

**SUMMARY:** Company – exercise of powers of - by directors.

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## ORDER

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**On appeal from:** The Cape High Court (Van Der Riet AJ sitting as court of first instance).

The appeal is dismissed with costs.

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## JUDGMENT

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**PONNAN JA (Harms ADP, Scott and Combrinck JJA and Griesel AJA concurring):**

[1] The present appeal has its genesis in the grant by the Minister of Environmental Affairs and Tourism, in terms of s18 of the Marine Living Resources Act 18 of 1998 of certain long term hake fishing rights, which authorised the catching of hake by the deep sea trawl method for commercial purposes. Given the capital intensive nature of deep sea trawling as well as the fact that significant numbers of permit holders have been granted rights to relatively small tonnages of fish, the Directorate of Marine and Coastal Management of the Department of Environment and Tourism actively encouraged holders of rights in the fishing industry to pool their resources to foster economic viability.

[2] Against that backdrop, during 1999, two of the holders of commercial fishing rights in the hake deep sea trawl fishery, Blue Continent Products (Pty) Ltd ('Blue Continent') (the sixth respondent) and Azanian Fishing (Pty) Ltd ('Azanian') concluded a joint venture agreement, which came to be known as the Compass Fishing Hake Joint Venture ('the joint venture'), to facilitate exploitation of their pooled fishing rights. Over time, the fifth respondent, Lynweth Keith Bhana ('Bhana') and the first appellant, Surmon Fishing (Pty) Ltd ('Surmon'), elected to become participants in the joint venture in accordance with the general terms and conditions ('the GTC') applicable to it.

[3] Whilst the joint venture employed vessels belonging to third parties at its inception, the common intention of the parties to the joint venture had always been to acquire a trawler to properly exploit their pooled fishing rights. To that end, in 2001, Blue Continent purchased a vessel that came to be known as the MFV *Compass Challenge* for approximately R 20.5m. After the vessel had been subjected to an extensive refit and reconfiguration, it was sold for approximately R 33.6m to the first respondent, Compass Trawling (Pty) Ltd ('Compass Trawling'), a company in which the participants in the joint venture held shares. At the same time funds were loaned by Blue Continent to Compass Trawling to facilitate the sale. All of this occurred in consultation and by agreement with the joint venture participants.

[4] Initially, Compass Trawling and the joint venture operated as separate entities. During April 2003, however, a written Agreement of Assignment was concluded, in terms of which, as the agreement put it: 'the parties agreed to transfer the rights and obligations of the joint venture to Compass Trawling with the consent of the participants and to allow the joint venture to remain extant but dormant until otherwise agreed by the parties'. To that end, once again in the words of the written agreement: 'the joint venture assigned to Compass Trawling all of its rights and obligations ... arising out of the JV [joint venture] Formation Agreement and the JV Participation Agreements read with the GTC'. Thereafter, Compass Trawling carried on the business activities relating to the exploitation of the pooled hake rights, which had previously been conducted by the joint venture.

[5] On 13 August 2007, a written offer was made by the third appellant, Foodcorp (Pty) Ltd ('Foodcorp'), to Surmon to purchase its hake rights. It is common cause that an offer of that kind is subject to Clause 9.3 of the GTC, which reads:

'9.3 Should a Participant ("the Willing Seller") at any time receive an offer for all or any of its assets ("the Offer") from a third party ("the Offeror") which the Willing Seller wishes to accept, then the following provisions shall apply:

9.3.1 the Willing Seller shall forthwith and in writing furnish the Joint Venture with relevant details of the Offer;

9.3.2 within twenty [20] days of receipt of the said details in terms of sub-clause 9.3.1 above, the Joint Venture shall be entitled to purchase the assets referred to in the Offer at the same price and on the same terms and

conditions *mutatis mutandis* contained in the Offer and in the event of the Joint Venture purchasing such assets, the provisions of sub-clause 9.2.11 above shall apply *mutatis mutandis*;

- 9.3.3 if the Joint Venture decides not to purchase the assets referred to in the Offer, then the Willing Seller shall be entitled to accept the Offer provided that in respect of any assets not disposed in terms of the Offer any future sale shall remain subject to the provisions of this sub-clause 9.3.'.

