IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION

UNREPORTABLE

Case No: 17743/05
Date heard: 10, 11 May'07
Date of judgment: 3 August 2007

In the matter between:

Lurgi South Africa (Pty) Ltd	APPLICANT
and	
Lurgi Environment (Pty) Ltd	1ST RESPONDENT
Minister Of Trade & Industry M.	2ND RESPONDENT
C. Mahlangu (Pty) Ltd	3RD RESPONDENT

DU PLESSIS J: NT

The applicant conducts business as a process-engineering contractor. It previously was part of its business to install and maintain gas-cleaning equipment known as electrostatic precipitators ("esp's"). The applicant is a

wholly owned subsidiary of a German company, Lurgi AG and it represents the latter's interests in sub-Saharan Africa. Lurgi AG is part of a group of companies that own many specific technologies that are used in the relevant field of endeavour. Some of these technologies have been made available to the applicant in terms of an "Exclusive Co-operation and Licence Agreement".

Although the motivation is in issue, it is not in issue that the applicant identified the first respondent for use in circumstances that require a black economic empowerment (BEE) partner and that it alienated its esp spares and maintenance business to the first respondent. While, in circumstances that will become clear, the applicant's shareholding in the first respondent is in dispute, there is no issue that the other, BEE, shareholder in the first respondent is the third respondent. Furthermore, there is no dispute that the third respondent has no black person as a shareholder. The only natural person involved as shareholder in the third respondent is a certain Mr DR Alexander, a white man. Although Alexander claims that the other shareholder is an Irish company, the applicant's investigations revealed that the Irish company was dissolved in 2000.

The applicant contends that the first respondent was formed, not for the purpose of bona fide meeting its BEE requirements, but as a vehicle to defraud the applicant and its German parent company and to procure that it alienates its business to the first respondent. In the circumstances the applicant seeks an

order in terms of section 258(1) of the Companies Act, 61 of 1973 to have the affairs of the first respondent investigated.

Section 258(1) provides that when "the Court by order declares that the affairs of a company ought to be investigated, the Minister shall appoint one or more inspectors to investigate the affairs of such company and to report thereon ..". The second respondent, the minister concerned, did not participate in the proceedings. The first and third respondents, represented by Alexander, contend that the applicant, having alienated the relevant part of its business to the first respondent, suffers from seller's remorse, that that motivated the application and that the applicant has not made out a case that the affairs of the first respondent ought to be investigated.

The court has "a wide power to order an investigation if it considers it right or advisable to do so" (Sage Holdings Ltd v The Unisec Group Ltd 1982 (1) SA 337 (W) at 359E to G). The applicant for an order in terms of section 258(1) must show a "well-founded suspicion of some grave impropriety which has a solid and substantial basis" (The Unisec Group Ltd and Others v Sage Holdings Ltd 1986 (3) SA 259 (T) at 283C). As was pointed out in the latter judgment, the factual allegations whereupon the suspicion is founded need not be undisputed.

For reasons that will become apparent, the applicant' relies heavily on the results of an investigation conducted by its present managing director who was not involved in the dealings giving rise to these proceedings. The case is largely based on the interpretation of documentary evidence and inferences to be drawn from those documents. The case is also based on inferences to be drawn from the lack of certain documentary evidence. While not repeated in argument, the respondents contend in the papers that the application is based on hearsay evidence. That is not correct in all respects as the applicant's deponents can and do testify from personal knowledge as to which documents exist and which not. To the extent that the evidence might be hearsay, however, it must be borne in mind that the applicant is not called upon to establish all the facts. It must establish a well-founded suspicion and the facts will, if an order is made, be established in the course of the proposed investigation.

The applicant contends that the required suspicions are founded on, briefly, the following. At all relevant times until November 2004 one Karel Vlok was the applicant's managing director. In early 2002 Vlok proposed to the applicant's board of directors that, in order for the company to grow in the spares and maintenance area, it would have to "bring in a black empowerment partner". At the time Vlok did not spell it out, but by June 2002 it became clear that his proposal was that the applicant should form a new company in which the BEE partner would be the controlling shareholder and that the applicant would transfer its esp spares and maintenance business to the new company. Vlok, without any

apparent approval from the applicant's board, proceeded to establish the new company, the first respondent. Although Lurgi AG was represented on the applicant's board of directors, VI ok in November 2002 addressed an e-mail to Dr Schonung, Lurgi AG's then chairman, in which he explained the need for a BEE partner and reiterated his proposal as to how the relationship with the first respondent should be structured. For some reason Vlok at this stage also proposed the involvement of another company, Lurgi (Pty) Ltd (not a member of the Lurgi group). I find it unnecessary to deal with the detail of this latter proposal. There is no doubt that VI ok represented to both the applicant's board of directors and to Lurgi AG that the first respondent was to be a BEE company by virtue thereof that at least half plus one of its shares were to be held by a BEE entity and that the applicant would, directly or indirectly, retain at least a minority interest in the first respondent.

