IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No: 56/2019

In the appeal between:

DR. BUTARE RUKUNDO	FIRST APPELLANT
SIYANAKA ACUTE CARE HOSPITAL (PTY) LTD	SECOND APPELLANT

And

BUSISIWE NANDI FUPHE N.O	FIRST RESPONDENT
NATASHA SIPHIWE TSHABALALA N.O	SECOND RESPONDENT

Neutral citation: *Dr. Butare Rukundo & Another vs Busisiwe Nandi Fuphe N.O & Others (56/2019) [2020] SZHC 10 (2020)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**

JUSTICE DR. B. J. ODOKI, JA

JUSTICE S. P. DLAMINI, JA

Heard : 26th March, 2020

Delivered : 19th May, 2020

SUMMARY

Civil appeal – Article 64 of the Memorandum and Articles of Association of the second appellant provides for the appointment and removal of Directors by Shareholders in a general meeting by ordinary resolution – two years after the death of one of the two Shareholders, the first appellant as the remaining Shareholder unilaterally dissolved the Board of Directors and usurp the control and management of the Company to the exclusion of the respondents as Shareholder Representatives of the Estate with a 50% shares – consequently the respondents requisitioned for a general meeting in terms of section 158 of the Companies Act and appointed themselves as Director and alternate Director of the company respectively in the absence of the first appellant who was notified but failed to attend the meeting;

The respondents challenged the first appellant in the *court a quo* for the unilateral dissolution of the Board and the usurpation of control and management of the company– respondents further sought an order declaring the legitimacy and lawfulness of the requisitioned meeting – the respondents also sought an order compelling the first appellant to

provide them with the audited financial statements – *court a quo* granted the orders sought in the notice of motion;

On appeal to this Court it was held that the provision of Article 64 is evidence that the 50% equal shareholding of the company was intended for the exercise of equal control on the governance and management of the joint venture company;

Held further that Article 64 was a constraint directed at maintaining a power equilibrium and for preventing either Shareholder from exercising unilateral control over the management of the joint venture company;

Held further that it is a fundamental principle of the law that no one is allowed to improve his own condition by his own wrongdoing;

Held further that the first appellant cannot unilaterally dissolve the Board and take over the control and management of the company on the pretext that he had not registered the respondents as Shareholder

Representatives pending their participation in the management of the affairs of the company;

Held further that the respondents as Shareholder Representatives of the Estate with a 50% shares in the company were entitled not only to the equal control and management of the company but to the Shareholder payments, an audited financial Statements as well as the costs of the requisitioned general meeting;

Accordingly, the appeal is dismissed with costs.

JUDGMENT

M. C. B. MAPHALALA CJ:

[1] This is an appeal against the judgment of the *court a quo* delivered on the 11th September, 2019 in favour of the respondents. The respondents had instituted legal proceedings against the appellants on the 4th July 2017, and, the cause of action appears from the order granted by the *court a quo*.

[2] The *court a quo* granted judgment in favour of the respondents for the following relief: Firstly, that the appointment of the first respondent as Director of the second appellant and of the second respondent as the alternate Director of the second appellant by the requisitioned General meeting of the 24th September 2015, confirmed. Secondly, that the Estate of the late Thembeka Ruth Tshabalala, Master's reference No. EH 65/2013, as the holder of the shares in the second appellant, is entitled to equal control of the management of the second appellant including the right to appoint an equal number of Directors into the second appellant's Board. Thirdly, that the respondents as Shareholder Representatives of the Estate of the late Dr. Tshabalala are entitled to participate equally in the management of the affairs of the second appellant. Fourthly, that the respondents are hereby empowered to appoint a Forensic Auditor to conduct a forensic investigation, examine the second appellant's books of accounts, financial statements and management affairs of the second appellant for the period covering the financial period 2013, 2014, 2015, 2016 and 2017. Fifth, that the first appellant is hereby directed to facilitate the delivery to the respondents or the Forensic Auditor of all management, accounting records and information of the second

appellant as may be requested by the respondents for purposes of conducting the forensic investigation, examining the books of accounts and the financial and management affairs of the second appellant.

