order as it deems fit in order to an end the matters complained of. See Henochsberg on Companies Act, 5th ed, 2003 at page 476.

I am of the view that in the light of the 1st Respondent's conduct, which appears to be obstructive in the circumstances, this would be a proper case in which this Court should come to the Applicant's aid. I say so for the reason that the Applicant, who from the indications appears to be a director of the 2nd Respondent, has been excluded from participating as she used to, in the management of the company and its business. This exclusion appears to have been carried out in the absence of a resolution. This calls for the Court's intervention.

[48] To do otherwise would amount to a condonation by the Court of the 1st Respondent's injurious action and would promote the resort by some directors of companies to self-help as a useful remedy for removing a co-director, knowing that the Court may not intervene. In this way, that director, regardless of how shortchanged he or she has been, would be bereft of an immediate remedy and would be forced to apply for liquidation of the company which may not always be *elixir* or panacea for every case, at least not in the short term, if that party's interests are to be adequately catered for and protected.

[49] I am also of the considered opinion that it cannot be correct in such cases to say that the only remedy open to a person in the Applicant's shoes, is liquidation. If that were to be said to be the

case, it may, in certain cases be that by the time that the company is finally wound up, the majority have dissipated the company assets to the detriment of the minority and possibly the larger body of creditors. The fact that there is a deadlock between the parties should not on its own render the Court incapable of coming to the assistance of a party who finds him or herself in a weaker position in the interregnum, even if liquidation will finally be resorted to. As indicated earlier, the *Nel v De Necker* and *Imroth* cases *{supra),* provide ample authority for the proposition that the Court is at large to intervene.

Parties who are members in companies must not be left to feel that they can be a law into themselves and that notwithstanding any injurious conduct on their part which is oppressive, the Court's will have withered hands and be unable to intervene. They should know that the Court will still expect them to conduct themselves with probity, fairness and restraint. Where the Court properly intervenes on behalf of a party, surely the other party will be expected to comply with the judgment of the Court and if need be, on the pain of a contempt order or some other condign censure.

It also appears to me that once it is established that the Applicant is *prima facie* a director of the 2nd Applicant, she is in terms of the Companies Act, 1902, and the common law, entitled to the companies records and books. See also Joubert, The Law Of South Africa, First Reissue Part 2 at p. 175 para 114. It is not disputed that before she was ousted from doing management of the business and apparently on

present indications, without a proper or any resolution, the Applicant had apparently unbridled access to all the 2nd Respondent's documents and records. The argument to the contrary holds no water in my view.

In the premises, I am of the view that this is a proper case in which to grant the relief sought by the Applicant as follows :-

1. A *rule nisi* be and is hereby issued, returnable

On 13 June, 2009 calling upon the 1st and 2nd Respondents to show cause why the following Orders should not be made final: -

an Order directing the Respondents immediately to:

(i) recognize the Applicant as a director of the 2nd Respondent;

(ii) allow the Applicant full access to all financial statements, management accounts, business records and other information relating to the affairs of the 2nd Respondent;

(iii) restore the Applicant's signing powers on all bank accounts operated by the 2nd Respondent;

(iv) allow the Applicant full access to the premises of the 2nd Respondent and the right to obtain any information required by the Applicant concerning the business activities of the 2nd Respondent;

an Order interdicting and restraining the 1st Respondent from:

(i) taking or implementing any actions to exclude the Applicant from the business of the 2nd Respondent;

(ii) withdrawing any fund for his own benefit, save an amount of E35 000 per month;

(iii) dissipating any of the 2nd Respondent's assets, transferring funds or making any payments without the Applicant's prior written consent;

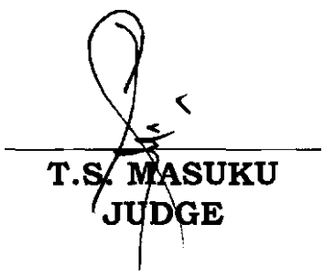
an order declaring that all cheques drawn on any of the 2nd Respondents' accounts must bare (sic) the signature of the Applicant and the 1st Respondent;

an Order declaring that the Applicant and the 1st Respondent shall each continue to receive their monthly income from the 2nd Respondent in the sum of E35 000;

an Order directing the Respondent to pay the costs occasioned by this application on the scale as between Attorney and own client, alternatively, an Order reserving such costs for determination at the hearing of the divorce.

2. Orders 1(b) to (e) operate with interim date of the *rule nisi.* be and are ordered to effect pending the return

DONE IN OPEN COURT IN MBABANE ON THIS THE 20 DAY OF MAY, 2009



Messrs. Cloete/Henwood/DlWiini/Magagula Associated For the Applicant
Messrs. Currie & Sibandze Associates for the Respondents