

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, PORT ELIZABETH)**

CASE NO: 3682/09

Date heard: 20 May 2010

Date delivered: 24 June 2010

In the matter between:

DOUGLAS CHRISTOPHER LOUW	First Applicant
ANDRE HERMANN DANKWERTS	Second Applicant
ARTHUR OLIVER RUDMAN	Third Applicant
GEOFFREY GEORGE VAN COLLER	Fourth Applicant
JOHANNES THEUNIS VILJOEN	Fifth Applicant
BKB LIMITED	Sixth Applicant
RONALD JOHN SMITH	Seventh Applicant

and

SA MOHAIR BROKERS LIMITED	First Respondent
THE REGISTRAR OF COMPANIES	Second Respondent
OOS VRYSTAAT KAAP OPERATIONS LIMITED	Third Respondent
CMW OPERATIONS (PROPRIETARY) LIMITED	Fourth Respondent
ARTHUR MARTIN SHORT	Fifth Respondent

IGNATIUS ROTHNER BEKKER	Sixth Respondent
JAN MARAIS VAN DER WESTHUISEN	Seventh Respondent
PETER LOGIE CAWOOD	Eighth Respondent
THEUNIS MARTHINUS LAAS	Ninth Respondent
HERMANUS WILHELM BOTHA	Tenth Respondent
ARTHUR BLAKE HOBSON	Eleventh Respondent
FRANCOIS MICHAU	Twelfth Respondent
PIERRE DU PLESSIS VAN DER VYVER	Thirteenth Respondent
NIGEL CLINTON HAMILTON-SMITH	Fourteenth Respondent

JUDGMENT

Y EBRAHIM J:

[1] The applicants seek an order in the following terms:

- ‘1. Setting aside ordinary resolution number 1.4 passed at the annual general meeting of the First Respondent held on 4 December 2009;
2. Setting aside the special resolution passed at the annual general meeting of the First Respondent held on 4 December 2009;
3. Interdicting the Second Respondent from registering the special resolution passed at the annual general meeting of the First Respondent held on 4 December 2009 in terms of Section 200 of the Companies Act 1973;
4. Interdicting the First Respondent from taking any further steps to implement ordinary resolution number 1.4 passed at the annual general meeting of the First Respondent held on 4 December 2009;
5. Interdicting the First Respondent from taking any further steps to register the special resolution passed at the annual general meeting of the First Respondent held on 4 December 2009;

6. Interdicting the First Respondent from taking any further steps to implement the sale of the Sale Shares and Sale Claims to the Third Respondent as contemplated in the special resolution passed at the annual general meeting of the First Respondent held on 4 December 2009.’

[2] The First to Fifth Applicants, who are shareholders in the First Respondent (‘SAMB’), and the Sixth and Seventh Applicants aver that they are entitled to the relief they seek as the Fifth Respondent, ‘in his capacity as chairman of SAMB and the AGM acted improperly and unlawfully:

- ‘(a) in ruling that proxies granted by 706 shareholders of SAMB (“the Proxy Grantors”) in favour of Smith (the Seventh Applicant), Wolf Edmayr and Michael Nurse (“the Proxy Holders”) to attend the AGM and to speak and vote thereat on their behalf as they deem fit, were invalid;
- (b) in evicting the Proxy Holders from the AGM at the commencement of the AGM.’

[3] The respondents oppose the application and dispute that the Fifth Respondent acted improperly and unlawfully in issuing the aforesaid ruling. It is common cause that the genesis of the decision to exclude the proxy holders from participating in the Annual General Meeting (‘AGM’) was a series of events preceding the AGM.

[4] The following is a brief summary of the pertinent facts that are at the centre of the dispute between the parties. On 27 October 2009 the Third Respondent (‘OVK’), which held 34% of the shares in the Fourth Respondent (‘CMW’), concluded an agreement with the directors of SAMB for the purchase of SAMB’s 66% shareholding in CMW. Since this was the major asset of SAMB its shareholders were required to approve the sale to OVK in a special resolution.¹ Consequently, the members of SAMB were given

¹ Companies Act, No. 61 of 1973 – s 228 stipulates that:

‘(1) Notwithstanding anything contained in it’s memorandum or articles, the directors of a company shall not have the power, save by a special resolution of its members, to dispose of –

notice that a special resolution² to this effect was being tabled for adoption at the AGM scheduled for 4 December 2009.

