IN THE HIGH COURT OF SWAZILAND

JUDGMENT ON APPLICATION TO ANTICIPATE RULE NISI

HELD AT MBABANE **Case No. 1642/19**

In the matter between:

J.M BUSHA CAPITAL SWAZILAND (PTY) LTD **Applicant**

And

FINANCIAL SERVICES REGULATORY AUTHORITY **Respondent**

In re:

FINANCIAL SERVICES REGULATORY AUTHORITY **Applicant**

And

J.M BUSHA CAPITAL SWAZILAND (PTY) LTD **1st Respondent**

INYATSI CONSTRUCTION GROUP HOLDINGS

(PTY) LTD **2nd Respondent**

PRICEWATERHOUSE COOPERS SERVICES

(PTY) LTD **3rd Respondent**

Neutral Citation : **J.**M Busha Capital Swaziland (Pty) Ltd v. Financial Services Regulator Authority In re: Financial Services Regulatory Authority v. J.M capital Swaziland (Pty) Ltd & 2 Others (1642/19) [2019] SZHC.199 (23.October 2019).

Coram: Magagula J

Date Heard: 15/10/19

Delivered: 23/10/19

[1] On the 9th October 2019 this court was approached on an exparte

basis by the applicant in the main application (FSRA).The applicant

sought an order in the following terms:

" 1. Dispensing with requirements of the rules of court relating to service of process and time limits, and enrolling this matter as one of urgency and on an ex parte basis as provided for in Rule 6 (25) (a) of the rules of this court.

2. A rule nisi do hereby issue calling upon respondents to show cause on or before Friday 25th October 2019, why prayers 3,4 and 5 below should not be made final.

3. Interdicting and restraining the first respondent from carrying on the business of an asset manager and/or collective investment scheme manager or similar activities pending finalisation of the proceedings to be instituted by the applicant against the first respondent.

4. Interdicting and restraining the second and third respondents from paying to the first respondent the proceeds of the Inyatsi Construction Group Holdings Medium Term Note Series ICL 206 and 207, which are due to be paid on Friday 11th October 2019, to the extent of E16 Million.

5. Directing the second and third respondents to pay to an escrow bank account to be controlled by the Managing Director of Eswatini Development and Savings Bank, Mr Zakhele W. Lukhele being an account held escrow at Eswatini Development and Saving Bank.

6. That prayers 3,4 and 5 above operate with immediate and interim effect pending the finalisation of this application.

7. That the applicant be directed to cause a copy of this application and any interim order to be

served on the respondent immediately upon grant of the order.

8. Costs in the event of unsuccessful opposition."

[2] The application was also brought under a certificate of urgency and as an ex parte application. I duly granted the interim relief sought.

[3] The notice of motion indicated that the respondents could anticipate the return date which was the 18th October 2019. I must also point out that it was the 1st and 2 respondents in the main application (BUSHA AND INYATSI) who sought to challenge the rule nisi. The 3rd respondent (Price Water House Coopers) did not file any papers. When the matter was called on the 15th October 2019, Mr Mdladla who appeared for both BUSHA and INYATSI informed the court that INYATSI was no longer pursuing the challenge on the rule nisi. It had since elected to abide by the order of court.

[4] The 1st respondent (BUSHA) pursued the challenge. The challenge is based on the contention that the court was fed with wrong information and that had the court known the correct position it would not have granted the order. BUSHA accordingly prays that the rule be discharge forthwith on this basis.

[5] BUSHA states its case in paragraphs 11 – 18 of its founding affidavit as follows:

“ 11. It is noted that the Honourable Court has granted the Orders on an ex-parte basis. The facts which were relied upon are incorrect as a result the Honorable Court has granted an Order which is extremely detrimental to the Applicant.

12. The Respondent has stated in its Founding Affidavit that the Applicant is a subsidiary of an entity known as JM BUSHA INVESTMENT GROUP (PTY) LTD with respect this is incorrect.

13. The Respondent/ Applicant further states that the Applicant issued a Medium Term Note which was submitted to by the 1st Respondent. The Respondent continues to state that the 2nd Respondent (INYATSI) is due to pay the Applicant/ 1st Respondent’s interest payments to the First Respondent’s interest payments to the First Respondent pursuant to the maturity of the Medium Term note.

14. With the greatest of respect all of the above, is devoid of any truth. The Applicant has never issued a Medium Term Note.

15. ***INYATSI is not obligated to pay the Applicant any interest in the amount of E16 Million or at all.***

16. ***The correct position is that the Medium Term note was issued by J M BUSHA INVESTMENT GROUP (PTY) LTD which is a company registered under the laws of South Africa under the registration number 2000/0159479107.***

17. ***This therefore means that the Applicant/1st Respondent has been wrongly cited, it follows therefore that the allegations made by the Respondent/ Applicant are incorrect and extremely misleading and they cannot sustain the current Interim Order and or Rule Nisi.***

18. ***I am advised and verily believe that the Rule as it stands, stands to be discharged."***

[6] On the other hand FSRA maintains that it did not mislead the court in anyway. In his affidavit answering the anticipation application, the Chief Executive Officer (CEO) of FSRA Mr Sandile Dlamini states at paragraph 5:

" In my founding affidavit and at paragraph 5.1, I stated that ….the first respondent is a subsidiary of J M Busha Investment Group (Pty) Limited (I

referred to the entity as a Holding Company in the founding affidavit). I stand by that assertion ….”

The CEO then proceeds to annex Form C of the Eswatini Companies Act which indicates that the South African company is the holder of 50% of the shares in the company with Landmark Financials holding 20% of the shares and 30% of the shares held by staff equity. Clearly the South African Company is the majority shareholder in BUSHA. Majority shareholding is one of the criteria for determining whether a company is a subsidiary of another under the companies Act, 2009. It is not the only criterion used though.

