

SOUTH AFRICA / JUDGMENT

Clarke and Others v Kwezi Mining (Pty) Ltd and Others (2010/47125) [2011] ZAGPJHC 240 (17 June 2011) [2011] ZAGPJHC 240

COURT

South Gauteng High Court, Johannesburg

BEFORE

C G Lamont

CASE / FILE NUMBER

2010/47125

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NOT

REPORTABLE

SOUTH

GAUTENG HIGH COURT, JOHANNESBURG

CASE

NO: 2010/47125

DATE:17/06/2011

in

the matter between:

JEREMY

EDWARD

CLARKE.....First

Applicant

MICHAEL

WILLIAM WRIGHT N.O.

DOREEN

VALERIE SALMON MO.

DAVID

ROBERT BUYS MO.

(in

their capacities as trustees of the

Wright

Family

Trust)Second

Applicants

GOLD-ROSE

INVESTMENTS (PTY)

LTD.....Third

Applicant

and
 KWEZI
 MINING (PTY)
 LIMITED.....First
 Respondent
 KWEZI
 GROUP (PTY)
 LIMITED.....Second
 Respondent
 SADTU
 INVESTMENT HOLDINGS (PTY) LIMITED
Third Respondent
 NATIONAL
 COUMCIL FOR PERSONS WITH
 PHYSICAL
 DISABILITIES IN SOUTH AFRICA.....Fourth
 Respondent
 THE
 TRUSTEES FOR THE TIME BEING
 OF
 THE NONHLANHLA CHILI FAMILY
 TRUST.....Fifth
 Respondent
 THE
 TRUSTEES FOR THE TIME BEING OF THE
 ABAQANDULI
 WOMEN DEVELOPMENT TRUST.....Sixth
 Respondent
 DA
 JO INVESTMENTS (PTY)
 LIMITED.....Seventh
 Respondent

JUDGMENT

LAMONT, J:

[1] This is an application brought by the applicants as the minority members of the first respondent ("the company"). They seek relief under section 252 of the Companies Act No. 51 of 1973 ("the Companies Act"). During the proceedings the new Companies Act was promulgated and came into force. This does not affect this application. It must be determined as if the Companies Act had not been repealed (item 10 of Schedule 5 to the Companies Act 2008).

[2] Since October 2010 the shareholders of the company have been the applicants and the second to seventh respondents who hold their

shares as follows:

1. The applicants - 16,76%.
 2. Second respondent - 52%.
 3. Third respondent - 10%.
 4. Fourth respondent - 6%.
 5. Fifth respondent - 5%.
 6. Sixth respondent - 5%.
 7. Seventh respondent – 5%.
- [3] The company conducts business as an investment-holding company in the mining industry,
- [4] The relationship between the shareholders is regulated by the articles and a shareholders agreement to which the company is also a party.
- [5] There are broadly speaking at present two factions of shareholders. A faction comprising the applicants and a faction comprising the respondents save for the third respondent.
- [6] Until 11 December .2006 the applicants were represented on the board by three directors Messrs Wright, Clarke and Abel. During the period those directors were represented on the board the company purchased an investment which matured into an investment worth some R74,5 million as at 23 February 2007; it also commenced negotiations with Rio Tinto which later resulted in a joint venture between the company and Rio Tinto to exploit a coalfield in Limpopo through what has been referred to as the Chapudi Coal Project.
- [7] Subsequent to the removal of the directors representing the applicants, the applicants have been excluded from participation in the affairs of the company. The only rights they were permitted were the rights conferred upon shareholders. In consequence of this exclusion the applicants became unable to obtain information previously available to them concerning the affairs of the company.
- [8] The applicants claim that the removal of the directors was the evidence of the beginning of a protracted campaign of the second respondent to secure the exit of the applicants as shareholders of the company. The campaign comprised of conduct alleged to have been performed by the second respondent qua shareholder and by the second respondent qua person able to direct affairs of the company through the board.
- [9] Insofar as the second respondent acted qua shareholder such acts are not directly relevant save as evidence of motive for acts of the second respondent acting qua director and so able to manipulate decisions of the board.

CONDUCT ALLEGED BY APPLICANTS.

