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

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: A156/2020

In the matter between:

RAHIDA INVESTMENTS (PTY) Ltd Appellant

and

FREDERICK KING TAUKOBONG First Respondent
KRAMER WEIHMANN AND JOUBERT INC Second Respondent
BIF ACCOUNTANTS (PTY) Ltd Third Respondent
CHRISTOFFEL GERHARDUS NEL Fourth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fifth Respondent

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CORAM: REINDERS ADJP *et* LOUBSER, J *et* PAGE, AJ

HEARD ON: 19 July 2021

DELIVERED ON: 16 August 2021

JUDGMENT BY: PAGE, AJ

Introduction

[1] The Appellant, Rahida Investments (PTY) Ltd, purchased Pensfontein in the district of Hay in the Northern Cape, a farm rich in iron ore and manganese, during 2001. In the same year, Boris Bannai became the sole shareholder and director of the Appellant. He sold 26 % of his shares to the First Respondent, Mr Frederick King Taukobong to the value of R 150 million. They concluded a shareholder's agreement on 13 April 2011 (2011 SHA). In 2014 the First Respondent was duly appointed as a director of the Appellant. In 2016 the First Respondent was removed as director by way of resolution. The First Respondent disputes the validity of his removal as director.

[2] Boris Bannai, thereafter, sold his entire shareholding to his son, David Bannai on an undisclosed date during 2016. David Bannai and the First Respondent entered into a new shareholder's agreement (2016 SHA). On 25 August 2019, a mining right was granted to the Appellant. On 23 October 2019, David Bannai notified the First Respondent in terms of Clause 5.11 of the 2016 SHA to transfer his shares to empowerment persons. The First Respondent did not comply with the notice. This resulted in David Bannai confiscating the First Respondent's shares, and selling it to a new BBBEE partner, Inastep, for a purchase consideration of R 300 million.

[3] The First Respondent has continued to act on behalf of the Appellant notwithstanding his purported removal as shareholder and director. The Appellant launched an application before the court a quo seeking an order that the Respondents be interdicted and restrained from acting on behalf of the Appellant, representing to other parties that they are authorised to act on behalf of the Appellant and further that they be restrained from registering a bond or secure finances using the Appellant's assets as security. Grobler, AJ dismissed the application, and the Appellant was granted leave by the court *a quo* to appeal to the Full Bench. The appeal is not proceeding against the Second to

Fourth Respondents and the Fifth Respondent is only cited insofar as it has an interest in the matter and no relief was sought against the Fifth Respondent.

[4] The Appellant contends that the shares held by the First Respondent was validly removed and transferred to a third party, namely Inastep, pursuant to and in accordance with the terms of the 2016 SHA. It is contended that the new shareholders passed a resolution appointing new directors of the Appellant on 13 July 2020. The First Respondent was thus, according to the Appellant, no longer a shareholder, nor a director of the Appellant. The new board of directors therefore, as contended by the Appellant, are duly authorised to institute the motion proceedings which was heard before the court a quo. The First Respondent contends that his removal as shareholder was unlawful and therefore the purported newly elected board of the Appellant was unlawfully elected resulting in a lack of *locus standi* on the part of the Appellant.

[5] The central issue in this appeal remains whether the motion proceedings launched before the court a quo were properly authorised. In order to establish the authority and locus standi of the Appellant, it is necessary to determine whether the removal of the First Respondent was duly effected in accordance with the terms of the 2016 SHA.

<u>The legal position and applicable legislation.</u>

[6] The following cannons of interpretation of a document such as the Shareholder's Agreement in issue are enunciated in **Bothma-Batho Transport v Bothma & Seun Transport**[1], **First Rand Bank Ltd vs Clear Creek Trading**[2], **Natal Municipal Pensions Fund v Edumeni Municipality**[3] and **Department of Land Affairs v Goedgelegen**[4] as follows:

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[1] **2014(2) SA 429 (SCA)**
[2] **2018(5) 300 (SCA) at para 16**
[3] **2012(4) SA 593 (SCA) paras 25 and 26**
[4] **2007 (6) SA 199 (CC)**

1. The point of departure is the language of the document.
2. The ordinary rules of grammar and syntax should be considered.
3. Where more than one meaning is possible, each possibility must be weighed in the light of the rest of these factors.
4. Relevant and admissible context may be found in the legislation referred to in the document.
5. The consideration of the context of the document calls for a reading of the particular provision(s) in the light of the document as a whole as well as the circumstances of its coming into existence.
6. The apparent purpose to which it is directed should be considered.
7. The material known to the persons responsible for its production and
8. the background to the preparation and production of the document should also be considered.
9. A sensible meaning should be preferred to one that leads to insensible or unbusinesslike results or one which undermines the apparent purpose of the document.

