

SOUTH AFRICA / JUDGMENT

Cape Investment Property 317 CC and Others v Orion Real Estate Limited (7174/2020) [2023] ZAGPJHC 1270 (7 November 2023) [2023] ZAGPJHC 1270

COURT

South Gauteng High Court, Johannesburg

BEFORE

C J Mc Aslin

CASE / FILE NUMBER

7174/2020

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REPUBLIC OF
SOUTH AFRICA
IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, JOHANNESBURG
CASE

NUMBER: 7174/2020

Date

of Judgment: 7 November 2023

Reportable:

No

Of interest

to other judges: No

In the matter

between: CAPE
INVESTMENT PROPERTY 317 CC
First
Applicant
SEAN
PETER Mc CARTHY N.O.
Second
Applicant
JÉAN-CLAUDE
MENZO BARRISH N.O.
Third
Applicant
And
ORION
REAL ESTATE LIMITED
Respondent

JUDGMENT

Mc Aslin AJ:

1. This is a matter involving dissenting shareholders' appraisal rights in terms of section 164 of the Companies Act 71 of 2008 ("the Act").
2. The First Applicant and the Second and Third Applicants, in their capacities as the duly appointed trustees of the Sean Mc Carthy Trust ("the Trust"), allege that they are dissenting shareholders of the Respondent within the meaning of the Act.
3. The evidence shows, and there is no genuine dispute on this, that the First Applicant and the Trust are the only dissenting shareholders and, consequently, there is no need to join any other shareholder to these proceedings in terms of section 164(15)(a) of the Act.
4. The Respondent is a public company that used to be listed on the JSE. It is now listed on an exchange known as ZARX.
5. An important element of the Respondent's listing is its status as a real estate investment trust ("REIT").

The Respondent is a property investment company and, as I understand it, its status as a REIT exempts it from paying capital gains tax on properties sold by it. The Respondent's bottom line, and ultimately its share price, will be higher without the obligation to pay capital gains tax.

6. In November 2018 the JSE suspended trade in the Respondent's shares and in February 2019 the Respondent's status as a REIT was withdrawn by the JSE. It is not necessary to go into the reasons for those two events for purposes of this judgment, but they obviously had a material impact on the sustainability of the Respondent as a public real estate investment company.

7. At the time that the trade in the Respondent's shares was suspended, the Respondent's share price was 58 cents per share.
8. The Respondent ascertained that it could regain its status as a REIT on the ZARX exchange. Initially, the Respondent wanted to transfer its listing from the one exchange to the other. However, the JSE stipulated that it would not allow a transfer of the listing and it required the Respondent to delist from the JSE.
9. In order to achieve its purpose of regaining its REIT status on the ZARX exchange by complying with the JSE's requirement for a complete delisting from the JSE, the Respondent proposed a scheme in terms of which its controlling shareholder would purchase all the shares of those shareholders participating in the scheme at a price of 2 cents per share, with the understanding that any participating shareholder could repurchase its shares at the same price for a period of 6 months after the delisting of the Respondent from the JSE.
10. It is common cause that the Respondent's contemplated scheme constituted a scheme of arrangement in terms of section 114(1) of the Act.
11. In terms of sections 114(2) and 114(3) the Respondent was required to appoint an independent expert inter-alia to describe and evaluate the material effects that the scheme of arrangement would have on every class of shareholder in the Respondent.
12. The Respondent duly appointed Neema Capital (Pty) Ltd ("Neema") as the independent expert.
13. On 9 October 2019 a director of Neema, Mr or Mrs R Mc Donald, produced a report in which it was found that the proposed scheme of arrangement was both unfair and unreasonable for the shareholders of the Respondent.
14. Importantly for this judgment is the valuation done by Neema in which it concluded that the "most likely valuation ... prior to the implementation of the [scheme of arrangement]" was 50.95 cents per share.
15. Notwithstanding the findings in the Neema report, on 15 October 2019 the Respondent announced its intention to implement the scheme of arrangement.
16. It did so on the basis of the decision of its independent board who, although the board acknowledged the scheme to be unfair, decided that the scheme was reasonable in light of the Respondent's ultimate purpose of regaining its REIT status on the ZARX exchange.
17. On 24 October 2019 the Applicants notified the Respondent in terms of section 164(3) of the Act that they objected to the Respondent's proposed resolution to implement the scheme of arrangement.
18. The scheme of arrangement was considered at a special meeting of the Respondent's shareholders on 13 November 2019, and the resolutions to authorise and implement the scheme of arrangement were approved by a majority of the Respondent's shareholders.

