



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NO: 1565/2010**

In the matter between:

**CIVILS 2000 HOLDINGS (PTY) LTD  
and**

**Plaintiff**

**BLACK EMPOWERMMENT PARTNER CIVILS  
2000 (PTY) LTD**

**First Defendant**

**CIVILS 2000 (PTY) LTD**

**Second Defendant**

**SHARIF PANDOR**

**Third Defendant**

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<b>JUDGE</b>	<b>:</b>	<b>P.A.L. Gamble</b>
<b>FOR THE PLAINTIFF</b>	<b>:</b>	<b>Adv. M.J. Fitzgerald SC and Adv. I.C. Bremridge</b>
<b>INSTRUCTED BY</b>	<b>:</b>	<b>C&amp;A Friedlander</b>
<b>FOR 1<sup>st</sup> and 3<sup>rd</sup> DEFENDANTS</b>	<b>:</b>	<b>Adv. Paul Tredoux</b>
<b>INSTRUCTED BY</b>	<b>:</b>	<b>K.J. Bredenkamp</b>
<b>DATES OF HEARING</b>	<b>:</b>	<b>22 November 2010</b>
<b>DATE OF JUDGMENT</b>	<b>:</b>	<b>8 February 2011</b>



**IN THE HIGH COURT OF SOUTH AFRICA  
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**REPORTABLE**

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**Plaintiff**

**and**

**BLACK EMPOWERMENT PARTNER CIVILS  
2000 (PTY) LTD**

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**Second Defendant**

**SHARIF PANDOR**

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**JUDGMENT DATED 8 FEBRUARY 2011**

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**GAMBLE, J:**

[1] On 26 January 2010 the Plaintiff company issued summons against the three Defendants for relief based on Section 252 of the Companies Act, 1973 ("the Act").

[2] On 1 April 2010 the First and Third defendants filed a special plea of non-joinder as also a plea on the merits.

[3] On 15 June 2010 the First and Third defendants filed an exception to the Plaintiff's particulars of claim, the substance whereof I shall revert to shortly. Since the exception was filed out of time and after service of the plea, it was capable of

being set aside as an irregular step under Rule 30. The Plaintiff elected however not to file a Rule 30 notice but arranged for the exception to be heard as a matter of semi-urgency.

[4] When the matter was called I enquired of counsel for the Plaintiff whether there was any objection to the procedure adopted by the first and third Defendants. Mr Fitzgerald SC, who appeared with Mr Bremridge for the Plaintiff, noted that the exception raised a law point which was required to be resolved before the matter could proceed on the merits. He suggested that the exception should be heard so that the Plaintiff could proceed without further ado in the event that the exception was dismissed. That seems to me a sensible approach and one which will avoid further potential delays under Rule 33(4).

[5] The Plaintiff's case as pleaded is that it and the First Defendant are currently the shareholders of the Second Defendant ("the Company") to the extent of 70% and 30% respectively. Their relationship *inter se* is effectively governed by a shareholders agreement dated 14 October 2005 which was concluded by the Third Defendant ("Pandor") on behalf of the First Defendant and the erstwhile so-called founding shareholders of the Plaintiff.

[6] It is common cause that Pandor was duly appointed as a director of the Second Defendant and that a certain Shireen van der Schyff was appointed as an alternate director in Pandor's stead.



[7] The Plaintiff complains that the affairs of the company are being conducted in a manner which is unfairly prejudicial, unjust or inequitable by Pandor and/or van der Schyff who are alleged to have committed a host of corporate misdemeanours which, it is said, constitute *inter alia* fundamental breaches of their fiduciary duties towards the company.

[8] The Plaintiff says that it is unable to remove either Pandor or van der Schyff as directors of the company due to the structure of the shareholders agreement – the terms are such that it cannot muster the requisite 76% of shareholder support to achieve this end. It has therefore approached the Court for an order under Section 252 to secure the transfer of the First Defendant's shares in the company to either the company, or it, at no consideration.

[9] The relevant provisions of Section 252 of the Companies' Act, 1973 are to the following effect:

- "(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of sub-section (2), make an application to the Court for an order under this section .....
- (2) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of

*any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.*

(3) *Where an order under this section makes any alteration or addition to the memorandum or articles of a company –*

(a) *the alteration or addition shall, subject to the provisions of paragraph (b), have effect as if it had been duly made by special resolution of the company; and*

(b) *the company shall, notwithstanding anything contained in this Act, have no power, save as otherwise provided in the order, to make any alteration in or addition to its memorandum or articles which is inconsistent with the order, except with the leave of the Court."*

[10] It has been held that the purpose of the section is to afford equitable relief to any members of a company who have a legitimate complaint of any act or omission by the company or of the conducting of its affairs which is prejudicial, unjust or inequitable towards them<sup>1</sup>.

