IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 1171/18

HELD AT MBABANE

In the matter between:

YASMIN BANU SULEMAN (Nee KHAN) **APPLICANT**

And

CASSIM SULEMAN **1st RESPONDENT**

CASSAY INVESTMENT (PTY) LTD **2nd RESPONDENT**

Neutral Citation: *Yasmin Banu Suleman (Nee Khan) vs Cassim Suleman & Another [1171/18] [2019] szhc 152 (14 August 2019)*

Coram: **M. LANGWENYA J**

Heard: 1 August 2018; 17 August 2018; 12 December 2018; 25 January 2019; 5 March 2019

Delivered: 14 August 2019

Summary: *Company law-at incorporation of the second respondent, the applicant and the first respondent became directors and*

shareholders of the second respondent-The applicant and respondent are husband and wife who are on the throes of divorce in Courts in South Africa.

The applicant unilaterally removed the first respondent as a director of the company-no notice was served on the applicant that she would be removed as a director-held-that the removal of the applicant from being a director and shareholder of the second respondent is inconsistent with provisions of the company Act 2009.

JUDGMENT

[1] The applicant and the first respondent are husband and wife currently embroiled in divorce proceedings in the courts in the Republic of South Africa.

[2] In the founding affidavit the applicant describes herself as an adult South African national. The first respondent is described as an adult South African national businessman. In his answering affidavit, the first respondent describes himself as 'a major male Swazi citizen' and a managing director and shareholder of the second respondent. The first respondent does not deny that he is a South African national in his answering affidavit.

[3] The second respondent is a limited liability company duly registered and incorporated in accordance with the company laws of ESwatini, with its principal place of business at Lenhle Complex, Sidwashini Industrial site, Mbabane.

Orders sought

[4] On 1 August 2018, the matter came as an urgent *ex-parte* application for an order in the following terms:

1. Dispensing with the usual forms and procedures relating to institution of these proceedings and allowing the matter to be heard and enrolled as one of urgency.
2. Condoning applicant's non-compliance with the rules.
3. That a rule *nisi* do hereby issue calling upon the respondents and any other interested party to show cause, on a date to be determined by the Court why an order in the following terms should not be granted namely:
    3.1 Granting the applicant full access to all financial statements, management accounts, business records and other information relating to the affairs of the second respondent;
    3.2 Granting the applicant full access to the premises of the second respondent and the right to obtain any information required by the applicant concerning the business activities of the second respondent;
    3.3 An order interdicting and restraining the first respondent from:-

3.3.1 Taking or implementing any actions to exclude the applicant from the business of the second respondent;

3.3.2 Dissipating any of the second respondent's assets, transferring funds or making any payments without the applicant's prior written consent.

4. 4.1 Re-instatement of the applicant as a Director and shareholder of the second respondent.

4.2 Recognizing the applicant as a Director and shareholder of the second respondent.

4.3 Directing and or ordering that the applicant shall continue to receive basic director's remuneration in the sum of E13 000.00 (Thirteen Thousand Emalangeni) per month from the second respondent as long as the applicant remains a director in the second respondent

The applicant's case

[5] At the incorporation of the second respondent, the applicant and the first respondent became the directors and equal shareholders of the company. The main business of the company is to supply and service all Canon products for instance, printers, machinery and cameras in ESwatini.

[6] It was an agreed arrangement between the applicant and the first respondent the business would operate on the premise that both directors shall derive equal financial benefit from the operation of the second respondent. In 2008,

the applicant avers that she entered into an oral agreement with the first respondent that her basic director's remuneration would be E13 000.00 per month. Her director's remuneration, it was agreed, would be paid through an account at FNB on the last day of every month. The applicant does not say at what scale the first respondent would be paid as a director of the second respondent.

[7] Both parties were expected to act with utmost good faith towards each other and towards the company. Neither party would make unreasonable decisions aimed at jeopardizing the sustainability of the company either through mishandling of the company financials or alienation of the company assets to the detriment of the company.

[8] The applicant contends that during the first ten years of the incorporation of the company, the applicant and the first respondent played an active role as managing directors of the company. They both had custody and control of and access to all records of the company until 18 September 2010 when the applicant returned to the Republic of South Africa because her marriage to the first respondent had broken down.

