IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 3186/2022

DATE: 2022.04.13

In the matter between

SEAN DRICK MOCKFORD Applicant

and

LUNGELO TERENCE MATIWATNE First Respondent

KWAKA LQ (PTY) LTD Second Respondent

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***EX TEMPORE* JUDGMENT**

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**CARTER, AJ**: Let me give an *ex-tempore* judgment on what I am going to find and it will be brief, because the facts are common knowledge between the parties, that we have in essence a breakdown in the relationship between directors and we have a breakdown between shareholders.

More importantly, the day-to-day functioning of the company is not what it should be. I can exclude shareholders in that regard, because they are not involved in day-to-day

functioning of managing a business, which just so happens that the applicant and the first respondent are shareholders and there even is some dispute, if I read the papers originally, how that shareholding was actually allocated.

So it goes way back to the constitution of the second respondent where there was 58,33 percent issued to the first respondent in shares and 41.67 percent issued to the first respondent. But the agreement was that it should have been 51-49 in favour of the first respondent. So the foundations of the second respondent, just at the commencement was not on a very sound footing, might I add.

To me, those are real fundamental issues and not complicated issues that one gets right up front. There is reference to the shareholders agreement in the papers, but very flippantly and it is just simply alluded to. I have not seen it at all and it would probably been good to have seen if there is such a thing as a shareholder's agreement, but often you find you do not see shareholders' agreements and people realise somewhere down the line, oops, we better get a shareholders' agreement in place. And that would have certainly rectified that.

So with the dysfunctioning of the relationship between the directors, which is sad to see, because, again in the papers, it

is a company which seems to have a very viable business in terms of its turnover and I notice that it is also fairly unique in its business offering. Luxury Quarters, LQ. So you do not come across that very often and I have some interests myself in the marine industry in the sense of fishing. So I have an idea of what is at stake.

But as time goes on, the relationship which seem to have, in terms of the papers and agreed by both parties, got worse to the extent that, as I started off with this matter, there are three applications in relation to the second respondent, which are pending in the court here in the Western Cape. I am of the view that the liquidation proceedings were maybe a tad premature in the circumstances and because of the situation which had arisen between the shareholders and the directors.

I am not going to deal with the employees of the company. We know that employees need to get paid and if there is one thing that I am adamant about, you never mess around with an individual's salary or wages, depending who they are. That is a fundamental right. If somebody has provided and worked, you pay them. It is a different matter if you do not have the money, because of the third party that has not paid, but there is money in this situation and salaries should be paid.

The CCMA situation falls outside the parameters as far as I am concerned regarding this matter. That was only, I think the day before yesterday, I cannot recall the date, it is within the last 48 hours or so that the CCMA ruling was granted. That is something that falls without my having to consider in this matter today. And rightly so, Mr Meeker has his own remedies in terms of which to enforce that CCMA ruling. He is no longer an employee, so he must do what he has to do and he has. He went to the CCMA and do what he had to do. But there are other employees which are in the business and are still trying to make a tick over in the circumstances whilst there is this brewing battle going on about it, which is never nice in any company, it is not. It is not good leadership and it is stems from the top, which permeates down to the employees of every company.

I want to then deal with what is being requested in terms of the notice of motion by the applicant. There is, without doubt in my mind, through this entire process in terms of the papers that I have read, even the one that I got early this morning, that there has been this request, if not a plea for the first respondent to please add himself as a signatory to the bank account. That was after the Financial Manager/Director, Mr Nico, resigned and left. Now, one would think as a director in the fiduciary duty where you have a 51 percent majority

shareholder, that the basics of basics would be seen to. That has not been done. I cannot think that it is too much to ask somebody to please go add yourself as a signatory to a bank account for any functioning company, because cash flow is king.

And it would seem that all efforts or all actions by the first respondent have been thought to go and do that simple procedure. And it is not asking much. In actual fact, the bank does it all. You just tell the bank; I would like to be added as a signatory. Practically they provide you with all the documentation, all you have to do is sign. Notwithstanding in an electronic environment, you still get a plethora of documents and you have to sign them. The final step thereafter is for you to physically go onto the particular bank's website and then register yourself and you are granted then authority in terms of authorisation by a pin code or whatever it might be.

Now, that to me is not asking much on anybody, whether you would be a director, a financial manager or an administrative person that has only view rights on a bank account. It goes to the fundamentals of making a business run smoothly, functionally, and successfully. That has not been done as we sit before this Court today. It is still not been done and I ask

that pertinent question, whether that final element of the first respondent having to actually do something regarding the bank account and I could not get an answer. So I will take it that it has not been done, because it would only be to the benefit of everybody if had been done and I cannot understand the rationale why that has not been done.