[7] In **Dex Group (PTY) Ltd v Trust Co Group International (PTY) Ltd & Others 2013 (6) SA 520 (SCA)** Wallis JA emphasized at para 16 that:

> "…Context, the purpose of the provisions under consideration and the background to the preparation and production of the document in question <u>are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset.</u>" (my underlining)

It is accepted by the parties that the Mineral and Petroleum Resources Development Act,2002 (MPRDA), BBBEE Legislation and the Mining Charter, 2018 provides the background, context, and purpose of the 2016 SHA. The objects of the MPRDA are, inter alia, the promotion of equitable access to the nation's mineral and petroleum resources to all the people in South Africa; substantial and meaningful expansion of opportunities for historically

disadvantaged persons in the mineral and petroleum industries, giving effect to S 24 of the Constitution by ensuring that mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.[5]

[8] Section 100 (2) of the MPRDA gave rise to the Mining Charter, 2018 which serves as a regulatory instrument to the mining industry and targets transformation of the mining industry. The Charter has been revised after assessment in 2015. One of the highlighted issues during the assessment was that the spirit of the Mining Charter was not fully embraced, and compliance was generally thought of as means to protect the "social licence to operate"[6]. The review process giving rise to the Mining Charter, 2018, sought to improve and ensure meaningful participation of Historically Disadvantaged Persons in accordance with the objects of the MPRDA.

The Interpretation of the 2016 SHA

[9] The Appellant's argument is that clauses 1.1 to 1.7 focusses mainly on the obtainment of a mining right and the need of the Appellant to comply with BBBEE requirements. The thrust of the argument is that these clauses should be read independently ("are self – standing") from clauses 1.8 and 5.11 because they deal with the obtainment of a mining right and the latter two clauses focusses mainly on the achievement of empowerment. Clause 1.3 of the 2016 SHA reads as follows:

> *1.3 In order to obtain a mining right the company must comply with the Minerals and Petroleum Resources Development Act no 28 of 2002 (MPRDA) and other relevant legislation in respect of broad-based black economic empowerment, and on 13 February 2011 26 % (twenty-six percent) of the issued share capital in the Company was sold to KING for R 150 million (one hundred and fifty million rand), on the terms and conditions set out in that agreement which also stipulates the mode of payment.*

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[5] Section 2 of Act 28 of 2002.
[6] The Preamble of the Charter, P5

[10] A simple reading of Clause 1.3 refers to compliance with the MPRDA and specifically Broad Based Black Economic Empowerment and in the same breath indicates that on 13 February 2011 26% shares of the issued share capital in the company was sold to the First Respondent. The definition of a "BEE Compliant Company" as per the Charter, reads as follows:

> *"..a company with a minimum B-BBEE Level 4 status in terms of the Department of Trade and Industry's Broad-Based Black Economic Empowerment Codes of Good Practice, and minimum 25%+1 vote ownership by Historically Disadvantaged Persons."*[7]

Further, Paragraph 2.1.1.1 of the Charter provides that

> "An existing mining right holder who has achieved a minimum of 26 % BEE shareholding shall be recognised as compliant for the duration of the mining right."

Clause 1.3 thus, clearly within context of the above definitions, indicates that the required 26 % BEE shareholding has been achieved.

[11] It is further evident from a simple reading of the clause that the parties complied with the empowerment requirements set out in the legislation and further, that the company should be compliant for the duration of the mining right. This clause can be regarded as a clear motivation for a mining right to be awarded to the company. The clause forms part of the introductory clauses to the shareholder's agreement and the immediate perception is and should be that empowerment had been achieved at the outset.

