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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no **434/2022**

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

MICHAEL NKEPE LITABE

Applicant

and

DI THABENG WHOLESALE FUEL SUPPLY (PTY) LTD

1st Respondent

CHANE-INGE BEUKES

2nd Respondent

**COMPANIES AND INTELLECTUAL PROPERTIES
COMMISSION**

3rd Respondent

CORAM:

DAFFUE et DANISO JJ

HEARD ON:

8 JUNE 2023

DELIVERED ON:

9 OCTOBER 2023

JUDGMENT BY:

DAFFUE J

ORDER

1. The decision of 6 January 2022 taken at an alleged shareholders' meeting of the first respondent is reviewed, declared invalid and contrary to section 71 of the Companies Act 71 of 2008 and set aside;
 2. The first respondent is directed to reinstate the applicant as a director of the first respondent;
 3. The first respondent shall pay the applicant's costs of the application on a party and party scale, excluding the wasted costs occasioned by the postponement on 3 October 2022 which shall be borne by the applicant.
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JUDGMENT

INTRODUCTION

[1] A former director of a company has been removed as a director of that company during a shareholders' meeting. The dispute to be adjudicated is whether the removal was effected by the majority shareholder on a properly constituted shareholders' meeting. An issue that could have been dealt with swiftly and on a narrow basis has been dragged out over more than a year. In the process several side issues have been addressed which did not contribute to the adjudication of the real dispute.

THE PARTIES

[2] The applicant is Mr Michael Nkepe Litabe, a major male person residing in Clocolan, Free State Province. He was not only employed as a truck driver of his employer, the first respondent, but he is the owner of a 26% shareholding in the first respondent. He was also a co-director of the first respondent until his alleged unlawful removal during a shareholders' meeting.

[3] The first respondent is Di Thabeng Wholesale Fuel Supply (Pty) Ltd, a company with registered office situated at [...] P[...] B[...] Street, Clocolan. The second respondent is Ms Chane-Inge Beukes, an adult female and co-director of the first respondent. I shall refer herein after to the first respondent as Di Thabeng and to the second respondent as Beukes when I refer to them individually. They will be referred to as the respondents when the occasion demands it, bearing in mind that the third respondent, the Companies and Intellectual Properties Commission (the CPIC), is not contesting the relief sought.

THE RELIEF SOUGHT

[4] The applicant seeks the following relief in his notice of motion:

'1. Reviewing and setting aside the removal of the applicant as director of the first respondent and to declare same as invalid and contrary to section 71 of the Companies Act 71 of 2008.

2. In the alternative to paragraph 1 above, reviewing and setting aside the removal of the applicant as director of the first respondent on the basis that it offence (sic) the doctrine of legality.

3. Ordering the first respondent, acting through the second respondent, to reinstate the applicant as the director of the first respondent.

4. Directing the third respondent to reinstate and to record the applicant's name and details, as director of the first respondent, on the third respondent's records and systems.

5. In the alternative to paragraph 4 above, and in the event the third respondent has not removed the applicant's names and details as the first respondent's director,

as at the date of the grant of this order, that the third respondent be ordered not to remove the applicant's names and details on the third respondent's records and systems.

6. Directing the first respondent, acting through the second respondent, to furnish to the applicant certified copies of the following documents:

6.1 the incorporation documents of the first respondent;

6.2 licence documents relating to the first respondent's licence operations from Department of Mineral Resources and Energy;

6.3 first respondent's latest Broad Based Black Economic Empowerment ("BBBEE") compliance certificates;

6.4 first respondent's shareholders' agreement and share certificate;

6.5 all audited financial statements of the first respondent between 2015 and 2022;

6.6 account statements of the first respondent from all banking institutions that first respondent has or had bank accounts at between 2015 and 2022;

6.7 first respondent's board resolutions between 2015 and 2022; and

6.8 the applicant's employment contract, as an employee (driver), of the first respondent.

7 Ordering the first respondent to pay the costs of this application on a punitive scale of attorney and own client and such costs to include costs occasioned by the employment of two counsel.

8 Further, and/or alternative relief.'

THE LITIGATION HISTORY

[5] The applicant's notice of motion was issued on 1 February 2022 and served on 10 February 2022. Having considered that his review application was served late, a notice of motion, dated 10 February 2022, was also filed in terms whereof condonation was sought for the alleged late filing of the review application. The condonation application does not require any further attention as the applicant was under the misapprehension that ss 71(5) of the Companies Act 71 of 2008 applied. That sub-section deals with the situation where a company's board of directors makes a determination about the suitability of a director of the company in terms of ss 71(3) which is not the case in this instance. The respondents filed their answering affidavit on 14 April 2022 to which the applicant responded on 19 August 2022, hopelessly out of time.

