IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No.: **AR384/2023**

High Court, Durban, Case No.: **D3962/2022**

In the matter between:

CAPABILITY BPO GLOBAL (PTY) LTD	First Appellant
CAPABILITY INVESTMENT GROUP (PTY) LTD	Second Appellant
MARK GEORGE ESSEY	Third Appellant
JUSTIN LAWRENCE FARRY	Fourth Appellant
JOHN GEORGE ESSEY	Fifth Appellant

and

FORE CONSULTING AND MANAGEMENT BV	First Respondent
TRANSFORMATION CONSULTING AND MANAGEMENT SERVICES BV	Second Respondent
SANDER SCHEPENS	Third Respondent

ORDER

On appeal from: the High Court of South Africa, KwaZulu-Natal Local Division, Durban (Hadebe J sitting as court of first instance):

1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel on scale C.

2. The orders of the High Court granted on 8 March 2023 are set aside, and replaced with the following:

(a) The application is referred to trial.

(b) The notice of motion shall serve as a simple summons.

(c) The applicants shall deliver their declaration in terms of Uniform Rule 20 within one month from the date of this order.

(d) Thereafter, the time periods as provided for in the Uniform Rules of Court shall apply to the further conduct of the matter.

(e) The costs of the application are reserved for the decision of the trial court.

JUDGMENT

Balton J et Harrison J (and Oliff AJ concurring)

Introduction

[1] This appeal concerns an application before Hadebe J in the court *a quo* which was ostensibly based on the provisions of ss 162 and 163 of the Companies Act 71 of 2008 (the Companies Act).

[2] On 8 March 2023, Hadebe J granted an order which included the following:

(a) declaring the third appellant ('Mark'), the fourth appellant ('Justin'), and the fifth appellant ('John') to be delinquent directors;

(b) declaring the first respondent ('FCMB') to be a shareholder holding 226 of 1 000 shares ('the shares') in the first appellant ('Capability');

(c) declaring FCMB to have earned the shares in terms of the Consultancy Services Agreement ('the Consultancy Agreement') concluded between the second respondent ('Transformation') and Capability;

(d) declaring the second appellant's ('Capability Investment') purported exercise of its option by notice dated 5 May 2020 to have been invalid;

(e) directing Capability to deliver the necessary share certificate to FCMB, refrain from altering its register, and reflect its name in its register;

(f) granting the sheriff the authority to give effect to the aforegoing should it not be performed by Capability;

(g) interdicting Capability, Capability Investment, Mark, Justin, and John from interfering with FCMB's rights;

(h) directing Capability to maintain its accounting records and give notice of shareholders meetings, and to allow FCMB to participate in shareholders meetings;

(i) appointing Eddie Moyce as a director of Capability;

(j) interdicting Capability, Capability Investment, Mark, Justin, and John from interfering with Moyce's rights and obligations as a director;

(k) declaring invalid and ineffectual Capability's purported cancellation of the Consultancy Agreement on or about 5 May 2020;

(l) directing Capability to comply with its obligations under the Consultancy Agreement and provide within 15 days after month end, copies of all relevant invoices, cost of income items, payment calculations, invoiced amounts, cash payments received, and a profit and loss review;

(m) in the event of the information not being provided, that the billing in respect of the Consultancy Agreement will be based on financial forecasted EBITDA (net profit);

(n) that Capability Investments, Mark, Justin, and John pay the costs of the application on an attorney-client scale.

[3] Leave to appeal was refused by the court *a quo* and leave was subsequently granted by the Supreme Court of Appeal on petition.

Facts

[4] The third respondent ('Schepens') introduced Mark to a Dutch company, Custom Connect International NL ('Custom Connect'), which provided business process outsourcing ('BPO') to companies such as Groupon.

[5] This then resulted in the Consultancy Agreement being concluded between Capability and Transformation on 15 September 2018.[1] Relevant portions of the agreement provide:

'**2 Introduction**

2.1 Capability requires the services of a consultant to provide the services listed in paragraph 3.1.

2.2 The Consultant, having examined and considered the scope of services, is able to and undertakes to render the services from time to time to Capability in accordance with Capability's requirements.