[3] The sixth order made by the *court a quo* was that the second appellant and its employees are directed to deliver and facilitate the delivery to the respondents or Forensic Auditor of all management accounting records and information of the second appellant as may be requested by the respondents or the Forensic Auditor for purposes of conducting the forensic investigation, examining the books of accounts and the financial and management affairs of the second appellant. Seventh, that the appellants are directed to co-operate with the respondents and the Forensic Auditor and to grant them full access to all records, information and documents as may be required whilst conducting the forensic investigation examining the books of accounts and the financial and management of the second appellant.

[4] The eighth order made by the *court a quo* is that the appellants are directed to pay to the Estate of the late Dr. Ruth Tshabalala within ten

(10) days from the date of the order, the Shareholder Payments discontinued by the first appellant, such payments to be with effect from August 2015 to-date and to continue the payments for as long as the Shareholder Agreement still subsists. Ninth, directing the first appellant to pay the costs of the Requisitioned General Meeting held on the 24th September 2015. Lastly, that the appellants are directed to pay costs of the application on the ordinary scale.

[5] The appellants have appealed the whole judgment of the *court a quo* on the following grounds: Firstly, that the *court a quo* failed to uphold the appellants' point of law that the respondents lack *locus standi* to obtain the relief sought but instead declared that the respondents who are co-executors of the deceased Estate and Shareholder Representatives of the Estate are entitled to participate equally in the affairs of the second appellant. Secondly, that the *court a quo* failed to uphold the appellants' point of law that the respondents lack *locus standi* as directors to seek and obtain the relief sought but instead holding that the respondents' appointments as directors by a Requisitioned General Meeting of the 24th September 2015 are to be confirmed as valid.

[6] The third ground of appeal is that the *court a quo* was wrong in holding that the deceased estate as holder of 50% of the shares is entitled to equal control and the management of the second appellant including the right to appoint directors. Fourthly, that the *court a quo* committed an error of law by holding that the respondents are entitled to a forensic audit on the operations of the second appellant. Fifthly, that the *court a quo* erred in holding that the appellants are liable to pay the deceased estate the shareholder amounts of E65, 000.00 (Sixty-five Thousand Emalangeni) per month effective August 2015 pending the subsistence of the Shareholder Agreement.

[7] The sixth ground of appeal is that the *court a quo* was wrong in holding that the appellants should pay the costs of the Requisitioned General Meeting when the respondents did not have the right to requisition or convene a general meeting and receive payment. Lastly, that the *court a quo* was wrong in failing to grant the counter-application for the registration by the Registrar of Companies of the respondents as directors of the second appellant to be declared null and void *ab initio.*

[8] It is common cause that the second appellant was established by the deceased Dr. Ruth Tshabalala together with the first appellant as a joint enterprise company with each Shareholder having 50% shares. The object of the company was to operate a hospital specialising on women and children. The company was incorporated on the 21st May, 2008. The hospital commenced operations on the 1st November 2011. It is not disputed that prior to the establishment of the company the deceased was a General Medical Practitioner practising on her own account under the name and style **"Siyanaka We Care Health Centre"** and the first appellant was a Paediatrician practising on his own account under the name and style **"Children's Clinic".**

[9] There is no dispute that the deceased's contribution to the business venture was a vacant piece of land, being Portion 7 of ERF No. 369 situate at Kelly Street Manzini measuring 2885 square metres. The hospital business was built on this vacant piece of land and the funds for the construction were sourced from the Swaziland Industrial Development Company Limited which mortgaged the piece of land for E8 000 000.00 (Eight Million Emalangeni). There is no evidence of a capital contribution made by the first appellant during and after

the incorporation of the second appellant. In addition there is correspondence in the record of proceedings being annexures **"NF1", "NF2"** and **"NF3"** in which Attorneys of the deceased were instructed by the deceased to demand a capital contribution from the first appellant towards his shareholding in the company. The first appellant alleges that he made certain payments in respect of the hospital expenses; however, when he was called upon to produce receipts of the payments, he was unable to do so.

