

SOUTH AFRICA / JUDGMENT

Sharp and Another v Buthelezi and Others (2024/088147) [2024] ZAGPJHC 908 (18 September 2024)

[2024] ZAGPJHC 908

COURT

South Gauteng High Court, Johannesburg

BEFORE

Makume

CASE / FILE NUMBER

2024/088147

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE NO: 2024-088147

1.

REPORTABLE: YES / NO

2. OF

INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED.

In the matter between:

GARETH
WILLIAM SHARP
First
Applicant
PALADAR
RESOURCES (PTY) LTD
Second
Applicant
And
NGCEBO
BUTHELEZI
First
Respondent

MUZIWENI
HOLDINGS
Second
Respondent
DAVID
BREWS
Third
Respondent
DALE
PACKHAM
Fourth
Respondent
CONNAUGHT
MINING (PTY) LTD
Fifth
Respondent
CIPRO
Sixth
Respondent

JUDGMENT

MAKUME, J

Introduction

- [1] The applicants seek an order on an urgent basis in the following terms:
- 1.1 setting aside the resolution adopted by 1st, 2nd and 5th respondents dated the 4th June 2024 in which 3rd and 4th respondents were appointed directors of the fifth respondent;
- 1.2 setting aside the resolution in terms of which the first applicant was purportedly removed as a director of the fifth respondent.
- 1.3 that the 5th respondent be placed under supervision and business rescue in terms of Section 131 of the Companies Act number 71 of 2008 (the Act).

Background Facts

- [2] The first applicant was appointed Director of the fifth respondent on the 8th December 2020. He is also a director/shareholder of the second applicant which holds 40% shares in the fifth respondent.
- [3] The second respondent holds 60% shares in the fifth respondent. First respondent is the sole shareholder in Muziweni Holdings.

- [4] On the 4th June 2024, the first respondent sent an email to the applicants and copied the company as well as the third and fourth respondents. In that email she gave notice of a resolution that would have the effect of appointing the third and fourth respondents as Directors of the fifth respondent.
- [5] On the 5th June 2024, the records of CIPC were amended to indicate the third and fourth respondents as Directors of Connaught without there having been a shareholder's meeting and a resolution.
- [6] On the 17th July 2024, the first respondent sent an email to the applicants as well as the third and fourth respondents informing them of a
- shareholders meeting to be held on Monday, the 22nd July 2024 at 11h00. The Agenda was indicated as follows:
- i) Safcol wayforward
 - ii) Presentation of PNL
 - iii) Proposed monthly shareholders meetings
 - iv) Iron Rock
 - v) Removal of Directors
- [7] The applicants on receipt of this email raised concerns and grievances. Instead of Buthelezi addressing the grievance she then on one day notice called for the meeting to be held on the 31st July 2024, which meeting was attended also by third and fourth respondents, the first applicant was removed as a Director of Connaught.
- [8] Prior to that, Buthelezi on her own concluded an agreement to cancel the Langkloof Mining JV which resulted in Connaught agreeing to part ways with Kalamini, the JV Partner, on payment of an amount of +/- R14 million. This was in contravention of section 115 read with section 65 of the Companies Act.[1]
- [9] Buthelezi together with third and fourth respondents then concluded a new JV called IPP and in which it amongst others saddled the applicants with financial obligation without their participation and comment.

Urgency

- [10] The respondents maintain that the application is not urgent, that any urgency is self-created and therefore the application ought to be struck off the roll. The respondents say that what the applicants complain of as being oppressive conduct in terms of section 163 of the Companies Act was known to them as far back as April 2024. Secondly, that the applicants themselves acquiesced in the decisions taken.

- [11] I have come to the conclusion that this matter is urgent for the reason that the first applicant was removed as a director at short notice without following the requirements of the Companies Act nor the Companies Memorandum of Incorporation. Secondly, the cancellation of certain contracts has the potential of prejudicing the applicants that on its own is sufficient to found urgency.

The removal of Gareth William Sharp as a Director of Connaught Mines

- [12] On Wednesday, the 17th July 2024 at 19h25, the first and second respondents addressed an email to the applicants calling for a shareholders meeting of the fifth respondent at which meeting amongst others an item titled, "removal of directors (Dale)" was to be discussed.
- [13] In that email the third and fourth respondents were copied. The date of that shareholders meeting was the 22nd July 2024.
- [14] On the morning of the 22nd July 2024, Mr Gareth Sharp and the second applicant addressed an email to the first respondent in which the following was said:

"We have noted your vexatious attempt to remove Mr Sharp as director of the company under the auspices of Section 71(3) whilst we believe that you have complied with the provisions of the Companies Act and the formalities, procedure and substance will be challenged if it becomes necessary, we record that any such allegations of delinquency are denied and the basis for such removal is unsubstantiated."