On 27 August 2007 and acting in terms of Clause 9.3 of the GTC read together with the Agreement of Assignment, Surmon furnished Compass Trawling with details of the Foodcorp offer. Compass Trawling thus became entitled to purchase Surmon's hake rights on the same terms and conditions as reflected in the Foodcorp offer.

[6] On 12 September 2007, a duly constituted meeting of the directors of Compass Trawling was convened to consider and discuss the Foodcorp offer. At that meeting four out of the six directors present and voting, voted in favour of a resolution that Compass Trawling should purchase Surmon's hake rights at the same price and on the same terms and conditions as contained in the Foodcorp offer. After the meeting, Compass Trawling addressed correspondence to Surmon and Foodcorp, notifying them that it had resolved to purchase Surmon's hake rights. On 13 September 2007, the second appellant, Sam Montsi ('Montsi'), purported, in his capacity as a director of Compass Trawling, to call a meeting of the shareholders of Compass Trawling to discuss 'the acquisition by the Company of certain hake rights as decided by the Board of the Company at its meeting on 12 September 2007 ... and if necessary, to overrule such decision and commitment.' In response, on 21 September 2007, attorneys acting for Wayne Louw (the second respondent), Sunil Ranchod (the third respondent) and Barrie King (the fourth respondent), all directors of Compass Trawling, who together with Bhana had voted in favour of the resolution to purchase Surmon's hake rights, addressed a letter to both Montsi and Surmon. This stated, *inter alia*, that a valid and binding contract for the purchase of the hake rights had come into existence and that Montsi's notice purporting to call a general meeting, was invalid and unauthorised.

[7] That letter elicited a response from attorneys acting for Surmon, which formally withdrew Montsi's notice but contended that the decision of Compass

Trawling to purchase Surmon's hake rights lacked validity, inasmuch as the requirements of Clause 7.10 of the GTC had not been satisfied. Accordingly, so the letter proceeded, Surmon had accepted the offer from Foodcorp.

[8] Impasse having been reached, an application was launched by Surmon, Montsi and Foodcorp as the first, second and third applicants, respectively, for declaratory relief, inter alia, that:

- '(a) At a meeting of the board of directors of the first respondent [Compass Trawling] held on 12 September 2007 a resolution in the following terms was not passed:-  
*"that Compass Trawling buy the quota of Surmon Fishing on terms contained in their offer from Foodcorp";*
- (b) The decision of the board of directors of the first respondent at the aforesaid meeting was in effect a decision not to buy the first applicant's long term Hake Fishing Rights on the terms contained in the offer from the third respondent;
- (c) The first applicant's acceptance of the offer by the third applicant to purchase the first applicant's long term Hake Fishing Rights on the terms contained in the offer ("the offer") brought about a firm and binding agreement of sale on the terms and conditions contained in the offer.'

The respondents opposed the relief sought and launched a counter-application. Van Riet AJ, who heard the matter in the Cape High Court, granted an order in the following terms:

- '1 That the application is dismissed with costs.
- 2 That the counter application accordingly succeeds.
  - 2.1 It is declared that, at the meeting of the Board of Directors of the First Respondent held on 12 September 2007, a resolution was validly passed in the following terms: *"That Compass Trawling buys the quota of Surmon Fishing on terms as contained in their offer from Foodcorp"*.
  - 2.2 It is further declared that a valid and enforceable agreement exists between the First Respondent and the First Applicant in terms whereof the First Respondent has purchased the long-term hake rights of the First Applicant at the same price and on the same terms and conditions, *mutatis mutandis*, as those contained [in] the offer of the Third Applicant dated 13 August 2007, ....
  - 2.3 The First Applicant is directed to take all such steps as are necessary in order to transfer the long-term hake rights held by it to the First Respondent,

including the signing of all necessary documentation in this regard, as well as making application for such transfer in terms of section 21 of the Marine Living Resources Act No 18 of 1998.

