

SOUTH AFRICA / JUDGMENT

Pakade N.O. and Others v Lukhanji Leisure (Pty) Ltd and Others (3390/2016) [2017] ZAECGHC 22 (7 March 2017) [2017] ZAECGHC 22

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NW Gqamana

CASE / FILE NUMBER

3390/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Not

Reportable

IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE, GRAHAMSTOWN)

CASE NO:

3390/2016

In

the matter between:

JOHANNES
MONWABISI MKULULI
PAKADE
N.O.
FIRST APPLICANT
NONTSIKELELO
BLOSSOM PAKADE N.O.
SECOND APPLICANT
TABISA
MOLESHE N.O.
THIRD APPLICANT
and
LUKHANJI
LEISURE (PTY) LTD
FIRST RESPONDENT
ZITOLOR
(PTY)
LTD
SECOND RESPONDENT

EASTERN
CAPE GAMBLING AND
BETTING
BOARD
THIRD RESPONDENT

JUDGMENT

GQAMANA, AJ

- [1] This is an application brought by the Applicants,[1] seeking an order declaring null and void the lease entered into between First and Second Respondents on 25 April 2016 and also an order setting aside of the Board resolution of the first respondent which was passed on 14 June 2006.
- [2] The legal basis upon which the Trust seeks the aforesaid relief is predicated upon the provisions of s 163 (1) of the Companies Act 71 of 2008 (“the Companies Act”) which reads:
- “(1) A shareholder or a director of a company may apply to court for relief if –*
- (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
 - (b) the business of the company, or related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or has been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.”
- [3] The application is opposed by the first and second respondents only. The third respondent filed a notice to abide. Before I consider the legal argument advanced by the parties’, I need to sketch out in summary form the material facts relevant in this matter.

Summary of material facts

- [4] In this application, the historical facts broadly speaking are common cause[2] and those facts are the following. The first respondent is the registered owner of immovable property where a casino has been operated by the first respondent. The Trust is a minority shareholder and a BEE consortium in the first respondent. The first respondent was awarded in December 2007 a licence to operate a casino for a period of ten years. The casino operations are running at a loss.

- [5] During 2015, the third respondent issued a request for proposals (RFP) for casino licences for Zone 3 for the period commencing on the expiry of the current licence. The Board of the first respondent considered whether to submit an application for such RFP but resolved unanimously that the first respondent would not apply for a new casino licence based on sound financial and commercial

reasons. The Board also resolved that those shareholders of the first respondent who wished to remain in the casino business would have the opportunity to acquire shares in a special purpose vehicle (SPV).

- [6] To give effect to this resolution a company called Queens Casino & Hotel Ltd (“Queens”) was formed and registered on 17 August 2015. The shareholders agreement of Queens forms part of the evidence in this application (annexure “MP6”) and such agreement was subject to a number of conditions precedent that, the third respondent grant to Queens a casino licence in response to the application to be submitted by Queens for a licence on 5 October 2015, the acquisition by the Osner Trust the entire equity and loan accounts in the first respondent and the conclusion and signature of an agreement of lease with the first respondent.
- [7] On or about 5 October 2015, Queens submitted a bid for a casino licence. That bid was rejected by the third respondent.

The bid was rejected for various substantive reasons.[3] On or about 15 December 2005, an email was addressed by Mr Abdo to various shareholders’ representatives of Queens including Mr Pakade confirming that Queens will still be used for submission of another bid for the casino licence. Fundamentally, all the parties in this application agree that the rejection of the bid by Queens resulted in a non-fulfilment of the suspensive conditions in the shareholder’s agreement of Queens and that agreement lapsed.[4] However, the Trust contends that the terms of the splitting agreement continues to be of force and effect. I will revert to this later in my judgment.

- [8] On 10 February 2016, a new RFP for the Zone 3 casino licence was issued by the third respondent. The new RFP required submission of bids by 10 May 2016. The Trust contends that the new RFP was purchased by Queens,[5] but proof of payment shows that same was purchased by WF Osner Investments (Pty) Ltd with a reference “Queens Casino application”. [6] But in my view nothing turns on this.
- [9] In a meeting of the first respondent’s shareholders held in February 2016,[7] agreement was reached that those disqualified shareholders of Queens would relinquish their shareholding, however, they would still be given an opportunity to take up an interest in Queens again should they be able to purge their disqualification.
- [10] On or about 7 March 2016, a draft agreement was proposed providing for the sale by the minority shareholders in Queens[8] to African Pioneer Gambling of their shares in Queens and for an option to purchase those shares back should their ineligibility be resolved within a period twelve months from the granting of a casino licence[9]. The aforesaid agreement was forwarded to Mr Pakade on behalf of the Trust and Zulukamma Trust.