In fact, within the context of your email of 4 June 2024 wherein you state that it only makes sense to appoint Mr Packham and Mr Brews as directors in a representative capacity your attempt to remove Mr Sharp as a director of the company (and representative of Paladar Resources) appears to have an ulterior motive which we would not accept.

Any attempt to remove Mr Sharp will be opposed especially if such removal is based in terms of Section 71(3) as there is absolutely no substance for your allegations."

- [15] The first and second respondents did not respond to the e-mail above. The meeting did not take place on the 22 July 2024 instead on Tuesday, the 30 July 2024 at 15h45, the first respondent sent a WhatsApp message to Chris, Dale, David, Lolo and you in which she said the following:

"Guys can we meet tomorrow at 11am Connaught meeting at CCJ."

- [16] At 16h20, the first applicant sent a response on WhatsApp and said the following:

"Hi Lolo, we are prepared to meet to discuss the current operations of the company and our concern that we have canvassed. Can we aim to start at 11:15 however prior to confirming please urgently send proposed agenda for the meeting"

Best regards Gareth"

- [17] At 21h31 on the same day, first applicant does a follow up and once more asked Lolo Buthelezi to please circulate the proposed agenda for tomorrow's meeting.

[18] The first respondent only responded on Wednesday morning the 31st July 2024 at 9:30 and said the following:

“Agenda is to discuss the letters that have been sent by Muzweni and Paladar”

To this answer the first applicant respondent as follows:

“Hi Lolo with respect your letter had certain agenda items that we wish not entertain, be advised that if you attempt to raise same the meeting will be stopped immediately we will gladly discuss the other items.”

[19] The first respondent then wrote as follows at 10:36 AM:

“Hi Gareth I called a shareholders meeting not you. Secondly you cannot dictate what is and is not discussed in shareholders meeting.”

Gareth then said: “you have not convened a shareholders meeting in accordance with the Companies Act and we have not consented to deviation thereof, we will not attend the meeting. It is unfortunate that your attitude in this matter is hostile and inflammatory.”

[20] The meeting took place on the 31 July 2024 and in attendance was Buthelezi, David Bruce and Dale Packham. All three voted in favor of removing Gareth Sharp as the director of the 5th respondent.

[21] It is common cause that on Wednesday, the 17th July 2014, the applicants were notified of a shareholders meeting to be held on the 22 July 2024. That meeting was to be in person at CCJ at 11:00 AM. There were five items of the agenda with item five reading “removal of director (I Dale)”.

[22] That meeting did not take place instead a number of emails as well as WhatsApp messages were exchanged between the applicant and the 5th respondent. The first applicant informed the first respondent that the notice calling for a shareholders meeting to remove him as a director of Connaught was not procedural. The first applicant referred the respondent to the provisions of Section 71(3) of

Companies Act.

[23] The Company’s Memorandum of Incorporation as well as the Companies Act requires the following procedures to be followed for a shareholders meeting:

23.1 the company must deliver a notice to each shareholder in the prescribed manner and form at least 10 business days before the meeting is to begin (section 62 (1)(b) of the Companies Act).

23.2 the company may call a meeting with less notice but such meeting may only proceed if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda:

23.2.1 is present at the meeting section 62(2A) (a) of the Companies Act.

23.2.2 votes to waive the required minimum notice of the meeting section 62 (2A) (b) of the Companies Act.

[24] When the applicants raised the concerns as detailed in the correspondence exchanged, Miss Buthelezi, the first respondent responded in a strange and unprofessional manner on the 30 July 2024 and directed that the shareholders meeting be held on the following day being the 31st July 2024. This was not only improper but no agenda was provided as to what was to be discussed at that meeting.

[25] That meeting proceeded in the absence of Paladar as a shareholder, on one day's notice and to make matters worse a Mr. Brews and Mr. Packham, being the 3rd and 4th respondents, voted for the removal of the first applicant as a director when in fact they themselves were not shareholders of Connaught.

[26] Section 71 (1) and 71 (2) (a)(b) reads as follows:

“(1) Despite anything to the contrary in a company’s memorandum of incorporation or rules or any agreement between a company and a director or between any shareholder and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the person entitled to exercise voting rights in an election of that director subject to subsection (2).

