

SOUTH AFRICA / JUDGMENT

Chase Willow Financial Services (PTY) Ltd v Debt Rescue (PTY) Ltd and Others (55941/2021) [2022] ZAGPJHC 872 (7 November 2022)

[2022] ZAGPJHC 872**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

55941/2021

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA,****GAUTENG****DIVISION, JOHANNESBURG****Case****Number: 55941/2021****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

11/7/2022

In the matter between:

CHASE

WILLOW FINANCIAL SERVICES (PTY) LTD

Applicant

And,

DEBT

RESCUE (PTY) LTD

First Respondent

NEIL

FRANS ROETS

Second Respondent

NEIL

FRANS ROETS N.O

Third Respondent

MELT

UYS RAUTENBACH N.O

Fourth Respondent
DIHAN
DU PLESSIS
Fifth Respondent
STEPHAN
VAN DER HOVEN
Sixth Respondent
FRANSIE
VAN DER HOVEN
Seventh Respondent

JUDGMENT

FISHER J:

Introduction

- [1] This application concerns the interpretation of provisions of the Memorandum of Incorporation (MOI) of the first respondent (Debt Rescue/the company) which relate to matters reserved for shareholder approval.
- [2] The applicant holds 49.89 % of the shares in the company and the Neil Roets Share Trust (the Trust) holds the balance of 50.11%.
- [3] Mr Niel Roets, the second respondent is a Trustee in his eponymous Trust.
- [4] The applicant and the Trust have the right respectively to nominate two and three directors each to the Board. The fifth, sixth and seventh respondents are the current directors nominated by the Trust. Mr Mervin Muller, the deponent to the founding affidavit and Mr Lufuno Makhari are the directors nominated by the applicant.
- [5] Mr Niel Roets is the CEO of the company. Payments made to him as increased salary and award of a bonus are at the centre of the dispute.
- [6] The applicant seeks to impugn the resolutions of the Board approving such payments. It argues that, in terms of the MOI, these payments are matters reserved for shareholder approval by special resolution. The applicant seeks a number of declarations relating to these salary and bonus payments. It goes further and seeks a general declaration as to what constitutes a reserved matter.

Factual

background

- [7] Debt Rescue was established in 2006 as a provider of debt counselling services. The applicant is a company of venture capitalists in the United Kingdom.

[8] On 23 April 2018 Mr Roets concluded a written employment agreement with Debt Rescue in terms of which he was appointed as its CEO.

[9] In terms of the employment agreement:

- Mr Roets would receive a net monthly salary of R220 000 (R2 640 000 per annum);
- the salary would be reviewed on a semi-annual basis;
- it was recorded that he ‘may be eligible to participate in any executive bonus schemes by the Company from time to time...’;
- it was recorded that the payment of such bonus would be in the sole discretion of the company;
- It was recorded that, if the Board determined that he was entitled to a bonus, the amount payable would be linked to certain key performance indicators (“KPI's”) of the company which were said to be set out in annexure A to the agreement and which would be set, from time to time, by the Board and provided to the Executive.

[10] On 24 March 2021 Mr Roets sought to increase his annual salary and that of certain other executives. His salary was thus increased from R5 500 822.20 to R5 940 888 - an 8% rise.

[11] Initially, there was no formal board approval of this raise. The applicant and its appointed directors complained that this salary increase was a reserved matter. The Trust and its appointed directors disputed this. They contended the reservation as to salary in the MOI did not apply to existing employees. In essence the argument is to the effect that the reservations are not retroactive. The dispute grumbled on for some months. The dispute as to whether a bonus for Mr Roets would fall within the reservation was also raised.

[12] On 28 October 2021 there was a meeting of the Board. On the agenda was the ratification/ approval of the salary increases including that of Mr Roets and a substantial bonus for Mr Roets.

[13] The night before the Board meeting Mr Roets resigned as CEO whereupon the Trust nominated the seventh respondent, Mrs van der Hoven, the wife of the sixth respondent in his stead. Mr Roets and the van der Hoven’s are close family friends. It seems that Mr Roet’s has subsequently taken up his position as executive of the company again in that he describes himself as the CEO in his confirmatory affidavit.

[14] On 28 October 2021 the Trust-appointed directors (now including Mrs van den Hoven in the stead of Mr Roets) adopted a resolution in terms of which they approved or ratified the salary increase of Mr Roets and other executives and awarded a bonus to Mr Roets in the amount of R1 293 544.

[15] The applicant contends that the resignation of Mr Roets was contrived. It replaced him for a vote which he was not able to participate in because of his conflict of interest.

[16] I now deal with the relevant terms of the MOI.