- [11] The aforesaid share option agreement provided for a mechanism whereby Queens may apply for a casino licence and for a means whereby the interest of the shareholders under investigation may be reinstated in Queens by virtue of taking up shares with African Pioneer.
- [12] The option agreement was also subject to conditions precedent that; Queens is awarded the casino licence in respect of Queenstown Zone 3 licence.[10]
- [13] On 12 March 2016, an email was addressed by Mr Abdo to Mr Pakade which reads:

“I attached the draft agreement to cover, including you, if the Board clears you on the 18th March. If it is acceptable please let me know what time on Monday you and Lumko can call so that we can complete the signing of the documents to enable the big documents to be completed.

I confirm that the Shareholders Agreement will be amended to include Zulukamma.”[11]

- [14] On 14 March 2016, Mr Pakade responded to the aforesaid email and sought confirmation that the company used in the bid was the same company that “bided” and the same as the one that purchased the RFP. In response to this email a few minutes

later, Mr Abdo stated that they hoped to use the same company, i.e. Queens, which previously submitted the bid and which had also

purchased the RFP, but his response also contained a proviso that, if no agreement is reached shortly, a new company would be used.[12] In the same email it was drawn to the attention of Mr Pakade that the shareholders agreement, resolutions and bid documents could not be finalised until he (Mr Pakade) signs them and that other shareholders might not have patience to wait any longer.

- [15] While the process of submitting the new RFP was being undertaken and the signing of the relevant documentation by Mr Pakade was still awaited, on 23 March 2016, the third respondent raised concerns of Mr Pakade’s suitability to hold an interest in the Zone 3 casino licence.[13] The reason for the third respondent’s concern of the suitability of Mr Pakade was spelt out and Mr Pakade was required to provide further representations thereto by 6 April 2016. The representations were not submitted within the stipulated time period by the third respondent. Mr Pakade made his representations on 13 April 2016 followed up by further representations prepared by DTS Attorneys.[14]
- [16] Between 11 April 2016 and 14 April 2016 the directors of the first respondent signed a round robin resolution[15] whereby it was agreed:

“1. That the company lease the immovable property comprising the casino and hotel situated at Cathcart Road, Queenstown, for a period of twenty years at a commencing rental of R1 100 000.00 (One Million One Hundred Thousand Rand) per month and upon the terms and conditions set out in the draft of the lease which is attached hereto.

2. That Avril Douglas Kaschula in his capacity as a director be and is hereby authorised, settle the terms and conditions of the lease and to conclude and sign the agreement of lease on behalf of the company and to do all other acts and sign all documents that need to be required to give effect to this resolution.
 3. That in accordance with s 73 of the Companies Act, the directors waive noted.”
- [17] The exact interpretation to be given to this resolution is hotly contested. The draft lease agreement was also attached to this resolution. The said draft lease agreement is between the first respondent and Queens. The Trust contends that Kaschula was authorised to conclude a lease with Queens and no other entity. But the first respondent contends that it was known to all directors that Kaschula was authorised to conclude a lease which was central to the new bid application with a new SPV and that the copy of the lease was attached only to record the terms of the lease but not indicative of the lessee.
- [18] During the investigations by the third respondent on the fitness of Mr Pakade to hold an interest in a gambling operation, relationships amongst the shareholders deteriorated and Mr Dondolo, a managing director of African Pioneer, made it clear that he was no longer prepared to participate in the bid should the Trust remain a part of it.
- [19] Although the dates are not specified, but it is common cause that meetings were held with the representatives of the BEE consortium and in those meetings Mr Pakade attended representing the Trust and Mr Mhlauli, representing Zulukamma Trust. However, of importance is a meeting held at the Kennaway Hotel. Again there is a dispute between the parties as to what occurred in this meeting. Mr Pakade contends that the purpose of that meeting was to enable Queens to be the applicant company for the new RFP and that there was no decision taken at such meeting that the bid would be submitted by another company. On the other hand, Mr Kaschula, contends that in this meeting he informed both Mr Pakade and Mr Mhlauli who were representatives of both the Trust and Zulukamma Trust that, unless all documentation relating to Queens could be put in order, the application would have to proceed in another company.[16] Mr Kaschula states that he made it clear that it was the Trust’s last chance to sign the documentation and that if it did not, the first respondent would proceed with the submission of the application in the name of another company. He further states that Mr Pakade and Mr Mhlauli left the meeting refusing to sign the documentation.
- [20] What then follows is that on 18 April 2016, the representatives of the majority shareholders of Queens and the Osner Trust resolved that it was not practically possible to continue to prepare the bid application by Queens and that it was rather necessary to prepare the bid application in the name of a compliant company. On 22 April 2016, the second respondent was formed and concluded a lease agreement with the first respondent[17] the bid application in response to the new RFP had to be submitted by not later than 10 May 2016.

