

SOUTH AFRICA / JUDGMENT

Kruger N.O and Others v Gouws and Others (14080/2018) [2023] ZAGPPHC 1133 (1 September 2023) [2023] ZAGPPHC 1133

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhoba

CASE / FILE NUMBER

14080/2018

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

HIGH COURT DIVISION, PRETORIA

Case

no: 14080/2018

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE:

01 SEPTEMBER 2023

SIGNATURE

In

the matter between:

DOUW
GERBRANDT KRUGER
N.O.
First
Applicant
JOHANNES
NICOLAAS BELL N.O.
Second
Applicant
ERIKA
KRUGER N.O.
Third
Applicant
ANNETTE
VAN ZYL
N.O.
Fourth
Applicant
(in
their capacities as trustees of the OLYMPUS TRUST)
DOUW
GERBRANDT KRUGER
And
Fifth
Applicant
JOHANNES
FREDERICK GOUWS
First
Respondent
JOHANNES
PETRUS ERASMUS SWARTS
Second
Respondent
JOHANNES
FREDERICK GOUWS N.O.
Third
Respondent
LYNETTE
GOUWS N.O.
Fourth
Respondent
WILLEM
JACQUES GOUWS N.O.
Fifth
Respondent
ABRAHAM
AARON ROUP N.O.
Sixth
Respondent
(in
their capacities as trustees of the WM Gouws Familie Trust)

JOHANNES
PETRUS ERASMUS SWARTS N.O.
Seventh
Respondent
JOHANNES
PETRUS ERASMUS SWARTS N.O.
Eighth
Respondent
ANETTE
VAN ZYL
N.O.
Ninth
Respondent
(in
their capacities as trustees of the Johan Swarts Familie Trust)
DAVID
SOLOMON MABOTJA
Tenth Respondent
PATRICK
MPHEPHU
Eleventh
Respondent
OZOSAT
INVESTMENTS (PTY) LTD
Twelfth
Respondent
PATRICK
MPHEPHU N.O.
Thirteenth
Respondent
ABIGAIL
MPHEPHU N.O.
Fourteenth
Respondent
(in
their capacities as trustees of the Abipa Family Trust)
JDJ
HOLDING COMPANY (PTY) LTD
Fifteenth
Respondent
(Reg
no: 2004/006725/07)
ZAMORI
ENGINEERING SERVICES (PTY) LTD
Sixteenth
Respondent
(Reg
no: 2003/028727/07)
EVENING
SHADE PROPERTIES 46 (PTY) LTD
Seventeenth

Respondent
(Reg
no: 2006/015369/07)

JUDGMENT

MAKHOBHA, J

- [1] There are two applications before court. The first application is about an order by Mogale AJ, which order the applicants contend have been complied with and seek from this court to adopt the joint minute compiled by the experts instructed and appointed by the respective parties to determine the value of shares. The order is sought in terms of section 38 of the Superior Court's Act 10 of 2013.
- [2] The first, third, fourth, fifth and six respondents do not oppose the application and abides by the decision of this court. It is only the second and seventh to ninth respondents that oppose the main application.
- [3] The second application is the counter application by the second, seventh to ninth respondents. They seek an order to allow an amendment or variation of Mogale AJ's order which is referred to in paragraph one above. This application is opposed by all the parties in this application.
- [4] Mr Douw Kruger, Mr Johan Gouws and Mr Johan Swarts are directors of JDJ Holding Company (Pty) Ltd the fifteenth respondents. They are the main role players in this matter.
- [5] The three directors are also members of the three trusts namely the Olympus Trust, the Gouws Trust and the Swarts Family Trust respectively.
- [6] For purpose of this judgment the first, second, third, fourth and fifth applicants will be referred to as "the Kruger group"
- [7] The first, third, fourth, fifth and sixth respondents will be referred to as the "Gouws group".
- [8] The second, seventh, eighth and ninth respondents will be referred to as the "Swartz group".
- [9] The fifteenth respondent will be referred to as "JDJ". The Olympus Trust, The Gouws Family Trust and the Swarts family trust holds Shares in "JDJ" Holding Company (Pty) Ltd.
- [10] It is common cause that on 28 March 2019, Mothle J granted an order in favour of the "Kruger group" and ordered "JDJ" to buy shares of the "Kruger group".
- [11] On 4 February 2021 the order by Mothle J was amended by agreement between the parties. The agreement was about how the shares of the "Kruger group" should be valued.

