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

Case Number: 71201/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

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DATE SIGNATURE

In the matter between:

ELMOS SERVICES BV	APPLICANT

And

MICROSYSTEMS ON SILICON (PTY) LTD	RESPONDENT
HELGARD ROSS	1ST INTERVENING PARTY
ARTHUR WILHELM SUNTKEN N.O	2ND INTERVENING PARTY
WOLFGANG MANFRED SUNTKEN N.O	3RD INTERVENING PARTY
JUTTA INGRID SCHMIDT N.O	4TH INTERVENING PARTY

JUDGMENT

Fabricius J,

[1] On 8 October 2019, I heard this application in which Applicants sought a final winding-up of the Respondent as a solvent company in terms of the ***2008 Companies Act, Act 71 of 2008***. The provisional winding-up order had been granted on 12 March 2019. On 12 April 2019, a counter-application was filed and on 3 September 2019, the Court ordered that the Second and Third Respondents be joined as intervening parties in this counter-application.

[2] In the intervening parties' counter-application the following relief was sought:

"1. That the applicant be directed, in terms of section 163 (2) of the Companies Act, 71 of 2008, to dispose of its shareholding in the respondent, comprising 51% of the issued shareholding in the respondent, to the intervening parties.

2. That the intervening parties be directed to pay the applicant the amount of €149,529.00 (one hundred forty nine thousand five

hundred twenty nine Euro), on such terms as the Honourable Court directs, as consideration for the purchase of the shareholding of the applicant in the respondent as set out in paragraph 1 above, which amount shall be paid by the intervening parties jointly and severally, the one to pay to others to be absolved.

3. In the alternative to paragraph 2:

    3.1 The intervening parties are directed to purchase the shareholding of the applicant in the respondent at fair value, calculated pro-rata to the total issued share capital of the respondent, which amount shall be paid by the intervening parties jointly and severally, the one to pay the others to be absolved;

    3.2 The fair value of the shareholding held by the applicant in the respondent shall be determined by agreement between the parties, or failing agreement, such other method of calculating the fair value of the said shareholding as the Court, in its sole discretion, may direct;

3.3 That any costs which may reasonably be incurred in determining the fair market value of the shareholding held by the applicant in the respondent, be borne by the parties in equal shares."

[3] The history of the dispute between the parties and the importance of pending litigation in Germany is fully set out in a written judgment by Tuchten J delivered on 17 December 2018, under case number 32255/2018. This judgment must be read in the light thereof, particularly having regard to the orders that Tuchten J made, which are the following:

"1. The second respondent (Elmos BV) is directed to abide by the process pursuant to s. 165 of the Companies Act, 71 of 2008 initiated by the applicants on 25 April 2018 (the s. 165 process), subject to the first respondent (MOS) pursuing that process to its conclusion within a reasonable time from the date of the undertaking.

2. The shareholders and directors of MOS are directed to cooperate fully and timeously in order for MOS to fulfil its obligations under paragraph 1 of this order.

3. Elmos BV is directed to refrain from initiating or calling on its appointed director to initiate any process in either shareholders' or directors' board meetings calling for MOS to settle or abandon the action brought by MOS in the Landgericht Dortmund under case no. 53002/17 (the Landgericht Dortmund action) prior to the issuing of the report in terms of section 165 and the members of the board having had two weeks to consider the report.

4. It is declared that if there is a shareholders' vote in MOS for the removal of either the minority directors, and the minority directors do not support the removal of their directors, the removal of the minority directors for the purpose of obstructing or interfering with the section 165 process or the progress of the Landgericht Dortmund action shall not be good cause for so doing in terms of s. 5.2.2.2 of the shareholders' agreement referred to in paragraph 1 of this judgment.

5. Elmos BV is directed to refrain from acting in conflict with the provisions of 4 of this order.

6. The costs of this application are reserved for later adjudication. Any party to this application may set the matter down for adjudication on notice to all the other parties."

[4] Having heard the application, I issued a directive on 11 October 2019, in which I requested the parties to provide me with a draft order to the following effect:

"3.1 The provisional order is extended to 11 December 2019, when Fabricius J will preside on the proceedings;

3.2 The counter-application is postponed to 11 December 2019;

3.3 One of the 3 persons proposed by the Applicant in the letter of 20/05/2018 he requested to report as provided in s. 165 (4) (a). Fabricius J leaves the proper and concise formulation of this part of the order to Counsel.

3.4 Costs of the proceedings of 7 October 2019 are reserved."

[5] Having considered the arguments and also especially the judgment of Tuchten J and the orders that he issued, I deemed it appropriate to have made a draft

order that was handed to me an order of Court, and this order reads as follows:

“1. The provisional winding up order granted on 12 March 2019 is hereby extended to 11 December 2019 before Fabricius J.