[6] The application was initially set down by the respondents for hearing on 3 October 2022 as the applicant failed to take the initiative in this regard. On that date it was removed from the roll, costs to stand over for later adjudication. On 20 September 2022 and prior to the hearing an email was circulated to all the parties. Certain queries were raised. I quote:

'Good day,

This review application has been allocated to Daffue and Daniso JJ. I have been requested by Daffue J to communicate with you and trust to receive your written responses and compliance not later than Friday, 23 September 2022:

1. The application papers have not been properly indexed, paginated and bound in the appropriate order. The applicant's attorney is directed to rectify the matter, making use of plastic ring binders.
2. The applicant submits that section 71(3)(b) of the Companies Act is not applicable and reliance is placed on section 71(8) (see *inter alia* paragraph 27 of the founding affidavit) and in light hereof applicant is called upon to make detailed submissions as to why this court has jurisdiction to review in accordance with section 71(5) and why the matter was not referred to the Companies Tribunal in accordance with section 71(8)(c).

3. The notice of motion is in the form required for review applications in terms of Rule 53 and apparently as a result thereof the matter has been set down on a Monday before two judges in accordance with the practice directives of this court, instead of on a Thursday on the usual opposed motion court roll. On the basis that a review application is dealt with, the parties' heads of argument should have been filed 15 and 10 days before the hearing respectively. No heads of arguments have been filed by both parties and their submissions in this regard are required. The matter shall not be entertained in the absence of detailed written heads of argument.

I am looking forward to receive your responses on/or before Friday, 23 September 2022.'

During the hearing on 3 October 2022 and over and above the written queries communicated to the parties, their attention was also drawn to the fact that Beukes' shareholding in Di Thabeng was in contention and should be properly addressed.

[7] On 7 March 2023 the respondents filed a supplementary affidavit by Ms Anouchka van Zyl pertaining to the alleged shareholding of Beukes in Di Thabeng. Thereafter their legal representative set the matter down for hearing on 20 April 2023. This caused a reaction from the applicant's legal representatives. On 4 April 2023 a notice of motion was filed in terms whereof the applicant sought leave to file a further affidavit, referred to as a fourth affidavit. In this affidavit the applicant dealt with his complaint to the Broad Based Black Economic Empowerment Commission (the BBBEE Commission), as well as a complaint to the Companies Tribunal. The BBBEE Commission has not adjudicated the complaint, whilst the Companies Tribunal indicated that it did not have jurisdiction to entertain the complaint. On 20 April 2023 the matter was postponed to 8 June 2023, the applicant to pay the wasted costs.

[8] On 8 June 2023 the matter again came before me and my colleague, Daniso J, whereupon the following order was made in chambers by agreement:

- ‘1. The applicant’s further affidavit dated 28 March 2023 is accepted, no order as to costs in the application for leave to file this affidavit.
2. The applicant shall substitute his heads of argument on/or before 12 June 2023.
3. The first and second respondents shall file their supplementary heads of argument, if any, on/or before 15 June 2023.
4. The parties shall stand by their heads of argument and agree that the judges shall determine the matter based on the papers and that oral argument is dispensed with.
5. Today’s costs shall be costs in the cause.’

[9] It needs to be pointed out that contrary to the query raised as long ago as 20 September 2022, the applicant’s attorneys failed to ensure that the papers were timeously and properly indexed, paginated and bound. This occurred only late the afternoon of 7 June 2023, a day before the hearing.

[10] The parties have now complied with the order of 8 June 2023 by filing substituted and/or supplementary heads of argument. It needs to be mentioned at this stage that, contrary to the observation in the email of 20 September 2022, the respondents’ initial heads of argument were indeed filed timeously with the registrar, but these were never sent through to the presiding judges.

THE COMMON CAUSE FACTS

[11] Di Thabeng was registered on 28 July 2015¹. Initially, Beukes’ late father, Mr Pieter Jacobus du Toit (who passed away in July 2021) was the sole director and shareholder of Di Thabeng. The applicant became a co-director on 13 December 2018. Prior to his death, the late Mr Du Toit relinquished his position as director in

¹ Founding affidavit: annexure MNL 1, p 27.

favour of his daughter.² She was appointed as director on 18 May 2021 and he resigned on 25 June 2021.