2.3 Capability accordingly hereby appoints the Consultant to provide services in terms of this agreement and the Consultant accepts the appointment.

2.4 Capability and the Consultant shall owe to each other a duty of good faith at al times. Their relationship shall be construed as that of quasi partners.

3 Duration of Agreement

This agreement commences on 1st of September with a duration of 6 years and is automatically renewed for same term unless Parties agree otherwise (only under mutual consent) and terminates when the Consultant ceases providing the services to Capability, or when Parties agree (only under mutual consent) to discontinue the partnership subject to both Capability and the Consultant's right to terminate this agreement prior to the termination date in accordance with the provisions of paragraph 7.9.

4 Consultant's Mandate

4.1 The Consultant will provide (on a case by case bases, meaning not all services for all projects involved) the following services to Capability –

. . .

5 Consultant's Fees

5.1 . . .

5.2 As consideration for the services in connection with this agreement, Capability shall pay (aside from the above in clause 5.1 mentioned optional fees) the Consultant a % of Revenue on each Project based on the following sliding scale: (Table omitted)

5.3 The Consultant will bill Capability for the fees in clauses 5.1 and 5.2 on a monthly basis, in arrears, and the amount billed will become due and payable by Capability within 15 days of receipt of the Revenue by Capability from its

[1] Pages 71 to 80 of the record.

clients. Capability will provide Consultant within 15 days after Month ending with an overview which holds all relevant invoices send to clients, payment calculations concerning these invoiced amounts, cost- and income items, cash-payments received from clients, and provides a clear Profit & Loss Overview including gross- and Nett-margins. If Capability cannot meet the 15 day reporting cycle, then billing will be done based on financial forecasted ebita (nett profit) for appliable periods, which will be corrected for actuals the following bill-cycle/month.

The Consultant will bill Capability in the currency that Capability bills the clients.

5.4 As additional compensation for the services to be rendered by the Consultant pursuant to this Agreement, Consultant will receive a stock option:

(1) to purchase up to 22.6% of the company's outstanding shares;

(2) at an exercise price of the par value (of a single (1) South African Rand in total) of the shares;

(3) vesting on the achievement of cumulative Revenue milestones based on the audited financial statements of the company (due no later than 4 months after the end of the Company's financial year, which is February); …'

The respondents' (the applicants in the court *a quo)* version

[6] The Consultancy Agreement provided that:

(a) Transformation would bill a fee equivalent to 3% of the total revenue generated by Capability;

(b) there would be an adjustment, up or down, depending on whether a base margin of 13% would be exceeded or not;

(c) the billing would be on a monthly basis;

(d) Capability would account to Transformation within 15 days of month end with an overview of all relevant invoices;

(e) in the event of Capability not meeting the 15-day reporting cycle, billing would be done on financially forecasted earnings before interest, tax depreciation, and amortisation (EBITDA); and

(f) Transformation be given a stock option to receive 22.6% of Capability's shares.

[7] After concluding the Consultancy Agreement, in December 2018 Schepens concluded a Shareholders Agreement with FCMB as the shareholder, and not Transformation. Thus, FCMB became the shareholder and Transformation a service provider and creditor for the payments of consultancy fees under the Consultancy Agreement.

[8] Pursuant to the conclusion of the Shareholders Agreement Capability appeared to establish a successful business and Schepens, on behalf of Transformation generated monthly invoices to Capability for consultancy fees for the period February 2019 to February 2020.

[9] Schepens contends that the last set of financial information received as at 28 February 2020, reflecting revenue of R56 499 822 and a net profit of R14 538 639 is set out in a screenshot, Annexure 'FA6'[2] to the founding affidavit. Schepens disputes the accuracy of these figures, but then states that:[3]

'Based on the figures in "**FA6**", in terms of the Consultancy Agreement as read with the Shareholders Agreement, FCMB, alternatively Transformation, had earned at least 166 shares (a shareholding of 16.6% in the Company).'

