REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42781/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

2016/02/18
DATE

.....
SIGNATURE

In the matter between -

CLAUDIA DE VILLERS — Applicant

and

KAPELE J HOLDINGS & OTHERS — Respondent

JUDGMENT

SUTHERLAND J

[1] Claudia de Villiers has applied urgently for relief against Kapele Holdings (Proprietary) Limited and Kapele Investment Holdings (Proprietary) Limited and several individuals who are directors and shareholders in the two companies, as is she.

[2] The objective of the application is to interdict the respondent companies from taking any further steps to interfere with her shareholding in the two companies and to inhibit, in particular, the purported deemed offer of her shareholding to the other shareholders, as a result of certain provisions in the shareholder's agreement, which agreement binds herself and the other parties.

It is useful at the outset to identify the *fons et origo* of the dispute.

[3] In respect of her shareholding in both the companies, there is a provision in the shareholders agreement, Clause 10, which relates to deemed offers. It is triggered by a specified event. The possible events are identified in Clause 10.1.5 which reads as follows:

> "If the shareholder in question is an executive director, or executive of the Kapele Group, and is dismissed, resigns or leaves the employment of the Kapele Group for whatever reason, prior to reaching retirement age of 63 years." (underlining supplied)

[4] Upon such an event there is a deemed offering of that person's shareholding to the remaining shareholders. The further provisions in Clause 10, deal with the mechanics of that transaction. It is common

cause that such an event has taken place. However, in respect to that event, there are two points of contestation.

[5] First, the papers demonstrate that her termination of employment as an *employee* of the Group, took place by way of a purported retrenchment. It is the applicant's view that she has being unfairly dismissed and her contentions are that the retrenchment was a contrivance by the other respondents to get rid of her and that there was no genuine retrenchment basis for the termination. That *lis* she is prosecuting in the fora established by the Labour Relations Act, and the merits, or the merits of those claims are of no interest to this court.

[6] Second, she makes, in *her capacity as a shareholder* a claim respect in each of the two companies. In that capacity she has approached this court for relief as set out in the notice of motion. She alleges that she contemplates bringing an application in terms of Section 163 of the Companies Act of 2008, which empowers a court to order a wide range of relief to a shareholder, or director of the company where a case for oppressive or prejudicial conduct against such person has been made out.

[7] Among other considerations, one of the circumstances which triggers the court's jurisdiction under the section is, as provided in section 163 (a):

> "An act, or omission of the company, or a related person [I interpolate- that would obviously include a director, or a fellow shareholder] that has a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant."

[8] The essence of the applicant's predicament, so she says in her papers, is that she has fallen out with fellow shareholders and directors and as part of, what can only be called a fraudulent and disreputable scheme, they have contrived to invent a reason to retrench her falsely, in order to get to rid of her, with the effect that the deemed offering of her shareholding would be triggered in the way I have described. Apart from any other number of considerations, the most important consideration for this purposes of this application, is her contention that the way in which the company has consciously been managed, is that all parties who have a financial interest, have suppressed and deferred their financial benefits and in the future, there is the prospect of huge windfalls arising as various investments mature. Self-evidently, if the deemed offering, in terms of Clause 10 of the shareholder's agreement is triggered now, she will not be an eligible person to enjoy the benefits of such accrual in due course.

[9] It is not important for the purposes of this judgment to make any comment about whether or not such a case can be made out in due course. But such is the nature of the case she proposes to put forward. As is evident in what I have already said, she needs to prosecute two claims. The one in the fora established by the Labour Relations Court and secondly a section 163 action before the High Court.

[10] The relief which she seeks is essentially a *status quo* preservation of her shareholding. Counsel on behalf of the applicant has contended that this

is a vindicatory claim, and therefore, harm is presumed, which must be shown not to be an eventuality that is at material risk by the respondent. The case law certainly seems to support that proposition.

[11] So what we have before us then, is an interdict seeking to prevent her from being irreparably damaged by being compelled to submit to a deemed offer, while she is litigating on two fronts, first, with the prospect of potentially restoring her employment relationship, and second, potentially establishing that she has been the victim of a fraud by her fellow shareholders.

[12] The principal reason for resisting any interim relief, as argued on behalf of the respondent, turns in part on an interpretation of Clause 10, to which I shall return in a moment, and in part on broader considerations about the appropriateness of restoring or preserving or fossilising some kind of relationship between the parties, when, on the papers, it is clear that they are at daggers drawn.

[13] As far as the broader considerations are concerned, it is common cause that even though the details about the cause may differ, the parties are no longer on good terms. Were this an application to restore her to employment that might well mean, on an interim basis the very least, an inappropriate order to grant. But that is not a difficulty which presents itself in deciding this interdict application.

