THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 554/13

In the matter between:

DANIELINA CORNELIA BUTLER	**FIRST APPELLANT**
DANIELINA CORNELIA BUTLER NO	
PHILLIP ARNOLDUS OLIVIER NO	**SECOND APPELLANT**

and

GERRIT MARTHINUS VAN ZYL	**FIRST RESPONDENT**
NUCO CHROME BOPHUTHATSWANA (PTY) LTD	**SECOND RESPONDENT**
GAPATSIE MATTHEW MKHWANAZI	**THIRD RESPONDENT**
THE ROYAL BAFOKENG NATION	**FOURTH RESPONDENT**
MARTIN ROSENBERG	**FIFTH RESPONDENT**

Neutral citation: *Butler v Van Zyl* (554/13) [2014] ZASCA 81 (30 May 2014)

Coram: Mpati P, Ponnan and Willis JJA, Van Zyl and Legodi AJJA

Heard: **16 May 2014**

Delivered: **30 May 2014**

Summary: Company Law – removal of a director at a shareholders meeting – ss 61(3) and 71(1) of the Companies Act 71 of 2008 – shareholders requisition shareholders meeting to consider removal of a director –

shareholders subject to court order interdicting them from voting on their shares – whether they are entitled to act in terms of s 61(3) – meaning to be attributed to the order of the court.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mathopo J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and substituted with the following:

'The application is dismissed with costs, such costs to include the costs of two counsel where employed.'

JUDGMENT

Van Zyl AJA (Mpati P, Ponnan and Willis JJA and Legodi AJA concurring)

[1] This appeal concerns the right of shareholders of a company to requisition a shareholders meeting to effect the removal of a director. The majority shareholders of the second respondent, Nuco Chrome Bophuthatswana (Pty) Ltd (Nuco), seek to remove its managing director, Gerrit Marthinus Van Zyl (Van Zyl) from his position.

The majority shareholders are the co-executors (the executors) of a deceased estate. They hold 78 per cent of the issued share capital in Nuco. The other shareholders are Van Zyl and an entity described as an association of persons representing the people of the Royal Bafokeng nation. They are the first and fourth respondents respectively. Van Zyl owns 12 per cent of the shares and the association the remaining 10 per cent.

[2] There are many reasons why the executors, the second appellant, want to get rid of Van Zyl. The most important reason is an accusation that he had placed Nuco at risk of losing its only asset, namely its right to prospect for chromite deposits on the farms Boschfontein and Kookfontein in the Rustenburg area. Van Zyl is said to have engaged in, what has been referred to as bulk sampling, and the mining and disposal of minerals extracted from the farm Kookfontein for his own benefit. He is alleged to have done this, not only without the permission of Nuco's board of directors, but more importantly, without first having obtained the permission of the Minister of Mineral Resources as is required by s 20 of the Mineral and Petroleum Resources Development Act.[1] The result of his actions was that Nuco had been issued with a notice in terms of s 47(2) of that Act to give reasons why its prospecting right should not be cancelled. Whether there is any merit in this, or any of the many other charges directed at Van Zyl, is not relevant to a decision on the issues raised in this appeal.

[3] Section 71 of the Companies Act[2] (the Act) authorises the removal of a director by an ordinary resolution adopted at a shareholders meeting by persons entitled to exercise voting rights in an election of a director. To achieve their aim of removing Van Zyl as a director in terms of this section, the majority shareholders had to secure a meeting of Nuco's shareholders. The Act authorises the board of directors of a company, or any other person specified in the company's

[1] Act 28 of 2002.
[2] Act 71 of 2008. Section 71(1) reads: 'Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).'

Memorandum of Incorporation or rules, to convene a meeting of shareholders.[3] Who the members of Nuco's board of directors are is one of the issues in this appeal. What is, however, not in dispute is that Van Zyl and the first appellant, Danielina Cornelia Butler (Butler), are duly elected directors of Nuco. Butler is also one of the co-executors.

