IN THE SUPREME COURT OF SWAZILAND

APPEAL CASE NO.35/2006

In the matter between:

PAUL FRIEDLANDER	**1ST APPELLANT**
MYRA ANNE SALKINDER	**2nd APPELLANT**
ANTON PRETORIUS	**3rd APPELLANT**
KIRSH HOLDINGS LIMITED	**4th APPELLANT**
SWAZI PLAZA PROPERTIES (PTY) LTD	**5th APPELLANT**
MBABANE DEVELOPMENT CORPORATION (PTY) LTD	**6th APPELLANT**
SWAZI PLAZA TOWERS (PTY) LIMITED	**7th APPELLANT**
S & B BUILDING (PTY) LIMITED	**8th APPELLANT**
VS	
SWAZILAND INDUSTRIAL DEVELOPMENT CORPORATION	**RESPONDENT**

CORAM: STEYN JA

TEBBUTT JA

BANDA JA

JUDGMENT - 15th NOVEMBER 2006

SUMMARY

The 4th appellant K.H. and the/ respondent (SIVC) were/ each; 50% shareholders' in the/ 5th appellant (Swazi Plaza) - cv resolution/ of the/ board/ of directory of Swa^O Plaqa/ sought to- bund/ the/ SIVC as cv shareholder to- cv E108 million/ development known as- Corporate/ Place/ - validity of the/ resolution/ challenged/ and an interdict yought - High/ Court upholding/ challenge/ and granting* inter diet.

In an appeal/: Held that the/ articles of assoxxatixyn/provided/for constraints on/ any one/ shareholder exercising majority control

on/ the/ board of directory and thus- over S\ocuyL> Pla^a - an

attempt to- avoid yuch/ constraints- by an/ artificially created

majority on/ the/ board of directory unlawful/ and in/ breach/ of

the/ contract between the/ parties ay per the/ articles of the/

ayyociatvon/ - appeal accordingly diymiyyed.

Appeal against an order granted by the/ High/ Court

interdicting/ the/ 8th appellant (the/ building' contractor)

abandoned/ by the/ respondent - no- clear right against 8'

respondent proved - appeal upheld with coyty.

Stevn JA

[1] On the 19th of July 2006 the High Court per Maphalala J granted the respondent in this appeal certain interdictory relief of a permanent nature. It is against the orders granted by the High Court that those against whom they were operative appeal to this Court.

[2] The parties to this appeal are the following:

The first appellant is Paul Friedlander (Friedlander). He is a director of the fourth, fifth, sixth and seventh appellants. He testified on behalf of the 4th Appellant - Kirsh Holdings (K.H.) - and has been referred to in the papers as the chief executive officer of that company. The second appellant is Myra Anne Salkinder (Salkinder). She describes herself as the managing director of K.H. and as the chairperson and a director of the fifth, sixth an seventh appellants. The third appellant is Anton Pretorius (Pretorius) described as a director of fifth, sixth and seventh appellants.

Fourth appellant is Kirsh Holdings (K.H.) referred to above. The fifth appellant is Swazi Plaza Properties (Pty) Limited (Swazi Plaza) a "joint venture" initiative of K.H. and the respondent. The sixth and seventh appellants' are private

companies cited nominally and play little, if any, significant role in these proceedings.

The 8th appellant is S and B Building (Pty) Ltd (the contractor). In citing this appellant in these proceedings the respondent avers that "no particular order is being sought" (against it) "but who is cited herein as the company carrying out the works complained of. It should be noted however that the interdictory relief sought in paragraph 2 of the notice of motion includes the contractor as one of the parties against whom an order, if granted, would become operative.

The Respondent in this appeal is Swaziland Industrial Development Company Ltd (SIDC or "the company") a limited liability company registered as such in accordance with the laws of Swaziland. (Such registration applies to all the corporate entities cited above.)

I deal herein with the interdictory relief sought by SIDC. The relevant prayers read as follows:

"3.1 <u>The respondents</u> be and are hereby interdicted and

restrained from carrying out or continuing with the construction works at Swazi Plaza or development of Corporate Place pursuant to the illegal and or irregular 'Resolution' purportedly passed by the Board of Directors on 22nd February 2006 authorising the development of Corporate Place.

(own emphasis)

20.1 **Interdicting and restraining the 5th, 6th, and 7th respondents from carrying out and putting into effect in any manner whatsoever the illegal and/or irregular 'Resolution' to proceed with the development of Corporate Place at Swazi Plaza, Mbabane, purportedly passed by the Board of Directors on 22nd February 2006.** (own emphasis)

20.2 **The 'Resolution' of the Board of Directors of the 5th, 6th and 7th respondents be and is hereby set aside as irregular and of no force or effect, alternatively:**

20.3 **An Order declaring the 'Resolution* of the Board of Directors of**

the 5th, 6th and 7th respondents dated 22nd February 2006, invalid.

20.4 **An Order declaring that the applicant and the 4th respondent are represented by an equal number of Directors in the 5th, 6th and 7th respondents.**

20.5 **Costs of suit (a special order for costs was claimed but not granted by the High Court.)**

20.6 It will be noted as recorded above that the interdict sought in paragraph 2 of the notice of motion restraining the carrying out or continuing with the construction works at Swazi Plaza or development of Corporate Place "pursuant to the illegal and/or irregular resolution purportedly passed by the Board of Directors on 22nd February 2006 authorising the development of Corporate Place" includes within its ambit also the 8th appellant (the contractor).

20.7 The High Court granted the SIDC all the orders cited above as prayed. It only granted prayer 2 and a costs order against the contractor. Such an order would

however only be operative if such construction were

carried out pursuant to the allegedly flawed resolution.

By seeking and obtaining this relief also against the contractor the respondent placed it in jeopardy should it seek to rely on a building contract concluded with Swazi Plaza "pursuant to" the allegedly flawed resolution. I record this up-front, because it was only after the argument for all the appellants had been concluded and counsel for the respondent had addressed us in support of the relief granted to it as against the first seven appellants, that the Court was informed that the respondent was not seeking any relief against the contractor and was abandoning the order granted by the High Court against it. I will comment further on this aspect of the matter below. When I therefore now refer to the appellants collectively I do not include the contractor within that appellation.

The appellants appealed against the relief granted on a large number of grounds. It is not necessary to set these out because it became apparent that the only real issue this court was asked to resolve was whether or not the resolution of the Board of Directors of Swazi Plaza dated the 22nd of February 2006 authorising the company to conclude an agreement for the construction of "Corporate Place" at a cost of El08 million was valid and enforceable or not. However the resolution of this dispute requires a careful consideration of

the history of the relationship between K.H., SIDC and their involvement in the Swazi Plaza, or the Corporate Place project through their shareholding in that company (i.e. in the fifth respondent).

Swazi Plaza was registered as a company on the 21st of April 1977. K.H. and SIDC each held a 50% shareholding in the venture. For some 22 years, i.e. until January 1999 the company's board of directors consisted of 4 persons, equal representation being awarded to each of the "partners". Unlike the situation in another joint venture between the parties in a company known as Swaki (Pty) Limited (Swaki), there was no deadlock-breaking mechanism incorporated in its founding documentation. What was provided however in article 65 of the articles of association, was that the directors of the company had to be appointed by the shareholders in general meeting. It seems clear therefore that K.H. and the SIDC intended to operate on a consensus decision making basis. Indeed in July 2000 when a fifth director was appointed pursuant to the nomination by K.H., the chairperson is recorded in the minutes as saying the following:

> **... in regard to Mr. Cloete's appointment. ... (she) considered that as a leading attorney and a director of SWAKI (Pty) Ltd (his) expertise would be of tremendous value to the company.**

She advised the directors representing SIDC Ltd, in view of the Cloete's appointment that SIDC could, if they so wished, appoint an additional director, (own emphasis)

This offer, even though it was not immediately taken up, is evidence of an acceptance of an underlying assumption shared by the parties; i.e. that by virtue of their equal shareholding the governance of the company would be based on the principle of equality or joint control and that no "partner" would be empowered to force decisions on the other with which it did not agree. The fact that the shareholders had to appoint the directors as provided in article 65 was a key mechanism directed at ensuring joint control over the company by its two 50% shareholders.

It appears from the minute book of Swazi Plaza that on the 27th of December 2001, SIDC nominated Dr. E.T. Gina (Gina) as a director of the board of directors "with effect from 31st December 2001" and that he participated as a director from that date. Thus e.g. he voted for a resolution appointing Friedlander as a Director in March 2002. As at February 2003 SIDC had three of its representatives recorded as directors of the company and on the 11th of March 2004 Mrs. Masisi-Hlanze was also added to the

Board as a representative of the SIDC. By that date Mr. M. Simelane had already also been appointed and had served as a SIDC representative on the Board. That Messrs. Gina, Kunene, Simelane and Masisi-Hlanze were recognized and acted as directors is evident from resolutions signed by them in their capacity as directors. Thus when the company's bank accounts were transferred from Standard Bank to Nedbank as per resolution of the Board of Directors these four directors signed it authorizing such transfer. There are also other resolutions similarly endorsed by them as directors of Swazi Plaza properties. See e.g. the resolutions signed by them on the 14th and 19th of January 2005. They are all four also recorded as being present as directors at the meeting of the board held on the 1st of April 2005. Three of them are recorded similarly at the meeting held on the 22nd of June 2005 with an apology noted for the absence of Gina.

Therefore, the contention advanced on behalf of the appellants that from the 1st of January 1999 "the board of Swazi Plaza was constituted of five directors, three of whom was appointed (by K.H.) and two appointed by (the SIDC)" is not supported by the independent evidence of the minute book of the company.

The history of how the company operated prior to the tensions that

arose over the projected new development for Swazi Plaza is important in assessing the validity of the disputed resolution.

This history does in my view confirm the contention advanced on

behalf of the SIDC that it and K.H. (each being a 50% shareholder),

were "equal partners" in Swazi Plaza and that important decisions

affecting the rights and obligations of the two shareholders, in

order to be valid and enforceable, would require the approval of

both. Not only is this assessment of the situation supported by

the record of the company's minute book but also by the inherent

probabilities. Unlike in their other joint venture, (Swaki) the

parties had not incorporated in its founding documents any

deadlock-breaking mechanism. Indeed, they had for many years

operated the company on the premise that they would share

power. This one would expect in a situation where the two parties

were equal shareholders in the company and each of them were

equally at risk should any venture prove to be unprofitable. This

principle meant that, in order to bind the shareholders to any major decision,

it had to be taken by consensus. That this was the perception not only of

SIDC but also of K.H. appears from an undated e-mail from Friedlander to

Gina. Under the heading, "Defining the overall relationship between SIDC and

K.H. given the events of the last year" Friedlander says: "I do not believe that at any point either party has ever contemplated a situation where we would not work together in areas of mutual benefit. The new extension at the Swazi Plaza is an example of where we share an identity of interests to proceed with the expansion proposed."

Under the heading, "Management of the Joint Assets" Friedlander says in his e-mail: "It is common practice in equal partnerships for the operating partner to have management control for which a commensurate fee is payable nor are any issues of corporate governance brought into question in this regard." He then goes on to say the following under the same heading:

"On shareholder matters, K.H. and SIDC have always worked on the basis of unanimous assent. This is evidenced by the fact that over the long relationship, as far as I am aware, there has not been a single incident of disagreement that was resolved by K.H. expressing its casting vote."

Friedlander then concludes as follows:

"On the contrary, the 50 - 50% shareholding has ensured an identity of interests that is underscored by the duration of the

relationship. Unhappiness with this scenario would inevitably have resulted in SIDC wanting to sell its shares in SWAKI and the PLAZA."

(When Friedlander refers to a casting vote, such reference must be to the situation that obtained in SWAKI where its charter contained such a deadlock-breaking mechanism. As we know, no such provision was incorporated in the founding charter of Swazi Plaza.)

As pointed out above the articles of association of this company contained another constraint directed at maintaining a power equilibrium. This was that directors to its board could only be appointed in a general meeting of the shareholders (article 65). Whilst both parties did from time to time ignore this protective provision - and I will deal with the implications of their conduct below - this sanction is a prescription directed at preventing either party from exercising unilateral control over the decision-making processes of the company on any major or policy issue which is the legitimate territory of its board of directors. Therefore, whilst K.H. had responsibility for management for which they were remunerated, the whole ethos of the joint venture in Swazi Plaza was that an equilibrium of

control had to be maintained and that neither party was authorised to embark upon a course of action that was inimical to the other. It follows that major decisions could only be taken by consensus. That this was clearly understood by Friedlander is apparent from his e-mail to Gina cited above.

It is against this backdrop that the events that unfold - particularly during 2005 and early 2006 - concerning the proposed project for what is referred to in the minutes as a "proposal to develop the site in front of Standard House" (the project). The meeting at which the project was outlined by management in some detail and a conception presentation was made, was held on the 2nd of March 2004. At this meeting four representatives of the SIDC attended. The minute book contains a record of a meeting of the board on the 4th of December 2004 and it identifies the same four representatives of the SIDC who attended the presentation referred to above and refers to them as directors of Swazi Plaza.

On the 1st of April 2005 a meeting of the directors of Swazi Plaza is held at which the "new building", i.e. the project, was again discussed. The same four directors represented the SIDC at the meeting i.e. Gina, Kunene, Simelane

and Masisi-Hlanze. Pretorius is noted as attending and his nomination as an alternate director to Friedlander is approved by the board. The project is referred to under the heading "New Building - C.E.'s motivations." The minute reads as follows:

"The overall importance of the new development for the Swazi Plaza was highlighted.

- **Approximately 10 000m² will be created with roughly 6 500m² of retail and 3 500m² office space.**
- **Management is confident that the building can be tenanted with an anticipated return of 8% per annum on a total cost of E80 million.**
- **A presentation of the new building will be made to the Board on 13th April 2005."**

Before I come to deal with the critically important board meetings held in June 2005 and thereafter, it is advisable that I refer to certain developments concerning the issue as to how the board of directors of Swazi Plaza was constituted. At the meeting held on 2nd March 2004 at which the project was mooted and a conceptual presentation made, Ms. Masisi-Hlanze is reported

as enquiring

"whether the company was in compliance with the memorandum and articles of association in terms of the allowable number of directors of each shareholder." Some 20 months later and in a letter dated 25th October 2005 addressed to the directors, Mbabane Development Corporation (Pry) Ltd (the 6th appellant) and with reference to the provisions of the memorandum and articles of Association of **that company,** an attorney and ex-director Mr. Rob Cloete advises Friedlander that "I believe that the 5 (five) directors reflected in the latest return filed with the Registrar of Companies represent those directors who have lawfully appointed (sic) to the Board of Directors of the Company," I proceed to deal with the correctness of this advice. It will suffice if I record that:

10.1 It is not clear what Cloete's instructions were and why his enquiries were directed at the charter documents of the 6th appellant (Mbabane) and not at Plaza Properties.

10.2 Cloete makes it clear that he has not "had sight of all records and returns of the company concerned." (Mbabane)

10.3 He did not have the benefit of examining e.g. the minutes of the meetings of Swazi Plaza and how the shareholders themselves structured and viewed the directorate of that board.

10.4 His mind was evidently directed principally at an examination of documentation submitted as record for the benefit of the Registrar of companies.

10.5 He appears not to have applied his mind to the significance of the rights of shareholders to participate equally in the

decision making processes of Swazi *Plaza,* more particularly that appointments to the board of directors of Swazi Plaza could only be made in a general meeting of its shareholders and not simply at the behest of one of the shareholders. The fact that in a return to the registrar a particular individual's name is recorded as a director could never per se validate an invalid appointment.

Cloete's advice was in my view clearly wrong.

In the meantime an important meeting of the board of directors of the 6th Respondent (Mbabane) and Swazi Properties had taken place on the 22nd of June 2005. Pretorius attended the meeting. Up to that time he had served on the board of the Swazi Plaza as an alternate director to Friedlander (see the minutes of September 11, 2003). At the meeting of the 20th of June 2005, the chairperson (Salkinder) stated that Cloete had resigned as a member of the Board and that Pretorius had been appointed in his place. The minute goes on to record that "there being no objections to his appointment" he was welcomed to the board.

It is however to be noted that at this time Cloete's opinion had not yet been obtained. Gina, Kunene, Simelane, and Ms. Masisi-Hlanze had been serving as directors representing the SIDC as a 50% shareholder. The directors representing K.H. who attended according to the minutes

were Salkinder (Chairperson), Kirsh, and Friedlander. Had Cloete not resigned he would have been the 4th representative of K.H. Pretorius being appointed in his place merely restored the parity of representation of the two stakeholders. It is abundantly clear that his appointment was not communicated as being the appointment of a 5th director creating a majority representation for K.H. I have no doubt that,

bearing in mind the long history of equal representation, none of the parties would have seen Pretorius' appointment as creating a majority representation for K.H. on the board of Plaza Properties.

The meeting was, however, important for a different reason. It became clear that there were serious differences between the two shareholders concerning the financial viability of the proposed project. Whilst there was no "in principle" objection by the SIDC to the proposal, the scale and cost of the initiative was questioned by Gina. It is not necessary for me to detail the debate or comment upon the validity or otherwise of the concerns expressed by him. It is sufficient if I say that he wanted the project limited to a capital outlay of E60m and was looking for an income from the development for the SIDC of E3m per annum. After a lengthy discussion the board authorized Friedlander to sign the small works and a piling contract to the total value of E7.5million. The

chairperson recorded that the board was committing itself to the project but that the final size and scope of the development still had to be agreed upon. The board also agreed that Friedlander and Gina would meet at their earliest convenience to discuss the way forward on the final costing and to "discuss regularizing the various shareholders management issues." (It is not necessary to detail these. However, the minutes reflect an articulated discomfort on Gina's part with the returns on the investment the SIDC was receiving from its joint venture projects with K.H.) Whether these were justified or not is not relevant for present purposes. What is, is that the relationship between the parties, while not yet openly hostile was under stress. The scope and size of the project and the capital requirements for its implementation were under serious challenge. Gina was clearly not convinced that it was in SIDC's interests to commit itself to the project as proposed by management. In fact the first warning shots had been fired on behalf of the SIDC across K.H.'s bows at this meeting of the 14* $_0$f October 2005.

It should be noted that some 11 days later i.e. on the 25th of October 2005 Cloete furnished his opinion on the constitution of the board of directors of the 6th respondent. That this was accepted as being also valid for Swazi Plaza is clear, because at the next meeting of the board on the 2nd of December 2005 the minutes record the following under

the heading directorship:

> **"The Chairperson stated that for the record, after some investigation, that the following represents the legal position regarding the directorship of the company. 1. The memorandum and articles of association of both companies provide for a minimum of 2 and a maximum of 5 directors.**
>
> **2. In order to increase the permitted number of directors, a series of special meetings would need to take place. A minute of a board meeting held on March 2, 2004 is the only record found on the matter. According to the official records held by the registrar of companies, the current directors are as follows:**
>
> 20.8 **M. Salkinder (Chairman)**
>
> 20.9 **P. Friedlander**
>
> 20.10 **A. Pretorius**
>
> 20.11 **T. Gina**
>
> 20.12 **V. Kunene**

Kirsh was then proposed and accepted as an alternate to Pretorius. The minutes then read as follows:

> **"Mr. Kirsh said that he would like to see all acrimony put aside**

for the sake of the companies, and pointed out that we all have common interests and should look to the best interests of the business. He also said that he would like to commend Plaza staff on their management of the centre. On another note, Mr. Kirsh told the meeting that while the project was viable in its own right, the positive effect of inflation had been left out of the calculations assessing the viability of the new development. Dr. Gina said that in order to settle the issue of directorship of the companies, the Secretaries of SIDC and the Plaza companies should conduct a thorough investigation exercise and report back to the Board.

Mr. Hlanze wished to clarify that she was suggesting to the meeting that the issue of the directorship of the companies needs to be addressed. Mr. Kirsh advised that for that to happen, the proper procedure must be followed and that he may not agree with SIDC'S proposals, if these meant altering the balance on the Board."

A debate then ensued concerning the financial viability of the project. Gina handed out a copy of a report conducted at the instance of the SIDC. He also adverted to the alleged large cost overruns experienced on a previous project. The meeting ended inconclusively, the SIDC members withdrew and did not return at the suggested time for a recommencement of the meeting.

I come to deal with the meeting of the 22nd of February 2006 where the decision to approve of the project was allegedly taken. In order to appreciate the composition of the meeting, the nature and contents of the discussion as well as the manner in which the decisions were taken the minute as recorded in the minute book is

reproduced as an annexure to this judgment.

There are several matters that have to be noted from the record of these proceedings. They are ***inter alia:***

15.1 For the first time two of the representatives of the SIDC, who had at all the previous meetings been attending and participated as directors, are now recorded as attending "by invitation". (Masisi-Hlanze and Simelane) Kirsh is also recorded accordingly.

20.13 For no given reason Pretorius is recorded as a director when he was the most recently elected member of the board. (His vote was of course crucial).

20.14 It is manifestly inequitable that the joint venture partner who holds 50% of the shares in the company, is by virtue of an artificially created majority on the board purportedly committed to a El08m project of which it clearly did not approve and of which it was clear that they wanted no part, particularly if it was at the cost proposed by management, i.e. El08 million.

15.4 It is also clear that the SIDC representatives protested and contended that they should be allowed to vote.

The chairperson's reliance on the "books of the registrar of companies" is given as a justification for their exclusion. One would ask why are they excluded as candidates for the fifth position when they were both directors in good standing and were appointed prior to Pretorius? Surely the answer could not be because his name appeared on a registrar submitted by management to the registrar of companies. In this regard it is to be noted that there are two copies of the return submitted to the registrar. The one designated Pretorius as an

alternative director, the other records him as a director against a date of appointment of the 23rd of August 2002 which is clearly wrong. He was in fact proposed and accepted on the 22nd of June 2005.

On the 6th March 2006 Gina on behalf of the SIDC requisitioned an extraordinary shareholders' meeting of Swazi Properties to address the following issues:

"1.1 The proposed development of "Corporate Place" (the project) - its size and scope.

20.15 Swazi Plaza Properties debenture - defaults in payments by the company.

20.16 Composition of the board of directors.

20.17 Corporate governance issues; i.e. shareholders agreement, management agreement."

On the date of the meeting (the 14th of March 2006) the SIDC issued a statement dealing with each one of the four issues cited above. It sets out in some detail the motivation of the company, why it was aggrieved at the conduct of its shareholder partner to force the project on it.

17.1 The extraordinary shareholders meeting did not resolve the dispute and the parties were - according to the SIDC -

deadlocked on the issue. Acrimonious correspondence followed, the battle lines were drawn and, ultimately, the interdictory proceedings were launched.

17.2 As was outlined in paragraph 4 above the only real issue to be resolved was whether or not the resolution authorizing the company to "construct Corporate Place at a cost of El08 million" was valid and enforceable or not. In order to obtain the relief it sought the SIDC bears the onus to establish all the elements necessary for the grant of a permanent interdict; viz that it had a clear right to the relief claimed, that an injury had actually been committed, or was reasonably apprehended, and that there was no other satisfactory remedy available to it. See in this regard:

V AND A WATERFRONT PROPERTIES (PTY) LTD AND ANOTHER V HELICOPTER AND MARINE SERVICES (PTY) LTD AND OTHERS 2006 (1) SA 252 (SCA).

It does not appear to be in dispute that the appellants' appeal, other than that of the contractor (the 8th appellant), must fail if this court is of the opinion that the court a quo was right in finding that the resolution was

invalid and unforceable as between the shareholders. The question of its validity as against the contractor will be dealt with separately below. I therefore proceed to deal with this issue in so far as it relates to the shareholders.

It is common cause that the provisions of article 65 had not been observed in respect of the appointment of directors to the board of Swazi Plaza. It was an entrenched practice for the two shareholders to appoint their respective "representatives" by nomination and notification and that these nominations where invariably accepted by each of the two shareholders. Until the receipt of Cloete's opinion dated the 25th of October 2005 the board was clearly unaware of the limitations concerning the minimum and maximum number of directors that could serve as such on the board (a minimum of two (2) and a maximum of (5). At the time of Pretorius' appointment the two shareholders (K.H. and SIDC) would have perceived the situation concerning the composition of the board to be the following:

The SIDC had four directors representing it; i.e. Gina, Simelane, Kunene and Masisi-Hlanze. K.H. had, with

Cloete having resigned, only three. Pretorius' appointment

therefore restored the equilibrium. Bearing in mind the long

history of consensus-based decision making, it was clearly the intention of both shareholders to structure the board in such a manner so as to manifest this underlying ethos. Inasmuch as the appellants rely on the principle of "unanimous assent" it has to be established, not only that Pretorius' appointment was agreed to, but that the SIDC assented to his appointment as a fifth director representing K.H.

Not only is such a proposition in conflict with the overwhelming probabilities, but no evidence was adduced to prove such an assent. It is far more in accordance with this principle to apply it

as authorizing a departure from the provisions of article 65

limiting membership to five (5), even though no such resolution to

do so had been passed in general meeting. See in this regard

GOHLKE & SCHNEIDER V WESTIES MINERALS BPK 1970 (2)

SA 685 (A), more particularly the reasoning at pages 693-694.

However, this principle could never be invoked in order to legitimize the appointment of Pretorius as a fifth director of the board of Swazi Plaza.

In any event the strategem of using his appointment as a means of passing the resolution is also to be rejected for a more fundamental reason.

The parties had for decades observed the underlying principle of an equilibrium of power between the two equal shareholders. The independent record speaks loudly as to this tacit but firmly entrenched contractual principle. To seek unilaterally to act in breach thereof is not only clearly inequitable but in my view also in breach of a contractual obligation each shareholder owed the other.

In this regard, it is clear that the articles of association of a company have the same force and effect as a contract between the company and each and every member as such, to observe their provisions. See **Gohlke** supra at page 692 and the cases cited op.cit. See also: **DE VILLIERS V JACOBSDAL SALTWORKS (PTY) LTD 1959(3) SA 873 (O)** and **PALMER'S COMPANY LAW: CHAPTER 14-14-11 [163].** The provisions

concerning the process through which a director is to be appointed; i.e. only in a general meeting, must therefore be meticulously observed and its constraints cannot be avoided otherwise than with the explicit agreement of the other member(s). (See **PALMER** op.cit) It follows, bearing in mind that this constraint was directed at the maintenance of a power equilibrium on the board of directors, that no appointment which disturbs that equilibrium can be made without, ***in casu,*** the SIDC deliberately and knowingly consenting thereto. It could never be suggested that it had done so.

On an overview of all the facts I am therefore of the opinion that the resolution of the 22nd of February 2006 was invalid and unforceable as between the shareholders.

I summarise our conclusions as follows:

20.18 The evidence established that Swazi Plaza was a joint venture with an equal (50% - 50%) shareholding by K.H. and the SIDC.

20.19 The articles of association were structured in such a manner so as to ensure that an equilibrium of power was maintained. Thus e.g. no director could be appointed other than in a general meeting of the shareholders. There was also no deadlock-breaking mechanism in the charter of the

company and the chairperson had no casting vote. All major decisions had to be taken by consensus between the shareholders.

20.3 This view of how Swazi Plaza had to decide major issues was common to both parties. In this regard the undated e-mail from Friedlander to Gina when he says: "On shareholder matters K.H. and SIDC have always worked on a basis of unanimous consent" is significant.

20.4 K.H. could not, via an artificially created majority on the board of directors of the company, lawfully commit SIDC to the implementation of a E108 million development project it did not support. To do so would he in breach of the obligations each of the two shareholders owed the other in terms of their contract as enshrined in its founding charter (the memorandum and articles of association).

20.5 The appointment of Pretorius as a fifth director representing K.H. and giving it a majority on the board of directors of Swazi Plaza at the meeting of the 22nd of February 2006 was a nullity.

As set out above the parties had for decades observed the

underlying principle of an equilibrium of power between the two equal shareholders. The independent record speaks loudly as to this tacit but firmly entrenched contractual principle. To seek unilaterally to act in breach thereof is not only clearly inequitable but in my view also in breach of a contractual obligation each shareholder owed the other.

On an overview of all the facts I am of the opinion that the resolution of the 22nd of February 2006 purporting to authorise the construction of "Corporate Place" at a cost of E1 08m was invalid and unforceable as between the shareholders.

For these reasons we conclude that the appeals of the appellants 1 to 7 fail and are dismissed with costs including the certified costs of two counsel.

[21] I come to deal with the appeal of the contractor (the 8th appellant). I have already in paragraph 3.8 above referred to the fact that it was only when presenting its oral argument in reply to the appellants' submissions, that this Court was informed for the first time by respondent's counsel that it was not seeking any relief against the contractor (the 8th appellant) and was abandoning the order granted by the High Court against it. In its heads of argument,

respondent urged this Court to dismiss the appeal of the contractor with costs on a variety of grounds. That obliged the 8th appellant to argue its appeal before us and the respondent only abandoned the appeal in the circumstances and the manner set out above. I am of the view that the respondent was right to abandon the judgment in its favour against the 8th appellant. It did not establish a clear right to interdictory relief against it. The Court erred in granting it an order in terms of paragraph 2 of the notice of motion.

The appeal of the 8th appellant (the contractor) is accordingly upheld with costs including the costs of counsel. The order of the court a quo against the 8th respondent in this Court is set aside. In its place it is ordered as against the 8th respondent in the High Court that:

"The application is dismissed with costs including the certified costs of counsel."

I should add that this appellant (the 8th) sought in reply to hand in a handwritten conditional counter - application to us. We have obviously had no regard to this belated attempt to introduce a counterclaim.

J.H STEYN

Judge of Appeal

I AGREE

P.H. TEBBUTT

Judge of Appeal

I AGREE

R.A. BANDA

Judge of Appeal

MINUTES OF THE MEETING OF DIRECTORS OF MBABANE DEVELOPMENT CORPORATION (PTY) LTD AND SWAZI PLAZA PROPERTIES (PTY) LTD

HELD AT THE SWAZI PLAZA PROPERTIES BOARD ROOM ON FEBRUARY 22, 2005 at 12pm

Present: Mssrs. M. A. Salkinder (Chairman)

P. J. Friedlander

A. Pretorius

T. Gina

V. Kunene

M. Masisi-Hlanze (by invitation)

N. Kirsh (by invitation)

M. Simelane (by invitation)

T. Hlophe (Secretary)

Confirmation of Minutes

The Chairman welcomed all to the meeting and informed the Directors that due to the specific agenda of today's meeting, the minutes of the previous Board meeting would not be confirmed in this meeting but at the next meeting of Directors.

Report back of sub-committee on Corporate Place

The Chairman requested P Friedlander to report back to the Board on the work and recommendations of the sub-committee. Friedlander gave a brief summary and said that the committee had met twice and in his view, had made good progress and had scheduled a third meeting with the expressed objective of finalizing a recommendation to the Board. However management then received a letter from SIDC indicating that all further discussion on the development was futile unless certain shareholder issues were addressed to SIDC's satisfaction. P Friedlander then suggested that V. Kunene should report to the Board in his capacity as the Chairman of the sub-committee

V Kunene outlined to the Board the circumstances surrounding the formation of the Corporate Place sub-committee and the composition thereof. He mentioned that the sub-committee had met twice. He briefed the 3oarc on the presentation of the three construction scenarios and that the first option (option A) had been rejected, as the cost of construction was considered to be too high at E117 miliion. The remaining options (B and C) with costs of E108 miliion and E30 million respectively, were then discussed.

Kunene then said it was quite clear from the onset that managements preferred option was that of the E108 million project (ootion 3). Management then suggested that as per the mandate from the Board, a recommendation be crafted for presentation. The SIDC members then requested time to consider the recommendation and a meeting was scheduled for a later date. He said the request for time tc consider the recommendation arose out of a oeiief that some of the assumptions used in assessing the viaoility of the project were fundamental to

the concerns raised by SIDC on a range of issues, such as the debentures **ana** shareholders agreement and a comment made in a Board meeting that SIDC would not receive any money from the property companies.

The Chairman responded by saying that in all respects the companies were run professionally and there appeared to be a confusing of issues. She suggested that there be a shareholder discussion to deliberate on the shareholder issues and that the time had come for the Board to consider managements' recommendation and to make a decision on Corporate Place.

E.T Gina told the Board that the project was coming at a time when the companies are not well run and are not able to meet their financial obligations to the shareholders and therefore it is not possible for SIDC to endorse the project, as it is not a prudent time to begin a development.

N Kirsh responded by saying that it was clearly too late to advise against starting a development, as the entire Board had already committed substantial monies to the project and the Plaza was currently in the midst of construction. He also said that he took strong exception to the comment that the companies were not well run. He said that the companies are well run by any standard of measure, such as income, occupancy, expenses and maintenance. He further stated that the issue of arrears on the debentures can be resolved easily with a hghis issue, the proceeds of which will be used to bring the arrears up to date. **N** Kirsh undertook to underwrite the rights issue.

M Simelane told the meeting that one of the reasons the company is failing to meet its obligations is the escalation of costs in the previous project (1998), where the final cost significantly exceeded the initial project cost of E34 million. In his view it is imperative that the reasons for the cost escalation be documented in a report to the Board.

The Chairman responded by reminding the meeting that historically, the debenture finance W3S based on the original project scope. The Board at the time then agreed to increase the scope of that project in order to accommodate a larger parking garage, other improvements and changes in tenancy. At the time, all involved seemed pleased with the final outcome and that additional revenues were realized as a result.

She further stated that clearly Corporate Place is a separate issue and that there had been ample opportunity for queries and questions relating to the project to be raised and responded to, and that this had taken place in a number of forums. It had been resolved previously that should agreement between the shareholders on the rescheduling of the repayments not take place, a rights issue would address the concern of the debentures and the arrears interest. The Board therefore needed to proceed with the business of the day and make a decision on Corporate Place.

E Gina said that SIDC had proposed a methodology to regularize the arrears as agreed by the Board in a previous meeting. The Chairman responded by saying that the proposed methodology had not been suiiaoie and reiterated that it was now time for the Board to make a decision.

During the voting of the Directors, a resolution to construct Corporate Place at a cost of E1(58 million, was carried by a majority vote of three Directors to two. M Simelane and M Masisi-Hlandze queried why they were not given the opportunity to vote. The Chairman responded by saying that they were not directors, as the Memorandum and Articles of Association of the company only allowed for a maximum of five directors and that this situation was also reflected in the books of the Registrar of Companies.

The Board majority then mandated management to award the contract and authorized P Friedlander to sign such documents as

may be necessary.

N Kirsh then advised SIDC that if they felt that the decision reached by the Board was in anyway flawed, they should seek legal redress and should try to obtain an interdict stopping the development.

A discussion on whom the company should approach to assist with the rights issue then ensued and a suggestion of African Alliance or Standard Bank was made.

Both P Friedlander and the Chairman expressed disappointment at the way in which the decision to proceed had been reached, especially since it was clear to all that this development is undoubtedly in the best interests of the company.

There being no other business the Chairman called the meeting to a close at approximately 13:00 hrs. "

CHAIRMAN'S SIGNATURE

DATE