[5] The Sixth Applicant ('BKB'), a competitor in the mohair industry, was opposed to SAMB selling its 66% shareholding in CMW to OVK since it would result in OVK acquiring the entire shareholding in CMW. In the view of BKB and the other applicants this was not in the interests of the mohair industry as a whole as OVK operated in the grain farming industry.

[6] On 11 November 2009 BKB wrote to SAMB to advise that it was BKB's 'intention to submit an offer to SAMB for the acquisition of its shares in CMW' and that the offer would be delivered to the registered offices of SAMB the next week. It is common cause that the offer never materialised. BKB, in the weeks prior to the AGM of SAMB, concluded agreements with numerous shareholders in SAMB for the purchase of their shares. BKB also obtained a proxy from each of these shareholders to attend the AGM and vote on the shareholder's behalf, the intention being to vote against the adoption of the special resolution.³

(a) the whole or the greater part of the undertaking of the company; or

(b) the whole or the greater part of the assets of the company.'

² **'SPECIAL RESOLUTION 1**

'Resolved that in terms of Section 228 of the Companies Act, as amended ("the Act"), the shareholders adopt, ratify and confirm the disposal of the whole or the greater part of the assets of the company, namely the Company's shareholding in CMW Operations Proprietary Limited Registration Number 1964/000925/07 ("CMW") constituting 66% of the entire issued share capital of CMW ("Sale Shares") and all amounts of any nature whatsoever owing by CMW to the Company on the effective date, ("Sale Claims") to Oos Vrystaat Kaap Operations Limited, Registration Number 1999/004069/06 ("OVK") on the terms and conditions as set out in the Sale of Shares and Claims Agreement dated 27 October 2009 ("the Agreement"), with effect from 1 July 2009 ("the Effective Date")

³ Companies Act, 61 of 1973 – Section 199 specifies that a resolution shall be a special resolution if it 'has been passed, on a show of hands, by not less than three-fourths of the number of members of the company entitled to vote on a show of hands at the meeting who are present in person or by proxy or, where a poll has been demanded, by not less than three-fourths of the total votes to which the members present in person or by proxy are entitled.'

[7] On 2 December 2009 the attorneys representing BKB wrote to SAMB to inform it that certain shareholders of SAMB had sold their shares to BKB and 'in the agreements of sale concluded with BKB granted BKB an irrevocable authority to exercise the voting rights attaching to the Sold Shares'. A specimen of the agreements of sale⁴ was attached to the letter. Transfer of the shares had however not been registered yet as the share register of SAMB had closed.⁵ Accordingly, the shares remained registered in the names of the selling shareholders.⁶ Copies of the proxy forms were annexed and the original proxy forms lodged timeously at the registered office of SAMB prior to the AGM.

[8] The first applicant, who had not sold his shareholding in SAMB, also appointed a proxy and authorised the proxy holder to attend the AGM and vote on his behalf.

[9] A special meeting of the directors of SAMB was convened on 3 December 2009 at which the letter from BKB's attorneys was considered. The chairman referred to

⁴ 'I, the undersigned ("*the Seller*"), hereby sell my all my shares in SA Mohair Brokers Limited ("*SA Mohair*") ("*the Shares*") and cede all my claims in and against SA Mohair (whether on loan account or otherwise, "*the Claims*") to BKB Limited or its nominee ("*the Purchaser*"), as reflected in the attached CM42 transfer form, which I have duly signed.

I accept in full and final payment for the sale of the Shares and of the Claims the sum of R2, which shall be paid to me by the Purchaser within 3 days of this undertaking.

I hereby give BKB Limited (or its nominee) ("*BKB*") my irrevocable proxy to vote the Shares as it in its sole discretion deems fit at the Annual General Meeting of Shareholders of SA Mohair which has been called for 4 December 2009 and any adjournment or postponement of that meeting. My signed proxy to that effect is attached hereto.