[4] The executors must have anticipated that Van Zyl would not be too enthusiastic to agree to convene a meeting of the shareholders to consider a proposal by the majority of the shareholders that he be removed as a director. For obvious reasons such a meeting could only have had one outcome. Instead, they chose to requisition a shareholders meeting in terms of s 61(3) of the Act. This subsection provides that the board of a company, or such other person as may be authorised to do so in the company's Memorandum of Incorporation or rules, must convene a shareholders meeting if:

'one or more written and signed demands for such a meeting are delivered to the company, and-
(a) each such demand describes the specific purpose for which the meeting is proposed; and
(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.'

[5] According to the executors the decision to proceed in terms of this section was based on advice that its provisions were peremptory, that it places an obligation on the board of a company to convene a shareholders meeting, and that it is not open to it to choose not to do so. What followed was the issuing of four written notices. The first step was taken by the executors as the majority shareholders. In compliance with subsection (3) they directed a written and signed demand to Nuco on 1 November 2012 to convene a shareholders meeting. In this notice, two resolutions were proposed for decision and adoption by the shareholders. The first was that Van Zyl be removed as a director of the company with immediate effect.

[3] Section 61(1).

The second was that the appointment of the third respondent, Gapatsie Matthew Mkhwanazi (Mkhwanazi), as a director of Nuco be confirmed, alternatively, that he be so appointed.

[6] The demand for a shareholders meeting was accompanied by a detailed list of the grounds on which the proposed resolutions were founded. These grounds were repeated in all the notices which followed. On 5 November 2012 the company secretary advised the directors in writing that a demand in terms of s 61(3) of the Act had been received from the majority shareholders. The next step was taken by Butler in her capacity as a director of Nuco. She gave Van Zyl written notice of her intention to call a meeting of Nuco's board of directors. This notice is dated 8 November 2012. The stated purpose of the meeting was to give effect to the request of the executors to convene a shareholders meeting. The board meeting took place on the appointed day and was attended by Butler and Van Zyl. Although there are different versions with regard to what exactly transpired at that meeting, the parties are in agreement that Van Zyl voted against the holding of a shareholders meeting.

[7] As she was of the view that the board had no choice, despite Van Zyl voting against it, to convene a meeting of Nuco's shareholders, Butler, on 16 November 2012, proceeded to notify the shareholders, including Van Zyl, that a meeting was to be held of all the shareholders as requested by the executors in terms of s 61(3) of the Act. The date of the shareholders meeting was set in the notice for 5 December 2012. Butler issued this notice in her capacity as a director of Nuco. Under cover of a letter by the company secretary dated 19 November 2012 the executors, as the majority shareholders requesting the meeting, also advised Van Zyl, in his capacity as a director of Nuco, of the date of the shareholders meeting, and the resolutions which they intended to propose for adoption at that meeting.

[8] Van Zyl's response to these notices was to make good on an earlier threat which he had made in correspondence between himself and Butler to institute legal proceedings. On 21 November he launched an urgent application in the South Gauteng High Court, Johannesburg (the high court) in which he sought an order: (i) that the four notices, starting with the demand by the executors for the holding of a shareholders meeting, to the three notices which followed thereon, be declared

invalid, and that they be set aside; (ii) that Butler and the executors be interdicted from holding a shareholders meeting for the purpose of dealing with any of the proposed resolutions; (iii) that it be declared that Mkhwanazi is not a director of Nuco; and (iv), that the two executors be convicted for being in contempt of an interdict which was granted by the North West High Court, Mafikeng (NW high court) in proceedings instituted by a certain Martin Rosenberg (Rosenberg). Van Zyl cited Rosenberg as a respondent in the application. Rosenberg is the fifth respondent in this appeal.

[9] Van Zyl's application was first heard in the high court on 4 December 2012. As an interim measure the respondents in the application were interdicted from proceeding with the shareholders meeting which was scheduled for the following day, and the matter was postponed for final determination. The matter subsequently came before Mathopo J, who finally disposed of it. Van Zyl did not persist with the contempt proceedings in the high court and no order was consequently made in respect thereof. The high court determined the matter in favour of Van Zyl. It proceeded to declare the four notices invalid and they were set aside. The remainder of the order of the high court reads as follows:

'5. It is hereby declared that the fourth respondent is not a director of the first respondent.

6. The second, third and fourth respondents are hereby interdicted and restrained from holding a shareholders' meeting for the purpose of dealing with any of the matters set forth in any of the notices referred to in one or more or all of paragraphs 1 to 4 above.

