IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32255/2018

In the matter between:

HELGARD ROSS	First Applicant
ARTUR WILHELM SUNTKEN	Second Applicant
WOLFGANG MANFRED SUNTKEN NO	Third Applicant
JUTTA INGRID SCHMIDT NO	Fourth Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

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

17/12/18
DATE

SIGNATURE

MICROSYSTEMS ON SILICON (PTY) LIMITED	First Respondent
ELMOS SERVICES BV	Second Respondent
JAN DIENSTUHL	Third Respondent

JUDGMENT

Tuchten J:

1 This is a dispute between shareholders. The first and second applicants, Mr Ross and Mr Suntken individually and the minority directors, minority shareholders or just the minority collectively,

founded the first respondent, MOS, in 1999. It specialises in mixed-signal integrated circuits. On 29 May 2002, the minority shareholders, together with another shareholder who has fallen out of the picture, concluded a shareholders' agreement with the second respondent, Elmos BV, a company registered in the Netherlands, in terms of which 51% of the shares in MOS were sold to Elmos BV.

2 The business of MOS grew and attracted the attention of Elmos AG, a company registered in Germany. The two Elmos companies (the Elmos parties) have close corporate ties. I do not need to explain the corporate relationship between ELMOS BV and ELMOS AG because counsel were agreed that the interests of these two companies are identical for present purposes.

3 In 2010 MOS and the Elmos parties concluded a cooperation agreement.[1] The cooperation agreement provided for MOS to develop product, which would be sold by Elmos AG as part of its product line. MOS would receive commission and Elmos would be

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1 The cooperation agreement was drawn in the German language with an English translation. The German text is the original memorial of the parties' agreement.

> ... compensated for manufacturing costs plus an overhead rate of 0.6, covering functional costs expended by Elmos [AG], coming to a total of 1.6 times the manufacturing costs.[2]

4 If the proceeds of the sales were below the manufacturing costs including overhead, MOS would not be paid any compensation but would compensate Elmos AG for its loss instead.

5 On 27 February 2014, MOS, Elmos BV and Elmos AG concluded a written amending agreement, pursuant to which the formula for remuneration was amended. The English text now provided in paragraph III that MOS's remuneration would be as follows:

> The remuneration is rearranged as follows and with the effective date (01/01/2014) to bring this additional agreement to apply. It concerns only the products that are handled by ELMOS. Whether a product about ELMOS is handled, it is decided case by case by the shareholders. Special arrangements are possible.
>
> - From sales of MOS products ELMOS will keep the manufacturing costs and a sum of 0.3 times sales and overheads contribution.
>
> The formula is as follows: Remuneration of MOS = sales - production - 0.3 times sales

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2 Clause III. "ELMOS bekommt die Herstellungskosten sowie ein Gemeinkostenaufschlag von 0.6, der die von ELMOS eingesetzen Funktionskosten abdeckt, ingesamt somit das 1.6-fache der Herstellungskosten vergütet."

The difference between fakturiertem net sales price and the production costs including overheads surcharge is MOS remunerated by ELMOS.

- If the invoiced nett sales price below the production cost including overheads surcharge AND MOS is that the product will continue to be produced and distributed, MOS gets logically no remuneration, but refunded ELMOS loss. If ELMOS continues to manufacture and distribute the product, the resulting losses are not passed on to the MOS. For the product concerned the remuneration of MOS is 0. Euro- in this case.

Example:

Net VK	EUR 1.00
- Manufacturing costs	EUR 0.50
- GK surcharge	EUR 0.30
Compensation to MOS	EUR 0.30

Cost of production in volume production lcs are MOS disclosed and are updated every year. The figures are based on calculations in ELMOS Price Calculation System which can be viewed by MOS during the annual reviews.

The remuneration of MOS is monthly for 20 day under the intercompany billing means billing procedure by ELMOS. (ELMOS Contact: Holger Meisel or Accounts Payable).

In future, the fixation of the plan cost made one year in advance, namely before 1 December of each year for the following year.

Within the year to the pre-established plan production costs are compared with the actually incurred actual manufacturing cost. If this results in more than 5%, the difference of each party must be paid by 31 December of the same year by he other party.

Should ELMOS not want to produce more product, discuss the possible solutions partner in particular in regard to a foreign production.

