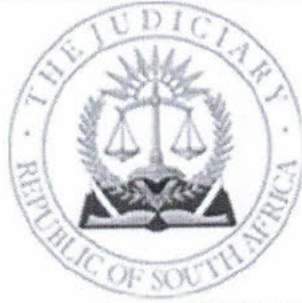


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023/084314

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

27 September 2023
DATE

...
SIGNATURE

In the matter between:

POWERGROUP SA (PTY) LIMITED

Applicant

and

KARADENIZ HOLDINGS LIMITED

First Respondent

KARPOWERSHIP SA (PTY) LIMITED

Second Respondent

MINISTER OF MINERAL RESOURCES AND ENERGY

Third Respondent

JUDGMENT

MIA J:

- [1] When the matter appeared before me on 19 September 2023 the applicant sought an order seeking:

“1. The applicant’s non-compliance with the rules relating to service and process is condoned and this application is permitted to be considered on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.

2. The respondents are hereby interdicted and restrained from:

2.1. taking any steps to transfer, acquire, sell or in any manner deal with the Powergroup Subscription Shares and Ordinary Shares until the finalisation of the arbitration dispute referred on 21 August 2023 to the Arbitration Foundation of South Africa; and

2.2. taking any further steps in terms of the Shareholders’ Agreement pursuant to the Call Option Exercise Notice issued by the First Respondent in terms of Clause 12 of the Shareholders’ Agreement.

3. It is directed that any decision to transfer the equity of Powergroup cannot take place without the prior consent of the Minister of Mineral Resources and Energy.

4. The directors of the First Respondent are interdicted and restrained from exercising any powers, or taking any steps, in terms of clause 12.9 of the Shareholders’ Agreement.

5. The aforesaid relief in prayers 2 to 3 above shall operate as an interim interdict pending the final determination of an expedited arbitration referral to the Arbitration Foundation of South Africa.

6. The respondents are ordered to pay the costs of this application including the costs occasioned by the employment of two counsel.

7. Granting the applicants such further and/or alternative relief as may be just in the circumstances.”

- [2] The application was opposed by the first and second respondents. There was no appearance for the third respondent. The matter was postponed until 22 September 2023 to enable counsel for the first and second respondents to file heads of argument by 20 September 2023 and to accommodate his appearance in another urgent matter in the same week. The applicant requested the matter be heard on 21 September 2023 as a meeting was about to take place where their shares would be transferred as envisaged in the notice of motion. The first and second respondents' counsel was not available. The matter proceeded on 22 September 2023. In the interim, the respondents did transfer the shares of the applicant to the first respondent. The applicant filed an amended notice of motion and seeks an order as follows:

"1. The applicant's non-compliance with the rules relating to service and process is condoned and this application is permitted to be considered on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court

2. The respondents are hereby interdicted and restrained from:

2.1. taking any further steps to transfer, acquire, sell or in any manner deal with the Powergroup Subscription Shares and Ordinary Shares until the finalisation of the arbitration dispute referred on 21 August 2023 to the Arbitration Foundation of South Africa;

2.2. taking any further steps in terms of the Shareholders' Agreement pursuant to the Call Option Exercise Notice issued by the First Respondent in terms of Clause 12 of the Shareholders' Agreement; and

2.3. in any way limiting the rights, benefits or interests of the applicant pursuant to the Shareholders' Agreement.

3. The directors of the First Respondent are interdicted and restrained from exercising any powers, or taking any steps, in terms of clause 12.9 of the Shareholders' Agreement.

4. The First Respondent is interdicted from negotiating, concluding and entering into any agreement with any party in terms which are in conflict with the provisions of the MOI, the Shareholders Agreement and the Implementation Agreement.

5. The First Respondent, alternatively the Respondents, is ordered to reinstate the applicant's ordinary shares pursuant to its Call Option Exercise Notice dated 11 August 2023.

6. The aforesaid relief in prayers 2 to 5 above shall operate as an interim interdict pending the final determination of an expedited arbitration referral to the Arbitration Foundation of South Africa.