[12] On 21 January 2021 the late Mr Du Toit and applicant provided an Ultimate Beneficial Ownership declaration to Mercantile Bank.³ Therein they recorded that the late Mr Du Toit held 74% ownership interest (shares) in Di Thabeng and the applicant 26%. The applicant's shareholding of 26% in Di Thabeng is uncontested, but as will be shown later herein, the same does not apply to the remaining 74% shareholding.

[13] Notice was given of Di Thabeng's directors' meeting to be held on 15 October 2021, *inter alia* to discuss the removal/dismissal of applicant as director. The applicant and his legal representative requested certain documents as a result the meeting did not proceed. At that stage a charge sheet was also prepared on behalf of Di Thabeng, indicating the reasons why the applicant should be removed as director in terms of s 71 of the Companies Act. Hereafter correspondence ensued between the legal representatives, *inter alia* in an apparent attempt to settle the disputes between the parties, but to no avail.

[14] On 20 December 2021 the applicant was given notice of a shareholders' meeting to be held on 6 January 2002 on the Zoom virtual platform. The applicant was afforded an opportunity to give reasons why he should not be removed as director of Di Thabeng. The applicant and his legal representative joined the meeting via Zoom, but withdrew at a stage where after a resolution was taken by Beukes as the alleged majority shareholder to remove the applicant as director with immediate effect.⁴

ISSUES IN DISPUTE

[15] The following issues are in dispute:

² Answering affidavit: annexures CB 4 and CB 5, pp 115 & 116.

³ Founding affidavit: annexure MNL 2, pp 28 – 30.

⁴ Founding affidavit: annexure MNL 21, p 74.

- a. whether the applicant is entitled to approach the court with an application for review, either in terms of the doctrine of legality, or the common law, especially bearing in mind the respondents' version that ss 71(1) and 71(2) of the Companies Act do not provide for a review procedure as is the case in respect of board decisions in terms of ss 71(5) which is not applicable *in casu*;
- b. whether Beukes is a shareholder of Di Thabeng and whether she as the majority shareholder was entitled to remove the applicant as director;
- c. whether applicant is entitled to an order to be furnished with the documents set out in the notice of motion; and
- d. the appropriate costs order.

STATUTORY PROVISIONS AND AUTHORITIES PERTAINING TO THE REMOVAL OF DIRECTORS

[16] First and foremost, it is apposite to quote s 71 of the Companies Act, dealing with the removal of directors, in full. It reads as follows:

'71 Removal of directors.

(1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, *a director may be removed by an ordinary resolution adopted at a shareholders meeting* by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).

(2) Before the *shareholders* of a company may consider a resolution contemplated in subsection (1)—

(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.

(3) If a company has *more than two directors*, and a shareholder or director has alleged that a director of the company—

(a) has become—

(i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or

(ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or

(b) has neglected, or been derelict in the performance of, the functions of director, *the board*, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

(4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given—

(a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

(b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

(5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director

as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days to a court to review the determination of the board.

(6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be—

(a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and

(b) the court, on application in terms of paragraph (a), may—

(i) confirm the determination of the board; or

(ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.

(7) An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.

(8) *If a company has fewer than three directors—*

(a) *subsection (3) does not apply to the company;*

(b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and

(c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.

(9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for—

(a) loss of office as a director; or

(b) loss of any other office as a consequence of being removed as a director.

(10) This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation.’ (my emphasis)

[17] In *Steenkamp and Another v Central Energy Fund Soc Ltd and Others*⁵ (*Steenkamp*) the court emphasised that ss 71(1) and 71(2) deal only with shareholders’ meetings, whereas ss 71(3) to 71(7) deal primarily with meetings of a company’s board of directors in the case where the company has more than two directors which is not applicable *in casu*. As mentioned in *Steenkamp*, a company’s shareholders, acting at its shareholders’ meeting, have a wider discretion to remove directors than does the company itself, acting through its board of directors. This is apparent from the wording of ss 71(3) which is not found in ss 71(1) and 71(2). There may obviously be cases where the shareholders are of the view that a director should be removed for the reasons mentioned in ss 71(3), but they do not have to find any such grounds before they are entitled to remove a director.

