IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

3/11/2016

CASE NO.: 80516/16

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

3/11/2016 .....

In the matter between:

KAREL FREDERIK GOTTLIEB POTGIETER	First Applicant
FREDERIK DANE VILJOEN	Second Applicant
GERRIT BASTIAT VILJOEN	Third Applicant

and

BLYVOOR GOLD (PTY) LTD	First Respondent
RANDLORD CAPITAL (PTY) LTD	Second Respondent
RANDLORD GOLD (PTY) LTD	Third Respondent
BLYVOOR GOLD OPERATIONS (PTY) LTD	Fourth Respondent
BLYVOOR GOLD RESOURCES (PTY) LTD	Fifth Respondent
RANDLORD UNDERGROUND OPERATIONS (PTY) LTD	Sixth Respondent
RANDLORD GROUP (PTY) LTD	Seventh Respondent
RICHARD LLEWELLYN FLOYD	Eighth Respondent
STRATOCORP (PTY) LTD	Ninth Respondent
RANDLORD HOLDINGS (PTY) LTD	Tenth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Eleventh Respondent

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JUDGMENT

VAN DER WESTHUIZEN, A J

1. This application comes before me by way of urgency. It relates to a dispute amongst directors of a number of companies and the holding of shareholders' meetings at which it is intended to remove some of the directors as directors of the companies listed as respondents.

2. The applicants seek to restrain the eighth respondent, a fellow director, from holding himself out as the sole director of the companies. They also seek to interdict the shareholders of the companies from holding shareholders' meetings that are allegedly unauthorised.

3. The ninth respondent filed a counter application. At the hearing of the matter, leave was sought to amend the notice of the counter application to limit the relief sought therein to the first respondent.

4. At the hearing of the matter, Mr Badenhorst SC, who appears on behalf of the first to ninth respondents, sought to limit the dispute to the first respondent, conceding to the relief against the second to seventh respondents.

5. The background leading to this application can be summarised as follows:

   (a) Seven companies have been for the past two years involved in the envisaged reclamation of gold at the Blyvooruitsicht Mine and slimes dams;

   (b) These companies are the first respondent, the holding company, and the second to seventh respondent, its six subsidiaries;

   (c) The estimated reclamation of gold in the slimes dams and underground reserves would lead to the tenth largest gold mining and reclamation in the world and thus is an extremely valuable corporate opportunity;

   (d) The said operation has been thus far funded through the ninth respondent, by one Peter Skeat, the father in law of the eighth respondent;

(e) The applicants and the eighth respondent are the four directors of the first to seventh respondents;

(f) The tenth respondent together with the ninth respondent hold 100% of the shares in the first respondent;

(g) The applicants are the shareholders of the tenth respondent and have pledged their shares in the tenth respondent *in securitatem debiti* to the ninth respondent. They may thus not vote at shareholders' meetings;

(h) The relationship between the applicants on the one hand and the eighth respondent and Mr Skeat on the other has become strained. The applicants were suspected of theft of company assets and criminal charges were preferred against them. Criminal investigations are underway. The applicants deny any wrong doing;

(i) The applicants made an offer to Messrs Skeat and Floyd in respect of repayment of the loan and to part ways. That offer seems to have been the catalyst and resulted in attempts to have the applicants removed as directors;

(j) The attempts at removing the applicants as directors are the following:

(1) The eighth respondent, Mr Floyd, lodged documents on10 October 2016 at the offices of the eleventh respondent to change the directors of the first to seventh respondents;

(2) Mr Floyd threatened to hold a meeting on the same day for the purpose of removing the

applicants as directors, but that attempt was foiled by the applicants;

(3) Further on 10 October 2016, Mr Floyd unilaterally terminated the appointment of CMV Auditors as auditors of the first respondent, indicating in the letter that the board of directors had terminated the said appointment. The board of directors never held a meeting at which such decision was taken;

(4) On 11 October 2016, Mr Floyd, purportedly in terms of a resolution of a shareholders' meeting, unilaterally appointed Mr Alan Smith as CEO of the first respondent. No such shareholders' meeting had been convened. Mr Floyd personally signed the resolution as director. It was not signed by the chairperson of the alleged meeting;

(5) On the same day, Mr Floyd caused attorneys, Messrs Tabacks, to address a letter to First National Bank incorrectly alleging that the applicants had resigned as directors on 7 October 2016 and that Mr Floyd was the only authorised signatory on the bank account.