[10] Schepens set out various contracts with certain companies which he contended would entitle Transformation to bill for additional amounts, in terms of the Consultancy Agreement and the revenue for which, he contends, would exceed R74 million. He therefore concludes that FCMB, alternatively, Transformation would have attained the necessary threshold for the 22.6% shareholding in Capability. During December 2019, Mark and Justin informed Schepens that Transformation would not be receiving any fees on new deals or projects.

[11] Schepens contends that he was prejudiced at a directors meeting in January 2020, when an attorney attended the directors meeting and he was not advised thereof or given an opportunity to have an attorney present.

---

[2] Page 102 of the record.
[3] Founding affidavit para 58.

[12] Schepens details how he, FCMB and Transformation did not receive any financial information from Capability despite various requests to do so. He contends that because Mark, Justin, and John failed to give information this constituted unauthorised and unlawful conduct. Schepens thereafter details the non-payment of Transformation invoices from March 2020 onwards.

[13] As at the time of the hard lock down during Covid-19, the relationship between the parties had soured. Schepens describes the failure to communicate with him as being a breakdown of trust. Schepens then details the exercise of the call option by Capability Investments pursuant to clause 2 of the Shareholders Agreement, which was exercised during May 2020. That exercise of the call option sought to invoke the formula of the purchase price being limited to R226 for the par value of the shares. Simultaneously with the exercise of the call option, Capability purported also to cancel the Consultancy Agreement on the basis that Transformation had materially breached the agreement in that it failed and/or ceased to provide the envisaged services to Capability. In addition, Mark, Justin, and John sought to call upon Schepens to resign.

[14] Schepens sought the appointment of further/alternate directors to the board of Capability.

The appellants version (the respondents in the court *a quo*)

[15] In the answering affidavit, the appellants set out in detail the services which Transformation/FCMB were to supply and contend that the respondents failed to comply with the services specified in clause 4 of the Consultancy Agreement. They detail the failure by FCMB and Transformation to provide the services, contending that Capability is entitled to cancel the Consultancy Agreement, as well as to justify why no further fees were payable.

[16] They contend that the figures upon which Schepens relied were inaccurate, detailing why they were inaccurate and furnishing an explanation of same. Capability claimed that none of the other projects for which FCMB and

Transformation were claiming fees had come to fruition, thereby disentitling them to the so-called commission claims or the right to have earned the shares contended for by Schepens in the founding papers.

[17] The non-payment of the Transformation invoices is founded on the premise that services were not provided by FCMB and Transformation, therefore not entitling them to any further payments.

[18] The answering affidavit also sets in detail the reasons why the purported appointment of further directors to Capability was inappropriate particularly as the nominations for directors were persons who were direct competitors of Capability.

Issues

[19] The court *a quo* has set out the test for deciding applications where there are disputes of fact, detailing the *Plascon-Evans*[4] test and its interpretation. The court adopted a robust approach to deciding the matter on the papers, not only finding that there had been minority oppression, but the exclusion of Schepens from the management of the companies amounted to conduct which was oppressive behaviour warranting the removal of Mark, Justin, and John as directors under s 162 of the Companies Act.

[20] In light of our finding in this matter it is our view that the main issue is whether the court *a quo* ought to have referred the matter to trial in light of the disputes of fact.

The law

[21] Sections 162(5) and 163 of the Companies Act form the foundation of this case.

[22] An application under s 163 is required to be brought by a shareholder or a director. In this instance, it would be FCMB or Schepens. Transformation is

---

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

nothing more than a creditor and lacks any locus standi to bring itself under this section for relief. Schepens has deliberately conflated these entities in order to seek to suggest that Transformation is equally entitled to relief under this section. Transformation is not entitled to such relief.

[23] Section 163(1) of the Companies Act affords a director or a shareholder the right to approach the court for relief from oppressive or prejudicial conduct that unfairly disregards the interests of the applicants in the following three scenarios:

'*(a)* any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(*b*) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(*c*) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.'

[24] It is only once the abovementioned conduct is established that relief can then be sought under s 163(2). Section 163(2) grants a court a wide discretion to make any interim or final order it considers fit as set out in the section.

