

SOUTH AFRICA / JUDGMENT

Dlamini v Imbokodv Lemabalabala Holdings Limited (2022/051081) [2024] ZAGPJHC 647 (16 July 2024) [2024] ZAGPJHC 647

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

2022/051081

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

1.

NOT REPORTABLE

2.

NOT OF INTEREST TO OTHER JUDGES

Case

NO: 2022-051081

DATE:

16th
July 2024

In the matter between:	DLAMINI, PRINCE MAKHOSONKE CAMBRIDGE First Applicant EMBHULENI TRADITIONAL AUTHORITY Second Applicant NKOSI, ACTING CHIEF NDUMISO Third Applicant EDLAMBHEDLWINI TRIBAL AUTHORITY Fourth Applicant and IMBOKODVO LEMABALABALA HOLDINGS LIMITED First Respondent IMBOKODVO LEMABALABALA FORESTRY (PTY) LTD Second Respondent THE UNLAWFUL BOARD OF IMBOKODVO LEMABALABALA FORESTRY (PTY) LTD Third Respondent THE TRADITIONAL AUTHORITY INVESTMENT HOLDINGS COMPANY ("TAIHC") Fourth Respondent KOTI INVESTMENTS (PTY) LTD Fifth Respondent COMMISSION FOR INTELLECTUAL PROPERTY AND COMPANIES Sixth Respondent SIYAQHUBEKA FOREST (PTY) LIMITED Seventh Respondent SOUTH AFRICAN FOREST COMPANY LIMITED Eighth Respondent Neutral Citation: Prince Dlamini & Other v Imbokodvo Lemabalaba Holdings and Others (051081/2022) [2024] ZAGPJHC --- (16 July 2024)
Coram:	Adams J
Heard:	31 January 2023

Delivered:	16 July 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 16 July 2024.
Summary:	Company law – shareholders and directors – rights and duties – application for declaratory orders relating to ownership and control of company – factual disputes – to be decided on the basis of the Plascon Evans principle – and on the basis of the doctrine of comity – findings in arbitral award not taken on review or appeal – therefore same accepted by the Court – Court finding that applicants did not make out a case for the relief sought – factual disputes decided in favour of the respondents – Application dismissed – ORDER (1) The applicants' application be and is hereby dismissed. (2) The first, second, third and fourth applicants, jointly and severally, the one paying the other to be absolved, shall pay the first, second, third and fifth respondents' costs of this opposed application, such costs to include the costs consequent upon the utilisation of two Counsel, one being a Senior Counsel.

JUDGMENT

Adams J:

[1]. The litigation between the parties in this matter – especially as between the first applicant (Prince Dlamini), the first respondent, Imbokodvo Lemabalabala Holdings Limited (ILH), and the second respondent, Imbokodvo Lemabalabala Forestry (Pty) Limited (ILF) – has had a long and a tedious history. At the heart of the dispute between the parties in this opposed application, as is the case in all of the other litigation, is ownership and control of ILF, which is an integral part of a Broad Based Black Economic Empowerment (BB-BEE) venture in the KwaZulu Natal forestry industry aimed at empowering members of previously disadvantaged communities.

[2]. Most of the issues in dispute have however been resolved by arbitration proceedings instituted against ILF by the seventh

respondent, Siyaqhubeka Forests (Pty) Limited (SQF), and Mondi Timber (Wood Products) Pty Limited (MTWP), a wholly owned subsidiary of the public company, Mondi Limited (Mondi). Mondi, through MTWP, holds 51% of the shares in SQF, while ILF is a 13.2% shareholder in that company. During the late nineties-early 2000's SQF was formed as a special purpose vehicle to own and manage the KZN Forestry assets of the BB-BEEE venture with Mondi Limited. In 2001 a Mr Moses Molefe (Mr Molefe) and a Ms Dina Moraka (Ms Moraka) were appointed as the directors of both ILH and ILF. During that same year a suite of agreements required for the implementation of the BB-BEE transaction were concluded, which included a share sale agreement in terms of which the eighth respondent, South African Forests Company Limited (SAFCOL), sold its shares in SQF, which held the KZN forestry assets, to MTWP and ILF. Mondi and ILH were also parties to this agreement and ILH is described in the agreement as the holder of all shares in ILF.

[3]. A shareholders agreement regulating the relationship between the shareholders in SQF, namely ILF and MTWP, was concluded, in which ILH was again described as the 100% shareholder in ILF. Amongst the many provisions of the shareholders agreement were those which broadly precluded the sale of SQF shares by ILF to any entity other than ILH or one of its subsidiaries. From inception of the BB-BEEE venture, ILH was and still is described as the consortium wholly owned by previously disadvantaged individuals consisting of the fourth respondent, the Traditional Authorities Investment Holding Company (Pty) Limited (TAIHC), and the fifth respondent, Koti Investments (Pty) Limited.

