REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2011/11210

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

13 February 2013 FHD VAN OOSTEN

In the matter between

MARUNG INVESTMENT LTD	**PLAINTIFF**
and	
LONDON CLUBS INTERNATIONAL (OVERSEAS) INVESTMENTS (PTY) LTD	**FIRST DEFENDANT**
EMERALD SAFARI RESORT (PTY) LTD	**SECOND DEFENDANT**
UBAMBO LEISURE (PTY) LTD	**THIRD DEFENDANT**
MODIRAPULA LEISURE (PTY) LTD	**FOURTH DEFENDANT**
GAUTENG GAMBLING BOARD	**FIFTH DEFENDANT**

Trial - separation of issues in terms of Rule 33(4) ordered - Special Plea for referral of matter to arbitration as provided for in shareholders' agreement - considerations arising - special plea upheld.

Arbitration - sanctity of private arbitrations to be upheld by Court - discretion of court in terms of s 3(2) and s 6(2) of the Arbitration Act 42 of 1965 - onus on party attempting to

avoid arbitration to show that court should not in the exercise of its discretion refer the matter for arbitration.

JUDGMENT

VAN OOSTEN J:

[1] The action between the parties in essence concerns a contractual claim to enforce a right of pre-emption in terms of a shareholders' agreement (the shareholders' agreement). At the commencement of the hearing and as agreed between the parties, I ordered that the special plea raised by the first, second and third defendants, that the action be stayed pending the outcome of arbitration proceedings pursuant to clause 20 of the shareholders agreement, be heard as a separate issue, in terms of Rule 33(4). The fourth defendant, although not having raised the special plea, joined forces with the other defendants in pursuing the special plea. The fifth defendant has not entered the fray. The adjudication of the special plea proceeded on argument only and no evidence was led. Having heard argument on behalf of the parties, I granted an order in terms of a draft order presented to me by counsel for the second defendant, in essence upholding the special plea with costs. I indicated to the parties that reasons for granting the order would be furnished later. What follows are those reasons.

[2] The parties to the action are all involved in the gaming industry. It is necessary for a proper understanding of the disputes between the parties, to briefly refer to their contractual relationship and the disputes that have arisen between them as set out in the pleadings. At the heart of the dispute lie the shareholders' agreement and three addendums thereto. It regulates the relationship of the parties thereto concerning their shareholding in the second defendant (Emerald). The main agreement was concluded on 13 June 1997 between the plaintiff (Marung), Emerald, the third defendant (Ubambo) and a company known as London Clubs Holdings Ltd. The plaintiff alleges in its particulars of claim that the "interests" of London Clubs Holdings Ltd "are now with the first defendant". This is denied by the defendants in their pleas. In argument before me the defendants no longer persisted in the denial and in fact conceded that the first

defendant (LCIOI) has become the other contracting party to the shareholders agreement. The denial and the defendants' change in stance have some relevance to the arguments presented on the separated issue to which I shall revert.

[3] Marung's cause of action is based on its pre-emptive rights derived from clause 16 of the shareholders' agreement in terms of which Marung, in the event of one of the shareholders disposing of any shares, would become entitled to take up those shares. Marung alleges that, in breach of the provisions of clause 16, a sale and disposal of shares (the affected shares) took place. The transaction complained of occurred in two stages. In March 2008 Ubambo transferred 25% of its shareholding in Emerald to LCIOI, which was to be held by it for purposes of transferring the shareholding to a new BEE shareholder (so-called 'warehousing'), yet to be identified. The second stage occurred in July 2010 when LCIOI sold the affected shareholding to the fourth defendant (Modirapula) in terms of a transfer of shares agreement. Clause 11.1 thereof provides that Modirapula by its signature thereof, bound itself to the terms and conditions contained in the shareholders' agreement.

[4] The relief claimed by Marung is for an order cancelling the agreements between LCIOI and Modirapula and for specific performance against ICIOI, Emerald and Ubambo, which, if granted, would in effect result in Marung becoming the owner of the affected shares. As against the fifth defendant (the Board), the plaintiff seeks an interdict restraining it from approving the transfer of the affected shares to Modirapula.