- [10] The company and the second respondent have brought two arbitrations against the applicants. Those arbitrations were brought solely for the benefit of the second respondent with a view to the second respondent acquiring the applicants' shares in the company. The company paid a share of the costs due to the legal team employed by the company and the second respondent in the pursuit of that litigation. Inasmuch as the litigation was solely for the benefit of the second respondent (as the sole purpose of the litigation was to obtain the applicants' shares in the company) payment made by the company towards the costs of the company and the second respondent was improper.
- [11] The company borrowed more monies than were required to meet the purchase price of shareholding it purchased as an investment and used the excess money to pay the second respondent. This act was improper.
- [12] The company borrowed monies from and paid monies to the second respondent in amounts which were inappropriate and otherwise then in pursuit of the objectives of the company which was not a money-lending company. These acts were improper.
- [13] The company failed to have regard to the provisions of the shareholders agreement by repaying monies to the second respondent at the instance of the second respondent without following the procedure laid down. This was improper.
- [14] The conduct of the company is largely common cause.

THE ARBITRATIONS,

- [15] During March 2007 the second respondent's attorneys addressed a letter to the applicants and various other persons. That letter was the precursor of litigation (arbitration proceedings) brought by the second respondent and the company against the applicants, in the litigation the second respondent and the company sought a declarator that the applicants had diverted income due to the company to themselves; that such diversion constituted a breach of the obligations under and in terms of the shareholders agreement; that in consequence of that breach there was a deemed offer by the applicants of their shareholding and that the deemed offer had been accepted, in the litigation the company sought no relief to which it would be entitled if succeeded in obtaining the declarator. The only entity seeking relief consequent upon the declarator was the second respondent. The arbitrator held that while a few breaches had been established, the second respondent had not validly exercised its rights to purchase the shares. He granted the declarator in respect of a limited number of the offences complained of and awarded the company and second respondent the costs. The applicants were dissatisfied with the result and brought an application to review it. Van Oosten J referred the matter back to the arbitrator for reconsideration of the costs order he had made. The basis upon which that referral was made was that the second respondent and company had been unsuccessful in the arbitration in that the substantive relief sought namely the delivery of the shares allegedly purchased had been unsuccessful. In the course of his judgment Van Oosten J held that the declarator sought by the company and the second respondent was only necessary in the

context of the claim for final relief for the delivery of the shares. The final relief sought concerning the purchase of the shareholding had not been granted. Hence the company and the second respondent had been substantially unsuccessful. Hence the costs should not have been awarded as the arbitrator had awarded them.

[14] The analysis of Van Oosten J reveals that the arbitration concerned the affairs of the shareholder namely the second respondent alone. There was no claim of any consequence made by the company. The company in particular did not ever claim payment of the amount which it claimed the applicants had wrongly appropriated.

[17] On this analysis the company had no role to play in the arbitration and should not have been a party. By participating in the litigation the company incurred a liability to the successful party whose costs it was ordered to pay in addition to the portion of costs it had agreed to pay its own legal team,

[18] On 24 June 2009 the company resolved that shareholders were

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obliged to contribute to monies which the company required as a loan, pro rata to their shareholding in the company. The applicants disputed the right of the company to have passed the resolution. In consequence the company and the second respondent instituted

proceedings against the applicants by way of arbitration claiming the right to acquire the applicants' shares. The arbitrator dismissed the claims of the company and second respondent and in the course of doing so held that the whole subject-matter of the arbitration

concerned shareholder issues and that all other issues were ancillary to that issue. Accordingly the company could as easily have been cited as a respondent. The ratio decidendi of the finding was that the company had no role to play in a shareholders dispute.

[19] There was other extensive litigation between the applicants, the company and the second respondent arising out of the arbitrations. It is not necessary to detail that other litigation here.

[20] Suffice it to say that in the course of the litigation including the two arbitrations the company disbursed an amount of some R3,5 million in the form of costs of litigation which it paid to the legal representatives of the company and the second respondent. This amount excludes the amount due under the costs order made against it.

[21] It is apparent from the precis set out above that at best for the second respondent; the company had no role to play other than as a necessary party to the litigation.

[22] In these circumstances the company should not have been required to fund litigation which was essentially that of the second respondent qua shareholder. The effect of this funding was that the value of the applicant's shareholding was reduced by costs the company paid and became obliged to pay in the course of the litigation.

COMPANY DEBIT FOR MANAGEMENT FEES.