[18] If a company has less than three directors, ss 71(8) applies. In such a case a determination of whether there is cause for the removal of a director cannot be left to the board, but must be referred to the Companies Tribunal. Di Thabeng’s board of directors did not deal with the removal of applicant as was Beukes’ initial idea, bearing in mind the notice of a directors’ meeting to be held on 15 October 2021. The removal was dealt with at an alleged shareholders’ meeting. It was not required to refer the matter to the Companies Tribunal as the applicant initially believed to be the case.

⁵ (13599/2017) [2017] ZAWCHC 107; 2018 (1) SA 311 (WCC) (22 September 2017).

[19] It is apparent from ss 71(1) and 71(2) that a company's shareholders may remove a director by an ordinary resolution adopted at a shareholders' meeting. The director must be given notice of the meeting and the resolution to be taken and such director must be afforded a reasonable opportunity to make a presentation before a resolution is put to the vote. There is a clear distinction between the removal of a director by the company's shareholders on the one hand and where the board of directors seeks the removal. This difference is acknowledged by Matojane J in *Miller v Natmed Defence (Pty) Ltd and Others*⁶. The learned judge went further in stating the following⁷:

'[36] Where shareholders seek the removal of a director, s 71(1) does not require shareholders to provide the director concerned with a statement setting out the reasons for the proposed resolution, as is the case where the removal is by directors. The legislature has deliberately preserved the right of the majority shareholders to remove a director whom they no longer support. Directors serve at the behest of shareholders who elected them. The shareholders can remove them at will without having to provide reasons.'

[20] It is not necessary to consider the correctness of the learned judge's viewpoint that shareholders do not have to give reasons as is apparent from the aforesaid *dictum*. Di Thabeng, through the actions of Beukes and her legal advisers, presented the applicant with reasons for the proposed resolution to be taken at the shareholders' meeting of 6 January 2021. The applicant was afforded a reasonable opportunity to make representations. He and his legal representative attended the virtual Zoom meeting, but left the meeting at a stage before any resolution was taken. I conclude in saying that if it is established through admissible evidence that Beukes was a majority shareholder at the time, the applicant cannot insist to remain a director in circumstances where the trust relationship between him and her as majority shareholder has been broken down irretrievably. It is the respondents' case that the applicant has committed serious offences that has led to the eventual decision to remove him as director. It is not required to say more in this regard in

⁶ (18245/2019) [2021] ZAGPJHC 352; 2022 (2) SA 554 (GJ) (24 August 2021) at para 29.

⁷ *Ibid* para 36.

light of my conclusion arrived about Beukes' shareholding in Di Thabeng. I deal with that issue later herein.

ACCESS TO COURT

[21] The respondents submitted that the doors of the court were shut for the applicant who was not entitled to the relief sought. According to them he is at best only entitled to damages or other compensation as provided for in ss 71(9).

[22] I am satisfied that this court may deal with the review application, either based on the principle of legality, or the common law. Such right is afforded the applicant in accordance with s 34 of the Constitution, notwithstanding the absence of an express right to review the resolution by shareholders as provided for in terms of ss 71(1) and (2) and the reference to a claim for damages and/or compensation in ss 71(9).⁸

IS BEUKES A SHAREHOLDER OF DI THABENG?

[23] In order to adjudicate whether Beukes is indeed a shareholder of Di Thabeng, it is apposite to deal with the legislation as well as the law of evidence. Firstly, I shall deal with relevant statutory provisions. The following definitions are apposite⁹:

“securities” means any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company;

“securities register” means the register required to be established by a profit company in terms of section 50(1);

“shareholder”, subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be;

⁸ See also *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* (CCT 291/21) [2022] ZACC 43; 2023 (3) BCLR 296 (CC); 2023 (3) SA 36 (CC) (9 December 2022) paras 27 - 29, 31, 32 & 35; *Agri Wire (Pty) Ltd v Commissioner of the Competition Commission and Others* (6600/2011) [2012] ZASCA 134; [2012] 4 All SA 365 (SCA); 2013 (5) SA 484 (SCA) (27 September 2012) para 19.

⁹ Section 1 of the Companies Act.

“shareholders meeting”, with respect to any particular matter concerning a company, means a meeting of those holders of that company’s issued securities who are entitled to exercise voting rights in relation to that matter.’

