REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURTS

CIVIL SUIT 55 OF 2008

JOAN KATHRYN HENKEL……..…...…PLAINTIFF/APPLICANT

VERSUS

HERMAN ROBERT WILHEIM HENKEL.....….DEFENDANT/RESPONDENT

R U L I N G

This is a Chamber Summons application dated 8th February, 2008 expressed to be brought under order XXXI Rule 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks prayers 3 and 4 of the application.

3. THAT a temporary injunction be issued against the Defendant either by himself, his agents and/or servants from excluding the Plaintiff from the day to day running and/or management of the affairs of the business of Henkel Polymer Company Limited and/or denying her access to the premises of the said company pending the hearing and determination of this suit.

4. THAT the Honourable Court do restrain the Defendant from acting as the Executive Chairman and/or the Sole Director of Henkel Polymer Company Limited and to declare all the decision and/or actions by the Defendant acting as such as null and void.

There are five grounds upon which the application is based.

a) THAT the Plaintiff and the Defendant are the shareholders and the Directors of **HENKEL POLYMER COMPANY LTD** with 300,000 ordinary shares and whereby the Applicant holds 71,738 shares and the Defendant holds 43,886 shares.

b) THAT the Defendant has issued a Memo to the Company shareholders, secretaries and staff thereby declaring himself as the Executive Chairman and thereby assuming all the powers as the Sole Director of **HENKEL POLYMER COMPANY LTD.**

c) THAT as a consequence the Defendant has excluded the Plaintiff from the day to day running and/or management of the affairs of the business of **HENKEL POLYMER COMPANY LTD** and has obstructed her from accessing the company premises.

d) THAT the Defendant is further interfering with the smooth running and operation of the company as he has started to sack all the employees who he considers to be loyal to the Plaintiff and the company.

e) THAT the interference with the smooth running of the company is putting to risk the general output of the company which in the long run will affect its profitability taking into account the fact that the company is one of the leading chemical manufacturing factory in both Kenya and the entire East Africa

by the name **HENKEL CHEMICALS EAST AFRICA.**

The application is also supported by an affidavit which is sworn by the Plaintiff which I have considered together with the annextures thereto. There is also a further affidavit by the Plaintiff in response to the replying affidavit sworn by the Defendant which I have also considered.

The application is opposed. The Defendant has filed a replying affidavit and has put annextures to the said affidavit. I have considered the replying affidavit and annextures thereto.

The brief facts of the case are that the Plaintiff and the Defendant were husband and wife until recently when they divorced. They were the only directors of a company, Henkel Polymer Company Limited, herein referred to as the company. The Plaintiff is a majority shareholder with 71,738 shares while the Defendant holds 43,886 shares and a daughter of the marriage holds 34,373 shares. When their relationship failed, the Plaintiff wrote a Memo to the Defendant offering her shares for sale and also offering to resign from being a director of the company. That letter is annexture 1 to the further affidavit of the Plaintiff and is dated 10th January, 2008. The Plaintiff avers that inadvertently she forgot to mention the exact number of shares she was offering for sale as required in the Articles of Association and Memorandum of the company. Upon receipt of the Memo in which the Plaintiff was offering to resign from the company and to sell her shares, the Defendant sent to the Plaintiff a Memo dated 22nd January, 2008, accepting the offer to buy the shares and also indicating that he was willing to take up any shares that may not be taken up by their other shareholder. The Plaintiff has annexed a Memo to the Defendant dated 21st of January, 2008 in which she withdrew her offer to sell the shares.

Why the Plaintiff has finally come to court is because the Defendant has allegedly removed the Applicant from the Company records and the Company register has declared himself a Chief Executive Chairman and has also given instructions to employees of the company not to deal with the Applicant as a director. The Plaintiff avers that the Defendant has also directed that the Applicant should not be paid any honoraria and has effectively denied the Applicant any access to the company. The Plaintiff contends that the Defendant has acted contrary to the terms of the Articles of Association and the Memorandum of the Company by effecting the resignation and the transfer of the shares without holding a Board meeting to consider the Plaintiff's application to resign. The Applicant also contended that the Board is composed of the two directors of the company, which means it is the Plaintiff and the Defendant.