19. On 19 November 2019 the Applicants issued a demand to the Respondent in terms of section 164(5) of the Act, wherein they required the Respondent to pay them the fair value for the shares held by them.
20. In terms of section 164(11) of the Act the Respondent was required to make a written offer to pay the Applicants an amount considered by the Respondent's directors to be the fair value of the shares.
21. It is common cause that the Respondent did not make the required offer to the Applicants.
22. In the result the Applicants commenced legal proceedings for a declarator that the fair value of the shares is 50.95 cents per share, and for an order obliging the Respondent to pay the Applicants for the shares held by them at that value.
23. Upon the exchange of the affidavits and heads of argument in the application a host of issues existed between the parties. The Respondent disputed the following:
 - (a) that the Applicants had the necessary locus standi to bring the application because they were not shareholders of the Respondent;
 - (b) that the scheme of arrangement was unfair;
 - (c) that the Second and Third Applicant were authorised to represent the Trust;
 - (d) that the Applicants had delivered their demand to the Takeover Regulation Panel as required by section 164(8) of the Act;
 - (e) that the Applicants had sent their demand within 20 days of learning of the resolution to adopt the scheme of arrangement; and
 - (f) that the Applicants attended the special meeting of shareholders and voted against the resolutions as required by section 164(5)(c)(i) of the Act.
24. The Respondent also contended that the application was premature because the Applicants were first required to obtain an order compelling the Respondent to make the written offer stipulated in section 164(11) of the Act and, furthermore, that the Applicants were non-suited because they should have applied to review and set aside the scheme of arrangement in terms of a provision cited by the Respondent but which does not exist in the Act.
25. Fortunately, when the matter was called counsel for the Respondent informed me that he did not prepare the answering affidavit or the heads of argument and that he was proceeding with only one point viz. the point that the Applicants did not vote against the resolutions at the special meeting of shareholders on 13 November 2019. The point, in short, was that if the Applicants did not vote against the resolution at the special meeting then, in terms of the Act, they would not be entitled to be paid the fair value of their shares.

26. Counsel's approach at the hearing to abandon all of the points raised by the Respondent bar one, was prudent because prior to the hearing of the matter I had formed the prima facie view, upon a consideration of the Act and the evidence, that the points taken by the Respondent were without merit; sometimes patently so.
27. However, even the point that counsel did pursue in argument does not bear up under scrutiny.
28. The point arose from a paragraph in the Applicants' demand wherein the following was stated: "the Dissenting Shareholders instructed SBG Securities (Pty) Ltd to vote against the Resolution, and to the best of the Dissenting

Shareholders' knowledge such vote was in fact exercised on their behalf".

29. In the answering affidavit the Respondent denied "that the Applicant's (sic) representatives attended the special meeting or that they opposed the adoption of the resolutions and the Applicants are put to the proof thereof".
 30. In the replying affidavit the Applicants sought to prove that they had voted against the resolutions via their agent, SBG Securities (Pty) Ltd, and relied on an e-mail dated 31 August 2020 from the Standard Bank Group to support that position.
 31. The e-mail does not reflect anything about the votes at the meeting of 13 November 2019. Hence, it was argued by the Respondent that the Applicants had failed to prove their vote against the resolutions.
 32. It is readily apparent from the e-mail that the copy included in the court papers is incomplete due to a portion of it being cut off, and I was informed at the hearing of the matter that the complete version of the e-mail would establish that the Applicants' representative had voted against the resolutions.
 33. I asked that the complete e-mail be sent to me, which was rightly not objected to by the Respondent's counsel. Upon receipt of the complete e-mail, it is quite plain that the Applicants' representative voted against the adoption of the resolutions.
 34. In addition, my attention was drawn to an affidavit deposed to by Ms Asanda Macingwana, who is employed as a manager at SBG Securities (Pty) Ltd, and which affidavit was filed by the Applicants after the matter was set down for hearing on 11 October or 11 November
2021. There is a dispute between the parties as to the date on which the matter was set down.
35. Ms Macingwana's affidavit spells out the steps taken by the Applicants' representative, and it is quite clear that SBG Securities voted against the resolutions on the instruction of the Applicants.

