THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 602/10

In the matter between:

SA MOHAIR BROKERS LTD	**Appellant**
and	
DOUGLAS CHRISTOPHER LOUW	**First Respondent**
ANDRE HERMANN DANKWERTS	**Second Respondent**
ARTHUR OLIVER RUDMAN	**Third Respondent**
GEOFFREY GEORGE VAN COLLER	**Fourth Respondent**
JOHANNES THEUNIS VILJOEN	**Fifth Respondent**
BKB LIMITED	**Sixth Respondent**
RONALD JOHN SMITH	**Seventh Respondent**

Neutral citation: *SA Mohair Brokers v Louw* (602/10) [2011] ZASCA 87 (27 May 2011)

Coram: Harms DP, Brand, Heher JJA and Meer and Plasket AJJA

Heard: 18 May 2011

Delivered: 27 May 2011

Summary: Company law – limitation on sale of shares contained in Articles – effect.

ORDER

On appeal from: Eastern Cape High Court (Port Elizabeth) (Y Ebrahim J sitting as court of first instance):

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

JUDGMENT

HARMS DP (BRAND, HEHER JJA and MEER AND PLASKET AJJA concurring)

[1] The appellant, SA Mohair Brokers Ltd, and BKB Ltd (one of the respondents) carry on business as brokers in the mohair industry. They are competitors. The appellant's main asset consists of 66 per cent of the entire issued share capital of its operating company, CMW Operations (Pty) Ltd. The balance of the shares belongs to Oos-Vrystaat Kaap Operations Ltd. The appellant wished to dispose of its shareholding in CMW to Oos-Vrystaat and for that purpose it required a special resolution in terms of s 228 of the Companies Act 61 of 1973. BKB, in turn, wanted to buy those shares but was advised that it could encounter problems with the competition authorities. Preferring to retain the appellant as its competitor instead of Oos-Vrystaat, it then devised a plan to stymie the special resolution by purchasing a sufficient number of shares in the appellant from some of its shareholders and obtaining proxies from them to defeat the proposal.

[2] The sellers completed four documents pursuant to their willingness to dispose of their shares and handed them to BKB. These were (a) a sale agreement; (b) a request to the appellant to issue the share certificate reflecting the seller's shareholding to enable the seller to transfer the shares to BKB; (c) a signed blank securities transfer form; and (d) a signed blank proxy form enabling the proxy holder to vote against the special resolution. BKB paid the sellers in full.

[3] The terms of the sale agreement (a) were as follows:

'I, the undersigned ("*the Seller*"), hereby sell all my shares in SA Mohair Brokers Limited ("*SA Mohair*") ("*the Shares*") and cede all my claims in and against SA Mohair (whether on loan account or otherwise, "*the Claims*") to BKB Limited or its nominee ("*the Purchaser*"), as reflected in the attached CM42 transfer form, which I have duly signed.

I accept in full and final payment for the sale of the Shares and of the Claims the sum of R2, which shall be paid to me by the Purchaser within 3 days of this undertaking.

I hereby give BKB Limited (or its nominee) ("*BKB*") my irrevocable proxy to vote the Shares as it in its sole discretion deems fit at the Annual General Meeting of Shareholders of SA Mohair which has been called for 4 December 2009 and any adjournment or postponement of that meeting. My signed proxy to that effect is attached hereto.

I further undertake to forthwith provide BKB with a signed proxy to vote all the Shares at any meeting of shareholders in SA Mohair (as it in its sole discretion deems fit) which is called prior to the registration of transfer of the Shares to into the Purchaser's name.

I also undertake to forthwith on receipt to pay to the Purchaser any distribution or dividend or any other payment which I may receive from SA Mohair in the period from the signature of this undertaking to the date of transfer of the Shares to the Purchaser, up to the amount of R2 per Share.'

[4] The proxies were duly lodged with the appellant prior to the meeting but the chairman, acting on legal advice, ruled that they were invalid and refused the proxy holders permission to speak or vote at the meeting. The advice was based on the terms of the articles of association dealing with the transfer and transmission of shares:

'14.1 The instrument of transfer of any shares in the company shall be in the form required by Section 135 of the act or in such other form which the directors approve.