The Defendant's position is that the Plaintiff is guilty of material non-disclosure. Miss Babu for the Defendant relies on the Memo to the Defendant by the Plaintiff, in which the Plaintiff wrote that she wanted to resign from the Company. It is dated 10th January, 2008. Miss Babu invoked Article 38 (e) of the Articles of the Association and submitted that under that Article the office of a director stands vacated upon a written resignation. Miss Babu also drew the court's attention to paragraph 4 of the further affidavit in which she claims that the Applicant admitted resigning as a director of the company. Miss Babu also invoked Article 36 of the Articles of Association and submitted that only directors could run the company and that having resigned, the Plaintiff had no right to run the company. In the same light, Ms. Babu submitted that the Applicant has no right of access to the Company being merely a shareholder. Ms. Babu urged the court to find that the mandatory injunction sought under prayers 2 and 3 cannot be granted as the Applicant lacked locus to bring the suit and that what the Applicant was wishing this the court to do was to reinstate her to the company.

I have considered the rival arguments of the Advocates to the parties. The Applicant seeks both an interlocutory and an interlocutory mandatory injunction. In addition to the tests applicable as set out in the case of **Giella vs. Cassman Brown & Co. Limited [1973] EA 348** the test whether to grant a mandatory injunction or not is more strict. It was correctly stated in the **Halsbury's Laws of England 4th Edition Vol. 24** page 948 thus:

"***A Mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary***

one which can be easily remedied, or if the Defendant attempted to steal a march on the Plaintiff, mandatory injunction will be granted on an interlocutory application."

In the case of **Locabail International Finance Limited vs. Agroexport and Others [1986] 1 ALL ER 901**, after citing the extract from **Halsbury's Laws of England** as above, the court stated:

"***Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high degree of assurance that at the trial it would appear that he injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."***

I have set out the case for each of the parties herein. What appears from the documents before the court is that the Plaintiff wrote a Memo to the Defendant, a Co-director of Henkel Polymer Company Limited, dated 10th January, 2008, informing him of two things. The first was an expression of a desire to resign from the company. It is not in dispute what 'resigning from the company' meant and it appears that both parties understood that expression to mean to resign as a director of the company. The second piece of information passed was that the Plaintiff wished to sell her shares for the sum of Kshs.15 million. The Memo requested for a response before the end of that month. It is JKH1 in the further affidavit.

The Plaintiff wrote another Memo to the Defendant dated 21st January, 2008 withdrawing her offer to sell her shares. It is JKH2 in the further affidavit. The Defendant wrote a Memo dated 22nd January, 2008, one day after the Plaintiff withdrew the sale of her shares. That Memo is titled "ACCEPTANCE OF OFFER FOR SALE OF SHARES". In the content of the Memo the Defendant states that he is formally accepting the Plaintiff's offer to sell her shareholding in the company and also states his willingness to take up shares the other existing shareholder may not take up. It concludes by stating that the modalities of payments etc. will be addressed in due course. It is JKH3 in further affidavit.

Thereafter the Plaintiff, through her Advocate Chege Wainaina & Co. Advocates wrote to the Defendant a letter dated 25th January, 2008 clarifying that as provided under Article 14 of the Articles of Association of the Company, a notification of sale of shares had to specify the actual number of shares offered for sale. The letter went on to clarify that the Plaintiff was offering five shares only for a sum of Kshs.15 million. It is JKH5 in the further affidavit.

The Plaintiff's Advocate wrote again to the Defendant on 28th January, 2008 stating that since no letter accepting the Plaintiff's offer was received from either the director or the shareholders, the circumstances remain as before.

The Defendant has in his replying affidavit annexed only two Memos. The Plaintiff's Memo of 10th January, 2008 offering shares and to resign from the company as "HRWH 1". The other Memo is his Memo of 22nd January, 2008 accepting offer of the shares. The only other document he annexes is the Particulars of Directors and Secretaries showing that the Plaintiff had resigned as director of the company and that Mrs. Ruth Martha Henkel-Rehsi had been appointed as director on 19th February, 2008.

The issue is whether there was an acceptance or ratification of the Plaintiff's offer to resign from the company. The Plaintiff's case is that there was none as it was necessary for the Board of Directors to meet and accept the resignation which has never happened. The Defendant's position is that the moment the Plaintiff wrote the Memo expressing the desire to resign, the same was effective and there was no need for the Board to meet and accept.

The Board at the time in issue comprised the Plaintiff and the Defendant. It is clear that the Board never met to deliberate on the resignation and or sale of Shares. That is despite the letter to the Directors from the Equatorial Secretaries and Registrars of the Company dated 24th January, 2008 indicating the urgent need to call an urgent meeting of the Board of Directors. The Agenda proposed by the secretaries included:

1. To consider, and if thought fit, accept the resignation of Mrs. J.K Henkel as a Director of the

Company.

2. If the above resignation is accepted to appoint another director in place of Mrs. J. K. Henkel.

3. To approve the transfer of the shares held by Mrs. J.K. Henkel to Mrs. Herman R. W. Henkel…. It is JKH 8 in the further affidavit.