[25] It is noteworthy that s 163(2)*(l)* includes a referral to trial of any issue determined by the court. It is clear that the legislators contemplated that the procedure adopted in invoking s 163 would be by way of application and that, when faced with a dispute of fact, the court would have the option to refer specific matters to trial. The appellants have, as part of the relief sought in the appeal, sought for a referral to trial.

[26] Section 163(2)*(i)* of the Companies Act provides:

'an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;'

[27] The production of financial records as contemplated in paragraph 2.6 of the court order, specifically references the 30 and 45-day periods which are taken from the Shareholders Agreement. The wording of the court order is taken directly from the Shareholders Agreement and arises not out of any statutory obligation, but out of a contractual obligation. This type of situation was referred to by Wallis AJA in *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Another*[5] where at paragraphs 87 to 94, Wallis AJA identifies the types of cases where there are exclusions from the company as complained of by Schepens in this matter.[6] At paragraph 94 Wallis AJA states:

'…Where the parties have expressly addressed and provided for particular situations that may arise in the future, courts should be wary of holding that the implementation of what was agreed is unfairly prejudicial to a minority shareholder and, by overriding the agreement, confer rights on the minority shareholder that they agreed not to have.'

[28] The right of a member to financial information was recently examined in the matter of *Trustees for the Time Being of the Kromrivier Trust v Trustees for the Time Being of the Hartwig Family Trust and Others*.[7] Cloete J was faced with an application dealing with ss 31, 61, and 163 of the Companies Act, and similar to this case, was asked to make an order in terms of s 163 as well as order that the removal of a director be declared invalid. Cloete J specifically found that there were disputes of fact as regards the s 163 portion of the application. However, when being called upon to make a declaration under s 31(1)*(b)* relating to the right to receive annual financial statements, he pointed out that:[8]

---

[5] *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Another* [2024] ZASCA 29.

[6] Wallis AJA was dealing with s 252 of the Companies Act 61 of 1973. However, the examination of unfair prejudice was specifically handled in a manner where the applicability to s 163 was not only compared, but also clearly connected, the judgment referencing s 163 and making the comparative analysis.

[7] *Trustees for the Time Being of the Kromrivier Trust v Trustees for the Time Being of the Hartwig Family Trust and Others* [2025] ZAWCHC 19.

[8] Ibid para 35.

'…It remains open to the applicant to avail itself in due course of the mandatory provision in s 30(1) of the Companies Act, namely the obligation imposed on a company to prepare financial statements annually within six months of the end of each financial year.'

[29] From a conspectus of these cases, it is clear that a party must utilise the appropriate remedy and section in order to secure its rights. If the right being enforced is a right under a contractual arrangement, either the Shareholders Agreement or the Memorandum of Incorporation, then the shareholder must enforce such contractual right, subject to it not being enforced in an improper fashion. A director similarly must use the provisions of ss 26 and 30 of the Companies Act in order to secure financial information, and the securing of financial information under s 163 should only be resorted to where there is unfairly prejudicial conduct, or the other remedies have already been attempted or exhausted.

[30] It appears that the respondents brought the application under s 162(5) of the Companies Act. Section 162(5) was specifically examined in *Gihwala and Others v Grancy Property Ltd and Others*,[9] where Wallis JA held that:

'[142] In order to assess these arguments, it is appropriate first to examine the purpose of s 162(5). . . . it is not a penal provision. Its purpose is to protect the investing public, whether sophisticated or unsophisticated, against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against the misconduct of delinquent directors. What is that conduct? It is helpful to examine some of the other provisions of the section. Under ss 5*(a)* consenting to serve as a director, or acting in that capacity or in a prescribed office, while ineligible or disqualified from doing so, attracts delinquency. Under ss 5*(b)* acting as a director while under a probation order in terms of s 162, or the corresponding provision dealing with close corporations, results in delinquency as both orders are directed at preventing that very conduct.

