

**IN THE HIGH COURT OF LESOTHO**  
**(COMMERCIAL DIVISION)**

**HELD AT MASERU**

**CCA/0057/2022**

In the matter between

**PLATINUM CREDIT LTD**

**APPLICANT**

**AND**

**PLATCORP HOLDINGS LIMITED**

**RESPONDENT**

**Neutral Citation:** Platinum Credit Ltd v Platcorp Holdings Limited [2022] LSHC  
199 Comm. (25 AUGUST 2022)

**CORAM:** MOKHESI J

**DATE OF HEARING:** 07<sup>TH</sup> JULY 2022

**DATE OF JUDGMENT:** 25<sup>TH</sup> AUGUST 2022

## SUMMARY

**CIVIL PRACTICE AND PROCEDURE:** *Abuse of urgency procedure- Application dismissed with punitive costs for abuse of urgency procedure- Law of property- counter application for a spoliatory relief in relation to incorporeal property- principles considered and applied.*

## **ANNOTATIONS**

### **STATUTES**

*Financial Institutions Act of 2012.*

*High Court Rules 1980*

### **BOOKS**

Cilliers & Benade **3 ed. Corporate Law**

Harms **Civil Procedure in the Superior Court,**

Herbstein and Van Winsen **The Civil Practice of Supreme Court of South Africa 5<sup>th</sup> ed. Vol.1**

### **CASES**

*Beinash v Wixley 1997 (3) SA 721*

*Blendrite (Pty) Ltd and Another v Moonsami and Another (227/2020) [2021] ZASCA 77 (10 June 2021)*

*Commissioner SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA)*

*First Rand Ltd. t/a Rand Merchant Bank and Another v Scholtz NO and Others [2006] SCA 98 (RSA); 2008 (2) SA 503 (SCA)*

*Khabo v Khabo (C of A (Civ) 72/18 [2019] LSCA 56 (01 Nov. 2019)*

*LNDC v LNDC Employees and Allied Workers Union LAC (2000 – 2004) 315*

*Makoala v Makoala LAC (2009 – 2010) 40*

*Nino Bonino v De lange 1906 T.S 120*

*Tigon Ltd v Bestyet Investments (Pty) Ltd 2001 (4) SA 634*

*Vena and Another v Vena and Others 2010 (2) SA 248 (ECP)*

*Vice-Chancellor of NUL and Another v Putsoa LAC (2000-2004) 458*

*Zietsman v Electronic Media Network Ltd and Another (771/2010) [2011] ZASCA  
169 (29 September 2011)*

*United Enterprises Corporation v STR Pan Ocean Co. Ltd [2008] ZASCA 21:  
2008 (3) SA 585 (SCA)*

## JUDGMENT

### [1] **Introduction**

This judgment has two facets to it. The main application and the counter application. Both applications are opposed. In the main application the applicant (Platinum Credit Ltd) had approached this court on an urgent basis seeking the following reliefs:

1. *Dispensing with normal rules of this honourable court pertaining to periods and modes of service due to the urgency of this matter.*
  
2. *A rule nisi be issued, returnable on the date and time to be determined by this honourable court, calling upon the Respondent to show cause if any, why:*
  - a) *This application shall not be served by edictal citation on Phillipus Fourie, an employee of the respondent based here in Lesotho pending finalization hereof;*

*Alternatively*

- b) *This application shall not be served by edictal citation via email to the corresponding officer of the Respondent pending finalization hereof;*
  
3. *The Respondent shall not be interdicted from interfering with the management of the Respondent (sic)*

4. *The Respondent shall not be interdicted from acting as the Board of Directors of the Applicant and/or management and or Principal of the Applicant.*
5. *The employees and or agents of the Respondents shall not be interdicted from interfering with the management of the Applicant and or act as the management of the Applicant.*
6. *Respondent shall not be interdicted from communicating with the Central Bank of Lesotho, the Regulator, on Applicant's behalf on issues concerning the Applicant.*
7. *It shall not be declared that the relationship between applicant and Respondent is purely that of debtor and creditor.*
8. *Costs of suit.*

[2] **Parties**

The applicant is a company registered in terms of the laws of the Kingdom and conduct its business as micro-lender. It advances money to the public and charges interest on the monies advanced. It has a Tier II licence. The respondent is a company duly registered in terms of the laws of Mauritius and is based at Port Louis, Mauritius.

