IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 1936/15

In the matter between:

COMPUTER SOLUTIONS (PTY) LTD	**1ST APPLICANT**
HELEN BOTHA	**2ND APPLICANT**

And

STANLIB SWAZILAND (PTY) LTD	**1ST RESPONDENT**
ANDRE CHRISTO BOTHA	**2ND RESPONDENT**

In Re:

ANDRE CHRISTO BOTHA	**APPLICANT**

And

STANLIB SWAZILAND PTY LTD	**1st RESPONDENT**
HELEN BOTHA	**2nd RESPONDENT**

Neutral Citation: *Computer Solutions (Pty) Ltd and Another vs. Stanlib Swaziland (Pty) Ltd and Another (1936/15) [2018] SZHC (118) 12th June 2018*

Coram: **MLANGENI J.**

Heard: **4th June 2018**

Delivered: **12th June 2018**

Summary:

Civil procedure – rule nisi granted ex parte and returnable on a later date – rule nisi having final effect in that it ordered that money that was the subject of the suit be paid to the Applicant forthwith.

Intervening party filed opposing papers but did nothing to obtain either a stay of the order, rescission or discharge. In the meantime the order to pay the money to the ex parte applicant was complied with.

After close of pleadings a dispute of facts was manifest and the parties were ordered to oral evidence.

Before oral evidence was led intervening party moved an interlocutory application to reverse the payment. Point of law raised that the Applicants had no locus standi to move the application in the manner that they did, on the basis of failure to comply with Section 228 of the Companies Act 2009.

Held:

The provisions of Section 228 (2) (a) of the Companies Act 2009 are peremptory, and failure to comply is a ground to sustain an objection based on locus standi. However on the special circumstances of the present case it would be unreasonable to expect or require the interlocutory applicants to have complied with the strict provisions of the sub-section.

Held, further, that a case of negligence had not been established against the First Respondent, and that in any event a claim based on negligence is not suitable for motion proceedings.

Held, further, that no wrong-doing could be attributed to the Second Respondent, having been paid the money in terms of an order of court, and the interlocutory applicants having failed to take proper procedural steps to stay or stop execution of the order.

Held, further, that the order sought in the interlocutory application was, in any event, incompetent as it would amount to reversing the interim order without a proper basis having been presented to the court.

Application dismissed with costs.

JUDGMENT

BACKGROUND

[1] On the 10th December 2015 this Honourable Court issued an order, per His Lordship T. Dlamini J, in the following terms:-

> **"1. The 1st Respondent is directed and ordered to release and repay to the Applicant forthwith the Applicant's monies kept in 1st Respondent's account**

held in possession of the 2nd Respondent under Account Number 551051726 and 55197703.

2. **The 2nd Respondent is directed and ordered to release to the Applicant monies held in Account Number 551051726 and 55197703 forthwith.**

3. **That orders 1 and 2 apply forthwith as an interim order with immediate effect pending the finalization of this matter.**

4. **That a rule *nisi* do hereby issue calling upon the Respondents to show cause on the 16th December 2015 at 9:30 am why the above orders should not be confirmed and made final".**

[2] I have reproduced the order as it appears at pages 73 and 74 of the book of pleadings dated 23rd May 2017. I see orders 1 and 2 as a repetition of the same thing. If there is any significance to this, I do not readily perceive it.

[3] The money that is the subject of the order referred to above is said to be E1, 978,049.22. I must mention that in their founding papers the Applicants state the amount as E2, 041,418.17[1]. Whatever the correct figure might be, it is common cause that the amount was subsequently- and pursuant to an order of court - released to the Applicant in the main matter, being Andre Christo Botha. It was released by the investment entity Stanlib Swaziland (Pty) Limited, which is the First Respondent in the main matter.

[4] It is also common cause that the application for the release of the investment was moved *ex parte.* This is apparent from the face of the

[1] At para 9, page 6 of the Book .

order dated 10th December 2015 which expressly states that there was no appearance by the Respondents.