2. The counter application is postponed to 11 December 2019.

3. The second and third respondents (the provisional liquidators of the first respondent) are directed to instruct Dr Franz Tepper as an independent party to prepare a report in terms of section 165 (4) (a) of the South African Companies Act 71 of 2008.

4. In the event Dr Tepper is unavailable or unable to prepare a report in sufficient time for the next hearing on 11 December 2019, the second and third respondents shall without delay instruct Dr Andree Dignas and, failing him, Mr Dieter Schmitz.

5. The Intervening Parties’ attorneys will forthwith deliver the documents listed in paragraph 6 below, to the second and third respondents to transmit forthwith to Dr Tepper. The Intervening Parties’ attorneys will simultaneously deliver a copy to the Applicant’s attorney.

6. The second and third respondents will instruct the German Attorney by delivering to him:

   6.1 a copy of this order;

   6.2 a copy of section 165 of the Companies Act 71 of 2008;

   6.3 the demand in terms of section 165 dated 24 April 2018;

   6.4 the resolution of the board of respondent dated 24 July 2018, a copy of which is attached hereto as “X”;

   6.5 the documents provided for in paragraphs 3.3, 3.4 and 3.5 of the resolution, save that no draft “Replik” or consequential draft “Duplik” shall be delivered to the German attorney.

7. The terms of reference for the German attorney will be set out in paragraph 1.1 of the resolution and the German attorney will have the powers provided for in paragraph 3.7 of the resolution.

8. In the event that the first respondent, Microsystems on Silicon (Pty) Ltd, has insufficient funds to pay the German Attorney's fees, any unpaid balance shall be paid to the liquidators at their request and in the following proportions:

   6.1 51% by the applicant; and

6.2 49% by the intervening parties.

9. The second and third respondents are directed to obtain the report in terms of section 165 (4) by the German Attorney before the hearing date of 11 December 2019, and immediately deliver a copy to all parties' attorneys and to the Court.

10. Costs of the proceedings on 7 and 8 October 2019 are reserved."

[6] The hearing resumed on 11 December 2019, and the written report of Dr F. Tepper had become available and had been considered.

[7] Counsel handed up draft orders dealing with the final winding-up order on the one hand, and on the other dealing with the sale of shares, providing detail as to how "fair value" would be determined. Applicant's Counsel also handed up a letter with prejudice which made various proposals of settlement to the Respondents which were however not accepted.

[8] Applicant's Counsel also handed up a Supplementary argument which dealt with the report of the German Attorney Dr Tepper. I had been provided with a

copy of that report in German which I read, and the English translation thereof which I obviously also read. Before I deal with aspects of that report, it must be remembered that the Respondents' and the Intervening Parties' case was that the alleged sole purpose of the winding-up application was to deprive MOS of the ability to further pursue adjudication of the relevant dispute which was pending in Germany. It was contended on behalf of Applicant that the German report was detailed and balanced and considered the problem from all parties' perspectives without entirely adopting or rejecting any of them. From my reading of the reports, I agree with that conclusion. At this stage it is convenient to briefly state what the issues are that are pending in the German Court:

1. Prayers 1 and 2 are for orders declaring that Elmos AG's 7 June and 31 August 2017 terminations of the Co-operation Agreement are invalid and that the Co-operation Agreement persists. Details of this cancellation are contained in the judgment of Tuchten J.

[9] Prayer 3 was for specific performance of the Co-operation Agreement. Prayer 4 was that in translation "the Defendant [Elmos AG] should reimburse the

Plaintiff [MOS] for all damages that arose and will arise from non-continuation of the Co-operation Agreement”, and its additional agreement.

[10] Dr Tepper’s opinion was that MOS’s claim 1 declaring Elmos AG 7 June 2017 termination invalid, had reasonable prospects of success with the qualification that it remains valid as ordinary notice effective on 31 December 2017. Dr Tepper also reached a similar conclusion on MOS’s claim 2: relating to the 31 August 2017 termination, save that it becomes effective as ordinary notice on 31 December 2018. On this basis the Co-operation Agreement probably did not persist after 31 December 2017, limiting damages to that date. His other opinion was that a third claim, for specific performance, could not be upheld owing to the passage of time. His opinion was that if Elmos AG terminations were ineffective, MOS suffered damages as a result of the premature termination of its co-operation with Elmos AG. Self-evidently, damages for premature termination could not exceed the termination date on normal notice, i.e. 31 December 2017.

[11] The German Attorney also pointed out that MOS's proposed settlement of €5318,182 related to unpaid commission and revenue shares from the sales of MOS's products, and does not fall under the pending Dortmund action which was concerned only with claims for damages.