7. That the second and third respondents pay the applicants costs on the scale as between attorney and own client to the exclusion of the first respondent, such costs to include those reserved on 3 December 2012 and 4 December 2012.

8. The second and third respondents are ordered to pay the applicants costs on a party and party scale such costs to include the reserved costs of the 3rd December 2012 and 4th December 2012.

9. The conditional counter application is dismissed with costs.'

With the leave of the high court Butler and the executors have appealed against the whole of the judgment.

[10] In support of the relief he claimed, Van Zyl essentially relied on two grounds. The first ground is premised on the existence of the aforementioned interdict of the NW high court. The relevant portions of the interdict read as follows:

'1. Pending the final determination of an action or application (the proceedings) to be issued by [Rosenberg] within thirty (30) days of the date of this order seeking an order declaring that [Rosenberg] is the owner of 45% of the insured share capital of [Nuco] and or, in the same or in a separate proceeding for final relief as set forth in paragraph 1.3 to 1.6 herein [Nuco, the executors and Van Zyl] are interdicted and restrained from:

1.1 Directly or indirectly voting on or alienating or disposing of any shares in [Nuco].'

[11] Van Zyl's argument, both in the high court and in this court, was that the effect of the interdict is that the shareholders of Nuco were prohibited from voting on their shares. That being the position, the executors could no longer be said to be the holders of 10 per cent of the voting rights 'entitled to be exercised in relation to the matter proposed to be considered' at the shareholders meeting as required by s 61(3)*(b)* of the Act. The argument was that on a reading of the section, the ability of shareholders who requisition a shareholders meeting to vote on the matter proposed to be considered at that meeting, constitutes a jurisdictional fact, the existence of which is a necessary prerequisite to a valid demand. Accordingly, if the executors were unable to vote on their shares by reason of the existence of the interdict, it must follow that they could not lawfully demand the holding of a shareholders meeting, and the board of directors of Nuco could not lawfully convene such a meeting. It was argued that this, in turn, meant that the notice demanding the holding of the meeting, and any notice issued pursuant thereto, had no legal effect and should be set aside.

[12] Van Zyl's second ground relates to the validity of the two notices, dated 16 November and 19 November 2012, to the shareholders advising them of the intended meeting on 5 December 2012. The issues raised in this regard were that the notices did not comply with the formalities prescribed by those sections in the Act which deal with shareholders meetings and the proposed removal of a director and, in the absence of a decision by the board of directors to convene a shareholders meeting, Butler could not act alone and convene such a meeting. The short answer to all of this is that by the time that Van Zyl's application was finally heard in the high

court, the date of the proposed shareholders meeting had come and gone. This rendered the issues pertaining to the validity of the notices moot and without any practical effect or result. In this court counsel for the respective parties correctly acknowledged that to be the position and the second ground was, as a result, not persisted with in argument.

[13] Butler, the two executors and Mkhwanazi opposed Van Zyl's application. Butler and the executors in response also filed what they referred to as a conditional counter application. The relief claimed therein was made conditional upon Van Zyl being successful in his application. That relief was twofold: a declaratory order that the executors are entitled to vote in respect of the shares they hold in Nuco and, secondly, that Nuco be ordered to convene a shareholders meeting to consider and decide upon the resolutions proposed by the executors in their demand in terms of s 61(3) of the Act. The conclusion reached in this appeal on Van Zyl's application renders the conditional counter application academic.

[14] In answer the appellants, Butler and the executors, denied that there was any impediment to the shareholders of Nuco voting on their shares as contended by Van Zyl. The reason advanced was that the interdict on which he was relying was discharged. It was granted *pendente lite* and, so the contention went, its continued operation was made subject to the finalisation of the proceedings which Rosenberg had to institute in the NW high court in compliance with the terms of the order of that court. Accordingly, once those proceedings had been finalised, the interdict was, *ipso facto*, discharged. The appellants further contended that Van Zyl's actions in voting against the holding of a shareholders meeting, and in relying on the interdict as the reason for doing so, was nothing more than an attempt to prevent the shareholders from taking a decision on the proposal that he be removed from his position. This, according to the appellants, had the effect of creating a deadlock and a situation where the continued functioning of Nuco had been made impossible.