The MOI

[17] Article 33 of the MOI deals with reserved matters which are the shareholders sole preserve, to be approved in writing by shareholders holding not less than 75% of the issued shares or by a special resolution. Such matters include:

- The entering into by the company of any agreement, transaction or project which is 'material' or which is 'not in the normal and ordinary course of business of the Company.'
- The 'remuneration' of Directors.

[18] Article 33.3.3 provides that a transaction is "material" if the Company is obliged to make or render or entitled to receive payments and/or other performance having an aggregate value in excess of R100 000.00;

The disputes

[19] The respondents argues in relation to the salary increase that the reservation as to salary does not apply to directors, such as Mr Roets, who were incumbent at the implementation date of the MOI.

[20] In relation to the award of the bonus they argue that a bonus does not, on a literal reading of the text, constitute remuneration.

[21] The applicant argues that, even if it were to be found that a bonus is not remuneration (which it denies) the bonus transaction is hit by the materiality requirement in that it has an aggregate value of R100 000.

[22] Thus the interpretative questions to be decided are as follows:

- Does the reservation as to directors' salaries only apply to new positions?
- Does a bonus constitute remuneration?
- In any event, is the award of the bonus hit by the materiality provision.

[23] As to the non-specific declarations sought, the respondents argue that such a declaration is inappropriate in that it fails to allow for the contextual analysis which is necessary in the interpretation exercise.

[24] I will deal with each of these arguments with reference to the legal principles applicable to interpretation.

The approach to interpreting the MOI

[25] It is well settled that interpretation is the process of attributing meaning to the words used in a document. It is a unitary exercise which requires reference to text, purpose and context.

[1] Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax.[2] The process always starts with the text. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.

I will deal with each of the arguments with reference to these principles.

Does the reservation in respect to directors' salaries exclude directors who were incumbent at the date of implementation?

[26] It is not denied that the purpose of the reserved matters was to allow the applicant, as minority

shareholder, control over the expenditure of the company in relation to larger defined items of such expenditure. It is acknowledged that this occurred in a context which Mr Roets describes as 'differing philosophies' between the shareholders as to expenditure.

[27] One such item so reserved is directors' remuneration. Control over the executive's remuneration would not be served by excluding existing directors from the limitation and thus giving Mr Roets and his co- Directors

appointed by the Trust free rein over their own remuneration.

[28] To my mind, the purpose of the reservation provision as to remuneration was to curtail salary raises by the high earners including the executive directors. Mr Roets was responsible for negotiating the reservation. Had there been an intention to limit the reservation on the existing directors' remuneration going forward this would have been done expressly.

[29] There is, to my mind, no basis on which the term can be construed to mean that Directors who were incumbent at the time of the execution of the MOI would be immune to the reservations and limitations in the MOI. In relation to the context and purpose of these provisions such an interpretation would be counter-intuitive.

Is a bonus 'remuneration'?

[30] The respondents argue that as a 'bonus' is not a quid pro quo for service, as is a salary, it is not remuneration per se.

[31] 'Remunerate' according to the Shorter Oxford Dictionary can mean 'to give a reward'. Mr Roets' employment agreement expressly provides for bonuses to be earned with reference to the performance of the company. In terms thereof the discretion of the Board as to the granting of a bonus and the determination of the amount thereof is limited with reference to a 'bonus scheme' linked to the performance indicators of the company which were to be set out in annexure A to the agreement. This annexure A is not part of the papers and there is no indication that any indicators were employed in the calculation of the bonus amount. The point is however that, on these intended criteria, the bonus contemplated is to be

earned in the context of the performance of the company. Such performance would obviously relate to the success of its executive management. It is not purely gratuitous.

- [32] On this basis the respondents' characterisation of a bonus is incorrect. The bonus is meant a reward for a particular kind of performance of the terms of employment. It would thus be covered by the use of the word remuneration.
- [33] From a purposive and contextual perspective, it is unlikely that controls over the salary would be put in place which could be circumvented by the payment of lump sums as bonus.

Is the award of the bonus hit by the materiality provision?

- [34] In any event, the applicant argues that the award of the bonus would be hit by the R100 000 threshold reservation.
- [35] The respondents argue that the application of this reservation would lead to absurdity in that it would require too much hands-on attention by shareholders.
- [36] It is common cause that the purpose of the reserved matters in the MOI is to introduce shareholder control over certain day to day expenditure by the company. It is relevant in this context that there are two shareholders who have different approaches and interests in the manner in which the company's business is run. It is relevant also that both shareholders have agreed that there is to be a significant and perhaps unusual amount of shareholder input into the conduct of the business.
- [37] The applicant denies that this shareholder intervention involves so cumbersome a process as to the carrying out of relatively small or everyday transactions that it would lead to absurdity. It argues that the monitoring of the relevant expenditure can be done by way of round robin. It points to numerous occasions where this has been done.
- [38] It is important that this alleged unworkable or absurd result contended for is not directly relevant to the dispute at hand. What this Court is dealing with implicates only the salary increase and bonus in issue. The nature of these matters is such that they do not entail repeated resort to the shareholders. Once a salary increase has been approved this would continue in force until it came to the next increase by special resolution of the shareholders. The respondents' suggestion that there would have to be a monthly approval is without foundation.
- [39] The approach of the respondents appears to be that this court should find that because the R100 000

reservation is unclear as to its application in relation to certain expenditure, the whole reservation structure in the MOI should fall.