[5] Although the order purports to be interim and returnable on a future date, it is ubundantly clear that it had a final effect in that the money was to be paid forthwith. Once the money was to be paid to the Applicant, the reality is that the question whether or not it was to be returned to the investment entity ushers in new considerations that must come into the equation. This aspect will become apparent later on in the judgment when I mention the procedural options that were available to the Applicants once they became aware of the court order. There is no doubt that a better and more prudent approach would have been one freezing the said accounts, pending the return date and/or finalization of the matter. This aspect is, however, now water under the bridge and it is certainly not an issue for my determination in the present application.

[6] It appears that on or about the 16th December 2015, which was the return date of the rule *nisi*, a notice to oppose was filed on behalf of one Helen Botha who had an interest in the investment and subsequently, on or about the 18th December 2015 an application was filed on her behalf for leave to intervene. It takes very little to figure out that the legal battle over the money is a spillover from matrimonial issues between the two Bothas.

[7] It is significant to point out that nothing was done on behalf of Helen Botha to either stay execution of the interim order or to immediately and timeously challenge it in any other manner. It is axiomatic that interim orders, especially those obtained *ex parte* and in the particular background that obtains in this case, are easy to challenge or at least seek a stay of. This could have been done on the 16th December 2015 or on the 18th December when the application for leave to intervene

was filed. It appears from the papers that the money was released on or about 21st December 2015[2]. It has been averred that an undertaking was made on behalf of the Applicant in the main matter that the money would not be released. I only mention that this has turned out to be a highly controversial issue which, however, is of no consequence to the outcome of the matter. If such an undertaking was made, it is not reflected on the numerous entries that have been made by Their Lordships on the court file.

[8] The money in question was invested in the name of a corporate entity, Computer Solutions (Proprietary) Limited, which is the first Respondent in the main matter. Helen Botha and Andre Botha are the two directors of this entity. When the pleadings were closed, Helen Botha having intervened and filed her papers, it became clear that there was a dispute of facts regarding ownership of the money as between the two directors. From a practical point of view the real issue could well be the source[3] of these funds rather than ownership *strictu sensu,* at the time of the litigation. This aspect is potentially vexed in that it transcends the corporate entity and possibly touches upon proprietary rights between the two Bothas whose marriage has gone wrong.

[9] The matter has had a long life on the court roll, with numerous postponements for various reasons and the rule *nisi* being extended accordingly. In October 2016 I ordered that oral evidence should be led in order to determine the respective rights of the Bothas in the disputed amount. Oral evidence has not been heard as yet. In March 2017 an interlocutory application was instituted by the corporate entity Computer Solutions (Pty) Ltd and Helen Botha as first and second Applicants respectively. The First Respondent is Stanlib Swaziland (Pty) Ltd wherein the money was previously invested, and the Second

[2] See pages 7 and 22 of the Book.

[3] At page 8 of the Book Helen Botha itemises various substantial amounts of money that she claims to have personally contributed to the investment accounts.

Respondent is Andre Christo Botha, to whom the amount was released pursuant to the order of court dated 10th December 2015.

INTERLOCUTORY APPLICATION

[10] In the interlocutory application the orders sought are in the following terms:-

"1. That the First Respondent and/or Second Respondents be and is hereby directed to refund to and/or pay all funds/money in the amount of E1,978,049.22 to the investment accounts of 1st Applicant held and invested with First Respondent under accounts numbers 55105726 and 551197703 with immediate effect.

2. Granting costs to (sic) application at attorney and own client scale.

3. Granting further and/or alternative relief."

[11] Clearly, the interlocutory application seeks to restore the *status quo ante*. It is opposed by both respondents and full pleadings were filed by all parties. The Second Respondent, for its part, raised a point of law in *limine* and pleaded over.

[12] My understanding of the main relief being sought by the Applicants is that I am being required to reverse the order of my brother Dlamini J. which was granted as interim relief on the 10th December 2015. This is the order that directed that the money be paid to the Second Respondent, as Applicant, forthwith. At the hearing of legal arguments on the interlocutory application I asked Applicants' Counsel Mr.