14.2 The transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register of members as holder thereof.

15.1 Any decision by the directors of the company shall be final and binding on a shareholder of the company for the purposes of this clause 15.

15.2 A shareholder of the company may not sell, alienate, donate or burden in an manner whatsoever the shares that he is the owner of, without prior approval of the directors of the company.

15.3 A shareholder in whose name any share or shares has been registered, contrary to the provisions of clause 15.2, shall not in respect of such shares –

15.3.1 be entitled to exercise any vote, provided that any decision taken on the strength of such shares shall be deemed to be valid if a similar decision would have been taken by the required majority of votes;

15.3.2 be entitled to receive any dividend or other advantage, which dividend or advantage shall revert to the company to be utilized to the advantage of the company as the directors may determine.'

[5] The advice was this. A sale of shares without prior approval of the directors, being in conflict with clause 15.2 of the articles of association, is null and void. The proxy was part and parcel of the void agreement. It was an indivisible transaction. The resultant proxy was, accordingly, also void. The chairman of the meeting could therefore reject the proxies.

[6] The advice, which was accepted, was based on an incorrect premise. An agreement can only be null and void if it is in conflict with the law, statutory or otherwise. A sale of shares without the prior approval of the directors is not void as much as the sale of another's property is not void. The only effect is that the appellant is not obliged to register the purchaser as shareholder. But the sale is inter partes binding. It might be that the seller may not be able to obtain registration of the shares in the name of the purchaser which could amount to breach of contract by the seller, but nothing more. It would then be for the purchaser to pursue its ordinary contractual remedies if it so wished.

[7] The quoted clause 15.3 supports the conclusion that a sale without prior approval is not void. It postulates a case where shares are transferred to a purchaser in spite of the lack of prior approval. In that instance non-compliance only means that the purchaser may not vote or receive dividends. It does not mean that the purchaser may not take cession of the claim for dividends or that the purchaser may not hold a proxy – all matters that were provided for in the cited agreement. Clause 15.4 in addition states that the appellant may waive the requirement of prior approval, another indication that such a sale in not without legal effect.

[8] Furthermore, the sale agreement was res inter alios and did not involve the appellant. BKB duly lodged proxies in the prescribed form. The reasons or motives

of the shareholders (who also were sellers) in giving proxies did not concern the appellant from a legal or administrative perspective. The appellant had to accept proxies that were on their face valid because they were given by the sellers who, as at that date, were still shareholders.

[9] There is another matter that needs mentioning. The first respondent, Mr Louw, was the chairman of BKB but also a shareholder in the appellant. He did not sell his shares to BKB but gave it a proxy to speak and vote on his behalf. His proxy was also rejected, presumably because the chairman of the meeting, Mr Short, believed that Louw had also sold his shares. This misapprehension resulted from the preceding correspondence in which BKB's attorneys did not draw a distinction between the proxies held pursuant to a sale and those that did not involve a sale of shares. The letter was misleading because it was written on behalf of the 'proxies appointed by the Selling Shareholders'. And at the meeting, when Short dealt with the proxies of the sellers, the proxy holder did not inform him that he also had proxies from shareholders who had not sold their shares. In view of these facts I prefer not to express any view on whether the disallowance of Louw's proxy – something only raised in reply – would have been a ground for setting aside the resolutions taken at the meeting.

[10] The court below was correct in setting aside the resolutions taken at the impugned meeting of 4 December 2009. It needs to be mentioned, however, that the court below, taking its cue from the submissions made by the respondents – and repeated in the heads of argument in this court – based its decision on the provisions of s 252 of the Act which entitles a court to set aside at the behest of any shareholder an act or omission by a company that is unjustly prejudicial, unjust or inequitable. On the view I take of the matter namely that the rejection of the proxies was unlawful, the equitable jurisdiction under s 252 does not arise.

[11] The appeal is dismissed with costs, including the costs of two counsel.

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L T C Harms

Deputy President

APPEARANCES

APPELLANT/S	J J Gauntlett SC (with him R G Buchanan SC)
	Instructed by Spilkins Inc, Port Elizabeth
	Symington & de Kok, Bloemfontein
RESPONDENT/S:	S du Toit SC (with him F Odendaal SC)
	Instructed by Mike Nurse Attorneys, Port Elizabeth
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