[143] Turning to ss 5*(c)*, one starts with a person who grossly abuses the position of director, conduct of which I have found Mr Gihwala and Mr Manala guilty. We are not talking about a trivial misdemeanour or an unfortunate fall from grace. Only gross

[9] *Gihwala and Others v Grancy Property Limited and Others* 2017 (2) SA 337 (SCA).

abuses of the position of director qualify. Next is taking personal advantage of information or opportunity available because of the person's position as a director. This hits two types of conduct. The first, in one of its common forms, is insider trading, whereby a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others. The second is where a director appropriates a business opportunity that should have accrued to the company. Our law has deprecated that for over a century. The third case is where the director has intentionally or by gross negligence inflicted harm upon the company or its subsidiary. The fourth is where the director has been guilty of gross negligence, wilful misconduct or breach of trust in relation to the performance of the functions of director or acted in breach of s 77(3)*(a) – (c)*. . . .

[144] All of these involve serious misconduct on the part of a director. In the affidavits raising the constitutional issue there was a complaint that gross negligence could trigger a delinquency order. There is no merit in this complaint. There is a long history of courts treating gross negligence as the equivalent of recklessness, when dealing with the conduct of those responsible for the administration of companies, and recklessness is plainly serious misconduct. It was urged upon us that there might be circumstances of extenuation, or perhaps that, notwithstanding the seriousness of the conduct, the company might not have suffered any loss. But neither of those is relevant to the protective purpose of the section. Its aim is to ensure that those who invest in companies, big or small, are protected against directors who engage in serious misconduct of the type described in these sections. That is conduct that breaches the bond of trust that shareholders have in the people they appoint to the board of directors. Directors who show themselves unworthy of that trust are declared delinquent and excluded from the office of director. It protects those who deal with companies by seeking to ensure that the management of those companies is in fit hands. And it is required in the public interest that those who enjoy the benefits of incorporation and limited liability should not abuse their position. . . . '[Footnotes omitted].

[31] *Gihwala* was considered in *Lewis Group Ltd v Woollam and Others*[10] where Binns-Ward J commented on the import of s 162(5) as follows:

'[14] Treating of subpara (i) thereof, Wallis JA remarked that a gross abuse of the position of director did not involve "a trivial misdemeanour or an unfortunate fall from grace". Indeed, the adjective "gross" used in a context like "gross abuse" denotes

---

[10] *Lewis Group Ltd v Woollam and Others* 2017 (2) SA 547 (WCC).

obvious and egregious conduct. The conduct in question must relate to the use of *the position* as director, it does not relate to the performance by the person concerned of his or her duties and functions as a director because that is a matter dealt with discretely in terms of subpara (iv). Subparagraph (i) does not appear to be applicable in respect of Woollam's complaints.

. . .

[18] It follows that for a company or any of its shareholders to succeed in obtaining a declaration of delinquency in respect of any of the company's directors or former directors they must demonstrate very serious misconduct by the person concerned. The relevant causes of delinquency entail either dishonesty, wilful misconduct or gross negligence. Establishing so-called "ordinary" negligence, poor business decision-making, or misguided reliance by a director on incorrect professional advice will not be enough.' (Footnote omitted.)

[32] The declaration of delinquency of a company's director involves an element of *mala fides* to the point that the conduct is required to be unlawful. It is insufficient to have a mere recitation of the wording of the section of the Companies Act to describe a director's conduct as being delinquent. This is a conclusion which must be substantiated by facts.

[33] In order for a court to conclude that there has been such malfeasance by a director, requires not just the allegation, but reference to the specifics, and the actual conduct of the director complained about. The mere breakdown of the relationship between parties is not sufficient for a declaration of delinquency.[11] The conduct complained of must be as against the company as a whole and be to the detriment of the company or unlawful as regards its conduct towards the members, but the harm cannot be based on an individual's sensibilities being offended or his/her mere exclusion from the company. Mere dissatisfaction with another party is not sufficient to found a basis for a declaration of delinquency.[12]

---

[11] *McMillan NO v Pott and Others* 2011 (1) SA 155 (WCC) para 34.

[12] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) paras 55-57.

[34] Courts, when being called upon to make declarations of delinquency, are being called upon to adjudicate serious misconduct. Whilst s 162 specifically references that the parties may apply to court, the nature and extent of making the findings which are required to declare delinquency, are best determined by trial or the hearing of oral evidence.