[14] What is sought here is not the restoration of a relationship, or any obligation on the parties to deal with one another on a day to day basis, but to

preserve her proprietary right in what she contends is a potentially very lucrative shareholding; ie to preserve that *status quo*, until such time as she has an opportunity, pursued as expeditiously as possible, to establish whether or not she is indeed the victim of fraudulent scheme to deprive her of her financial interests.

[15] On behalf of the respondent, it was contended that were such relief to be granted, the respondent itself would suffer irreparable harm. The submission is based on an interpretation of Clause 10 in the shareholders agreement.

[16] As alluded to, the relevant provisions provide for various events to trigger a deemed offer. Once an event, as described in Clause 10.1.5 takes place, the termination of the employment follows, for whatever reason. There is then an opportunity for the respondent's board to compel the person, having so departed, to offer the shares and be deemed to have offered the shares at a price to be determined in accordance with a particular formula. It is the contention on behalf of the respondent that there is a provision in Clause 10.5, which closes the window of opportunity for the respondent to accept the particular offer.

[17] The relevant provisions are 10.3, 10.4 and 10.5; I cite them together:

> "Whether or not the notice, as is required in terms of Clause 10.2, within 30 days after learning of the occurrence in the events contemplated in Clause 10.1, the board may, by notice, in writing, to the offering shareholder to compel the offering shareholder to offer his shares in the company to the company..."

I interpolate to say that that event, as is common cause, has taken place. I read on]:

> "....The offer by the offering shareholder shall be deemed to have been made on the date preceding the day upon which the event referred to in Clause 10.1 occurred...."

[I interpolate again to remark that the careful wording of that text clearly contemplates that the offer would have been made on the day, but one, before the departure. That is to say, the last day upon which that person would have been in the employ of the respondent. I read on]:

> ".....As soon as the board so compels the offering shareholder to offer his/her its shares, and shareholder's loan, the offering shareholder shall be deemed to have offered the shares to the company, at the price determined in accordance with Clause 10.9, and such offer shall be open for acceptance thereafter for a period of 90 business days."

[18] The sting in the provision is the last sentence, regarding the period of 90 business days. On the one hand, the respondent contends that the 90 business days is triggered by the event of the deemed offer, and on the other hand the applicant submits that it would be illogical for the deemed offer to start running before the valuation has been established.

[19] On the basis of proposition advanced on behalf of the applicant, the way to read this clause would be, that only after the price had been determined, the offer, which undoubtedly is triggered, would then stand open only for acceptance by the respondents for 90 business days.

[20] That dispute must be resolved by the application of common sense and thus it must be asked: what would make business sense? Self- evidently, in my view, either of the constructions could be inferred from this wording. But when one approaches it on a functional basis, with what must have been in the mind of the drafter, the absurdity must be recognised that a party that was expected to accept an offer in the absence of knowing all the *naturalia* of an offer of sale, would certainly be in an invidious situation. On balance, it seems to me, it is more likely that the 90 day period is triggered from the time that a full offer could be made inclusive of knowledge of the price.

[21] That being so, the irreparable harm which the respondents contend would endure, does not exist, and the argument fails. That of course is not the end of the matter. The fundamental case which the applicant must make out is that there will be irreparable harm to her if the relief is not granted. The clear right she has to her proprietary right, is not in itself disputed, save, of course, for the fact that such rights are subject to the very bargain which she made by concluding the shareholder's agreement. In that regard, I was referred to the decision of *Reeves v Marfield Insurance Brokers CC 1996 (3) SA 766 (A)*, which, in the context of a restraint of trade dispute, the court concluded that the fact that the individual may have been wrongfully dismissed, did not disturb the portion of the agreement which triggered the restraint of trade obligation. Similar to the wording used in the present case, the text of the agreement provided for termination, *for any reason whatsoever.* It would be remiss not to remark that the harshness of that decision has been noted more than once. But nevertheless, that is the law.

[22] It was pressed upon me to apply reasoning analogous to that decision. I decline to do so, because it seems to me that there is an important distinguishing factor. The circumstances of public policy, which did not disturb the harsh outcome in *Reeves v Marfield*, are quite distinct from the circumstances of public policy which arise in the present case. A mere wrongful dismissal, which nevertheless triggers a provision of an agreement which has as its objective a well-recognised and legitimate means by an employer to protect its interests against unfair competition is hardly to be compared to the circumstances as here alleged. What is alleged here is that a shareholder, an employee, has been targeted as a victim by other members of the Group, and has been deliberately and wrongfully being made the victim of a fraud.

[23] Once again, as alluded to earlier, I make no comments on the merits of the allegations, but that of course is what might be proven once she has the opportunity to take the necessary legal steps to assert her rights.

[24] If considerations, the like of which were addressed in *Reeves v Marfield Insurance Brokers* are absent, then the harm which is to be considered here, seems to me to be well established, and in circumstances where it is clear that there is no alternative remedy of any utility that could be invoked it seems to me that the application in that regard is well-founded.