Sibandze whether it was within my power to grant such an order in the manner in which it was sought. In other words, short of a proper application for either rescission or variation of the order of my brother Dlamini J., is it within my power to simply order restoration of the *status quo ante?* Mr. Sibandze's response was non – committal, and I can only express my disappointment that he didn't seem to realise that this is a hurdle of mammoth proportions. I do not have the power or authority to simply undo what an order of another judge has done or directed. There are established ways to achieve such a result, and they are so basic that there is no need for me to go further on this subject.

[13] Having made the above observation, it must be apparent that the interlocutory application was destined to fail and the matter could well end at that. However, because of other issues of interest that have arisen in the course of the *lis* I proceed to deal with such issues herein below.

SECOND RESPONDENT'S POINT OF LAW IN *LIMINE* – LACK OF *LOCUS STANDI*

[14] It was averred by the Second Respondent and argued that the Applicants do not have *locus standi* to move the application in the manner that they did. This point is predicated upon the premise that this application is formally and effectively made by the corporate entity – the First Applicant. I need only refer to the main prayer, which seeks that the money in issue is to be paid back into **"the investment accounts of 1st Applicant….."** The Second Applicant clearly has an interest in the money, on the basis of her shareholding in the company and possibly other factors relating to the marital regime between herself and the Second Respondent. But the fact that she wants the money paid over to the company places a veil over her personal interest in the matter. That being the case, goes the argument, the

provisions of Section 228 of the Companies Act of 2009 should have been complied with.

[15] The effect of Section 228 is that if a company has suffered damages or loss or has been deprived of any benefit as a result of wrong doing by a director or officer,**"…….any member of the company may initiate proceedings on behalf of the company against such director or officer…….in the manner prescribed by this section……".** It then prescribes how such proceedings are to be initiated and pursued.

[16] The provisions of Section 228 (1) are a statutory re-statement of the common law derivative action, otherwise known as the '**Rule in Foss v Harbottle'.** The statutory provisions have gone further than the common law by laying down certain peremptory steps that must be taken by a member who seeks redress on behalf of a company that is otherwise unable to or does not act on its own. In *casu* it must be accepted that because of the stand-off between the only two directors of the company who are spouses, the company is incapacitated from instituting proceedings in the ordinary way. It would not be possible, for instance, to get a resolution to authorize litigation. It is on that basis that the Second Applicant is in a position to act, and can only do so within the rules laid down in Section 228. The procedure starts off with the issuance of a notice to the company[4], followed by an application to court by the aggrieved member for the appointment of a curator *ad litem*[5], and other things follow.

[17] The Applicants deny that they do not have *locus standi* on the basis that is alleged by the Second Respondent. Paragraphs 5.1.3 and 5.1.4

[4] See section 228 (2) (a).
[5] See section 228 (2) (b).

of the applicants' replying affidavit make the following cryptic allegations[6]:-

> **"5.1.3 In the aforesaid circumstances I am advised and verily believe that I am duly authorized to act without the authority and consent of the 2nd Respondent.**
>
> **5.1.4 It is therefore denied that I have failed to comply with the requirements under Section 228 of the Companies Act of 2006. I wish to aver that the application is two-fold. I am seeking an order directing the Respondents to return and refund the money withdrawn against the said investment accounts whilst the a (sic) determination thereof is being adjudicated by the court and that my contributions be paid to me."**

[18] This response is cryptic in many ways. It makes reference to having authority, without stating the source of or the nature of the authority. It also makes reference to Section 228 of the Companies Act of 2006, legislation that does not, as far as I am aware, exist in the books of this Kingdom of Eswatini. Second Applicant avers that she wants her contributions to be paid to her, yet there is nowhere in the prayers where this is sought. It is a stark example of hotch-potch. It is my view that to make an allusion to authority without reference to the nature or source of the authority can never be enough, especially in a situation where the authority is specifically being challenged by the other side.

[6] At page 120 of the Book.