I further undertake to forthwith provide BKB with a signed proxy to vote all the Shares at any meeting of shareholders in SA Mohair (as it in its sole discretion deems fit) which is called prior to the registration of transfer of the Shares to into the Purchaser's name.

I also undertake to forthwith on receipt to pay to the Purchaser any distribution or dividend or any other payment which I may receive from SA Mohair in the period from the signature of this undertaking to the date of transfer of the Shares to the Purchaser, up to the amount of R2 per share.'

⁵ Article 21.2 of the Articles of Association of SA Mohair Board provides that the directors may suspend registration of the transfer of shares during the 14 days immediately preceding the AGM

⁶ Article 14.2 reads: 'The transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members as holder thereof.'

section 15.2⁷ of the Articles of Association of the company and thereafter the meeting, acting on legal advice that had been obtained from senior counsel, resolved *inter alia*:

‘That the purported sales to BKB by members of the company recorded by Attorneys Pagdens for BKB be disallowed and that they are hereby not approved.

That the proxies produced by BKB be regarded as part of an indivisible transaction of sale of shares and as such are not recognized.

That representatives of BKB are accordingly not entitled to attend the Annual General Meeting to vote and be required to leave the meeting.’⁸

[10] After opening the AGM on 4 December 2009 the chairman raised the issue of the eligibility of certain proxy holders to attend the meeting and referred to what had taken place in the meeting of the directors the previous day. He informed the AGM that as the prior approval of the directors had not been requested by shareholders for the sale of their shares the directors had ‘decided that they are unable and unprepared to approve these sales.’ Further, they had taken ‘Senior Counsel, Mr R van Rooyen SC, [sic] opinion with effect to the sales and that the sales were accordingly invalid. Senior counsel has advised further that because the sales are invalid and the proxies are given in pursuance of the sales as one indivisible transaction the said proxies are similarly invalid and cannot be entertained. I as the Chairman rule that the proxies are invalid as is the reported [sic] sale of the shares accordingly the representatives of BKB have no standing to be present at this meeting and are required to leave the meeting at once as also any of their representatives if any. So I therefore request that those who are here representing those proxies would then leave the meeting.’⁹

The proxy holders thereupon left the meeting which continued in their absence with the

⁷ ‘15.1 Any decision by the directors of the company shall be final and binding on a shareholder of the company for the purposes of this clause 15.

15.2 A shareholder of the company may not sell, alienate, donate or burden in any manner whatsoever the shares that he is the owner of, without prior approval of the directors of the company.’

⁸ Page 292 of the papers - Annexure ‘AMS14’

⁹ Page 293 of the papers - Annexure ‘AMS15’

items of business enumerated on the agenda. In due course the special resolution was adopted by the members present.

[11] The attack directed by the applicants at the ruling that excluded a number of proxy holders from participating in the AGM and at the decision of the directors of SAMB (which the AGM endorsed) that the sale agreements concluded by BKB with certain shareholders of SAMB was invalid, is premised on various grounds.

[12] The respondents have not disputed that the proxy holder of the First Applicant should have been allowed to remain in the AGM and that he was entitled to participate in the meeting but dispute that his shares carried sufficient votes to prevent the special resolution from being approved by the requisite majority. Insofar as the other applicants are concerned the respondents deny that they are entitled to the order sought.

[13] Mr Odendaal SC who, with Mr Rorke, appeared for the applicants submitted that in terms of the provisions of s 252 of the Companies Act the applicants were entitled to approach the Court for relief. Section 252 permitted any member of a company to apply for an order not only if the act or omission or the conduct of affairs was unjust or inequitable towards him but also if it was unjust or inequitable towards other shareholders. The conduct of SAMB in excluding proxy holders, representing 706 shareholders of SAMB,¹⁰ from participating in the AGM was oppressive towards the proxy grantors. If these proxy holders had not been excluded the special resolution would not have attained the requisite majority of votes. Mr Odendaal contended that

¹⁰ Mr Odendaal submitted that approximately 14 million votes were eligible for consideration. The total number of votes at the AGM was 6.7 million of which 3.2 million, on the version of the respondents, was excluded whereas on the version of the applicants 4.2 million had been excluded.

by not disclosing their intention to exclude the proxy holders the conduct of the directors lacked probity and smacked of *mala fides*.