- [23] The shareholders recorded in the shareholders agreement that at all times during the subsistence of the agreement they would act with the utmost good faith towards each other (clause 21.1). They also recorded that the second respondent as well as other non-executive shareholders had obligations in terms of clause 10.1 to perform certain work for the company.
- [24] During May 2010 the company resolved to debit itself retrospectively with an amount equal to some R4,5 million representing management fees in favour of and due to the second respondent. The causa for the management fees was the obligation of the second respondent in terms of clause 10.1 of the shareholders agreement to have performed certain work. The amount of the remuneration had not prior to the passing of this resolution been agreed. Suddenly during May 2010 this amount was agreed and debited as being the amount agreed to be due by the company to the second respondent for the period March 2002 to date. The work which had been performed by other shareholders was not recognised and no resolution in respect of monies due to them was passed. The passing of this resolution clearly constituted a benefit calculated to accrue to the second respondent alone. It was not a general resolution dealing with the company's obligation to pay all persons who had been obliged to render services in terms of the shareholders agreement. There is no evidence that consideration was given to whether or not the obligation of the company to pay had become prescribed or whether it was an opportune moment for the debit to be raised, or whether other persons who rendered services should

be paid. On the face of it the resolution of the board of the company was lawful. The arbitrator found it to be such during the arbitration concerning the obligation of shareholders to contribute to the funds the company wished to raise. The timing of the adoption of the resolution was made at a time when in terms of the financial statements ended 28 February 2009 the company had made a loss of some R45,9 million.

- [25] This was not an opportune moment for the company to have passed the resolution in question.
- [28] On the probabilities while the resolution may well have been lawfully taken by the company, the transaction was not commercially in order. There was no evidence that the second respondent was pressing for payment. This debt was raised at a time when the second respondent was pressing rights it claimed by reason of the shareholders agreement, to compel shareholders to contribute monies to the company. The greater the amount the company required, the greater the contribution which could be levied, if the premise was correct. The second respondent gained an advantage by reason of the amount claimed becoming identified and admitted. If it had been correct in its interpretation of the shareholders agreement it would have been able to raise monies at the expense of other shareholders. The resolution results in a benefit accruing to the second respondent who at the time controlled the board of directors and was later made to deal with the second

respondents fees alone.

LOAM ACCOUNT TRANSACTIONS.

- [27] The second respondent had a loan account in the company. From time to time over the period debits and credits were made to that loan account with the consent of the company. During February 2007 according to the audited annual financial statements the company was indebted to the second respondent in an amount of some R4,1 million. The loan account of the second respondent was repaid in a large amount.
- [28] The submission was that as the loan had been made by the second respondent to the company and as the loan is reflected in the financial statements as being the loan account of a shareholder, the provisions of clause 23 of the shareholders agreement applied to it.
- [29] Under and in terms of that clause money standing to the credit of a shareholder could not be withdrawn without a procedure being followed. That procedure was not followed hence so the argument ran, the monies could not be withdrawn. Under and in terms of article 23 monies which stand to the credit of the loan account of the shareholder are subject to its terms. These monies were so recorded and hence they are subject to the terms of article 23 as was submitted. The second respondent submitted that the loan had been made otherwise than as a shareholders loan and hence that it was entitled to repayment under and in terms of the contract of loan. In my view this argument must fail in the light of the clear wording of article 23 and the fact that the second respondent accepted by agreeing to the financial statements that the monies were standing to the credit of its loan account as a shareholder.
- [30] In these circumstances the second respondent through the board of the company manipulated the affairs of the company to obtain a payment to which it was not entitled as it had not followed the procedures set out in article 23.

AFR1MAT.

- [31] A submission was made that the second respondent had conducted itself in a manner to cause the company to expose itself to the risk of the loss of an asset which it acquired in Afrimat Limited. The submission was premised upon the fact that the company had borrowed an amount greater than the amount required to obtain the asset and had pledged the asset as security for the amount it had borrowed. In consequence of a fall in value of the asset a call had been made for payment by the creditor, which the company was unable to meet. Had the monies not been borrowed the call would not have been made at the time when it was and perhaps the company could have saved the asset. The evidence is in my view too speculative and there is no evidence to demonstrate that the transactions were anything but commercial.

[32] The conduct of the second respondent towards the applicants as a shareholder evidences that the second respondent had adopted a fixed and settled intention of in some manner acquiring the shares held by the applicants. The provisions of section 252 of the Companies Act with which I shali deal more fully below deal with acts of the company itself. In considering the acts of the company itself however

sight must not be lost of the general context in which the company has acted. That includes consideration of the acts of the shareholder

qua shareholder which are relevant to colouring otherwise seemingly innocuous acts.

[33] Sections 252(1) and (3) of the Act read as follows: “252(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 subsection

(2) make an application to the court for an order under this section.