[21] On 14 June 2016 the Board of the first respondent took a decision relating to the conclusion of the lease agreement with the second respondent. It is against these facts that I must consider the arguments by the parties. The first and second respondents have raised a number of preliminary points, but I intend to deal first with the challenge on the authority of Mr Pakade to bring the application on behalf of the Trust.

Mr Pakade's authority:

[22] The first and second respondents are challenging the authority of Mr Pakade to bring this application on behalf of the Trust. The main argument is that the resolution relied upon by Mr Pakade as to the authority to bring the application is in terms so vague that, it cannot reasonably be construed as constituting authority for him to bring the present application for the relief sought under s 163 of the Companies Act. The resolution relied upon reads:

"RESOLVED:

1. That the Trust instructs MBABANE & SOKUTU INC., to act as its legal representative for the purposes of instituting any legal proceedings against whatever parties deem necessary to safeguard the Trusts' interests it has in the pending bid for the Queenstown Zone 3 casino licence."

[23] The resolution further authorised Mr Pakade to depose to any necessary documentation in regard to any litigation in the aforementioned legal process.

[24] In response to this argument, Mr Paterson, on behalf of the Trust, correctly conceded that the resolution gave a wide discretion. But argued that, the mandate was given to the Trust's attorneys to do whatever they think should be done under the authority and therefore there is nothing untowards for a principal to give a mandate to an agent that affords an agent a measure of discretion.

The argument was further developed that, having regard to the relief sought, the issue of locus standi is intimately tied up with the merits. I agree.

[25] The contested resolution contains a proviso that the Trust's attorneys must take the necessary steps to safeguard the Trust's interests in the pending bid for the Queenstown Zone 3 casino licence. Having regard to the issues in this application, I am satisfied that Mr Pakade has the requisite authority to bring the application on behalf of the Trust.

[26] In any event, even if I am wrong in that regard, but in my view it will not be in the interests of justice to depose of a matter of this nature with such huge commercial interest to all the parties by way of the technical bar of lack of standing.

Consideration of the merits of this application:

[27] As a point of departure, this application is predicated upon s 163

(1) of the Companies Act. An applicant seeking judicial intervention in terms of the provisions of s 163 (1) of the Companies Act must show a conduct by the majority of the shareholders or directors which is oppressive, or unfairly prejudicial or that unfairly disregard the interests of the minority shareholder.

[28] Clear from the provisions of section 163 (1) is that the focus is on the results. It is the results that must be judged as to whether the consequences of the conduct complained of are oppressive or unfairly prejudicial.

[29] In *Henochsberg on The Companies Act 71/2008* at 568, under the discussion of section 163, the following is said:

“A number of circumstances could give rise to the remedy under this section becoming available. The first is where an act or

omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant (s163) (1) (a). The phrase ‘has had a result’ indicates that the act must be completed. It is also the result, and not the act, that must be oppressive or unfairly prejudicial. Secondly, where the business of the company or a related person is carried on in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant (s 163 (1) (b)), or thirdly, (s 163 (1) (c)) where the powers of a director or prescribed officer of the company, or a person related to the company are exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant (s 163 (1) (c)).”

[30] Further, both Counsel referred me to the judgment in *Visser Citrus (Pty) Ltd v Goede Hoop Citrus Ltd and Others*[18] as authority for their respective arguments.