6 The German language text reads as follows:

Absatz III:

Die Vergütung werd wie folgt neu geregelt und ist mit dem Datum das Inkrafttredens (01.01.2014) dieser Zusatzvereinbarung zur Anwendung zu bringen. Sie betrifft auschließlich die Produkte, die über ELMOS abgewickelt wird, wird von Fall zu Fall durch die Gesellschafter entschieden. Sonder vereinbarungen sind möglich.

- Vom Umsatz mit MOS Produkten behält MOS die Herstellkosten und eine Summe von 0,3 mal Umsatz als Gemeinkostenbeitrag ein.
  Die Formel st wie folgt: Vergütung an MOS = Umsatz -Herstellkosten -0,3 mal Umsatz
- Die Differenz zwischen fakturiertem Nettoverkaufspreis und den Herstellungskosten inkl. Gemeinkosttenaufschlag wird MOS durch ELMOS vergütet.
- Liegt der fakturiertte Nettoverkaufspreis unterhalb der Herstellungskosten inkl. Gemeinkostenaufschlag UND besteht MOS darauf, dass das Produkt weiterhin hergestellt und vertrieben wird, bekommt MOS folgerichtig keine Vergütung, sondern erstattet ELMOS den Verlust. Besteht ELMOS weiterhin auf die Herstellung und den Vertrieb des Produktes, werden die daraus resultierenden Verluste nicht an MOS weiterverrechnet. Für das betroffene Produkt beträgt die Vergütung an MOS in diesem Fall 0. - Euro.

Beispiel:	
Netto-VK	EUR 1,00
- Herstellkosten	EUR 0,50
- GK Aufschlag	EUR 0,30
Vergütung an MOS	EUR 0,20

Die Herstellungskosten der in Serienproduktion befindlichen ics wind MOS offengelegt und werden jedes Jahr aktualisiert. Die Angaben basieren auf Kalkulationen im ELMOS Price Calculation System (EPCS) die von MOS im Rahmen der jährlichen Reviews eingesehen werden können.
Die Vergütung an MOS erfolgt monatlich zum 20. Tag im Rahmen der Intercompanyabrechung mittels Gutschriftverfahren durch ELMOS. (ELMOS Anrechpartner: Holger Meisel bzw. Kreditorenbuchhaltung).
Zukünftig erfolgt die Fixierung der Planherstellungskosten einmal jährlich im Voraus, und zwar bis spätestens zum 1. Dezember eines Jahres für das Folgejahr.
Im Rahmen der Jahresbetrachtung werden die im Voraus festgelegten Planherstellungskosten den tatsächlich angefallen Ist-Herstellungskosten gegenübergestellt. Sofern sich hieraus eine Abweichung von mehr als 5% ergibt, ist die Differenz der jeweiligen Partei bis zum 31. Dezember des gleichen Jahres durch die andere Partei zu vergüten.
Sollte ELMOS ein Produkt nicht länger produzieren wollen, diskutieren die Gesellschafter mögliche Lösungen insbesondere auch in Hinblick auf eine Fremdfertigung.

7 MOS was therefore obliged under the amended agreement to compensate ELMOS AG for losses under certain circumstances.

8 On 29 November 2016, MOS received an invoice from ELMOS AG for €862 820. This was for an alleged overpayment of commission paid to MOS for the period January to October 2016. This claim was disputed by the minority shareholders. The dispute led inexorably to the present litigation. The papers before me have mushroomed to over 800 pages as the parties moved to consolidate and improve their strategic positions in relation to their dispute but in all this paper, there is no suggestion that the parties undertook any meaningful attempts to get to the bottom of the fundamental issue between them: whether MOS is obliged to compensate ELMOS AG for commission allegedly overpaid during the period January to October 2016 and, if so, how much that compensation should be.

9 I must now explain certain aspects of MOS's corporate governance structure, which at a formal level has led to the litigation before me.

10 Under clause 5.2.2 of the shareholders' agreement, the board of MOS (the MOS Board) would comprise four directors, one to be appointed, removed and replaced from time to time by ELMOS BV and three to be appointed removed and replaced by the minority shareholders. Clause 5,2,2,2 gave rise to some debate before me and reads:

> The Shareholders undertake to vote in favour of all resolutions necessary, from time to time, to give effect to the aforegoing and their vote shall not be withheld without good cause being shown, it being agreed that the onus shall be on any Shareholder withholding its vote to show good cause for so doing.