(3) 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 or 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”

[34] The section is not available to a person who can by the exercise of powers he has under the company’s constitution, articles and shareholders agreement or under the Companies Act himself put an end to the prejudice.

[35] The applicant in his application must make out a cause of action and identify all the persons against whom relief is sought, it must also set out the case with sufficient clarity that the conclusion can be drawn that the provisions of the section apply. The applicant is required to establish the particular act or omission or state of affairs complained of, that the act, omission or conduct of affairs is unfairly prejudicial or unjust or inequitable to him or some part of the members of the company, the nature of the relief that is sought to bring the matters complained of to an end and that it is just and equitable that such relief be granted. See *Louw and Others v Nel* 2011 (2) SA 172 (SCA) para [23]. The conduct about which there is complaint should at the lowest involve a visible departure from the standards of fair dealing and constitute a violation of the standards of fair play on which every shareholder who entrusts his money to a

company is entitled to rely. See *Elder v Elder and Watson Ltd* 1950

(2) SC 49 at 55;

*“Although fairness is a notion which can be applied to all kinds of activities its content will depend on the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others (Its not cricket’) it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war so the context and background are very important, in the case of section 459 (the English equivalent of section) the background has the following two features. First a company is an association of persons for an economic purpose, usually entered into with some legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the judicial roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered this would be contrary to good faith. These principles have with appropriate modifications been carried over in company law.*

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner in which equity would regard as contrary to good faith.”

See *O’Neill v Phillips* [1999] 1 WLR 1092 at 1098/1099; *LouwvNei* (supra) at paras [22] and [24],

[36] While the section must be given a beneficial construction, courts must be careful not to assume the management of companies. When consideration is given to the conduct in question the principle is that a shareholder who has become a member of a company undertook to be bound by the decisions of the prescribed majority of shareholders provided those provisions were arrived at in accordance with the law, even where they adversely affected his own rights as a shareholder or otherwise prejudiced his interests. See *Sammel v President Brand Goldmining Co Ltd* 1969 (3) SA 629 (A) at 878.

[37] The courts accordingly will not normally intervene in internal domestic affairs of a company and will not enquire into the

commercial wisdom of a particular transaction. Even a commercially unreasonable approach to the making of profits will not normally

justify intervention in the absence of any suggestion of wilful mismanagement or of impropriety in the conduct of the affairs of the company. See *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 at 692 CA (NZ). The majority is entitled to adopt policies and pursue them. Their decisions are not impeachable merely because the majority took into account their own interests when they cast their votes. See *Sammel* at 680. The fairness of conduct must be judged in the context of its entirety.

- [38] Fairness involves the balancing of all the interests involved in the light of the history and structure of the company, the policies underlying the section and the Companies Act, the duties of directors, the rights and duties of majority shareholders in relation to minority shareholders and the agreements or understanding which shareholders have which give rise to legitimate expectation. See *Reid v Bagot Well Pastoral Co (Pty) Ltd* [1993] SASC 4323; [1993] 12 ACSR 197 at 212 SC (SA).
- [39] Consideration must be given to whether or not a minority shareholder is seeking to use the section to escape being locked into a company and to obtain a price which he considers would more realistically reflect the value of the underlying assets attributable to his shareholding. Unless the company has performed an act or given rise to a state of affairs even though trust and confidence between shareholders has been broken down it does not follow that a minority shareholder is entitled to recover his stake using the section.
- [40] The trigger which must be pulled to bring the section into play is the unfair prejudicial unjust or inequitable conduct constituted by the particular act or omission or state of affairs.
- [41] It is a general principle that the money and assets of the company should not be expended on disputes between shareholders. A company is separate from the shareholders and has no business whatsoever to be involved in such disputes or to spend its money in the pursuit of such disputes. Should the company use funds to finance disputes between shareholders such use constitutes a misuse which confers a distinct financial advantage on the majority and prejudices and discriminates against the minority. This is both unfair and infringes the fundamental principle to which the parties subscribed at the time of becoming members that the ties and funds of the company be used for the purposes of the company, See *Blackman Commentary on the Companies Act Volume 2* page 9-54-2; *D G Brims and Sons (Pty) Ltd*
- [1995] 16 ACSR 559 at 591/2.
- [42] It does not avail the majority shareholder who has caused the company to perform the conduct in question to raise any fault on the part of the minority. The *dean hands doctrine* is of no application. See *McMillan N.O. v Pott* 2011 (1) SA 515 (WCC) at 532B-533E. *Binn's-Ward AJ* held:

“Having regard to the equitable nature of the remedy, and the attendant wide ambit of the judicial discretion to grant or withhold it on terms appropriate to the peculiar characteristics of the given case, there is no compelling reason why fault on the part of the applicant should as a rule preclude the grant

of relief in terms of s 252. There may of course be cases in which the excluded member's fault might be so gross, in the context of its effect on the company or its other members, as to render the member's exclusion without an offer of redemption neither prejudicial, nor unjust nor inequitable; or may lead the court to conclude that it is not just and equitable to afford a remedy, but those instances will, / would imagine, be exceptional."