[3] **Background Facts**

The applicant has two directors who are also its main shareholders, namely Ms Motena Lishea, Managing Director and majority shareholder (995 shares); Ms Nthabiseng Nthako, a director and minority shareholders (5

shares). Mr Phillipus Jacobus Fourie, the applicant's *de facto* operational manager and formerly the applicant's 50% shareholder prior to its conversion from private company to a public company and its erstwhile managing director. There are third parties who are also involved in the dealings between the applicant and the respondent: First National Bank (FNB) Lesotho, where the applicant holds four banking accounts comprising of operations account, a collections account, a disbursements account and a call account; Standard Lesotho Bank (SLB), where the applicant holds two banking accounts consisting of collections and disbursement accounts and The Central Bank of Lesotho (CBL) as the Regulator of financial institutions in terms of the Financial Institutions Act of 2012 (hereinafter 'FIA').

[4] The applicant was formerly known as Wazzah (Pty) Ltd. It was registered on the 30 November 2017. At the time of its incorporation, Mr Fourie was its 50% shareholder and the managing director. On the 31 August 2018 the former shareholders of Wazzah (Pty) Ltd transferred their shares to Ms Motena Lishea, whom Mr Fourie had been acquainted to for ten years, and Ms Nthako.

[5] On 17 January 2019, Wazzah was converted into a public company and had its name changed to Wazzah Limited. Wazzah Limited had an issued share capital of M1000 divided into One Thousand ordinary shares with a par value of M1.00 each. Ms Motena Lishea owned 995 shares and Ms Nthabiseng Nthako 5 shares. On 29 May 2020, Wazzah Limited changed its name to Platinum Credit Limited. This was done in anticipation of a sale of shares which was done on the 01 June 2020, whereby the two ladies mentioned above, entered into a share Purchase Agreement with the

Respondent represented by Mr Ignatius Obara. On the same day Lishea and Nthako resigned as directors of the applicant and the new board was “constituted.” I am using the inverted commas advisedly, in the light of the fact that the CBL has not yet approved the share purchase agreement. It is trite that in terms of the FIA, prior authorisation by the Central Bank is the requirement for share transfer agreement to be effective.

- [6] Authorisation by the CBL was accordingly sought 30 May 2022. Pending authorisation by the CBL, the *de facto* position between the parties was that the respondent advanced substantial amounts of unsecured loans to the applicant; In order to mitigate the risk of misappropriation of funds respondent’s officers were granted authorisation and signatory powers to FNB and SLB account by Ms Lishea, essentially participating in functions such as authorising disbursements, making disbursements and ensuring effective running of the payroll every month. Ms Lishea had effectively authorised the respondent, through its representatives (Fourie) to administer and to take joint control of the applicant’s daily operations. The respondent made use of its Mambu software to conduct the applicant’s daily operations pertaining to collections, disbursements and other operational payments. On 31 May 2022 the reminded the CBL that its authorisation of the share transfer agreement had been sought and wanted to know the progress regarding the matter. The latter’s response was that it recognized only Ms Lishea as the person who could engage them on the matter. Unbeknown to the respondent Ms Lishea constituted the applicant’s new board on the 13 June 2022, and this was the turning point in the worsening relationship between the parties. The respondent’s employees’ involvement in the operations of the applicant was in terms of the Management Contract which

was signed between the applicant and the respondent. The application is opposed.

