REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2021/17568

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

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SIGNATURE **DATE:** 22 October 2021

In the various matters between:

MICHAEL JOHN BARENBRUG	Applicant
And	
CRAIG MATJEE	First Respondent
MOTSAMANE BERNARD MATHOSI	Second Respondent
MATHOSI ENGINEERING SERVICES (PTY) LTD	Third Respondent
BANZI TWALA	Fourth Respondent
METSI PROJECTS (PTY) LTD	Fifth Respondent
MARTIN JOHN SUTER	Sixth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Seventh Respondent

And

In the Matter **CASE NO:23794/2021**

MARTIN JOHN SUTER	First Applicant
And	
MICHAEL JOHN BARENBRUG	Second Applicant
CRAIG SERETLWA MATJEE	First Respondent
MOTSAMANE BERNARD MATHOSI	Second Respondent
BANZI TWALA	Third Respondent
MATHOSI ENGINEERING SERVICES (PTY) LTD	Fourth Respondent
METSI PROJECTS (PTY) LTD	Fifth Respondent

JUDGMENT

SIWENDU J

Introduction

[1] The court is seized with three applications and is called upon to determine matters involving (1) the composition of the board of the fifth respondent, (2) the lawfulness of the suspension and removal of one of its directors and (3) the validity of the cancellation of the company's shareholders' agreement two of the fifth respondent's shareholders.

[2] Mr Barenbrug launched the first application (the Barenbrug Application**)** on 12 April 2021 against Mr Matjee, Mr Mathosi, Mathosi Engineering Services (Pty) Ltd, Mr Twala and the CIPC. He sought an order to set aside the:

[2.1] appointment of Mr Matjee as a director of Metsi Projects (Pty) Ltd on 25 November 2020;

[2.2] notice of the meeting of 16 March 2021 purporting to convene a meeting of directors of Metsi on 18 March 2021; and

[2.3] the resolution purportedly passed at the meeting of 18 March 2021 suspending and/ or removing Mr Barenbrug as director of Metsi.

[3] He also sought an order directing that the Companies and Intellectual Property Commission(CIPC) amends its records by removing Mr Matjee from the register of directors of Metsi.

[4] Mr Suter and Mr Barenbrug jointly launched a second application (the Suter Application**)** on an urgent basis On 14 May 2021 against the same respondents as in the Barenbrug application above.

[5] As Part A, of an interim relief, they sought an urgent order:

[5.1] interdicting and restraining Mr Matjee, Mr Mathosi and Mr Twala from assaulting intimidating, and threatening Mr Suter and Mr Barenbrug or their service providers and/or representatives; and

[5.2] an order prohibiting them from interfering with the business of Metsi, its employees and or service providers.

[6] As Part B, and for a final relief, they sought an order declaring that the shareholders' agreement entered between Mr Matjee, Mr Mathosi, Mr Twala and Mathosi Engineering Services (Pty) Ltd was validly cancelled.

[7] On 26 May 2021, Part A of the Suter application was resolved. The respondents agreed to be restrained albeit without admitting liability in a court order by Francis J. Part B of the relief about the validity of the cancellation of the shareholders' agreement was postponed *sine die*.

[8] Within weeks after the court order of Francis J, Mr Suter and Mr Barenbrug jointly launched a second urgent application (the Urgent Interlocutory Application**)** which served before me on 6 July 2021. They sought an order:

[8.1] Declaring that the notice dated 25 June 2021 delivered by Mr Twala convening a shareholders meeting of Metsi on 9 July 2021 be declared invalid and set aside;

[8.2] That Mr Matjee, Mr Mathosi, Mr Twala and Mathosi Engineering Services (Pty) Ltd, or anyone acting through or on their behalf be interdicted, restrained and prohibited from:

- Proceeding with a shareholders meeting of Metsi convened on 9 July 2021;
- Voting on the proposed resolution contained in the Notice dated 25 June 2021;
- Convening any shareholders or directors meeting of Metsi with the purpose of tabling a resolution to remove Mr Suter as director of Metsi; and
- Voting at any shareholders or directors meeting of Metsi on a resolution to remove Mr Suter as director of Metsi

[9] On 8 July, I granted an interdictory relief affecting the rights of all the parties, the salient features which included *inter alia*:

[9.1] Holding in abeyance the implementation of the purported removal of Mr Barenbrug as a director;

[9.2] Suspending the convening of shareholder meetings and passing of shareholder resolutions;

[9.3] Holding in abeyance the dispute pertaining to the cancellation of the shareholders' agreement,

[9.4] The provision of access to information pertaining to the financial affairs of the company by the respondents;

[9.5] The suspension of any further distributions and/ or payments of dividends;

[9.6] The future conduct of the affairs the company pending the final determination of the issues;

[10] In addition to the above, I certified the application a commercial case in terms of the Commercial Court Practice Directive and ordered that the Barenbrug Applications under case number 2021/17568 and the Suter Application under case number 23794/2021 (to the extent of the determination of Part B of the application about the validity of the cancellation of the shareholders' agreement) be consolidated and postponed for hearing on 26 and 27 July 2021.

[11] The applicants are the founders and directors of Metis Projects (Pty) Ltd. Other than in respect of the Companies and Intellectual Property Commission (CIPC) in the Barenbrug application, the applicants and respondents are the same. It is also fair to say that Mr Suter and Mr Barenbrug make common cause with one another on all the material issues in the dispute. Even though Mr Barenbrug cited Mr Suter as the sixth respondent in the Barenbrug application, he included him as an interested party. No relief was sought against him.

