

SOUTH AFRICA / JUDGMENT

Engelbrecht v Coleman and Another (20951/2016) [2017] ZAGPJHC 27 (2 February 2017) [2017] ZAGPJHC 27

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

20951/2016

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT SOUTH AFRICA
(GAUTENG
LOCAL DIVISION, JOHANNESBURG)
CASE
NO: 20951/2016

Reportable: NO
Of
interest to other judges: NO
Revised.
2
February 2017
In
the matter between
PIETER
HENDRIK
ENGELBRECHT APPLICANT
and
JESSE HENRY COLEMAN
FIRST
RESPONDENT
RYNFIELD VETERINARY
CLINIC (PTY) LTD SECOND
RESPONDENT
Company –

shareholding - applicant and respondent equal shareholders in second respondent - common cause that their relationship qua shareholders broken down - applicant seeking an order for equal division of the shareholding in the second respondent - section 163(2)(e) of the Companies Act 71 of 2008 - in regard to the equal division court required to issue directions in regard to a valuation and determination of the fair value of the shares in the second respondent in order to effect an equal apportionment between the applicant and the first respondent which they were unable to achieve
- such order granted each party to pay its own costs.

JUDGMENT

VAN OOSTEN J:

Introduction

- [1] The applicant and the first respondent are the equal shareholders in and only directors of the second respondent, which as is evident from its name, is a veterinary clinic, operating in Benoni. The applicant and the first respondent have been practising as veterinary surgeons, through the vehicle of the second respondent albeit in true nature as a partnership, since 2006. The business relationship between the applicant and the first respondent, it has become common cause in this application, has gradually deteriorated over the past years and has finally broken down. The reasons for the breakdown, although fully ventilated in the papers before me, are thus no longer relevant and it remains for this court to issue directions in order for a valuation and determination of the fair value of the shares in the second respondent, in order to effect an equal apportionment between the applicant and the first respondent, which they have thus far not been able to achieve.

The relief sought

- [2] The applicant seeks an order for the equal division of the shareholding in the second respondent, based on the provisions of s 163(2)(e) of the Companies Act 71 of 2008 (the Act). Before I deal with the terms of the order sought by the applicant it is necessary to dispose of an issue raised by the first respondent and, surprisingly so, persisted with in argument before me by its counsel.
- [3] Counsel contended that the relief sought does not fall within the ambit of s 163(2)(e) of the Act, on the ground of an absence of evidence of conduct by the first respondent 'that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant'. The contention is misconceived and falls to be rejected.

- [4] Section 163 provides for relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of a company.

Sub-sections 1(a) to (c), in wide terms, set out the circumstances in which an application for the relief provided for in sub-section (2), can be applied for. For present purposes it is only necessary to refer to sub-section 2(e), which provides for ‘an order

directing an issue or exchange of shares’ which substantially, is the relief sought by the applicant.

- [5] In *Grancy Property Ltd v Manala* 2015 (3) SA 313 (SCA) para

- [26] the Supreme Court of Appeal held that s 163 provides an extensive remedy and that it had to be interpreted to advance the remedy rather than limit it. In *Louw and Others v Nel* 2011 (2) SA 172 (SCA) the requirements that must be established by an applicant for relief under s 252 of the old Companies Act, were held, are the following:

‘[T]hat the particular act or omission has been committed, or that the affairs of the company are being conducted in the manner alleged and that such act or omission or conduct of the company’s affairs is unfairly prejudicial, unjust or inequitable to him or some part of the members of the company; the nature of the relief that must be granted to bring to an end the matters complained of; and that it is just and equitable that such relief be granted. Thus, the court’s jurisdiction to make an order does not arise until the specified statutory criteria have been satisfied.’

- [6] The question arising, having regard to the facts of the present matter, is whether a complete deadlock between the only shareholders

in and directors of the company can be read into and would qualify as oppressive or prejudicial conduct within the meaning thereof in s

163. In my view, it undoubtedly does. The deadlock detrimentally affects both the applicant and the first respondent, and, of course,

in addition thereto, the second respondent. Given the wide discretion the court is endowed with and the flexible mechanisms provided for in s 163, the relief sought by the applicant, in my view, is proper and should be given affect to (cf *De Souza and Another v Technology Corporate Management (Pty) Ltd and Others* 2016 (6) SA 528 (GJ) para [36] – [43]; *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* 2012 SA (GSJ) para [49] et seq).