[7] **Counter Application**

For convenience, the parties will be referred to as they are in the main application. In its answering affidavit, the respondent included the counter application in terms of which it sought spoliatory relief against the applicant in the main. The reliefs were couched as follows:

*“1. That the application be dealt with as an urgent application in terms of Rule 8 of the Court Rules, condoning non-compliance with procedural prescripts.*

*2. That the status quo ante be restored as at its position on 14 June 2022, whereby the Respondent (through its authorized representatives) is:*

*2.1 Granted access to the Applicant banking accounts with FNB Lesotho and the Standard Lesotho Bank;*

*2.2 Granted signatory rights to the Applicant’s banking accounts with FNB Lesotho and the Standard Lesotho Bank;*

*2.3 It’s (de facto) position pertaining to the authorization of the Applicant’s transactions and disbursements (by way of the implemented systems) be restored.*

*3. An order whereby FNB Lesotho and the Standard Lesotho Bank be authorised to give effect to the court order.*



4. A copy of the court order be served forthwith on FNB Lesotho, the Standard Lesotho Bank and the Applicant's board of directors.

5. The abovementioned order be of interim immediate force and effect, PENDING the institution of an application/action by the Respondent (within 30 days), until its finalization, broadly aimed at and with reference to the Sale of Shares Agreement entered into by the Respondent and the Applicant's shareholders, namely;

5.1 Motena Lishea and

5.2 Nthabiseng Nthako.

6. Cost to be costs in the cause.”

[8] **Factual Matrix**

Following the Constitution of the new board by Ms Lishea, as alluded to above, on the 13 June, unbeknown to the respondent, the newly appointed board made the following resolutions which affected the *status quo* mentioned above;

- (i) Messrs Fourie and Mangana be removed from their positions and evicted, and the respondent be interdicted from any management functions.
- (ii) Webber Newdigate be removed as Company Secretary and Adv. E. K Mahase appointed instead.

[9] On the same day, the Applicant, wrote a letter to Fourie advising that he is not an employee or officer of the company and that his role was to facilitate

a loan agreement between the applicant and respondent, which agreement does not bestow him with the status of being its employee. Fourie was given an order to leave the applicant's premises immediately. A similar letter was sent to Mangana. He was also ordered to vacate the premises.

[10] On 15 June 2022, Ms Lishea wrote an e-mail to FNB instructing it to have only a direct contact with her, Ms Nthako or Adv. Mahase who is the applicant's new Company Secretary. On the 19 June 2022 Adv. Mahase, directed a letter to the respondent, on behalf of the board, in which, in relevant parts, the following was communicated:

*“1. The purported “share transfer agreement” is non-existent on the basis of the following –*

- (i) Same was not submitted to the Commissioner (CBL) for pre-approval in terms of the law;*
- (ii) Neither was it signed by both parties thereto and existed only as an offer and/or intent to contract nor was it executed in accordance with its own purported terms and conditions thereto.*

*2. The purported “Management Contract” between Platcorp Holdings and Platinum Credit is unlawful and contrary to the regulations of CBL.*

*3. The purported US \$15 million apparently the basis of your concern is neither in conformity with the law and regulations of CBL, nor does*

*it reflect how same was requisitioned, approved and/or authenticated and disbursed.*

*4. The requisitioned, approved, and disbursed US \$2 million is neither reflective of pre-agreement quotation for does it reflect loan amortization of same.”*

In effect the applicant was repudiating the contract it had concluded with the respondent.

- [11] In its replying affidavit, through Ms Lishea, the applicant dealt with the respondent’s averments, but as it the factual averments between the parties are largely common cause, except the applicant’s insistence that the parties’ relationship is that of a creditor and debtor. Before pleading over, the applicant raised three of the so-called points in *limine*, namely (i) Non-compliance with the rules of this court as to form of applications; (ii) Non-joinder of the Banks and the applicant’s board of directors, and the shareholders, (iii) lack of urgency.
- [12] On the merits, the applicant insists that the purported transfer of shares by the shareholders was unlawful for non-compliance with the FIA. The long and the short of the applicant’s response is that the respondent was lawfully ousted from the functions it was accorded in the applicant company. After hearing arguments in the counter applicant, the court acceded to the spoliatory reliefs sought by the respondent and promised to deliver written reasons for the decision in due course. The order in which I propose to follow in this judgment, is to start with the main application and then conclude with the spoliation application.