[19] In a quest to defeat the Second Respondent's point of law Applicant's counsel seeks to rely on the High Court judgment of Mamba J. in the case of **WBD Investment (Pty) Ltd v Synergy Chartered Accountants Swaziland Ltd and Another**[7], a judgment which was later confirmed by the Supreme Court[8]. This judgment is of no assistance to the Applicants for the simple reason that the matter was dealt with solely on the basis of whether or not there was a valid lease agreement between the parties. Section 288 of the Companies Act 2009 was not at all canvassed in the judgment. The Supreme Court, on appeal, also approached the matter on the basis that there was a valid lease agreement. It is on that basis that I conclude that the two judgments are not authority for the argument that in *casu* there was no need to comply with the provisions of Section 288 of the Companies Act 2009.

[20] Mr. Sibandze, for the Applicants, relies on the word **"may"** which is used in Section 288(1) of the Act in support of the argument that the Applicants were not enjoined to comply with the provisions of the Act. This argument misses an important point, totally. The word **"may"** is in relation to the decision by a member whether or not to proceed against the company or officer whose wrong is sought to be addressed. Once a decision is taken to proceed, the word **"shall"** in sub-section (2) (a) comes to bear. It is then peremptory to serve a written notice on the company.

[21] However, during legal arguments Applicants' counsel made the point that in the particular circumstances of this case it would be unreasonable to expect or require that the Applicant should have complied strictly with the requirements of the Act relating to notice and other issues, mainly because there was already on-going litigation

[7] (1584/2013) [2014] SZHC 148.
[8] Synergy Chartered Accountants and Another v WBD Investments (Pty) Ltd (31/2014) [2014] SZSC 82.

in which the Second Applicant needed to intervene timeously. This argument is certainly sound, and it is the one reason I would be reluctant to dismiss the application for lack of *locus standi* on the basis argued for by the Second Respondent. However, in totality of the matter, and the final outcome, this aspect is of no consequence.

THE CASE AGAINST THE FIRST RESPONDENT

[22] The case that is sought to be made against the First Respondent is that by releasing the funds to the Second Respondent it acted **"negligently and recklessly"**. I quote paragraphs 24 and 25 of the Applicants' founding affidavit[9] below:-

> **"24. I advised (sic) and verily believe that the filing and serving of the notice to oppose and the subsequent filing and service of the Intervention Pleadings in particular the service of on (sic) the First Respondent; suspended the legal effect and/or operation of the said interim order as they were now legally aware of my interest in the matter.**
>
> **25. I am further advised and verily believe that in the absence of a final Order, the First Respondent were not legally obligated to pay any money to the Second Respondent and that the said First Respondent …..acted negligently and recklessly by paying out the said money to Second Respondent in particular since they were now aware of my interest and defence in the matter".**

[23] Well, so much for advice and belief! Before I get to the correctness or otherwise of the advice that is said to have been given I wish to touch

[9] At page 9 of the Book.

upon an issue that I raised with Applicants' counsel at the hearing of legal arguments. The present proceedings being motion proceedings, I wanted to know whether I could in law make findings of negligence or recklessness on the part of the investment institution – the First Respondent. In other words, are motion proceedings suitable for a determination based on negligence? His answer was in the affirmative. This, in part, might be an explanation for the advice that the deponent avers she received and believed. Without being circuitous, I must mention that motion proceedings are not suitable for a determination of claims based on negligence. This is so basic that I need not make reference to any legal authority. If there was a need, I would refer to the very judgments that Applicants' counsel handed over to me in court. These are the judgments that relate to negligence of banking institutions[10], and they are all based on action proceedings.

[24] Proof of negligence is by no means a simple matter. Even where negligence may be inferred, such inference can only result from a proper enquiry that can only be achieved through oral evidence, cross-examination, credibility issues and all. This opportunity is not there in motion proceedings, where deponents might even sign affidavits that they have not read; if they have read them they might not have fully understood some technical parts of it.

[25] The aforegoing is a fatal weakness in the case of the applicants against the First Respondent. If First Respondent was negligent or reckless, applicants must pursue redress through action proceedings.