[24] All company records referred to in s 24 must be accessible at or from the company’s registered office, or if not kept at the company’s registered office, a notice must be filed by the company setting out the location at which the records can be obtained.¹⁰

[25] A share issued by a company is regarded as movable property and is transferable in any manner provided for or recognised by the Companies Act or any other legislation.¹¹ It is trite that the transfer of shares contains several acts or series of steps, to wit (a) agreement to transfer, (b) the execution of a deed of transfer and eventually, (c) the registration of the transfer.¹²

[26] Once the parties to the share transaction have agreed on transfer and executed the deed of transfer, the registration process as provided for in the Companies Act must be complied with. Section 51 reads as follows:

‘Registration and transfer of certificated securities

(1) A certificate evidencing any certificated securities of a company-

(a) must state on its face-

(i) *the name of the issuing company;*

(ii) the name of the person to whom the securities were issued;

(iii) the number and class of shares and the designation of the series, if any, evidenced by that certificate; and

¹⁰ Section 25 of the Companies Act.

¹¹ Section 35 of the Companies Act.

¹² *In Land Property Development Corporation (Pty) Ltd v Cilliers* 1973 (3) SA 245 (A) at 251.

(iv) any restriction on the transfer of the securities evidenced by that certificate, subject to item 6(4) of Schedule 5;

(b) *must be signed by two persons authorised by the company's board*; and

(c) is proof that the named security holder owns the securities, in the absence of evidence to the contrary.

(2) A signature contemplated in subsection (1)(b) may be affixed to or placed on the certificate by autographic, mechanical or electronic means.

(3) A certificate remains valid despite the subsequent departure from office of any person who signed it.

(4) If, as contemplated in section 50(5), all of a company's shares rank equally for all purposes, and are therefore not distinguished by a numbering system-

(a) each certificate issued in respect of those shares *must be distinguished by a numbering system*; and

(b) if the share has been transferred, the certificate must be endorsed with a reference number or similar device that will enable *each preceding holder of the share in succession to be identified*.

(5) Subject to subsection (6), *a company must enter in its securities register every transfer* of any certificated securities, including in the entry-

(a) the name and address of the transferee;

(b) the description of the securities, or interest transferred;

(c) the date of the transfer; and

(d) the value of any consideration still to be received by the company on each share or interest, in the case of a transfer of securities contemplated in section 40(5) and (6).

(6) A company may make an entry contemplated in subsection (5) only if the transfer-

(a) is *evidenced by a proper instrument of transfer* that has been delivered to the company; or

(b) was effected by operation of law.’ (my emphasis)

[27] A certificate in compliance with ss 51(1)(a) constitutes *prima facie* evidence of the shareholder’s ownership. In the absence of evidence to the contrary, it becomes conclusive proof. Any share transfer must be registered by the company by entering in the registrar of members not only the name and address of the transferee, but also the other information envisaged in ss 51(5). For a transfer to be lawfully registered, a proper instrument of transfer must be delivered to the company in accordance with ss 51(6). *In casu*, there is absolutely nothing presented by the respondents to show that Beukes is the legitimate holder of any shares in Di Thabeng. The court has not been informed whether the late Mr Du Toit sold or donated his shareholding to his daughter, or what exactly was the nature of the alleged transaction. Ms Van Zyl’s affidavit, filed in support of the respondents’ case, specifically obtained after queries raised by the court, is of no assistance. It does not lay in her mouth to say that the applicant admitted ‘to the signing of the relevant documents.’ It is not alleged that the applicant was a party to any agreement between the late Mr Du Toit and his daughter pertaining to the transfer of his shares to her.

[28] The minutes of the meeting of 18 May 2021 deal only with the change in directorship, indicating that Beukes would be appointed as director from that date. This document was signed by the late Mr Du Toit, applicant and Beukes.¹³ As strange as it may sound, a further meeting was held on 25 June 2021, also dealing

¹³ Answering affidavit: annexure CB4.

with a change in directorship. The minutes thereof reflect that the late Mr Du Toit would resign as director on that day. This document was not signed by the applicant, but only by the late Mr Du Toit and his daughter.¹⁴ Neither of the two documents serves as corroboration of a shareholders' meeting and/or an agreement between the late Mr Du Toit and his daughter pertaining to an agreement to transfer, the execution of the deed of transfer and the registration of the transfer.