[12] As will be evident from the judgment, the issues germinate from similar facts. Both parties agreed to the consolidation. In this judgment, unless required by the context, I refer to Mr Barenbrug and Mr Suter jointly as the applicants.

The Respondents

[12] Mr Matjee (Mr Matjee), is the first respondent and a director of Mathosi Engineering Services (Pty). The company conducts its business from Unit 2 Evergreen Park, Corner Sam Green and Evergreen Road, Tunney Ext 9, Germiston. Mr Mathosi (Mr Mathosi) is the second respondent and a director of Mathosi Engineering Services (Pty).

[13] Mathosi Engineering Services (Pty) Ltd (MES) is the third respondent and a registered company as referred to in paragraph 4 above. Mr Twala, is the Fourth respondent, and an adult male employed by Metsi based at 368 Oak Avenue Ferndale Randburg, Gauteng. Unless otherwise required by the context, I refer to Mr Matjee, Mr Mathosi, MES and Mr Twala as the respondents.

[14] Metsi Projects (Pty) Ltd (Metsi) is the fifth respondent and a registered company which conducts its business from 386 Oak Avenue, Ferndale, Randburg. Metsi is joined as an interested party and there is no relief sought against the company.

[15] At the hearing of the applications, all the parties agreed that the interim interdict referred to in paragraph 9 above, resolved the issues in respect of the urgent interlocutory application. Accordingly, nothing remained for determination in respect of that application. The applicants had also taken issue with the late delivery of the answering affidavit by the respondents which was due by 14 May 2021. The parties had resolved that issue amongst themselves.

[16] What remained for adjudication were the disputes pertaining to (1) the purported appointment of Mr Matjee as director of Metsi; (2) the purported removal of Mr Barenbrug as a director of Metsi, and (3) the validity of the notice of the meetings convened, (4) the resolutions taken and (5) the validity of the cancellation of the shareholders' agreement entered between the applicants and the respondents.

[17] As already alluded to, there is a common factual history and background in respect of all the applications. It is necessary to provide a detailed background drawn from both applications to give the full context of the genesis of the litigation.

Background

[18] The applicants have been business partners since 1998. They traded as members of a close corporation which sold and marketed water treatment products as well as transportation of water, sewerage and effluent. It was a common cause that the applicants operated their business informally.

[19] In 2004**,** they registered Metsi, then a close corporation. In order to meet the Broad Based Black Economic Empowerment (BBBEE) policy imperatives, they introduced black members to the close corporation. One of the members died in a car accident in 2007 and the second member resigned from the business in March 2016.

[20] In August 2016, the applicants converted the close corporation into a proprietary limited company in terms of the Companies Act No 71 of 2008, and commenced trading as Metsi Projects (Pty) Ltd. Simultaneously, with the conversion, they each disposed 5.5% their respective shares and sold these to Mr Twala. Mr Twala became an effective 11% shareholder and director of Metsi from 28 March 2017.

[21] In a second transaction in February 2017, the applicants each disposed a further 20% of their respective shares in Metsi to Mathosi Engineering Services (Pty) Ltd (MES) for a consideration of R 7.5m. MES paid R2m upfront for the shares. The balance was to paid within five years from dividends received. Thus, MES became a majority shareholder with an effective 40% shareholding in Metsi. On 28 March 2017, Mr Mathosi of MES became a director of Metsi. Mr Suter and Mr Barenbrug each retained 24.5% of the shares. By virtue of the sale of the shares to Mr Twala and to MES, Metsi became a 51% black owned company.

[22] The relationship between the applicants and the respondents is governed by a shareholders' agreement concluded in March 2017. Mr Twala, Mr Suter and Mr Barenbrug were involved in the day to day operations of Metsi. In his founding affidavit, Mr Barenbrug states that Mr Twala was "an employee" while he and Mr Suter were "the executive directors". Mr Barenbrug also states that it was not contemplated that MES would participate in the running of the operations of Metsi.

[23] Despite the terms of the agreement, the applicants allege that all shareholders agreed that Mrs Sarah Mathosi (Mr Mathosi's mother) be appointed as an additional director of Metsi because of her credentials as a black woman. The appointment was made at the request of Mr Mathosi and as a favour to him. Mrs Sarah Mathosi became a director with effect from 28 March 2017. However, she resigned from the Board in February 2020. Mr Mathosi, Mr Suter, Mr Twala and Mr Barenbrug remained the registered directors of Metsi. As will be apparent from the judgment, part of the contention between the parties concerns the number of directors MES was entitled to appoint on the board of Metsi.

[24] The applicants claim that after the sale of the shares, other than queries from Mr Mathosi and MES about financial information of Metsi which arose now and again, the business operated well. However, in 2020, queries about Metsi's compliance with governance prescripts and calls for the disclosure of financial information increased. Part of the information MES required related to dividends declared by the applicants before the disposal of the shares to MES and Mr Twala.