(2) Before the Shareholders of a company may consider a resolution contemplated in subsection 1-

(a) the director consent must be given notice of the meeting and the resolution at least equivalent to that which a shareholder is entitled to receive irrespective of whether or not the director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make representations, in person or through a representative, to the meeting, before the resolution is put to vote.”

[27] Mathopo J as he then was in 2013, in the matter of Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd and Others[2] said the following:

“In my view unless a shareholders meeting was properly convened in the absence of waiver or ratification by all the shareholders, the notices are a nullity. This is especially so because of the general rule that an irregularity in regard to the convening of a proceedings at a general meeting will render invalid resolutions passed at that meeting.”

[28] Van der Schyff J in Baptista N.O. and Others vs Quickstep 684 (Pty) Ltd and Others[3] stated the following at paragraph 14:

“The Legislature acknowledged that short notice may occur and provided for conducting a valid meeting despite a notice of a shareholders meeting being short in section 62 (2a) of the Act. ‘The absence of an allegation as to prejudice suffered’ is not mentioned in this section as a reason to condone short notice. The legislature explicitly provided: ‘A company may call a meeting with less notice than required by subsection 1 or by its Memorandum of Incorporation but such a meeting may proceed only if every person who is entitled to exercise voting rights in respect of any items on the meeting agenda-

- a) is present at the meeting.
- b) votes to waive the required minimum notice of the meeting.”

[29] The resolution relieving the first applicant of his position as a director was signed on the 31 July 2024 and adopted on the same day at a flawed shareholders meeting. This is not in compliance with the requirements of the Act.

[30] In paragraph 55 of the founding affidavit, it is the applicant's case that a shareholders meeting was called which did not comply with the Act read with the MOI also that Paladar as a shareholder did not waive the irregular status of that meeting. In their answer the respondents say that the meeting was convened in terms of section 60 of the Act. At paragraph 201, Buthelezi says that no shareholders meeting was convened but that a resolution was submitted to Paladar and Muzweni for consideration.

[31] Firstly, this response by the first respondent is contradicted by the wording of the notice calling for that meeting it refers to a shareholders meeting and nothing else.

[32] Section 60 of the Companies Act has its heading as, “Shareholders acting other than at a meeting” and reads as follows:

“(1) A resolution that could be voted on at a shareholders meeting may instead be-

- a) submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution; and
- b) voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution within 20 business days after the resolution was submitted to them.”

[33] Henochsberg[4] on the Companies Act writing on section 60-page 228(6) issue 14 says the following:

“Section 60 is silent on the other formal requirements in respect of a resolution. It is submitted that S60 only regulates the voting

machinery and majority that would have applied in respect of a formal meeting and all other requirements in respect of meetings e.g. The content and period of notices (See section 62 and notes thereon) should apply mutatis mutandis.”

[34] The notice sent to Paladar and to the third and fourth respondents called for a shareholders meeting. It did not require their shareholders to consider a resolution and vote thereon. In my view section 60 is not applicable in this matter. The respondents are trying desperately to avoid the consequences of an unprocedural and invalid meeting.

[35] Removal of a director by way of the resolution as envisaged in section 60 was found not to be appropriate in the matter of Pretorius and Another vs Timcke and Others[5] in that case shareholders gave notice to the directors of their intention to remove them by way of a resolution. The directors'

representatives attended the meeting and requested the reasons the shareholders proposed to remove the directors. The shareholders

maintained that the directors were not entitled to reasons but stated that the shareholders no longer wanted the applicants to remain as directors. The shareholders proceeded with adopting a resolution to remove the directors. The Court declared the resolution taken to remove the directors invalid and set them aside the Court stated:

"[10] I respectfully disagree with the argument postulated in support of the opposition of the relief claimed. Whilst the act requires less of the shareholding in removal of directors the affected directors indeed have a statutory right to be heard before the shareholders

vote to adopt a resolution for his or her removal.

[11] Rules of natural justice and the fundamental principle of audi alteram partem presupposes the right to place facts and evidence before the decision maker. A prelude to the exercise of the right includes the right to obtain information, particulars or documents so as to place the affected in a position to meet the case that need be answered."

[36] I am persuaded that the shareholders meeting that took place on the 31 July 2024 at which meeting a resolution was adopted removing the first applicant as a Director of Connaught was unprocedural, as the result, the resolution taken at that meeting is hereby set aside and declared null and void. The 6th respondent is hereby directed to amend its records, so it is to reflect the first applicant as the director of the 5th respondent.