[14] Mr Buchanan SC, with Mr Brookes, appeared for the respondents. He submitted that if one shareholder at a shareholders meeting was prevented from casting his vote against a resolution that the other shareholders had voted in favour of it was a technical irregularity and inappropriate to set aside the proceedings because of this. Such a dispute had to be resolved according to the Law of Meetings which had developed in regard to meetings of voluntary associations and companies both here and in England.¹¹ In the *Garment Workers Union* case the Court held that an applicant who sought relief on this basis had to show that his rights had been violated by a diminution of the effect of his votes through the failure to vote of a substantial number of persons who were entitled to vote by reason of the irregularity complained of. These basic principles had been followed in a number of cases over many years¹² and the correct enquiry was always whether the excluded votes would have affected the end result.¹³

[15] In response to the submissions by the respondents, Mr Odendaal submitted that the case of the *Jockey Club of South Africa* was inapposite in relation to the present application. It did not deal with s 252 or the Law of Meetings but with review proceedings prior to the advent of the Promotion of Administration of Justice Act.¹⁴ The

¹¹ *Jockey Club of South Africa and Others v Veldman* 1942 (A) 340 at 351 and 359; *Garment Workers Union v De Vries and Others* 1949 (1) SA 1110 (W) at 1123

¹² *Chetty v Tamil Protective Association* 1951 (3) SA 34 (N) at 39; *De Vos v Ringkommissie van die Ring van die N G Kerk, Bloemfontein and Another* 1952 (2) SA 83 (O) at 94; *Motaung v Mukubela and Another, N.O.*; *Motaung v Mothiba, N.O.* 1975 (1) SA 618 (O) at 626-627; *Williamson and Another v Durban City Council* 1977 (3) SA 342 (D & C.L.D) at 342 at 348B-C and 348 E-F; *Jonker v Ackerman and Others* 1979 (3) SA 575 (O) at 583

¹³ See, Lewin: *Law, Procedure and Conduct of Meetings* (5th Ed.); *Gerber v Stander and Hall* N.O. 1960 (4) SA 480 (C) at 488-489

¹⁴ Act No. 3 of 2000

other cases cited by counsel for the respondents, save for the *Garment Workers Union* case, referred to the issue addressed in *Jockey Club of South Africa* and were similarly inapposite. In regard to the *Garment Workers Union* case counsel for the respondents had incorrectly summarised what had been said by the Court. What the Court said was, ‘that an applicant must show that its rights have been violated “by a diminution of the effect of its votes through the voting of a substantial number of persons who were not entitled to vote”.’ The *Gerber* case also did not deal with the Law of Meetings or s 252 but entailed review proceedings in respect of the provisions of an Ordinance. None of the cases cited were authority for the proposition that if one could not show that the result would have been different that relief cannot be granted. These cases did not address what the applicant had to show in terms of s 252, which revolved around fair play, probity and equity.

[16] The argument advanced by the respondents is, in my view, misplaced. The issue is not whether sufficient votes attached to the shares of the First Applicant to alter the outcome of the vote but whether the decision to exclude him from participating in the AGM was justifiable or not. As a registered shareholder the First Applicant was entitled to be present at the AGM and to participate fully in its proceedings. He was denied this right when his proxy was evicted and it constituted a violation of his rights. He had not sold his shares in the company and the ruling to eject shareholders, who had sold their shares, from the AGM should not have been applied against him. The first Applicant’s right to speak on and debate any matter on the agenda, more particularly the special resolution, prior to members being required to vote was denied him and violated the *audi alteram partem* rule. In the circumstances the exclusion of the First Applicant from the AGM was manifestly unlawful.