[10] It is common cause that the respondents are the biological children of the deceased. During the lifetime of the deceased, the first respondent was appointed a director of the second appellant together with other directors to manage the affairs of the company. The deceased died in March 2013. The respondents were subsequently appointed by the Master of the High Court as Joint Executrixes of her estate in terms of Letters of Administration marked as annexure **"NF4"** in the application proceedings before the *court a quo*. By virtue of the appointment the respondents became Joint Shareholder Representatives of the second appellant representing the deceased estate with 50% interest in the joint venture.

[11] It is not in dispute that during the lifetime of the deceased, the Shareholders had agreed to receive Shareholder Payments of E65 000.00 (Sixty-five Thousand Emalangeni) per month in lieu of the company declaring dividends pending the full payment of the loans taken by the second appellant. After the death of the deceased the second appellant continued payment of Shareholder Payments to the respondents in respect of the estate of the deceased.

[12] When the deceased died she left behind the Board of Directors which was managing the affairs of the company. The first respondent was a member of the Board of Directors. However, in February 2015 the first appellant unilaterally dissolved the Board of Directors and usurped the control and management of the company.

[13] It is common cause that the business of the second appellant should be managed by the Board of Directors appointed by the Shareholders in a general meeting. Similarly, it is the shareholders in a general meeting who have the power to dissolve the Board of Directors and appoint a

new Board. In view of the death of the deceased it is the first appellant and the Shareholder Representatives who can perform this function.

[14] The Articles of Association of the second appellant provide the following:-[1]

> **"64. There shall not be less than two or more than fifty directors of the company; and, the company may from time to time in general meetings increase or reduce the number of directors and may by ordinary resolution remove any director from his appointment. Any vacancy or vacancies howsoever created may be filled by the appointment of another director or other directors by the shareholders of the company.**
>
> **65. The first directors of the company shall be:-**
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> | | |
> |---|---|
> | **Dr. Thembeka R. Shabalala** | Businesswoman |
> | **Dr. Butare Rukundo** | Businessman |

[1] Articles 64, 65, 67 and 70

. . . .

67. No person shall be required to hold any share to qualify him for the office of a Director.

. . . .

70. The business of the company shall be managed by the directors who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company, as are not by the proclamation, or any amendment thereof for the time being in force, or by these articles, required to be exercised by the Company in general meeting, subject nevertheless to any of these regulations, to the provisions of the said laws, and to such regulations being not inconsistent with the aforesaid meeting, but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulations had not been made . . . .”

[15] Subsequent to the unilateral dissolution of the Board the first appellant took sole and exclusive control of the management of the affairs of the second appellant and excluded the Shareholder Representatives of the Estate from the control and management of the company. Furthermore, the first appellant stopped Shareholder Payments to the Estate in August 2015 contrary to the Shareholder Agreement that Shareholder Payments shall be made in lieu of declaring dividends pending payment of the loan accounts. Similarly, the first appellant did not account or furnish audited Financial Statements to the respondents as 50% Shareholder Representatives of the Estate. The Estate as the holder of the 50% shares has the equal right to the control and management of the affairs of the company.

[16] In accordance with her will Dr. Tshabalala bequeathed her 50% shares in the second appellant company to the respondents. She further appointed the respondents as Joint Executrixes and Administrators of her Estate. The respondents were appointed to be heiresses in equal shares in the Estate. The respondents by virtue of their shareholding and in terms of articles of association are entitled to exercise joint control of the company.

[17] The Articles of Association of the second appellant in this regard provide the following:-[2]

> **"27. The executor in the Estate of a deceased sole holder of a share shall be the only person recognized by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivor or survivors, or the executor of deceased's survivor shall be the only person recognized by the company as having title to the share.**
>
> **28. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right either to be registered as a member in respect of the share or instead of being registered, to make such transfer of the share as the deceased or**

[2] Articles 27, 28 and 30

insolvent could have made; but the directors shall, in either case, have the same right to decline or suspend, registration as they would have in the case of the transfer of the share by the deceased or insolvent before the death or insolvency but nothing herein contained shall release the Estate of a deceased joint shareholder from any liability in respect of shares jointly held by him.

. . . .

30. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, being entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company."

