REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 38097/2021

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

01/09/2021 **Judge Dippenaar**

In the matter between:

THE KANYIN BODY CORPORATE Applicant

and

LUMIC PROPERTY CONSULTANTS (PTY) LTD
(Registration No: 2009/007863/07) First Respondent

SHERIFF OF THE HIGH COURT, PALM RIDGE Second Respondent

STATION COMMANDER OF BRACKENDOWNS POLICE STATION Third Respondent

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JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 1st of September 2021.

DIPPENAAR J:

[1] The applicant, the body corporate of the Kanyin Estate comprising of 540 units, by way of urgent application sought orders: (i) compelling the first respondent to sign all documents pertaining to its trust bank account held with Nedbank Limited in favour of the applicant ("the trust account") which are necessary to assign the first respondent's rights, title, interests and obligations in and to the said trust bank account to the applicant; and (ii) compelling the first respondents to return to it all of the applicant's books of account, financial records and documents which are in its possession, together with ancillary relief.

[2] The first respondent is the managing agent of the body corporate, thus appointed in terms of a written service level agreement ("the agreement"), concluded between the parties on 15 April 2020 embodying the mandate provided to the first respondent to perform certain management functions on behalf of the applicant.

[3] The background to the application is not contentious. The genesis of the application lies in a payment made by the first respondent to one of the applicant's service providers on 15 January 2021 into an incorrect banking account as the banking details of the account had been fraudulently changed. The service provider remains unpaid. The

applicant contended that the first respondent had breached the agreement and its fiduciary duties by failing to timeously make the necessary disclosure to the trustees, as it was aware of the problem since 28 January 2021 but only informed the trustees of the applicant of the issue at a trustees meeting on 8 March 2021. The payment and the cyber fraud are not in dispute between the parties. What is in dispute is whether the first respondent breached the agreement and who should be liable for the loss. The parties have been unable to reach an amicable settlement of the issue.

[4] On 21 May 2021, the applicant made written demand to the first respondent to rectify its breach, contending for a repudiation of the agreement due to the breach of the first respondent's fiduciary duties under the agreement. On 22 May 2021, the applicant notified the first respondent of a further breach of the agreement, being the disclosure of personal information of the owners to another owner. On 28 May 2021, the first respondent's attorney in writing denied that any breaches of the agreement had occurred and certain undertakings were provided. On 12 July 2021, the parties' respective legal representatives unsuccessfully attempted to reach settlement of the matter.

[5] On 26 July 2021, the applicant by way of a lengthy letter set out the first respondent's failure to address its breaches of the agreement and its fiduciary trust obligations. Further breaches of trust and defamatory averments made by the managing director of the first respondent during a Whattsap conversation with one of the previous trustees, belittling and insulting the trustees and owners, were set out in some detail, in support of the contention that all trust between the parties had broken down. The first respondent was notified that the agreement was terminated with immediate effect, such resolution having been taken the previous day by the trustees at a normal meeting. Demand was made for the return of all the applicant's records within 10 days, relying on

rule 27(3)[1] of the Prescribed Management Rules to the Sectional Title Schemes Management Act[2].

[6] On 30 July 2021, the first respondent responded in a lengthy letter, addressing the alleged breaches and disputing that it was in breach of the agreement and its fiduciary duties. It also disputed the applicant's entitlement to cancel the agreement and the validity of the cancellation thereof.

[7] On 3 August 2021, the applicant confirmed the cancellation of the agreement and demanded that the first respondent sign the necessary documents to transfer the control of the trust account to the applicant. On 4 August 2021, the first respondent responded, refusing to sign the documentation and contending that as the agreement had not been terminated it was entitled to retain the applicant's documentation and would continue to perform its duties under the agreement. On 11 August 2021, the applicant concluded a new agreement with an another managing agent. The present application was launched the following day.