[12] Dr Tepper then also considered the high cost of litigation and the time it would or could take for litigation to be concluded. In Germany litigation costs are assessed on the basis of a tariff depending on the brackets into which the value of a claim falls.

[13] Dr Tepper then also made certain recommendations to MOS on further procedures taking into account particular risks. The legal dispute could take a couple of years if all appeals were pursued. The proceedings would incur significant costs. MOS might be entirely unsuccessful if the Dortmund Court concludes that Elmos AG 7 June 2017 termination was effective.

[14] Dr Tepper then recommended a settlement and, as I have said on the day of the hearing on December, settlements could not be concluded.

[15] Mr Kemack SC therefore argued that in the light of the persistent failure to settle the matter sensibly, and if I discharged the provisional winding-up order, the company would still remain in a state of managerial deadlock because the minority directors had taken unlawful control of the Board and had obstructed attempts to remedy this through normal corporate governance. It would also be unjust and inappropriate to respond to this deadlock by ordering a sale of shares under the counter-application. The effect of this would be an endorsement of intentionally unlawful conduct inasmuch as the directors had at all times refused to attend any meetings of whatever nature. Without agreement by the minorities to the lodging of an amended memorandum of incorporation giving effect to the relevant provisions of the Shareholders' Agreement regarding directors votes, the only appropriate remedy for the deadlock was a final winding-up order.

[16] It is of course true that the claim in Germany is one based for damages as a result of an early termination of an agreement, and not a claim for specific

performance for commissions on products sold, and that claim would have to follow its own course.

[17] It was argued that the Applicant's tender of the payments recommended by Dr Tepper, was inconsistent with the minorities' allegations that the Applicant's ulterior motive for this application was to stifle MOS's Dortmund claims. The minority shareholders initiated the s. 165 process and Applicant had fully co-operated with it and on the basis of my order, this process had now been concluded. Accordingly, there was merit in the Respondents' allegations that the sole purpose for the winding-up proceedings was to stifle the German litigation process.

[18] During the proceedings in Court, I mentioned to the parties that the conflict between them for a number of years reminded me to a large extent to certain divorce proceedings over which I had to preside in the past, but at the same time, expressing my view that if a sensible and practical approach be adopted, the result may well be to the advantage of all the litigants. The German process has not been completed and if the claim for damages is

pursued successfully, a different outcome may most probably result other than the one presently sought by the parties hereto.

[19] There is no doubt that the provisions of s. 81 of the ***2008 Companies Act*** give me a wide discretion based on the relevant facts to make an order that is fact-related, appropriate and fair.

[20] It is my view that the proceedings in Germany ought to run their course, and that it is at this stage premature to grant a final winding-up order. There is little doubt upon a proper reading of the judgment of Tuchten J that he was of the same view, albeit that he obviously did not know what the conclusions of a German Referee would be. Nevertheless, having regard to the report of Dr Tepper in its totality, there seems to be reasonable prospects of success in the context of the validity of the termination of the Co-operation Agreement on the one hand, and on the other hand, the claim for damages if that is properly pursued. In my view therefore, a final winding-up order would at this stage be premature.

[21] I also have a wide discretion in the context of the counter-claim, and I am of the view that, having regard to the basis upon which it was lodged, should not be granted, and in any event not at this stage. I do not believe that the provisions of s. 163 of the ***2008 Act*** can in law support the counter-claim, but it is not necessary to express a final view thereon now. On the facts of the case, reliance thereon is not justified. I agree with Applicant's Counsel that there can be no "oppressive conduct" by the Applicant when it has fully co-operated with the Intervening Parties' s. 165 process.

[22] The parties have engaged in their conflict on a commercial battle field of their own choosing. It is not necessary at this stage to decide which party holds the higher – and which party holds the lower ground, and whether this is of any importance at this stage in any event. There is in my opinion, no reason to grant the orders sought and a final winding-up order is premature on the present facts.

[23] During the hearing in December 2019, I invited the parties to make further written representations if they so wished on the topic of what the probable

factual results would be if I discharged the provisional winding-up order and refused the counter-application, or alternatively, made no order. Representations were received and considered. Counsel were ad idem that these proceedings should be finalized. I agree.

Accordingly the following order is made:

1. **The provisional winding-up order is discharged;**
2. **The counter-application is dismissed;**
3. **There is no order as to costs.**

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 71201/18

On behalf of the Applicant: Adv A. Kemack SC

Adv M. Nieuwoudt

Instructed by: WerthSchröder Inc

Counsel for the 1st Respondent &

Intervening Parties: Adv H. Fourie SC

Adv H. Struwig

Instructed by: Spellas Lengert Kubler Braun Inc

Dates of Hearing: 8 October 2019 & 11 December 2019

Date of Judgment: At 10h00 on 21 January 2020