[17] An issue that the exclusion of the proxy holders from the AGM (and in effect therefore the proxy grantors) raises in respect of all the applicants is the right of a member of a company to participate in the affairs of the company. Subject to any justifiable limitation imposed by the Articles of Association regarding a member's rights *vis-a-vis* the company, every member is vested with the right to attend the meetings of members of the company, to participate in its proceedings and, in particular, to address members present and to speak for or against any motion tabled for adoption and to register his vote for or against the motion. Although it falls within the realm of speculation whether or not a speaker may have persuaded others to accept his/her viewpoint the uncertainty of the outcome thereof cannot clothe an improper and unlawful deprivation of a shareholder's right to speak at a meeting of shareholders with the cloak of legality. The ruling that excluded certain proxy holders from participating in the AGM offended the *audi alteram partem* rule and denied the proxy grantors, who were still registered shareholders in the company, from the full enjoyment of their rights. This was not a situation where a minority was refusing to accept the decision of the majority which, as shareholders, they were contractually bound to do by the Articles of Association,¹⁵ but a violation of their right as members of the company to participate in the decision making process.

[18] I do not agree with the contention by the respondents that the issue of the chairman's ruling is one that must be resolved in terms of the Law of Meetings. What occurred did not amount to a technical irregularity that could be put right without any

¹⁵ *Sammel & Others v President Brand G.M. Co Ltd* 1969 (3) SA (A) at 678G-H; *Donaldson Investments (Pty) Ltd v Anglo-Tvl Collieries Ltd* 1980 (4) SA 204 (T) at 209G

undue prejudice to the members of the company who had been adversely affected by the ruling. It was an act that was manifestly 'unfairly prejudicial, unjust or inequitable' to them and their interests as shareholders as stipulated in s 252.¹⁶

[19] It needs to be emphasised that irrespective of whether the ruling was valid or not it certainly could not have operated against the First Applicant who retained all the rights vested in him as the registered owner of shares in SAMB.

[20] It is not in dispute that registered shareholders were never advised prior to the AGM that their proxies would not be recognized as valid. On 28 November 2009 the Fourteenth Respondent, in his capacity as company secretary, dispatched a telefax¹⁷ to shareholders wherein he drew attention to the provisions of Article 15.2 of the Articles of Association regarding the sale of shares and warned that the failure to comply therewith would result in the shares not being transferred to the purchaser. No mention was made of the fact that if the shareholder had already given a proxy that it would be

¹⁶ See note 1 *supra* – 'Section 252 reads:

252 Member's remedy in case of oppressive or unfairly prejudicial conduct

- (1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section.
- (2)
 - (a)
 - (b)
 - (c)
 - (d)
- (3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.'

¹⁷ Page 186 of the papers – Annexure 'DL19'

regarded as invalid. Shareholders were informed, however, that if they had already granted 'a proxy to another party [it] could be over-ridden by a signed one at a later date' and a proxy form appointing the Fifth Respondent, alternatively the Ninth Respondent, as proxy of the shareholder was attached. The applicants have submitted that the proxy form failed to comply with s 189(5)¹⁸ since it did not contain 'adequate blank space immediately preceding' the names already reflected therein to allow the member to insert the name, and an alternative name, of a proxy of his/her own choice.

[21] The purpose of this letter, it is apparent, was to persuade shareholders who had sold their shares and granted proxies to BKB to resile from the agreements or, at the very least, to replace the proxies they had given with proxies in favour of the person(s) named in the form. It needs to be noted that both the Fifth and Ninth Respondents were in favour of the sale to OVK of SAMB's 66% shareholding in CMW. It is clear that the directors were concerned that if BKB acquired sufficient shares and, thereby a sufficient number of votes to oppose the adoption of the special resolution, the sale to OVK would not be approved.