11 Up to 14 November 2017, ELMOS BV had simply not exercised its right under clause 5.2 of the shareholders' agreement to appoint any director to the MOS Board. When the dispute arose, Messrs Ross and Suntken, the minority directors, constituted the MOS Board. However, on that date, after some initial efforts to resist his appointment, the minority shareholders voted with the majority shareholder to appoint the third respondent, Dr Dienstuhl, to the MOS Board.

12 The situation was thus that even after the appointment of Dr Dienstuhl to the MOS Board, the minority directors controlled the MOS Board. This did not matter when there was unanimity between the minority and majority shareholders. But now this led to an anomaly. I was told from the bar and counsel for both sides agreed that under Act 61 of 1973, the old Companies Act and the predecessor to the Companies Act, 71 of 2008 (the new Companies Act), certain governance functions could be performed by shareholders. However, under s 66 of the new Companies Act, all the functions of a company are performed by its board, subject to the provisions of the new

Companies Act itself or the memorandum of incorporation (MOI) of the company itself.

13 Because MOS was incorporated before the inception of the Companies Act, it did not have an MOI. An attempt had been made to register one but that attempt proved irregular. And now that the minority and majority shareholders were in dispute, the minority resisted the attempt to register an MOI, for they feared such an MOI could include provisions which would enable the majority shareholder to achieve majority control of the MOS Board.

14 One way that the majority shareholder could attain Board control would be to use its position at shareholder level to try to vote the minority directors out of office.

15 This has become important because the minority directors used their control of the MOS Board to institute proceedings in the Landgericht in Dortmund, Germany in an attempt to resolve the dispute. This forum was selected because the parties consented in the shareholders' agreement to the jurisdiction of this court in respect of any dispute arising from that agreement.

16 The immediate precipitating cause of the litigation was the communication by ELMOS AG to the minority shareholders of a letter dated 7 June 2017, terminating the cooperation agreement. The fundamental reason why ELMOS AG took steps to terminate the cooperation agreement was that MOS had not paid, indeed refused to pay, ELMOS AG the substantial amount ELMOS AG claimed for alleged historical overpayment of commission as I have described in paragraph 8 above. This caused MOS to find itself, in the words of the minority directors, with no income and no means of effectively conducting business in the industry.

17 The minority shareholders sought to engage with the majority. The response from the majority, in a letter dated 9 May 2017 was implacable: the trust relationship had been disturbed by the minority's actions, thus the majority, part of the money claimed must forthwith be paid and ELMOS AG would be taking action in the Dortmund Landgericht.

18 On 10 May 2017, the minority gave notice of a shareholders' general meeting to consider mandating MOS's representative to consider and, if thought appropriate, take legal action against ELMOS AG. The majority wrote back on 18 May 2017, refusing to agree to this course. On the same date, ELMOS AG made formal demands that MOS

rectify what ELMOS AG described as a violation of the cooperation agreement. In a letter dated 31 May 2017, ELMOS AG wrote to the minority to say, in effect, that ELMOS AG agreed with ELMOS BV that MOS should not be allowed to sue ELMOS AG.

19 MOS did not pay the amount claimed. Then followed the letter dated 7 June 2017 referred to in paragraph 16 above, in which ELMOS AG conveyed its decision to terminate the cooperation agreement. It did so on three alternative bases but that is not germane for present purposes.

20 The minority took legal advice from Anwälte practising within the jurisdiction of the Landgericht Dortmund. They were advised that MOS did not owe the amount claimed and that the attempt by ELMOS AG to cancel the cooperation agreement was bad. The Anwälte recommended an urgent application to the Landgericht to prevent (in the South African sense, interdict) ELMOS AG from treating the cooperation agreement as terminated pending a hearing in that court on the merits of the dispute.

21 The minority then, no doubt appreciating their tactical advantage at this level, held a board meeting. On 10 July 2017, the MOS Board resolved, amongst other things, to institute an urgent application for

the interdictory relief recommended by their Anwälte. The urgent application by MOS was lodged with the Landgericht on 30 June 2017 and dismissed on 3 July 2017. MOS then, again on the strength of the action taken by the minority through their control of the MOS Board, instituted a sofortige Beschwerde, an immediate complaint in the nature of an appeal, to the Oberlandesgericht Hamm, which exercises appellate or oversight jurisdiction over decisions of the Landgericht Dortmund.

22 On 8 August 2017, the Oberlandesgericht dismissed MOS's sofortige Beschwerde but observed in its reasons that everything seemed to indicate that the attempt by ELMOS AG to terminate the cooperation agreement had been legally ineffectual.