## **The Parties' Respective cases**

### **[13] The Applicant's case.**

It is the applicant's case (through Ms Lishea), that it agreed to have Mr Fourie to advice on its daily operations in order to safeguard the respondent's financial interests. It argues that it was not its intention to be taken over by the respondent as the latter's employee, Mr Fourie, has access to and control of the applicant's financial assets. The applicant says what brought about its application are the activities of Mr Fourie within the applicant which seem to interfere with its smooth running. As an example of the said interference, Mr Fourie, even contacts the Regulator on behalf of the applicant.

### **[14] The Respondent's case.**

The respondent, as already said, opposes this application and had raised a points in *limine* that the matter is not urgent in view of the two-year working relationship between the parties; that it amounts to abuse of court process; that the reliefs sought are legally untenable, and failure to satisfy the requirements of final interdict. On the merits, it argues that this application goes against the *de facto* working relationship of the parties and that the orders sought are impractical. I turn to deal with the main application and the issues raised.

### **[15] Abuse of urgency procedure**

It is trite that the urgency procedure as provided for in Rule 8 (22) of the High Court Rules 1980 is invoked only there are "... extraordinary

circumstances.... to prevent immediate and serious damage, prejudice or harm being caused” (**LNDC v LNDC Employees and Allied Workers Union LAC (2000 – 2004) 315 at 325 B – C**).

[16] It is equally trite that urgency relates to the abridgement of the periods and forms provided for in the rules of this court, and does not relate to the substance of the dispute between the parties and for that reason, it is not “a prerequisite for a substantive relief” (**Commissioner SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA) at para. 9**). The court stated that where urgency is determined not to exist, the appropriate order is to strike the application from the roll and not to dismiss it. In determining whether urgency exist, some of the following factors are considered:

*“(a) the consequence of the relief not being granted*

*(b) whether the relief would become irrelevant if it is not immediately granted.*

*(c) whether the urgency was self-created.” (New Nation Movement NPC and Others v President of the Republic of South Africa and Others 2019 (9) BCLR 1104 (CC) (3 July 2019) at par. 8)*

Anyone familiar with the jurisprudence of the courts in this jurisdiction will attest to the fact that for the two decades and more, the courts have lamented the fact that litigants and counsel abuse urgency procedure and have even warned that in the exercise of its inherent power to protect itself and others against abuse of its processes, the applications may be dismissed and made costs *de bonis propriis* against counsel (**Vice-Chancellor of NUL and Another v Putsoa LAC (2000-2004) 458 at 462 F – I**: on abuse of urgency

procedure see also the views expressed in **Vena and Another v Vena and Others 2010 (2) SA 248 (ECP) at paras. 5 – 7**. On the one hand, abuse of court process in an issue to be determined on the basis of the circumstances of each case and does not have a catch-all meaning to be used to characterize the circumstance of every case (**Beinash v Wixley 1997 (3) SA 721 at 734 F – G**).

[17] In the present matter the parties have known each other for two years with the respondent advancing substantial unsecured loan amounts to the applicant. Banking services, disbursements and payments were made through the Mambu system in terms of which Ms Lishea would request the respondent to load payments and for the latter to disburse the funds. Authorization was only done by the respondent through Mambu system to make payments, disbursement and to effect payroll. This was done through the bank accounts operated by the applicant. Since the conclusion of the agreement for the purchase of shares, Mr Fourie was posted to the applicant to oversee the utilization of funds advanced.