Forget about the fact, let us assume that there has been no disagreement that the parties had a wonderful relationship. They were – I am talking now about the applicant and the first respondent – there was no bad blood between them and everything was going smoothly. And the then financial director, Mr Nico, financial manager, I beg your pardon, resigned, for whatever reason. I would imagine things would have been a bit different, that the first respondent would have gone and done what he had to do and that was to go and make sure that he was a signatory on the bank account so that this business could move forward.

So as regards prayer 2, I cannot see that it is reasonable at all that the first respondent been ordered to complete the process that is left to get himself appointed as a second signatory on the bank account. That is the First National Bank account. I do not have the exact number in front of me, but I think we all know what we are talking about. And that, I am going to order,

must be done by close of business tomorrow. So it will be, let us make it 3 o'clock.

As regards prayer 3, and I take into consideration the issues which is well documented, for which I extend my gratitude to you, Mr Brown, for your heads of argument. We are drawing a fine line between what is mandatory in terms of the Court saying, you must go and do that as opposed to whether there is a discretion. And in my experience, it is not good for a Court to get involved by way of an order into the day-to-day functioning of a company. Yes, it is well documented and well acknowledged by the first respondent that there are certain payments which are due and payable. They have not been disputed. Not on these papers and I give you one good example and that is the SARS payment.

Now SARS is a preferent creditor in any business, period. And unfortunately Uncle SARS also then applies interest and applies penalties. I cannot understand why, as a director of a company, let alone the majority shareholder, that the first respondent would just simply oversee that and say, well, we will deal with it at a later stage. It mind boggles me. SARS is one creditor that you make certain you pay, because by George, those penalties and interests mounts substantially and places any company in a worse position. Let alone as

individual taxpayers. We get it as well.

I can understand that the other payments, there might be a dispute as to the quantum, because that is not really what I have to deal with today, is the amounts. The fact is that there are creditors. SARS regularly get it wrong. However, there is a process and that is why I am a little reluctant in terms of what is being asked in prayer 3 and onwards, to dictate that that is what must be paid, because in a SARS situation, you can object. And an objection process can take months. And normally SARS are fairly lenient and they would give a reduction for whatever the reasons, therefore. I am not too certain what the reasons are here, because this matter has come a long way where these debts have arisen and not been paid.

So I foresee some difficulties that the second respondent is going to have in terms of settling for a lesser amount that is owed to SARS as it is on the papers, let alone the interest which is running and the penalties which are running. It would be imperative, as far as I am concerned, that somebody like SARS get paid post-haste. And there are a number of other, and I cannot recall the pages in this lengthy application which I did highlight, of other creditors which need to be paid.

Now, how do I reconcile that with the fact that, as both of the counsel have argued, obviously appals apart, that one is preferring one creditor over another? Well, no liquidation has been granted as yet. That has not even been heard. Only papers have been filed. And in files I am concerned and find the authorities that I have read that there cannot be any preference in terms of pay one creditor over another, as long as it is in the normal course of business. And it would include salaries, wages, depending what type of individual it is. SARS, for instance, they are a preferent creditor. You're not preferring one creditor over, it is by law, pay SARS. And that is certainly within the normal functions and duties and managing of a company that one performs those payments.

So the mechanism, I think is really what the second part of this application is all about, where prayers 3, 4 and 5 are being requested. I think we have a very fine line in terms of me dictating or this Court dictating what should be done and how it should be done as opposed to a mechanism.

I am going to order and we disagree with the prayers in, specifically 5. I think I've made it very clear that the first respondent needs to fulfil his duties a director. I am surprised that there isn't a fourth application being brought for a delinquent director. For me it that would be more important

than a section 163, because then you're hurting everybody.

I would hope, but I've made it very clear today in what I've stated, that the applicant and the first respondent meet eye to eye, sort this out before having to run off to court with these lengthy applications at great costs, which I still got to come to, when simply this can actually be sorted out amicably.

The mechanism in terms of what payments are due in the ordinary course of business because there is no liquation at the moment. That's why I wanted to know when it was filed and what was taking place. Because an application for liquidation has been file, doesn't necessarily mean a company comes to a standstill. Of anything, the company must continue until such time that it is placed in provisional liquidation. Because up until that point, because those type of applications could take months. It could be opposed. It could take years. There is a duty upon the directors to continue to make certain that the company is functioning in the way it should in the normal course of business. Not to simply sit back and say, oh well, let us sit back and see what the Court has to say about a liquidation. Especially where it is opposed.