¹⁸ See note 1 supra – Section 189(5) stipulates:

- '(5) If for the purposes of any meeting of a company invitations to appoint as proxy a person, or one of a member of persons, specified in the invitations or the instruments appointing a proxy, are issued at the company's expense, any such invitation or instrument appointing a proxy shall –
 - (a) contain adequate blank space immediately preceding the name or names of the person or persons specified therein to enable a member to write in the name and, if so desired, an alternative name of a proxy of his own choice;
 - (b)
- (6)
 - (a)
 - (b)
- (7) In the event of a failure to comply with any requirement of subsection (5), every director or officer of the company who authorizes, knowingly permits or is party to the failure, shall be guilty of an offence.'

(N.B. During the course of argument counsel for the respondents conceded that the proxy forms did not comply with the provisions of s 189(5) and informed the Court that the Fifth Respondent accepted that the defective proxy form constituted an offence in terms of the Companies Act.)

[22] It is evident that the directors never conveyed to proxy grantors that the proxies granted by them were considered invalid and would not be recognized. Even after the Board of Directors took the crucial decision to exclude the proxies they made no effort to inform the proxy grantors of this. 'It is a well established rule of company law that the directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company.'¹⁹ Accordingly, the directors should have taken suitable steps to convey their decision in an expeditious manner to shareholders, despite the lateness of the hour, since it adversely affected their rights and interests in the company. These shareholders should have been afforded the opportunity of taking appropriate measures to safeguard their rights and interests by either authorising another proxy or even attending the AGM personally, instead of being informed only at the commencement of the AGM that the proxies could not represent them. The conduct of SAMB in failing to alert shareholders to their decision and in denying a substantial number of shareholders the right to participate in the AGM, speak on issues and, importantly, to vote on any motions, prejudiced them and was 'unfairly prejudicial, unjust or inequitable' to shareholders, more specifically the First, Second, Third, Fourth and Fifth Applicants.

[23] One of Mr Buchanan's submissions was that the respondents unequivocally denied that a number of proxies (under the letter 'J') had been delivered to the First Respondent and consequently, so he argued, even though the applicants contended the contrary, in accordance with the *Plascon-Evans*²⁰ rule it had to be accepted that these proxies were not delivered.

¹⁹ *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) at para [18]

²⁰ *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (AD)

[24] On the issue of the disputed proxies Mr Odendaal contested the contention that the denial created a proper dispute of fact. The respondents had merely denied receiving these proxies without directly answering the averments of K M Riga (a chartered accountant) that all the proxies, which included the disputed proxies, had been collated and filed in alphabetical order with a schedule. All these proxies had been delivered to the Fourteenth Respondent at the registered offices of SAMB.

[25] There is merit in Mr Odendaal's contention. The bare denial by the respondents is not such 'as to raise a real, genuine or bona fide dispute of fact'²¹ and I accordingly accept the version of that of the applicants. Moreover, it is not in dispute that BKB acquired at least 28% of the shareholding in SAMB. Accordingly, if the votes of the proxies opposed to the special resolution had been taken into account the votes in favour, as recorded at the AGM, would in all probability not have reached a majority of 75%.

[26] The decision to exclude certain proxy holders from the AGM was premised on the interpretation that the directors of the company placed on the agreements of sale BKB had concluded with various shareholders. Their view, reinforced by the opinion obtained from senior counsel, was that the failure to comply with the requirements of Article 15.2 resulted in the sale agreements being invalid. The respondents contend that the agreement of sale and the grant of the proxies are not severable and formed a single indivisible agreement. The agreement was intended to vest BKB with the rights of a principal and the proxy was granted to enable BKB to exercise such rights pending registration of transfer of the shares into its name.

²¹ *Ibid* at 6341

[27] Mr Buchanan submitted that in a complex transaction containing a number of parts and one part was void, the question was whether the void part could be severed from the contract and the remainder of the contract enforced. This depended on the nature of the transaction and the intention of the parties. If the unenforceable part of the contract embodied the main purpose of the transaction, the whole was unenforceable.²² If it had not been for the agreements of sale the sellers would not have given any proxy. Accordingly, as the agreement was invalid the granting of the proxies was similarly invalid and had been correctly excluded.