[18] In September 2020 the Forex application from First National Bank of Lesotho/Central Bank of Lesotho was initiated. But during this time the regulator's authorization was not sought to effect the transfer of shares. It is common cause that during this time Covid-19 had caused havoc everywhere on the globe and this country was no exception as the country was operating on running lockdowns. It should be stated that on 01 June 2020, the applicant engaged Mr Fourie on a fixed term contract as Operations Manager and Wayne and Barratt signed on behalf of the applicant as *de facto* directors. Fourie's remuneration was therefore paid out of the

applicant's coffers. With this little uncontested factual background, it is clear that the applicant's directors granted the respondent's officials unprecedented and far-reaching access to the applicant's assets even before share transfer could be effected. This state of affairs has been going on for two years until earlier this year when things took an unexpected turn. In the light of these facts should the applicant have approached this court on an urgent basis, as if to deal with a situation of sudden emergency which could occasion harm or prejudice to its interests, when its directors consciously for the past two years had granted the respondent's representatives access to its bank accounts and its operational machinery. It should be said unprecedented and far-reaching access in view of the fact the CBL had not yet given a green light to the share-purchase agreement between the parties. My considered view is that the lodging of the present matter on an urgent basis was an abuse of court process which should attract a dismissal of the matter with punitive costs to mark this court's displeasure about this unabating conduct by legal practitioners.

[19] It should, however, be stated that by dismissing this case on a procedural ground, this court is by no means shutting its doors on the face of the applicant, because if advised, it can re-enroll the matter on proper notice. Plea of *res judicata* would not be sustainable in the circumstances. I am supported on this position by the following decisions: **Zietsman v Electronic Media Network Ltd and Another (771/2010) [2011] ZASCA 169 (29 September 2011) at par. 14; United Enterprises Corporation v STR Pan Ocean Co. Ltd [2008] ZASCA 21: 2008 (3) SA 585 (SCA) at para.9**. Dismissal of a case in these circumstances is an equivalent of an absolution from the instance in actions (Herbstein and Van Winsen **The**

**Civil Practice of Supreme Court of South Africa 5<sup>th</sup> ed. Vol.1** at 924 and the authorities cited). The conclusion that the application be dismissed renders it unnecessary for this court to deal with other points in *limine* raised by the respondent.

[20] **Counter Application**

As already stated, after hearing arguments on the counter application (spoliation), I made an order granting the reliefs sought and promised to deliver written reasons in due course. In the counter application, the respondent sought the restoration of the *status quo ante* pending the institution of proceedings to resolve the share sale agreement dispute. Perhaps, at the risk of being repetitious, the obtaining situation at which this application is directed, is that:

- (i) The parties have been jointly managing the applicant's daily operations for the past two years.
- (ii) The respondent was in possession of the applicant's corporeal property (bank accounts etc.) which made it possible for the respondent's employees to authorise transactions, make disbursements and run applicant's payroll.

[21] In replying to the court application, the applicant raised two points in *limine*, namely, (i) lack of urgency, (ii) the impermissibility of the respondent's consolidated answering affidavit serving both as answer and a founding affidavit in the counter application. (iii) non-joinder of the applicant's board



of directors and the shareholders. I turn to deal with the points in *limine* raised. The issue related to urgency is without any merit given that it is the applicant who first lodged the application on urgent basis. The respondent was therefore entitled to include its counter application in the answering affidavit as I demonstrate in the ensuing discussion of the next point in *limine*.