[40] This is not a cogent argument. Whilst the MOI must be looked at as a whole, the fact that there may be a lack of clarity in one part of an agreement does not damn the entire agreement to that finding.

[41] The point is that the transactions which are being dealt with are the salary increase and bonus. The provision is workable in its application to these items of expenditure. It is unhelpful to suggest applications where it might

not be workable – we do not have to do with such applications of the reservation here.

[42] Thus there is no answer to an argument to the effect that even if a bonus was not hit by the reservation of directors' remuneration, it would be hit by the R100 000 limitation. Thus the bonus transaction seen in context would fail on either reservation.

[43] To my mind the award of a large bonus to a director who has involvement in one of the shareholders under circumstances where such award was not in terms of the approved scheme would not only be material but would also fall outside of the normal course of business.

[44] Thus, to my mind, the impugned resolutions are invalid for want of compliance with the MOI and fall to be set aside.

The scope of the declaratory relief

[45] The applicant seeks also that this Court declare that 'any decisions to be taken by the applicant's board of directors regarding the entering into by the applicant of any agreement, transaction or project, having an

aggregate annual value in excess of R100 000.00, shall constitute a reserved matter in terms of Article 33.2.4.3 of the MOI'. There are also a number of superfluous declarators sought in relation to the resolutions at hand.

[46] The applicant casts its net widely as far as the declaratory relief is concerned. It asks that I exercise my discretion on the basis of the facts of the matter and declare:

- That the annual salary increase which the second respondent awarded to himself during March 2021 constitutes remuneration as contemplated in article 33.2.5.4 of the MOI
- that neither the second respondent nor the board of the first respondent had the power or authority to approve the award of the annual salary increase.
- that the award of an annual bonus to the second respondent in his capacity as the Chief Executive Officer of the first respondent for the year ended 28 February 2021 constitutes remuneration as contemplated in article 33.2.5.4 of the MOI.
- that the board of the first respondent did not have the power or authority to approve the award of the annual bonus.

- that the award of the annual salary increase and annual bonus constituted a reserved matter and had to be approved by the shareholders in terms of article 33.4 of the MOI.
- that the decisions of the second respondent and/or the board to award the annual salary increase and the annual bonus are set aside;
- that any decisions to be taken by the first respondent's board of directors regarding the entering into by the first respondent of any agreement, transaction or project, having an aggregate annual value in excess of R100 000.00, shall constitute a reserved matter in terms of Article 33.2.4.3 of the MOI.

[47] This is a 'scatter-gun' approach. The point is made by the respondents that, on the facts before the Court, the true dispute is whether the decisions relating to the increase in salary and award of bonus are reserved matters under the MOI. I agree. There is no actual dispute as to the other matters in respect of which declarations are sought. A determination of what the MOI means beyond the real dispute at hand is superfluous.

[48] In light of the unitary approach to interpretation which takes into account language and purpose it would be imprudent to offer my interpretation of these other articles in a vacuum.

[49] The applicant seeks also repayment to the company of the amounts paid to Mr Roets under the invalid resolutions. I turn now to deal with this claim.

The claim for repayment

[50] Notwithstanding the objections of the applicant and its appointed directors the increased salary and bonus was paid to Mr Roets.

[51] The question to be answered is whether the applicant has the locus standi to press for such payment.

[52] The respondents correctly raise that the applicant's claim is for a derivative action.

[53] The only source of a court's jurisdiction to entertain a derivative action is section 165 of the Companies Act 71 of 2008. Section 165(1) provides:

"Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right".

[54] Section 165(2) requires service of a demand on a company by a category of persons including shareholders to commence or continue legal proceedings. Since the applicant did not comply with the provisions of section 165, the monetary orders it seeks are not competent.

Conclusion

[55] The MOI, properly construed, precludes the approval and implementation of the impugned resolutions.

[56] The broader declaratory relief sought should not be granted in that it is, to my mind, not sufficiently

founded in fact.

[57] The money judgment sought is derivative and not competent because of the peremptory requirements

of section 165 of the 2008 Companies Act.

[1] Natal Joint Municipal Pension Fund v Endumeni Municipality ('Endumeni') 2012

(4) 593 (SCA) at p604 C-D.

[2] Endumeni at p614 A-B.

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