- 2.4 The Deputy Sheriff of this court is authorised and directed, in the event of the First Applicant failing to sign any such documents or to take any steps referred to in the preceding sub-paragraph within 5 (five) days of the order of this court, to sign such documents and to take such steps on the Applicant's behalf.
- 2.5 An interim interdict is granted, pending the transfer of the long-term hake rights, presently held by the First Applicant to the First Respondent:
  - (i) Prohibiting the first applicant from transferring the long-term hake rights presently held by it to the Third Applicant;
  - (ii) Directing the First Applicant to make the long-term hake rights presently held by it available to the First Respondent, on the terms set out in clause 9.1 of the General Terms and Conditions ... and to, forthwith, take all steps and sign all documents necessary in order to give effect thereto.
  - (iii) The Deputy Sheriff of this court is authorised and directed, in the event of the First Applicant failing to sign any such documents or to take any steps referred to in the preceding sub-paragraph within 5 (five) days of the order of this court, to sign such documents and to take such steps on the Applicant's behalf.
- 2.6 That the Applicants, are jointly and severally to pay the Respondents' costs of the counter application.'

[9] Clause 7.10 of the GTC provides:

'Decisions of the Management Board and the Executive Committee shall be taken by a majority of the members thereof present and voting provided that any decision relating to all financial matters, whether of the Joint Venture itself or in relation to the Participants vis-à-vis the Joint Venture, to the rights and obligations of the Participants in relation to the Joint Venture and to matters arising in connection with the contracting of the Vessel to the Joint Venture, shall require the support of more than 66.6% (sixty six point six percent) of the Management Board or Executive Committee members, as the case may be, present and voting to be adopted.'

[10] Two issues thus arose for determination in the court below: first, whether or not Clause 7.10 was indeed applicable; and, second, whether the requisite majority

of more than 66.6% of those present and voting, had been attained. Van Riet AJ thought it unnecessary for him to enter into what he described as the ‘vexed question as to whether Clause 7.10 of the GTC applied to the decision of the Board of Directors of Compass Trawling’ as he was willing to ‘assume, without deciding, in the [appellants’] favour that it did indeed apply and that, therefore: “... *the support of more than 66.6% ...*” of its Directors was required in order to validly pass the resolution’. The learned Acting Judge accordingly held that when four out of the six directors voted in favour of the resolution, the requisite majority of more than 66.6% envisaged in Clause 7.10 had been attained. That issue should perhaps first be disposed of in order to clear the way for a consideration of the main issue in this appeal. I will do so briefly.

[11] On this aspect of the case, the thrust of the appellants’ contention is that 66.6% in the context of Clause 7.10 should be interpreted to mean two-thirds. Accordingly, so the contention proceeded, what the clause required is a majority of *more than two-thirds* of the directors present and voting. Van Riet AJ reasoned: ‘on its ordinary grammatical meaning, 66.66 (recurring)% [being the number that had voted in favour of the resolution] is more than 66.6%. That is a linguistic and mathematical fact. The fact that the difference is small does not, ... detract from this fact. ... The use of the words “*more than*” however, means that the parties could just as well have meant to say: “*at least two-thirds*”, through the use of the words: “*more than 66.6%*”.’

[12] In *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A), Hefer JA stated (at 726H – 727A):

‘Recourse to authoritative dictionaries is, of course, a permissible and often helpful method available to the Courts to ascertain the ordinary meaning of words (*Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another* 1980 (2) SA 636 (A) at 660F-G). But judicial interpretation cannot be undertaken, as Schreiner JA observed in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 664H, by “excessive peering at the language to be interpreted without sufficient attention to the contextual scene”. The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears (*Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA

834 (W) at 856G *ad fin*). As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however, it is not. The present appears to me to be such a case.'