7. The respondents are ordered to pay the costs of this application including the costs occasioned by the employment of two counsel.

8. Granting the applicants such further and/or alternative relief as may be just in the circumstances.

PART B: FINAL RELIEF BE PLEASED TO TAKE NOTICE that the applicants intend to make application to the above Honourable Court on a date to be decided by the Registrar of this Court for an Order in the following terms:

1. It is declared that the Memorandum of Incorporation and the Shareholders Agreement concluded between the Applicant and the First Respondent is unconstitutional, unlawful, of no force or effect and is set aside.

1.1 In the alternative, it is declared that clause 2.1.24, clause 12, clause 15.4 of the Shareholder's Agreement and clause 6.8.3 of the Memorandum of Incorporation are unconstitutional, unlawful, of no force or effect and they are set aside.

2. It is declared that the First Respondent is bound to make a contribution of R350 million on behalf of the Applicant in respect of the tender."

- [3] The relief is partly related to the arbitration proceedings and partly based on constitutional relief sought in Part B. The applicant maintains that the constitutional relief is not part of the relief sought in arbitration and is required. The relief it seeks on an urgent basis is to restore its position to the state prior to the transfer of shares and specifically to reinstate its shares as well as to declare the agreement unlawful and unconstitutional.
- [4] The background to the application is the following. The applicant and the second respondent entered into various agreements including a memorandum of incorporation (MOI) and a shareholders agreement. The applicant contends that the agreements constitute contraventions of the law and fronting if they are not amended and are in violation of the Broad-Based Black Economic Empowerment Act, 2003. The agreement refers to the applicant's shareholding of 49% and the applicant states that its beneficial interest is 24%. It complains that it has no access to financial information and operations of the company which is wholly controlled by the first respondent. In this context, the first respondent has now demanded an amount of 2,5 million for working capital whilst no explanation is furnished why the funds are required and what specifically it is will be utilised for.
- [5] The applicant states that, in the face of the unlawful and unconstitutional nature of the MOI which permits the first respondent to make key decisions with its 51% shareholding, it now seeks to elevate Dr. Anna Mokgokong and Community Investment Holdings, the entity she has an interest in. The applicant contends that Dr. Mokgokong has significant interests in government tenders and is politically connected. Neither Dr. Mokgokong nor Community Investment Holdings were joined in the proceedings.

- [6] On 27 February 2023, the Chief Executive Officer of the first respondent sent out a proposed Board resolution and draft Funding Notice in terms of clause 13.2.3 of the Shareholders agreement. In response, the applicant requested financial information and rectification of the 12 million US dollar loan from Mr Karadeniz to the respondents. In addition, it requested disclosure of all lenders and financiers approached for additional funding as well as disclosure of all third parties that had engaged with Mr Karadeniz relating to the replacement of the applicant as a new BBEE partner with the first respondent. In view of Mr Karadeniz having been the financier to date the applicant had expected that Mr Karadeniz would be providing funds to the second respondent, in terms of previous loan agreements, subject to a repayment date commensurate with the flow of funds from the senior debt facility. If Mr Karadeniz was not providing the funding, the directors were still required to exhaust the processes in the Shareholders Agreement and the MOI. This was ignored and a funding notice requesting additional funding was issued. The applicant informed the first respondent that the notices for funding were unlawful and indicated the reasons they contended it was so. They maintain their concerns were not addressed.
- [7] Mr Karadeniz engaged with them to offer their shares to a third party for amounts between R3 million to R26 million, in order to bring funding into the project where the applicants had not put up funds. A meeting took place on 22 June 2023 at the Palazzo Hotel between representatives of the applicant, the first respondent and Mr. Joe Madungandaba and Mr. Linda Cibe of Community Investment Holdings. Mr. Cibe made an offer to the applicants to dilute their shareholding to accommodate Mr. Madungandaba and Dr. Mokgokong. On 11 August 2023, the first respondent issued a notice to exercise their call options under clause 12 of the shareholders' agreement. This, the applicant contends, is an ulterior motive intended to remove them and is unlawful as it is in breach of the undertaking given to the Department of Mineral Resources and Energy to fund activities of the project in the amount of R1 billion. They

maintain the exercise of the call option is in breach of commitments made in terms of section 9 of the Constitution, the Broad-Based Black Economic Empowerment Act 2003, and the Implementation Agreement.