The resolution appointing third and fourth respondents as directors

[37] It is common cause that on the 4th June 2024, the first respondent, recommended the third and fourth respondents for appointment as directors of Connaught by the fifth respondent. Paladar, the other shareholder in Connaught did not sign the resolution nor did Mr. Gareth William voice his disagreement at that time, first time that the first applicant raised his concern about the appointment was in his letter dated the 22 July 2024.

[38] The first applicant maintains that the appointment of the two directors was not in accordance with the Companies Act in that no shareholders meeting was convened for that purpose. Once again, the 1st respondent relies on the provisions of section 60 which I have dealt with in my summation on the removal of the first applicant

[39] Notwithstanding the fact that the provisions of the Companies Act were not followed in appointing the third and fourth respondents the first applicant said nothing for a period of more than a month besides that the first applicant acquiesced in the appointment, for example:

39.1 On the 14th June 2024, the first applicant signed a resolution authorizing Dale Packham, the fourth respondent to sign Court papers in his capacity as a director of Connaught in an application by Connaught against the Department of Mineral and Energy.

39.2 On the 19 June 2024, the first respondent sent invoices to forthwith for payment to service providers.

[40] The first applicant's acquiescence and delay as set out above amounts to a waiver and abandonment of a right. Nienaber JA in the matter of Road Accident Fund v Mothupi[6] said the following about waiver:

"[15] Waiver is first and foremost a matter of intention whether it is the waiver of a right or remedy or privilege or power, an interest or benefit and whether in a unilateral or bilateral form the starting point invariably is the will of the party said to have waived it. The right in question in the instant case is the statutory provision specifically accorded to the Fund to avert claims which are out of time."

[41] The decision to abandon may be either express or tacit. Tacit abandonment is proved by conduct plainly inconsistent with an intention to enforce the right now relied on. In Hepner v Roodepoort-Maraisburg Town Council,[7] the Court said the following:

"There is authority for the view that in the case of a waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (Smith v Mombert, 12 S.C. 295; Victoria Falls and Transvaal Souer Co vs Consolidated Langlaagte Mines Ltd., 1915 AD 1 at p. 62)."

[42] In this matter the first applicant knew what his right were and decided not to lodge an objection towards the appointment of the third and fourth respondents. He embraced their appointment by his further conduct post their appointment. He did not act swiftly and as he did with his removal as a director of the company.

[43] In his replying affidavit responding to the waiver and acquiescence the first applicant denies that and say he did sign the resolution of the 14 June 2024 simply because the names of Mr Brews and Packham appeared on the record of the CIPC as directors and that according to him those records only constitute prima facie proof that they are directors. He says that he had no choice but to request their signature. He adds that his action does not provides proof that he accepted their appointment as directors.

[44] With due respect the first applicant is missing the point, it is not about him having accepted or not accepted the appointment of Brews and Packham as directors it is whether they were appointed at a shareholders meeting which he knew about and decided to boycott same to be followed by his silence on the appointment.

[45] I am satisfied that the appointment of Brews and Packham, despite having taken place at an improperly convened meeting, has now been ratified by the silence and acquiescence of Paladar. Their appointment must stay.

Has the applicant proved that the actions complaint of amount to oppressive or prejudicial conduct as described in section 163 of the Companies Act thus justifying an order in terms of section 131 (1) and (4)(a)(ii) as well as section 131(5) of the Companies Act.

[46] At the Centre of the complaint is the cancellation of two contracts namely the Joint Venture with Kalamín and that between Connaught and JJ Mining and their being replaced by the IPP contract.

[47] Having said that first applicant at paragraphs 41 and 42 of his replying affidavit says the following:

“The applicants are not applying to set aside these contracts and therefore evidence that I facilitated transaction to ensure the

company continued to conduct business after the termination and conclusion of the contracts takes the matter no further. Submitting

invoices and facilitating payments amount to nothing more than conducting the business of the company to ensure the interest of the various stake holders of the company are looked after.”

[48] The second applicant’s complaints is that it was excluded from its right to vote on the conclusion and termination of these agreements which disposed of all or the greater part of its assets or undertaking of the company and now that he has been removed as a director of the company. I have no way of determining whether these contracts are in the best interest of the company and stakeholders including Paladar as one of the shareholders.

[49] The respondents say that the Kalamín JV agreement was terminated by mutual agreement and that prior to that IPP was approached to effectively substitute Kalamín JV as a founder for the mining operations. On the 17 April 2024, Mr Christopher George Needham, a director of Paladar and a friend to the first applicant acknowledged the termination of the Kalamín JV.