36. I am satisfied that the Applicants have established that they, through their representative SBG Securities (Pty) Ltd, voted against the resolutions at the special meeting of 13 November 2019 as required by section 164(5)(c)(i) of the Act.
37. In light of the above the Applicants are entitled to be paid the fair value of their shares by the Respondent, and it remains to determine that value. As was the case with the other issues in this application, there is no genuine dispute on what the fair value should be.
38. The Applicants say that the fair value should be 50.95 cents per share. They base that on the valuation done by Neema, the independent expert appointed by the Respondent. That valuation is also the closest to the time stipulated by section 164(16) of the Act viz, the time immediately before the Respondent adopted the resolutions to implement the scheme of arrangement.
39. Somewhat surprisingly, in its answering affidavit the Respondent did not accept the Neema valuation on the basis that Neema was not appointed by the Respondent. However, that proposition is contrary to the evidence. The Neema Report records in express terms that Neema was appointed by the Respondent's independent board of directors.
40. Despite not accepting the valuation proposed by the Applicants, the Respondent never put up its own value which it considered to be fair. Save for a bald denial based on a distortion of the evidence, there is simply no version to gainsay the value put up by the Applicants.
41. Once again, counsel for the Respondent sensibly informed me at the hearing that he cannot dispute that the fair value of the shares is 50.95 cents per share as set out in the valuation section of the Neema Report.
42. In terms of section 164(15)(c)(iii)(aa) of the Act, I have the discretion to appoint an appraiser to assist me in determining the fair value of the shares.
43. In *BNS Nominees (RF) (Pty) Ltd v Arrowhead Properties Ltd* 2023 (1) SA 478 (GJ) the Court stated at [59] that the discretion should not be exercised too readily lest the judicial function be abdicated to an expert. Manojm J went on to say that whether the discretion is exercised should not be a matter of general principle, but rather a consequence of the facts of each case.
44. In this matter I already have the undisputed valuation of an independent expert in the Neema Report, and it does not seem necessary for me to exercise my discretion in favour of appointing another appraiser to assist in determining the fair value of the shares.
45. The Act also affords the court a discretion in section 164(15)(c)(iii)(bb) to "allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective until the date of payment".