[8] The first respondent opposed the application on various grounds. It raised four points in limine, being (i) a lack of urgency; (ii) non-compliance with r 41A; (iii) the existence of material disputes of fact and (iv) an arbitration clause in the agreement requiring disputes to be referred to mediation. It also challenged the application on its merits, contending that none of the requirements for final interdictory relief had been met and no case was made out for the vindicatory relief sought.

[9] In summary, the applicant's case was predicated on the nature of the agreement being one of agency and mandate, which the applicant, as principal, was entitled to

[1] The reference is erroneous and should be a reference to rule 27(7) which provides: "If the body corporate terminates its contract with an employee or a managing agent, that person must within 10 days deliver to the body corporate all records referred to in this rule that are in the person's possession or under the person's control".

[2] 8 of 2011

terminate under common law[3]. It contended that due to the various breaches of trust by the first respondent and its stance in refusing to return the applicants documents and control of the trust account to it, the applicant has lost all faith and trust in the first respondent by virtue of its conduct which left it no option but to cancel the agreement and seek the present relief. It was the applicant's case that the first respondent could not bind it to an agreement which has terminated, irrespective of the validity of the termination and the existence of factual disputes in relation thereto as the relationship between the parties has become toxic and their trust relationship has broken down completely.

[10] The first respondent's case was that as the breaches contended for by the applicant and the validity of the cancellation were in dispute and subject to irresoluble disputes of fact, which disputes were to be resolved by arbitration, it was lawfully entitled to be in possession of the applicant's documents and to retain control of the trust account and was not obliged to accede to the demands of the applicant.

[11] Regarding the issue of urgency, although some of the first respondent's criticism is warranted, I am persuaded that the applicant has illustrated sufficient urgency to warrant the entertainment of the application on its merits.

[12] Although the applicant did not deliver a r 41A notice with its founding papers, this is not of itself a sufficient reason to dismiss the application and the rule does not contain a sanction for non-compliance. The first respondent supported the referral of the matter to mediation. In reply, the applicant objected to mediation and provided the requisite R41A notice together with reasons why mediation would not be appropriate. I am not persuaded that the matter should be referred to mediation. I shall deal with the remaining two points in limine when considering the merits of the application.

[3] Liberty Group Ltd and Others v Mall Space Management CC t/a Mall Space Management [2019] JOL 45954 (SCA) ("Liberty")

[13] The applicant seeks final relief of an interdictory and vindicatory nature. It is trite that where an applicant seeks final interdictory relief in motion proceedings, the so-called Plascon Evans[4] rule applies.

[14] The first respondent sought the dismissal of the application on the basis of the existence of factual disputes between the parties pertaining to the breaches and the validity of the cancellation of the agreement, of which the applicant was aware prior to launching the application. It was argued that in the face of such disputes, this application is doomed to failure as the factual disputes are bona fide and are irresoluble on the papers.

[15] In its founding papers and in argument, the applicant acknowledged the existence of factual disputes regarding breaches and the validity of the termination of the agreement. It was thus common cause between the parties that such factual disputes exist. The applicant did not seek any declaratory relief pertaining to the cancellation of the agreement and acknowledged that such issues were to be resolved by arbitration as envisaged in the agreement. The applicant further recognised that it may be liable to the first respondent in damages if the cancellation was found not to be valid, but contended that it could not be held to specific performance of the agreement considering the nature of the agreement and the breaches of trust which had occurred. It further argued that irrespective of the existence of any factual disputes regarding the facts which gave rise to the breakdown of the trust relationship between the parties, it was common cause between them that such relationship has broken down and that no amicable resolution could be reached between them.