[18] The Articles of Association of a company govern the relationship between the company, its Shareholders and Directors; they constitute their contractual rights and obligations. Article 64 provides for the procedure for the appointment and removal of Directors. Article 70 provides that the management of the second appellant vests with the Board of Directors. Accordingly, the unilateral dissolution of the Board of Directors by the first appellant was in contravention of the Articles of Association. Similarly, the unilateral take-over of the management of the company was contrary to the Articles of Association.

[19] The appointment of Directors by Shareholders as required by the Articles of Association of the second appellant is a key mechanism directed at ensuring joint control over the company by its two 50% Shareholders. Undoubtedly this mechanism serves as a constraint directed at maintaining a power equilibrium and prevents either Shareholder from exercising unilateral control and management of the joint venture company.

[20] In **Paul Friedlander and Seven Others v. Swaziland Industrial Development Corporation**[3]**,** the fourth appellant Kirsh Holdings Limited and the respondent Swaziland Industrial Development Corporation (SIDC) held 50% each in the fifth appellant, Swazi Plaza. A resolution of the Board of Directors of Swazi Plaza Properties (Pty) Ltd sought to bind SIDC as a Shareholder to a E108 000 000.00 (One Hundred and Eight Million Emalangeni) development known as Corporate Place. The validity of the resolution was challenged and an interdict sought. The High Court upheld the challenge and granted the interdict sought. On appeal to this Court it was held that the Articles of Asociation provided for constraints on any one shareholder exercising majority control on the Board of Directors and thus over Swazi Plaza. The Court further held that an attempt to avoid such constraints by an artificially created majority on the Board of Directors was unlawful and in breach of the contract between the parties in terms of the Articles of Association. The Court dismissed the appeal.

[3] Supreme Court of ESwatini Civil Appeal Case No. 35/2006

[21] In the **Paul Frielander**[4] matter, the real issue was whether the resolution of the Board of Directors of Swazi Plaza dated 22nd February 2006 authorizing the company to conclude an agreement for the construction of "Corporate Place" at a cost of E108 000 000.00 (One Hundred and Eight Million Emalangeni) was valid and enforceable. Article 65 required Directors of the company to be appointed by Shareholders in a general meeting. Kirsh Holdings appointed a fifth Director representing itself and giving it a majority on the Board of Directors of Swazi Plaza at the meeting of 22nd February 2006. Steyn JA who delivered a majority judgment had this to say:[5]

> **"8. As pointed out above the Articles of Association of this company contained another constraint directed at maintaining a power equilibrium. This was that directors to its board could only be appointed in a general meeting of the Shareholders (Article 65).**

[4] Supra footnote 3

[5] Para 8, 15.3 and 19

. . . this sanction is a prescription directed at preventing either party from exercising unilateral control over the decision-making processes of the company on any major or policy issue which is the legitimate territory of its Board of Directors. Therefore, whilst Kirsh Holdings Limited had responsibility for management for which they were remunerated the whole ethos of the joint venture in Swazi Plaza was that an equilibrium of control had to be maintained and that neither party was authorised to embark upon a course of action that was iminical to the other. It follows that major decisions could only be taken by consensus.

. . . .

15.3 It is manifestly inequitable that the joint venture partner who holds 50% of the shares in the company, is by virtue of an artificially created majority on the Board purportedly committed to a E108 000 000.00

(One Hundred and Eight Million Emalangeni) project of which it clearly did not approve and of which it was clear that they wanted no part, particularly if it was at the cost proposed by management, i.e. E108 000 000.00 (One Hundred and Eight Million Emalangeni).

. . . .

19. . . . . In this regard it is clear that the Articles of Association of a company have the same force and effect as a contract between the company and each and every member as such, to observe their provisions . . . . The provisions concerning the process through which a director is to be appointed; i.e. only in a general meeting, must therefore be meticulously observed and its constraints cannot be avoided otherwise than with the explicit agreement of the other members . . . . It follows, bearing in mind that this constraint was directed at the maintenance of a power equilibrium on the Board of

Directors that no appointment which disturbs that equilibrium can be made without, in casu, the SIDC deliberately and knowingly consenting thereto. It could never be suggested that it had done so."

