IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 2464/10

DATE: 9 February 2010

In the matter between:

MIXSHELF 1 (PTY) LIMITED Applicant

and

KWEZI INVESTMENTS TWO (PTY) LIMITED 1st Respondent

KWEZI V3 ENGINEERS (PTY) LIMITED 2nd Respondent

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JUDGMENT

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DAVIS, J

This is an urgent application, which has been brought after consideration by the applicants for one source of relief, namely an interdict against the first respondent from holding a meeting of the Board of Directors of first respondent on Tuesday 9 February 2010, until such time as three directors, Dr Sohn, Mr September and Mr Dreyer, have been removed as directors, or as appears to be the basis of the relief, pending the outcome of a mediation process relating thereto.

It is trite law that for such an interim interdict to be justified there has to be a case made out in the first place that the

applicant possess a *prima facie* right. In this case, Mr Naidoo who argued, very ably, I might add, on behalf of the applicant, submitted that the right the applicants sought to invoke was their right as a majority shareholder in first respondent, which was sourced in a shareholders agreement entered into between applicant and first and second respondents. In other words, there exists an agreement between second respondent, a 30% shareholder in first respondent, and applicant, a 70% shareholder in first respondent to regulate the conduct of first respondent. In terms thereof, it appears that applicant was entitled to appoint six directors to the Board of first respondent, at least four of which had to enjoy registered professional status in one of the building or environment professions.

Pursuant to clause 5.1.7, directors so appointed may at any time be removed and replaced by another director by the shareholder who has appointed that director in the first place; in other words in this case, applicant was entitled in terms of 5.1.7 to remove any of the directors that it so appointed pursuant to clause 5.1.2.

On 10 December 2009, applicant through its attorneys generated a letter to the company secretary of first respondent informing him that applicant had removed Dr Sohn, Mr

September and Mr Dreyer from their positions as directors. What complicated the matter was that the removal appears not to have been accepted. The dispute between respondents and the applicant with regard to the removal of these directors is subject to a mediation and arbitration clause (Clause 16 of the shareholders' agreement) which was invoked. It is common cause that this process of arbitration has been invoked but it has not yet been completed. In the papers, there is a letter of 6 February 2010 generated by applicant's attorney to the President of the Law Society of the Northern Provinces in which he applies to the latter for the nomination of a suitable mediator to mediate the disputes between the parties; that is the disputes to which I have made mention.

I remain somewhat sceptical of the legal implications of the relationship between clauses 16 and 5 of the shareholders agreement but mercifully this particular issue is not before me. Therefore I must work on the basis that the parties have agreed that the invocation of the right to remove a director pursuant to clause 5.1.7 is subject to a mediation process as set out in clause 16. I must also work on the assumption that clause 16 governs the procedure and that an outcome of the process is still awaited.

Within this context, as I have outlined it, it appears that a

meeting has been convened for today, that is Tuesday 9 February 2010 at ten am, which I understand has been postponed to await the outcome of this application.

There is considerable dispute as to the reasons for this meeting being called, whether adequate notice was given for this meeting and whether the urgency of this application has been self-induced pursuant to the knowledge of such meeting or not. For the purposes of this issue, it should be noted that at a first stage, these considerations can be left aside.

What is clear is the meeting has been called to deal with a range of issues. I cannot help but notice that many of the issues on the agenda have to do with the conduct of Mr Mahamba, who happens to be a director of first respondent, and indeed of applicant. It may well be that it is this part of the agenda that has precipitated the urgency of this application. Again it is not an issue that has to be decided.

Suffice to say, applicant has come to Court to stop the meeting. It argues that the meeting should be stopped because it is contrived to undermine its rights to appoint and remove directors. It contends, through submissions made by Mr Naidoo that in effect the conducting of a meeting with directors present who have already been removed by

applicant, subverts applicant's rights under clause 5 of the agreement, and accordingly it would be to its considerable prejudice, were the meeting to go ahead.

Mr Wragge, who appeared equally ably on behalf of the respondents, submitted that there was no authority which could be found to support the proposition that a shareholder, save for the inherent rights which a shareholder holds, may approach a Court to prevent the internal workings of a company, that is to prevent a company from operation. There are clear remedies available to shareholders but an interdict to prevent a company from actually operating is not one of them.

For this reason, Mr Naidoo was constrained to argue in terms of the shareholders' agreement as opposed to principles of company law, meaning that what was sought was the protection of a contractual as opposed to a company law right. But a shareholders agreement has to be located within the context of company law; that is the contract provides applicants with rights, but those rights are as set out and must be read within the greater context of what right shareholders possess within the context of company law.

In this case, the right which is claimed is effected is that, if the meetings continue, the sacking of the directors by applicant

would be subverted and accordingly applicants' contractual right will be rendered nugatory. The contrary proposition is that the right that they have in terms of clause 5.1.7 must be read together with clause 16, and until such time as that procedure has been implemented to completion, these rights are not ones which can be considered to be subject to interdictory relief so as to vindicate them. There are of course remedies available to applicant. Directors owe a fiduciary responsibility to the company. It is to the company that they must look in assailing their conduct, including at this particular meeting.

In my view, it is difficult to see, given the way in which the parties have chosen to interpret clause 5.1.7 together with clause 16, to what right has been breached by the conduct of a meeting which is then sufficient to justify interlocutory relief. If I am incorrect, there is of course one further requirement, being the balance of convenience. The concern was clearly that the directors will act to suspend Mr Mahamba from being a director; that is what appears in the agenda for today's meeting. That suspension would of course be subject, not only to the provisions of natural justice, but also to the directors who vote for the motion. By directors I mean lawfully appointed directors, which may not be the case if the arbitration finds in the direction that clause 5.1.7 provides the applicant with the

far more unfettered right than respondents appear to take to be the case, an argument which in my view may not be sustainable in terms of the wording thereof.

Accordingly when I consider the balance of convenience, and the onus which is imposed upon the directors to conduct their meeting, the balance of convenience cannot be considered to be such as to dictate that interlocutory relief of the kind sought should be granted in this case.

However, in refusing this application I would urge the directors of the first respondent to take extremely seriously the comments that this Court has made with regard to their rights and duties in relation to the company. For these reasons, however, THE APPLICATION IS DISMISSED with costs.

DAVIS, J

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