[12] The Appellant's contention that clauses 1.1 to 1.7 in essence records that the Appellant has applied for a mining right and that it must comply with BBBEE requirements and further that the First Respondent may have to relinquish a portion of his shares for no value to enable the Appellant to comply with the DMRE requirements to obtain a mining right is not completely correct. Clearly,

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[7] **Paragraph 2.1.1.1 Mining Charter, 2018**

as indicated supra, clause 1.3 indicates that empowerment has been achieved. The event of the First Respondent having to relinquish a portion or all of his shares for no value to enable compliance is almost superfluous since empowerment had been achieved.

[13] The Appellant refers to Clause 1.7 of the 2016 SHA which reads as follows:

> *1.7 The definition of Broad Based Economic Empowerment in the MPRDA, the Black Economic Empowerment legislation and the Mining Charter (the charter) (Empowerment) requires that this empowerment is broad-based. As an Individual KING does not qualify as an Empowerment entity. In order to obtain the mining right it will be necessary for KING to transfer some or more of the "B" shares, the extent still to be agreed, to Empowerment persons as defined in the MPRDA, the other legislation referred to in this clause and the charter. This reduction in KING'S shareholding will lead to a pro rata reduction in the price which he will have to pay for the shares in the Company, which he will continue to hold after empowerment has been achieved, which will be reflected in a written amendment to the sale of shares agreement mentioned in clause 1.5 above. It is recorded that in reducing KING'S shares in the Company, it will not be necessary for recipients of these shares to pay either a pro rata portion of the R 150 million (one hundred million and fifty million rands) referred to above, or any consideration at all, the prime object of the transfer of shares to the Empowerment persons being to ensure compliance with the MPRDA, the other empowerment legislation and the Charter.*

[14] The clause clearly does not reflect the situation at the time since it indicates that "As an individual KING does not qualify as an Empowerment entity." The clause can be accepted, within context of the legislation to be reference to the event of King not complying with empowerment requirements, which could only mean in the event of King not owning the required 26 % of the shares, which *in casu* was not the case. It may of course be in the spirit of the Act to allow for meaningful participation and expansion of opportunities to all people of South Africa as intended by the MPRDA should the First Respondent act within clause 1.7 by transferring some or more of his shares to empowerment persons at a pro rata reduction in price. The Appellant's interpretation of clauses 1.1 to 1.7 peculiarly ignores the stated fact that 26 % of the shares have been sold to the First Respondent which means compliance had been achieved. The

Appellant's contention in the circumstances cannot be accepted to have been intended by the parties in the light of the fact that the parties both had knowledge of the legislation and such information formed the basis of the agreement concluded.

[15] This brings us to the Appellant's interpretation of clause 1.8 and clause 5.11 of the 2016 SHA.

> *1.8 In order to achieve Empowerment to the satisfaction of the DMR and of BANNAI, it may be necessary for KING to relinquish all his shares in the Company in favour of Empowerment persons, and KING hereby undertakes to transfer such portion and/or the whole of his shareholding in the Company to such Empowerment persons as are nominated in writing by Bannai on demand therefor as more fully set out in this agreement.*

According to the Appellant clause 1.8 is not concerned with the transfer of shares in order to obtain a mining right but is focussed on the achievement of "empowerment to the satisfaction of DMRE and of Bannai," as well as the necessity of the First Respondent to "relinquish all of his shares in favour of empowerment persons." The Appellant relies on the obligation created by Clause 1.8 allowing for the First Respondent to relinquish a portion or all of his shares to empowerment persons to the satisfaction of the MDRE and Bannai.

[16] The Appellant raises various arguments in support of the contention that it was necessary for the First Respondent to relinquish his shares in order to obtain empowerment alternatively to extend empowerment post the granting of a mining right to the satisfaction of the DMRE and of Bannai. The legislation only provides that the DMRE should be responsible for and satisfied that empowerment has been achieved. The notion that a major shareholder should be satisfied with the achievement of empowerment is not mentioned in the Act nor the Charter. Should it be desirable that a major shareholder wish to achieve higher empowerment with the intention to improve the meaningful participation of historically disadvantaged persons, it may surely be welcomed by the DMRE, but if this is done with the aim of confiscating the shares of an existing BBBEE

partner and selling it for a larger value to another empowerment person, such conduct would clearly be repugnant to the spirit of the MPRDA and the Charter. It means that such an interpretation of the clause in issue clearly falls outside the context, aims and objectives of the legislation. The context and purpose of the legislation are fundamental to the interpretation of the clauses of the document in issue and thus the interpretation of the Appellant cannot be acceptable and correct.