[16] The high water mark of first respondent's case in its answering affidavit is that it is in lawful possession of the applicant's documents and is entitled to operate its banking account in terms of a valid agreement, which remains extant and has not been validly cancelled. In the founding papers, various averments of misconduct and dishonesty were

[4] Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A) at 634E-635C

levied against the respondent. In the answering affidavit, although in bald terms disputing any breaches of the agreement and the validity of the termination thereof, the first respondent did not grapple with or meaningfully deal with the averments of the applicant. Instead, it broadly characterised the applicant's averments of dishonesty and other breaches of the agreement underpinning applicant's averment that the trust relationship between the parties has irretrievably broken down as "irrelevant". It was further not disputed in the answering affidavit that the powers and obligations afforded the first respondent were of such a nature that a fiduciary relationship existed between the parties.

[17] In those circumstances it cannot be concluded that the first respondent has raised bona fide disputes of fact[5] on the issue whether the trust relationship between the parties has irretrievably broken down and whether the applicant is on that basis entitled to terminate its mandate to the first respondent. There is no countervailing evidence to controvert the applicant's version that the relationship of trust between the parties has irretrievably broken down. Moreover, the first respondent did not dispute the incorrect payment issue in its answering papers, nor did it dispute the conversation and the defamatory allegations made by its managing director referred to in the founding affidavit. Instead, it invited the deponent to the applicant's affidavits to institute legal proceedings.

[18] The applicant's reliance on the principle that it is open to a principal to terminate the mandate of its agent at any time[6] is well founded. This principle is recognised in the agreement[7] which provides for cancellation without penalty or liability on two months written notice by the applicant if the cancellation was approved at a special resolution passed at a general meeting of owners. It is also recognised in the Prescribed

[5] Applying the test enunciated in J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) and applied in Buffalo city Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another2011 (1) SA 8 (SCA) at paras [19] and [20]
[6] Liberty Group Ltd and Others v Mall Space Management CC t/a Mall Space Management [2019] JOL 45954 (SCA)
[7] Clause 7.1

Management Rules to the Sectional Title Schemes Management Act[8] which contains a provision similar to the agreement.

[19] A fundamental dispute which remains is whether the applicant was entitled to summarily terminate the agreement absent providing the necessary notice period envisaged in the agreement, either being two months if the conditions of the agreement were met or pursuant to a 30 day rectification notice in the event of a breach. That issue need not and cannot be determined in the present proceedings. The issue for determination is whether in the circumstances, the applicant has illustrated a clear right to the relief sought.

[20] The applicant sought both vindicatory and final interdictory relief. The requirements for vindicatory relief are trite. They are (i) ownership of the items in question; (ii) that the first respondent is in possession of the items in question and (iii) that the items in question are in existence and are readily identifiable[9]. It is not necessary for the applicant to prove that the defendant's possession of the items is unlawful[10]. The first respondent must establish that it has a right to retain possession.[11]

[21] The first respondent argued that the applicant did not make out a case for ownership of the documents and the trust account in its founding papers. I do not agree. The founding papers contain the necessary averments that the trust account is the account of the applicant and that the records belong to the applicant. These averments are not disputed.

[22] The first respondent further contended that as the agreement was not validly cancelled, it has a valid right to retain possession of the documents. To counter this contention, the applicant relied on the full bench decision in *Troskie en 'n Ander v Van*

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[8] 8 of 2011
[9] Van Der Merwe Sakereg 2nd Edition pp347-352
[10] Krugersdorp Town Council v Fortuin 1965 (2) SA 335T; Chetty v Naidoo 1974 (3) SA 13 (A)
[11] Dreyer and another NNO v AXZS Industries (Pty) Ltd 2006 (5) SA 548 (SCA) para [4]

der Walt[12] in support of the proposition that even if the agreement was not validly cancelled, and the applicant repudiated the agreement by terminating it, the first respondent's claim would be limited to one in damages as the services rendered by the first respondent are of a personal nature analogous to a contract of employment. It was argued that by virtue of nature of the agreement requiring the performance of personal services of a continuous nature and the total breakdown in the trust relationship between the parties an order for specific performance would not be granted[13]. This argument has merit. I have already referred to the fact that the applicant's averments pertaining to the irretrievable breakdown of the trust relationship between the parties were not disputed by the first respondent. This entitled the applicant to terminate the agreement. Considering the facts and the dispute which exists pertaining to the validity of the cancellation, I am not persuaded that the first respondent has illustrated that it has the right to retain possession of the documents and control of the trust account, irrespective of whether the termination constituted a valid cancellation or a repudiation of the agreement.