[4]. All of the foregoing facts are based on the findings of the Arbitrator, Mr F D J Brand, who, in his well-reasoned

arbitral award dated 1 March 2022, concluded and declared that ILH was the sole shareholder in ILF when the shareholders agreement

relating to SQF and each of the amendments to the said agreement was concluded during 2001, 2007 and 2011 respectively. Importantly, the Arbitrator declared that ILF 'remains the wholly owned subsidiary of ILF'. I accept these facts as correct. I revert

to them later on in the judgment. Suffice, at this stage, to note that, on the basis of these facts, the applicants' case does not make it out of the starting blocks.

[5]. In this opposed application, the applicants apply for orders which in effect, if granted, would 'reinstate' the first applicant as a director of ILF, as well as acknowledge the applicants' interest in that company. It may be apposite to cite in full the relief prayed for by the applicants in their notice of motion, which reads that they would be applying for the following relief: -

'1. Declaring that the conduct of the persons acting as the share directors of the first and/or second respondent on the 17th of September 2022 at eMalahleni, purporting to remove the first applicant, amongst others, as the director and/or shareholder of the first and/or second respondent, is unlawful, is reviewed and is set aside;

2. Declaring that the first applicant is the founding member, shareholder and director of the first respondent;
3. Declaring that in so far as he acted as such prior to 17 September 2022, the first applicant acted lawfully and as such with authority, and was the director of the second respondent, as reflected in the company records of the CIPC issued prior to 17 September 2022;
4. Declaring that the first applicant be returned and re-enrolled in the register of directors of the second respondent with retrospective effect from date of his unlawful removal as such, and that confirmation of the said re-enrolment be issued to the applicants' attorneys by not later than 15-days from the date of this Order;
5. Declaring that to the extent that the seventh respondent may have, since issuance of these proceedings, effected changes reflecting the removal of the first applicant as a director and/or shareholder in either the first or second respondent without having obtained the satisfactory proof compliance with the provisions of section 71, alternative without valid proof of a resignation by the first applicant, such conduct be declared as irregular, is reviewed and set aside, alternatively is rectified;
6. Declaring that the first applicant is entitled to such remuneration as was due to all, and any other director of the second respondent or a shareholder of the first respondent, and that such remuneration be paid to the first applicant;
7. Declaring that the communities and tribal leaders of the applicants are the primary, and main beneficiaries of the Siyaqhubeka Forestry venture and that any conduct aimed at depriving or frustrating such communities from benefitting from declared and paid dividends due to the first or second respondent, is either unlawful, unconstitutional and violates the principles of the Broad-based Black Economic Empowerment legislation and regulations of the Republic, and is reviewed and set aside;
8. Declaring the failure to provide the third respondent with a notice to the meeting of the 17th of September 2022, is a violation of the shareholders' agreement, and the Companies Act and is reviewed and set aside;
9. Declaring that the notice issued by the first respondent recalling the applicant as director of the second respondent is unlawful and set aside;
10. Declaring the amendment and or variation of the "draft" shareholders' agreement from Seven (7) Traditional Authorities to Ten (10) Traditional Authorities is unlawful and set aside;
11. Declaring that the conduct of the third respondent(s) jointly and/or severally regarding the affairs of the first and second respondents, are unlawful and is reviewed and is set aside.

12. Declaring that any payments made to any person by the third or the Second Respondent, other than through the authority of the first and the other directors who were unlawfully removed, is until such act was performed after the 17 September 2022, unlawful is to be recovered from such person, unless specifically excused by the re-enrolled directors after consideration of the motivation and justification of such payment.
13. Declaring all resolutions taken by the reconstructed board of the second respondent from the 8th of November 2022 as unlawful and set aside;
14. Declaring that the removal of the first applicant as director of the second respondent is a contravention of section 71(1)(2), 7(3), of the Companies Act of 2008;
15. Declaring that the Notice issued by the First Respondent in terms of section 71 is unlawful and set aside;
16. Declaring that the shareholders meeting of the 17th of September is a contravention of section 61 of the Companies Act of 2008, and is unlawful and set aside;
17. Declaring that the failure to convene a shareholders' meeting of IL Holdings is a contravention of section 61 of the Companies Act;
19. Declaring that the draft shareholders' agreement is of no force and effect;
20. The reconstruction of the board of the Second Respondent is unlawful and set aside;
21. Granting further and alternative relief;
22. Cost of suit
23. Granting costs against the Third Respondents jointly and severally, the one paying the others being excused, including costs occasioned by the employment of two counsel; and
24. Issuing any appropriate remedy which in terms of section 173 of the Constitution, is deemed just and equitable in the circumstances.'