- [8] Of significance is the applicant's reliance on statements made in its supplementary affidavit. The first is that the Implementation Agreement provides in clause 17 that,

"17.1 For the duration of the term, the seller shall procure that there be no change in the seller (or in any company of which the seller is a subsidiary) without the prior written approval of the Department.

17.2 For the period commencing on the signature date and ending on the date which falls five (5) years after the commercial operation date, the seller shall procure that there is no:

17.2.1 dilution, sale, assignment, cession, transfer exchange, renunciation or other disposal of the whole or any party of the Equity; or

17.2.2. dilution, sale, assignment, cession, transfer exchange, renunciation or other disposal of the whole or any party of the Issued share capital of and/ or the shareholder loads in and to a conduit shareholder,

Without the prior written approval of the Department."

The applicants contend that the first respondent's plan to replace them with a new BEE partner is contrary to the Implementation plan and is unlawful. The respondents by invoking clause 12 of the agreement and purchasing their shares without following the process to obtain funding, is also contrary to the Implementation Plan.

- [9] Counsel for the applicant argued that the first and second respondents have entered into an agreement with BHI Energy Property (Ltd) to develop projects to meet the demand for electricity, fuel through powerships. Counsel referred to an unsigned copy in the applicant's possession. The project is the same tender that the applicant and the

second respondent were awarded. The applicant invites the first respondent to produce the signed copy thereof. It suggests that the first and second respondents used the applicant to obtain the tender and are now scheming to remove it from the project. The parties with whom the respondents are said to be conspiring have not been joined to the proceedings.

- [10] Moreover, counsel for the applicant argued that the agreement constituted fronting and was unconstitutional and should be set aside. This, it was argued, only a court could do.

- [11] Counsel for the first and second respondents argued that the applicant was incorrect on a number of points. It seeks to set aside the Shareholding agreement on the basis that it is contrary to the BBBEE Act and constitutes fronting, however, the applicant was a party to the agreement which it contends is unlawful in many respects and was content to benefit from the agreement which it now says constitutes fronting. The respondents deny that the agreement is unlawful or that the relief sought is urgent. Counsel argued that the application amounted to forum shopping as the initial application was set down before Pullinger AJ. The applicant removed the matter from the roll and proceeded to arbitration. Once the arbitrator determined the aspect of urgency, the applicant was not happy with the arbitrator and proceeded back to court to make out a case for urgency. Counsel maintains that the issue will be addressed in arbitration as the applicant refers to their recourse in arbitration, suggesting that they are content to address part of the dispute through arbitration.

- [12] Counsel argued furthermore that the Implementation Agreement is yet to be signed and the details are not disclosed as required between the parties. The respondents will need to take various steps to transfer the applicant's shares and hand over to a third party after obtaining the Minister of Mineral and Resources's (the Minister) consent in terms of

the agreement to comply with the Implementation Agreement. The Implementation Agreement has not yet been signed by the Project companies who have not been joined in the proceedings. Changes to the Bid Project are subject to the decision of the third respondent once the respondent has furnished an explanation regarding the circumstances which have changed. The Ministers' discretion regarding the changes and approval thereof appears to be crucial in the circumstances before any changes can be finalised and the project can be given the green light.