[35] This is not to say that in circumstances where the misconduct is of such an egregious nature that it is patently obvious from the papers that the relief can be sought, but in circumstances where it is disputed, the rejection of the version put up by the impugned director should not be dealt with by way of application.

Analysis

[36] There appears to be inherent contradiction in Schepens version namely:

(a) Schepens contends that Capability is doing better than that which was suggested in annexure 'FA6';

(b) he makes these allegations in order to claim an entitlement to 22.6% of the shares;

(c) on his version, Capability is doing well and was running at a profit;

(d) he claims that the directors, Mark, Justin, and John, are delinquent for acting unlawfully;

(e) this claim is based on a failure to account and pay Transformation the monthly consultancy fees claimed for by Transformation (bearing in mind that Transformation is neither the director nor the shareholder, but merely a creditor);

(f) the failure to pay the claimed consultancy fees is on the basis that the directors are acting in a fashion which is not in the interest of Capability;

(g) in order to claim the right to the shareholding, Schepens is claiming that Capability is doing well and making a profit, yet in the same breath, he is seeking to say that the directors are delinquent because they are acting with gross negligence to the detriment of the company.

[37] The failure to pay the consultancy fees does not give rise to the conclusion that there is maladministration and/or malfeasance in Capability. The failure to pay the consultancy fees is to the detriment of Transformation. It may be "unfair" that Transformation is not paid a consultancy fee but Transformation is only a creditor and it cannot invoke s 163 of the Companies Act.

[38] Schepens' complaint in the founding affidavit is Capability's failure to pay the monthly consultancy fee, his exclusion from Capability, and that Capability chose not to pay further consultancy fees going forward. In our view Schepens has mistakenly conflated Transformation's rights to receive payment *qua* creditor with his personal right as director, or as the controlling mind of the shareholder, FCMB.

[39] The declaration of delinquency is based on allegations contained in paragraphs 177 to 179 of the founding papers which are, for the most part, a mere recitation of the wording of the Companies Act without linking how it applies to the previous allegations relating to the conduct complained of in the papers. Reduced to the bare bones, Schepens' allegation of unlawful conduct is that there was a failure to pay Transformation. Transformation lacks the necessary *locus standi* to bring such a declaration and, as is set out above, Schepens may have conflated his position as director with his position as the sole director of the creditor, Transformation.

[40] Schepens engaged in a so-called financial analysis, comparing annexure 'FA6', being the figures which he contended were inaccurate as at 28 February 2020, with certain figures provided by Capability's attorneys to engage in what can only best be described as a justification for the contention that FCMB and Transformation have *'earned'* the 22.6% shareholding despite there being no annual financial statements put up as part of the papers. Further, Schepens qualifications to engage in such analysis is never disclosed nor is any basis laid as to how this analysis supersedes the contractual requirement that the annual financial statements be used for the earning of the shares.

[41] In seeking to emphasise the services for which the monthly management fee was to be charged, Capability has demonstrated that both parties appear to have approached the monthly fee from a completely different perspective. Capability approached the fee as only being earned if the services as provide for in clause 4 of the Consultancy Agreement were to be provided, whereas FCMB and Transformation viewed it as a payment for revenues generated and more akin to a royalty fee and a payment for work already brought into Capability.

[42] The failure to pay Transformation, whilst prejudicial to Transformation, is not prejudicial to FCMB. If the consultancy fee was not paid, then the retained earnings of Capability is increased and this benefits FCMB as regards the right to claim the shareholding and any dividend which may accrue thereunder. What is prejudicial to Transformation is not prejudicial to FCMB. The failure to pay Transformation will increase earnings and increase FCMB's claim to having earned the shares.

[43] The declarations that FCMB is the shareholder of 226 of the 1 000 shares, and that the shares had been earned, together with the other relief in paragraphs 2.1 to 2.6 of the court order, is problematic as the very agreements which entitles FCMB to make claims to that shareholding and its right to have earned same, requires the production of the annual financial statements. Clause 5.4.3 of the Consultancy Agreement clearly sets out that the vesting of the achievement on cumulative revenue milestones is based on audited financial statements.

