REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14018/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

6/12/16
DATE

SIGNATURE

In the matter between:

HLAHLA, MONHLA WILMA	Applicant
and	
ELS, GREGORY JOHN	First Respondent
PRAXLEY CONSORTIUM 3 (PTY) LTD	Second Respondent
GWAGWA, NOLULAMO NOBAMBISWANO	Third Respondent
PRAXLEY CONSORTIUM 11 (PTY) LIMITED	Fourth Respondent
PRAXLEY CORPORATE SOLUTIONS (PTY) LIMITED	Fifth Respondent

J U D G M E N T

WEINER, J:

INTRODUCTION

[1] The applicant herein is a 30% shareholder in the second respondent (the company). She seeks to enforce her statutory rights, as shareholder to enable her nominated director to be elected to the board of the company. She seeks to do so, either by the means of a poll by the board or the convening by the board of the company of a shareholders' meeting.

[2] In terms of the shareholders' agreement, any shareholder holding more than 20% of the shares in the company is entitled to exercise voting rights in respect of a particular director.

[3] The applicant is supported in this relief by the third respondent who holds 25% of the shares in the company. There is a dispute as to whether or not the fourth respondent's decision to support the application is valid in view of the fact that the first respondent (Els) is a director of the fourth respondent but was not involved in the decision to support the applicant. The company's sole director, Els and the fifth respondent (Praxley Corporate), a company controlled by Els, oppose the relief sought. (the opposing respondents)

[4] It is common cause that Els is the company's sole director. Praxley Corporate holds 20% of the company's shares. The applicant contends that although Praxley Corporate nominated Els as a director in terms of the shareholders' agreement, the decision is invalid as Praxley Corporate does not hold more than 20% of the shares in the company. (emphasis

added). Although not strictly relevant to the present proceedings, it is noted that the applicant and Els are married to each other, but are presently involved in an acrimonious divorce.

BACKGROUND

[5] Els was called upon, at the instance of the applicant and the third respondent in terms of section 61(3) of the Companies Act 2008 (the Act) to convene a shareholders meeting to enable the election of nominated directors. Section 61(3) reads as follows:

> *"(3) Subject to subsection (5) and (6), the board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and-*
>
> *(a) each such demand describes the specific purpose for which the meeting is proposed; and*
>
> *(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting".*

[6] Els, as the sole director failed to accede to the request to convene a meeting. It is clear that he does not intend to do so as appears from the allegations in his answering affidavit.

[7] The applicant accordingly seeks relief in terms of section 61(12) of the Act which provides that, if a company fails to convene a meeting when required by shareholders in terms of section 61(3), a shareholder may apply to court for an order requiring the company to convene a meeting on

a date and subject to any terms that the court considers appropriate in the circumstances.

DEFENCES RAISES BY THE OPPOSING RESPONDENTS

[8] The opposing respondents contend that:

8.1. The applicant should have resorted to arbitration as provided for in the shareholders' agreement.

8.2. It is inappropriate for the proposed directors to be appointed as they are not fit to be directors.

8.3. That the applicant has come to court with unclean hands and an ulterior motive.

[9] The opposing respondents submit that the application is brought with an ulterior motive and for that reason alone should be dismissed.

ARBITRATION

[10] In regard to the respondents' contention that the applicant should have resorted to arbitration proceedings in terms of the shareholders' agreement, the applicant argues that section 61(12) of the Act provides for the shareholder to apply to a court for an order. The opposing respondents dispute the applicant's entitlement in terms of clause 6.1.2 of the shareholders' agreement to appoint directors of the company. This dispute, they state, is a precursor to the applicant being entitled to call for a meeting or the conducting of a poll for the purposes of the applicant appointing directors of the company. This dispute should first be referred to arbitration for decision. The relief sought by the applicant is not a

disputed issue in the sense in which it is used in the arbitration agreement. The "dispute" must have some factual or legal basis. The applicant's entitlement as shareholder is provided for in terms of the shareholders' agreement. This cannot be a legitimate dispute.

[11] The respondents also referred to an agreement in terms of which it was agreed between the applicant and Els that he would have control of the board of the company. This is denied by the applicant. Therefore, respondents contend that this dispute should be referred to arbitration. However, what this defence fails to take into account is that the applicant and Els could not have entered into such agreement on behalf of the company without the involvement of the other shareholders in the company. Therefore, any such agreement would be of no force and effect.

[12] The opposing respondents contend further, in this regard, that the applicant is not entitled to appoint directors of the company especially the specific proposed directors. Therefore, the applicant cannot call for such meeting and cannot compel the company or Els to convene the meeting. The respondents contend that this is a further dispute which should be decided by arbitration. I disagree for the reasons set out above and for the reasons raised in the authorities referred to below.

