

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

Case no: **14080/2018**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
01 SEPTEMBER 2023

DATE

SIGNATURE

In the matter between:

DOUW GERBRANDT KRUGER N.O.

First Applicant

JOHANNES NICOLAAS BELL N.O.

Second Applicant

ERIKA KRUGER N.O.

Third Applicant

ANNETTE VAN ZYL N.O

Fourth Applicant

(in their capacities as trustees of the OLYMPUS TRUST)

DOUW GERBRANDT KRUGER

Fifth Applicant

And

JOHANNES FREDERICK GOUWS	First Respondent
JOHANNES PETRUS ERASMUS SWARTS	Second Respondent
JOHANNES FREDERICK GOUWS N.O.	Third Respondent
LYNETTE GOUWS N.O.	Fourth Respondent
WILLEM JACQUES GOUWS N.O.	Fifth Respondent

ABRAHAM AARON ROUP N.O.	Sixth Respondent
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(in their capacities as trustees of the WM Gouws Familie Trust)

JOHANNES PETRUS ERASMUS SWARTS N.O.	Seventh Respondent
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JOHANNES PETRUS ERASMUS SWARTS N.O.	Eighth Respondent
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ANETTE VAN ZYL N.O.	Ninth Respondent
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(in their capacities as trustees of the Johan Swarts Familie Trust)

DAVID SOLOMON MABOTJA	Tenth Respondent
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PATRICK MPHEPHU	Eleventh Respondent
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OZOSAT INVESTMENTS (PTY) LTD	Twelfth Respondent
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PATRICK MPHEPHU N.O.	Thirteenth Respondent
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ABIGAIL MPHEPHU N.O.	Fourteenth Respondent
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(in their capacities as trustees of the Abipa Family Trust)

JDJ HOLDING COMPANY (PTY) LTD

Fifteenth Respondent

(Reg no: 2004/006725/07)

ZAMORI ENGINEERING SERVICES (PTY) LTD

Sixteenth Respondent

(Reg no: 2003/028727/07)

EVENING SHADE PROPERTIES 46 (PTY) LTD

Seventeenth

Respondent (Reg no: 2006/015369/07)

J U D G M E N T

MAKHOB A, J

- [1] There are two applications before court. The first application is about an order by Mogale AJ, which order the applicants contend have been complied with and seek from this court to adopt the joint minute compiled by the experts instructed and appointed by the respective parties to determine the value of shares. The order is sought in terms of section 38 of the Superior Court's Act 10 of 2013.
- [2] The first, third, fourth, fifth and six respondents do not oppose the application and abides by the decision of this court. It is only the

second and seventh to ninth respondents that oppose the main application.

[3] The second application is the counter application by the second, seventh to ninth respondents. They seek an order to allow an amendment or variation of Mogale AJ's order which is referred to in paragraph one above. This application is opposed by all the parties in this application.

[4] Mr Douw Kruger, Mr Johan Gouws and Mr Johan Swarts are directors of JDJ Holding Company (Pty) Ltd the fifteenth respondents. They are the main role players in this matter.

[5] The three directors are also members of the three trust namely the Olympus Trust, the Gouws Trust and the Swarts Family Trust respectively.

[6] For purpose of this judgment the first, second, third, fourth and fifth applicants will be referred to as "the kruger group"

[7] The first, third, fourth, fifth and sixth respondents will be referred to as the "Gouws group".

[8] The second, seventh, eighth and ninth respondents will be referred to as the "Swartz group".