[9] The applicant contends that she has never tendered her resignation as a director and shareholder of the second respondent. It is applicant's contention that in 2014 she per chance found a document stating that in a meeting of shareholders of 20 September 2010 she had resigned as director

and shareholder of the second respondent. In this document, the first respondent had fraudulently signed using the applicant's signature. When confronted about the document, the first respondent took it from the applicant. She accordingly approached the first respondent about this anomaly. The first respondent informed the applicant that he would approach the second respondent's auditors to have her re-instated as a director and shareholder of the second respondent. The first respondent subsequently gave the applicant a letter dated 1 October 2014 addressed to the auditors requesting them to appoint applicant as director and fifty percent shareholder of the second respondent. It was on the strength of the letter of 10 October 2014 that the applicant believed she had been reinstated as second respondent's director and shareholder.

[10] The applicant avers that the first respondent had at some point suggested that the matter be settled through an agreement between the parties. The first respondent had suggested that such a settlement be made part of the divorce settlement between the parties. This suggestion fell flat when the applicant disputed the value of the second respondent as relayed to her by the first respondent. The first respondent then unilaterally reduced the director's remuneration that the applicant was paid from E13 000.00 (thirteen thousand Emalangeni) to E7 000.00 (seven thousand Emalangeni). This happened immediately when divorce summons were served on the first respondent in January 2017. The applicant still receives the payment of E7 000.00 to date.

[11] According to the applicant's replying affidavit, she received E13 000.00 payment as director's fees from the year 2010 until January 2017 when the first respondent was served with divorce summons[1].

[12] The applicant instructed her attorneys to verify her status as a director and shareholder of the second respondent with the Registrar of companies. The response she got was that she was neither a director nor shareholder of the second respondent. On 4 April 2018, applicant's attorneys informed her she was removed as director and shareholder of the second respondent on 21 September 2010.

Respondent's Case

[13] The first respondent raised preliminary issues: first, that there were disputes of fact and that, the matter could therefore not be decided on the basis of the papers; second, that the application has failed to meet the peremptory requirements of a temporal interdict; third that the applicant has failed to meet the peremptory requirements of a final interdict; and lastly that the matter is not urgent. I will revert to these issues later in my judgment.

[14] The first respondent does not deny that he and the applicant were once co-directors and shareholders of the second respondent. The first respondent contends he allocated to the applicant the shares with certain conditions; that

[1] See paragraph 11.2 of the applicant's replying affidavit at page 103 of the Book of Pleadings.

the applicant did not buy the shares. The applicant failed to fulfill the conditions attendant to the ownership of the shares.[2] It is his contention that the applicant was removed from directorship for failure to execute her administrative and financial duties towards the company. The removal, so the first respondent argued, was preceded by warnings for the applicant to improve her skills in this regard.

[15] The first respondent contends also that the applicant's appointment as director was subject to her obtaining a valid work permit to work in the country. According to the first respondent, the applicant failed to secure a work permit and was notified by the first respondent that she would then be removed as a director of the second respondent. What is not in dispute is that the applicant had a work permit before she was removed as a director of the company. The applicant states that she left eSwatini when her marriage to the first respondent disintergrated; and that she was never requested by the first respondent to apply for a work permit[3].

[16] According to the first respondent's version, the director's remuneration due to the applicant was not reduced, it was stopped when the applicant was removed as a director of the company in 2010. The applicant was, in September 2010 served with a letter of termination and with 'Y2' being a company resolution of applicant's resignation as director and shareholder of the second respondent and the appointment of Mohamed Farouk Suleman as

[2] See paragraph 24 of first respondent's answering affidavit at page 44 of the Book of Pleadings.
[3] Paragraph 16 of the applicant's replying affidavit at page 105 of the Book of Pleadings

director. Mohamed Farouk Suleman and Esaw Chirwa were also appointed shareholders each holding forty percent and ten percent of the shares respectively.

[17] In January 2011, the first respondent contends the parties entered into an oral agreement aimed at the settlement of all disputes which were likely to arise as a result of the applicant's termination of directorship and shareholding. It was agreed that the first respondent would buy the applicant a flat and furnish it; that he would also buy her a motor vehicle in full and final settlement of her removal as director and shareholder of the second respondent. The first respondent avers that he duly bought the applicant a flat which he furnished and a motor vehicle. This, according to the first respondent was more than what the applicant was entitled to in law as a director of the company. This is denied by the applicant who states that the apartment was bought and registered in both their names as they are married in community of property; that they both contributed in the purchase of the apartment and that the motor vehicle is registered in the first respondent's name[4].