(k) In the evening of 10 October 2016, the applicants received an e-mail from Messrs Tabacks with the heading "*Notice of an extraordinary shareholders' meeting to be held on 26 October 2016*". Attached to this e-mail were seven notices of general meetings of the first to seventh respondents. All the said notices informed the applicants that, "*notice is hereby given of an extraordinary general meeting of the shareholders of the Company convened by the Board to be held*". Noticeably, Mr

Floyd signed the notices, purporting to act on behalf of the Board. The meeting was said to be held on 26 October 2016.

(l) Neither of the applicants participated in the purported resolution to convene the said meeting of shareholders. No board meeting was ever held at which such purported resolution could have been taken.

6. The foregoing appears to be common cause between the parties.

7. The *lis* between the parties, in the application and the counter application, primarily concerns the removal of the directors of the first to seventh respondents and the procedure to be followed in that regard. The amended notice in respect of the counter application limits the relief to the first respondent.

8. Mr Preis SC, who appears on behalf of the applicants, contends with reference to the provisions of sections 71 and 61 of the Companies Act, 71 of 2008 (the Act), that the incorrect procedure was followed in the present instance. The argument is *inter alia* premised upon the common cause facts set out above.

9. Mr Badenhorst, on the other hand, relying on the provisions of section 71 of the Act, contends that nothing untoward has occurred in convening the extraordinary shareholders' meeting for 26 October 2016. He submits, with reference to the English law and the corresponding legislation in that regard, that the nub of the issue is a "contest" between the persons entitled to exercise 100% of the voting rights in an election of the director or proprietors of the first respondent on the one hand, and the three applicants who are resisting the shareholders' desire to hold the said meeting. Furthermore, reliance is placed upon the provisions of section 61(12) of the Act in support of the counter application.

10. Further in this regard, Mr Badenhorst relies, in the alternative, upon the doctrine of unanimous assent.

11. It will be prudent to record the provisions of the aforesaid sections of the Act relied upon. In this regard, section 71 of the Act, the section providing for the removal of a director, provides as follows:

> *"(1) 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).*
>
> *(2) 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 the director is a shareholder of the company; and*
>
> *(b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.*
>
> *(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the 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 ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

(4) Before the 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 is put to a vote.

(5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66 (4) (a) (i), if applicable, may apply within 20 business days to a court to review the determination of the board.

(6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be-

(a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be

exercised in the election of that director, may apply to a court to review the determination of the board; and

(b) the court, on application in terms of paragraph (a), may-

(i) confirm the determination of the board; or

(ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.

(7) An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.

(8) If a company has fewer than three directors-

(a) subsection (3) does not apply to the company;

(b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and

(c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.

(9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for-

(a) loss of office as a director; or

(b) loss of any other office as a consequence of being removed as a director.

(10) This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation."

12. Shareholders' meetings are governed by the provisions of section 61 of the Act, and provides as follows:

"(1) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, may call a shareholders meeting at any time.

(2) Subject to section 60, a company must hold a shareholders meeting-

(a) at any time that the board is required by this Act or the Memorandum of Incorporation to refer a matter to shareholders for decision;

(b) whenever required in terms of section 70 (3) to fill a vacancy on the board; and

(c) when otherwise required-

(i) in terms of subsection (3) or (7);

or

(ii) by the company's Memorandum of Incorporation.

(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 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.

(4) A company's Memorandum of Incorporation may specify a lower percentage in substitution for that set out in subsection (3) (b).

(5) A company, or any shareholder of the company, may apply to a court for an order setting aside a demand made in terms of subsection (3) on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to reconsider a matter that has already been decided by the shareholders, or is otherwise vexatious.

(6) At any time before the start of a shareholders meeting contemplated in subsection (3)-

(a) a shareholder who submitted a demand for that meeting may withdraw that demand; and

(b) the company must cancel the meeting if, as a result of one or more demands being withdrawn, the voting rights of any remaining shareholders continuing to demand the meeting, in aggregate, fall below the minimum percentage of voting rights required to call a meeting.

(7) A public company must convene an annual general meeting of its shareholders-

(a) initially, no more than 18 months after the company's date of incorporation; and

(b) thereafter, once in every calendar year, but no more than 15 months after the date of the previous annual general meeting, or within an extended time allowed by the Companies Tribunal, on good cause shown.