23 By letter dated 31 August 2017, perhaps influenced by the reasons of the Oberlandesgericht, ELMOS AG again wrote to terminate the cooperation agreement.

24 Undaunted by their failures to achieve urgent interim relief, the minority caused MOS to issue summons on 27 September 2017 against ELMOS AG and ELMOS BV in the Landgericht Dortmund under case no. 53002/17 (the Landgericht Dortmund action) for a declaratory order that the cooperation agreement had not been

terminated and that ELMOS AG should compensate MOS for damages caused by ELMOS AG's failure to abide by the cooperation agreement. Fundamental to these questions is the following: Has there been an overpayment of commission? If so, how much is owed by MOS to ELMOS AG? Counsel for the majority submitted that these questions had not been raised directly in the Claim (Klage) lodged in the name of MOS in the Landgericht. I think that the Claim is wide enough to raise these questions but if I am wrong, I have no reason to believe that if procedurally appropriate, these fundamental questions cannot be raised directly in the Landgericht by an appropriate amendment to the Claim. The Landgericht Dortmund action is pending.

25 By this time, the positions of the disputing parties had hardened into rigidity, a posture not generally conducive to the resolution of commercial disputes. The trust which must exist between parties to relationships such as these was no longer present. There were negotiations between the parties. These negotiations frequently took place within the framework of attempts to hold meetings at shareholder and board level and efforts to resist altogether or delay such meetings. Each side, ably supported by their respective lawyers, dusted off company documents previously filed away and ignored while the parties worked together to promote their common goal and

researched the company and procedural law of at least two jurisdictions to find ammunition to entrench and advance their positions.

26 I find however no reason to conclude that the trust which a short while ago existed between the parties cannot be restored once the fundamental dispute between the parties has been resolved.

27 The attempts by the ELMOS parties to advance their positions included moves to exploit their advantage as majority shareholders to circumvent the Landgericht Dortmund action. They did this by attempting to pass resolutions at shareholder level to impose a settlement of the dispute and to remove one or both the minority directors from their offices as directors of MOS. The logic of the ELMOS parties' campaign was impeccable: control the MOS Board and one controls the Landgericht Dortmund action. The propriety of the campaign is however another matter.

28 The minority shareholders sought to counter the ELMOS parties' strategy in two ways. Firstly, they initiated a process by making a demand under s 165 of the new Companies Act. Section 165, sv Derivative Actions, codifies and replaces the common law in this regard. A statutory right is provided to persons including shareholders

and directors of a company to initiate a procedure pursuant to which such a person may apply to court for leave to bring or continue proceedings in the name of and on behalf of the company.

29 Section 165(4) provides for an "independent and impartial person" to investigate the demand made by the aggrieved person and report to the board of the company in question on a variety of matters, including whether it would be in the interests of the company to continue the proceedings and, in that event, the probable costs that would be incurred.

30 Secondly, the minority brought an application to this court under the present case number. The first part of this application was brought urgently and culminated in an order by Strijdom AJ on 22 May 2018. This order reads, in relevant part:

> 1 In terms of section 61(5) of the Companies Act, 71 of 2008 the demand made on 2 May 2018 by [Elmos BV] in its capacity as majority shareholder of [MOS] is set aside on the grounds that the demand is frivolous or otherwise vexatious,
>
> 2 An order is granted in terms of section 163 of the Companies Act restraining [Elmos BV] from calling for a meeting for the purpose of removing the [minority shareholders] as directors of MOS pending the finalisation of this application.

3 In terms of section 163 of the Companies Act [Dr Dienstuhl] is restrained from convening shareholders' meetings for the purpose of removing [the minority directors or either of them] as directors of MOS pending the finalisation of this application.

4 The further prayers are postponed sine die.

31 The second part of the application served before me and was argued over three days.[3] Much of the argument advanced on behalf of the majority was directed toward showing that the individual steps taken in the campaign were irreproachable under South African company law. But this in my judgment misses the fundamental point. Rights cannot be used for an improper purpose.

32 The thrust of the case for the minority directors before me was that the majority was seeking to use its position as majority shareholder in MOS to circumvent or otherwise neutralise the minority's efforts to have the fundamental dispute adjudicated in the Landgericht. By so doing, counsel for the minority argued, the majority had acted in a way which fell foul of s 163(1) of the new Companies Act.[4]

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3 22 November and 10-11 December 2018

4 Section 163(1) reads:

A shareholder or a director of a company may apply to a court for relief if-

(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

33 On the last day of the argument, the parties presented drafts which reflected, on the one hand, the relief which the minority regarded as necessary to protect its interests in this regard and, on the other hand, what the majority was prepared to concede by way of undertaking to achieve the same purpose.