[29] Matters are complicated by the three unsigned documents that appear to be share certificates. The first document reflects that 50 shares were issued to Beukes on 25 June 2021, but neither a director of Di Thabeng, nor anybody else signed the document.¹⁵ Beukes indicated in her affidavit that this was a mere typing error as it appears from the remainder of the document that 74 shares were in fact allocated to her. As strange as it may sound, the next document¹⁶ appears to be an unsigned share certificate in favour of the applicant dated 17 December 2021 (it should be remembered that he already obtained his shares in December 2018), indicating that he is the holder of 26 shares. The third document¹⁷ was apparently prepared to rectify the earlier error. In terms hereof Beukes is indicated as the holder of 74% shareholding in Di Thabeng. Again, this document is meaningless insofar as it has not been signed by anybody.

[30] Ms Van Zyl indicated that certain original documents had been lost due to water damage. She did not say which documents. If that was indeed the case, I would have expected Di Thabeng to immediately arrange for duplicate copies, duly certified, to be obtained. There is also no indication as to the fate of the securities register that was supposed to be kept at the registered office. Finally, and apparently in order to show that some kind of agreement was entered into between the late Mr Du Toit and his daughter pertaining to the transfer of shares, Ms Van Zyl referred to 'the relevant loan accounts due to the deceased written against the costs of the shares then owned by the Second Respondent.' The document relied upon in

¹⁴ Answering affidavit: annexure CB5.

¹⁵ Answering affidavit: annexure CB1.

¹⁶ Answering affidavit: annexure CB2.

¹⁷ Answering affidavit: annexure CB3.

support of her version is not annexed as alleged and could therefore not even be considered.¹⁸

[31] The applicant submitted that the documents pertaining to share certificates and transfer of shares as well as the securities register should be kept by the CPIC. This is not correct as is evident from the legislation referred to herein.

[32] Beukes cannot say that the respondents were caught by surprise. The applicant made it clear in paragraph 10 of his founding affidavit, although referring to Beukes as a shareholder, that he was 'unable to discern what the second respondent's shareholding in the first respondent is due to the fact that I have never been furnished with the first respondent's shareholders agreement and/or documents that evince the second respondent's shareholding in the first respondent.' In paragraph 22 he stated that the deceased died without furnishing him with documents evidencing the second respondent's shareholding in the first respondent. Consequently, he stated that he was 'unable to "sure-footedly" say what was the second respondent's shareholding in the first respondent'. Although Beukes repeatedly stated in her answering affidavit that she is a 74% majority shareholding in Di Thabeng and that her late father transferred his shareholding to her, she was unable to produce any documentation and/or inform the court why it was impossible to do. Her legal representative should have told her about the court's view when the matter was to be heard on 3 October 2022, but notwithstanding that, an affidavit was filed by Ms Van Zyl which was not even confirmed under oath by Beukes. In his replying affidavit the applicant emphasised that no *iota* of evidence had been placed before the court to demonstrate that Beukes was a 74% shareholder in Di Thabeng.

[33] The facts in this matter are clearly distinguishable from those in *Transnet Ltd v Newlyn Investment (Pty) Ltd*.¹⁹ In that case admissibility of oral evidence was not argued before the court *a quo*, but raised for the first time on appeal. Secondly, there was no doubt about the existence of the addendum to the agreement between the parties. There was only one original addendum, which after having been signed by the one party, was sent to the other party, the appellant in that case. The Supreme

¹⁸ Paragraph 2.8 of her affidavit, referring to annexure CB40 which was not attached.

¹⁹ 2011 (5) SA 543 (SCA); [2011] ZASCA 44; 553/09 (29 March 2011).

Court of Appeal held that secondary evidence of a document in possession of the opposite party, the latter failing to produce it, was allowed. In this case there is not even the slightest of evidence that an agreement was entered into between the deceased and his daughter and/or even if there was one, what were the terms thereof. Furthermore, and equally important, the required share certificate and securities register, evidencing Beukes' rights, have not been presented to the court and her shareholding thus not proven.

[34] In *Principles of Evidence*²⁰ the authors refer to the two basic rules governing the admissibility of a document: the original document must be produced and the document must be authenticated. They also deal with the admission of secondary evidence in certain exceptional instances. Although the production of the original document remains a requirement in our law, secondary evidence may be admitted if it is the only means of proving the document. Secondary evidence may be used in cases of exception to prove the contents of a document in the following circumstances: (a) the document is lost or destroyed; or (b) the document is in the possession of the opposing party, or (c) in possession of a third party; or (d) it is impossible or inconvenient to produce the original; or (e) it is permitted by statute.