This were the Company's Secretaries saying a meeting of the Board was required urgently to deliberate on the issues stated in their letter. The fact that none of the parties have annexed any minutes of a Board meeting is proof that none was held. It also means that all decisions taken, appointing the Defendant as the Executive Chairman of the company as evidenced in his Memo to the Plaintiff JKH 3 in supporting affidavit, the appointment of Board of Directors as communicated in the Defendant's Notice to all staff members dated 7th March, 2008, JKH 10, the change of directors as Particulars of Directors and Secretaries, form part of JKH9 in Plaintiff's further affidavit and part of "HRWH 1" in Defendant's Replying Affidavit show, were all not decisions of the Board of Directors but those of the Defendant.

None of the Advocates has drawn attention to any clause in the Articles of Association of the Company showing how decisions of the nature shown herein above should be carried out. However, I have noted clause 30 provides that the number of Directors shall not be less than two, which also means one Director cannot sit alone to comprise a Board of Directors for the Company. Under clause 35 the role and functions of Directors is given. Under clause 38, it provides for disqualification of directors. Under (e) the office of a Director shall *ipso facto* be vacated if by notice in writing he resigns his office. Considering the notice by the Secretaries and Registrars of the company, the resignation of a director had to be deliberated upon in a Board meeting and either accepted or rejected. Under the First Schedule, Part 1 of the Companies Act, rule 99 provides that the quorum necessary for transaction of business shall be fixed by the Directors and in absence of such agreement, shall be two. The instant company had agreed on the quorum for the Board of Directors meeting to be two. That means that since the Plaintiff and Defendant were the only directors, and as long as both never sat to deliberate on the Plaintiff's Memos, including that of 10th January, 2008, then any decision made regarding that Memo was made *ultra vires*. Under Rule 100 of same schedule, it limits the function of a continuing director, where the number of directors is reduced below the number fixed, to action for purposes of increasing the number of directors or of summoning a general meeting and for no other purpose. In my view before the Defendant could act for purposes of increasing the number of directors of the company, the resignation by the Plaintiff had first to be accepted by the Board of Directors. Before such acceptance, the Defendant could not have had any powers to act in order to increase the number of Director(s). For this reason also, since the resignation by the Plaintiff was never addressed by the Defendant, especially in all his communications with the Plaintiff, and since no Board sat to deliberate on same, any actions taken by the Defendant on the basis that the Plaintiff was no longer a Director were taken *ultra vires*.

The resignation of a Director of a Company is a serious matter which must be handled as required either under the Regulations of the Company and or the law. This is because a Director forms part of the company board which is charged with the duty of managing the company affairs and business, and is engaged in all the financial, contractual, legal and other decisions affecting the company.

The issues of the liability of the company and how the company conducts its business are all critical issues. Therefore, where a director has offered to resign or has resigned, the most urgent step a Board can take is the one the Equatorial Secretaries and Registrars recommended, that is, an urgent Board meeting of Directors to deliberate upon, accept or reject the resignation, and to appoint a replacement. Otherwise, the company will be unable to run or conduct business.

I do find that the Defendant acted *ultra vires* by failing to have the resignation by the Plaintiff deliberated upon in a Board of Directors meeting, and also in failing to have the Board appoint a replacement for the Plaintiff. I find that there are special circumstances in this case that warrant the court to grant the mandatory injunction sought.

I noted that the Defendant ignored the Plaintiff's resignation and neither accepted nor rejected it but

nevertheless made unilateral decisions and took actions as if he was a Board of Directors including the decision and or action of appointing himself the Executive Chairman and appointing new directors. That in my view was evidence that the Defendant did not desire to follow the proper, reasonable and plausible procedure. I do find that the Plaintiff was avoiding his obligations as a director and by so doing was stealing a match on the Plaintiff. A party ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful way.

Having come to the conclusion I have of this application, I do grant the application in terms of prayers 3 and 4 of the Chamber Summons dated 8th February, 2008 as follows:

1. A temporary injunction be and is hereby issued against the Defendant either by himself, his agents and/or servants from excluding the Plaintiff from the day to day running and/or management of the affairs of the business of Henkel Polymer Company Limited and/or denying her access to the premises of the said company pending the hearing and determination of this suit.

2. That the Defendant be and is hereby restrained from acting as the Executive Chairman and/or the Sole Director of Henkel Polymer Company Limited.

Consequently, the Company Directorship and Board shall revert back to its former position before the Plaintiff's letter of 10th January, 2008.

The costs of this application be borne by the Defendant.

Dated at Nairobi this 31st day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Wainaina for the Applicant

Miss Babu for the Defendant

LESIIT, J.

JUDGE