- [12] On 26 November 2021 the experts appointed by the three groups produced a joint minutes in terms of which they agreed about the value of the Kruger group's shares in "JDJ". The shares were valued to be R49 million.
- [13] On 8 February 2022 the "Kruger Group" launched the "section 38" application whereby they ask the court for an order that the joint minutes of the experts be made an order of the court.
- [14] The "Gouws Group" filed a notice to abide the section 38 application whereas the "Swarts group" opposed the application and launched a counter-application.
- [15] Pursuant to the order issued by Van Niekerk AJ on 30 May 2023 counsel for the "Swarts Group" submitted to this court that the "Swart group" will no longer persist with the relief sought in prayers 4, 5, 6 and 7 of the notice of motion of the counter application.
- [16] What remains to be decided by this court is the following:
- 16.1 The court must decide whether "JDJ" must pay to Olympus Trust ("Kruger group") the balance of R10 649 321.00 (R49 458 999.00 – R38 809 678.00)
- 16.2 The cost of the application to winding-up "JDJ" on 30 May 2023.
- 16.3 The costs of the urgent application brought by the "Kruger group" (Olympus trust) under case number 25038/2022.
- 16.4 The counter application by the "Swart group" in seeking to amend the order dated 4 February 2021 and declaring that the director's meeting of the board of directors of "JDJ" on 31 March 2022 was not called in accordance with the provision of section 73(1) of the Companies Act, 2008.
- [17] It is further common cause that "JDJ" is a holding company, it does not itself trade. Its only assets are shares and loan accounts in other private companies and certain investments and related financial assets.
- [18] The Olympus trust ("Kruger group"), the Gouws Trust ("Gouws group") and the Swarts Trust ("Swart group") each hold one third of the shares in "JDJ", and each Trust is represented on the board of directors of "JDJ" by a representative. The three representatives are the only directors of "JDJ".
- [19] Counsel for the "Swart group" argued that neither the provision of section 38 nor the existing order have the result that the reports of the experts nor their joint minute by themselves constitute the final determination of the value of the "Kruger group" shares as at 28 March 2019. They argued that it is this court that must make the final determination of the value concerned.

- [20] It was further contended by counsel for the “Swarts group” that any party may still dispute the amount that the experts have agreed upon and convince the court not to adopt the reports and the joint minute. In this regard counsel referred the court to the decision in *Annama v Chetty*[1].
- [21] On behalf of the “Swart group” it is furthermore contended that there is uncontroverted evidence that certain information included in the report of the expert evaluator Mr. Regeness is incomplete and incorrect. The Kahamelo report should be adopted by this court as the correct amount that is payable by “JDJ” to the “Kruger group” in accordance with the existing order.
- [22] In addition it is contended on behalf of the “Swart group” that the meeting called by Mr Kruger for 6 May 2022 was not authorized by the board of directors of “JDJ” and was thus unlawful, being in breach of the provisions of section 73(1) and 76(2) of the Companies Act, 2008.
- [23] The meeting was called with a view to consider the adoption of a resolution regarding the payment of dividends that would either be moot, alternatively would constitute a breach of the standards of conduct of Mr Kruger and Mr Gouws as contained in section 75 and 76 of the Companies Act.
- [25] The “Gouws group” are of the view that the counter application should be dismissed with cost. The Gouws Family Trust does not oppose the relief sought by the Olympus Trust in the section 38 application.
- [26] Counsel for the Gouws group refers to the Plascon-Evans test[2] and submitted that applying the Plascon-Evans test because the “Swart group” is seeking final relief on the motion, the respondent’s version should be accepted unless it can be rejected as being far-fetched and untenable.
- [27] It is further submitted by counsel for the “Gouws group” that the “Swarts group” were invited to make representations. The application to amend the order should be dealt with in terms of Rule 42 of the Uniform Rules of court and this have not been done by the “Swart group” on that bases their application should be dismissed.
- [28] The “Gouws group” contend further that the “Swart group” are not entitled to a final interdict restraining the “JDJ” board of directors forever from declaring dividends and has no alternative remedy and will suffer irreparable harm if the interdict sought are not granted.