[35] I have carefully considered whether the secondary evidence tendered by Ms Van Zyl should be admitted, bearing in mind the context and the totality of the facts, but am satisfied that this secondary evidence should be rejected. Consequently, the respondents failed to prove that a duly constituted shareholders' meeting took place on 6 January 2022, the sole reason being that they failed to prove that Beukes is and was at all relevant times a shareholder – let alone a majority shareholder – of Di Thabeng.

THE APPLICANT'S ENTITLEMENT TO DI THABENG'S DOCUMENTATION

[36] The applicant seeks to be provided with certified copies of a number of documents, *inter alia* licence documents issued by the Department of Mineral Resources and Energy, BBBEE compliance certificates, shareholders' agreement and share certificate and even his employment contract as an employee. He relied

²⁰ Schwikkard et al, *Principles of Evidence* ,5th ed, 2023 JutaStat e-publications, ch 20 – p 464 and further.

on the judgment of Naidoo J in *Makanda and Others v Afrinnai Health (Pty) Ltd and Another.(Makanda)* ²¹ If it is the applicant's case that Di Thabeng, of which he is a shareholder, has not received a licence from the Department of Mineral Resources and Energy, he could obtain that information from the Department, if at all relevant. He has already laid a complaint with the BBBEE Commission and any certificates can be obtained from that entity. If it is his case that he has been unfairly dismissed as an employee, he has the right to act in accordance with the provisions of the Labour Relations Act 66 of 1995. The employment contract may be relevant in those proceedings, but not here. The respondents indicated that they provided the audited financial statements and bank accounts to the applicant and there is no reason to reject their version in this regard as untenable and false. In any event, there is no reason for the applicant to obtain these documents, including board resolutions, for the period from 2015 until he became a director in December 2018. He has no entitlement to the documents for the 2015, 2016, 2017 and 2018 financial years. Also, once his status as director has been restored, he may deal with the issue afresh at any subsequent directors' meeting.

[37] In light of the dispute of fact as to whether the documents to which the applicant is entitled, have been provided to him and bearing in mind the irrelevance of the other documents mentioned earlier, I am satisfied that the *Makanda* judgment is distinguishable from the matter at hand. Consequently, the applicant has not made out a proper case to be furnished with the documents required.

[38] I do not intend to make any order pertaining to the reinstatement of the applicant's name in the records of the third respondent. The applicant failed to indicate whether the third respondent had already removed his name from its records. Consequently, the required relief may be totally superfluous.

COSTS

[39] The applicant is substantially successful and entitled to his costs, but he is not entitled to a punitive costs order. There is also no reason to grant the costs of two counsel. The matter is not intricate at all. In an about turn in the heads of argument,

²¹ (3590/2014) [2015] ZAFSHC 6 (5 February 2015) paras 3 - 10.

the applicant sought a costs order against the second respondent. He never sought an amendment of his notice of motion and also did not deal with this aspect in his affidavits. This court cannot find that Beukes did not *bona fide* believe that she is a 74% shareholder in Di Thabeng. The company had been incorporated by her late father who had run it for several years until he resigned as director, whereupon she was appointed in his place. In my view and contrary to what was submitted on behalf of the applicant, there is no reason why Di Thabeng, ie the first respondent, should not be ordered to pay the applicant's costs of the application on a party and party scale.

[40] The costs of 3 October 2022 stood over for later adjudication. None of the parties made any submissions in this regard. Although I mentioned in paragraph 3 of the aforesaid email that no heads of argument had been filed by both parties, this was not correct as unknown to me at the time, the respondents' heads of argument had in fact been filed with the registrar on 19 September 2022. The applicant not only failed to ensure that the papers were properly indexed, paginated and bound, but no heads of argument had been filed on his behalf. Therefore, he should be ordered to pay the wasted costs of 3 October 2022.

ORDER

[41] The following order is issued:

1. The decision of 6 January 2022 taken at an alleged shareholders' meeting of the first respondent is reviewed, declared invalid and contrary to section 71 of the Companies Act 71 of 2008 and set aside;
2. The first respondent is directed to reinstate the applicant as a director of the first respondent;
3. The first respondent shall pay the applicant's costs of the application on a party and party scale, excluding the wasted costs occasioned by the postponement on 3 October 2022 which shall be borne by the applicant.

JP DAFFUE J

I concur

NS DANISO J

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