[17] To reiterate the obvious, the necessity or obligation imposed on the First Respondent to relinquish his shares are clearly not required since, as pointed out supra, empowerment had been achieved from the outset and as provided for in clause 2.1.1.1 of the Charter, shall be recognised for the duration of the mining right. The Appellant contends that clause 1.8 entitles the parties to trigger clause 5.11 which reads as follows:

> *5.11 Should Bannai require KING to transfer any or all of the "B" shares to an Empowerment person, KING undertakes that he will within 2 (two) business days of receipt of a written notice to this effect from Bannai sign all such documents and do all such other things that may be necessary to give effect to the said transfer, whether this transfer will be only for part or the whole of the shares which he owns at that time. In the event of Takabong (KING) failing to comply strictly with the time limits and the extent of his obligations in terms of his undertaking he hereby gives and grants to Bannai a power of attorney to do all of the aforesaid things in his name, place and stead."*

The Appellant gave notice in terms of the above clause and upon the failure of the First Respondent to transfer all his shares Mr Bannai proceeded to transfer the shares to Inastep, a different empowerment person or entity.

[18] Needless to say, if empowerment had been achieved as mentioned hereabove, it remains unnecessary for the shares to be relinquished or transferred to a different empowerment person. The argument that because clause 5.11 refers to the achievement of empowerment and not the obtaining of a mining right, allowing for the transfer of shares may be sensible if there was no empowerment, but in a case such as this where empowerment had been

achieved the activation of the clause is non-sensical and uncalled for. The interpretation of the shareholder's agreement illustrated by the Appellant in its argument undermines the apparent purpose of the document in question. The justification for selling the shares for value since clauses 5.11 deals with empowerment and not with the obtaining of a mining right, creating an artificial distinction between the two concepts with the aim of justifying the sale of shares for double the value to another empowerment person/entity, clearly is not socially and economically justifiable and may amount to an infringement of S24 of the Constitution which is one of the objects of the MPRDA.

[19] Grobler AJ applied the principles of the interpretation of a document as set out in the Case Law and found that it did not permit Mr David Bannai to resort to clauses 1.8 and 5.11 by dealing with the achievement of Broad-Based Economic Empowerment as "a means to commandeer the First Respondent's shares." The findings of Grobler AJ resonates with my findings. The learned judge further states that the clauses "speak to a very specific purpose. That was for the purpose of firstly obtaining "*empowerment"* and secondly to consequentially obtain a mining right. The two are interlinked and inseparable. Empowerment had to be achieved in order to obtain the mining right- the latter to be the ultimate goal." It is abundantly clear that the Appellant's actions and interpretation of the shareholder's agreement are unbusinesslike and oppressive.

Disposal of BEE shares as regulated by the Mining Charter,2018

[20] The Charter deals specifically with the Disposal of BEE shareholding in respect of existing and new mining rights. This aspect was never dealt with by either of the parties on their papers and argument. Seeing that the important issue in this case is the disposal of BEE shareholding, one would presume that reference to this clause in the Charter is pertinent because it creates specific proviso's applicable to the disposal of BEE shareholding.

[21] Clause 2.1.6.1 of the Mining Charter states:

"*Where a BEE shareholding or part thereof is disposed of below the prescribed minimum shareholding, a mining right holder's empowerment credentials shall be recognised for the duration of the mining right, provided that:*

2.1.6.1.1 A mining right holder is compliant with the requirements of the Mining Charter,2018 at the time of the disposal.

2.1.6.1.2 The BEE shareholder must have held the empowerment shares for a minimum period equivalent to a third of the duration of the mining right, and an unencumbered net value must have been realised;

2.1.6.1.3 The recognition of empowerment credentials shall only be applicable to measured effective ownership which has vested to BEE shareholding; and;

2.1.6.1.4 An agreement detailing exit mechanisms and BEE shareholders' remaining financial obligations constituting a contract between the mining right holder and BEE shareholders is submitted to the Department.

2.1.6.2 The recognition of consequences of previous deals shall not be claimed against future mining rights or mining right renewal applications."