[26] But the real colosus that the Applicants need to deal with is the fact that in releasing the funds the First Respondent acted upon an order of court. The wording of the order of court dated 10th December 2015 is

[10] The judgments that counsel handed in to support the case for negligence are the following :-
- Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd 1995 (1) SA 377.
- McCarthy Limited v Absa Bank Ltd (518/08) [2009] ZASCA 118.

clear and unambiguous. It requires that payment be made forthwith. During legal arguments the Applicants' counsel, upon being asked by the court the meaning of **"forthwith"**, stated that it means **"immediately".** As it happened, the payment is alleged to have been made on or about the 21st December 2015. That is not exactly immediate, depending of course on when the order was served upon the First Respondent. If the First Respondent did not release the funds as ordered, it might have been exposed to contempt proceedings[11]. Mr. Jele for the First Respondent rightly pointed out that an institution of his client's standing cannot afford to ignore a court order.

[27] Between the 10th December 2015 and the 21st December 2015 when the money was paid, the Applicants had ample opportunity to make an effective intervention by seeking a stay of the order pending a rescission application or at least pending finalization of the matter. This was not done, and this catastrophic omission may, sadly, be explained by the mistaken belief that the service and filing of papers has the automatic effect of staying execution of an order of court. That is certainly not the case. An order of court is valid and stands binding until set aside, varied or discharged. I can do no better than quote the wise words of Lord Radcliffe[12] as follows:-

> **"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders".**

[11] Nomcebo Nkambule & Others v Mchalangeni Development Company (Pty) Ltd & Others (1713/2013 [2014] SZHC 63.
[12] Smith v East Elloe Rural District Council and Others [1956] 1 AER 855(HL)

I have no doubt that the above statement is a proper reflection of our law.

[28] Even if it was established beyond dispute that an undertaking was made on behalf of the Second Respondent, whatever the legal consequence of an undertaking might be, it could not have the effect of absolving the First Respondent from compliance with the order once it was served upon it. The unavoidable conclusion, therefore, is that the case against the First Respondent cannot stand.

THE CASE AGAINST THE SECOND RESPONDENT

[29] Applicant's deponent alleges that the Respondents "**purposely misled the honourable court under continuous litigation under the main proceedings, very well knowing that all or any moneys held in the said investment accounts was paid to the said Andre Botha on the 21st December wrongfully and unlawfully".**

[30] The gist of the above averments is that the Respondents deliberately misled the court. Assuming that this was in fact the case, the course of action that has been adopted by Applicants is futile. Further allegations by the Applicants, at paragraph 32 of the pleadings[13], are in the following terms:-

> **"Whereas the Second Respondent misled the court and kept us occupied in academic litigation, entailing the filing of court pleadings, court appearances in furtherance of obtaining finality to the matter. The court has been deliberately and maliciously and *mala fide*…… misled to date by Second Respondent."**

[13] At page 10 of the Book.

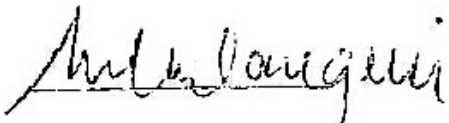
[31] In response, the Second Respondent denies having misled the court in any way and further denies that the litigation in the main matter is academic and states that if, after oral evidence is concluded and it is determined who the owner of the money is, an appropriate order can be made by the court.

[32] I fail to see how the court could possibly be misled in the manner alleged by the Applicants, when it is the same court that ordered the release of the money to the Second Respondent. But perhaps a complete answer to the case that is being advanced by the Applicants is at paragraph 7.5 of the Second Respondent's heads of arguments dated 1st June 2018, wherein a submission is made in these words:-

> **"……..the Applicants were served with the order and were aware of same since December 2015 …….There was never any application by the applicants to stay, set aside or discharge such interim order. The argument that the Applicants believed that the monies were not transferred cannot hold water where the order is explicit and clear"**

CONCLUSION

[33] The aforegoing discourse leads me to the conclusion that the interlocutory application cannot succeed, and it is hereby dismissed with costs against the Applicants jointly and/or severally, one paying the other one to be absolved. I am alive to the fact that the First Applicant did not authorize the litigation but if the First Applicant has any assets it is only fair that it should bear the costs.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For The Interlocutory Applicants: Mr. Sibandze

For First Respondent: Mr. N.D. Jele

For Second Respondent: Mr. S.V. Mdladla