[5] This brings me to the arbitration clause and the issue I am required to determine which is whether the parties are bound by it. It is at the outset necessary to refer to the way in which the special plea has been dealt with in the pleadings. As mentioned it was raised by way of a special plea by LCIOI, Emerald and Ubambo. The plaintiff, however, has not filed a replication to the special pleas. The absence of a replication effectively disposes of one of the arguments raised by counsel for the plaintiff, which as I have already touched on above, turns on the denial in the pleadings by the defendants of the *locus standi* of LCIOI and their subsequent change in stance in argument. The contention flowing from this is that the outcome of the arbitration proceedings will be binding on the plaintiff and LCIOI but the door will thereafter still be open to Emerald,

Ubambo and Modirapula to deny that it is binding on LCIOI. As counsel for Emerald correctly pointed out, this issue would have been properly dealt with had the plaintiff availed itself of the opportunity to replicate to the special plea. The plaintiff bears the *onus* of satisfying the court, once the court is satisfied that a dispute exists and that the dispute is covered by the arbitration clause (both having been admitted by the plaintiff in regard to its claim against Emerald) that it should *not*, in the exercise of its discretion, refer the matter for arbitration (see s 3(2) and s 6(2) of the Arbitration Act 42 of 1965). The facts on which the plaintiff rely in this regard, including the contention now raised concerning the *locus standi* of LCIOI, should have been alleged in the replication. That would have afforded the defendants the opportunity to respond thereto. In the absence thereof the argument raised by counsel for the plaintiff cannot be entertained and it is ejected.

[6] I do not consider it necessary to deal with all aspects concerning arbitration. It suffices to deal with the remaining arguments advanced by counsel for the plaintiff. Counsel somewhat feebly, submitted that the defendants have failed to show that the disputes between the parties are covered by the arbitration clause. In support of the contention counsel submitted that the fourth defendant is not a party to the shareholders' agreement or any other contract with the plaintiff and that there is accordingly no arbitration agreement between them. The contention is short-lived: what has been overlooked is the existence of a contractual relationship between the plaintiff and Ubambo, as it appears from the facts of this matter as a whole, as I have already alluded to, on the one hand, and, in any event, Ubambo's consent to the matter being referred to arbitration, on the other. Counsel further vaguely suggested that arbitration could result in a multiplicity of actions. I am unable to agree. All the participating defendants in the action have agreed to arbitration. The benefits of arbitration are *legio*: a speedy final resolution of the disputes between the parties, in the particular circumstances of this case, is obviously eminently desirable. As for the remaining defendant, the Board, it has, for one, not opposed the action and, in any event, the only relief that can be sought against the Board, at best for the plaintiff, is consequential in nature. All that is required from the Board is to apply or refuse to apply its statutory stamp of approval (in terms of s 38 of the Gauteng Gambling Act 4 of 1995) only once

the transaction for the sale and transfer of the shares has been finalised. It is moreover common cause between the parties that the Board has in fact approved the contentious transaction (subject to certain conditions) which of course renders the interdict sought against it by the plaintiff, of academic interest.

[7] In conclusion I merely need to refer to the importance of a court upholding the sanctity of private arbitration agreements. In this regard counsel for Ubambo referred me to the Constitutional Court judgment in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC) para [219] *et seq*, where this aspect is extensively and decisively dealt with (see also *Altech Data (Pty) Ltd v MB Technologies (Pty) Ltd* 1998 (3) SA 748 (W) 752C-754J). I am satisfied that in the exercise of my discretion no sufficient reason exists why this matter should not be referred to arbitration in accordance with the shareholders agreement (See *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) 333G-334C).

[8] In the result the following order in accordance with the draft order marked "X", is made:

1. The plaintiff's action is referred to an arbitrator appointed in accordance with clause 20 of the shareholders' agreement.
2. All pleadings filed in the action will stand as pleadings in the arbitration.
3. The plaintiff shall pay all of the first, second, third and fourth defendant's costs of suit incurred to date, including the costs consequent upon the employment of two counsel (where employed), save for the costs of drawing the pleadings, which costs are to be determined by the arbitrator.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF ***ADV JP COETZEE SC***
ADV R LIPHOSA

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FOURTH DEFENDANT'S ATTORNEYS	*KALIAN & KATHRADA*
DATE OF HEARING *DATE OF JUDGMENT*	*11 FEBRUARY 2013* *13 FEBRUARY 2013*