THE SECTION 38 APPLICATION

- [29] Of primary importance in this case is the provision of section 38 of the Superior Court Act 10 of 20B and the order of Mogale AJ dated 5 February 2021.
- [30] The relevant portions of section 38 of the Act read as follows:

[31] The relevant paragraphs of Mogale AJ's order reads as follows:

“3.

3.1 The applicants and the respondents will at their own costs each appoint their own experts (“the experts”), namely Johan Ferreira of J Ferreira Inc and Heinrich Regenass of Logista Inc., both of which are registered and practicing chartered accountants of not less than fifteen years standing, in order to determine the value of the OLYMPUS TRUST's shares in JDJ as at 28 March 2019, in accordance with paragraphs 4, 7, 8 and 10 below.

3.2 Within 20 (twenty) days upon finalisation of the respective experts' valuation reports they shall meet in an attempt to reach consensus on the value of the OLYMPUS TRUST's shares in JDJ as at 28 March 2019, and within 10 (ten) days of their meeting compile a joint minute reflecting their positions.

3.3 If the parties' experts do not reach consensus on the value, and/or valuation method and/or any other issues, the experts will compile a joint minute reflecting the common cause issues, and the issues that remain in dispute, and then jointly refer the issue(s) that remain in dispute to Mr. Wynand Rossouw of Business Valuation Advisors (Pty) Ltd (“the referee”), a registered and practicing chartered accountant of not less than fifteen years, for his determination.

11. The referee's report, alternatively the expert reports together with their joint minute (to the extent that the experts are ad idem about the value of the Olympus Trust's shares in JDJ) are to serve before this Court mutatis mutandis as would a referee's report in terms of section 38 of the Superior Courts Act 10 of 2013. Such report is to be dealt with by this Court in accordance with section 38 of that Act.”

[32] The provisions of section 38 and the variation order must be interpreted in accordance with the well established principles of interpretation[3].

[33] “A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the documents”[4].

[34] In *University of Johannesburg v Auckland Park Theological Seminary* another[5] the court said “A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances

leading up its conclusion, and the knowledge at the time of those who negotiated and produced the contract.”

[35] In my view the sensible meaning which is unambiguous of the variation order is that, should the experts in term of paragraph 3.3 of the variation order fail to reach consensus, the remaining issues in dispute have to be referred, jointly by the experts to the referee, Mr Wynard Rossouw (“the referee”) for his determination.

[36] The experts and the parties did comply with paragraphs 3.1 and 3.2 and in my view there was no need for paragraph 3.3 to be activated and implemented. This is much evident from the joint minutes.

[37] It is further my view that on proper construction of paragraph 7 of the variation order, the referee can only consult with the parties and their financial representatives after he has been appointed in terms of paragraphs 3.3 and 5 respectively.

THE MEETING OF THE BOARD OF DIRECTORS OF “JDJ” HELD ON 31 MARCH 2022

[38] Section 73 (1) of the Companies Act reads as follows:

73. Board meetings – (1) A director authorised by the board of a company –

(a) may call a meeting of the board at any time; and

(b) must call such a meeting if required to do so by at least-

(i) 25% of the directors, in the case of a board that has at least 12 members; or

(ii) two directors, in any other case.’

[39] The logical interpretation of section 73 (1)[6] in my view does not preclude any of the directors in “JDJ” to call a board meeting.

[40] Moreover “JDJ’s” memorandum of incorporation read as follows:

“73. Directors may meet together for the dispatch of business, adjourn and otherwise regulate their meeting as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In the event of any equality votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of all of a director shall, at any time, convene a meeting of directors.”

[41] Thus, therefore in my respectful view all of the directors of “JDJ” were at all material times authorised by “JDJ” to call a board meeting as envisaged by section 73(1) of the Companies Act.

[1] 1946 AD142; Schmidt, CWH, The law of Evidence; paragraph 17.5.2.2. page 17-14 Coopers (South Africa) (Pty)

Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung GmbH 1976 (3) SA 352 (A).

[2] Plascon Evans Paints v van Riebeek Paints (PTY) LTD [1984] ZASCA 51; 1984 (3) SA 623 and National Directors of Public

Prosecutions v Zuma (Mbeki and another intervening) 2009 (2) All SA at page 26.

[3] Natal Joint Municipal Pension Fund v Endumeni Municipality 2021 (4) SA 593 (SCA).

[4] Natal Joint Municipal Pension Fund para 18

[5] 2021

(6) SA1 (CC) AT Paragraph 66.

[6] Companies Act

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