[43] Similarly it does not avail the majority shareholder to rely on the fact that there is a pre-emptive clause within the matrix of rules governing the relationship between shareholders. The minority member is not able to force the other members to purchase the shares and the machinery provided for in the pre-emptive provision does not provide such a right on the minority. There are risks involved in the following of the pre-emptive procedure as customarily there are mechanisms for valuation involved. These mechanisms may result in values being ascribed to the shares which do not coincide with market values. See Blackman (supra) at 9-40.

[44] As appears from the facts set out earlier the company became embroiled in a shareholders dispute and paid monies to the attorneys

promoting that dispute on behalf of the company and second respondent. I was invited to find that the findings of the arbitrators and Van Oosten J in regard to the matter of costs and the right of the shareholder to have participated therein were res judicata between the parties. Findings of fact in determinations of law forming part of the ratio are binding upon the parties. See *Kommissaris van Binnelandse Inkomste v Ahsa Bank Bpk* 1995 (1) SA 653 (A) at 666, 671 and 676. The material facts relevant to the arbitration insofar as the participation of the company is concerned

are the same before this Court as they were before the arbitration (albeit to establish a different right). The findings made by the arbitrators and Judge were dependent upon the same findings which it is necessary for me to make namely as to costs in the first arbitration, whether or not company was properly a party and in the second arbitration also as to costs whether or not the company was a proper party. The costs being considered in the arbitrations were costs which the minority would seek to recover from the majority and company. However this distinction makes no difference to the issue of whether or not the company should have paid costs to its attorney in pursuing the arbitrations. In the circumstances it appears to me that the parties are bound by the result. However if I am wrong in this finding it is my view that on the facts before me the company should not have participated in either of the two arbitrations in question. In making this finding I am mindful of the fact that the time to consider whether or not the company should have become involved in the litigation is immediately prior to its commencement, insofar as the first arbitration is concerned prior to its commencement the majority shareholder was seeking relief from the minority shareholder pursuant to a letter which preceded the arbitration. The company obtained no relief in the arbitration save in the form of a declarator which led to no secondary relief (payment of monies or other relief). As far as the second arbitration is concerned it concerned what is patently a shareholding issue.

[27] In my view the company should not have contributed to the costs of the applicants in the arbitrations.

[28] The company having contributed to those costs is bound by its agreement to have done so. There is no way that contribution can be undone otherwise than by consent of persons some of whom are not parties to the present litigation. The company cannot compel

repayment. The applicant a minority shareholder cannot compel repayment. The second respondent does not seek to compel a repayment

either by compulsion or agreement. The second respondent for whose benefit the money was expended does not seek to make good the value of the monies paid by the company from which payments it benefited. The acts of the company in paying the costs it paid in respect of the two arbitrations performed constitute conduct actionable in terms of section 252.

Other unfair and prejudicial conduct of the company include:-

its conduct in resolving to pay the second respondent's management fees when it did, its conduct in allowing funds to be withdrawn by second respondent in breach of the shareholders agreement, its conduct in allowing the second respondent to withdraw a large sum of money when it was suffering losses and when such monies were not due to the second respondent save as a loan newly created by the company to the second respondent, its conduct in adjusting its affairs vis-a-vis the second respondent so as to reflect in the financial statements when the statements of one year are compared with another a fairly static loan account in respect of second respondent. The payments made to and from the company are not apparent to shareholders who do not have representation on the board.

[47] In my view the applicants have established that the company has both performed particular acts which are unfairly prejudicial but also that the affairs of the company are being conducted in a manner which is unfairly prejudicial unjust and equitable towards themselves.

[48] It was submitted that even if I reach this conclusion that it would not be just and equitable to direct that the shares of the applicants be purchased. The submission was that the shares are difficult to value and that it was unfair to compel the second respondent to fund an early exit for the applicants.