[22] In the Paul Frielander's case[6] the additional Director was nominated by Kirsh Holdings and the Chairperson of the Board advised Directors representing SIDC that they could appoint their additional director if they so wish. His Lordship Justice Steyn said:

> **"5. . . . . This offer, even though it was not immediately taken up, is evidence of an acceptance of an underlying assumption shared by the parties; i.e. that by virtue of their equal shareholding the governance of the company would be based on the principle of equality or joint control and that no 'partner' would be empowered to force decisions on the other with which it did not agree. The fact that the shareholders had to appoint the directors as**

[6] supra para 5 of the judgment

provided in Article 65 was a key mechanism directed at ensuring joint control over the company by its two 50% shareholders."

[23] In the present appeal the provision of Article 64 relating to the appointment of Directors by Shareholders at a general meeting is evidence of an underlying assumption shared by the parties that by virtue of the equal shareholding the governance of the joint venture company would be based on the principle of equality or joint control. Accordingly, no 50% Shareholder is entitled to usurp control of the company and exclude the other 50% Shareholder from the management of the affairs of the joint venture company. Article 64 presents a key mechanism directed at ensuring joint control over the company by its two shareholders; it is a constraint directed at maintaining a power equilibrium and prevents either Shareholder from exercising unilateral control over the decision-making process of the joint venture company.

[24] It is apparent from the aforegoing that the first appellant was not entitled to ignore Article 64 and usurp control of the joint venture

company and exclude the respondents in their capacity as Shareholder Representatives of the Estate as a 50% shareholder from exercising its rights to appoint an equal number of directors in the Board to manage the affairs of the company. The right to appoint Directors forms the mechanism through which each of the Shareholders is able to participate in the management of the affairs of the joint venture company.

[25] During the lifetime of the deceased and before the first appellant unilaterally dissolved the Board and usurped the sole control of the company, both shareholders were involved in the management of the affairs of the company through the Board of Directors; they attended the annual general meetings and discussed the affairs of the company including financial statements. The respondents by virtue of their shareholding and in terms of the Articles of Association have an inalienable right to exercise joint control of the company with the first appellant. The respondents exercised this basic right until the first appellant unilaterally dissolved the Board of Directors and assumed control of the company. Needless to say that the respondents have suffered irreparable harm by the conduct of the first appellant. Not

only has the first appellant deprived the respondents of the joint control of the company but the first appellant unilaterally terminated their Shareholder payments.

[26] It is common cause that the company has not held an annual general meeting since the first appellant unilaterally took over the control of the company contrary to the provisions of the Companies Act[7]**.** According to the Act the general meeting of a company should be held annually to deal with matters prescribed in the Act including financial statements and appointment of directors as well as other incidental matters provided in the Articles of Association.[8] The Act also deals with the calling of general meetings on requisition by members,[9] and provides the following:-

> "**158. (1) The directors of a company shall notwithstanding anything in its Articles, on the requisition of members holding at the date of**

[7] Section 155 Act No. 8 of 2009

[8] Section 155(3) Companies Act

[9] Section 158

lodging of the requisition not less than one tenth of such of the capital of the company as at the date of the lodgement carries the right of voting at general meetings of the company, within fourteen (14) days of the lodging of the requisition issue a notice to members convening a general meeting of the company for a date not less than twenty-one (21) and not more than thirty-five (35) days from the date of the notice.

(2) The requisition shall state the objects of the meeting and shall be signed by the requisitionists and lodged at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not within fourteen (14) days from the date of the lodging of the requisition issue a notice as required by subsection (1), the

requisitionists representing more than one-half of the total voting rights of all of them, may themselves on twenty-one (21) days' notice convene a meeting, stating the objects thereof, but no meeting so convened shall be held after the expiry of ninety (90) days from such date.

(4) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by the directors of the company concerned.

(5) Any reasonable expense incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other

renumeration in respect of their services to such of the directors as were knowingly party to the default."

