

SOUTH AFRICA / JUDGMENT

Brikor Limited and Another v Parkin N.O. and Others (11622/2020) [2021] ZAGPJHC 525 (4 March 2021) [2021] ZAGPJHC 525

COURT

South Gauteng High Court, Johannesburg

BEFORE

MJ Engelbrecht

CASE / FILE NUMBER

11622/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, JOHANNESBURG
CASE
NO: 11622/2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
NO

DATE:

12 MARCH 2021
In

the matter between:

BRIKOR
LIMITED
First
Applicant
GARNETT
PARKIN
Second
Applicant
And
ELSIE
PARKIN
N.O.
First Respondent
PHILIPPINA

MARIA MCDONALD N.O.
Second Respondent
MARIA
NEWTON
N.O.
Third
Respondent
MATHYS
DE BRUIN
N.O.
Fourth
Respondent

JUDGMENT

ENGELBRECHT, AJ:

1. Enrolled before me for the week of 1 March 2021 was an application for an order that:
 - 1.1. the request of the first to fourth respondents (Respondents) for a shareholders meeting to be convened to confirm the appointment of new directors pursuant to the outcome of the Annual General Meeting of the first applicant (Brikor) of 9 October 2019 be set aside; and
 - 1.2. the request of the Respondents for a shareholders meeting to be convened for the purpose of the removal of Mr. Allan Pellow, the second applicant (Mr. Parkin) and Mr. AP van der Merwe (Mr. Van der Merwe) be set aside (the First Application).
2. The relief was sought under section 61(5) of the Companies Act, 2008, which provides that a company may apply to a Court for an order setting aside a shareholders' demand for a meeting in terms of section 61(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 shareholders, or is otherwise vexatious.
3. I directed that the First Application be heard on 4 March 2021.
4. On 1 March 2021, Brikor and Mr. Parkin (Applicants) filed an application seeking postponement of the hearing, so that the matter to be set down for hearing together with an application under case number 9390/2021 (the Second Application). The basis for the application for postponement was a material change in circumstances, as follows:
 - 4.1. The First Application, which was before me, related to requests made during February 2020. It was launched on 20 May 2020.
 - 4.2. After the affidavits and heads of argument in the First Application had been filed, Brikor held its Annual General Meeting of Shareholders on 6 November 2020 (2020 AGM). The first respondent (Ms. Parkin) was unable to vote the shares of the Daniel Parkin Testamentary Trust

(Daniel's Trust) as the 2020 AGM, because her co-trustee at the time (Mr. De Bruyn) was not prepared to accede to the voting as proposed by Ms. Parkin in respect of the shares in Brikor held by Daniel's Trust.

4.3. The outcomes of the 2020 AGM included that:

4.3.1. Mr. Van der Merwe was no longer a director;

4.3.2. Mr. Pellow was re-appointed as Chairman of Brikor's Board by a majority vote of the shareholders; and

4.3.3. the appointment of the directors whom the Respondents had sought to have installed (Dr. Henry and Mr. Hornby) was not confirmed.

4.4. At the 2020 AGM the shareholders also approved a resolution to place Brikor's authorized, but unissued shares under the control of Brikor's Board.

4.5. This led to a further request on 9 February 2021 for a meeting of shareholders of Brikor. At first Ms. Parkin proposed that the resolution of the shareholders at the 2020 AGM be set aside. Then, on 17 February 2021, she proposed that the resolutions be reconsidered and voted again at the requested meeting.

4.6. Pursuant to that request, the Applicants launched the Second Application to have the requests set aside under the provisions of section 61(5) of the Companies Act, 2008, on 25 February 2021. The request for a shareholders meeting in respect of the positions of Mr. Pellow, Dr. Henry and Mr. Hornby as directors of Brikor is now the subject-matter of the Second Application, because the shareholders of Brikor voted on the matter at the 2020 AGM.