[15] Rosenberg, in turn did not formally oppose Van Zyl's application. Instead, he elected to file what he referred to as a 'statement of position', in which he made a number of legal submissions aimed at explaining his position and protecting his rights in relation to the interdict on which Van Zyl was relying. Rosenberg's main

concern was clearly Butler's contention that the interdict had been discharged, and any finding the court hearing Van Zyl's application may make in relation to that contention. He accordingly placed it in issue, arguing that, on the facts, it could not be said that the proceedings, which he had instituted in the NW high court in compliance with the terms of the interdict, had been finalised. It is not necessary, for present purposes, to decide this issue. The reason is that counsel for the appellants did not persist with the argument that the interdict was discharged. His decision in this regard was in response to a tender made on behalf of Rosenberg during the course of argument (which tender was accepted by the appellants) to abandon that part of the order of the NW high court which places a restraint on the shareholders of Nuco from voting on their shares. That abandonment thus effectively disposed of any such dispute as may have existed between Rosenberg and the appellants and, but for Van Zyl's participation, would have disposed of the matter in its entirety. Moreover, had the court order truly served as an impediment as to the holding of the contested meetings, the abandonment cleared the way for the convening of those meetings in the future. It thus for all intents and purposes rendered the matter moot. However, it was submitted on behalf of Van Zyl that the interdict as originally framed, served as an impediment to the holding of the meetings and that he was thus entitled to have approached the high court. Given the lateness of the tender, so the submission went, he would, notwithstanding the tender, still be entitled to his costs both in the high court and on appeal. I may mention that Rosenberg did not seek an order for costs either in this court or the one below.

[16] That therefore makes it necessary to consider whether Van Zyl's application should have succeeded before the high court. That requires a consideration of two issues. The first issue is whether para 1.1 of the interdict, as it stood at the time when the matter was considered in the high court, prohibited the executors from requisitioning a shareholders meeting in terms of s 61(3). The second issue is whether or not Mkhwanazi is a director of Nuco. In order to deal with Van Zyl's arguments in relation to the first issue, it is necessary to take a closer look at the interdict which he says prohibited the shareholders from exercising their voting rights at the proposed shareholders meeting. The background to the grant of the interdict is that a company, Mogale Alloys (Pty) Ltd (Mogale), and Rosenberg instituted legal proceedings in the NW high court against Nuco, two of its shareholders, namely Van

Zyl and the executors, and a company known as Uthango Mining Resources (Pty) Ltd. Both Mogale and Rosenberg asked the court to grant them interdictory relief which was to operate pending the determination of proceedings which they intended to institute in that court.

[17] It would appear from the judgment of the NW high court that the claims of Mogale and Rosenberg were based on two separate and distinct causes of action. The court, as a result, made two separate orders. In terms of both of these orders the respondents to the application were interdicted, inter alia, from 'directly or indirectly voting on, alienating or disposing of any shares' in Nuco, 'pending the final determination' of an action or application to be instituted. It is common cause that the action instituted by Mogale was subsequently dismissed, and that the interdict which operated in its favour was discharged. It consequently has no relevance to the present proceedings.

[18] Whether Rosenberg's interdict presented an obstacle to the shareholders of Nuco in requisitioning the holding of a shareholders meeting for the stated purpose is primarily a question of determining the ambit of the interdict. On a reading of para 1.1 of the order it is evident that it has been widely stated. The principles applicable to construing documents also apply to the construction of a judgment or order of a court. The court's intention is to be ascertained primarily from the language of the judgment or order, and by reading the judgment or order, and the court's reasons for giving it, as a whole.[4] The issue before the NW high court was confined to ownership in the shareholding of Nuco. Rosenberg's case was that he is the beneficial owner of 45 shares in Nuco. According to him, he was instrumental in securing Nuco's right to prospect for chromite ore on the two properties. In return for his services, and in terms of a shareholders agreement, he was given shares in Nuco. Those shares were held by a certain Keeton as his nominee. The NW high court found that there existed sufficient evidence to support Rosenberg's claims, and that he had established, at least prima facie, a right of ownership to shares in Nuco. In this context the court then proceeded to grant the interdict in para 1.1 of the order.