(iii) **Impermissibility of including the counter application in the answering affidavit.**

In terms of Rule 8(16) of the High Court Rules 1980:

*“8(16) Any party to an application may bring a counter-application or may join any party to the extent as would be competent if the party wishing to bring such counter-application of join such party were a defendant in an action and the other parties to the application were parties in such action.”*

[22] Like in the equivalent South African Rule 6 (7), the above sub-rule is silent about how the counter application should be launched. The learned author Harms **Civil Procedure in the Superior Court, B. 57** explains in the following manner why a separate affidavit pertaining to counter application is unnecessary:

*“If a respondent requires more than the dismissal of the application and a consequent order for costs, it is incumbent upon him to make a counter-application. The rules are silent about how this should be done, but by analogy with the bringing of a counterclaim in actions it is*

*unnecessary, although preferable, to file a separate notice of motion. It is sufficient to include the prayers in the answering affidavit. The answering affidavit may also serve as the founding affidavit in the counter-application. The applicant's replying affidavit then serves additionally as his answering affidavit and the respondent has a right of reply."*

[23] In the present matter the respondent did exactly what the learned author says is sufficient for the purposes of a counter application. I therefore, find that the point is without any merit.

(iii) **Non joinder of the applicant's shareholders and the board of directors.**

This point is without any merit because the shareholders are part of these proceedings, the main one has even deposed to the founding affidavit. (See: **Makoala v Makoala LAC (2009 – 2010) 40** at 43 at para.6, on the approach to non-joinder issue when raised). As regards board of directors, there was no need to join them where the company is sued. I turn to consider the merits of the application.

[24] The *mandament van spolie* remedy is aimed at restoring possession which has been taken away without consent or forcibly: In a well-known case of **Nino Bonino v De lange 1906 T.S 120 at 122**, it was stated to be:

*"[S]poliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right."*

This remedy is granted in order to restore possession before an enquiry into the right of ownership or legality of possession is enquired into. (**Nino Bonino v De Lange ibid at p. 122**). It is trite that this remedy is also available where incorporeal property is spoliated (**Blendrite (Pty) Ltd and Another v Moonsami and Another (227/2020) [2021] ZASCA 77 (10 June 2021) at para. 9**). In this incident it used to protect “the quasi-possession” of incorporeal rights. However, not all incorporeal rights may be protected through this remedy:

*“The mandament van spolie does not have a “catch-all function” to protect the quasi-possession of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament van spolie is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligation is claimed: its purpose is the protection of quasi-possessio of certain rights. It follows that the nature of the professed right, even if need not be proved, must be determined or the right characterised to establish whether quasi-possessio is deserving of protection by the mandament. Kleys seeks to limit the rights concerned to ... such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of “mere” personal rights (or their exercise) is not protected by the mandament. The right held in quasi-possession must be a ‘gebruiksreg’ or an incident of the possession or control of the property (**First Rand Ltd. t/a Rand Merchant Bank and Another v Scholtz NO and Others [2006] SCA 98 (RSA); 2008 (2) SA 503 (SCA) at para. 13**: (underlining is provided for emphasis).*

[25] Possession worthy of protection need not be exclusive but can be joint (**Khabo v Khabo (C of A (Civ) 72/18 [2019] LSCA 56 (01 Nov. 2019)** at para. 17. All that the applicant must allege and prove is that he was in peaceful and disturbed possession (**Khabo v Khabo ibid at para. 16**). In the present matter, in order to succeed, the respondent had to prove that it had quasi-possession of the right and that it actively exercised it until it was unlawfully spoliated. All it needed to prove was the factual position of the exercise of such a right not its physical existence (**Tigon Ltd v Bestyet Investments (Pty) Ltd 2001 (4) SA 634** at 642 C – D).

[26] In the present matter, it is common cause that the applicant's shareholders and the respondent signed a share purchase agreement in terms of which all the shares in the applicant were to be transferred to the respondent. It is also common cause that since the conclusion of the agreement, the applicant provided the respondent (its agents) with joint control of certain of its bank accounts and its joint management. In terms of this arrangement, the respondent would make authorizations, make disbursements and managed payroll, and even provided its main banking platform software for carrying out these transactions (Mambu System). Was the respondent dispossessed of any of the incorporeal rights? In order to answer this question, resort must be had to the Companies Act 2011 and the FIA.

[27] In our law a person becomes a shareholder and a member of the company by means of a contract, which can either be through applying for shareholding and being allotted the shares or through acquisition of shares by transfer.