34 This approach makes it unnecessary for me to analyse the relief sought by the minority and the specific objections advanced by counsel for the majority to each item of that relief. Suffice it to say that the drafts on both sides acknowledge the fundamental principles which in my view ought to be applied to resolve this present, essentially procedural, dispute.

35 Firstly, there is the right of the minority to have their dispute with the majority resolved by a fair process. This is in South Africa a constitutional right, protected by s 34 of the Constitution.[5] Secondly, and without implying any hierarchy of rights, the majority is entitled to

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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.

5 Section 34 reads:
Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

the legitimate exercise of its rights as majority shareholder and to acknowledgement of the principle that a company must be run by its directors and not by the court.

36 The resolution of the dispute in the case before me must be achieved by balancing these rights, not by enforcing one of the rights and rejecting the other. And it goes almost without saying that the purpose of the order which I shall make is to establish a framework to help the parties approach and resolve their fundamental dispute as I have described it above.

37 The parties are agreed that the following, as embodied in paragraphs 1 and 2 of their respective drafts must apply to the further conduct of this dispute. These paragraphs were submitted on 11 December 2018, the third day of oral argument, and read:

> 1 ELMOS BV undertakes to abide by the section 165 process initiated by the applicants on 25 April 2018, subject to [MOS] pursuing that process to its conclusion within a reasonable time from the date of the undertaking. The shareholders and directors undertake to cooperate fully and timeously in order for the first respondent to do so.
>
> 2 ELMOS BV undertakes that it will not initiate or call on its appointed director to initiate any processes in either shareholders' or directors' board meetings

> calling for [MOS] to settle or abandon the first respondent's action in the Landgericht Dortmund prior to the issuing of the report in terms of section 165 and the members of the board have had two weeks to consider the report.

38 Clause 3 of the drafts proved contentious. The minority's clause 3 reads:

> ELMOS BV undertakes that it will not initiate or call on its appointed director to initiate any processes in shareholders' meeting in order to remove [either of the minority directors] in order to remove [them] as directors of [MOS], pending the completion of the process in paragraph 2 above.

39 The majority's clause 3 reads:

> If there is a shareholders' vote for the removal of either of the minority directors, and the minority directors do not support the removal of their directors, the removal of the minority directors for the purpose of obstructing or interfering with the section 165 process shall not be good cause for so doing in terms of section 5.2.2.2 of the Shareholders' Agreement. Moreover, the majority shareholder undertakes not to do so.

40 The majority's objection to clause 3 as drafted by the minority was that it went too far and was not needed to protect the minority's rights as I have identified them. The objection of counsel for the minority to the formulation of clause 3 of the majority's draft was that it left the way open to the majority, who had proven themselves to be untrustworthy, to take action outside the terms of the undertaking proffered to defeat the minority's rights, in which case the minority would have to come to court again.

41 I do not see it that way. I think that the majority's formulation of clause 3 is broadly adequate to protect the minority's rights and that the minority's formulation goes too far in abridging the majority's rights. The undertakings acknowledge the principle that the s 165 process must determine whether the Landgericht Dortmund action proceeds. I cannot think of any basis in bad faith by which the majority could, in the face of its undertakings, disrupt the s 165 process. If they do so, the minority can approach this court once again for protection.

42 There is however one aspect in which I think the majority's formulation of clause 3 is deficient. I think that the majority should be precluded from using its majority shareholder status to obstruct both the s 165 process and the progress of the Landgericht Dortmund action.

43 The approach which culminated in the presentation of the drafts makes prohibitory interdicts unnecessary. I shall accordingly translate the drafts, with the addition I have mentioned, into declaratory and directory orders.

44 As to costs: these proceedings were designed to achieve the ventilation of the claim in the Landgericht. It may therefore well be that the costs of the present case ought to follow the result in the Landgericht. But I am reluctant to make costs in a domestic case costs in the cause of litigation in a foreign jurisdiction. For that reason I shall reserve the question of costs with leave to all concerned to set the issue down on notice for consideration.

45 I make the following order:

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

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

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

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

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

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

NB Tuchten
Judge of the High Court
17 December 2018

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