[25] Metsi made distributions to the applicants as follows:

- R 8 500 000.00 in July 2016
- R17 250 000. 00 September 2016
- R 5 000 000.00 in February 2017

[26] I note that the last financial statements for the year ending February 2017 were signed by all the directors including those appointed by MES. The queries about financial information, directors' emoluments, compliance, certain company resolutions, travel expenses and motor vehicle expenses culminated in a meeting held between Mr Barenbrug, MES (represented by Mr Mathosi) and Metsi's company auditors on 26 August 2020. After the meeting, Mr Barenbrug provided Mr Mathosi with Metsi's bank statements, information about directors' emoluments, vehicle

purchase information and proof of payment as well as information pertaining to the Withholding Tax to SARS. He first declined to furnish information predating the sale of shares agreement.

[27] From September 2020, there was dissatisfaction, as a result, questions simmered and difficulties increased leading to internal conflict laced with suspicion of impropriety. The applicants claim the tone of the requests became aggressive and belligerent. On the other hand, the respondents contend that the questions arose because there were financial irregularities in the operations of Metsi. Decision were taken without the approval or the authority of the board or shareholders. Their complaint is that even though MES was a shareholder for two to three years, Metsi did not declare a dividend and the applicants were "stripping" the company of funds without authorisation**.** Relations between the applicants and the respondents soured.

[28] The first letter intimating a termination of the shareholder relationship was on 23 September 2020 when Mr Barenbrug wrote:

"In view of these rather uncomfortable circumstances, if it is your preference to terminate your shareholding/investment in Metsi Projects, we will not obstruct you in this decision. After much deliberation we are prepared to buy back your shares at the same price that you have already paid in cash i.e. R 2000 000.00 for the total 40% shareholding. This will be conditional on your acceptance and signature of the 2020 financials once you are satisfied with the review which has been done at your request"

[29] In October 2020, Mr Mathosi declined the offer, but advised the applicants that he would consider a sale of MES's shares for R15m. The parties agreed to hold a meeting of shareholders and directors on 6 November 2020. Mr Barenbrug circulated an agenda to shareholders on 28 October 2020. MES revised the agenda to include the nomination and appointment of a Managing Director and Financial Director for Metsi. MES also proposed a resolution to change Metsi's auditors. According to Mr Matjee, because Metsi was informally run, the meeting of 6 November 2020 was an inaugural shareholders' annual general meeting.

[30] While discussions about the offer to purchase MES's shares was pending, and the meeting of 6 November 2020 eminent, a fresh dispute involving Metsi's Standard Bank account and Metsi's compliance with FICA surfaced. On 20 October 2020 the applicants received a letter from the bank's business account executive, Mr Teffo requesting an overhaul of the bank mandate pursuant to the appointment of Mr Twala

and Mr Mathosi as directors. As will be evident later in the judgment, this became an added source of conflict.

[31] On the day of the shareholders meeting on 6 November 2020, Mr Mathosi sent two proxy forms, one by Mrs Sarah Mathosi on behalf of MES. The proxies purported to grant Mr Matjee the right to vote at the meeting on behalf of MES. Mr Mathosi who was also present at the meeting tabled the proposal to appoint Mr Matjee as a financial director. The applicants opposed the proposal because they maintained MES was only entitled to appoint one director to the board. Their position was that either Mr Mathosi resigns as a director and Mr Matjee be appointed in his stead, but MES could not appoint two directors on Metsi's board.

[32] On 11 November 2020, Mr Barenbrug furnished MES additional information which included company bank statements from 1 March 2016 to February 2017, IRP5 from 1 March 2017 to 28 February 2020, Investment accounts from 2016 to 2020, Asset Register, Travel Expense accounts amongst others. Notwithstanding, the question of the remuneration of directors of Metsi remained a sticking point.

[33] On 11 December 2020, while the question of the appointment of Mr Matjee lingered, Mr Teffo from Standard Bank wrote a letter, intimating that Metsi was in breach of FICA requirements and threatened to freeze the bank account. Mr Matjee entered the fray as the "Financial Director" of Metsi, proposing that the bank should freeze the business account until the necessary documents have been submitted. He also implored the bank to amend the contact details so that he becomes the contact.

[34] The applicants state that between November 2020 and February 2021, crucial matters which included the signing of annual financial statements (AFS) of Metsi remained outstanding. Metsi could not finalise its BEE audit until the financial statements were signed by directors. ln February 2021, Mr Barenbrug called a meeting of directors to sign the companies AFS. Mr Matjee and Mathosi attended the meeting on behalf of MES, and produced documents showing that Mr Matjee was a registered director of Metsi with effect from 6 November 2020. The applicants claim that despite seeking information about Mr Matjee's appointment, CIPC was not forthcoming.

[35] On 19 February 2021, the applicants wrote to MES and formally disputed Mr Matjee's appointment. They contended that the appointment was unlawful and it

breached of the shareholders' agreement. They demanded Mr Matjee's within 14 days.

[36] On the other hand, Mr Matjee asserted that he was legitimately appointed as a director on 6 November 2020 and persisted with the request to Standard Bank to freeze the bank account. He also called for an urgent meeting of directors on 23 February 2021 to discuss the alleged non-compliance with FICA and the change of Metsi's bank mandate. The applicants claim to have attended the meeting on 23 February 2021 to register their position. At this meeting they agreed to a compromise, which entailed that all directors including Mr Matjee would sign the bank application forms**.** Mr Matjee was thus appointed a signatory to the Metsi's business bank account on behalf of MES. However, it is not disputed that the applicants excluded Mr Mathosi as a signatory to the bank account.