[13] Linguistically, Van Riet AJ may well be correct, but in ordinary parlance it would be most unusual to say that 66.6% means something other than two-thirds. In this instance, the narrow confines of a linguistic interpretation are clearly inapposite. As Conradie JA put it in *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) para 14: 'Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by [the relevant clause]. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by the ... provision'.

[14] One's common understanding, particularly in this contextual scene, undoubtedly is that a resolution by 66.6% means a resolution by two-thirds of those present and voting. To interpret the clause so that a majority of two-thirds *exactly* and not a majority of *more* than two-thirds is required is unnatural and clearly emasculates the clause. Had three directors voted in favour of the resolution and three against it, the resolution would have failed. Four in fact voted in favour of the resolution. That, on the approach of the learned Acting Judge, constituted both a simple majority as well as the special majority envisaged in the clause. In my view, it could never have been contemplated that in a situation such as this - namely, where provision is made for a special voting regime - the voting of one extra director in favour of a resolution would at one and the same time constitute the swing vote for both a simple majority as well as for the special majority contemplated by Clause 7.10. It follows that the court below ought to have reached a contrary conclusion to that reached by it on this aspect of the case. I turn now to consider the principal issue in this appeal.

[15] Compass Trawling is a company duly incorporated in terms of the Companies Act 61 of 1973 and as such its board of directors is charged with the management of the business of the company, subject of course to the provisions of the Act, its articles of association and the provisions of its shareholders agreement. Clause 68 (a) of Compass Trawling's articles of association provides:



'The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In the event of an equality of votes, the chairman shall have a second or casting vote. A director may at any time convene a meeting of the directors.'

The shareholders agreement of Compass Trawling, which was concluded on 16 August 2001, contains fairly detailed provisions relating to its directors. Clause 6.4 reads:

'All resolutions put to the vote at meetings of directors, if not passed unanimously by the directors present, shall be deemed to have been rejected unless passed by majority vote of all such directors.'

It is thus clear on either the articles of association or the shareholders agreement that a majority vote is all that was required for a valid decision of the board of directors of the company.

[16] In terms of the assignment it was the *rights* and *obligations* of the joint venture – not its *management* - that came to be assigned to Compass Trawling. Nor, in fact, could the management be assigned. Clause 7.10 of the GTC appertains to the internal management of the joint venture. It prescribes the voting regime for valid decisions of its management board and executive committee. That voting regime cannot simply be imposed upon the board of directors of Compass Trawling, a separate and distinct juristic entity. When resolving to purchase Surmon's hake rights, each of those present and voting at the meeting acted *qua* director of Compass Trawling. As such they had no inherent powers, for the powers that they exercised were in fact the powers of the company, which had been conferred upon them by the articles of association. They thus lacked the authority to place further restrictions on the powers of the company than those provided for in the articles of association. The board of directors owed their fealty to and were accordingly obliged to apply - rather than to defy - the articles of association of the company.

[17] What, however, presents as an insuperable obstacle in the way of the appellants' contention is Clause 8 of the agreement of assignment. Clause 8, headed 'Conflict', provides:

'In the event of any provision contained in the JV Formation Agreement and/or the JV Participation Agreements, read with the GTC conflictin[g] with any provision of the Compass Trawling Shareholders Agreement, the latter shall prevail.'

In my view that clause is destructive of the appellants' case, for it makes plain that the parties applied their minds to the possibility of a conflict between the GTC and the shareholders agreement and resolved unequivocally and expressly that, in the event of such conflict, the latter would prevail. It follows in those circumstances that the first issue and consequently the appeal falls to be decided against the appellants.

[17] In the result the appeal is dismissed with costs.

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**V PONNAN**  
**JUDGE OF APPEAL**

## APPEARANCES:

For Appellant:

H M Scholtz SC  
R D E GordonInstructed by:  
Cliffe Dekker Inc  
Cape Town  
Claud Reid  
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For Respondent:

J Newdigate SC

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