So the one party is asking for it to be liquidated, the other party is saying, no, no, we do not have to liquidate. And to

that extent I also find the actions of the first respondent a little bit contradictory that he does not want the, without reading the papers in terms of the liquidation proceedings, does not want the company to be liquidated, but on the other hand, I am sorry, but I am finding difficulty to have myself included as a signatory. It does not gel.

So I am going to order regarding prayers 3 to 5, not as what they've stated there. I am not going to grant them as such. But what I am going to order is that within, with the long weekend, by end of April at the latest, because I am very, very conscious of, and I might sound like a stuck record now, I am conscious of SARS. Those penalties and interest are unkind to all of us. But if you do not want to pay, well, then bite the bullet and then be responsible and you're going to have to go and do it. It is only adding further purgatory to the second respondent.

So I am going to order that by the end of April, and I am sorry, I do not have a calendar in front of you, maybe one of you could help me, the last working day. So I am going to make it, because Friday is never a good day, I will make it Thursday, the 28th. Thursday, 28 April. And I want it done by midday on Thursday, the 28th, because that always gives time for the banks to shout and scream on what they have to do and then if

you want to run off to court, you got until 4 o'clock that day in which to do so, but hopefully that will not be necessary.

That by 28 April, with the assistance of – and again I am only saying this because I am conscious of costs – an independent auditor – not an attorney, because this is a financial issue - it is not a legal issue, that an independent auditor; I am going to ask PKF, they are the second ring of auditors, not one of the big four, so the costs will be less. That auditors of PKF here in Cape Town be [indistinct] to sort out such payments that are necessary and that are agreed to between the applicant and the first respondent. And I cannot make an order on that because I have some questions as to the quantum's that need to be paid on the outstanding accounts which are due and payable. That would include any salaries that are paid and I do not include here, Mr Meeker's CCMA payment. That he must sort out by himself.

It is pretty obvious what will happen. He will walk into the front door of the company and ask for payment. I mean that is what happens because there is an order.

And in that way prayers 3, 4, 5 will be dealt with in an efficient and quicker manner as, you will agree, well then, I'll go the Cape Bar and then I am going to ask for this and I am going to

ask for that. PKF, they will deal with it, because there is an acknowledgement by the first respondent that certain amounts are due and payable on the invoices. There is that acknowledgment on the papers. It is not disputed. In actual fact it is acknowledged. And that is why I want an auditor or an accountant to be involved in the finalisation of those payments so they can look at the accounting thereof, the figures, not the legalities.

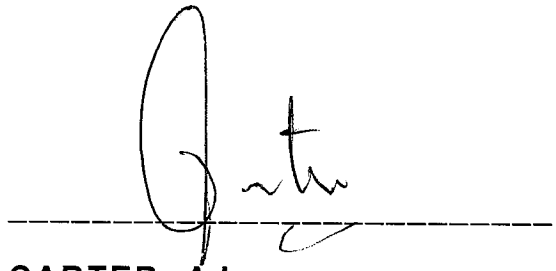
This is not a legal issue; this is a monetary issue in terms of how we need to settle the difficulties between the two directors and the two shareholders. Thereafter the other issues can take the normal course, whether it by liquidation or whatever it might be and I am not too certain whether you're going to proceed with the section 163 application.

As regards costs, Mr Brown, you have motivated and stated verbally that you would like a punitive cost. Now, even in the papers that you provided; you didn't give for me sufficient motivation regarding a punitive cost order. I've been involved in matters where punitive cost orders have been asked and there is a certain element, there is a certain onus, a certain reliable and liability that one has to prove why it should be of a punitive nature.

The papers are riddled with allegations flung between the applicant and the first respondent. They got a good blow at one another and I think that is enough. It is sad that it has to get to this, but that is what's in the papers and I got to see it for what's worth.

So I am not going to award a punitive cost order, but I am going to award a cost order in favour of the applicant on a party-and-party basis, due to the nature of the way this has been conducted up until now between the applicant and the first respondent. Let them learn through it. I know it has been tough, but you were also shareholders and, in a way, you have devastated your own shareholding in the company. It is a good company, it has good turnover, it can do it. I do not hope that you could find some success out of it still in terms of my rationale and what I've delivered *ex tempore* today.

So it be ordered as such.



**CARTER, AJ**

**JUDGE OF THE HIGH COURT**