5. The Respondents filed a notice of intention to oppose the application for postponement on the same day. An answering affidavit deposed to by Ms. Parkin was filed on 3 March 2021. The position of the Respondents as set out therein is that:

5.1. the Second Application "deals with completely different issues to the Current Application presently before the Honourable Court and it is not convenient for the two applications to be heard together"; and

5.2. "Whilst the application in regard to Van der Merwe has become moot, that does not render the Current Application moot, inter alia in this regard the resolution sought to remove Garnett and Pellow as directors and to appoint Mattheyse, Hornby and Greeff as directors remain extant".

6. The answering affidavit in the postponement application quotes large tracts from an affidavit filed in proceedings in another application under case number 6549/2020, seeking an order that Brikor be interdicted from utilizing, for purposes of any acquisition, the authorized but unissued shares in Brikor pending the outcome of an action instituted by Ms. Parkin in her personal capacity and in her capacity as trustee of Daniel's Trust pending removal of Mr. De Bruyn as trustee. It deals with events surrounding the 2020 AGM, and Mr. De Bruyn's refusal

to act jointly with Ms. Parkin.

7. The conclusion reached is that:

7.1. “The issues in the Current Application are not related to the issues which will be tested in the Second Application. In addition, the answering affidavit in the Second application has not yet been finalised and it is simply not possible for the Court in these circumstances to determine whether it is convenient for the two matters to be heard together”; and

7.2. “The Current Application is ready for hearing and should be disposed of. Postponing the matter would only serve to make the task of the Judge who eventually deals with the matters more onerous. The issue in the Current Application is whether the proposed resolutions are frivolous and vexatious. It is submitted that there is no need for that issue to be heard with the Second Application where a resolution based on completely different facts will be before the Court”.

8. Moreover, the submission is made that “the right of a shareholder to exercise any particular resolution should be determined as soon as possible”. Asserting more than a year’s delay since the request for the shareholders meeting, it is said that the Respondents have a right for the resolutions to be dealt with, and therefore that the First Application should be dealt with as soon as possible.

9. The reply in the postponement application was filed later in the day on 3 March

2021. The Applicants set out the ways in which the issues raised in the First Application and the Second Application are inter-related. Essentially the response is that:

9.1. The request for a meeting, in February 2020, to confirm the appointment of Mr. Hornby was overtaken by the 2020 AGM: the appointment was voted on and was not confirmed by the shareholders. The February 2021 request is to reconsider the vote in respect of Mr. Hornby. The appointment of Mr. Hornby is therefore an issue in the Second Application and no longer in the First Application.

9.2. The February 2020 request for a meeting to remove Mr. Pellow was overtaken by the 2020 AGM. Mr. Pellow’s position was considered at the 2020 AGM and the shareholders voted in favour of his re-appointment. The February 2021 request is a request to reconsider the vote. That is now the subject of the Second Application.

9.3. The February 2020 request for a meeting to remove Mr. Van der Merwe as a director of Brikor has become moot, because he resigned by not making himself available for re-election at the 2020 AGM.

9.4. A meeting has already been held in respect of the request to remove Mr. Parkin and appoint Mr. Mattheyse as director of Brikor - the 2020 AGM.

10. At the commencement of argument before me, Mr. Kaplan, who appeared for the respondents, submitted that, upon consideration of the reply, the Respondents accepted that the only live issues arising from the First Application were the proposed removal of Mr. Parkin and the appointment of Mr. Mattheyse as directors of Brikor.
11. The postponement application was argued at some length.
12. In essence, Mr. Joubert SC, who appeared for the Applicants made the point that the matter covered in the First Application would cast a shadow forward to the matters to be considered in the Second Application,

and that the events that followed the institution and exchange of papers in the First Application would cast an illuminating light on the consideration of the remaining live issues in the First Application. For that reason, he argued, it would be convenient for the Court to hear the matters together. He proposed that this Court place strict time limits on the prosecution of the Second Application in order to address any concern that the postponement application is being abused as a dilatory tactic to prevent the Respondents from exercising their rights under the Companies Act, 2008, and in particular the section 61(3) obligation of the Board of Directors to call a shareholders meeting when demand is made for it.