(8) A meeting convened in terms of subsection (7) must, at a minimum, provide for the following business to be transacted:

(a) Presentation of-

(i) the directors' report;

(ii) audited financial statements for the immediately preceding financial year; and

(iii) an audit committee report;

(b) election of directors, to the extent required by this Act or the company's Memorandum of Incorporation;

(c) appointment of-

(i) an auditor for the ensuing financial year; and

(ii) an audit committee; and

(d) any matters raised by shareholders, with or without advance notice to the company.

(9) Except to the extent that the Memorandum of Incorporation of a company provides otherwise-

(a) the board of the company may determine the location for any shareholders meeting of the company; and

(b) a shareholders meeting of the company may be held in the Republic or in any foreign country.

(10) Every shareholders meeting of a public company must be reasonably accessible within the Republic for electronic participation by shareholders in the manner contemplated in section 63 (2), irrespective of whether the meeting is held in the Republic or elsewhere.

(11) If a company is unable to convene a meeting as required in terms of this section because it has no directors, or because all of its directors are incapacitated-

(a) any other person authorised by the company's Memorandum of Incorporation may convene the meeting; or

(b) if no person has been authorised as contemplated in paragraph (a), the Companies Tribunal, on a request by any shareholder, may issue an admini- strative order for a shareholders meeting to be convened on a date, and subject to any terms, that the Tribunal considers appropriate in the circumstances.

(12) If a company fails to convene a meeting for any reason other than as contemplated in subsection (11)-

(a) at a time required in accordance with its Memorandum of Incorporation;

(b) when required by shareholders in terms of subsection (3); or

(c) within the time required by subsection (7),

a shareholder may apply to a 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.

(13) The company must compensate a shareholder who applies to the Companies Tribunal in terms of subsection (11), or to a court in terms of subsection (12), respectively, for the costs of those proceedings.

(14) Any failure to hold a meeting as required by this section does not affect the existence of a company, or the validity of any action by the company."

13. Contextually, and purposively read, sections 71 and 61 of the Act are to be read conjunctively.

14. The notice convening the extraordinary general meeting of shareholders requires consideration. In this regard, the meeting was convened upon the following basis:

> *"The company, having received a written and signed demand from a shareholder representing at least 10% of the voting rights entitled to be exercised in relation to the proposed resolutions, herewith convenes the meeting in accordance with the provisions of section 61(3) of the Companies Act."*

15. The demand referred to, relates to the demand by the tenth respondent, Stratocorp (Pty) Ltd (Stratocorp). That demand was held back until 10 October 2016, when the procedures were put in place to remove the applicants as directors as referred to above.

16. From the aforementioned background, the following appears:

(a) No board meeting was convened at which the demand had served;

(b) No resolution was taken by the board to convene the extraordinary meeting of shareholders;

(c) The applicants were not aware of the demand, nor were they present at any board meeting before which the demand had served;

(d) The eighth respondent, Mr Floyd, had acted in his own stead, purporting to be the sole director of the first to seventh respondents.

17. It follows from the actions on the part of Mr Floyd, that there has been non-compliance with the provisions of section 71 of the Act, and in particular in respect of subsection (2) thereof, in purporting to have the applicants removed as directors on 10 October 2016. Accordingly, that attempt is *contra* the provisions of the Act, invalid and of no consequence.

18. Mr Badenhorst further submitted that there is no continued threat that the eighth respondent would further act in the manner complained of, the eighth respondent conceding in the answering affidavit that the applicants remain directors of the first to seventh respondent companies. However, Mr Preis correctly submitted that, at least, Mr Floyd has not withdrawn the letter to First National Bank, thus constituting a continued misrepresentation of the true facts.

19. It follows that the applicants are entitled to the relief they seek in restraining the eighth respondent from holding himself out as the sole director of the first to seventh respondents and that the applicants are no longer directors of the first to seventh respondents.

20. The issue whether the meeting scheduled for 26 October 2016 has been correctly convened in terms of the provisions of the Act, requires consideration.

21. I have set out the provisions of sections 71 and 61 of the Act above. In respect of the convening of a shareholders' meeting, the following requirements can be gleaned there from.

    (a) The board of a company, or a person specified in the company's Memorandum of Incorporation or rules may call a shareholders' meeting;

    (b) A company must hold a shareholder's meeting in specified instances;

(c) A shareholders' meeting must be held where a written and signed demand for such a meeting is delivered to the company by a shareholder who holds at least 10% of the voting shares.