[28] In terms of section 28 of the Companies Act 2011 shares in a company may be transferred by entry of the name of the transferee of the shares in the share register of the company (transferor). In the circumstances of the case, this legal position must be read with the provisions of section 19(2) of the FIA, which provides that:

*“(2) Without prior approval of the Commissioner, a person may not acquire or hold either directly or indirectly, acting alone or through or in concert with other persons, any interest in the capital share of a local financial institution which would confer upon him a voting share that reaches or exceeds ten percent of the total.”*

[29] The parties in the present matter concluded a share purchase agreement. The shares which the respondent bought could not be transferred (registered in the applicant’s share register) before the CBL could approve of the sale as it fell within the threshold provided by s. 19(2).

[30] The applicant contends that the share transfer agreement had not taken place in accordance with the Companies Act 2012, renders the whole transaction unlawful. And this is stated in para. 8.1 of its replying affidavit:

*“...Transfer of shares especially of financial institution is regulated by both the Companies act and the Financial Institutions Act. Therefore any purported transfer of shares in a financial institution not done in accordance with the two laws is not only unlawful but does not factually exist. Therefore the Applicant in reconvention was lawfully ousted from the critical functions of the Applicant...”*

[31] As I understand the factual situation of the present matter, it is inaccurate to say that the shares were transferred to the respondent. The transfer was awaiting the approval by the CBL. Without the shares being transferred to the respondent, what right did the latter have in the said shares? The position regarding unregistered shares has been stated as follows:

*“the transferor holds the shares and the rights deriving from the shares for the exclusive benefit of the transferee. The transferor will have to act in accordance with the instructions of the transferee as the beneficial holder and owner of the shares” (Cilliers & Benade 3 ed. Corporate Law para. 18.16)*

[32] In the circumstances, therefore, it can hardly be surprising that the respondent exercised the amount of influence and control over the affairs of the applicant. When the transferor (Ms Lishea and Nthako) granted the respondent the far-reaching powers in the applicant, it was in recognition of the share purchase agreement. In my considered view, therefore, when the applicant ousted the respondent from controlling the applicant, it committed an act of spoliation which warranted this court’s intervention to reverse this act of self-help.

[33] **Costs**

The applicant lodged the present matter on an urgent basis within highly compressed periods. Within those tight time frames set by the applicant’s counsel, the respondent managed to file the answering affidavit as well as the head of argument. On the 04 July 2022 when both counsel appeared before court, Adv. Tšenase had not yet filed the applicant’s heads of argument, and was directed by this court that they should be filed by 13:00

hours that day, and postponed the matter for hearing on the 06 July 2022. Mr Tšenase did not file the heads as directed by the Court, instead they were filed on the hearing date, 06 July 2022 accompanied by a medical prescription by Mago Clinic together with Mr Tšenase's explanation that he did not file the heads of argument because he fell ill. But even if I were to accept that he got ill on the 04 July 2022, there was no explanation why he could not file same on the 05 July 2022. In view of this unsatisfactory state of affairs, I requested Mr Tšenase to file an affidavit explaining why he should not be made to pay costs *de bonis propriis* as a mark of this court's displeasure at his conduct. Still, he did not file the said affidavit despite being given an opportunity to do. So, the costs order which will follow, will be representative of this court's censure of this behaviour and the abuse of urgency procedure.

[34] In the result the following orders are made:

- (i) The main application is dismissed with costs on attorney and client scale which costs shall include costs consequent upon employment of senior counsel, while Adv. Tšenase should pay 15% of the costs personally – *de bonis proprii* on the same scale.
- (ii) Counter Application is granted as prayed with costs.

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**MOKHESI J**

**For the Applicant:**      **Adv. Tšenase instructed by K.M Thabane & Co.  
Attorneys**

**The Respondent:**      **Adv. Jaco Roux SC instructed by Webber Newdigate  
Attorneys**