[28] The applicants contest the respondents' interpretation of the agreement of sale. They dispute that non-compliance with Article 15.2 rendered the agreements and the proxies invalid. Mr Odendaal submitted that since the Articles of Association constituted a written contract between the company and its shareholders, the normal principles of interpretation applied in interpreting the Articles.²³ It is trite that when interpreting a clause (in this instance Article 15.2) in an agreement, it must be read in conjunction with the rest of the clauses and the contract interpreted as a whole.²⁴ Article 15.2 did not stipulate that a sale of shares, without the prior approval of the directors, is void. It was apparent from the provisions of Article 43.2²⁵ that a different result was intended, as it

²² *Cameron v Bray Gibb & Co (Pvt) Ltd* 1966 (3) SA 675 (R) at 676-677; *Nedbank Ltd v Abstein Distributors (Pty) Ltd & Others* 1989 (3) SA 750 (T) at 754 and Kerr: *The Principles of the Law of Contract* (6th Ed) at p 162 and following.

²³ *Ex parte Premier Paper Limited* 1981 (2) SA 612 (W) at 615C-H

²⁴ See Wessels: *Contract* at para 1915; *The National Bank of S A v Graaf* (1904) SC 457; *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363

²⁵ '43. Subject to any rights or restrictions of the time being attached to any share or class or classes of shares –

43.1 every member, and if a member is a body corporate, its representative, shall have one vote on a show of hands, and on a poll have one vote for each share held by such member;

43.2 no owner of shares received contrary to the provisions of Article 15, shall have a vote, unless authorized thereto by the directors.'

stipulated that an 'owner of shares received contrary to the provisions of Article 15' did not have a vote unless this was authorized by the directors.

[29] It is contended by the respondents that Article 43.2 dealt with the situation where beneficial ownership had passed but, since this had not occurred in the present instance, its provisions were not applicable.²⁶

[30] The interpretation contended for by the applicants is, in my view, correct. I accept that, even if the agreements of sale were concluded contrary to the provisions of Article 15.2, the directors were not entitled to exclude a proxy for this reason. The decision of SAMB to debar the proxies from the AGM was improper and unlawful. The penalty such a transaction attracted was stipulated in Article 43.2, namely that the owner who acquired the shares was denied a vote. The fact that transfer of the shares had not taken place does not assist the respondents since the registered shareholder remained the owner of the shares until the completion of the registration process and retained the right to exercise his/her vote, whether personally or via a proxy. For the same reason Article 15.3²⁷ did not assist the respondents either. I am accordingly satisfied that the exclusion of the proxies was improper and unlawful.

²⁶ In *Smuts v Booyens: Markplaas (Edms) Bpk & Andere v Booyens* 2001 (4) SA 15 (SCA) at para [10] the Court stated that, 'In regard to shares, the word "transfer", in its full and technical sense, is not a single act but consists of a series of steps, viz. an agreement to transfer, the execution of a deed of transfer, and finally the registration of transfer.'

²⁷ 15.3
A shareholder in whose name any share or shares has been registered, contrary to the provisions of clause 15.2, shall not in respect of such shares –
15.3.1 be entitled to exercise any vote, provided that any decision taken on the strength of such shares shall be deemed to be valid if a similar decision would have been taken by the required majority of votes;
15.3.2 entitled to receive any dividend or other advantage, which dividend or advantage shall revert to the company to be utilized to the advantage of the company as the directors may determine.

[31] In regard to the question of severability Mr Odendaal submitted that while the agreements were obviously linked the agreement of sale and the proxy were separate and distinct from each other and each served a separate and specific purpose.²⁸ The agreement of sale, even though it referred to the granting of a proxy, did not confer a right on the proxy holder to vote on behalf of the proxy grantor. This required the completion of a separate proxy form conferring such rights and in the form prescribed in the Articles of Association, specifying the meeting it was for, the authority of the holder of the proxy and the number of votes that could be exercised.²⁹