[22] Of particular significance, and not excluding the rest of the provisios, is clause 2.1.6.1.4 which requires an agreement detailing the exit mechanisms which needs to be submitted to the Department in respect of the disposal of a BEE shareholding. There is for instance, no mention of such exit agreement in casu. The abovementioned clauses give direction and context to parties to a shareholder's agreement once a decision is reached to dispose of the BEE shares. This emphasizes that a major shareholder cannot simply dispose of shares without compliance of certain provisio's. The disposal of BEE shares is regulated by the Mining Charter. By disposing shares of a BEE partner in contradiction to these provisio's would be repugnant to the legislation which lends context to the document in issue. It can therefore safely be found that the failure to indicate compliance to these provisio's before disposal of the First Respondent's shares, further strengthens the finding that the confiscation of the First Respondent's shares was not pursuant to and in accordance with the 2016 SHA.

The removal of the First Respondent as director on 19 May 2016.

[23] The Appellant contends that the First Respondent's purported removal as a director on 19 May 2016 was lawful and even if it should be found that the removal was unlawful then the First Respondent acquiesced in same. The court a quo, in dealing with this argument, held that the matter is one of evidence and, since the court heard motion proceedings, the Frist Respondent's evidence could not "be disregarded out of hand." The grounds of appeal to this part of the judgment are set out in par [2.20] of the application for leave to appeal, namely that the Court failed in finding that the First Respondent acquiesced in his removal as director, more particularly:

> " *2.20.1 In failing to challenge his removal for close onto four years;*
> *2.20.2 In accepting in the first business rescue application brought by the First Respondent in January 2020, that he was not a director (at least by implication);*
> *2.20.3 In presenting conflicting versions on whether or not he knew of the resolution removing him as a director."*

[24] In motion proceedings the trite Plascon Evans test should be applied where disputes of fact have arisen on affidavits. An interdict may be granted if the facts averred in the applicant's affidavit, which have been admitted by the respondent together with the facts alleged by the respondent justifies such an order. The exception to the general rule is where 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. The court a quo did not reject the First Respondent's version. In paragraph [67] and [68] of the Appellant's heads of argument it is argued that it is common cause that the Frist Respondent never acted as director nor sought to assert any rights as a director from 19 May 2016 to 25 February 2020. In this regard the appellant relies on paragraph [52] of the answering affidavit. In paragraph [52] of the answering affidavit the First

Respondent makes it clear that he was not aware, until 25 February 2020, that he was allegedly removed as a director and that the shareholder's meeting of 19 May 2016, only came to his knowledge on 12 June 2020. The First Respondent deals with his appointment as director and when he received knowledge for the first time that he was allegedly removed as director in the papers. The Appellant has not provided proof of compliance of a notice filed in terms of Section 70 (6) of the Companies Act of 2008, which notice needs to be filed within ten (10) business days after a person becomes or ceases to be a director of a company.

[25] The issue of the First Respondent's directorship in the Appellant is riddled with factual disputes on the papers. The First Respondent's evidence that he did not receive knowledge of the shareholder's meeting held on 19 May 2016 is one of the factual disputes. The court a quo, correctly, could not with any accuracy conclude that the probabilities in favour of the Appellant's case should carry more weight than the First Respondent's assertions on the papers.

Conclusion

[26] In the circumstances, I find that the removal of the First respondent's shares was not in accordance with the proper, business-like interpretation of the shareholder's agreement.

Consequently, the First Respondent in fact remained a shareholder and the new shareholders did not have authority to resolve the appointment of a new board of directors. The new board of directors subsequently were not validly elected.

[27] The new purported board of directors had no authority and therefore no *locus standi* to resolve the institution of the motion proceedings before the court a quo.

The Appellant therefore lacked authority to institute the proceedings before the court a quo.

[28] I confirm the findings and outcome of the court *a quo*.

[29] I make the following order:

The Appeal is dismissed with costs.

C L PAGE, AJ

I concur:

C. REINDERS, ADJP

I concur:

P. J. LOUBSER, J

On behalf of Appellant:	Adv. M Smit
Instructed by:	Cliffe Dekker Hofmeyr Inc, Sandton
	C/O Van Der Berg Van Vuuren Attorneys Bloemfontein
On behalf of Respondent:	Adv. J. Zietsman SC
Instructed by:	Kramer Weihman Inc.
	Bloemfontein