

SOUTH AFRICA / JUDGMENT

Afrovan (Pty) Ltd v Wellsted (Pty) Ltd

(215/82) [1984] ZASCA 25 (26 March 1984)

[1984] ZASCA 25

COURT

Supreme Court of Appeal

BEFORE

Miller, Trengove, Cillié, Galgut, Howard

CASE / FILE NUMBER

215/82

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215/82 N.v.H.

AFROVAN (PTY) LTD

and

JACK WELLSTED (PTY) LTD

MILLER, JA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

AFROVAN (PTY)LTD Appellant

JACK WELLSTED (PTY)LTD RespondentCORAM: MILLER, TRENGOVE, CILLIÉ, JJA,

et GALGUT, HOWARD, AJJAHEARD: 12 MARCH 1984DELIVERED: 26 MARCH 1984

JUDGMENTMILLER, JA :-

The appellant company was incorporated in December 1971 with an authorized share capital of 4 000 / 2 4 000 shares of R1-00 each. It owed its formation to the decision of six removal contractors to form a "consortium" of such contractors for the purpose of co-ordination of removals throughout the Republic of South Africa and for "the joint development and maintenance of the standards of operation of the individual members of the consortium". Each of the six contractors, of whom the respondent company was one, subscribed for and was allotted 500 shares in the appellant. Each of the members became entitled by virtue of such shareholding to use the name, Afrovan, in association with its own name for purposes of advertising its business

as a removal contractor.

At the /

3 At the time of the occurrences which gave rise to this litigation, the respondent was still a member, holding 500 shares, together with six other members who were all engaged in the business of furniture removers and carriers. It is common cause that after incorporation, when the appellant had become known for its activities as the controlling medium of the consortium, its board found it necessary to amend the Articles of Association, more particularly in order to vest the board with powers relating to the shareholding of members including transfers of members' shares, and to make provision for better control by the board of the activities of members

of the /

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of the consortium. Art 36 bis thus found its way

into the Articles of Association. We are primarily concerned in this case with the provisions of para (b) of the article, but it is, I think, desirable to reproduce the whole of art 36 bis. It reads:-

"(a) Shares may only be allotted to, registered in the name of, or held by a registered furniture remover or carrier. Should any shareholder, thus qualified, cease at any time to hold the necessary qualifications, the shares held by such shareholder shall immediately revert to the control of the directors. The directors shall be empowered to dispose of the reversionary shareholding to whom they think fit, at what in their opinion is the best obtainable price, whereupon the directors shall account to the disqualified shareholder for the amount of the price received less the costs of disposal.

(b) /

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- b) In the event of there being a change in the ownership of the major domestic shareholding of a member company, or of the beneficial ownership of a member firm not being a company, such change shall be reported to the directors of the company who may direct the member to surrender its shareholding in the company to the control of the directors, who shall be entitled to dispose thereof as set out in the previous sub-clause but included in the powers of the directors in terms of this clause shall be the power to re-allocate the shareholding in this company to the said member company, on such terms as the directors may deem it desirable to impose.
- (c) Should any member resign or be expelled or forbidden from operating within the group, the shares in this company held by that member shall automatically revert to the control of the Directors as set out in sub-clause (a) above.

(d) Immediately a member's shares are required to revert to the control of the directors he may not continue advertising his membership of this company or using the name of the company /

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company, and the directors shall be free to advertise publically that the member has withdrawn from the Group.

(e) Any decision relating to the establishment or imposition of power to expel any member shall be reserved for decision at a Special General Meeting of the Company only, and a resolution so to expel, except as provided in Article 86 (bis) (a), or a resolution authorising the Directors to exercise an unlimited power to expel any member or direct any shareholder to allow its shares to revert to the control of the Directors shall only be passed on a unanimous vote by all shareholders entitled to attend the Special General Meeting."