[7] The CEO for FSRA further contends in the said affidavit that:

“ ……investments made with the first respondent {BUSHA} are transmitted to the Holding Company and presumably there is a flow of monies and information between the two companies.”

[8] On BUSHA’s contention that there is no obligation on INYATSI to pay BUSHA interest in the sum of E16 Million or at all, and that payment is due to the Holding Company and therefore the order should not have been granted against BUSHA, FSRA contends that this is an over simplification of the relationship that exists between BUSHA and the Holding

company. The CEO states in paragraph 5.5 of his responding affidavit:

“ 5.5 By way of an illustration of the nature of the relationship between the two entities – when we made an enquiry with respect to the source of the funds used in the acquisitions of the Inyatsi Bond, we wrote to the deponent (as she is the compliance officer)…..The response did not come from the deponent but rather from the Holding Company….It was this unsatisfactory response that prompted further investigations …..”

[9] FSRA further points out that in paragraphs 20 and 21 of the founding affidavit it did mention that when they enquired about the source of funds used to purchase the Inyatsi bonds BUSHA became evasive. BUSHA said the funds were from their operational revenue. However when FSRA conducted investigations to ascertain if BUSHA or the Holding company in South Africa had purchased the bonds, they established that none of these companies had such funds at their disposal.

[10] FSRA further mentions that during investigation they engaged their counterparts in the Republic of South Africa, the Financial Sector Conduct Authority (FSCA). In paragraph 9 of his responding affidavit the CEO for FSRA states:

" 9. In our enquiries with FSCA, they indicated that they did not have any records of the Holding Company having subscribed to a foreign bond i.e a bond held in the Kingdom of Eswatini. It was this report that caused us to carry out further investigations, resulting in our establishing that funds are being moved between the first respondent { BUSHA} and the Holding Company."

[11] The said CEO further states in paragraph 10 of his affidavit.

" 10. From a regulatory point of view and given the fact that the listing took place in the Kingdom of Eswatini, it was imperative that the enforcement be carried out with the entity that was under our regulation in the kingdom. It was on this basis that the pursuit made to the first respondent…"

The CEO then submits that FSRA has correctly cited BUSHA since this is the entity that sourced funds locally and proceeded to avail them to the Holding Company which in turn invested them in the INYATSI bond.

[12] I am of course alive to the fact that the question that I have to determine herein is whether there was material non-disclosure or misinformation on the part of FSRA when it applied ex parte for the order that was eventually granted by

the court. In so doing I must also try to establish if the allegations now made by BUSHA are true.

[13] The first point of call is whether BUSHA has been wrongly cited and has nothing to do with the notes purchased from INYATSI. In light of the relationship that has been shown to exist between the two entities, I find it difficult to come to such conclusion. The South African company is clearly a major shareholder in BUSHA. Moreover, FSRA has produced a letter dated 18th June, 2019 where BUSHA states ***inter arlia***:

> ***" J M BUSHA capital is not profitable and is supported by the parent company."***

By the parent company BUSHA means the South African company. This is evidence that there is a movement of monies between the two companies. FSRA has therefore correctly cited the entity that is within their jurisdiction as its operations are intertwined with those of the South African Company. Even more so, the companies are under the same director and CEO.

[14] As regards the notes being purchased by the South African company without the knowledge or involvement of BUSHA, this allegation is successfully refuted by FSRA. They state that their counterparts in South Africa, the FSCA could not find proof of any such transaction having been executed by the South African company.

[15] I accordingly dismiss without an ***iota*** of doubt the allegations by BUSHA that it had nothing to do with the transaction in question and that the transaction was only between INYATSI and the South African Company. In the premises I find that there has been no material non – disclosure or misinformation to the court on the part of FSRA

[16] Mr Mdladla also argued from the bar that the matter was not urgent since FSRA knew of the transaction a long time ago. Mr Jele contended and I think correctly so that urgency does not necessary come as a result of a past event. It may come as a result of an imminent future event. He further pointed out that in ***casu*** BUSHA has already communicated that it may close business and leave the country at any time. There is therefore a real apprehension of harm that if it is paid the amount of E16 Million it may indeed leave the country with the money to the extreme prejudice of local investors.

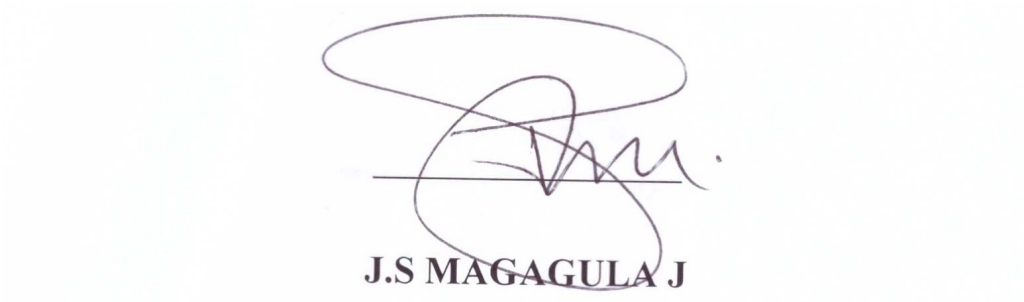
In my view the matter is very urgent and the point is accordingly dismissed.

[17] In the premises it is the finding of this court that:

17.1 The order sought and granted ex parte was properly sought and granted.

17.2 The 1st respondent [BUSHA] be and is hereby granted opportunity to respond to the full application if it so wishes.

17.3 Costs are to be costs in the main application.



For Applicant: **Z.D Jele**

For Respondent: **V. Mdladla**