[11] In bringing a claim based on the section it is not necessary that specific reference be made in the pleading to the statutory provision. However, to succeed in such a claim the Plaintiff would have to establish the following:

11.1 an act or omission by the company itself which is unfairly prejudicial to the Plaintiff or some part of the members of the company;

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<sup>1</sup> Lourenco and Others v Ferela (Pty) Ltd and Others (No 1) 1998 (3) SA 281 (T); Ben-Tovim v Ben-Tovim and Others 2001 (3) SA 1074 (C)

11.2 that the affairs of the company are being managed in such a manner;

11.3 the nature of the relief sought to remedy the matters complained of;  
and

11.4 that it is just and equitable that such relief be granted.<sup>2</sup>

[12] The substance of the First and Third Defendants' exception is as follows:

*"5...(T)he Honourable Court is only entitled to exercise the powers contained in Section 252 if the jurisdictional facts contemplated by the said section have been fulfilled.*

*6. In other words, the Honourable Court is only entitled to exercise the said powers if it finds that:*

*6.1 any particular act or omission of **Civils 2000 (Pty) Ltd** is unfairly prejudicial, unjust or inequitable; or*

*6.2 the **affairs of Civils 2000 (Pty) Ltd** are being conducted in a manner unfairly prejudicial, unjust or inequitable;*

*to the Plaintiff as a member of the company or to some part of the members of the company as contemplated and required by Section 252 of the Companies Act.*

*7. The facts and circumstances which the Plaintiff apparently contends constitute the allegedly unfairly prejudicial, unjust or inequitable conduct for the purposes of the jurisdictional facts required by the said section 252 are pleaded in paragraphs 26 through 35 of the Particulars of Claim.*

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<sup>2</sup> Ben-Tovim case supra at 1090D.



8. However, the alleged conduct relied upon by the Plaintiff does not constitute or amount to any:

8.1 act and/or omission of **Civils 2000 (Pty) Ltd**;

8.2 conduct of the affairs of **Civils 2000 (Pty) Ltd**;

as contemplated and required by Section 252 of the Companies Act.

9. The relief which the Plaintiff claims would – if granted – constitute arbitrary deprivation of the property of the First Defendant in violation of the latter's fundamental rights which are entrenched by section 25 of the Bill of Rights of the South African Constitution, 1996.

10. There is accordingly no legal basis for the Plaintiff's claims, which are bad in law and which disclose no cause of action."

[13] In a spirited argument Mr Tredoux, for the First and Third Defendants suggested firstly that the Particulars of Claim did not go far enough: There was, he said, no allegation of a link between the alleged misdemeanours of the individual directors and the company. It was said that success under Section 252 could only follow if a plaintiff had established that the proscribed conduct complained of was that of the company itself, as opposed to the directors in their individual capacities.

[14] This argument pertinently overlooks, *inter alia*, the following allegations in the Particulars of Claim:

"27. In the premises, van der Schyff and Pandor, while directors of the company and of African Footprint <sup>3</sup>, and as the representatives of the First

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<sup>3</sup> A company of which they were also directors and which was claimed to be *inter alia* competing unlawfully with the Second Defendant.

*Defendant on the Board of the company and, inter alia, acting on behalf of First Defendant:*

27.1 *Have set up a company or companies which compete or are intended to compete with the business of the company;*

27.2 *Are taking advantage of their association with the company in a manner that is fraudulent, unfair and unlawful and intended to benefit African Footprint and its shareholders, to the detriment of the company and ultimately the Plaintiff, as a member of the company, more particularly, in assisting African Footprint to compete unlawfully with the company."*

[15] It is further alleged in the Particulars of Claim that these directors were in breach of various of their fiduciary duties owed to the company.

[16] A director of a company will be in breach of the fiduciary duty owed to that company where he/she is placed in a position in which his/her duties or interests conflict with those of the company, for example, by becoming a director or taking up office in a competitor company<sup>4</sup>. This is precisely the nature of the corporate misconduct of which the Plaintiff complains.

[17] Further, it is an established principle of English company law that the acts or omissions of the directors of a company are acts or omissions of the company even where they injure the company and constitute a breach of any duty owed to that

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<sup>4</sup> Phillips v Fieldstone Africa (Pt) Ltd and Another 2004 (3) SA 465 (SCA); Volvo (Southern Africa) (Pty) Ltd v Yssel 2009 (6) SA 531 (SCA)



company. The approach is summarized thus in Gower and Davies, Principles of Modern Company Law <sup>5</sup>.

*" 'In addition to these wrongs to the minority, this is the type of case in which a wrong is done to the company itself and the control vested in the majority is wrongfully used to prevent action being taken against the wrongdoer. In such a case the minority is indirectly wronged.' There are a number of reported cases under the current legislation in which petitions have been entertained by the courts where the wrongdoers' conduct consisted wholly or partly of wrongs done to the company"*

[18] In support of this view the learned authors refer to a number of English decisions in which there were various forms of diversion of the companies' business to rival companies in which the majority was interested. (cf. Re Stewarts (Brixton) Ltd <sup>6</sup> and Re Cumana Ltd <sup>7</sup>.) Similarly in Re Saul D. Harrison and Sons Inc <sup>8</sup> the Court of Appeal recognised the necessity for relief in circumstances where the board of directors failed to act in good faith in the interests of the company.