[37] In the wake of these disputes the relationship between the applicants and Mr Twala faltered. On 25 February 2021 Mr Twala complained that there was pressure exerted on him by the applicants and MES to take sides. Mr Twala expressed an intention to resign from Metsi. Between 5 to 9 March 2021 Mr Twala held discussions with the applicants to sell his shares in Metsi. A broad outline of the terms of his exit was recorded.

[38] As will be evident from the judgment, Mr Twala ultimately aligned his interests with MES and Mr Mathosi. Matters came to a head on 11 March 2021, when Mr Matjee purported to convene the impugned meeting of 18 March 2021. The letter dated 11 March 2021 calling for the meeting contained an invitation to Mr Barenbrug to make representations on why he should not be suspended as a director with immediate effect. A dispute about the previous dividend distribution resurrected, including Metsi's compliance with the solvency and liquidity requirements before making the distribution as well as allegations that the applicants had defrauded SARS. It was also suggested that shareholders be barred from selling their shares.

[39] Mr Matjee issued a formal notice of the meeting to be held on 18 March 2021 at 15h00 on 16 March 2021. Mr Barenbrug sought to postpone the meeting of 18 March 2021 to a later date on account that there was no formal agenda and that the notice of 16 March 2021 was not sufficient notice required in law. Mr Matjee refused

the postponement, contending that if the quorum was met, then decisions would be taken. The agenda was circulated at 13h46 on the day of the meeting

[40] On 17 March 2021, the day before the meeting, Mr Twala purported to offer to sell his shares to MES for R 4.7m. Even though they first offered to purchase the shares for R1.5m, the applicants claim to have accepted the offer on 17 March 2021 subject to conditions in the shareholders' agreement which entailed a determination of the value of the shares at a later stage by Metsi's auditors. They claim that MES did not accept the offer to sell the shares within 30 days, accordingly their acceptance of Mr Twala's offer was binding. Simultaneously with the acceptance of the offer to acquire Mr Twala's shares, the applicants sent a letter through their attorneys cancelling the shareholders' agreement.

[41] At the meeting on 18 March 2021, Mr Barenbrug was called to make representations on why he should not be suspended and or removed as a director. After this meeting Mr Matjee followed with a notice of an intention to remove Mr Barenbrug at a meeting scheduled for 7 April 2021. The contentions about Mr Matjee's directorship resurrected and the dispute extended to the standing of MES representatives on the Board, premised on the purported cancellation of the sale of shares agreement. The meeting removing Mr Barenbrug took place on 7 April 2021.

[42] Mr Twala again expressed an intention to resign from Metsi with effect from 31 MAY 2021. The applicants called a meeting with Mr Twala to finalise the terms of his departure on 6 May 2021.

[43] On 6 May 2021, Mr Matjee and Mr Mathosi, Mrs Sarah Mathosi attended the meeting even though the meeting was scheduled to discuss Mr Twala's exit. Mr Matjee claims to have attended it at Mr Twala's request. Mr Twala is said to have complained to him that the applicants placed pressure on him to sell his shares and to resign as a director of Metsi. The respondents considered that the applicants' conduct and the meeting breached of the shareholders' agreement. They believed it was an attempt to *"ambush*" Mr Twala to sell his shares. The applicants counter that Mr Twala ambushed them and their attorney, Mr Gurovich by bringing MES and others to the meeting.

[44] It is common cause that a group of approximately 30 people accompanied Mr Twala and the respondents to support him in what Mr Matjee refers to as *"an injustice*

perpetrated" towards Mr Twala. They accused the applicants of fronting and laid a charge of fraud with the Hawks (Special Commercial Crime Unit) against them.

[45] The account of what occurred on 6 May 2021 differs. It is common cause however that there was an altercation, scuffling and manhandling at the premises of Metsi. There are counter allegations of assault. Mr Matjee disputed the allegations of threats and assault. His view was that the events were a culmination of grievances he and the respondents had with the service providers of Metsi. He persisted that the applicants were fronting using the respondents as empowerment partners without transferring financial benefits to them.

[46] It is a further common cause that the tensions of 6 May 2021 migrated to Standard Bank, Alice Lane Sandton, where the group of approximately 30 people staged a protest. Once again, the account of what occurred differs. There were reports of abuse of bank staff. The Standard Bank branch had to temporarily shut down. Mr Matjee claims they attended at the bank to remedy the impasse about the signatories. He denies that bank employees were assaulted or intimidated. It later transpired that there was no basis to the FICA complaint.

[47] On 7 May 2021, Mr Matjee and Mr Twala are reported to have attended the offices of Metsi's auditors. As a result, the auditors resigned with immediate effect. On 12 May 2021, Mr Gurovich wrote to confirm the cancellation of the sale of shares and shareholders' agreement. Despite the launch of the application, the letter confirming the cancellation of the shareholders' agreement, the respondents were undeterred and convened an extraordinary meeting of shareholders for 14 May 2021 to remove Mr Suter as a director of Metsi.

[48] From the respondents' view, the acrimonious relationship between the parties in relation to (i) the affairs of the Company, (ii) the management of the Company and the composition of the management of the Company is at the heart of the litigation. The respondents contend that they sought to formalise the operations of the Metsi by the appointment of a Managing and Financial Director in compliance with the Companies Act. They complain that the applicants took executive decisions without board approval.