- [9] The fifteenth respondent will be referred to as "JDJ". The Olympus Trust, The Gouws Family Trust and the Swarts family trust holds Shares in "JDJ" Holding Company (Pty) Ltd.
- [10] It is common cause that on 28 March 2019, Mothle J granted an order in favour of the "Kruger group" and ordered "JDJ" to buy shares of the "Kruger group".
- [11] On 4 February 2021 the order by Mothle J was amended by agreement between the parties. The agreement was about how the shares of the "Kruger group" should be valued.
- [12] On 26 November 2021 the experts appointed by the three groups produced a joint minutes in terms of which they agreed about the value of the Kruger group's shares in "JDJ". The shares were valued to be R49 million.
- [13] On 8 February 2022 the "Kruger Group" launched the "section 38" application whereby they ask the court for an order that the joint minutes of the experts be made an order of the court.
- [14] The "Gouws Group" filed a notice to abide the section 38 application whereas the "Swarts group" opposed the application and launched a counter-application.

[15] Pursuant to the order issued by Van Niekerk AJ on 30 May 2023 counsel for the “Swarts Group” submitted to this court that the “Swart group” will no longer persist with the relief sought in prayers 4, 5, 6 and 7 of the notice of motion of the counter application.

[16] What remains to be decided by this court is the following:

16.1 The court must decide whether “JDJ” must pay to Olympus Trust (“Kruger group”) the balance of R10 649 321.00 (R49 458 999.00 – R38 809 678.00)

16.2 The cost of the application to winding-up “JDJ” on 30 May 2023.

16.3 The costs of the urgent application brought by the “Kruger group” (Olympus trust) under case number 25038/2022.

16.4 The counter application by the “Swart group” in seeking to amend the order dated 4 February 2021 and declaring that the director’s meeting of the board of directors of “JDJ” on 31 March 2022 was not called in accordance with the provision of section 73(1) of the Companies Act, 2008.

[17] It is further common cause that “JDJ” is a holding company, it does not itself trade. It’s only assets are shares and loan accounts in other

private companies and certain investments and related financial assets.

[18] The Olympus trust ("Kruger group"), the Gouws Trust ("Gouws group") and the Swarts Trust ("Swart group") each hold one third of the shares in "JDJ", and each Trust is represented on the board of directors of "JDJ" by a representative. The three representatives are the only directors of "JDJ".

[19] Counsel for the "Swart group" argued that neither the provision of section 38 nor the existing order have the result that the reports of the experts nor their joint minute by themselves constitute the final determination of the value of the "Kruger group" shares as at 28 March 2019. They argued that it is this court that must make the final determination of the value concerned.

[20] It was further contended by counsel for the "Swarts group" that any party may still dispute the amount that the experts have agreed upon and convince the court not to adopt the reports and the joint minute. In this regard counsel referred the court to the decision in *Annama v Chetty*¹.

¹ 1946 AD142; Schmidt, CWH, The law of Evidence; paragraph 17.5.2.2. page 17-14 Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung GmbH 1976 (3) SA 352 (A).

- [21] On behalf of the “Swart group” it is furthermore contended that there is uncontroverted evidence that certain information included in the report of the expert evaluator Mr. Regenass is incomplete and incorrect. The Kahamelo report should be adopted by this court as the correct amount that is payable by “JDJ” to the “Kruger group” in accordance with the existing order.
- [22] In addition it is contended on behalf of the “Swart group” that the meeting called by Mr Kruger for 6 May 2022 was not authorized by the board of directors of “JDJ” and was thus unlawful, being in breach of the provisions of section 73(1) and 76(2) of the Companies Act, 2008.
- [23] The meeting was called with a view to consider the adoption of a resolution regarding the payment of dividends that would either be moot, alternatively would constitute a breach of the standards of conduct of Mr Kruger and Mr Gouws as contained in section 75 and 76 of the Companies Act.
- [24] According to the “Swarts group” the payment of dividends by “JDJ” would constitute a breach of the provision of section 46 and 112 of the Act.
- [25] The “Gouws group” are of the view that the counter application should be dismissed with cost. The Gouws Family Trust does not

oppose the relief sought by the Olympus Trust in the section 38 application.

