IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT, PORT ELIZABETH)

CASE NO: 3628/09

Date heard: 13 August 2010

Date delivered: 19 August 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 first respondent seeks leave to appeal to the Supreme Court of Appeal against the whole of the judgment of this Court, and the order issued in terms thereof, delivered on 24 June 2010. For the sake of convenience I refer to the parties as they have been cited in the main application.

[2] The notice of application for leave to appeal enumerates ten grounds of appeal but in argument Mr Buchanan SC encapsulated these in three main grounds. These were that the Court erred: (1) in holding that the directors of the first respondent had a fiduciary duty towards the shareholders of the company; (2) in finding that the applicants were entitled to relief pursuant to the provisions of s 252(1) of the Companies Act;[1] and (3) in failing to apply the law of meetings in determining the issues in dispute in relation to the first applicant.

[1] No. 61 of 1973

[3] Mr Buchanan confirmed that the allegation that the Court had determined the issues in terms of the Promotion of Administrative Justice Act was misguided and was not being pursued. Further, the first respondent was no longer seeking leave to appeal the costs order against the second to fourteenth respondents as the applicants had abandoned the order for costs granted in their favour. This was confirmed by Mr Rorke. Even though this issue has been resolved some comment is necessary. It is evident that the Court inadvertently awarded costs against the second respondent. However, this could have been rectified had the Court been approached within a reasonable time after judgment was delivered.[2] The Court's decision to award costs against the third to fourteenth respondents, jointly and severally, was due to the fact that in their affidavits the stance adopted by them was that they were associating themselves with the first respondent's answering affidavit. They had therefore joined issue with the applicants and had not stated that they would abide the decision of the Court.

[4] It was submitted by Mr Buchanan that the only fiduciary duty the directors had was to the company.[3] The simple question was whether the articles of association, which was a contract between shareholders and the company, had been enforced properly in relation to the sale of shares by certain shareholders. In the absence of any fiduciary duty to the shareholders, the enquiry as to whether 252(1) was breached or not was entirely different. In view of what had been stated in *Booysens*[4] there was a reasonable prospect another Court would differ from the conclusion of this Court that the applicants were entitled to relief pursuant to the provisions of s 252(1).

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[2] See *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) at 306F-307G; Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa* 4th Ed.

[3] *Smuts v Booysens; Markplaas (Edms) Bpk en 'n Ander v Booysens* 2001 (4) SA 15 (SCA) at para [17]

[4] See fn 3 *supra*

[5] In respect of the applicability of the law of meetings, Mr Buchanan contended that our Courts, albeit in a different context, had come to the same conclusion and applied the same principles espoused in numerous English cases. The Court should have considered whether it was probable that the exclusion of the first applicant's votes would have affected the final result. It was clear that the outcome would have been the same even if his votes had been included. There was a reasonable prospect, therefore, of another Court reaching a different conclusion on this issue.

[6] Mr Buchanan submitted that within the context of the facts of this particular case many of the issues were unique. The issues raised more than arguable points of law and impacted directly on whether or not the relief should have been granted to the applicants. In addition, this matter was of considerable importance to the respective parties. He accordingly requested that the first respondent be granted leave to appeal.

[7] Mr Rorke opposed the application for leave to appeal and submitted that the Court did not err in determining the issues. The directors of the company had conducted themselves in a manner which was unfairly prejudicial, unjust or inequitable. It was clear from the authorities that the Court had a wide discretion in this regard[5] and a higher court would not readily interfere on appeal with the exercise of that discretion. The company acted in a manner which did not enable a shareholder to enjoy a fair participation in the affairs of the company.[6] The question was not whether the directors owed a fiduciary duty to the company's shareholders as opposed to the company. There had been a lack of probity or fair dealing or a visible departure from the standards of fair dealing and the Court had concluded on the largely undisputed facts that the

[5] *Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) at 396; *Donaldson Investments (Pty) Ltd v Anglo-Vaal Collieries Ltd* 1979 (3) SA 713 (W) (1980 (4) SA 204 (T) at 209)

[6] *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C)

exclusion of the first applicant from the AGM was manifestly unlawful. Section 252 provided a statutory remedy and the Court had to interpret the statutory requirements, which it did. The suggestion that the law of meetings somehow altered the plain statutory requirements of the section was untenable. The contention that the applicants needed to demonstrate that there would have been a different result had the proxy grantors participated in the general meeting was not the enquiry relevant to s 252 but applied to the law of meetings.

[8] After due consideration of the respective submissions, I accept that the issues in this matter are complex and unique and raise important questions of law. I am accordingly of the view that there is a reasonable prospect that another Court may reach a different conclusion regarding the various issues. In the circumstances, I am persuaded that the first respondent should be granted leave to appeal.

[9] In the result, there is an order in the following terms:

(a) The first respondent is granted leave to appeal to the Supreme Court of Appeal against the whole of the judgment of this Court, and the order issued in terms thereof, delivered on 24 June 2010; and

(b) The costs of this application shall be costs in the appeal.

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pp **Y EBRAHIM**

JUDGE OF THE HIGH COURT **18 August 2010**

Louw & Others v S A Mohair Brokers Limited.LAPJ