[18] In 2014, the applicant reneged from the oral agreement of January 2011 as she demanded reinstatement as company director and fifty percent shares of the second respondent. It is first respondent's contention that he was open to reinstating the applicant as director and shareholder provided she obtained a

[4] Applicant's Replying affidavit at paragraph 13 at page 104 of the Book of Pleadings.

work permit. When the applicant failed to secure the work permit, the offer to reinstate her and allocate applicant her shares fell away. The first respondent contends that following the allocation of shares to new directors and new shareholders, the applicant can no longer be allocated shares.

[19] For the above reasons, the first respondent argues, a court cannot enforce, protect and uphold rights and duties that do not exist in law. The first respondent argues that the applicant relinquished her rights to directorship and shareholding when settlement agreement paying her off was reached by the parties.

[20] It is the case for the first respondent that the applicant no longer has a right to company documents and accounts because she is no longer a shareholder or director of the company.

[21] The removal of the applicant from the company's directorship and shareholding marked the end of a business relationship between the first respondent and the applicant-so the argument goes.

[22] The first respondent denies that as a director the applicant was entitled to the payment of E13 000.00 as director's remuneration. He avers, instead that the agreement was that each party received remuneration equal to the work

he/she put into the company and this was dependent on what the second respondent could afford to pay[5].

[23] It is the first respondent's case that at all material time he has acted in the best interests of the second respondent and has never made unreasonable decisions regarding the company's finances and alienation of company assets. It is his averment that, on the contrary, it is the applicant whose conduct jeopardized the sustainability and best interests of the second respondent. This, applicant did by failing to meet the company obligations regarding the payment of taxes; failing to work harmoniously with employees of the company and refusing employees a chance to be trained and empowered as well as refusing to implement the empowerment target much against the provisions of section 15(3) of the Companies Act 2009. Lastly, as a result of inexperience, the applicant failed to execute her administrative and financial duties towards the company-so the first respondent argued.

The law

[24] Section 200(1) of the Companies Act[6] authorizes the removal of a director by an ordinary resolution adopted at a shareholders' meeting by persons entitled to exercise voting rights in an election of a director. In order to remove the applicant as a director in terms of this section, a meeting should

[5] See paragraph 22 of the first respondent's answering affidavit at page 43 of the Book of Pleadings.
[6] No.8/2009

be convened and the affected director should be afforded a hearing before she is removed.

[25] It is not in dispute that the applicant and the first respondent were directors of the second respondent when the company was incorporated. It is not in dispute that the first respondent subsequently removed the applicant as a director of the company. What remains to be determined is whether applicant's removal as a director was in accordance with the law.

[26] The Companies Act, 2009 makes provision for the appointment and removal of company directors. The Act empowers a company to remove any of its directors before the expiration of her term. Section 200 of the Act provides that a company may, by ordinary resolution remove a director before the expiration of his period of office. A director intended to be removed by the company must be served with notice of such intention and accordingly afforded the chance to defend himself in writing at the meeting where he is to be removed. Failure on the part of the company to issue the requisite notice will render the action of the company a nullity.

[27] In this case it was submitted by the applicant that she was a director and shareholder of the company. This was not disputed by the first respondent. What first respondent contends is that the applicant was removed as director because she was inexperienced in the conduct of the company affairs.

[28] Section 200 of the Companies Act was not followed when the applicant was removed as a director of second respondent. There was neither a resolution taken by the company board of directors nor was there a special notice served on the applicant informing her of her removal. Contrary to section 200 of the Companies Act, the applicant was also not afforded a hearing before she was removed as a director.

[29] The first respondent relies on 'SC1' and refers to this document as a letter of dismissal of the applicant from being a director of the second respondent. 'SC1' was addressed to the applicant. The letter states as follows-

> 'I Cassim Suleman as the Managing Director of Canon Swaziland hereby advise as follows: you are **suspended** with immediate effect and **relieved** of your duties as a director for the following reasons:
>
> 1 (a) Failure to direct and manage your portfolio in administration.
>
> (b) Failure as a foreigner to apply and obtain your Swazi work permit of which you were given sufficient time.
>
> (c) Failure to work with and train the Swazi staff at the Bayabonga Branch
>
> (d) Failure to keep accurate records of PAYE, SNPF and staff records
>
> 2. Failure to direct and manage the financial portfolio.
>
> (a) Managing declaring and paying all dues to commissioner of taxes.
>
> (b) Allowing the cash flow situation in the company to deteriorate, where debtors exceeded purchases placing the company in a financial stress.
>
> 3. Thank you for your services. I wish you all the best in your future endeavours.