It appears from correspondence annexed to the applicant's papers that there may in early 2003 have been some unease among the executives of Lurgi AG about the circumstances surrounding the establishment of the first respondent and its involvement in the applicant's business. Vlok, by way of replies to queries, attempted to address the unease. In the course thereof he incorrectly stated on 3 June 2003 that the applicant was the holder of all the shares in the first respondent. What Vlok at that stage did not disclose was that he and one Viecenz, a director of the applicant and employee of Lurgi AG, held the shares in the first respondent. Vlok also conveyed that he was in the process

of negotiating and finalising the BEE deal and that such would be subject to approval by the boards of both the applicant and Lurgi AG. There is no record that he ever sought such approval.

On 1 September 2003, apparently without the approval of the applicant's board of directors, Vlok, purporting to act on behalf of the applicant and the first respondent, entered into a "Shareholders Agreement" with "Mahlangu (Pty) Ltd". Alexander purported to represent Mahlangu. At that stage, however, no company, relevant to these proceedings, by the name of Mahlangu existed. It is only much later, on 10 November 2003, that Alexander changed the name of his company, Ghana Alexander Financial Services (Pty) Ltd to MC Mahlangu Investments (Pty) Ltd. The Shareholders Agreement, not a mode! of clarity and consistency, purports to be a joint venture agreement between the applicant and Mahlangu, the joint venture vehicle being the first respondent in which the other two parties were to hold the shares. In terms of the agreement the applicant is purported to transfer intellectual property to the first respondent. Such transfer goes way beyond the requirements for the applicant's esp spares and maintenance business.

After the signature of the Shareholders Agreement, Vlok reported to Lurgi AG's chairman that the deal with "our BEE partner has been done". VI ok thereafter made certain payments to the applicant, purportedly in respect of the

joint venture and purportedly because Mahlangu had incorrectly and by reason of inexperience paid him.

In the meantime Consol Glass had awarded to the applicant a contract in relation to Consol's flue gas treatment plant in Bellville. The contract does not concern esp spares or maintenance nor does it have a BEE requirement. As a matter of fact, however, the contract was entered into between Consol and the first respondent. That, the applicant contends, VI ok procured without authority. After it had contracted with Consol, the first respondent placed an order for the contractual requirements with the applicant who executed it. The result of all this, so the applicant contends, is that the applicant executed the contract at its costs \Nhi!e the first respondent received all the profit from the contract.

Dr Schonung, Lurgi AG's chairman, passed away and Dr Plass replaced him. In May 2004 Vlok wrote to Dr Plass that the applicant was faced with a major risk in that its BEE partners may demand that the shares in the first respondent be bought back. Plass met with Alexander who demanded that all the shares in the first respondent be transferred to him. Without authority, Vlok, to whom Alexander had forwarded a copy of the demand, agreed thereto. Alexander persists in his contention that the shares must be transferred to him, thus disputing the applicant's shareholding in the first respondent.

Before Vlok's resignation as the applicant's managing director, the first respondent conducted business from the same premises as the applicant. It used some of the applicant's administrative personnel albeit that the applicant paid their salaries. When the application was launched, the first respondent competed with the applicant, using intellectual property belonging to the Lurgi group and it held out to the public that it was associated in the course of business with the applicant and the group.

An electronic message from Vlok to Alexander indicates that, as far back as December 2002, the two were in contact concerning Vlok's proposal of a BEE partner for the applicant. It is unnecessary now to go into detail as to the possible inferences that could be drawn from this e-mail save to point out that it reveals that Vlok, a director of the applicant, might have had a personal interest conflicting with the applicant's interests.

In a nutshell, Vlok led the applicant to believe that the first respondent would serve the purpose of BEE compliance in connection with the applicant's esp spares and maintenance business. Instead of a black partner, the applicant ended up with a partner that is a company without any black shareholding, a company controlled by Alexander with whom Vlok had been in contact long before the applicant's business had allegedly been transferred to the first respondent. Moreover, there are indications that VI ok held an interest in the first respondent contrary to his fiduciary duty as a director of the applicant. The

2. The Minister of Trade and Industry is directed to appoint one or more inspectors to investigate such affairs and to report thereon, in accordance with the provisions of the said Act.

3. The first and third respondents are ordered to pay the costs of the application, including the costs of two counsel.

B. R DU PLESSIS
Judge of t

Applicants Attorneys: Bell Dewar & Hall / Gerhard Mare

Respondents Attorneys: Smit & Marais / Savage Jooste & Adams

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applicant's intellectual property and some of its business have been transferred
to the first resp
of being the applicant's partner, the first respondent competed with the applicant
and held out to the public that it was connected in the course of trade with the
applicant. The applicant's requests for adequate information, particularly those
addressed to Vlok, have met with inadequate respo
has established a "well-founded suspicion of some
solid and substantial basis", I conclude that, exercising the wide powers that the
section gives to the court, an order in terms of section 258(1) of the Companies
Act is c
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warranted.

The following order is made:

1. It is declared that the affairs of the first respondent ought to be investigated in accordance with the provisions of section 258(1) of the Companies Act, 61 of 1973.