[26] Counsel for the Gouws group refers to the *Plascon-Evans* test² and submitted that applying the *Plascon-Evans* test because the “Swart group” is seeking final relief on the motion, the respondent’s version should be accepted unless it can be rejected as being far-fetched and untenable.

[27] It is further submitted by counsel for the “Gouws group” that the “Swarts group” were invited to make representations. The application to amend the order should be dealt with in terms of Rule 42 of the Uniform Rules of court and this have not been done by the “Swart group” on that bases their application should be dismissed.

[28] The “Gouws group” contend further that the “Swart group” are not entitled to a final interdict restraining the “JDJ” board of directors forever from declaring dividends and has no alternative remedy and will suffer irreparable harm if the interdict sought are not granted.

THE SECTION 38 APPLICATION

² *Plascon Evans Paints v van Riebeeck Paints (PTY) LTD* 1984 (3) SA 623 and *National Directors of Public Prosecutions v Zuma (Mbeki and another intervening)* 2009 (2) All SA at page 26.

[29] Of primary importance in this case is the provision of section 38 of the Superior Court Act 10 of 20B and the order of Mogale AJ dated 5 February 2021.

[30] The relevant portions of section 38 of the Act read as follows:

'38. Reference of particular matters for investigation by referee.—

- (1) *The Constitutional Court and, in any civil proceedings, any Division may, with the consent of the parties, refer—*
- (a) *any matter which requires extensive examination of documents or a scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or*
 - (b) *any matter which relates wholly or in part to accounts; or*
 - (c) *any other matter arising in such proceedings,*
- for enquiry and report to a referee appointed by the parties, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable.*
- (2) *Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the proceedings in question.*
- (3) *Any such referee shall for the purpose of such enquiry have such powers and must conduct the enquiry in such manner as may be prescribed by a special order of the court or by the rules of the court.'*

[31] The relevant paragraphs of Mogale AJ's order reads as follows:

"3.

- 3.1*** *The applicants and the respondents will at their own costs each appoint their own experts ("the experts"), namely Johan Ferreira of J Ferreira Inc and Heinrich Regenass of Logista Inc., both of which are registered and practicing chartered accountants of not less than fifteen years standing, in order to determine the value of the OLYMPUS TRUST's shares in JDJ as at 28 March 2019, in accordance with paragraphs 4, 7, 8 and 10 below.*

3.2 *Within 20 (twenty) days upon finalisation of the respective experts' valuation reports they shall meet in an attempt to reach consensus on the value of the OLYMPUS TRUST's shares in JDJ as at 28 March 2019, and within 10 (ten) days of their meeting compile a joint minute reflecting their positions.*

3.3 *If the parties' experts do not reach consensus on the value, and/or valuation method and/or any other issues, the experts will compile a joint minute reflecting the common cause issues, and the issues that remain in dispute, and then jointly refer the issue(s) that remain in dispute to Mr. Wynand Rossouw of Business Valuation Advisors (Pty) Ltd ("the referee"), a registered and practicing chartered accountant of not less than fifteen years, for his determination.*

11. *The referee's report, alternatively the expert reports together with their joint minute (to the extent that the experts are ad idem about the value of the Olympus Trust's shares in JDJ) are to serve before this Court mutatis mutandis as would a referee's report in terms of section 38 of the Superior Courts Act 10 of 2013. Such report is to be dealt with by this Court in accordance with section 38 of that Act."*

[32] The provisions of section 38 and the variation order must be interpreted in accordance with the well established principles of interpretation³.

³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2021 (4) SA 593 (SCA).