[30] From this letter, the applicant is simply dismissed without being afforded a chance to be heard. This is not only a contravention of the rules of natural justice, but it is also a contravention of section 200 of the Companies Act, 2009. The allegations leveled against the applicant in 'SC1' were not proved in a disciplinary hearing and the dismissal, it would appear was therefore misplaced. Accordingly, I find that the removal of the applicant as a director was not carried out in terms of the law. It is therefore unlawful and of no effect.

[31] The applicant's shareholding and directorship in the company came with the legitimate expectation of participating in the management of the company which she has been effectively and unfairly denied. As a director of second respondent, the applicant is entitled, among others, to have full access to all financial statements, management accounts, business records and other information relating to the affairs of the second respondent.

[32] The applicant's contention is that transfer of her shares by the first respondent was done without her knowledge and consent. In response, the first respondent avers that the parties entered into an oral agreement enabling and facilitating the transfer of applicant's shares[7]-a fact that is denied by the applicant. In my view, nothing turns on this contention by the first respondent if the Court has found that the removal of the applicant as a company director was done outside the law.

[7] See paragraph 11 of the first respondent's answering affidavit at page 40 of the Book of Pleadings.

[33] The applicant is a director and shareholder of the company by virtue of having acquired a fifty percent shareholding stake in the company after incorporation[8]. The oral agreement that was supposedly made *ex post facto* of the dismissal of the applicant as a director and shareholder of the second respondent amounts, in my view to nothing more than first respondent trying to make amends and rectify an unlawful act using an inappropriate way. When the first respondent ran roughshod over the law in dismissing the applicant from her position as a company director/shareholder, his act of entering into an oral agreement with the applicant is an attempt at validating an invalid act. Such cannot be countenanced by the Court.

Urgency

[34] Matter was enrolled and heard as an urgent application on 1 August 2018. The first respondent opposed the application on the grounds that the matter is not sufficiently urgent to be heard as an urgent application. The respondents also dispute that the applicant has satisfied the requirements for the granting of an interim interdict.

[35] In a nutshell the respondent avers that the applicant has delayed in instituting the proceedings. He avers that the applicant has known of her removal as company director and shareholder for a long time but sat and did nothing

[8] See paragraph 11 of the first respondent's answering affidavit at page 40 of the Book of Pleadings. See also Form J at page 32 of the Book of Pleadings.

about it. It is then argued that as a result thereof the applicant created her own urgency.

[36] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Rule 6(25) of the High Court Rules. The aforesaid sub-rule allows the Court or Judge in urgent applications to dispense with the form and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as to it seems appropriate. It further provides that in the affidavit in support of an urgent application 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.'

[37] The import thereof is that the procedure set out in rule 6(25) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course.

[38] The question whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to

the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[39] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. The applicant may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his/her case in that regard.

[40] In my view, the delay in instituting proceedings is not, on its own a ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand, a delay may have been caused by the fact that the applicant was attempting to settle the matter or collect more facts with regard thereto[9].

[9] See *Nelson Mandela Metropolitan Municipality v Greyvenouw* 2004 (2) SA 81 (SE) at 94C-D; see also *Stock v Minister of Housing* 2007 (2) SA 9(c) 12I-13A.

[41] It means that if there is some delay in instituting the proceedings an applicant has to explain the reasons for the delay and why despite the delay she claims that she cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If he cannot be afforded substantial redress at hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however, despite the anxiety of an applicant he can be afforded a substantial redress in an application in due course, the application does not qualify to be enrolled and heard as an urgent application.

[42] In this matter the applicant has explained that she apprehends that the first respondent might dispose of, alienate, sell and or conceal the company assets whilst the probate proceedings are pending in South Africa; that her unlawful removal as a director has deprived her of her livelihood.

[43] In addition thereto, despite the delay, it is clear that the matter remains urgent. The respondents have already held a meeting where directors were appointed and continue with operations of the company to the prejudice of the applicant.

[44] I am of the view that the applicant has demonstrated that this application is urgent because she found urgency on the fact that the unlawful termination of her company directorship and shareholding has infringed her right to be heard with the consequential precipitation of financial prejudice. The respondents did not address the issue of failure to afford the applicant a hearing before dismissing her as a director and shareholder of the company.

[45] In my view, the perceived threat to or the possible violation of the applicant's right to the common law rule of *audi alteram partem* and her consequent summary dismissal as a director and shareholder without being afforded a hearing founds and justifies urgency in this application.

Requirements of an interdict

[46] An applicant for an *interim* interdict must show the following requisites to the satisfaction of the Court at the time that the application is moved; namely: (i) a prima facie right; (ii) well- grounded harm apprehended or already commenced; (iii) no alternative remedy; and (iv)the balance of convenience[10].