- [50] Once again as in respect of the appointment of the third and fourth respondents as directors, the first applicant cooperated and dealt with the new arrangement without raising any concern that the new agreements were prejudicial to the company. As examples, on the 16 July 2024, Mr. Sharp generated an invoice from Connaught to IPP. On the 4 July 2024, Mr. Sharp shared the invoice from Connaught to IPP. Lastly, a number of payments were made to both Paladar and Mr. Sharp which payments were effected by IPP.
- [51] Similarly, the agreements between Connaught and JJ Mining were terminated by agreement because Connaught was unhappy with the services which were rendered by JJ Mining. It is so that Mr. Sharp, the first applicant raised no concern about the IPP agreement despite him having come to know about it before the 30 April 2024.
- [52] The first applicant in paragraphs 41 and 42 of his replying affidavit, which I have reference above, confirm that he is not applying to set aside the new agreement, his complaint is that as a minority shareholder it was excluded from voting on that resolution. The question to be answered is, does that amount to oppressive conduct notwithstanding waiver and if not, does it require placing the company under business rescue.
- [53] The requirements for a court order commencing business rescue proceedings were set out in section 131(4) of the Companies Act which reads as follows:
- “(4) After considering an application in terms of subsection (1), the Court may-*
- (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-
 - (i) the company is financially distressed;
 - (ii) the company failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract with respect to employment related matters; or
 - (iii) it is otherwise just and equitable to do so for financial reason,
- and there is a reasonable prospect of rescuing the company.”
- [54] This subsection grants a Court discretionary powers to issue or refuse an order for placing the company in business rescue.
- [55] CJ Claassen J in the matter of Oakdene Square Properties (Pty) Ltd and Others v Farm Bothaspect (Kyalami) Pty Ltd,[8] said the following:
- “The phrase ‘it is otherwise just and equitable to do so for financial reasons’ is extremely vague. The immediate question*
- arises: ‘for financial reasons of whom, the company, the creditors shareholders or the employees?’ Since the company

cannot apply to Court for a business rescue order as it is not an 'affected person' one can immediately say that the

financial reasons of the company are not referred to. However, that would render this provision absurd as it is primarily the financial

health of the company which is at stake. I have little doubt that the legislature never intended such absurdity. I would therefore hold that financial reasons relating to all stake holders except that of the practitioner contemplated in the business rescue provisions are to be considered by the Court when apply these provisions."

[56] The first applicant has failed to prove that the company Connaught is financially distressed and can therefore not be placed under business rescue. The IPP agreement has been in place for over three months with the applicant willfully participating. It was only after his removal as a director that he now says that the IPP contract is causing financial loans to the company. He does not explain why he did not see that earlier. Quite to the contrary, the respondents have been able to demonstrate that the company's financial position is healthier than before. There is no need to have a business rescue practitioner appointed to manage the business of Connaught.

[57] In the result, I make the following order:

Order

1. The resolution in terms of which the first applicant was removed as a director of Connaught is hereby declared invalid and is set aside.
2. The sixth respondent is directed to amend its records to reflect the first applicant as a director of the fifth respondent.
3. The application to declare the appointment of the third and fourth respondents as Directors of Connaught is dismissed.
4. The application to place the fifth respondent under business rescue in terms of Section 131 (1) and (4) as well as Section 131 (5) is dismissed.

Costs

[58] The applicants have been partially successful in the result, it is hereby ordered that the applicants pay 60% of the taxed party and party costs of the respondents on scale C which costs shall include costs of Counsel.

Dated at Johannesburg on this 18th day of September 2024

M A MAKUME

JUDGE OF THE HIGH COURT

JOHANNESBURG

DATE OF HEARING: 22 August 2024

DATE OF JUDGMENT: 18 September 2024

APPEARANCES

FOR THE APPLICANTS: Adv L. Laughland INSTRUCTED BY: Messrs Ricardo & Partners FOR THE RESPONDENTS: Adv Hollander SC INSTRUCTED BY: Messrs Schuman van der Heerden

[1] Act 71 of 2008.

[2] 2013 ZAGPJHC 40.

[3] 2024 JDR 1971 (GP).

[4] Piet Delport Henochsberg on the Companies Act 71 of 2008 4th Edition (LexisNexis South Africa) volume 1.

[5] [2015] SAZWCHC 215.

[6] [2000] ZASCA 27; 2000 (4) SA 38 (SCA) at [15].

[7] 1962

(4) SA 772 AD at 778 D.

[8] 2012

(3) SA 273 (GSJ) at [17].

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