

IN THE ARBITRATION PROCEEDINGS

BETWEEN:

PRAXLEY CONSORTIUM 3 (PTY) LIMITED First Claimant
[Registration No. 2007/007573/07]

PRAXLEY CORPORATION SOLUTIONS (PTY) LIMITED Second Claimant
[Registration No. 2003/000042/07]

and

NATCO SA INTERNATIONAL TRANSPORTERS
(PTY) LIMITED First Defendant
[Registration No. 1996/006913/07]

DURIG, PATRICK Second Defendant
[ID No. 720302 5122 089]

DURIG, PATRICK N.O. Third Defendant
[ID No. 720302 5122 089]

JAMES, MONIQUE N.O. Fourth Defendant
[ID No. 731111 0056 086]

INVESTEC BANK LIMITED Fifth Defendant
[Registration No. 1969/004763/06]

NAIDOO, NIRU Sixth Defendant
[ID No. 720429 0180 083]

AWARD


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1. The two claimants own 34% of the shares in the first defendant. This is reflected in the shareholders agreement entered into by them on 2 March 2011. There had previously been an agreement between the shareholders dated 3 July 2007. It is common cause that the March 2011 agreement is the only one relevant to the present proceedings. Clause 5 of the agreement deals with "provisions relating to directors". This clause reads:

5. PROVISIONS RELATING TO DIRECTORS

- 5.1 The following provisions will apply to the appointment, removal and replacement of Directors –
 - 5.1.1 the Board will until otherwise agreed between the Shareholders consist of not more than 6 (six) Directors;
 - 5.1.2 any Shareholder holding 9% (nine percent) or more of the issued share capital of the Company will be entitled to appoint one Director and to remove, replace or fill any vacancy in such Director.
- 5.2 By giving written notice to the effect to the Company from time to time, each Shareholder shall be entitled to –
 - 5.2.1 appoint one or more alternate Directors to the Director appointed by it. Any alternate so appointed shall be entitled to receive notice of every meeting of Directors as if he was an actual Director, and shall be entitled to attend and speak at any such meeting, but shall not be entitled to vote thereat unless the Director to whom he is an alternate is absent therefrom;
 - 5.2.2 remove any Director (or alternate) appointed by it, with or without appointing a replacement in terms of clause 5.1. Any such notice of removal shall have effect on the date stipulated for this purpose in such notice.

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- 5.3 Accordingly, the entitlement of the Shareholders to appoint Directors immediately after the Signature Date shall be as follows:
- 5.3.1 Dürig shall be entitled to appoint two Directors. Dürig has appointed Mike Dürig (identity number 780518 5168 082) and Dürig (identity number 720302 5122 089) as Directors;
- 5.3.2 Praxley Consortium shall be entitled to appoint one Director. Praxley Consortium has appointed Els (identity number 661125 5107 086) as its Director;
- 5.3.3 Praxley shall be represented by Els on the Board at Signature Date; and
- 5.3.4 Naidoo (identity number 720429 0160 083) is the duly appointed Financial Director as at Signature Date and will represent the Company on the Board for as long as she is employed in the Company.
- 5.4 No Shareholder shall appoint any person (other than persons whose appointment is agreed in this Agreement) as a Director –
- 5.4.1 until after consultation with the other Shareholders on the appointment; and
- 5.4.2 unless that person's directorship will not contravene this Agreement or the Companies Act.
- 5.5 Each person appointed as a Director or alternative shall, prior to his appointment becoming effective, but save to the extent otherwise agreed in writing by the Company and any such nominee who may have an executive role within the Company, execute a written acknowledgment in which he –
- 5.5.1 acknowledges and agrees that he will not be an employee of the Company;
- 5.5.2 acknowledges and agrees that he will not have any claims against the Company for remuneration or compensation for services rendered to the Company other than as may be approved by the Board; and
- 5.5.3 furnishes the Company with a postal address, telephone and facsimile number at which notice of meetings shall be given to



him in accordance with this Agreement and in particular clause 25.

- 5.6 Any Shareholder which has appointed a Director in terms of clause 0 shall remove (or procure the resignation of) that Director as soon as:**
- 5.6.1 that Shareholder ceases to be a Shareholder; or**
- 5.6.2 the continued directorship of that Director would contravene this Agreement or the Companies Act.**
- 5.7 The Board shall annually elect a chairman of the Board who shall chair and determine the procedure to be followed at all meetings of the Board and Shareholders, but shall not have a second or casting vote in addition to his deliberative vote. The chairman of the Board with effect from the Signature Date is Dürig who shall remain chairman for as long as he or any of the Associates own a minimum of 51% of the Shares.**
- 5.8 Any Shareholder who appoints any Director to the Board in terms of This clause 5 shall indemnify the Company against any loss, liability, damage, cost or expense which may be suffered or incurred by the Company as a result of any subsequent removal of such Director from the Board."**

2. On 15 December 2014 at a meeting of the first defendant's shareholders, Eis (the claimants' appointee) was removed as a director by the majority of shareholders purporting to act in terms of Section 71(1) of the Companies Act (Act 71 of 2008) ("the Act"). The relevant section reads:

"71 Removal of directors –

- (1) Despite anything to the contrary in a company's memorandum of incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director**


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may be removed by ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2)."

It was not in dispute that subsection (2) is not relevant in the present proceedings.

3. In essence, the claimants' case is that the 15 December 2014 shareholders meeting and the purported removal of Els as a director at such meeting by the shareholders, other than the first claimant, is contrary to the provisions of clauses 5.1, 5.2, 5.3, 5.4 and 5.6 of the shareholders agreement, and also contrary to the provisions of Section 71(1) of the Act, and as such unlawful and of no force and effect.

4. The first defendant's response to the claimants' case is that Section 71(1) of the Act is decisive as to how a director is to be removed, and as stated this is despite any agreement as relied upon by the claimants. This is by an ordinary



resolution adopted at a shareholders meeting by those entitled to exercise voting rights in an election of that director.

- 4.1 It was submitted that, as the first defendant has only one class of shares, the majority of shareholders at the general meeting have the final decision as to who is appointed or removed as director. In the present case, these shareholders are the only "persons entitled to exercise voting rights in an election of that director".
- 4.2 The argument continued that Section 15(7) of the Act makes it plain that any provision contained in an agreement which is inconsistent with the provisions of the Act is void to the extent of such inconsistency. It was submitted that the conditions of the agreement as to the appointment and dismissal of directors, as agreed to in clause 5 of the shareholders agreement, are in conflict with what is stated in the Act, which is that after the appointment of the first directors all subsequent directors are to be appointed or dismissed by a majority of shareholders at an ordinary shareholders meeting.


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4.3 In terms of Section 15(7) therefore, so it was submitted, as the agreement alters voting rights in an election for the removal of a director by limiting such rights to the aggrieved shareholders, the claimant being one of them in the present case, this conflicts with the express provisions of Section 71(1) of the Act and the terms of the agreement are of no effect.

5. This argument overlooks the fact that Section 71(1) does not in any way preclude shareholders *inter se* from agreeing in advance how they are to exercise their voting rights in the appointment and removal of directors.

The agreement by shareholders to act in this manner is in no way inconsistent with Section 71(1) which deals only with the relationship between a company and a director, or the shareholders and a director

6. In the present case, the director affected is not a party to the agreement. This section does not give those shareholders, who by contract have bound themselves to vote for the retention or removal of the director in office, the right


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to breach their agreement. As was said in *Amoils v Fuel Transport (Pty) Ltd and Others*, 1978(4) SA 343 (W) and 347, "an agreement by shareholders regarding the exercise of their votes in a general meeting of the company is valid and does not derogate from the company's right to elect or remove a director upon the requisite number of votes". *Amoils* case and the authorities referred to therein deals with the law as it existed under Section 220 of the previous Companies Act, Act No. 61 of 1973 ("the Old Act")

The relevant part of this section reads:

"220 Removal of directors and procedures in regard thereto (1) (a) A company may, notwithstanding anything in its memorandum or articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office."

7. Although Section 71(1) goes further than Section 220 of the old Act, it does not in any way limit or curtail the rights of shareholders to enter into agreements with each other as to how they will apply their votes in the appointment or removal of directors. The position is the same as that which applied in the


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Amoils case and that case and the cases referred to in it are relevant and have been accepted as being a correct statement of the law.

If the situation were otherwise, this would be an unjustified limitation of the common law rights of shareholders to act in their best interests.

8. After the matter had been initially argued before me, I thought that there might be a constitutional question in the interpretation and application of Section 71(1). I called for argument on this issue. Such argument took place on 28 August. After having heard counsel for both sides, I am of the view that I was incorrect in raising the constitutional issue. Counsel for both parties shared this view and nothing more need be said about it.

9. In the circumstances I find that the defendant shareholders concerned acted unlawfully in breaching the terms of the shareholders agreement between them and the claimants. Accordingly, the resolution passed by them at the meeting concerned cannot stand.

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10. First defendant's counsel submitted that the present case must be distinguished from the *Amoils* case and those referred to in it as they were applications to interdict meetings from being held, while the instant case is for the setting aside of a resolution duly passed at an ordinary meeting. In my view there is no merit in this contention. The circumstances in this case, as in the *Amoils* case, deal with the illegal conduct of the majority of shareholders who breached their contractual undertakings to each other not to act in a particular way. Such a breach cannot be condoned and any resolution arising from such breach falls to be set aside as having been illegally obtained.
11. On the issue of costs, claimants claimed that such costs as are awarded, if they succeed, should be paid by the first defendant. On reflection, I am of the view that this would be unfair, as in effect they would be paying part of the costs themselves, being shareholders in the first defendant. In my view, the costs should be paid by those shareholders who were responsible for calling the meeting and passing the resolution, namely the second, third, fourth and

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sixth defendants, jointly and severally. As this issue was not argued before me, the parties are entitled to present written argument within ten days of the publication of this award opposing this cost order, after which the order will be final or an amended cost order will be published.

Subject to what has been said about costs, I make the following order:

1. It is declared that the removal of Mr Els as a director of the first defendant at the 15th December 2014 meeting is unlawful and therefore of no force or effect.
2. The first defendant is ordered to reinstate Mr Els as a director of the first defendant.
3. The second, third, fourth and sixth defendants are, jointly and severally, ordered to pay the costs occasioned by the hearing of the directorship issue in these arbitration proceedings, such costs to include the costs of the Arbitrator.



DATED AT JOHANNESBURG ON THIS 12 DAY OF SEPTEMBER 2015



P BLIEDEN
ARBITRATOR