[47] It is not denied that the applicant was a director and shareholder of the company when the company was incorporated. This establishes a prima facie right on her part. It has been shown that the applicant was removed

[10] Prest, *Interlocutory Interdicts,* Juta 1993 at page 55.

from being a director of the second respondent without her knowledge and consent and outside the provisions of the Companies Act 2009-this establishes harm that had commenced at the time the application was launched. It is now trite that where a director has been unlawfully removed and prevented from exercising his duties as such he has a right to restrain his exclusion[11]. Despite many requests to reinstate the applicant to the position of director and shareholder, the first respondent has failed, refused and neglected to do so. There is no other appropriate forum to challenge the unlawful conduct of the first respondent except to seek the Court's intervention. The prejudice the applicant has suffered and continues to suffer because of the violation of section 200 of the Companies Act 2009 outweighs any prejudice, if any, that the respondents would suffer. The applicant's removal as a director/shareholder is unlawful; she therefore has no alternative remedy save to approach the Court for a remedy.

Dispute of fact

[48] It is trite that affidavits filed in motion proceedings must contain sufficient factual averments to support the cause of action on which the relief that is being sought is based[12]. The first respondent argues that the matter at hand raises *bona fide* disputes of fact which were foreseen by the applicant prior to moving the urgent application before Court. The respondent relies on section 95(1), 214 (1) and (2) and 94(6) of the Companies Act 2009 to support the point about a dispute of fact.

[11] See: *Burland v Earle* (1902) AC 83 at 93; see also *Robinson v Imroth* 1917 WLD

[12] *Butler and Others v Van Zyl and Others* (554/13) [2014] ZASCA 81 (30 May 2014) at paragraph 23.

[49] The applicant has provided both legal and factual basis on how she became a director and shareholder of the second respondent. This fact was not disputed by the first respondent. The applicant also provided a version of how she was unlawfully removed as a company director by the first respondent-a fact that is not disputed save for the first respondent to provide a justification for the removal. The allegations made by the applicant are neither vague nor insubstantial.

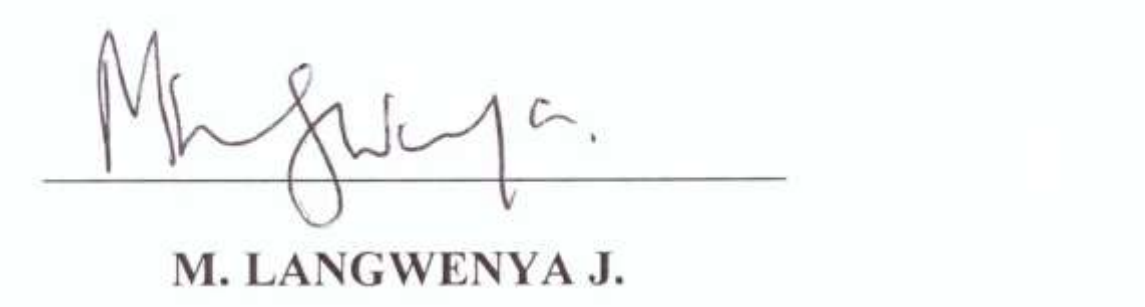
[50] The first respondent's allegations on why and how the applicant was removed as a company director is, in my considered opinion not such as to raise a real, genuine or *bona fide* dispute of fact; in fact they are untenable and I accordingly reject them merely on the papers.

For the above reasons, the points in *limine* are dismissed and the relief sought by the applicant in the notice of motion is granted. In this vein the following order is made:

[51] **Order**

1. The Order granted in terms of the Notice of Motion on 1 August 2018 is confirmed with the following additions:
2. The applicant is granted full access to all financial statements, management accounts, business records and other information relating to the affairs of the second respondent.

3. The applicant is granted full access to the premises of the second respondent and the right to obtain any information required by the applicant concerning the business activities of the second respondent.
4. The applicant is re-instated as a director and shareholder of the second respondent.
5. It is ordered that the applicant's name be reflected as director and shareholder in the second respondent's Form C and Form J and that same be updated at the Registrar of Companies' office.
6. The applicant shall receive a director's remuneration as long as she remains a director of the second respondent.
7. It is ordered that the applicant be paid out the dividend profit due to herself as part of being a director and shareholder of the second respondent for the period she was removed as director.
8. Costs to follow the event.



M. LANGWENYA J.

For the Applicant: B. Dube

For the Respondents: Ms. Q. Dlamini