22. Section 59 of the Act provides that the board of directors of a company is to determine a record date for the meeting of shareholders.

23. Further in this regard, section 61(12) provides that where a company fails to convene a shareholders' meeting on receiving a demand, a shareholder shall apply to a court for an order requiring the company to convene a meeting date, subject to any terms, that the court considers appropriate in the circumstances.

24. Mr Badenhorst submits that the tenth respondent, Stratocorp, owning 58 percent of the shares in the first respondent, has delivered a demand to convene a general meeting of its shareholders. He further submits that the company has refused to convene the required meeting as demanded.

25. It is apparent form the procedure followed by Mr Floyd to have the applicants removed as directors on 10 October 2016, that such attempts were ineffective and constituted a nullity. The applicants remain directors of the first to seventh respondents.

26. Accordingly, no demand for the convening of a shareholders' meeting served before the board of directors of any of the first to seventh respondents and no decision thereon could have been taken.

27. It follows that the boards of directors of first to seventh respondents could not and have not recorded the date of the meeting of shareholders to be 26 October 2016.

28. In respect of the provisions of section 61(3) of the Act, it is clear that the board of directors of the first to seventh respondents were never in a position to call the required and obligatory shareholders' meeting. The eighth respondent had unilaterally acceded to the demand without ever presenting the board of directors with the demand.

29. Mr Badenhorst submits that the demand for the shareholders' meeting had been delivered to the first respondent, it being received by the eighth respondent. That, in my view, is of no consequence. The demand is to be considered by the board of directors who is obliged to record the date of the shareholders' meeting. In the absence of the boards of directors of the first to seventh respondents not having knowledge of receipt of the demand, it could not have complied with the provisions of section 61(3) of the Act.

30. The purported notice of the meeting of 26 October 2016 is of no force or effect.

31. The further submission that the demand was posted to the registered addresses of each of the first to seventh respondents is without merit. It is pointed out that some of the registered addresses are incorrect. Furthermore, the acknowledgement by one of the applicants that he received the registered letter on 24 October 2016 in respect of the first respondent, does not constitute compliance with the prescribed requirements, at least in respect of the provisions of section 71(2) of the Act.

32. It follows further that Stratocorp cannot invoke the provisions of section 61(12) of the Act.

33. As a further string to Mr Badenhorst's bow, he relies on the doctrine of unanimous assent. In terms of that doctrine, the will of the shareholders must prevail over all technical defences raised by the

applicants. The reliance of the said doctrine is in respect of the counter application.

34. Applying the said doctrine in the present instance will refute the requirements of section 17(2) of the Act and will be to the detriment of the applicants. The contrived attempts to comply with the prescribed requirements constitute an attempt to prevent the applicants from enforcing their rights enshrined in section 71(2) of the Act.

35. It is common cause that insufficient time has been allotted to the applicants in respect of their rights in terms of section 71(2) of the Act.

36. Invoking the doctrine of unanimous assent cannot salvage the failure to comply with the prescribed requirements of sections 71 and 61 of the Act in the present instance.

37. It follows that the counter application cannot be entertained and stands to be dismissed.

38. It being conceded that the applicants are entitled to the relief sought in respect of second to seventh respondents, and having found that the counter application cannot succeed, the applicants are entitled to the relief sought in respect of the first respondent for the aforesaid reasons.

I grant the following order:

(a) The application is to be heard on an urgent basis and that the applicants' failure to comply with the ordinary rules governing service of application and time frames be hereby condoned;

(b) The first to tenth respondents are interdicted from proceeding with the proposed extraordinary shareholders' meetings of the first to seventh respondents scheduled to take place on 26

October 2016, or on the dates to which the meeting is to be adjourned in terms of the undertaking given by the ninth and tenth respondents;

(c) The eighth respondent is interdicted from holding himself out as the sole director of the first to seventh respondents or from holding out that the applicants are no longer directors of the first to the seventh respondents;

(d) The counter application is dismissed with costs;

(e) The eighth respondent is ordered to pay the costs, such costs to include the costs of senior counsel.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicants: D A Preis SC
Instructed by: Macrobert Attorneys

On behalf of First to Ninth Respondents: C H J Badenthorst SC
Instructed by: Mervyn Taback Inc.