[6]. The issues to be decided in this matter is whether the applicants, in particular Mr Dlamini, have made out a case for the relief sought by them in this application. Those issues are to be decided against the factual backdrop of the matter as alluded to hereinbefore and dealt with in more detail in the paragraphs which follow. In the case of factual disputes, which in casu are plentiful, I deal with those disputes on the basis of the principles set out in *Plascon Evans*[1]. Moreover, on the basis of the doctrine of comity, I accept as fact all of the findings of the Arbitrator, Mr F D J Brand, in the arbitration referred to supra. The simple point is that in all instances, if regard is had to the evidence as a whole, it cannot possibly be said that the version of the opposing respondents (ILH, ILF, the third respondent, Koti Investments, and SQF) is so far-fetched and untenable that this Court can reject it out of hand. Put another way, their version on the facts cannot and should not be rejected by this Court out of hand, as one being patently implausible and far-fetched.

[7]. The main relief claimed by the applicants is that contained in prayer (1) of the notice of motion – cited verbatim supra, and which relates to the decisions taken at a shareholders' meeting of ILF on 17 September 2022. At that meeting it was resolved inter alia that Mr Dlamini, who was given due notice of the said meeting and opted not to attend, should be removed as a director of ILF. Mr Dlamini complains that the decision to remove him as director and a shareholder of ILF and/or ILH is unlawful and should be set aside. Most of the other relief prayed for by the applicants are related to and secondary to the relief claimed in this prayer. It follows that if the applicants are unsuccessful in claiming that relief, the other relief claimed should also be refused.

[8]. The difficulty with the aforesaid claim by the applicants is that, as was held by the arbitral award, factually ILH is and was, at all times material hereto, the 100% shareholder of ILF. Mr Dlamini was never a shareholder in ILF, and he could accordingly not be removed as such from the said company. A claim for that relief is accordingly misguided and ill-advised and falls to be rejected.

[9]. As regards the decision to have him removed as a director of ILF, that was a decision of the shareholder of ILF, that being ILH, who acted fully within their rights to have a director of their subsidiary removed. Such a decision is, as contended by the respondents, in any event, not reviewable. Importantly, once a resolution has been taken by the shareholders of a company to remove a director, it cannot be challenged in any forum on the grounds that it was not clear or did not provide sufficient information. Moreover, on the basis of the evidence by the respondents, it can safely be concluded that ILH had adequate reason to have removed Mr Dlamini as a director, that being the fact there has been an irretrievable breakdown of the relationship of trust between the shareholder on the one hand, and Mr Dlamini, as its director, on the other hand. The same applies to other applicants.

[10]. Howsoever one views the case of the applicants for the relief sought as prayer (1), the inevitable conclusion to be reached is that they simply do not make out a cause of action, and therefore, their application simply stands to be dismissed.

[11]. For these reasons, the other relief claimed, which suffers from the same defects, notably a complete lack of a factual basis, should fail. The applicants cause of action is wholly misguided and based on a factual matrix, which is far removed from the realities and the actual facts in the matter. The simple point, that requires emphasis, is that Mr Dlamini was never a shareholder of either ILH or ILF and on the 17th September 2022 he was lawfully removed as a director of ILF by a meeting of the shareholders of the said company.

[12]. The relief prayed for in prayers 1 and 2 should therefore be refused. Prayer 7, as well as prayer 12, also falls under this category of the relief claimed and also falls to be dismissed.

[13]. The third prayer for an order that it be declared that Mr Dlamini, prior to 17 September 2022, when he acted supposedly in his capacity as director of and shareholder in ILF, acted lawfully, also falls to be rejected. Simply put and, as contended by the respondents, Mr Dlamini, when he was a director of ILF and prior to his removal on the 17th of September 2022, did not act

lawfully. His actions in his representative capacity qua director of ILF were not lawful nor properly authorised by ILF or by its shareholder, ILH. He was lawfully and validly removed from the Board of Directors of ILF on 17 September 2022.

[14]. The claim for an order as per prayers 3 and 4 of the notice should fail. The evidence on behalf of the respondents, which evidence I accept, is that the directors of ILF do not receive remuneration, but they are paid board fees as and when they attend meetings. The shareholders of ILH get periodic dividends once they are declared and received from ILF, who, in turn, receive dividends from SQF. Mr Dlamini is not entitled to any remuneration from either ILH or from ILF.

[15]. As for the relief claimed as prayer 5 of the notice of motion, same is likewise misguided. The facts relating to the structure of the BB-BEE venture as set out hereinbefore does not support the declaratory order sought. It cannot be suggested that the applicants are entitled to an order 'declaring that such communities and tribal leaders of the applicants are the primary, and main beneficiaries of the Siyaqhubeka Forestry venture and that any conduct aimed at depriving or frustrating such communities from benefiting from the declared and paid dividends due to the first or second respondent, is either unlawful, unconstitutional and violates the principles of the Broad Based Black Economic Empowerment legislation'. The relationship between the parties with an interest in the said venture is regulated by the different shareholders agreement and the applicants cannot insist on an order at variance with such a relationship.