PROPOSED DIRECTORS

[13] In dealing with why the proposed directors are inappropriate, the opposing respondents refer to several issues and litigation proceedings in which the parties are involved. They require the court to investigate these

contentious issues which the applicant contends are vexatious, scandalous, defamatory and irrelevant.

[14] It is common cause that none of the proposed directors are disqualified or ineligible as provided for in section 69 of the Companies Act. Reference was made by the applicant to *Yende v Orlando Coal Distributors (Pty) Ltd*[1], in which numerous allegations and counter-allegations were made by directors against each other. The court declined to intervene and stated that it was for the company by way of a shareholders meeting to deal with the removal and appointment of directors. This case was cited with approval in *Breetveldt & Others v Van Zyl and Others*[2].

[15] Applicant further contends that the right to participate in a meeting and the right to vote are inherent to rights of shareholders and that it is not competent for the board or any one director to frustrate that right by not holding a shareholders meeting. See *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd and Others*[3].

[16] The opposing respondents also seek by way of a counter-application in terms of section 61(5) of the Act the setting aside of the demand of the applicant and third respondent in terms of section 61(3) of the Act on the grounds that the demand is frivolous and/or vexatious.

[17] The result of this counterapplication will be determined by the conclusion reached in regard to the main application.

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[1] 1961(3) SA 314 (W) at 316B-C
[2] 1972 (1) SA 304 (T) at 317H, 318F
[3] (43825/2012) [2013] ZAGPJHC 40 (13 March 2013) at para [27]

[18] In my view, this entitlement of the applicants arises from the shareholders agreement and from the Companies Act and, as stated above, a court will not interfere with these internal issues.

ULTERIOR MOTIVE

[19] Els contends that the applicant has not disclosed various disputes that exist between the parties and that there is an ulterior motive for this application. He refers to the fact that the relationship between him and the applicant and the other shareholders has broken down consequent upon what transpired in reference to various litigious proceedings. Els presents allegations to the court without any factual basis that the purpose of this application comes with an ulterior motive. He alleges that the applicant intends to prevent certain arbitration proceedings from taking place; that she now has an interest in the company, because of the pending divorce; that there are certain other arbitrations between Natco and the company, which the applicant seeks to control and that the applicant has sought to undermine the financial wellbeing of the company.

[20] These allegations are made without any factual basis and are made in a bald and sketchy manner, without demonstrating what the ulterior motive is. For example, the Natco arbitration did continue and was in fact decided in favour of the company. These proceedings do not appear to directly affect the applicant. Els refers to certain correspondence between the applicant and the third and the fourth respondents' representatives from which he says it appears that they are intent on gaining control of the

company. If the applicants are the majority shareholders, they are entitled to control the company. Other shareholders have their rights as minorities in terms of the Act.

[21] All of the allegations contained in Els' affidavit are disputed in this regard. The opposing respondents have failed to make out a case that the purpose of the application has an ulterior motive.

[22] Els (whose directorship may in fact be irregular because of the lack of more than 20% shareholding) seeks to continue to be the sole director of the company of which "he" is a minority shareholder and which company was formed for BEE purposes. He claims that it is his fiduciary duty to ensure that certain people nominated as directors are not appointed as directors. This is not for the first respondent to decide. It is for the shareholders to decide who should be their nominated directors. The internal workings of the company can then be implemented in terms of the Act and any other legislation which may be applicable. It is not for the court to involve itself in making decisions in regard to alleged improprieties of the proposed directors and it is not for the court to delve into the side issues which appear to be vexatious and in certain instances defamatory. See *Louw and Others v Richtersveld Agricultural Holdings Company (Pty) Ltd and Others*[4]. They are certainly irrelevant to the present proceedings.

[23] In regard to the fourth respondent, Nemukula and the applicant are the only shareholders of the fourth respondent. They accordingly believed that they could represent the fourth respondent's interests in seeking the

[4] (1189/2010) [2010] ZANCHC 54 (29 October 2010) para [36]

appointment of Nemukula as a director of the company. Els states that they cannot represent the fourth respondent as he is the director thereof. It is not necessary for this court to determine this issue. It is common cause that the fourth respondent is not represented on the board of the company, as it is entitled to be. An order will, in the court's discretion, be made in this regard.

[24] Although the third respondent is not an applicant she supports the relief sought by the applicant and is entitled to do so in the capacity as a shareholder of the second respondent.

[25] The respondents have been unable to demonstrate that the proposed directors are either ineligible or disqualified from being appointed or that the application is brought for an ulterior purpose.