46. The discretion to allow a reasonable rate of interest in sub-section (bb) is separated from the discretion in sub-section (aa) by the word “or”, so that on the face of it a court has the discretion to appoint an appraiser or to allow a reasonable rate of interest.
47. Since I decline to exercise my discretion in favour of appointing an appraiser, I am free to exercise my discretion to allow a reasonable rate of interest on a plain reading of section 164(15)(c)(iii).
48. However, it strikes me that the disjunctive “or” cannot be given its plain meaning within the context of the sub-section as a whole. The two sub-sections deal with different topics. Sub-section (aa) concerns the fair value of the shares, whereas sub-section (bb) deals with the interest, if any, that is payable once the fair value of the shares has been determined. There is no sensible reason to afford a court a discretion to adopt one of two alternatives, where the alternatives address different issues. In that sense, the alternatives are not true alternatives.
49. In addition, the word “or” cannot be given its plain meaning within the context and purpose of section 164.
50. In *Cilliers v La Concorde Holdings Ltd* 2018 (6) SA 97 (WCC) at [34] – [43] Papier J, with reference to various authorities and sources, addressed the rationale behind the inclusion of section 164 in the new Companies Act. In short, the provision is intended “to provide minority shareholders with equitable protection and fairness” in those instances where they have been lawfully outvoted.
51. It follows that an interpretation that allows a court to do both i.e. to appoint an appraiser to assist in determining the fair value of the shares as well as to allow a reasonable rate of interest is more consistent with the purpose of section 164, than an interpretation that serves to limit the protection that can be given to a dissenting shareholder.
52. This is consistent with the decision of the Supreme Court of Appeal in *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) at [26] where the court found that section 163 of the Act, which is also a provision intended to protect the interest of minority shareholders, should be interpreted in a manner that advances the statutory remedy rather than limiting it.
53. Although not strictly necessary for my decision in this matter, I would interpret the word “or” to mean “and” where it appears in section 164(15)(c)(iii).
54. In light of the above I determine that the fair value of the Respondent’s shares at the time immediately before the Respondent adopted the resolutions to implement the scheme of arrangement was 50.95 cents per share.
55. In terms of section 164(9) of the Act a shareholder that demands to be paid the fair value of its shares has no further rights in respect of those shares other than to be paid their fair value.

56. In this matter the resolutions adopting the scheme of arrangement were passed at the meeting of 13 November 2019, and the Applicants gave their demand in terms of the Act on 19 November 2019.
57. The Respondent was required, in terms of section 164(11) of the Act, to furnish the Applicants with a written offer to pay an amount considered by the Respondent's directors to be the fair value of the shares.
58. The Respondent did not make a written offer as it was required to do, and the Applicants were compelled to bring this application in terms of the Act.
59. It has taken almost four years for the matter to reach its conclusion. During that time the Applicants had no rights in respect of the shares, nor did they have the benefit of the fair value being paid to them. Consequently, this is a matter where it is appropriate for me to exercise my discretion to allow a reasonable rate of interest on the amount payable to the Applicants.
60. Both parties contended that the reasonable rate of interest in this matter would be the rate stipulated in the Prescribed Rate of Interest Act 55 of 1975. Although the actual rate is in my discretion, I see no reason to depart from what the parties have contended.
61. The statute applies to a debt where the rate of interest is not governed by any other law or the agreement of the parties or a trade custom. There is no evidence of any other applicable law or agreement or trade custom and, consequently, the rate set out in the Prescribed Rate of Interest Act is a reasonable rate of interest in this matter.
62. There was some debate between the parties on when the interest should commence to run. The Applicant contended that the commencement date should be 19 November 2019, which is when it made its demand to be paid the fair value of the shares held by it. The Respondent, on the other hand, argued that the debt is only ascertained when the court determines the fair value and, consequently, interest should commence to run from the date of judgment.
63. The provision itself resolves the debate. Section 164(15)(c)(iii)(bb) states that interest is to run "from the date the action approved by the resolution is effective". In that regard, the circular that was sent to the Respondent's shareholders recorded the implementation date of the scheme of arrangement as 2 December 2019 and, accordingly, that is the date from which interest must be levied.
64. I turn now to the question of costs. Section 164(15)(c)(iv) of the Act provides that a court "may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court".
65. On the face of it this provision appears to restrict the court's general discretion on costs to only one factor viz. the difference between the offer made by the company and the fair value of the shares determined by the court.