[27] Various attempts were made by the respondents to have the first appellant call a general meeting but he refused until they requisitioned the general meeting in accordance with section 158 of the Act. The respondents as Share Representatives of the Estate had the right to requisition the meeting in the circumstances. Furthermore, the first appellant had no right to refuse to convene the annual general meeting when so requested or refuse to register the respondents as Shareholder Representatives of the Estate particularly because the respondents were Joint Executrixes and heiresses of the deceased Estate. Accordingly, the respondents have the right to represent the 50% shares of the Estate in the company. It is not in dispute that the refusal by the first appellant to register the respondents was intended for the unilateral takeover of the company. It is well-settled in this jurisdiction that a person is not allowed to improve his own position from his own wrongdoing. Furthermore, it is not disputed that after the demise of Dr. Tshabalala in March 2013 the respondents as Shareholder

Representatives participated in the joint control and management of the company until the first appellant unilaterally took control of the company in August 2015.

[28] His Lordship Justice Banda CJ in Swaziland Electricity Board and Another V. Malesela Technical Services and Two Others[10] had this to say:

> **"40. The agreement does not provide for this and the second respondent once again misled the Board of the first applicant. It is the applicants' submission that it is clear that the second respondent manipulated the bidding process, misled the Board and colluded with the first respondent to ensure that the first respondent was appointed. There can be no doubt, in my judgment, that the conduct of the second respondent constituted a fraud on the first applicants. It is clear, in my view that the first respondent should not be allowed to benefit from this**

[10] High Court Civil Case No. 1183/2005 at Para 40

fraudulent conduct. It is a fundamental principle of our law that no one should be allowed to improve his own position from his own wrongdoing."

[29] Schuttz JA in Wimbledon Lodge (Pty) Ltd v. Gore N.O and Others[11] had this to say:

> **" . . . . I am content to start with the Roman law. In DSO.17.134.1 Ulpian tells us *'nemo ex suo delicto meliorem suam conditionem facere potest',* rendered in Watson's translation as: *'No one is allowed to improve his own condition by his own wrongdoing.'***

[30] It is apparent from the evidence that after the death of Dr. Tshabalala there was unanimous assent of the first appellant as a Shareholder and the respondents as Shareholder Representatives that the respondents would act as representatives of the Estate. The

[11] (2003) 5 SA 315 at 321 Para 10, 11 and 12

respondents in their replying affidavit supports this legal principle of unanimous assent.[12]

[31] The first appellant did not file a further affidavit disputing the applicability of the principle of unanimous assent in this matter.

> **"31. The first respondent alleges that we have not been entered into the register of shareholders of the hospital and as such cannot requisition a meeting in terms of section 158 of the Companies Act.**
>
> **32. The first respondent has dealt with us as both shareholders representing the Estate and directors appointed to represent the Estate. The first respondent did a volte face after we questioned the unilateral decisions he was taking in the management of the affairs of the company and the marginalisation of the Estate as 50% shareholder in the joint venture company.**

[12] Para 31 – 40 respondents' replying affidavit in the *court a quo*

33. The fact of the matter is that there was unanimous assent between the shareholders that applicants as the Estate's Shareholder Representatives would act as such and be entitled to exercise any right conferred by membership in relation to meetings of the company. The applicants in their capacity as Shareholder Representatives attended shareholder meetings in which shareholder issues were discussed.

34. More importantly, the applicants participated in the management of the affairs of the company as shareholders and directors. This only changed when the first respondent usurped control of the company. As part of the usurpation of control the first respondent caused the second respondent to institute the proceedings under Case No. 433/2016 for an order directing that my appointment as director in terms of section 158 of the Companies Act was irregular and null and void. In this application the second respondent also sought a consequential order

to set aside the register of directors and documents lodged with the Registrar of Companies. The orders are set out in the application which is part of exhibit "A".

35. The first respondent used the company as a proxy to conceal the fact that the dispute was a shareholder dispute as opposed to being a dispute between the second respondent and the applicants in their capacity as shareholders representing the estate.

36. Quite clearly the first respondent was using the Court to cement his usurpation of control of the company and to legitimise the marginalisation of the applicants as equal partners from the management of the affairs of the joint venture company.

37. The full factual detail of the usurpation of control and attempt to legitimise it are set out in the answering affidavit which is part of exhibit "A". It

bears mentioning that the proceedings referred to in exhibit "A" were withdrawn by the first respondent after the filing of the answering affidavit.

38. I respectfully submit that the first respondent in usurping control of the company took away rights which I enjoyed as shareholder and director of the company. His actions were a spoliation of the applicant's rights as *nomino officio* shareholders and my right as director of the company.