[44] Absent the audited financial statements, the court *a quo* was not in a position to make the declaration as regards the shares having been earned.

[45] Whilst Schepens may have complained as to his exclusion from Capability, his relief was not to seek such a declaration under s 163 of the Companies Act, but rather to enforce his rights under ss 26 and 30 of the Act. It

is only after those audited financial statements have been produced, that there can be any such declaration regarding the shares.

[46] The appointment of Moyce as a director of Capability in paragraphs 2.7 and 2.8 of the court order is predicated on the basis of there being misconduct and malfeasance by the directors, as well as the failure to pay the monthly consultancy fee. The failure to pay a creditor is not a basis for appointing Moyce and as regards the participation in Capability, it is unnecessary to appoint Moyce in circumstances where Schepens could and should have exercised his director's rights in accordance with s 73 of the Companies Act. Schepens being out of the country, was not a bar to him attending directors' meetings as s 73 of the Act specifically provides for board meetings to be conducted by electronic communication. Schepens dissatisfaction with the manner in which he was being reported to, does not justify declarations of unfairly prejudicial conduct. Such declarations should be sought as a last resort. Schepens had other remedies and could and should have used them before resorting to ss 162 and 163 of the Act.

[47] The purported cancellation of the Consultancy Agreement is an issue which is clearly disputed and whether or not Transformation was providing the services, is a question of fact. The entitlement to the cancellation was not an issue which could be decided on the papers, and ought to have been referred to oral evidence.

[48] The accounting procedure, as contemplated in paragraph 2.10 of the court order, is deficient in that the entity which is entitled to claim the production of accounts is FCMB, yet the payments under the Consultancy Agreement is in favour of Transformation. Transformation did not have the right to make such a claim under the Shareholders Agreement; those were exclusively in favour of FCMB. Accordingly, the order for the adherence to the Consultancy Agreement is based on a conflation of the rights of a shareholder with the claims for payment by a creditor.

[49] The original application before the court *a quo* included a counter-application relating to the removal of Schepens as a director and is predicated upon an interpretation of whether the milestones had been met, and whether the call option could be exercised by Capability Investment Inherent in the exercise of the call option, is that the call option under the Shareholders Agreement references the Consultancy Agreement and as has been highlighted above, the Consultancy Agreement and the entitlement to 22.6% of the shares is based on audited annual financial statements. Accordingly, it was incumbent upon Capability Investment as well as Mark, Justin, and John, to put up the audited financial statements in order to justify their contention that they had validly exercised the call option, and they too failed to put those annual financial statements.

[50] What appears to have been overlooked, both in the founding papers and in the judgment of the court *a quo*, is that in order to exercise the stock option, the parties required that the annual financial statements must be used to determine whether the milestone figures have been reached as per the Consultancy Agreement. Further, when it came to the call option to Capability Investment to purchase the FCMB shares, such was to be determined according to the annual financial statements. It is apposite at this time to note that neither FCMB/Transformation/Schepens nor Capability Investments, Mark, Justin or John, at any stage, sought to put up the annual financial statements, yet both camps sought to invoke the provisions of the Consultancy and Shareholders Agreements, relying on clauses which require figures contained in the annual financial statements for their implementation.

[51] Consequently, in our view, the court *a quo* erred in not referring the matter to trial in light of the disputes of fact on the papers.

Order

[52] In the circumstances, the following order is issued:

1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel on scale C.
2. The orders of the High Court granted on 8 March 2023 are set aside, and replaced with the following:

(a) The application is referred to trial.
(b) The notice of motion shall serve as a simple summons.
(c) The applicants shall deliver their declaration in terms of Uniform Rule 20 within one month from the date of this order.
(d) Thereafter, the time periods as provided for in the Uniform Rules of Court shall apply to the further conduct of the matter.
(e) The costs of the application are reserved for the decision of the trial court.

____

Balton J

____

Harrison J

I agree

____

Oliff AJ

Case information

Date of hearing:
Date of judgment:

Appearances

For the appellants:
Instructed by:
Address:

Ref:
Tel:
Email:

For the respondents:
Instructed by:

Email:
And too:

Date reserved:

Date of delivery: