

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG  
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: 34403/2011

In the matter between:

**KUDUMANE INVESTMENT HOLDING LIMITED**

**Applicant**

and

**NORTHERN CAPE MANGANESE**

**COMPANY (PROPRIETARY) LIMITED**

**First Respondent**

**NWC MANGANESE (PROPRIETARY) LIMITED**

**Second Respondent**

**PAULUS BOY KOLOTI**

**Third Respondent**


**Neutral citation:** *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd & 2 others* 2012 SA (GSJ)

**Coram:** SATCHWELL J

**Heard:** 29 March 2012

**Delivered:** 11 June 2012

**Summary:** Section 163 of Companies Act of 2008 – mining company with two shareholders, one the financier, one the BEE party – majority shareholder a company which is litigating inter se – dispute re shareholders and directors of majority shareholder company – dispute re directors of majority shareholders nominated to board of mining company – minority shareholder alleging ‘oppression’ by reason of paralysis of mining company – board meetings, board decisions subject to challenge – temporary relief pending outcome of litigation between factions of majority shareholder – relief appointing non-disputed directors to board of mining company.

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(2) OF INTEREST TO OTHER JUDGES: YES/NO.	<input checked="" type="radio"/> YES <input type="radio"/> NO.
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## JUDGMENT

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**SATCHWELL J**

### **INTRODUCTION**

[1] The applicant ('Kudumane') is the minority (49 %) shareholder and the second respondent ('NWC') is the majority (51%) shareholder in the first respondent ('NCCMC') which is a joint venture company constituted for the sole purpose of exploiting certain prospecting rights. Kudumane relies on section 163 of the Companies Act 71 of 2008 ('the Act') to obtain relief from certain alleged 'oppressive and prejudicial conduct' of NWC.

[2] Such relief is sought by reason of the alleged acrimonious infighting within NWC which has resulted in pending High Court litigation between disputed 'shareholders' and disputed 'directors' of NWC. Kudumane claims that such infighting and litigation hamper the ability of NCCMC to conduct the affairs for which it was constituted thereby prejudicing the commercial rationale for its existence.

[3] Kudumane seeks an order to amend the shareholders' agreement between the two parties (Kudumane and NWC) by removal of the disputed directors of NWC from the board of NCCMC and to retain only one of the current directors of NWC on the board of NCCMC. This would be Mr Paulus Boy Koloti ('Koloti'), whose status, and therefore legal position, is not challenged by the other 'shareholders' and 'directors' of NWC in the pending litigation. This relief is sought pending the outcome of litigation between the disputing shareholders and directors of NWC.

### **IN LIMINE**

[4] The first respondent to this application is NWC and an answering affidavit has been filed on its behalf, deposed to by Mr Mongwaketse ('Mongwaketse').

[5] The pending litigation between different factions of NWC includes, as one of its disputes, whether or not Mongwaketse is or should be a director of NWC and is therefore authorised to represent NWC on the board of NCMC.

[6] I take the view that Kudumane was correct in serving this application upon NWC and attorneys acting for both of the litigating factions of NWC. It is to everyone's advantage that the issue before this court is fully canvassed. It is also vital that all contesting persons and entities within the NWC consortium are aware of the wider implications and potential impact of their internecine litigation.

[7] I can see no merit in determining the issue of the *locus standi* of Mongwaketse. It is far more important that at least one version opposed to that of Kudumane is heard and considered.

#### **NWC AND KUDUMANE SHAREHOLDERS IN NCMC**

[8] Early in the new millennium, the parties were determined to exploit manganese deposits in the Kuruman district, Northern Cape. In order to ensure that NCMC would be granted the necessary mining licences by the Department of Minerals and Energy ('DME'), it was necessary that the Black Economic Empowerment ('BEE') status of NCMC be adequate for that purpose. Accordingly, a shareholders' agreement was concluded between Kudumane (then known as AML Resources Ltd) and NWC on 20 July 2006 with NWC having 51% and Kudumane 49% of the issued share capital.

[9] The shareholders' agreement of NCMC records in its 'Introduction' that:

'...the shareholders have agreed to form the company for the purpose of conducting the company business in a manner which confirms their commitment to facilitating the participation by historically disadvantaged persons in the South African mining industry as anticipated by the Mineral Development Act. For the avoidance of doubt it is recorded that the shareholding in the company issued to NWC has been earmarked to be held by historically disadvantaged person(s) and pursuant to the foregoing –  
The sale by NWC of any of its shareholding in the company to any third party...shall only be made to other historically disadvantaged person(s); and  
Any change in the shareholding of NWC which will result in NWC not being owned and controlled by natural persons who are not historically persons shall result in a deemed offer as provided for...'

[10] The shareholders' agreement provides that each shareholder shall be entitled to nominate and appoint three directors to the board of NCMC and NWC shall be entitled to nominate and appoint the Chairman. The directors of Kudumane and NWC have a total number of voting rights corresponding to the nominating shareholders' total shareholding.<sup>1</sup> Where there is deadlock, Kudumane has a casting vote for a period of ten years from the date of signing of the agreement or until such time as the initial capital requirements and extra loans have been repaid to Kudumane.

## **PROSPECTING RIGHTS**

[11] On 8<sup>th</sup> November 2005 a prospecting right was granted by the DME in favour of NCMC and Dirleton Mining and Engineering (Pty) Ltd ('Dirleton'). Application was made on 31 July 2010 for such prospecting right to be renewed which was done on 4<sup>th</sup> April 2011 when it was extended to 2<sup>nd</sup> November 2013.

[12] The renewed prospecting right requires NCMC to conduct prospecting operations in accordance with the prospecting work programme attached to the renewal application. That work programme requires NCMC to conduct bulk sampling, which involves the process of removing and disposing of manganese samples from the area over which the renewed prospecting right has been granted; undertaking drilling activities over areas where it is anticipated that the source of the prominent magnetic anomaly will be located; conduct rehabilitation and environmental work in accordance with the renewed prospecting right in order to ensure that the environmental impact of the prospecting activities is kept to a minimum; appoint a field geologist to oversee contractors appointed to drill, conduct borehole surveys, core logging and sampling, core cutting and interacting with the laboratory for analysing the manganese-bearing samples extracted; produce geological models; collect data and compile reports for submission to the DME; and procure the financing necessary to fund the various tasks listed above.

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<sup>1</sup> At any meeting of directors, each director shall have that percentage of the total votes of all directors, which corresponds with the percentage shareholding in the entire issued shareholding of the company held by the shareholder which nominated such director divided by the number of directors nominated by such shareholder.

[13] The renewed prospecting right requires that the prospecting operations are to be conducted according to a 'phased approach' which will be 'results driven'. The programme is set out year by year (although the actual year pertains to the first prospecting contract). For instance, bulk sampling is to take place over the period April 2010 to May 2011 and drilling is to take place over a period of three years until November 2013.

[14] If NCMC does not comply with the terms of the right, the Minister is empowered in terms of the Mineral and Petroleum Resources Development Act to either cancel or suspend the right granted to NCMC.

## THE KIMBERLEY LITIGATION

### Litigation

[15] In February 2010 an application was launched in the Northern Cape High Court under case no 299/20 ('the Kimberley litigation') in which nine applicants seek orders, *inter alia*, declaring the shareholders in NWC to be twelve named persons and entities possessed of a certain number of shares and that four named persons be declared directors of NWC.

[16] Various orders have been granted in the Northern Cape High Court pursuant to this application. Various *rules nisi* have been issued. One order declared the identity of shareholders and quantum of their shareholdings in NWC and declared that the directors of NWC are 'Paul Koloti, Kuleka Mooi, Sentle Fenyane and David Mogashoa'.

[17] At the hearing of this application on 29<sup>th</sup> March 2012, I was informed that the Kimberley litigation is still pending and has now been referred to oral evidence. It is not known when the litigation will be determined in the Northern Cape High Court, if the result will be taken on appeal and to which courts such appeal(s) would be noted.

[18] Amongst the parties to this Kimberley litigation are the following persons:

- a. Mr David Mogashoa (1<sup>st</sup> applicant), Mr Paulus Koloti (7<sup>th</sup> applicant) and Mr Julius Mongwaketse (3<sup>rd</sup> respondent). These three litigants were the first persons authorised, in 2006, to represent NWC as directors on the board of NCMC;

- b. Mr Scholtz Jacob Babuseng (8<sup>th</sup> respondent). The NWC<sup>2</sup> informed NCMC that Babuseng was a director of NWC and authorised to represent NWC on the board of directors of NCMC instead of Mogashoa; and
- c. The four persons in respect of whom an order has been sought declaring them to be directors of NWC include Messrs Koloti (7<sup>th</sup> applicant) and Mogoashoa (1<sup>st</sup> applicant) as well as two others who had not previously been on the board of NCMC.

[19] The upshot is that of the three initial NWC directors authorised to sit on the NCMC board, two (Mogashua and Koloti) are now applicants in litigation contesting the position of one (Mongwaketse) who is a respondent and in respect of whom there is now an order which does not state him to be a director of NWC. Of the three persons whom, by October 2008, NCMC had been informed were NWC directors on the NCMC board, one is an applicant (Koloti) and two are respondents (Mongwaketse and Babuseng) in the litigation.

### **Correspondence**

[20] The dispute as to the identity of the NWC directors has been confirmed and compounded by certain correspondence.

[21] During May 2010, the attorneys representing the applicants in the Kimberley litigation wrote to Kudumane's legal representatives stating that:

'our clients have placed on record that if your client enters into any agreements with Mr J Mongwaketse the same will not be binding on NWC Manganese (Pty) Ltd unless there is a correctly constituted shareholders meeting and a resolution in that regard. The difficulty is that the shareholding is in dispute at this stage.'

[22] In June 2011, there was an exchange of correspondence between Kudumane and the legal representatives for both factions of NWC. Kudumane requested, *inter alia*, written confirmation from NWC of the persons who were duly authorised to represent it on the board of NCMC and an undertaking by NWC not to contest the authority of those persons.

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<sup>2</sup> Per letter signed by Mr Mongwaketse in October 2008.

- a. The reply from the applicants was to confirm the 'dispute regarding who the duly authorised directors of NCMC are' but to state that the applicants wished to safeguard the interests of NCMC and 'accordingly are agreeable to ensuring that the renewed right is maintained' and would therefore accede to the necessary steps being taken 'provided that there [is] ... a recordal of the dispute and that our clients submission to their signature by the de facto directors is without prejudice to their rights'.
- b. The reply from the respondents was that all agenda items and dates for meetings of the NCMC were in the past discussed between Kudumane's chairman and Mr Mongwaketse and 'our clients fail to see any basis for a change'. It was further stated that '[y]our client is aware of the identity of the Directors of NWC' and '[o]ur clients affirms that each of the signatories who signed on behalf of NWC are duly appointed and authorized to represent NWC at board meetings of NCMC'.

[23] Kudumane and NCMC were therefore without any reassurance or undertakings from the litigating factions of NWC. The applicant's response was to hedge its bets – NCMC could proceed with company business but that the applicants were not to be prejudiced thereby. The respondents took the view that the *status quo* remained and the litigation was to be ignored.

## **IMPACT ON NCMC**

### **Paralysis in NCMC**

[24] Kudumane asserts that while the Kimberley litigation is unresolved, there remains continued uncertainty both as to the shareholding of NWC and also of the identity of NWC directors authorised to sit on the NCMC board.

[25] Accordingly, NCMC has no assurance that the persons who purport to represent NWC at any board meetings which may be convened are in fact and in law authorised so to do. NCMC has no guarantee that any resolutions passed at any meeting of the board of NCMC will be valid because they may subsequently be challenged by the successful party in the Kimberley litigation.

[26] Kudumane has been identified as the financier of the project and needs to be mandated by NCMC to enter into negotiations to obtain required funding for the project. Currently, the ability of NCMC to convene board meetings, pass resolutions and act thereupon secure in the knowledge that such meetings and resolutions and actions will not be open to challenge on the part of persons purporting to be the 'real' or 'legal' or 'duly nominated' directors of NWC is compromised. So too, is the ability of Kudumane to act.

[27] Kudumane avers that NCMC is therefore unable to exploit the renewed prospecting right which it has been granted and, as a consequence of this inactivity, there is a real threat that the Minister may withdraw the right from NCMC. If this predicament continues, NCMC may lose its only significant asset.

[28] As one of the shareholders of NCMC, Kudumane submits it is being substantially prejudiced thereby.

#### **Uncertainty as to status of directors**

[29] Mongwaketse denies that there is any uncertainty as to the identity of the directors of NWC. He sets out in great detail the history of the formation of NWC and his leading role therein. He points out that, while in Parliament, he purchased the predecessor to NWC and brought on board the many entities and individuals who are now shareholders therein. He maintains that it has always been known to all concerned, including the Kudumane representatives, that he was and is a director of NWC. He states '[he] was always a key person in the functioning of NWC, became a director, signed documents, represented NWC in negotiations' and states that this knowledge and acceptance cannot now be retracted. Insofar as NCMC is concerned, Mongwaketse refers to meetings, agreements, dealings, meetings of the NCMC board and avers 'I have as a matter of fact attended all meetings of NCMC on behalf of NWC'.

[30] Whatever is the correct version as to the establishment of NWC, allocation of shares and appointment of directors is not a matter for this court to decide. I cannot comment on Mongwaketse's averments with regard to past behaviour.



[31] It is the very existence of the Kimberley litigation – both the identity of the parties, the subject matter of the dispute and the relief sought – which indicates a dispute as to the shareholders and directors of NWC which has not yet been resolved. Mongwaketse is central to that dispute. His status as a director of NWC is currently subject to challenge. There has been a *rule nisi* issued out of the Northern Cape High Court which declares persons other than himself to be a director of NWC.

[32] Mongwaketse's own authority to represent NWC was specifically disputed in the correspondence of May 2010 warning that any agreement concluded with him on behalf of NWC would not be binding on NWC. That advice was repeated in June 2010 when the applicants in the Kimberley litigation confirmed the ongoing dispute and failed or refused to confirm both the identity of the persons duly authorised to represent NWC on the NCMC board and to provide an undertaking that NWC would not contest the authority of such persons.

[33] That which is stated by Mongwaketse about Kudumane's acceptance of his authority prior to the launch of the Kimberley litigation is not of moment at the present time. I do not understand what Mongwaketse may mean by stating in his affidavit that 'they always knew that there were disputes about shareholdings and directorships'.

[34] Mongwaketse's continued assertion that he remains a director of NWC and that the CIPRO documents confirm this does not take the matter any further. To echo Gertrude Stein and proclaim 'a rose is a rose is a rose' does not nullify the court orders of the Northern Cape High Court in the Kimberley litigation. It also does not resolve the dispute as to his appointment as director and allay the concern that any meeting chaired by him, resolution voted upon by him and action taken as a result thereof may be successfully challenged and set aside in due course.

[35] Of course, this also applies to the more recent appointment of Babuseng who allegedly replaced Magashoa as an NWC director on the board of NCMC.

[36] A director is 'a member of the board of a company'.<sup>3</sup> Mongwaketse is a director of NWC and hence of NCMC until such time as he ceases to be so appointed or nominated or until such time as the court in the pending Kimberley litigation sets aside his appointment and declares that he is not a director.

[37] The issue is the impact upon NCMC of the disputed directorship(s).

[38] I was referred to *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 (3) SA 403 (A) where it was stated that the section providing that 'acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment' 'was enacted primarily for the protection of innocent persons who in good faith deal with the directors believing they have been properly appointed...'

[39] The facts in the present case are entirely distinguishable from those of *Marrok* and the authorities referred to therein. Here, it is a matter of public record that the appointments of certain directors of NWC is under challenge. No one who deals with NWC or NCMC can believe without any doubt that the NWC directors 'have been properly appointed'. The 'innocent persons' who might deal with NCMC cannot 'in good faith' now accept the nominations of NWC directors to the board of NCMC.

[40] In any event, if one were to ask who are those persons who are currently nominees from NWC to the NCMC board, the answer would depend of whom one enquired. It was Mogashoa, Koloti and Mongwaketse but Mongwaketse says that Mogashoa has resigned which Mogashoa denies. Mongwaketse says that Babuseng has been nominated in place of Mogashoa to the board of NCMC which appointment is disputed by the applicants to the Kimberley litigation. Mongwaketse's own appointment is disputed by the Kimberly litigants (which include two directors of NWC and NCMC) as having been procured under duress. The Northern Cape High Court issued a *rule nisi* naming four persons to the NWC board, only two of whom have ever been on the NCMC board.

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<sup>3</sup> See the definition of 'director' in the 2008 Act.

[41] The issue before this court is not determination of directors of NWC and hence of NCMC. The issue is the predicament in which NCMC currently finds itself. It has been informed that there may be a challenge to any actions carried out by the board of NCMC on which the disputed 'directors' of NWC sit. That predicament can paralyse NCMC in the present and lead to interminable disputes in the future.

### **Previous reliance upon Mongwaketse's authorisation**

[42] Mongwaketse avers that there can be no prejudice to Kudumane because it and NCMC have accepted his authority as a director of NWC subsequent to the institution of the Kimberley litigation in March 2010. He refers to various correspondence and emails, notices of meetings and agenda and minutes of a meeting of the board of NCMC chaired by himself. Most importantly, he refers to the reliance by both Kudumane and NCMC upon himself, as a duly authorised member of the NWC board and as a board member of NCMC, to procure the renewal of the prospecting right on 4 April 2011 and his signature thereof on 19 April 2011. He expresses the grievance that '[i]t appears that Kudumane wishes to recognise my status as director and Chairman of NWC when it suits its financial interest'.

[43] Mongwaketse points out that Kudumane (as AML Resources Ltd) has been cited as the seventh respondent in the Kimberley litigation, has known about it for several years, has opposed same and cannot only now allege that this litigation constitutes grounds for interference in the NWC and NCMC relationship.

[44] Subsequent to the Kimberley litigation, Mongwaketse refers to NCMC meetings attended by NWC representatives during 2010, signature of board resolutions by himself in January 2011 and his application for the renewal of the prospecting right at the end of 2011.

[45] Insofar as Kudumane may have been prepared to benefit from the presence of Mongwaketse as a director of NWC (though under challenge) and therefore a director of NCMC, Kudumane now states that 'it is no longer willing to convene these meetings and purport to pass resolutions at them in circumstances in which it has no guarantee that the resolutions will not subsequently be challenged as invalid'.

[46] Kudumane is entitled to change its mind; it is entitled to re-evaluate the prejudice which it believes it, and NCMC, are suffering; it is entitled to continually assess the impact which the uncertainty is having on the affairs of NCMC. I would certainly take the view that the alleged oppression or prejudice to or disregard of its interests is situated within a fluid situation which can be monitored. After all, once the prospecting right was renewed in April 2011, the situation did of course change. The right endures until the end of 2013. By then, the DME and the Minister had expectations of NCMC which have to be met.

[47] I would surmise that Kudumane was prepared to utilise Mongwaketse and his name and status for purposes of ensuring that the prospecting right was renewed notwithstanding that Kudumane knew of the challenges to Mongwaketse's position. It was probably prepared to take the risk that all members of the different factions in NWC had and have an interest in the renewal of the prospecting right and hope(d) that the renewal will never be subject to challenge by reason of Mongwaketse's involvement.

[48] The issue for determination is whether prejudice has been suffered and continues to be suffered by the minority shareholder as a result of these challenges to the authority of Mongwaketse.

## **SECTION 163 OF THE COMPANIES ACT**

[49] Section 163(1) of the Act provides that a shareholder of a company may apply to court for relief if any act or omission of a person related to the company has had the result that is oppressive or unfairly prejudicial to or unfairly disregards the interests of the applicant.<sup>4</sup>

[50] Section 2 of the Act spells out that a juristic person is 'related' to another juristic person if either of them directly or indirectly controls the other. Control of a juristic person is found where the 'related' person has the right to appoint directors who control a majority of the votes at a meeting of the board. *In casu*, NWC is a juristic person 'related' to NCMC by reason of its

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<sup>4</sup> Section 163 (1) (a) states: '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'.

51% shareholding in NCMC, with three directors on the board of NWC who, between them, control the votes corresponding to the shareholding in NCMC of NWC.<sup>5</sup>

[51] I note that the predecessor section was not construed as only applying to an oppressed minority group. The section was also invoked by a member of a company who shared the voting control equally with another.<sup>6</sup>

[52] The conduct complained of must not be an act or omission which may or will occur in the future. There must be ‘something which had already been done or performed’<sup>7</sup> at the time of bringing the application. I was referred to certain authorities in support of the proposition that the act complained of must have been completed.<sup>8</sup>

[53] I can see no reason why there cannot be a continuing state of affairs which constitutes the complaint – after all an act may be repeated; an omission may be enduring; the current state of affairs will certainly have commenced in the past and may continue indefinitely.

[54] In the present case, it is complained that NWC is currently unable to produce directors whose authorisation to represent NWC on the board of NCMC is incontrovertible. It is complained that NWC has been and remains unwilling (or unable) to assure Kudumane that there will be no challenge to the presence of the erstwhile NWC directors on the board of NCMC. This situation has been extant since the disputes as to shareholdings and directorships emerged into the open since commencement of litigation in early 2010. These acts or omissions are current and ongoing. If Kudumane or NCMC were to ask NWC the names of shareholders and the identity of directors of NWC and the identification of those persons authorised to represent NWC on the NCMC board, there would be no certain answer. Two ‘directors’ (Mogashoa and Koloti, the 1<sup>st</sup> and 7<sup>th</sup> applicants in the Kimberley litigation) would give one answer while two

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<sup>5</sup> See paragraph 7.3 of the shareholders’ agreement; On my calculations, each director of NWC on the board of NCMC has 17% of the NWC vote which is 51%.

<sup>6</sup> See *Livanos v Swartzberg and others* 1962 (4) SA 395 WLD; *Benjamin v Elysium Investments (Pty) Ltd and another* 1960 (3) SA 467 E.

<sup>7</sup> *Porteus v Kelly* 1975 (1) SA 219 W 222A-D; *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd* 1979 (3) SA 170 W 177 A-D.

<sup>8</sup> I note that the phrase ‘has had the result’ did not appear in the predecessor section 252 and our courts did not comment thereon. However, in both *Porteus* supra and *Empisal* supra what was sought was an order interdicting the passing of proposed resolutions which the courts found to ‘be something to be done in the future [which] is not yet an “act”’.

‘directors’ (Mongwaketse and Babuseng, the 3<sup>rd</sup> and 8<sup>th</sup> respondents in the Kimberley litigation) would give another answer. The *rule nisi* handed down in the Northern Cape High Court provides yet a further answer.

[55] The essential jurisdictional fact is that there has been ‘a result’. Section 163 does not require all possible results to have eventuated. Only one result – ‘a result’ – is required which meets the requirements of the section.

[56] I did not understand the submissions on behalf of NWC to be that the result must have emerged and taken concrete form in final and irrevocable shape. It may be that the argument was also to the effect that Kudumane anticipates a challenge by the successful NWC faction to the legitimacy of NCMC meetings, resolutions and actions which has not yet occurred and may never occur. I do not think that this is the only ‘result’ which is envisaged. Long term – in 16 months, 2 years, 5 years or whenever the litigation process is finally concluded – there may well be a successful party in the Kimberly litigation who would wish to and may challenge any decisions taken by NCMC during this period of NWC uncertainty. But that cannot be the only ‘result’ as required by section 163.

[57] At the present time there is already a consequence to the acts and omissions. There is uncertainty as to the identity of the directors of NWC. There is doubt which directors will be authorised to sit on the NCMC board. No meeting can be held or resolution passed in the complete confidence that such meeting or resolution will be secure from challenge. It is the lack of confidence and uncertainty which is the result. NCMC cannot know and Kudumane does not know, with legal certainty, who the majority shareholders directors and authorised representatives will turn out to be and whether or not they will acquiesce in and abide by decisions taken by the NCMC board at the present time.

[58] I have noted that section 163 requires only an impact upon the ‘interests’ of Kudumane. This is a far wider concept than any ‘rights’ which the minority shareholder may have.<sup>9</sup>

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<sup>9</sup> See *Hill v Spread Trustee Co Ltd and another* [2007] 1 All ER 1106 and the authorities cited therein.

[59] One such consequence or result which has already taken place is that Kudumane was obliged to bring an application before this court in 2011 for an order appointing a representative of NCMC to do all that was necessary to lodge and register the renewed prospecting right at the Mining and Petroleum Titles Registration Office. This application was necessitated because it was felt not to be possible to convene a board meeting to pass the necessary resolution authorising lodgement. The order was granted in this court on 5<sup>th</sup> July 2011. There was no opposition thereto by either NCMC, NWC or any of the parties to the Kimberley litigation.

[60] The general approach of the predecessor section 252 of the Companies Act was to give a construction to the words of the section which would advance the remedy provided by the section rather than to limit it. Thus we have seen reference to conduct which disables a minority shareholder from enjoying ‘a fair participation in the affairs of the company’<sup>10</sup> or which is ‘burdensome’<sup>11</sup> or which is ‘unfairly prejudicial, unjust or inequitable’<sup>12</sup> or ‘doing them an injury in their business’.<sup>13</sup>

## RELIEF SOUGHT

[61] The powers of a court to grant appropriate relief in such circumstances are framed in the broadest of terms in section 163. A court is empowered to make any order ‘it considers fit’. Although subsections (a) to (l) provide examples of the types of orders which a court may grant under section 163, the list is not exhaustive. It does, however, include an order appointing directors in the place of or in addition to all or any of the directors then in office, under subsection (f). The section is far-reaching. As the authors of Henochsberg on the Companies Act 71 of 2008 note, the section ‘introduces a new dimension to contracts, which must upon conclusion, also be tested against the criteria of “oppressive and unfairly prejudicial” conduct.’<sup>14</sup>

[62] In summary the relief would declare four individuals to comprise the board of directors of NCMC; they would be authorised to conduct the affairs of NCMC; a quorum for a meeting of

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<sup>10</sup> *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) at 527.

<sup>11</sup> *Scottish Co-operative Wholesale Society v Meyer and Another* (1958) 3 All E.R. 66 (H.L.) 74E-G.

<sup>12</sup> *Louw v Nel* 2011(2) SA 172 SCA 186E.

<sup>13</sup> *Scottish Co-operative Wholesale Society* supra.

<sup>14</sup> *Delpoort ed Henochsberg on the Companies Act 71 of 2008* Issue 1 page 57.

the directors of NCMC would be three of the declared directors; and in the event of a tied vote at a meeting of the directors, clause 7.10 of the shareholders' agreement will apply, which clause gives Kudumane the casting vote.

### **Temporary**

[63] Kudumane claims that the relief which it seeks would enable it, pending the resolution of the Kimberley litigation, to convene board meetings and pass resolutions to authorise prospecting activities which will make it immune from subsequent challenge when the Kimberley litigation is finally resolved. Kudumane asserts that this relief would be a temporary measure only. Kudumane undertakes that, as soon as the Kimberley litigation is resolved, the shareholders' respective representations on the board of NCMC and all the provisions of the shareholders agreement will be restored.

[64] NWC is not so sanguine about the temporary nature of this proposal and charges that this is an attempt by Kudumane to obtain illegitimate majority control over NCMC and that, since the decisions taken by the board of NCMC appointed by the court will have a final effect, Kudumane is really seeking final relief in respect of all decisions to be taken at NCMC board meeting level.

### **Directors**

[65] The declared directors would be the three current Kudumane representatives on the NCMC board about whom there is and can be no dispute.

[66] It is proposed that the only director of NWC and of NCMC whose authority has not been disputed by either of the parties to the Kimberley litigation be appointed as the NWC director on the NCMC board. He is Mr Paulus Koloti. As the representative of NWC, Koloti would also be chairman of the board of NCMC.

[67] However, NWC argues against the selection of Koloti for a number of reasons including, firstly, that he is not an impartial person by reason of his citation as 7<sup>th</sup> applicant in the Kimberley



litigation and secondly, because he has never attended meetings of NCMC and is therefore 'an ignorant' person.

[68] These objections miss the point. For NWC to be represented on the board of NCMC requires a director of NWC whose appointment has not been or is not currently challenged. It is not the individual (Koloti) but the office (director of NWC already a director of NCMC) which is required.

### **Control by Kudumane**

[69] NWC charges that Kudumane has the ulterior purpose of attempting to attain majority control over NCMC. Reference is made to the provisions of the shareholders' agreement which provides for the voting powers of each director and concludes that NWC through Koloti would only have 17% voting power compared to a total of 49% voting power of the three Kudumane directors. I do not understand this to be the position. At any meeting, Koloti would have the percentage of the total votes corresponding to the percentage holding in the company held by NWC divided by the number of directors (one) nominated by NWC.<sup>15</sup> In other words, Koloti would exercise 51% of the votes and all the Kudumane directors 49% of the votes.

[70] The submissions in respect of the casting vote are irrelevant – that has always been the case and there is no change – where there is a deadlock then Kudumane has a casting vote.

[71] In addition, I understood the argument to be that the proposed change to the required quorum for meetings of three directors would be sufficient, which would have the effect that Koloti may not even be present at such meetings. This concern is coupled with the reduced notification of meetings which is sought. I can see no reason why reduced notice be given to directors of meetings (prayer 1.4 of the Notice of Motion). As far as Koloti's presence is concerned, notice of meetings is required to be given to all directors.

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<sup>15</sup> See paragraph 7.3 of the shareholders' agreement which is not sought to be amended.

[72] NWC is also concerned that Kudumane seeks an order that the declared directors be authorised to nominate representatives to the board of directors of any company in which NCMC has an interest. The only entity in which NCMC has an interest is Kudumane Mineral Resources (KMR) in respect of which Dirleton and NCMC have concluded an agreement. I cannot see why Dirleton or KMR should have any concern about nomination of directors from NCMC and none has been suggested.

[73] It was argued on behalf of NWC that the proposed order constitutes an entirely unjustified interference in the affairs of NWC (who appoint directors of NWC and nominate directors to the board of NCMC and its shareholders who exercise their rights to ownership of those shares, *inter alia*, through such appointments). I was referred to *Scottish Co-operative Society v Meyer* 1958 (3) All E.R. 66 (H.L.) as authority that the conduct of a shareholder (ie NWC) outside of the company (NCMC) itself, even though that conduct may relate to the company in question, has no bearing on the conduct or omission catered for in section 252. I do not find that reading in the speech by Viscount Simonds. In that case there was a subsidiary company being starved of finance allowing 'the company's trading activities to decline or vanish'. The court held that the conduct of the majority shareholder in so doing was oppressive to some part of its members. In any event, the wording of section 163 is different to those with which all previous authorities have been concerned.

### **Interests of NCMC, Kudumane and NWC**

[74] Kudumane submits that the relief sought is in the interests not only of Kudumane but also of NCMC and, consequently, it is also in the interests of NWC as its majority shareholder. That may well be the case in the long term.

[75] I have, however, had regard to the sensibilities of all individuals and entities within the two litigating factions of NWC who are confronted with the indignity and the legal result that their ownership of shares becomes meaningless where shareholdings cannot be used to appoint directors to NWC who are then nominated to the board of NCMC. Having had regard to this, I can only but conclude that it is the ongoing litigation which has already rendered all factions of NWC impotent and not the actions of Kudumane in seeking this relief.

[76] I do note that not all applicants and respondents who claim to be shareholders in or directors of NWC have opposed this application. It is possible that those who do not oppose are content that NCMC matters are seen to proceed even though its majority shareholder, NWC, is in a state of disarray.

## CONCLUSION AND ORDER

[77] In my view Kudumane has discharged the onus to prove the necessary *facta probanda*.<sup>16</sup> I am satisfied that Kudumane has the *locus standi* to approach this court for relief in terms of section 163 of the Act. Kudumane is a minority shareholder. The actions of NWC in the Kimberley litigation has had a result that the affairs of NCMC, and hence of Kudumane, are being oppressed and unfairly prejudiced and unfairly disregarded.

[78] I am accordingly prepared to grant most of the relief sought on a temporary basis.

[79] An order is made as follows:

1. Pending the final outcome of the Kimberley litigation (case number 299/2010) :
  - 1.1 The following persons ('the declared directors') be regarded as comprising the board of directors of Northern Cape Manganese Company (Proprietary) Limited ('NCMC')—
    - i. Mr Hirotaka Suzuki;
    - ii. Mr Jiang Jian Tao;
    - iii. Mr Schalk van der Merwe; and
    - iv. Mr Boy Paulus Koloti
  - 1.2 The declared directors be authorised to conduct the affairs and activities of NCMC in their capacities as directors of NCMC, including, but not limited to taking all steps necessary to conduct prospecting operations in accordance with the Prospecting Programme, appoint contractors for the purpose of conducting such operations and entering into the necessary funding;

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<sup>16</sup> *Donaldson Investments (Pty) Ltd and others v Anglo-Transvaal Collieries Ltd and others* 1980 (4) TPD.

1.3 A quorum for meetings of directors of NCMC shall be any three of the declared directors. If no quorum is present at any duly convened meeting of the board of NCMC within 30 minutes after the scheduled time for the commencement of that meeting, the meeting shall be adjourned to the same time and venue two (2) business days later. If at the adjourned meeting a quorum is not present thirty minutes after the scheduled time for the commencement of the adjourned meeting, the directors present thereat shall constitute a quorum provided that there are at least two declared directors present thereat:

1.4 At any meeting of the directors of NCMC –

- i. Koloti (being a representative of NWC at such meeting) shall act as Chairman. In the event of any directors' meetings being adjourned and Koloti not being present at the adjourned meetings as contemplated in paragraph 1.3 above, van der Merwe shall act as Chairman in his place;
- ii. The provisions of sections 73(5)(c) and 73(5)(d) of the New Companies Act shall apply;
- iii. In the event of a tied vote at such meeting, the provisions of section 7.10 of the shareholders' agreement of NCMC shall apply;

1.5 The declared directors be authorised to nominate representatives to the board of directors of any company in which NCMC has an interest.

2. The costs of this application are postponed pending the outcome of the Kimberley litigation ie the litigation in the Northern Cape High Court under case no 229/20 which will determine the status of the party opposing this application.

DATED AT JOHANNESBURG ON THIS 11<sup>th</sup> DAY OF JUNE 2012

  
SATCHWELL J

## APPEARANCES

## APPLICANTS:

A Subel SC (with him K Hofmeyr)

Instructed by Werksmans Incorporated, Johannesburg

## RESPONDENT:

P R Cronje

Instructed by Van Zyl and Groenewald Attorneys,

Johannesburg