[23] The requirements for a final interdict are trite. They are (i) the existence of a clear right; (ii) an injury actually committed or reasonably apprehended and (iii) the absence of similar protection by any other remedy[14]. The first respondent argued that none of the requirements have been met.

[24] Regarding the existence of a clear right, the first respondent argued that the applicant did not prove or even allege a right which requires protection. The applicant contended for a clear right, based on their position as trustees of the applicant which stand in a fiduciary relationship to the applicant and the owners and have acted bona fide and in the best interests of the owners and members of the body corporate. Its case was that it is the rights of the sectional title owners (who are members of the body corporate) which require protection. I am persuaded that the applicant has satisfied this requirement.

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[12] [1994] 1 All SA 129 (O) at 134-135 and the authorities cited therein
[13] Christie's The Law of contract in South Africa, 6th Edition, p550-551
[14] Liberty Group Ltd supra, para [22]; Setlogelo v Setlogelo 1914 AD 221

[25] Turning to the second requirement, the test is whether there is a reasonable apprehension that the first respondent will interfere with the rights of the applicant with resultant prejudice. The applicant relied on the new service level agreement concluded with another managing agent which it will be obliged to pay, whilst the first respondent will pay itself its monthly retainer. It also complains of ongoing breaches and the first respondent's failure to adhere to a payment instruction to pay the invoice of the applicant's attorneys of record, albeit that this issue was raised in reply. The first respondent argued that the applicant has invaded its own rights and the first respondent is not the reason for this invasion. It contended that the applicant has thus failed to establish an injury reasonably apprehended.

[26] Considering the undisputed facts that the first respondent has not disputed that payment was not made to the correct service provider on 15 January 2021 which was not immediately disclosed to the applicant or its trustees, the defamatory statements made by its managing director and the breakdown of the trust relationship between the parties, I am persuaded that the applicant has illustrated an injury reasonably apprehended.

[27] The first respondent further challenged the availability of alternative remedies and contended that various remedies were available to the applicant. It was alleged that such remedies included a referral of the matter to mediation or arbitration, a valid termination of the agreement on two months' written notice after approval of a special resolution passed at a general meeting as specified in the agreement or the referral of the dispute to the Community Schemes Ombud under ss 38 and 39(5) of the Community Schemes Ombud Services Act ("CSOS Act") [15].

[28] I am not persuaded that the provisions of s39 of the CSOS Act avails the first respondent or constitute a suitable alternative remedy, considering the nature of the relief sought by the applicant and the limited ambit of s39(5) of that Act. Mediation would not be a viable alternative, considering the history of the matter and the stances adopted by

[15] 9 of 2011

the respective parties in this litigation. I am further not persuaded that arbitration constitutes a suitable alternative remedy to obtain the relief presently sought. The first respondent did not seek the stay of the application in terms of s6(2) [16] of the Arbitration Act[17] ("the Act"). The statutory powers afforded to an arbitrator under s14 of the Act further do not include the power to grant interim measures of protection in relation to the subject matter of the dispute. Absent such powers being afforded to an arbitrator in the agreement, a court must be approached for such relief. Considering the terms of the agreement pertaining to arbitration and the Act it cannot be concluded that the arbitrator would have the power to grant the vindicatory and interdictory relief sought, more so absent any referral of the disputes to arbitration or any proceedings pending before an arbitrator. I am persuaded that the applicant has thus met this requirement.

[29] For these reasons I conclude that the applicant is entitled to the relief sought. The normal principle is that costs follow the result. There is no reasons to deviate from this principle.

[30] I grant the following order:

1. The first respondent is directed to sign all documents pertaining to the first respondent's trust bank account held with Nedbank Limited with account number: 1908890061 which include a deed of assignment to assign its rights, title, interests and obligations in and to the trust bank account to the applicant forthwith within 5 (five) days from date of this order;

2. The first respondent is directed to hand over to the applicant all the books of account, financial records and documents ("the documents") of the applicant

[16] PLC Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA) par 7
[17] 42 of 1965.

forthwith and within 5 (five) days from date of this order, which documents include, but are not limited to:

2.1 Copies of all the documents referred to Rule 27(3) of the Sectional Titles Schemes Management Act, 2011 (Act No 8 Of 2011) and the Sectional Titles Schemes Management Regulations, promulgated on 07 October 2016.

2.2 In relation to debtors the following documents:

2.2.1 Detailed Ledger year to date from the start of the financial year;

2.2.2 Debtors contact information, listing unit number, unit owner number, unit owner e-mail addresses and unit owner contact details; and

2.2.3 Details of any current legal action / payment arrangement in place on arrears.

2.3 In relation to financial information the following documents:

2.3.1 Trial Balance sheet;

2.3.2 General Ledger year to date from the start of the financial year;

2.3.3 Journal batches year to date from the start of the financial year;

2.3.4 Cash book to date from the start of the financial year;

2.3.5 Bank Statements from the start of the financial year;

2.3.6 Copy of the last signed audited financial statements;

2.3.7 Auditor company details and contact person details;

2.3.8 Details of outstanding insurance claims.

2.3.9 Invoices (voucher files);

2.3.10 Unit transfer records;

2.3.11 Employee contracts, leave and UIF records (if applicable);

2.3.12 Income tax details and confirmation that all tax payments are up to date;

2.3.13 Last annual general meeting pack;

2.3.14 Schedule of participation quotas;

2.3.15 Insurance policy/ies and full contact details of broker;

2.3.16 Details of any outstanding issues with developers, municipalities and units;

2.3.17 Minute books and minutes of all meetings;

2.3.18 Management and conduct rules;

2.3.19 Sectional title deeds registrations and plans;

2.3.20 Policies and all forms and documents relating to security procedures;

2.3.21 Copies of all contracts with service providers;

2.3.22 POPI Act documentation.

3. Should the first respondent fail or refuse to sign the documentation in 1 above within 5 (five) days of date of this order, the second respondent is directed to give effect to this order by signing all documentation necessary on behalf of the first respondent;

4. If the first respondent fails to comply with 2 above, within 5 (five) days of this order:

4.1. The applicant or its lawfully appointed agent(s) or those appointed by the applicant to assist it in the execution of this order, are authorised to take into their possession and remove and take under their control all the documents of the applicant referred to in 2 above;

4.2. The applicant is authorised to appoint the second respondent to assist it in the execution 2 above;

4.3. The second respondent is ordered and authorised to assist the applicant in the execution of this order;

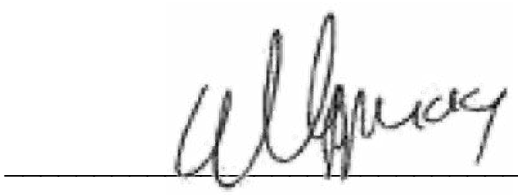
4.4. The applicant is authorised to rely on the services of the South African Police Services in the execution of this order;

4.5. The South African Police Services, its employees, or appointees are directed and authorised to assist the applicant, by lawful means, to execute this order;

4.6. The applicant, its lawfully appointed agents or those assisting the applicant in the execution of this order, are authorised to take into their possession all documents belonging to the applicant.

5. The first respondent is directed to remove the name of the applicant from its internet company profile within 5 (five) days of this order.

6. The first respondent is directed to pay the costs of this application.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

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DATE OF JUDGMENT	: 01 September 2021
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