- [7] The contention, for a further reason, is seemingly without merit. It is abundantly clear that, from the conduct of the applicant and the first respondent, in particular their attempts to solve the deadlock by an exchange of shares, either in buying or selling the other party’s shares, and the nature of the disputes as they have crystalized in this application, the fact of a termination of their relationship as shareholders in and directors of the second respondent, is not in issue. It is indeed expressly agreed between the parties that a division of their interests in the second respondent, objectively fairly valued and determined, must

be considered and ordered by this court. In the face thereof, it is inconceivable and indeed would result in a grave injustice to the parties, if counsel's contention were to be upheld.

Discussion

- [8] The only issue remaining is, who is to buy and who must sell. A belated written offer to purchase the applicant's shares was made by the first respondent during the course of the drafting of the applicant's application and founding affidavit in this application. The amount of the offer and conditions attached thereto, however, were not deemed reasonable and the application was launched.
- [9] In my view, the following factors are relevant to the consideration of this issue: the applicant, through a close corporation and trust, is the owner of the immovable property where the veterinary practice is conducted. The property was previously owned by both the applicant and the first respondent, again by way of equal membership interest in the close corporation. The first respondent, however, sold his membership interest in the close corporation to the applicant, for which he was duly paid. For that reason alone, the ownership of the immovable property falls outside the equation and decisively determines that the applicant should remain in practice at the property. It is true that the applicant conducts a second veterinary practice in Bapsfontein, entirely different in the nature of the services rendered, of which the first respondent is and has always been aware, which in my view, is of no relevance to the dispute. A buy out by the applicant would provide the first respondent with funds which would enable him to establish a veterinary practice at an open stand which he has recently purchased for that very purpose.
- [10] In regard to the objective valuation and determination of the value of the shares in the second respondent, I am in agreement with the terms of the order sought by the applicant in regard to the practicalities of the valuation and determination as reflected in the order I am about to make.
- [11] For all these reasons, I am satisfied that this case falls within the ambit of s 163 of the Act, or, that pursuant to the agreement between the parties I have referred to, a fair and reasonable division of interests of the applicant and the first respondent will be effected in terms of the order which now follows.

Order

- [12] In the result I make the following order:
1. The applicant is directed to purchase the 50% shareholding that the first respondent holds in the second respondent at fair value calculated pro rata to the total issued share capital of the second respondent.
 2. For the purpose of the applicant's purchase of the first respondent's shares, the fair value of the shares shall be determined with regard to the financial condition of the second applicant as at the date of instructions being given to the valuator.

3. The applicant and first respondent shall endeavour to agree upon the appointment of an independent practising Chartered Accountant of not less than 10 (ten) years' standing, to undertake the valuation of the shares in accordance with the order in paragraphs 1 and 2 above, to determine the purchase consideration of the shares, failing such agreement, the valuation and determination shall be undertaken by an independent Johannesburg-based practicing Chartered Accountant of not less than 10 (ten) years' standing to be nominated by the President of the South African Institute of Chartered Accountants (the valuator).
4. The costs of the said valuation and determination shall be borne in equal shares by the applicant and the first respondent.
5. The applicant and the first respondent shall in all respects co-operate with the valuator in furnishing the valuator with all such information appropriately vouched, as the valuator may reasonable require in order to undertake and finalise the valuation and determination of the first respondent's shareholding.
6. The valuator shall complete the valuation and determination and furnish each of the parties with a written report within a reasonable time after his or her appointment, or such extended period as the parties may agree to in writing.
7. In the event of the applicant or the first respondent refusing to accept the valuation and determination of the valuator, proceedings to obtain a judicial substituted valuation shall be instituted by the dissatisfied party within 20 (twenty) days of the publication of the valuation and determination, failing which it shall become final and binding on the parties.
8. The applicant shall pay to the first respondent the value of the first respondent's shares as determined by the valuator, within 30 (thirty) days of the date of publication of the valuator's determination, and against payment of the purchase consideration to the first respondent, the first respondent shall transfer his shares in the second respondent to the applicant.
9. Each party shall pay its own costs in regard to this application.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

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SAVAGE JOOSTE & ADAMS

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1 FEBRUARY 2017

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2 FEBRUARY 2017

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