[49] I start with the disputed appointment of Mr Matjee, thereafter deal with the purported suspension and removal of Mr Barenbrug followed by disputed about the purported cancellation of the shareholders' agreement.

Mr Matjee's Directorship

[50] The question for determination is whether Mr Matjee was correctly appointed as a director of MES. At the same meeting, Mr Barenbrug was appointed a Managing Director of Metsi. The applicants complain this was an unnecessary duplication of the roles. The issue boils down to MES's entitlement to appoint more than one director on Metsi's board. Essentially, it is whether Mr Matjee could be legitimately appointed as a director of Metsi while Mr Mathosi remained on the Board.

[51] The starting point are the contractual terms in Clause 7.3 and 17.3 of the shareholders' agreement which state that:

Clause 7.3 "It is recorded that Mathosi is an independent private company and has no employment obligations towards Metsi. Mathosi may, at their own discretion, provide marketing assistance and advice to Metsi relating to specific tenders or overall company management policy. Mathosi shall be entitled to appoint one director to the Board of Metsi, who may or may not be an employee of Metsi"

Clause 17.3 "In so far as the Articles as stipulated in the adopted Memorandum of Incorporation of the company may conflict with any of the terms and conditions of this agreement, then to such an extent, the provisions hereof shall constitute the overriding provisions"

On a plain reading of these provisions, MES was entitled to appoint only one director to the Metsi board. It had no contractual right to appoint a second director. It is common cause that when Mr Matjee was appointed on 6 November 2021, Mr Mathosi remained a director and on the board throughout.

[52] In response to these clear terms, Mr Machaba SC (for the respondents) argued that despite Clause 7.3, the applicants varied the terms orally and agreed to appoint an additional director, Mrs Sarah Mathosi**.** She was appointed as MES's nominee to the Metsi Board. The reason for appointing Mr Matjee was to fill in the vacancy left by Mrs Sarah Mathosi. He contended that the Applicants had accepted her informal appointment when it suited their need for a favourable BBBEE rating. What is more, is that he argued in his supplementary papers that the applicants had waived their

right to rely on Clause 7.3. Mr Machaba SC also submitted that Mr Matjee was appointed by the majority of the shareholders representing 51% interest in Metsi**.** The applicants lost the majority vote.

[53] I start with the argument about the applicants' waiver of their rights and the facts pivotal to that inquiry. Mr Machaba SC basis the argument on the SCA's decision in *Premier Attraction 300 CC t/a Premier Security v City Of Cape Town*[1], where the court held that:

"Waiver is a defence on a point of law that can be raised on the facts, provided that whenever it is invoked the other side has a fair opportunity to respond. An intention to waive must be inferred reasonably; no one can be presumed to have waived rights without clear proof. The test for such intention is objective. Some outward manifestation in the form of words or conduct is required; silence and inaction will do when a positive duty to act or speak arises. Mental reservations not communicated have no legal effect."

I have no difficulty with the stated principle. However, the onus to establish a waiver is strictly on the party asserting it. The long standing principle is that the respondents must show that the applicants, with the full knowledge of their rights abandoned either expressly or by a conduct inconsistent with an intention to enforce their rights. It is a clear cut question of fact[2]

[54] When Mr Matjee was appointed as a director, the question of MES's entitlement to appoint one director in terms of clause 7.3 of the shareholders' agreement was alive. Even though there is a dispute about whether, Mr Mathosi agreed to step aside from the Metsi Board, the applicants were vociferous in their objection to the appointment. I could not discern any evidence to show that MES and those voting to appoint Mr Matjee addressed the terms of the shareholders' agreement.

[55] An additional factor is the meaning to be attributed to the compromise reached between the applicants and the respondents about the signatories of the bank account. The parties agreed to make all the directors including Mr Matjee, signatories to the bank account. It is not disputed that when the applicants agreed to the compromise, they removed Mr Mathosi as a signatory and added Mr Matjee's name in his stead. The respondents confirmed that the highlight of the meeting was that Mr

[1] (592/2017) [2018] ZASCA 69 (29 May 2018)
[2] Law v Rutherfurd 1924 AD

Matjee took the place of Mathosi as a signatory to the account. This inconsistent with a waiver.

[56] The respondents claim they desired to regularise and bring good governance to the management of the business of Metsi. Yet, when regard is had to section 66(4) read with section 70(3)(b) of the Companies Act, they made no effort to fill the "vacancy" created for more than six months[3] after Mrs Sarah Mathosi resigned. They do not explain this delay. This takes me to the argument that the applicants' objection was defeated by the majority vote.

[57] As Mr Suttner SC (for the applicants) correctly pointed out during the argument, the shareholders' agreement is not well a drafted one, and I agree. Other than the broadly defined roles between the shareholders, the allocation of power between the board and the shareholders is not clear. The shareholders' agreement does not contain a breach clause. It is also silent on the variation of its terms. It does not spell out the voting rights attaching to the shares. Because of these deficiencies the applicants sought leave to have the Sale of Shares Agreement read in conjunction with the Shareholders Agreement.

[58] The complaint is that the voting of Mr Matjee into office was by means of an unlawfully created majority which included votes by Mathosi and Matjee. As already stated, the voting rights attaching to the shareholding of the parties is not defined. Other than that Mr Matjee had proxy votes from MES's Sarah Mathosi, it is also not clear why both Mr Mathosi and Mr Matjee were allowed to vote or why Mr Matjee would vote in a matter affecting his appointment, if he did. Mr Machaba SC merely contends that Trollip J, (as he then was), in Sammel v President Brand Gold Mining Co. Ltd[4] held that:

"By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder ... The principle of the supremacy of the majority is essential to the proper functioning of companies."