39. The applicants were entitled to proceed in terms of section 158 because we had enjoyed all rights enjoyed by shareholders of the company. We received shareholder payments which were only stopped after the usurpation of control of the company by the first respondent.

40. The meeting in terms of section 158 complied with all requirements of the section and the resolution passed at the meeting is valid.

[32] Trollip JA in Gohlke & Schneider and Another v. Westies Minerale (Edms) BPK and Another[13] discussed the principle of unanimous assent and had this to say:

> **"As to the articles, it will be immediately apparent that the section does not render them absolutely binding on the company and its members as though they were statutory enactments, which the *court a quo* seems to have assumed. The company and its members are bound only to the same extent as if the articles had been signed by each member, that is, as if they had contracted in terms of the articles. The articles, therefore, merely have the same force as a contract between the company and each and every member as such to observe their provisions . . . . Now that contract is not made immutable or indefeasible by the**

[13] 1970(2) SA 685 AD at 692

ordinance in any respect relevant here. Consequently, I can see no reason why, as with any other contract, it cannot be departed from by a *bona fide* agreement concluded between the company and all its members to do something *intra vires* of the company's memorandum but in a manner contrary to the articles, and why that agreement should not bind them, at least for as long as they remain the only members.

But the articles neither require that nor prohit the power from being exercised by their unanimous assent achieved otherwise than at such a meeting. After all, the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them, and, if the assent of all the members is otherwise obtained, why should that no be just as effective?

[33] The *court a quo* was correct and did not misdirect itself in coming to the conclusion that the respondents were entitled to the declaratory order in respect of equal control of the joint venture company,

management of its affairs and the right to participate equally in the affairs of the company. This right accrues to the respondents by virtue of being Shareholder Representatives of the Estate which holds 50% shares in the joint venture company and having the right to appoint Directors.

[34] The Articles of Association of the second appellant require that the directors shall cause proper books of account to be kept with respect to monies received and expended by the company, all sales and purchases made by the company as well as the assets and liabilities of the company.[14] The purpose of proper books is to give a true and fair view of the state of the company's affairs and to explain all transactions of the company which have taken place. The directors are from time to time required to prepare and present before the company in general meetings annual profit and loss accounts, balance sheets, group account and reports in respect of the company's affairs and transactions.[15] Financial statements of the company are audited by Auditors.[16]

[14] Article 95

[15] Article 98

[35] The *court a quo* was correct in its finding that the first respondent as a Director was entitled as of right to inspect the books of account of the Company in order to have a fair view of the state of the company's affairs. Furthermore, the *court a quo* was correct in its finding that the first respondent could exercise her right of inspection of the financial books with the help of an Auditor dating back to August 2015 when the first appellant unilaterally took control of the management of the company to the exclusion of the respondents. The duty of the first appellant to account arises from the management of the business of the joint venture company.

[36] It is apparent from the preceding paragraphs that the Founding Members of the second appellant concluded an agreement in terms of which each member would receive E65 000.00 (Sixty-five Thousand Emalangeni) in lieu of dividends pending the final payments of the company debts. The Shareholder Payments persisted even after the demise of Dr. Tshabalala and they were made to the respondents in their capacity as Shareholder Representatives of the Estate. The Shareholder Payments were stopped by the first appellant when he

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[16] Article 99

unilaterally dissolved the Board of Directors and took control of the company. Accordingly it is appropriate in the circumstances to pay the respondents the Shareholder Payment effective from August 2015 onwards in accordance with the Shareholder Agreement. The costs of the requisitioned meeting should be borne by the second appellant in accordance with section 158(5) of the Companies Act.[17] ,

[37] Accordingly the appeal is dismissed with costs.

[17] Section 158(5) Companies Act No. 8 of 2009. Supra footnote 6

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JUSTICE M. C. B. MAPHALALA

CHIEF JUSTICE

I agree

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JUSTICE DR. B. J. ODOKI, JA

I agree

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JUSTICE S. P. DLAMINI, JA

For Appellant : Advocate Margriet Van der Merwe instructed by Henwood Attorneys

For Respondents : Attorney Mangaliso Magagula from Magagula Hlophe Attorneys