[19] There do not appear to be any South African cases directly on point. However, the English approach is cited with approval in one of our leading text books on company law. Blackman et al Commentary on the Companies Act <sup>9</sup> remarks as follows:

*"Clearly, acts or omissions of the directors and managing directors are acts of the company; and in the circumstances so too are those of senior officers.*

<sup>5</sup> 7<sup>th</sup> Ed p. 513

<sup>6</sup> [1985] B.C.L.C.4

<sup>7</sup> [1986] Ch.211

<sup>8</sup> [1986] B.C.L.C. 14

<sup>9</sup> Vol 2, p. 9-9

*Acts or omissions of such persons are acts or omissions of the company even when they injure the company and constitute a breach of a duty owed to the company. Indeed, it has been held that acts of such persons are acts of the company even when not performed in the positive conduct of its affairs, if done in breach of a duty owed to it, eg. the setting up of a business by a director in competition to the company's business, for such acts constitute positive misconduct in relation to the company's affairs."*

[20] The development of one company law over the past century has drawn richly from English law. And while our 1973 Companies Act is said to have ushered in a marked divergence from that colonial legacy, our courts have often looked to English company law when interpreting statutory provisions with similar import in both countries.<sup>10</sup> Given the similarities between Section 252 of the Act and Section 459 of the English Companies Act of 1989, I am of the view that such an approach is warranted in the instant case.

[21] Accordingly, I hold that the Plaintiff's allegation that the breach of their fiduciary duty on the part of the directors who represent the First Defendant on the board of the company is conduct of the company as contemplated under Section 252 of the Act, is legally sound. In my view, there is therefore no merit in the first ground of exception raised by First and Third Defendants.

[22] In his main argument Mr Tredoux all but abandoned the constitutional point raised in the second ground of exception. In my respectful view there is no merit in this leg of the argument either and I shall therefore deal with the point briefly.

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<sup>10</sup> Cilliers and Benade, Corporate Law (3<sup>rd</sup> Ed) pp 18-20; Howard v Herrigel and Another N.N.O. 1991 (2) SA 660 (A) at 674 A-D.



[23] In the first place, to the extent that the First and Third Defendants seek to allege that Section 252 is law of general application which permits the "*arbitrary deprivation of property*", they must directly challenge the statutory provision in proceedings in which the Minister of Justice has been joined <sup>11</sup>. It is not appropriate to raise the issue by way of a collateral challenge in an exception.

[24] Secondly, the transfer of shares claimed by the Plaintiff is not an expropriation of property and, in any event, such a transfer can only take place pursuant to a court order and after a detailed and thorough consideration of a host of relevant facts and circumstances <sup>12</sup>.

[25] Thirdly, the provisions of Section 252 are sufficiently wide to permit a court to grant an order which may include an order for a *quid pro quo* on the part of the Plaintiff. The extent of that obligation could vary significantly from case to case, due regard being had to all the relevant circumstances. And it could be that a party is able to persuade a court to exercise its discretion under section 252(2) in such a manner that nothing is to be paid by that party for the transfer of the shares. In such circumstances, provided the court has exercised its discretion properly after consideration of all the relevant facts and circumstances, there can be no suggestion of an arbitrary deprivation of property.

[26] In his reply Mr Tredoux was driven to concede that the Plaintiff had put up an answer to the allegations made in para 8 of the exception. Undaunted by the

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<sup>11</sup> Naptosa and Others v Minister of Education, Western Cape, and Others 2001 (2) SA 112 (C) at 122C-123J

<sup>12</sup> First National Bank of S.A. Ltd v Commissioner, South African Revenue Service 2002 (4) SA 768 (CC) at 810 G.



consequences of his concessions, counsel then sought to salvage the case by relying on other potential grounds of exception. Since an excipient is bound strictly by the grounds raised in its notice of exception<sup>13</sup> such an avenue was not open to the excipient.

[27] In my view the exceptions must therefore fail. I am satisfied that the complexity and importance of the matter warranted the engagement of two counsel on the part of the Plaintiff.

[28] Accordingly I make the following order:

- (a) The First and Third Defendant's Exception to the Plaintiff's Particulars of Claim is dismissed.
- (b) The First and Third Defendant's are to bear the Plaintiff's costs of suit in the Exception jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent upon the engagement of two counsel.



P.A.L. GAMBLE, J

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<sup>13</sup> Feldman N.O. v EMI Music SA (Pty) Ltd 2010 (1) SA 1 (SCA) at 5A