- [13] Counsel for the respondent submitted that the reference to the negotiation with BHI being a clandestine and calculated plot is incorrect. The project requires a fund-contributing partner to reach commercial close and whilst the applicant contributed R98 and could not contribute funds it was referred to the BHI who could support it in this regard. The referral was not clandestine and was solution-driven to ensure the project could go ahead. The applicants have not raised the funds required. Counsel argued that it was in fact the respondents who stand to lose substantial funds approximately 700 million if commercial close is not reached. The consent of the Minister required for the transfer of shares would also be dealt with before the arbitrator, Counsel argued. Furthermore, with concern he submitted that the applicant's "state capture on steroids" argument is reckless and no case is made out on the papers. More importantly, he continued the statement made was without merit. He submitted that the shareholding agreement does not amount to fronting, and whilst the agreement has certain clauses which the first respondent had invoked, if the applicants are correct in their argument then they are not entitled to any shares. He pointed out that the applicants on their version will have been participating and seek to benefit from an unlawful agreement and if they succeed in setting aside the unlawful agreement they cannot gain the shares they say they should receive.

- [14] On the irreparable harm, he argued that the transfer of shares has occurred whilst an interdict is for future conduct. On the test for an interim interdict, counsel argued that the applicant has an issue with regard to their right, irreparable harm in view of the issue being dealt with in arbitration and the balance of convenience not favouring the applicant. Consequently, counsel argued the matter should be struck off with punitive costs, alternatively that the application should be dismissed with costs.
- [15] The applicant seeks an interim interdict and must establish a clear right or a prima facie right, that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and that the balance of convenience favours the grant of an interim interdict.
- [16] The harm which the applicant seeks to prevent namely the transfer of shares has already occurred. They call it a corporate hijack which they say must be interdicted until the matter is resolved by a court or in arbitration. The arbitration proceedings are pending. An interdict will not assist in restoring the shares which have been transferred. An interdict can only be called upon to restrict or bar future conduct. On the respondents' version, the issue of the transfer of shares is not an urgent matter. The transfer according to the first and second respondent must be approved by the third respondent in any event. There is no dispute that the third respondent, the Minister has to approve this transfer. The applicant has already referred a dispute to arbitration prior to approaching this court and intends for some aspect of the dispute to be addressed in arbitration. The issue with regard to the transfer of shares is not relief to be granted urgently where the shares have been transferred. There is no harm that can be averted with an interdict as sought by the applicant.
- [17] The relief sought in Part B of the amended notice of motion is not urgent. To the extent that there are parties that are affected and have an interest

such as the companies who form part of the project as referred to by counsel, they may need to be joined. It is premature to grant relief herein without their input where their interests may be affected. The Implementation Agreement has not been signed. The parties forming part of the implementation project are not all before this court. There may be issues to be ventilated ahead. Part B may be considered for later determination. The issue with regard to the transfer of shares is not relief to be granted urgently where the shares have been transferred. The applicant has not persuaded me that an interim interdict is warranted.

[18] I turn to the question of costs. Counsel for the applicant argued that the interdict be granted and the respondents be mulcted with costs because of the fraudulent conduct of the first and second respondent who unlawfully appropriated the applicant's shares. The costs to include the costs of two counsel. Counsel for the respondents argued that the application, at the very least, was not urgent and should be struck off with costs on the attorney and client scale, alternatively that the application be dismissed with costs similarly on the attorney and client scale. Whilst the case is not made out for an interim interdict, the applicant should not be dissuaded from pursuing constitutional rights. Access to courts is a right well protected. If the applicant seeks to have the matter determined in court it should not be shown the door by way of a punitive costs order. The first and second respondents were aware the matter was to be heard on 22 September 2023. The date was arranged to accommodate heads of argument to be filed as well as the respondents' counsel who was appearing in another matter in the urgent court. The respondents' conduct appears to be to disregard the court process.

[19] In the circumstances, I grant the following order:

1. The application is struck off with costs reserved.



S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

For the Applicant:

T Ngcukaitobi SC, T Ramogale
& N Ruhinda

Instructed by Mabuza
Attorneys

For the First and Second Respondent:

A Botha SC
Instructed by Werksmans

Heard: 22 September 2023

Delivered: 27 September 2023