IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: 1590/2014

In the matter of:

EDEN ROSE MINING RESOURCES (PTY) LTD	First Applicant
JOHAN MYNHARDT	Second Applicant
RAMUNLAL MAHADEVEY	Third Applicant
ASHWANI PATHAK	Fourth Applicant

And

MICHAU EXPLORATION & DRILLING (PTY) LTD	First Respondent
HALOGLO (PTY) LTD	Second Respondent

CORAM: VAN DER MERWE, J

JUDGMENT: VAN DER MERWE, J

HEARD ON: 30 OCTOBER 2014

DELIVERED ON: 11 DECEMBER 2014

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[1] This started out as an application for the final liquidation of the first respondent (the company). However, at the hearing counsel for the applicants eventually asked only that the matter be referred for the hearing of oral evidence on the issue of the locus standi of the applicants. I accordingly set out the background of the matter in so far as it is relevant to this question.

[2] At the hearing I made an order striking out the replying affidavit of the second applicant and I gave reasons for that order. The matter must therefore be decided on the founding and answering affidavits and annexures thereto. In the result the fourth and fifth sets of affidavits prepared by the company and the applicants respectively, were not admitted. It follows that each party should bear his/its own costs in this regard.

[3] During the period January to August 2012 Indian Technomac South Africa (Pty) Ltd (Itcol SA), the company and the second respondent entered into an arrangement which is inter alia embodied in three written agreements. At the time all the issued shares in the company were held by Ms M S E Michau and she and her husband, Mr C C Michau, were the directors of the company. These agreements are by no means models of clarity, but it appears to be common cause that essentially the following was intended. In return for payment by Itcol SA of the amount of R20 million, 70 per cent of the shares in the company would be transferred to Itcol SA. The other 30 per cent of the shares in the company would be transferred to the second respondent. Mr Michau and the second applicant would each obtain 50 per cent of the shares in the second respondent. The board of directors of the company would consist of two directors appointed by Itcol SA and two directors appointed by the second respondent.

[4] Whether or to what extent effect was given to this arrangement is heavily in dispute. In particular Mr and Ms Michau maintain that the arrangement was not implemented because it was subject to several conditions, including full payment of the amount of R20 million by Itcol SA. It is common cause that Itcol SA only paid an amount of R7 million.

[5] It appears to be common cause that the company is solvent. In the founding affidavit the applicants relied on s 81(1)(d)(ii) and 81(1)(e)(i) and (ii) of the Companies' Act 71 of 2008 (the Act). In terms of s 81(1)(d)(ii) a company, one or more of its directors or one or more of its shareholders may apply to the court for an order to wind up the company on the ground that the shareholders are deadlocked in voting power. Section 81(1)(e)(i) and (ii) provide for an order of winding-up of a company on application of a shareholder thereof on the grounds that the directors or other officers in control of the company are acting in a manner that is fraudulent or otherwise illegal or the company's assets are being misapplied or wasted.

[6] This court has a discretion to refer the matter for oral evidence. In the exercise of this discretion the court should be guided to a large extent (but not exclusively) by the prospects of *viva voce* evidence tipping the balance of

probabilities in favour of the applicants. It follows that it must be considered what the prospects are that *viva voce* evidence will show that at least one of the applicants is either a shareholder or a director of the company.

[7] There is no prospect that any of the applicants will be found to be a shareholder of the company. The case for the applicants is that Itcol SA and the second respondent are the shareholders of the company. It is clear however, that neither has been entered as shareholders in the securities register of the company and that neither fall within the definition of shareholder in s 1 of the Act. But this is beside the point, as neither Itcol SA nor the second respondent applies for the liquidation of the company. The first applicant is not a shareholder of the company. It is a minority shareholder in Itcol SA. The third and fourth applicants are shareholders and directors of the first applicant. The majority shareholder of Itcol SA is an Indian company (Itcol India). Why the first applicant is a party to this matter is therefore not easy to comprehend.

[8] The second applicant stated that he brings the application in the capacity of director of the company. Although one may read between the lines that they regarded themselves as directors of the company together with the second applicant and Mr Michau, there is no statement under oath by the third applicant or the fourth applicant that any of them act in the application in a capacity of director of the company. This is significant in the light of the following. According to the applicants the third and fourth applicants would have been appointed as directors of the company by Itcol SA. Attached to the answering affidavit is a letter from Dr R K Sharma, chairman and managing director of Itcol India, in which he states that the third and fourth applicants are no longer directors of Itcol SA and have no role to play in the affairs of the company. Moreover, Itcol SA has since been placed in business rescue and its business rescue practitioner has given written notice of his opposition to the liquidation of the company on the ground that it is not in the interest of of Itcol SA. There is thus little or no prospect that the third or fourth applicant will at the hearing of oral evidence be authorised or able to act as director of the company or to apply for its liquidation.

[9] Before this application was launched, the applicants were aware that Mr Michau denies that the second, third or fourth applicants were appointed as directors of the company. Correspondence to that effect was in fact attached to the founding affidavit. Nevertheless there is not a shred of evidence in the founding affidavit as to how, where and when the alleged new directors of the company were appointed. The only piece of evidentiary material in this regard is a sentence in a document purporting to be minutes of a meeting of the board of directors of the company held on 5 February 2014, attended by the second, third and fourth applicant, but not Mr Michau. This sentence reads:

> 'The directors of MED had been appointed by a resolution dated 17 February 2012 but there has been no information forthcoming from Wimpie Bardenhorst whether the formalities of their appointments were duly completed.'

'MED' is a reference to the company and 'Wimpie Bardenhorst' to its auditor. This sentence, tucked away in an annexure and not referred to in the founding affidavit, did not call for an answer by the company.

[10] As far as is presently relevant, s 66(7) of the Act provides that a person becomes entitled to serve as a director of a company when that person has been appointed in accordance with Part F of Chapter 2 of the Act and has delivered to the company a written consent to serve as its director. On the case for the applicants the appointment of the third and fourth applicants as directors of the company could only have been made by Itcol SA and that of the second applicant by the second respondent. In terms of s 57(1) of the Act Itcol SA and the second respondent had for this purpose either to have been shareholders of the company as defined in s 1 of the Act or entitled to exercise voting rights in relation to the company, irrespective of the form, title or nature of the securities to which those voting rights are attached. As I have said, neither Itcol SA nor the second respondents are shareholders as defined. The founding affidavit contains no allegation that when appointing directors of the company, Itcol SA and the second respondent exercised any voting rights nor of any particulars of such voting rights. Crucially, assuming that they could exercise voting rights, there is no evidence at all by the applicants that the alleged resolution of 17 February 2012 was taken by Itcol

SA and/or the second respondent. On the other hand, Mr Michau stated that he is the holder of 50 per cent of the shares in the second respondent, that the second respondent could therefore not appoint the second applicant as director of the company without his approval and that no such resolution was taken by the second respondent. And finally there is in any event no evidence before me that the second, third or fourth applicant has delivered to the company a written consent to serve as its director.

[11] In the circumstances I find the case of the applicants on this issue so vague and unconvincing that I am not persuaded to refer it for the hearing of *viva voce* evidence.

[12] The application is dismissed with costs.

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C H G VAN DER MERWE, J

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On behalf of the first respondent: F W A Dansfuzz SC
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