

IN THE HIGH COURT OF SOUTH-AFRICA

GAUTENG DIVISION, PRETORIA

CASE: 23553/2020

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

DATE 21.11.2022.

SIGNATURE

IN THE MATTER BETWEEN:

MPHO REGINALD MOHALE

APPLICANT

AND

HEADS TRACTOR (PTY) LTD

1ST RESPONDENT

RODNEY GRANT WOOD NO

2ND RESPONDENT

CHRIS DE WET N.O.

3RD RESPONDENT

JUDGMENT

STRIJDOM AJ

1. This application stems forth from an urgent application enrolled for hearing on 9 June 2020, seeking the relief as set out in Part A of the Notice of Motion.
2. The urgent application was launched seeking the relief in Part A on a purported interim basis pending the relief sought in Part B. The urgent application was dismissed with costs.
3. The Applicant, an erstwhile director and shareholder of the First Respondent sought relief in Part B as follows:
 - 3.1. The final winding-up of the First Respondent premised on a deadlock;
 - 3.2. In the alternative to the winding-up an order directing the valuation and sale of the Applicants' shares to the Second and Third Respondents.
4. The Respondent raised the following defences *in limine*:
 - 4.1. The material non-joinder of the Second and Third Respondents trustees;
 - 4.2. The Court's lack of jurisdiction premised on the arbitration clause in the shareholder's agreement.¹
5. But for the aforesaid technical defences, the Respondents oppose the relief sought on the defences that:
 - 5.1. The common cause shareholder's agreement barring winding-up in the case of a deadlock²;
 - 5.2. The First Respondent being a solvent and actively trading entity³;

¹ Opposing affidavit, p.87-89 para 22-27

² Opposing affidavit p.94 para 39.4

³ Opposing affidavit p.98 para 44.2 and 44.6

- 5.3. Clause 11 of the shareholder's agreement making provision for a deemed offer.⁴
6. The Respondents have launched a counter application and sought condonation for the delivery of a further affidavit to which the counter application is attached, together with condonation for the delivery of the heads of argument. The said condonation was granted by this Court. Condonation was conceded by the Applicant.
7. The Respondents did not persist on the issue of non-joinder of the Respondents' trustees.
8. The following facts are common cause between the parties:
- 8.1. The Applicant is a shareholder in the First Respondent;
 - 8.2. The remaining shares in the First Respondent are held in two trusts;
 - 8.3. During May 2020, the Applicant was removed as a director;
 - 8.4. Albeit that the Applicant contends that he was unlawfully removed, no relief is directed thereto;
 - 8.5. On the Applicant's version there is a deadlock between the parties;
 - 8.6. There is a valid shareholder's agreement, and the terms thereof are not in dispute.

LACK OF JURISDICTION

9. The Respondents contended that a valid shareholder's agreement was entered into between the parties, which is not in dispute, the Applicant being removed as director, which is not in dispute with the resultant effect that a deemed offer in terms of clause 11 of the shareholder's agreement was triggered and with the deemed offer being accepted.

⁴ Opposing affidavit p.111 para 61.2

10. Clause 20 of the shareholder's agreement provides:

"20. Deadlock

20.1...

20.2. If in terms of the foregoing provisions there is a deadlock between the shareholders, a dispute shall be deemed to exist between the shareholders which shall be dealt with as contemplated in clause 20.3. Any such deadlock shall not constitute grounds for the winding-up of the company.

20.3. Any dispute between the shareholders shall be submitted to arbitration as provided for in Section 166 of the Act on the following basis:

20.3.1...

20.3.2..."

11. The Applicant contended that he was unlawfully removed as a director. The lawfulness of the Applicant's removal as a director is disputed by the Respondents.

12. The Applicant further contended that the relationship between the Applicant and the Second and Third Respondents has irretrievably broken down.

13. The Applicant claims that the sole purpose of his removal as a director was to enable the Respondents to oust him from the business of the First Respondent and its effective running.⁵ The Respondents denied the assertion and contended that clause 11 of the shareholder's agreement "would result in a 'deemed offer' for sale of the shareholding."

14. The Applicant stated that he was not satisfied with the manner in which the financial affairs of the First Respondent was being conducted.⁶ The Respondents denied the assertions in this regard.

⁵ Founding affidavit p.17 para 14

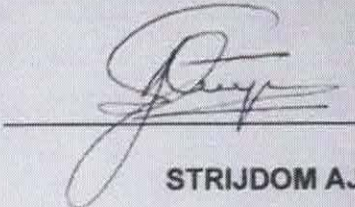
⁶ Founding affidavit p.17 para 15

15. The Applicant contended that from whatever perspective the factual matrix is viewed, it can be accepted that as a matter of fact that the shareholders are in deadlock.
16. It was submitted by the Applicant that this Court's jurisdiction cannot be ousted by the parties: if there is deadlock, this Court has jurisdiction to grant either an order for the winding-up or a buy out of shares; similarly, if the First Respondent is insolvent, the jurisdiction of this Court cannot be ousted.
17. The Applicant has admitted that it voluntarily entered into the shareholder's agreement.
18. It was stated by O' Regan ADCJ in *Lufono Mphaphuli E Associates v Andrews*⁷ that:
- "The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the Courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar terms."
19. The approach to arbitration clauses is to respect the parties' autonomy in concluding the arbitration agreement and to minimize the extent of judicial interference in the process.⁸
20. Having regard to clause 20 of the Shareholder's Agreement I concluded that:
- 20.1. Arbitration was freely and readily agreed to between the parties;
- 20.2. That the deadlock would not constitute grounds for winding-up.
21. Such a contractual term is not contrary to the prevailing legislation.
22. In the result the following order is made:

⁷ 2009 (4) SA 529 (CC)

⁸ *Aveng Africa Ltd t/a Grinaker V Midro Investments (Pty) Ltd* 2011 (3) SA 631 (KZD)

- (a) Condonation is granted for the late delivery of the counter application and affidavit,
- (b) The Application is dismissed with costs including the costs of the counter application.



STRIJDOM AJ

ACTING JUDGE OF THE HIGH COURT
OF SOUTH-AFRICA
GAUTENG DIVISION
PRETORIA

Appearances:

FOR THE APPLICANT:

Adv CC Ascar

INSTRUCTED BY:

Beder-Friedland Attorneys

FOR THE RESPONDENTS:

Adv PA Venter

Instructed by: VZLR Inc