[16]. ILH has been acting as its indirect shareholders through TAIHC, being nine communities that are spread over the territorial area of Limpopo and Mpumalanga. And ILH and ILF, have started a process of ensuring that the communities have registered Trusts, which will administer the dividends on behalf of the nine communities. The second and the fourth applicants are in fact part of those communities, and they are recognized as the shareholders of TAIHC. They will be receiving dividends once such are accrued, declared and paid to TAIHC, provided they provide it with proof that they have registered the community trusts.

[17]. Accordingly, this prayer has no merit and stands to be dismissed, and, for these reasons, the relief claimed as prayer 6 should follow the same fate.

[18]. Prayer 8, which relates to the amendment and or variation of the so-called 'draft shareholders' agreement from seven Traditional Authorities to ten Traditional Authorities, should fail. The factual basis for this relief claim is unsound. In the answering affidavit it is denied that the number of Traditional Authorities within TAIHC was increased from seven to ten. The Traditional Authorities within the said entity are still nine in number and accordingly this prayer falls to be dismissed, as it does not have any merit.

[19]. The relief sought in prayers 9, 10, 11 and 12 are so void of any merit that I shall make short thrift of same. The criticism levelled against the current board of directors of ILF is unwarranted and ill-advised. As contended by the respondents, the members of the said board have always been lawful and conducted their business strictly in accordance with the provisions of the Companies Act. The respondents also deny that the board of ILF was at any time reconstructed. Other directors were appointed by its shareholder and

the conduct of the said board of directors is valid and lawful.

[20]. The relief sought in prayers 13 and 14 should also fail. By all accounts, there was full compliance with the provisions of the Companies Act, when the meeting of 17 September 2022 was convened and the notices sent out, calling for members to attend. There was therefore nothing unlawful about the meeting and the notice convening same and the applicants are not entitled to an order declaring same to be unlawful.

[21]. On the basis of the findings in the arbitral award, the relief sought in prayers 15 and 16 should also fail. The arbitrator found that the shareholders' agreements regulated the relationship between the interested parties. ILH has a shareholders' agreement which is extant and valid, and it is ironic that Mr Dlamini is in fact the person who signed the said agreement on behalf of ILH. The relief prayed for in prayer 16 should fail, if for no other reason than the fact that it is way too broad and general and is not the type of order to be granted by a Court of law,

[22]. For all of these reasons, mainly the fact that the facts in the matter are dead against the applicants' cause of action, the application falls to be dismissed. In light of my foregoing findings, it is not necessary for me to deal with the myriad of other issues and disputes raised by the parties in the matter. Suffice to say that it may very well be that there are other reasons why the application should fail. An example of such a reason is the possible lack of locus standi in iudicio on the part of the second, third and fourth applicants.

[23]. For all of these reasons, the applicants' application falls to be dismissed.

Costs

[24]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[2].

[25]. I can think of no reason why I should deviate from this general rule. The applicants should therefore be ordered to pay the costs of those respondents who opposed the application.

Order

[26]. In the result, I make the following order:

- (1) The applicants' application be and is hereby dismissed.

- (2) The first, second, third and fourth applicants, jointly and severally, the one paying the other to be absolved, shall pay the first, second, third and fifth respondents' costs of this opposed application, such costs to include the costs consequent upon the utilisation of two Counsel, one being a Senior Counsel.

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 31st January 2024 JUDGMENT DATE: 16th July 2024 – Judgment handed down electronically FOR THE APPLICANTS: Adv M E Mathaphuna, with Advocate Keneilwe Lefaladi INSTRUCTED BY: Sibisi & Partners Attorneys, Mbombela FOR THE FIRST, SECOND, THIRD AND FIFTH RESPONDENTS: Advocate Sam Cohen, together with Advocate Clint Ascar and Advocate Abongile Mabensela INSTRUCTED BY: Molepo Incorporated Attorneys, Germiston FOR THE FOURTH RESPONDENT: No appearance INSTRUCTED BY: Ramushu Mashile Twala Incorporated, Strathavon, Sandton FOR THE SIXTH, SEVENTH AND EIGHTH RESPONDENTS: No appearance INSTRUCTED BY: No appearance

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) Sa 623 (A) at pp 634 and 635 held as follows: - 'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...'.

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fetches or clearly untenable that the Court is justified in rejecting them merely on the papers ...’.

[2] Myers v Abrahamson 1951(3) SA 438 (C) at 455

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