[25] Reference was made on behalf of the respondent about retrospective relief pursuant to Section 163. I am mindful of the very extensive relief which is possible for an applicant under Section 163 of the Companies Act

to procure. However, in examining the scope of the relief set out in Section 163 (2), it is not apparent to me that the unscrambling of this egg would be possible. Section 163 (2) (g) provides that a court may make:

> "an order directing the company, or any person to restore a shareholder, any part of the consideration the shareholder paid for shares, or pay the equivalent value, with or without conditions."

[26] What I do not see in this text, is anything that contemplates the sort of relief that might be necessary to deal with the present situation, should the applicant be successful in her action in due course.

[27] Similarly, the other provisions, of wide import, as they are, do not hint at the possibility of such relief. My remarks in this regard, of course, are purely *prima facie* and cannot taken as a definitive interpretation of the provisions of that statute, which must remain open for another court to consider at leisure, not as I am placed, driven to decide on an urgent basis.

[28] Having regard to all of those considerations; ie, the applicant's clear right to her proprietary interest, the harm which will take place if interim relief is not granted, the absence of an alternative remedy, and indeed the balance of convenience, I am satisfied that the relief sought is appropriate.

[29] As a result, I propose to grant the relief which is set out in the notice of motion. There was a debate about the costs of this interim relief and I was referred to the decision of *Maccsand CC v Macassar Claims Committee & Others*, 2005 (2) All SA 469 (SCA). The matter dealt with interim relief in the context of mining licenses. This is what Farlam JA had to say about

costs at [13]:

> "Costs order are, in the absence of exceptional circumstances, not generally made in interlocutory interdict proceedings since the court finally hearing the matter is in a better position, after hearing all the evidence, to determine whether or not the application is well founded."

[30] Certain authority is cited and the Judge *a quo* was criticised for not having given voice to any exceptional circumstances which would, in the words of Farlam J, justify "a deviation from the established practice."

[31] I must confess that I was not aware of this decision until it was cited to me and certainly, the established practice of this court is inconsistent with that dictum. I note that the decisions which Farlam JA cites, do not emanate from this court, but are indeed from the Eastern Cape, where I presume litigation is conducted in a more gentlemanly and leisurely manner than that to which litigants in Johannesburg are accustomed.

[32] It seems to me that there is a distinction to be made with reference to that decision. In many cases for interim relief, the final relief sought in subsequent proceedings, is in a very real sense, a re-run of what was ventilated at the interim stage. But that is not the case here. The particular circumstances which are immediately important, are whether or not *urgent interim relief* is required. That issue is not going to be revisited. The question of whether or not it was justifiable on the part of the applicant to seek relief in this form, seems to me to be the critical factor relevant to what is an appropriate costs order. I have been told from the bar and shown in the papers that requests for undertakings were given, which had they been

given, would have obviated the need for this application.

[33] Counsel for the respondent points out that I should not attach too much weight to that, as it is perfectly routine in matters of this nature for parties to seek undertakings from one another. Thus, the failure to give them, should not draw any adverse inferences. I think that is the wrong question. It is not a matter of criticising the parties for not giving an undertaking, which would axiomatically relieve the court of the need to hear the matter. Parties have good reasons, often ones that cannot be disclosed to the court, for not giving undertakings.

[34] In this particular case, at very least, the respondent had the view that the circumstances under which it would labour, in terms of the shareholders agreement, would put itself in a fix, were an undertaking be given. That seems to me to be a perfectly legitimate reason for refusing an undertaking and resisting the application. That of course does not, on the mere grounds that it was legitimate to oppose it, exempt the respondent from being exposed to a costs risk.

[35] In my view, the need for the interim relief, given the nature of the dispute between the parties, was legitimate and it seems to me that where the nature of the debate to be conducted here is not simply a rehearsal for what will be debated later on, it would be difficult to understand what the Judge hearing a further round would have in mind in order to determine the costs of this application and be in a better position than I am to consider such an order.

[36] For those reasons, I propose to make a costs order in this particular matter. Given the substance of the order which I have already indicated I shall give, costs in my view should follow the result.

[37] In the result therefore, I make an order as prayed, as follows:

1. Pending the outcome of Part B of this application, the respondents are interdicted from;

   1.1. Taking any steps to interfere with the applicant's ownership and possession of her shareholding in the 1st and/or 2nd respondents.

   1.2. Taking any steps in furtherance of the purported deemed offer of the applicant's shareholding, in terms of Clause 10 of the shareholder's agreements, in respect of the 1st and/or 2nd respondents.

2. The respondents are ordered pay the costs of this application, including the costs of two counsel jointly and severely, one paying the other to be absolved.

Roland Sutherland
Judge of the High Court,
Gauteng Local Division, Johannesburg.