[31] My understanding of the authorities and also the case law from foreign jurisdictions is that, the oppressive or unfairness of the act or conduct complained of must be judged in a commercial sense. Furthermore, a Court faced with an application of this nature must also not easily enter into the commercial space and must respect the majority rule.[19] This is so because by becoming a shareholder in a company, a person undertakes by his contract to be bound by the decisions of the prescribed majority, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights.

[32] In this application, the Trust in trying to locate the oppressive conduct complained of, it made the following allegations in the founding affidavit:

“66. This means first respondent has transferred the lease which was intended to be entered into with Queens to second respondent. By so doing it has placed second respondent in the position to be the sole bidder for the casino licence. Part of this scheme was a decision taken between first and second respondents that no new bid could or should be submitted by Queens. The result was to render nugatory the formation of Queens in which the Yanda-Pakade Trust had a shareholding, and by so doing also render nugatory the interest the Yanda-Pakade Trust has in the first respondent in its present operation

of the casino. This all happened without notice to the Trust and with no attempt to compensate the Trust for the loss of the obvious business opportunity existing in the operation of the casino licence.

67. This conduct on the part of first respondent, as set out above, is oppressive or unfair, prejudicial to or unfairly disregards the interests of the Yanda-Pakade Trust which is the minority shareholder in the first respondent as envisaged by s 163 (1) (a) of the Companies Act 71 of 2008. It also demonstrates that the business of first respondent has been conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the Trust, as envisaged by s 163 (1) (b) of the Act.
68. The exercising of the powers afforded to Kaschula by the resolution of 14 April 2016 in the manner he did, and the attempted rectification of that action in the resolution of 14 June 2016 is the exercise of a power of a director (or Board) in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the Trust, as envisaged by s 163 (1) (c) of the Act.”
- [33] In argument, it was submitted by Mr Paterson that the complaint of the Trust is that, it has been excluded from the bidding company and by such exclusion its interest in the bid has been extinguished. The submission was that essential to the bid was the granting of a lease by the first respondent to the bidding company.
- [34] The Trust further argued that the granting of the lease is an action impugnable by means of s 163 (1).
- [35] In my view all the Trust’s submissions must fail. As already indicated above, Mr Paterson locates the interests of the Trust in the shareholding of the first respondent read together with the splitting agreement. According to his submission, the Trust complains that through to scheme actually implemented, it has lost the right to participate in the casino operations and that its interests in the first respondent will now become limited to its share of the property ownership. It seems to me the Trust has lost sight of the fact that the first respondent’s shareholders (the Trust included) unanimously agreed that the first respondent would not participate in the casino operations and would focus its business operations to be the landlord of any entity that would be granted the casino licence by the third respondent. It was also agreed that those shareholders (and not the first respondent), who wished to continue to have an interest in a casino operation will do so through another entity. This then resulted in the formation of Queens.
- [36] Another fundamental point is that Queens shareholder’s agreement was subject to suspensive conditions and I have already
- mentioned above in this judgment that those conditions were not fulfilled and that agreement lapsed.

- [37] With those facts, I fail to comprehend and understand the Trust's argument that the terms of the splitting agreement continues to be of force and effect. In my view, when the suspensive conditions in the Queens shareholder's agreement were not fulfilled, that was the end of the terms of the splitting agreement.
- [38] It must also be remembered that Queens submitted a bid which was rejected by the third respondent. A new RFP was then issued by the third respondent and all attempts were made to overcome the challenges facing Queens and to submit a compliant bid. Even those attempts came to nil.
- [39] Amongst the commercial strategy to overcome such hurdles was the share option agreement, which envisaged the buying out of the tainted shareholders and/or trustees by African Pioneer with an option of them buying back their shares, should they clear themselves within a period of twelve months from the date of granting of the casino licence. That commercial strategy also did not work out.
- [40] The majority shareholders of the first respondent and the Osner Trust devised another commercial strategy which then resulted in the formation of the second respondent.[20] A lease agreement was then entered into with the second respondent and a bid for the casino licence was submitted in the name of the second respondent.
- [41] The other hurdle facing the Trust is that because these proceedings are motion proceedings and the Trust is seeking a final relief, and that there is a dispute of fact, the *Plascon-Evans Paints v Van Riebeeck Paints*[21] principle must be applied. The dispute of facts relates to the round robin resolution of 14 April 2016 ("MP18"). The Trust contends that there is nothing in this resolution empowering Kaschula to enter into a lease with a company of his own choice. To illustrate its point, the Trust argued that when an attempt was made in the first draft resolution ("MP35") to authorise Kaschula 'in his discretion' to settle the terms and conditions of the lease, Pakade on behalf of the Trust objected and the draft resolution was corrected by removing the words 'in his discretion'. On the other hand, Kaschula contends that the resolution ("MP18") was clear that it authorised him to conclude the lease which was central to the application with a new SPV and the copy of the lease which was attached to the said resolution was only to record the terms of the lease but not indicative of the lessee and that was known by the majority of the directors. There is an email confirming this albeit reflecting a date later than this resolution.
- [42] With this serious dispute of facts and having regard to the fact that the Trust seeks a final relief and based on the *Plascon-Evans* approach, the respondent's version cannot be rejected as far-fetched and as such the Trust's argument must fail.