[49] The second respondent had manipulated its own and the company's affairs since March 2007 to reduce the value of or compel the sale of the applicant's shares. During March 2007 and June 2009 it initiated proceedings designed to result in the applicants shares being sold. During May 2009 and November 2010 it sought to initiate steps which would have resulted in dilution of the applicant's

shareholding.

- [50] The forced buyouts initialled by the second respondent must have anticipated that it was possible to value the shares. The second respondent in my view cannot today set up a defence that the shares cannot be valued and that the applicants seek an easy exit.
- [51] Accountants are skilled in the art of valuation and are well able to capitalize and adjust prices to take into account the receipt of early benefits and the uncertainty of the future. They are able where necessary to obtain appropriate advice. The appropriate date of valuation is the date when the rights of applicants accrue, that is the date of this order. The applicants should not acquire an advantage from the order. The shares remain a minority holding for whatever reason the holding is sold. The valuation should take this into account. The second respondent should not be allowed to benefit by its wrong doing with regard to requiring the company to pay a portion of the costs of the arbitrations. The debt the company incurred pursuant to costs orders made against it should similarly be taken into account.
- [29] The reserved costs should be treated as if they had been directed in the cause and be paid by the losing party.
- [30] The disclosures made to the valuing party should remain confidential save in respect of necessary disclosures.
- [31] I make the following order.
1. The second respondent is ordered to purchase from the applicants the applicants' shares in the issued share capital of the first respondent ('the shares') at a price to be determined by independent auditors to be appointed by the President of the Institute of Chartered Accountants as being the fair and reasonable value of the shares as at the date of this order ('the effective date'). The fair and reasonable value of the shares shall be so determined as to ensure that it represents the amount a willing buyer would pay a willing seller for the shares on the terms set out below.
 2. in determining the value of the shares as at the effective date the auditors act as experts and will be entitled to take into account such facts, issues, circumstances and considerations as the auditors consider appropriate, save that in determining such valuation the auditors shall in any event take into account:
 - 2.1. the value of all the first respondent's assets including any rights the first respondent has to exploit any prospecting or mining rights whether in its own name or otherwise and its shareholding in Kwezi Mining Exploration (Pty) Ltd and Chapudi Coal (Pty) Ltd.
 - 2.2 insofar as the auditors may require expert assistance to make the valuation; they shall be entitled to employ persons with appropriate

expertise to advise them.

2.3. the value of all the first respondent's obligations, the amount due by the first respondent (whether paid or not) to any person for costs arising from the arbitration* and related litigation or shall not be taken into account as an obligation.

2.4. the fact that the shareholding constitutes a minority shareholding in the company.

3. The applicants, first and second respondents are ordered to take all steps necessary to enable this order to be expeditiously and effectively implemented including:

3.1 co-operating with the auditors and furnishing the auditors both orally and in writing with all information and all documents of the first respondent that the auditors may reasonably require for purpose of the valuation, including but not limited to any books of account, management account, company records and documents.

3.2 compiling, furnishing and making available to the auditors such information in relation to the first respondent as may be in their possession or under their control.

4. The valuation of the auditors will be final and binding.

5. The costs of the auditors in performing the valuation will be divided equally between the applicants, on the one hand, and the second respondent, on the other hand.

6. The auditors may call for such payment as they may require which shall be borne by the applicant, and the second respondent, in equal portions and which shall be paid within five days of written request by the auditors for such payment.

7. The auditors shall finalise and present the valuation to the applicants and the first and second respondents as soon as may be

practically possible, but not later than eight weeks from date of this order.

8. The auditors shall maintain confidentiality of all information acquired by them in the course of implementing their duties.

9. The second respondent will make payment for the shares within three months of presentation by the auditors of their valuation.

10. Delivery of the shares shall be effected by the applicants to the second respondent against receipt of payment for those shares.

11. The second respondent is ordered to pay the costs of this application including the reserved costs and the costs consequent upon the employ of senior and junior counsel.

12. The parties are afforded seven days from today to make submissions regarding the form of this order.

C G LAMONT

JUDGE OF THE SOUTH GAUTENG HIGH COURT./JOHANNESBURG

Attorneys for First Applicant : Brian Kahn Inc

Counsel for First Applicant : Adv. Van Blerk SC

Adv. B M Gilbert

Attorneys for First & Second Respondent : IVIhkabeia Huntley

Adekeye Inc

Counsel for First Respondent: Adv. Levin SC

Adv. M. Mado© SC Date of hearing : 16 May 2011

Date of Judgment : 17 June 2011

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