13. Mr. Kaplan's position was that, even if the matters remaining for decision in the First Application were now far more limited than at the outset, the Respondents were entitled to have their resolution considered, given the mandatory language employed in section 61(3). Distilled to its essence, Mr. Kaplan's submission is that the request for a meeting concerning the limited matters of Mr. Parkin's removal and Mr. Mattheyse's appointment should not be held to ransom because there has been further requests for a meeting to consider resolutions proposed by the same shareholder.
14. In the course of argument, both counsel referred me to the test for consolidation of actions under Uniform Rule 11, which rule also applies to applications by virtue of the operation of Uniform Rule 6(14). In the present case, there is no application for consolidation in the formal sense before me; what is sought is simply a combined hearing of the two applications. However, it is true that the principles applicable to consolidation are properly to be taken into account.
15. In the commentary on Uniform Rule 11 in Erasmus Superior Court Practice, it is highlighted that the paramount test is "convenience", which also connotes "appropriateness in the sense that procedure would be convenient if, in the circumstances of the case, it appears to be fitting and fair to the parties concerned". *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) 6 SA 8 (C) at 88B, the Court was identified as one of the parties whose convenience is to be brought into account. Nonetheless, if "substantial prejudice" to party were to flow from the consolidation, it must be refused, even if the balance of convenience favours the grant of consolidation.

16. The question that arises, then, is whether the Respondents can show “substantial prejudice” if the postponement were to be allowed. I think not.
17. The only live issues, which had been raised as early as February 2020, were not introduced by the Respondents for a vote at the 2020 AGM, where the issue could have been disposed of. I am not persuaded by Mr. Kaplan’s argument that this was because the proposed resolutions were *lis pendens*. As Mr. Joubert SC points out, it had been open to the Respondents to withdraw the request for a meeting in accordance with section 61(6)(a) of the Companies Act, which would have paved the way for raising the matter at the 2020 AGM. But even if Ms. Parkin had not withdrawn the request for the meeting, that would not have stood in the way of raising the removal of Mr. Parkin and the appointment of Mr. Mattheyse, because the section 61(5) demand was for a meeting that was to concern a variety of proposed resolutions. What was *lis pendens* was not the proposed resolutions, but rather the demand for a meeting.
18. I have carefully considered the position. The application for postponement falls to be granted. To my mind, the events subsequent to the exchange of papers and the filing of heads in the First Application cannot be divorced from the issues raised in it. There is no merit whatsoever to the contention that the matters raised are not inter-related. To expect this Court to entertain an application that, in part at least, is concerned with matter that have become moot and which, in any event, will be revisited in one form or another in the Second Application, is to expect it to waste valuable Court time. It seems to me that the matter covered in the two applications cannot be evaluated in isolation. That is not to say that the merits of the First Application will not be determined in their own right, as Mr. Kaplan suggested. I agree with his submission that the test whether the request covered by the First Application was frivolous or vexatious must be whether it had that character at the time. However, that does not mean that the application ought not to be heard together with the second application
19. I am declining the invitation to set time limits for the further conduct of the Second Application, since that matter is not before me. I do not consider it appropriate to give directions in a matter that was not allocated to me for consideration. The parties are nevertheless urged to adhere to the timelines as prescribed in the Uniform Rules to secure the speedy resolution of the matter.
20. In the circumstances I make the following order:
 - 20.1. The hearing of the application under case number 11622/2020 is postponed to be set down for hearing together with application under case number 9390/2020;
 - 20.2. The costs occasioned by the postponement are reserved for determination by the Court hearing the aforesaid applications.

MJ ENGELBRECHT

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and was handed down orally on 4 March 2021. It is published electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 MARCH 2021.

Date of hearing: 4 March 2021

Date of judgment: 4 March 2021

Appearances

For the applicants: Adv. A.P Joubert

SC Adv. N.J Horn

Instructed by:

Werksmans Attorneys

For the respondents: Adv. K.L Kaplan

Instructed by:

Bagraim Sachs Attorneys

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