- [43] With the evidence at my disposal in this application, I am unable to find that the first respondent's conduct was oppressive or it was unfairly prejudicial or it had disregarded the interests of the trust in a commercial sense. As indicated in the papers that, when it became clear that it would not be practically possible for Queens to submit a compliant bid and time running against them to submit the bid with the third respondent, a commercial strategy was then devised to set up a compliant entity for that entity to submit the bid.
- [44] Evidence further shows that Mr Pakade to a certain extent delayed the signing of the relevant documentation so as to enable the bid to be submitted timeously in the name of Queens. It was also known by Mr Pakade, through an email of 14 March 2016 from Mr Abdo, that the bid might also be submitted in the name of another entity if it is not possible to submit it in the name of Queens. It is in the same email where Mr Pakade was urged to attend to fulfilling his obligations by signing the relevant documentation so that the bid could be submitted in the name of Queens.
- [45] In the result, I am unable to find that the decision of the first respondent is oppressive or unfairly prejudicial or has the result which is oppressive or unfair prejudicial or disregarded the interests of the Trust in a commercial sense. The first

respondent had already taken a resolution unanimously that it will not participate in the casino operations and will focus its business on land ownership. The decision to enter into a lease agreement with the second respondent in fact achieved exactly what it intended to do, i.e. to secure a lease with a company that would eventually submit a bid for the casino operation. Therefore, the Trust's application must fail.

Order:

[46] In the circumstances, I issue the following order:

1. The application is dismissed with costs.

NW Gqamana

Acting Judge of the High Court

Appearances:

For the applicant:

Adv T Paterson SC

Chambers, Grahamstown

Instructed by:

Whitesides Inc

53 African Street

Grahamstown

For the first and second respondents: Adv RG Buchanan SC

Chambers, Port Elizabeth

Instructed by:

Ruchmere Noach Incorporate

Port Elizabeth

c/o Netteltons Attorneys

Third respondent:

Nevill Borman & Botha

Date Heard:

17 November 2017

Date Delivered:

07 March 2017

- [1] In their Nomine Officio capacity as trustees of Yanda-Pakade Trust (“the trust”)
- [2] But legal consequences flowing thereto are seriously contested as well as the round robin resolution of 14 April 2016 (“MP18”)
- [3] Main index pp 92 – 95 (annexure “MP7”)
- [4] Main index p 17 para 23
- [5] Main index p 17 para 26
- [6] Main index p 261
- [7] It being common cause that Mr Pakade was not present in this meeting but the Trust was represented in such meeting and Mr Pakade was informed of the discussions that took place in the said meeting.
- [8] The Trust, the Zulukamma Trust, the 4LM Trust and Ndudula Trust
- [9] See annexure “MP11” p 100
- [10] Main index p 104 clause 5.1.1
- [11] Main index p 117
- [12] Main index p 116 annexure “MP12”
- [13] Main index p 121 annexure “MP15”

-
- [14] Main index p 122 annexure “MP16”
- [15] Main index pp 125 “MP18”
- [16] Main index p 215 para 58 and pp 301 – 302 paras [33.1] – [33.4]
- [17] Main index pp 146 – 159 annexure “MP23”
- [18] 2014 (5) SA 179 WCC
- [19] *Sammel v President Brand Goldmining Company* 1969 (3) SA 629 (AD)
- [20] It was a shelf company which was not in operation.
- [21]
- [1984] ZASCA 51; 1984 (3) SA 623 (AD) at 634 - 635

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2017/22.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/pakade-no-and-others-v-lukhanji-unknown-topic-aecghc-2017>

Prepared on 28 October 2026 · Esheria