[32] I am not persuaded that the granting of the proxy is not severable from the agreement of sale. It does not appear that the shareholders (as the sellers) and BKB (as the purchaser) were unaware that transfer of the shares would only be finalized once registration of transfer to the purchaser had been entered in the share register of SAMB. Since the sellers of the shares remained the registered shareholders thereof until transfer had been properly finalized the votes attaching to the shares could not be exercised by anyone other than the shareholder except if duly authorized by proxy granted by the shareholder. The granting of a proxy was not dependent on the conclusion of an agreement for the sale of the shares but was collateral thereto. The two transactions, in my view, are separate with distinctly different purposes and accordingly the granting of the proxy is severable from the sale of the shares.³⁰ But,

²⁸ Compare, *Cash Converters Southern Africa v Rosebud WP Franchise* 2002 (5) SA 494 (SCA) at paras 23 and 24

²⁹ Blackman *et al*: *Commentary on the Companies Act*, Vol 1, pp 7-42 and the authorities cited there.

³⁰ See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) for a discussion on severability of clauses from a contract potentially void for being *contra bonos mores*.

even if the transactions are not severable, the agreement did not provide for SAMB to become a party to it and any question regarding its validity was a contractual issue confined to the contracting parties and open to one of them to canvass.

[33] Although the respondents have disputed the *locus standi* of certain applicants, I did not gain the impression from Mr Buchanan's submissions that this was being pursued with any great fervour. Be that as it may, all the applicants have shown that their interests were affected and therefore have the necessary *locus standi*. Even if it could be said that some of the applicants lack *locus standi*, which I consider not to be the case, the First Applicant is manifestly entitled to the relief sought. However, since the conduct of SAMB also affected the Second, Third, Fourth and Fifth Applicants as members of the company I am, in the circumstances, satisfied that they should be granted the same relief. In my view, it is just and equitable to grant the order sought by the applicants.³¹

[34] Even if the Sixth Applicant did not acquire any rights under s 252 its direct interest in the issue of the validity of the agreements of sale entitled it, and the Seventh Applicant, to join as applicants to protect its rights. Finally, the adverse consequences that flowed from the unlawful conduct permeated the AGM as a whole and I consider it just that ordinary resolution 1.4 also be set aside.

³¹ See *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 147E-F; *De Franca v Exhaust Pro CC (De Franca Intervening)* 1997 (3) SA 878 (SE); *Irvin and Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA (EC); *Donaldson Investments (Pty) Ltd v Anglo-Tvl Collieries Ltd (supra)* at 209D-F; *Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) at 396; *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D & CLD)

[35] In regard to costs, it is trite that in the absence of cogent reasons to order otherwise, that costs should follow the result. Such reasons have not been advanced and the applicants are accordingly entitled to an order for costs in their favour.

[36] In the result the following order shall issue:

1. The ordinary resolution number 1.4 passed at the annual general meeting of the First Respondent held on 4 December 2009 is hereby set aside;
2. The special resolution passed at the annual general meeting of the First Respondent held on 4 December 2009 is hereby set aside;
3. The Second Respondent is interdicted from registering the special resolution passed at the annual general meeting of the First Respondent held on 4 December 2009 in terms of Section 200 of the Companies Act, No. 61 of 1973;
4. The First Respondent is interdicted from taking any further steps to implement ordinary resolution number 1.4 passed at the annual general meeting of the First Respondent held on 4 December 2009;
5. The First Respondent is interdicted from taking any further steps to register the special resolution passed at the annual general meeting of the First Respondent held on 4 December 2009;

6. The First Respondent is interdicted from taking any further steps to implement the sale of the Sale Shares and Sale Claims to the Third Respondent as contemplated in the special resolution passed at the annual general meeting of the First Respondent held on 4 December 2009; and
7. The First to Fourteenth Respondents are liable jointly and severally, the one paying the other to be absolved, for the costs of the application which costs include the costs of two counsel.

Y EBRAHIM
JUDGE OF THE HIGH COURT

23 JUNE 2010

Counsel for the Applicants:

F H Odendaal SC with S C Rorke

Attorneys for the Plaintiff:

Pagdens Attorneys

PORT ELIZABETH

Counsel for the Respondents:

R G Buchanan SC with R W N Brooks

Attorneys for the Defendant:

Spilkens Inc.

PORT ELIZABETH