- [33] “A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the documents”⁴.
- [34] In *University of Johannesburg v Auckland Park Theological Seminary another*⁵ the court said “A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up its conclusion, and the knowledge at the time of those who negotiated and produced the contract.”
- [35] In my view the sensible meaning which is unambiguous of the variation order is that, should the experts in term of paragraph 3.3 of the variation order fail to reach consensus, the remaining issues in dispute have to be referred, jointly by the experts to the referee, Mr Wynard Rossouw (“the referee”) for his determination.
- [36] The experts and the parties did comply with paragraphs 3.1 and 3.2 and in my view there was no need for paragraph 3.3 to be activated and implemented. This is much evident from the joint minutes.
- [37] It is further my view that on proper construction of paragraph 7 of the variation order, the referee can only consult with the parties and their financial representatives after he has been appointed in terms of paragraphs 3.3 and 5 respectively.

⁴ Natal Joint Municipal Pension Fund para 18

⁵ 2021 (6) SA1 (CC) AT Paragraph 66.

**THE MEETING OF THE BOARD OF DIRECTORS OF “JDJ” HELD ON 31 MARCH
2022**

[38] Section 73 (1) of the Companies Act reads as follows:

73. Board meetings – (1) A director authorised by the board of a company –

(a) may call a meeting of the board at any time; and

(b) must call such a meeting if required to do so by at least-

(i) 25% of the directors, in the case of a board that has at least 12 members; or

(ii) two directors, in any other case.’

[39] The logical interpretation of section 73 (1)⁶ in my view does not preclude any of the directors in “JDJ” to call a board meeting.

[40] Moreover “JDJ’s” memorandum of incorporation read as follows:

“73. Directors may meet together for the dispatch of business, adjourn and otherwise regulate their meeting as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In the event of any equality votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of all of a director shall, at any time, convene a meeting of directors.”

⁶ Companies Act

[41] Thus, therefore in my respectful view all of the directors of “JDJ” were at all material times authorised by “JDJ” to call a board meeting as envisaged by section 73(1) of the Companies Act.

COUNTER APPLICATION

[42] In essence the “Swarts group” are asking this court to vary or amend the variation order so that they can use the Kahamelo report which the other parties knew nothing about.

[43] It is common cause that the variation order by Mogale AJ was by consent by all the parties including the “Swarts group”.

[44] Rule 42 deals with instances where a court order or judgment contains mistakes ambiguities or omissions which the court must correct or clarify to the litigants.

[45] Often, the purpose of such clarification or correction is to ensure that the proper and true intended purpose of the order or judgment is given effect to and to ensure that such order or judgment reflects the true intention of the presiding officer.

[46] In their counter application the “Swarts group” did not bring their application in terms of the Uniform Rule 42. In my view for this reason alone the counter application should be dismissed.

COSTS

[47] The papers filed in respect of the winding up application are not before this court. The parties did not present any written or oral argument before this court concerning the cost in the winding up and the urgent application brought by Olympus Trust under case number 25028/2023.

[48] This court cannot therefore give an order on the reserved cost of the urgent application and the winding up application.

[49] Taking into consideration the conspectus of all the facts and legal principles including the case law, I have referred to, I am of the view that the applicants have made out a case for the relief sought in terms of the section 38 application.

[50] The counter application by second, seven to nine respondents is dismissed.

ORDER

[51] I make the following order:

51.1. In respect of the main application (section 38), the application is granted, second, seven to nine respondents to pay the cost.

51.2. In respect of the counter application, the application is dismissed with costs including the costs of first, third to sixth respondents, jointly and severally, the one paying the other to be absolved.

51.3 The cost in respect of the winding up application including the urgent court application under case number 250338/2023 is postponed *sine die*.



MAKHOB A J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED JUDGMENT: 27 JULY 2023

JUDGMENT HANDED DOWN ON: 01 SEPTEMBER 2023

Appearances:

For the 1st, 3rd, 4th & 5th Applicants: Adv L M Malan SC (instructed by) Stefan Swart Attorneys

For the 1st, 3rd, 4th, 5th & 6th Respondents: Adv P L Uys (instructed by) Savage Jooste & Adams Inc

For the 2nd 7th 8th & 9th Respondents: Adv S D Wagner SC (instructed by) Weaving & Weaving Inc.