[4] See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-E; and more recently, *Van Rensburg NO & another v Naidoo NO & others; Naidoo NO & others v Van Rensburg NO & others* [2010] 4 All SA 398 (SCA) para [42].

The remainder of the relief granted in the order was aimed at preserving the assets of Nuco.

[19] The relevant portion of the interdict on which Van Zyl placed reliance for the relief claimed in his application in the high court, was therefore clearly aimed at protecting Rosenberg's prima facie beneficial interest in Nuco's shareholding. It was not aimed at preventing the shareholders of Nuco from voting on their shares in respect of matters which have no bearing on Rosenberg's claims in the contemplated proceedings in the NW high court. What the interdict most certainly did not proscribe were those matters which, directly or indirectly, deal with the management and the continued operation of the business of the company, such as the appointment or removal of a director. In terms of s 66(1) of the Act the business and affairs of a company must be managed by or under the direction of its board of directors. To hold, as was suggested on behalf of Van Zyl in argument, that the intention of the NW high court can only be consistent with the plain wording of the order, is to ignore the context in which it was granted and the purpose it was intended to serve.

[20] To give the order a literal construction may also have undesirable consequences. It would mean that Nuco would not be able to comply with, for instance, its obligation to hold an annual general meeting as required by s 61(7) of the Act, at which meeting the shareholders are obliged in terms of subsec (8) to deal with, and vote on, matters such as the presentation of the directors' report, the election of directors and the appointment of an auditor for the ensuing financial year. That would render the company moribund, and could not have been the intention of the NW high court when it granted the interdict.

[21] The executors were therefore entitled to demand that the board of directors of Nuco convene a shareholders meeting for the proposed purpose, and Butler, in her capacity as a director, to respond to that demand by convening a meeting of Nuco's board. It is not in dispute that Butler was otherwise authorised to convene a board

meeting. In terms of article 45 of the Articles of Association of Nuco the directors may meet, adjourn and otherwise regulate their meetings as they think fit and importantly, any director may convene, or direct the company secretary, to convene a meeting of the board of directors. The high court accordingly erred in setting aside the two notices dated 1 November 2012 and 8 November 2012.

[22] That leaves the issue of Mkhwanazi's status as a director of Nuco. The whole substance of Van Zyl's case in this regard was the allegation that he does not know who Mkhwanazi is, and that Butler unilaterally and without his knowledge appointed Mkhwanazi as a director. Butler disputed this in her answering affidavit, stating that Mkhwanazi was appointed as a director in November 2010, that his appointment was confirmed with Van Zyl and the other shareholders, that Van Zyl had been aware of the appointment since at least January 2011 and that he had failed to raise any objection or issue in relation to the appointment until he instituted the application proceedings in the high court nearly two years later.

[23] The high court, for reasons which do not appear from the judgment, granted the declaratory order sought by Van Zyl in this regard.[5] It erred in doing so. Firstly, affidavits filed in motion proceedings must contain sufficient factual averments to support the cause of action on which the relief that is being sought is based.[6] It is not clear on what basis, legal or factual, it was contended that Mkhwanazi's appointment was unlawful. The allegations made by Van Zyl in this regard are rather vague and insubstantial. Secondly, an applicant in motion proceedings, where there are disputes of fact in the affidavits, may only be granted final relief in the circumstances outlined in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[7] The applicant must accept the version set up by his opponent, unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. Butler denied the allegation that Mkhwanazi's

[5] In para 5 of the order granted earlier.
[6] See for example *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 323F-325C.
[7] 1984 (3) SA 623 (A) at 634D-635C.

appointment was unlawful. It was not contended, quite correctly, that this denial must be rejected as being 'far-fetched or clearly untenable'. The high court should therefore have decided the issue on Butler's version and not have granted the declaratory order sought by Van Zyl.

[24] In the result the appeal must succeed and the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and substituted with the following:

'The application is dismissed with costs, such costs to include the costs of two counsel where employed.'

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D Van Zyl

Acting Judge of Appeal

APPEARANCES

For Appellant:	J J Brett SC (with him D Mahon)
	Instructed by:
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