The / 6

The shares in the respondent company

(which I shall henceforth call "Wellsted" - and the appellant company, "Afrovan") were at the time of the incorporation of Afrovan held by members of the Kaye family. Denis Kaye ("Kaye") was a director of Wellsted and also of Afrovan and he represented Wellsted on the Afrovan board.-

It appears that during September 1979 Kaye and other members of the Kaye family, without giving notice thereof to Afrovan, transferred their shareholding in Wellsted to "a family holding company" called Pickfords Holdings (Pty) Ltd ("Pickfords"). The reason for not reporting such transfer to Afrovan in terms of para (b)

of art / 7

of art 36 bis was, according to Kaye, that Pickfords being a holding company of the Kaye family, the shares were, despite transfer to Pickfords, still "beneficially owned" by members of the Kaye family. The suggestion which I think is implicit in that explanation is that although there may have been, in form, a change in the ownership of the major domestic shareholding of Wellsted by virtue of the transfer to Pickfords, it was not such a "change" as was envisaged in para (b) of art 36 bis because the Kaye family, through Pickfords, were for practical purposes still at the helm of Wellsted. About a year later, the Unisec Group Ltd acquired 80% of Pickford's shares, thus gaining control of Pickfords.

Thereafter /

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Thereafter, towards the end of December 1980,

Kaye informed Afrovan that the controlling shareholding

in Wellsted had been transferred to the Unisec Group Ltd. There is uncertainty concerning the precise form of this communication; Kaye's recollection appears to be that he reported to Pettit, the executive officer of Afrovan, that the Unisec Group Ltd had acquired "the Wellsted business". What is not in dispute, however, is (i) that at the time of that communication Afrovan was wholly unaware of the previous transfer of the Kaye family's shareholding to Pickfords; (ii) that whatever the exact terminology used by Kaye was, the information he intended to convey, actually conveyed and was /

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and was understood to have conveyed to Afrovan in December 1980 was, that there had been a change in the ownership of the major domestic shareholding of Wellsted, by virtue of the disposal and transference of the controlling shareholding to the Unisec Group Ltd. A result of the passing of this information to Afrovan was that a meeting of the directors ("the board") of Afrovan was held on 11 February 1981. The minutes of the meeting reveal that one of the objects of such meeting was to deal with an application by Wellsted "to retain the Afrovan franchise" notwithstanding "the sale of Wellsted's business to Unisec".

(A similar application was made by another member of the /

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the consortium, Reid's Transport (Pty) Ltd, which had also effected a change in its shareholding such as is referred to in art 36 bis (b).)

Kaye was present at the meeting and according to the minutes apparently supported Wellsted's application to retain the Afrovan franchise by explaining to the board "the nature of " the company which had purchased the shares, "and its intent". It is common cause that thereafter Kaye (and the representative of Reid's Transport (Pty) Ltd) left the meeting, by agreement, to enable the remaining members of the board freely to discuss the merits of the respective applications and, no doubt, to arrive at

decisions / 11 decisions thereon. After what is described in the minutes as a "long discussion" the board announced that their decision was that Wellsted's shares in Afrovan were to be placed under the control of Afrovan to enable it to deal with them in terms of art 36 bis (b); i.e., to allocate them to other carriers. Wellsted would also be required to cease to use the name "Afrovan" in association with its own name in the carrying on of its removal business and to remove from vehicles, equipment, and other objects all signs of association with Afrovan. Kaye immediately said that his company (Wellsted) "would not accept the decision of the board, would not discontinue advertising Afrovan and would contest the matter legally".

When /

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When reaching its decision to exercise the

powers given to it by art 36 bis (b), the Afrovan

board was still wholly unaware of the fact that Kaye

and family had previously transferred their shareholding

in Wellsted to Pickfords and that the shares acquired by Unisec were shares in Pickfords. This information was,

however, supplied to Afrovan in a lengthy telex message

some fifteen days after the, board's decision to act in

terms of art 36 bis (b) had been announced. it was

alleged in the telex message that the sale of shares to Unisec was not a sale of shares in Wellsted but a sale of Pickford's shares and that therefore art 36 bis (b) did not apply. Afrovan was not persuaded by this

argument /

13 argument and insisted upon severance of Wellsted's ties with Afrovan. Wellsted refusing to meet Afrovan's requirements, the latter applied on notice of motion in the Cape Provincial Division for an order (I summarize) directing Wellsted to surrender and to deliver to Afrovan its shareholding in that company to be dealt with "as prescribed" in art 36 bis (b); interdicting Wellsted from advertising its membership of Afrovan, and directing Wellsted to remove from its vehicles and other objects all references to its association with Afrovan.