[3] Section 70(30)(a) and (b) deals with the filing of vacancies in instances where either a director was appointed by a shareholder in terms of the MoI under s66(4)(a)(i) or through an election by shareholders

[4] 1969 (3) SA 629 (A) at [678]

[59] Mr Machaba SC is partly correct that a majority vote is all that is required for a valid decision of the board. However, the submission is not as cut and dried when it comes to shareholder resolutions. In view of the informal manner in which Metsi was operated, I have accepted that the respondents considered the meeting of 6 November 2020 “an inaugural” meeting of shareholders. Yet, MES had been a shareholder for approximately three years before this meeting.

[60] For unexplained reasons, MES entered into an agreement which restricted and or limited its rights as a major shareholder. It is not clear whether such a restrictive term could be altered by an ordinary vote of shareholders or whether a special resolution of shareholders was required. Curiously, the terms of the Memorandum of Incorporation and or the Rules regulating the affairs of the company are not before me. It is not clear how and what primary, default or residual powers were allocated between the Board and the shareholders.

[61] In my view, as a major shareholder, MES should have initiated the amendment of the shareholders’ agreement and or of the restrictive condition before seeking to exercise its vote to appoint an additional director to the board. It did not move to amend the terms of the Shareholders Agreement or call meetings earlier as it was at liberty to do. Besides, as stated above, its right to exercise its vote in the manner it did is not cut and dried.

[62] The respondents have failed to discharge the onus which rested on them to prove the waiver. For reasons already stated, they also failed to show that they exercised their majority vote lawfully and or that the decision they took could be legitimately taken by an ordinary vote of shareholders. I conclude that Mr Matjee could not be lawfully appointed as a director while Mr Mathosi served on the Metsi Board. The appointment stands to be set aside.

Removal of Barenbrug as Director

[63] Mr Barenbrug was responsible for the administration and financial management of Metsi. He also assisted with the technical and commercial aspects of the work to be carried out. He was the interface between Metsi, MES when it came to the dissemination of information between the shareholders. He also interacted with Metsi’s service providers. The shareholders’ agreement entrenched his role.

[64] Mr Matjee convened the meeting to suspend and remove Mr Barenbrug within seven days from the date of the notice of 11 March 2021. This was after he presented a document with *"findings"* to the applicants. There was no formal agenda for the meeting. The agenda was circulated two days of the meeting and as already stated, Mr Barenbrug sought to postpone the meeting and registered his objection about the short notice. Despite this, Mr Matjee proceeded with the meeting on account that Mr Barenbrug had sufficient notice, and a quorum for the meeting was present.

[65] Mr Barenbrug claims he could not make representations on his suspension and proposed removal because the particulars of the charges against him were not disclosed. After the meeting of 18th March 2021, Mr Barenbrug received a notice of his final removal from the Metsi Board on 23 March 2021 at a meeting scheduled for 7 April 2021.

[66] The applicants also say the respondents were not entitled to vote or pass the resolutions at the meeting or at the subsequent meeting because they had cancelled the shareholders' agreement. The final notice of removal was issued after the cancellation of the shareholders' agreement. I deal with the question of the cancellation of the shareholders' agreement later in the judgment. For now, it is sufficient to merely address the narrow question of the sufficiency of the notice and the rights of Mr Barenbrug.

[67] It is clear from the facts that the matters at hand could not be dealt with by unanimous consent. It is not necessary to regurgitate the record of the proceedings save to note that there was confrontation, the language and the tone belligerent. Nevertheless, recourse must be sought from the agreements and the Companies Act. Section 71 (1) of the Companies Act states that:

"Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2)"

Section 71 (2) states that:

"Before the shareholders of a company may consider a resolution contemplated in subsection (1) -

(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not a director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make representation, in person or through a representative, to the meeting, before the resolution is put to a vote"

[68] It must be presumed that the respondents acted in term of s71(3)(b) of the Companies Act. The provision states that:

"If a company has more than two directors, and a shareholder or director has alleged that a director of a company –

a) Has become
    (i) Ineligible or disqualified in terms of section 69 other than on the grounds contemplated in section 69(8)(a) or
    (ii) Incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time or
b) Has neglected, or been derelict in the performance of the functions of director,

The board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be illegible or disqualified, incapacitated or negligent or derelict as the case may be.

[69] The power to remove a director is subject to s 71(4) which states that:

Before a board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given –

(a) Notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

(b) A reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution it put to a vote.

[70] The question is whether Mr Barenbrug had a reasonable notice and the notice given complied with the provisions as contemplated in the above. The provision mirrors a long standing position at common law that; one of the objects of requiring a reasonable notice is to give the receiving party sufficient time in which to reasonably

regulate their own affairs.[5] What entails a reasonable opportunity or notice in each instance is a matter of construction tested at the time of the notice.

[71] I accept that the issues between the shareholders were left to simmer over time, and that the areas of dispute were known to the applicants. However, Mr Barenbrug was entitled to a statement of the specificities of the complaints against him as s71(4) provides. The notice of the meeting was lacking in this respect.