CONCLUSION

[26] As the applicant relies upon a statutory remedy afforded by section 61(3) read with section 61(12)(b), a shareholder is entitled to apply to court for an order requiring the company to convene a meeting. In my view, the fact that there is an arbitration clause is not applicable to this application.. It is clear that the applicant has the right as a shareholder to appoint a director.

[27] The allegations by the opposing respondents as to the alleged improprieties of the proposed directors and the ulterior motive behind this application are not issues that the court is obliged to have regard to in an

application of this nature. See *Yende v Orlando Coal Distributors (Pty) Ltd supra* [5]and *Breetveldt & Others v Van Zyl and Others supra*[6].

[28] This also relates to the allegation that the applicant has come to court with unclean hands in failing to deal with the extraneous issues which the first respondent has raised. It is my view that the allegations made in the answering affidavit and more particularly in paragraphs 24 to 43, 48 to 69, 72 and 73 and 125 to 128 are not only irrelevant but vexatious and in certain instances defamatory. The opposing respondents are aware of the fact that in terms of the Act and the shareholders' agreement, the relief which the applicant seeks should be granted and that the court would not have regard to the disputes between the parties. It is for the shareholders to regulate their affairs by adopting appropriate resolutions. The opposing respondents have various other remedies which they can exercise in terms of the Companies Act if the applicant and/or the other directors proposed do not act in the best interests of the company.

[29] In terms of the Act, the appointment of directors occurs either by way of a shareholders meeting convened pursuant to section 61(1) or by way of polling pursuant to section 60(3) of the Act. The opposing respondents contend however that section 61(12) of the Act provides for a shareholder being entitled to compel the company/the board to convene a shareholders meeting. The Act does not contain a provision entitling a shareholder to compel the company/board to conduct a poll in terms of

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[5] Supra fn1
[6] Supra fn2

section 60(3) of the Act. The opposing respondents accordingly contend that the relief relating to polling is incompetent.

[30] I do not intend to deal with whether or not the relief sought (in terms of which the applicant seeks polling) is competent or not, as, the alternative remedy is certainly competent and will accordingly be granted.

[31] In view of what is set out the first, second and fifth respondents' counter-application falls to be dismissed.

[32] The court has a wide discretion to make an order, subject to any terms it deems appropriate in terms of Section 61(12) of the Act). I accordingly, intend to order that all shareholders of the company, other than the fifth respondent, are entitled to nominate directors. Els has already been nominated by the fifth respondent. If this nomination is considered invalid, the other shareholders/directors may take whatever action the deem necessary in the future.

[33] Accordingly there will be an order in the following terms:

1. Directing the second respondent, through the first respondent, within 5 (five) days of the grant of this order, to call a meeting of shareholders of the second respondent at the offices of Cowan Harper Attorneys, 136 Sandton Drive, Sandton for the election:

   1.1 by the applicant, or her appointee, which she may nominate before the meeting is held;

1.2 By the third respondent, or her appointee, which she may nominate prior to the meeting being held.

1.3 Of any person that the fourth respondent may nominate as its appointee

as directors of the second respondent.

2. Such meeting is to be called on a date to be agreed upon between the applicant's attorneys and the first respondent and failing such agreement within 5 (five) days of the grant of the order on such date as determined by the applicant's attorneys.

3. Directing the first respondent to take all steps necessary to give effect to the aforegoing including giving the requisite notice in terms of section 62 of the Companies Act, failing which the applicant is hereby authorised to do so.

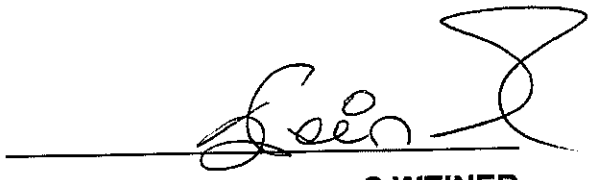
4. Directing that Stephen Sacks a qualified auditor and Johannesburg attorney is to chair the meeting and if he is unavailable such person as nominated by the Johannesburg Bar Council.

5. The costs of this application are to be paid by the first respondent.

6. The allegation contained in paragraphs 24 to 43, 48 to 69, 72 and 73, 125 to 128 are struck out as vexatious, scandalous and/or irrelevant.

7. The first respondent is to pay the costs of the application to strike out on an attorney and client scale.

8. The counterapplication is dismissed with costs.



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JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

For the Applicant: Adv B M Gilbert

Instructed by: Cowan-Haper Attorneys

For the Respondents: Advocate L Hollander

Instructed by: Schindlers Attorneys

Date of hearing: 22 November 2016

Date of Argument: 22 November 2016

Date of Judgment: 6 December 2016