The application was opposed by Wellsted on several grounds, some of which have since fallen away. In the main, apart from attacks upon the procedure

followed / 14 followed at the meeting of 11 February, Wellsted's contention was that what had been considered by Afrovan's board was the transaction by which Unisec acquired the shares and because the shares acquired by Unisec were in fact not Wellsted's shares, but Pickfords, the invocation by the board of the terms of art 36 (bis) (b) was not permissible. The Court (VAN DEN HEEVER, J) rejected this contention (and the other grounds of opposition relating to the applicants' authority to act and the alleged procedural irregularities) and granted the orders prayed. Afrovan then appealed to the Full Court of the Cape Provincial Division. The appeal was upheld, the Court concluding that

although /

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although Afrovan might have been entitled to invoke art 36 bis

- (b) in respect of the transfer of the Wellsted shares to Pickfords, that transaction had not been before the board at all, and that the transaction whereby the Unisec Group acquired Pickford's shares could not justify the invocation of art 36 bis (b) against Wellsted. The orders granted by VAN DEN HEEVER, J, were accordingly set aside. The Full Court refused Afrovan's application for leave to appeal against its decision to this Court, whereupon Afrovan successfully petitioned the Chief Justice for leave to appeal.

In argument before us Mr Hoberman, for Wellsted, conceded that the transference of shareholding in Wellsted

from / 16 from the Kaye family to Pickfords represented "a change in the ownership of the major domestic shareholding" of Wellsted and that the Afrovan board would have been entitled to invoke art 36 bis (b) against Wellsted had that transaction come to its notice. It is unnecessary to express any opinion on the correctness of that concession. Having made that concession counsel went on to contend (as the Full Court had in effect held) that the transfer of shares to Pickfords not having been brought to the notice of the board, its consideration at the meeting of 11 February was necessarily limited to the transaction by which Unisec acquired the shares and that that transaction fell beyond the scope of the

relevant /

17 relevant article because its subject matter was Pickfords', not Wellsted's, shares. The board, however, did not know on 11 February, when it came to its decision, that the shares acquired by Unisec were Pickfords' shares, not Wellsted's. The information available to the board was what Kaye himself had reported to it, and that was that Unisec had acquired Wellsted's business; in other words, that control of the major shareholding in We listed had gone over to Unisec. The meeting on 11 February was called because Kaye, acting on behalf of Wellsted, had applied for leave to retain "the Afrovan franchise". Considered in its context, such application clearly signified that it was

acknowledged /

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acknowledged by Wellsted that a change in its major domestic shareholding had taken place and that it was for the Afrovan board to consider and decide whether or not the provisions of art 36 bis (b) should be enforced against it. It was not suggested by Wellsted's counsel what the board, confronted by such an application and acknowledgement by one of its members, could and should have done other than to consider the application and give its decision thereon.

It is well to remember that the Articles of Association of the company "have the same force as a contract between the company and every member as such to observe their provisions".

(Gohlke /

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(Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another 1970(2) SA 685 (A) at p 692, per TROLLIP, JA.)

Also, the articles

"should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the article"

(Hohmes and Another v Keyes (Lord) and Others (1958)

2 All ER 129 at p 138, per JENKINS, L J.) The board was obliged to consider the application on the footing

that it was conceded by the applicant, a member of the consortium, that there had been a change in the ownership of the major domestic shareholding of such member.

The /

20 The board had also to be alive to the purpose and aims

of art 36 bis and of its duty to serve them within the framework of the articles. Such purpose and aims, as has already been indicated, included the achievement and maintenance of high standards in the service rendered by individual members of the consortium, so that the word "Afrovan" would serve as a badge signifying excellence when used by any member of the consortium in conjunction with its own name. The maintenance of high standards by members would obviously depend largely upon the quality of the management and control of such members. A change in the ownership of the major shareholding of any company member would involve a

change /

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change in the control of such company; The information which the board had from its Wellsted member was that

the controlling shareholding of the company had indeed

passed to another, viz, Unisec. In the Court of first

instance, VAN DEN HEEVER, J, when dealing with an argument that the members of the board did not apply

their minds to the correct transaction, observed that

the application to retain the Afrovan franchise

"was based on a transfer of the Kaye's control of Wellsted to Unisec regardless of the route by which this had occurred. Under the circumstances the directors applied their minds, correctly, to the situation presented to them".