[72] As to what is a reasonable notice in this instance should have been, guidance could be drawn from the sale of shares agreement, the shareholders' agreement, the provisions dealing with pre-emptive rights and the disposal of shares and the past conduct of shareholder meetings. I am satisfied that there were no representations made and there could not be any given the atmosphere of the meeting.

[73] Despite section 62(1)(b) and consistent what appears to have been an acceptable period for convening meeting, I find that 14 days would have been a reasonable opportunity to allow Mr Barenbrug to make representations. Furthermore, Mr Barenbrug was entitled to be represented at the meeting if he so wished. The failure to grant him sufficient time contravened the rights in 71(4) of the Companies Act.

[74] For reasons already stated, the notice of the meeting suspending Mr Barenbrug, the resolution taken at the meeting and the subsequent meeting finally removing him from the board are invalid and of no legal effect and fall to be set aside.

Cancellation of the Sale of Shares and Shareholders' Agreement

[75] What remains is the dispute about the lawfulness of the cancellation of the sale of shares and shareholders' agreements. The cancellation is based on two broad grounds, namely; (1) the breach of the shareholders' agreement arising from the appointment of Mr Matjee and (2) the breach by conduct which undermined their obligation to promote the interest of Metsi and the duty of good faith towards the company.

[76] The applicants sought an amendment of their notice of motion to include a prayer for the simultaneous cancellation of the sale of the shares agreement and for the sale of shares to be considered supplemental to the shareholders' agreement. This

[5] Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases (not referred to by the parties)

was not opposed by the respondents and that accords with Clause 4.1 of the Sale of Shares Agreement which states that:

"The purchaser undertakes to enter into a Shareholder's agreement with the seller as soon as practicable, but within one month of signature of this agreement. This agreement is supplemental to the Shareholders Agreement and should any terms of the two agreements be in conflict then the terms of this agreement shall prevail".

[77] In first instance, the applicants seek a confirmation of the validity of the cancellation of the shareholders' agreement based on the letter dated 18 March 2021. The Board meeting was scheduled for 15h00. The applicants sent a letter through their attorneys cancelling the shareholders' agreement at 10h56. The respondents consider the latter of cancellation as a retaliation for the refusal to postpone the meeting of 18 March 2021.

[78] Mr Suttner SC premised the right to cancel on Clause 14 of the shareholders' agreement[6] read together with clause 11 of the Sale of Shares Agreement. Clause 11 of the Sale of Shares Agreement states that:

"Should any party commit an irremediable material breach or a remedial breach of any material provisions of this agreement and fail to remedy such a breach within 14 days after receiving written notice from any other party requiring him to do so, then the party aggrieved by such breach shall be entitled, without prejudice to its rights in law, to cancel this agreement or to claim specific performance of all the defaulting party's obligations whether or not such obligations would otherwise then have fallen due for performance in either event without prejudice to the aggrieved party's right to claim damages."

[79] On the other hand, Clause 14.1 of Shareholders Agreement states that:

"The parties hereto shall at all times during the subsistence of his agreement and their relationship to the company, bear one to the other, the utmost good faith as required by Law to be borne by partners one to the other."

[80] The applicants first wrote to MES on 19 February 2021, notifying them of the breach and called on them to remedy it within 14 days by removing Mr Matjee as a director and by correcting the register of directors with CIPC. Nothing transpired following this letter until 18 March 2021, the day scheduled for the meeting to suspend

[6] This enjoins all the parties to act in good faith.

and/or remove Mr Barenbrug. As the applicants have stated, until the 18 March 2021, the applicants believed that there could be a compromise reached to resolve the impasse between them. I am satisfied from the facts that the attitude of the applicants was that the impasse about Mr Matjee's standing and appointment as signatory to the bank account would be resolved by substituting Mr Mathosi for Mr Matjee, which they did. They did not take any action to remove him as a director despite the letter dated 19 February 2021 or seek a declaratory order about the appointment or the right of appointment. I point this not to confuse the matter with the question of the waiver already disposed to above, but to distil the validity of applicants' grounds for cancellation.

[81] I observe that on 18 March 2021, the applicants amplified the cause for complaint and cancellation, stating that the respondents had acted in bad faith and had sought to freeze the Metsi's business bank account, there by endangering the affairs of the company. As I understand it, the framing of the complaint concerns a complaint about prejudicial conduct that affected the business affairs of Metsi which stands separate to the rights of the individual shareholders.

[82] It is evident that from the exposition above from 2020, there were fundamental disagreements between the shareholders about the management and control of the company. The respondents accuse the applicants of fronting. Even though I make no finding per se, it is perplexing how the appointment of Mrs Sarah Mathosi could be perceived as *"a favour"* to Mr Mathosi when the benefit of improved BBBEE credentials accrued to not Mr Mathosi or MES but to Metsi. I find the concession that despite her purported position on the board, Mr Suter had never met her incredulous.

[83] To my mind, at the heart of the disagreement were financial concerns, chief amongst which was the failure of Metsi to declare dividends to shareholders. The last dividend distribution was in February 2017 in the sum of R5m before the sale of shares. The failure to declare dividends while the applicants drew salaries, created a fertile ground for the discontent. I pause to mention that MES and Mr Twala were required to pay for their acquisition from dividend payments. The respondents also counter that the applicants breached the good faith clause of the shareholders' agreement on various grounds.