66. However, both parties argued that the section does not displace a court's general discretion on costs. In my view this must be correct. The wide discretion of a court when it comes to the question of costs is well established in our law, and if it had been the intention of the Legislature to make inroads into that discretion then it would have required clear wording to that effect.
67. In addition, a comparison between the fair value contained in an offer from the directors of a company and the fair value found by a court will have no application where the court has found, for one reason or another, that the application must fail. It could not have been the intention of the Legislature that the respondent company could not be awarded its costs of successfully opposing the application.
68. In my view, by requiring a court to compare the fair value attributed to shares by the directors of a company with the fair value determined by the court, section 164(15)(c)(iv) does no more than enjoin a court to consider the relative success of each party in the application.
69. In this matter the Respondent's directors did not make a written offer in terms of section 164(11) of the Act, and the Applicants were forced to bring this application. In the result, the Applicants have been successful, and they are entitled to their costs in the application.
70. The Applicants contend that the costs should be awarded to them on the scale as between attorney and client. The reasoning is simple, yet compelling. The Applicants say, in essence, that the Respondent opposed the application without there being a genuine dispute between the parties.
71. This is borne out by the Respondent raising a host of defences in its answering affidavit and in its heads of argument, only to abandon the defences when the matter was argued. Even then, the sole remaining defence would not have been arguable if half of the e-mail dated 31 August 2020 had not been cut-off in the court papers, or if the Respondent had not overlooked the supplementary affidavit that was filed by the Applicants in April 2023.
72. In that regard the Respondent argues that any costs award against it should only take effect in April 2023 when the supplementary affidavit was filed because, according to the Respondent, until the supplementary affidavit was filed "the Applicant's case was simply not in order".
73. The purpose of the supplementary affidavit was to prove what was contained in the cut-off portion of the 31 August 2020 e-mail viz. that the Applicants' representative had voted against the resolutions at the special meeting on 13 November 2019 and, consequently, the Applicants were dissenting shareholders in terms of the Act.

74. However, the Respondent's argument overlooks the fact that all the evidence to prove that the Applicants were dissenting shareholders was, strictly speaking, unnecessary because the Respondent, through its own agent, had recognised and acknowledged the Applicants' status as dissenting shareholders as early as 21 February 2020.
75. In other words, the only reason the Applicant had to put up the supplementary evidence was because the Respondent sought to argue a point that was inconsistent with its own conduct.
76. The Respondent failed to comply with its statutory obligation to furnish a written offer to the Applicants in terms of section 164(11) of the Act, which compelled the Applicants to approach the court for their statutory relief.
77. Having ignored the Applicants' statutory rights, the Respondent then rode roughshod over the Applicants' procedural rights in the application by advancing arguments that were manifestly without merit and which only served to drag out the conclusion of the application.
78. This conduct, in my view, warrants censure in the form of a punitive order as to costs.
79. There is also no merit in the Respondent's contention that the request for punitive costs was not contained in the notice of motion, nor substantiated in the founding affidavit. Most of the facts which justify a punitive costs order only manifested after the founding affidavit was filed. However, they are readily apparent from the record and the findings in this judgment.
80. Finally, I was asked to deal separately with the costs that were reserved on 11 October or 11 November 2021. The parties do not agree on when the costs were reserved, but that is something that can be resolved before the taxing master with reference to the necessary evidence.
81. Irrespective on which date is correct, the costs that were reserved on that date must also be paid by the Respondent. As I have already mentioned, the matter was postponed to enable the Applicants to file a supplementary affidavit to prove a fact that had previously been conceded by the Respondent. The supplementary affidavit was not necessary, and it follows that the wasted costs occasioned by the postponement were caused by the Respondent.
82. In light of all of the above I make the following order:
 - (i) The fair value of the shares as at the time immediately before the Respondent adopted the resolutions that gave rise to the Applicants rights in terms of section 164 of the Companies Act 71 of 2008 was 50.95 cents per share.
 - (ii) The Respondent is ordered to pay to the Applicants the fair value of the shares formerly held by them as follows:
 - (a) R1 681 713.78 to the First Applicant; and
 - (b) R158 120.78 to the Second and Third Applicants.

(iii) The Respondent is ordered to pay interest on the above amounts at the rate stipulated in section 1(2)(a) of the Prescribed Rate of Interest Act 55 of 1975 and calculated from 2 December 2019 to date of payment.

(iv) The Respondent is ordered to pay the costs of this application on the scale as between attorney and client.

C J Mc Aslin

Acting Judge of the High Court

7 November 2023

On behalf of the Applicant:

Adv. P-S Bothma

Instructed by:

Van Wyk & Associates c/o Wright, Rose-Innes Inc

On behalf of the Respondent:

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