I am in full agreement with that summation.

I might add that if, at the meeting of 11 February, Kaye had

divulged /

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divulged that the shares had first passed from the family to Pickfords and that Unisec had thereafter acquired 80% of Pickfords' shares, he would merely have been stating the reason for his acknowledgement that there had been a change in the ownership of the major domestic shareholding of Wellsted, the control of which had thus passed to Unisec. The provisions of art 36 bis would be no less applicable because the full reasons for the correct conclusion that there had been such a change were not divulged by Kaye to the board.

In my judgment the Full Court erred in over= ruling the decision of the Court of first instance that 23 the relevant article was applicable in the circumstances of this case. Having so concluded, the Full Court found it unnecessary to consider the other defences raised by Wellsted. In this Court only one of the alternative defences previously raised was persisted in and that was to the effect that the board had not, prior to announcing its decision on 11 February, given Kaye a proper or fair hearing. This defence rests on a platform which is very flimsy indeed. As I have mentioned, Kaye was present at the meeting and it is not disputed that he was given and took advantage of an opportunity to address the board in support of Wellsted's

application / 24 application. The terse note in the minutes of the meeting shows that Kaye "indicated the nature of" the company to which control of Wellsted had passed and the "intent" of such company. It is clear from the form of the minutes that the other member (Reid's Transport) applying for similar relief was given a similar opportunity, and also took advantage thereof. The contention that Kaye did not have a fair hearing stems from the circumstance that after he and the other applicant had left the room, the board decided the fate of his application in his absence and informed him of the result when he returned. As I understood the argument on behalf of Wellsted, it was that Kaye ought

to have /

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to have been afforded a further opportunity of addressing the board on his return to the room in which the meeting was held. There is no substance in such a contention. Kaye left the room, after addressing the board, apparently at the suggestion of the board and with his full concurrence. The purpose of vacating the room was clearly to enable the members of the board to discuss the problem freely, without the possibly inhibiting factor of the presence of a member whose acts and interests were to be discussed and adjudicated upon. This, I have no doubt, is a by no means unusual procedure when the conduct or interest or obligation of a

member /

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member of a board or council or institution is to be considered and decided upon by his fellow members. If Kaye in fact had in mind that on his return to the room he would be given a further opportunity of addressing the board before it gave its decision, I do not think that he was justified in holding such a belief. Nor do I accept that it is likely that he had that in mind. His willingness to leave his fellow-members to discuss the matter in private reflects his understanding that the nature of their private discussions need not be revealed to him. And if they were not to be revealed to him on his return to the room, in what respect could he have intended to address the board further?

There /

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There is nothing to show that he was inhibited by the board in regard to his explanations and address prior to his leaving the members of the board to consider the case in private. Moreover, even if Kaye believed that he was to be given a further opportunity of addressing the board, there is nothing to show that he asked for such an opportunity or that he was prevented from saying anything further. It was suggested in argument that Kaye's explanations prior to vacating the room were limited to the "nature and intent" of the Unisec company and that it may have been understood by Kaye that thereafter there would be an opportunity of further discussion or argument con=

cerning /

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cerning the retention of the Afrovan franchise. Again, this is extremely unlikely. Everyone concerned knew that there was only one issue in the application, and that was whether Wellsted should be permitted to retain its shares and the Afrovan franchise; and this was inextricably bound up with the nature and intent of the company to which the control of Wellsted had shifted. No reason comes to mind for splitting

that whole into two distinct parts for purposes of

single consideration of the issue before the board. On the

papers it has not been shown that Wellsted was denied

a fair hearing.

29 The appeal is allowed with costs, which shall include costs in respect of two Counsel. The order of the Court a quo (the Full Court) is set aside and there is substituted therefor an order dismissing the appeal to it with costs.

S MILLER JUDGE OF APPEAL

TRENGOVE, JA)

CILLIÉ, JA) CONCUR GALGUT, AJA) HOWARD, AJA)

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