[84] The impression created from the papers is that the applicants and the respondents the adopted tactical strategies to their deadlock to gain control of Metsi and its financial resources. The facts already alluded to above show that the respondents sought to gain control of Metsi by exercising a “majority vote” to remove Mr Barenbrug and appoint Mr Matjee to take over the management of the finances. They attempted to freeze the bank accounts to gain financial control.

[85] The applicants on the other hand attempted to purchase the shares held by Mr Twala just before the meeting of 18 March 2021 in order to regain control of Metsi. The purported compromise by the applicants after the letter of the 19 February 2021, which was ostensibly an attempt to move the business of Metsi forward appears self-serving. It seems to me that the letter of termination of the shareholders’ agreement was sent when it became clear that the meeting to suspend and or remove Mr Barenbrug would proceed, and, the question of the purchase of the shares held by Mr Twala to gain control of Metsi was in doubt.

[86] Mr Machaba SC contends the cancellation was a retaliation. It seems to me that it was a means to regain control of Metsi. This is so because the applicants contend that by virtue of the cancellation, the shares MES held in Metsi were automatically reallocated to them. As the shares reverted to them, they held all the rights, title and interest in 89% of the Company's shares, and MES had lost any rights, title and interest to the shares and the status of a Shareholder in Metsi. The applicants tendered a repayment of R2m paid by Metsi in 2017.

[87] I am not persuaded by this argument and disagree with the approach advanced. It disregards the agreed pre-emptive rights and the rights of all the shareholders. The repayment of the sale price without a valuation is repugnant to the share sale transfer terms and the nature of the shareholder relationship.

[88] The question that lingers is whether up until the 18 March 2021 it could be said the respondents acted in bad-faith and in breach of the shareholders’ agreement. While I accept the applicants’ contentions about non-waiver of their rights pertaining to the appointment of Mr Matjee, I have difficulty with the reliance on the dispute about the legitimacy of the appointment as evincing bad faith and a breach of the shareholders’ agreement. Even though the appointment of Mr Matjee was legally incorrect, and the respondents could be criticised for riding rough shod over the terms

of the shareholder agreement, the breakdown in the relationship over this issue does not without more create a breach of a fiduciary duty to the company. I do not accept that the purported appointment was a demonstration of bad faith as alleged or that it was a repudiation of the shareholders' agreement[7].

[89] The second difficulty concerns the argument that the respondents breached the duty of care owed to the company and endangered the business relationships of the company with its bankers and auditors instead of resolving the issues. It was not disputed that the respondent's conduct led to the resignation of Metsi's auditors resulting in the withdrawal of the company's draft Annual Financial Statements (AFS). As a consequence, Metsi was unable to place tenders for work and in addition this affected the company's relationship with its bankers.

[90] Factually, these events could not have given rise to the cause for cancellation on 18 March 2021. They occurred on the 6 and 7 May 2021, after the letter of cancellation was dispatched. I must emphatically state that what transpired at Metsi's premises and at Standard Bank on 6 May 2021 must be frowned upon and cannot be condoned. As I understand it, Mr Suttner SC nevertheless seeks a cancellation of the shareholders' agreement based on these events.

[91] I have a difficulty with the argument about the cancellation which does not address the residual rights of the shareholders involved. Importantly, legally, if there was a wrong perpetrated on the company by its major shareholders, the applicants' remedy lay in a derivative action to protect the company or in an application for the winding down of the company based on just and equitable grounds provided in the Companies Act. I must decline the relief in this instance.

[92] The costs of the applications, which are generally at the discretion of the court. They must largely follow the result. However, in so far as the costs of the interim interdicts are concerned they serve to be dealt with differently. It is fair that the respondents are held liable for the costs of the Part A of the urgent application on 25 May 2021 before Francis J.

[7] In my view, a repudiation evinces an intention to no longer be bound by an agreement.

[93] In so far as the costs of the urgent application on 8 July 2021, I take account that the applicants dealt with the acute problems in a reactive, haphazard manner ratchetting the legal costs. I disallow them those costs.

[94] Accordingly, I make the following order –

a. The purported appointment of the first respondent as a director of the fifth respondent on 25 November 2020 is set aside;

b. The notice of the 16 March 2021 purporting to arrange a meeting of directors of the fifth respondent on 18 March 2021 is set aside;

c. The resolution purportedly passed at the meeting on 18 March 2021 suspending and or removing Mr Barenbrug as a director of the fifth respondent is set aside;

d. The seventh respondent (CIPC) is directed to amend its records by removing the first respondent's name (Mr Matjee) from the register of directors of the fifth respondent's;

e. The costs of the above application shall be borne by the first, second, third and fourth respondents jointly and severally, the one paying the other to be absolved and include the costs of two counsel;

f. The application confirming and or declaring the cancellation of the shareholders' agreement is dismissed;

g. The applicants (Mr Suter and Mr Barenbrug) are ordered to pay the costs of the cancellation application jointly and severally, the one paying the other to be absolved which costs shall include the costs of two counsel

h. The costs of Part A of the interim interdict on 25 May 2021 shall be borne by the first, second, third and fourth respondents jointly and severally.

i. There is no order as to the costs of the urgent application of 8 July 2021.

T. SIWENDU J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 22 October 2021.

Date of hearing:	26 and 27 July 2021
Date of judgment:	22 October 2021

Appearances:

Counsel for the Applicants:	Adv J Suttner SC
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Instructed by:	Frese Gurovich Inc
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