

SOUTH AFRICA / JUDGMENT

Hesslewood v Naidoo and Another (50937/2013) [2017] ZAGPPHC 423 (7 March 2017)

[2017] ZAGPPHC 423

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie

CASE / FILE NUMBER

50937/2013

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

no. 50937/2013

In

the matter between:

P.D.

HESSLEWOOD.....Plaintiff

and

N.

NAIDOO.....First

Defendant

HTSA

POWER PTY

LTD.....Second

Defendant

JUDGMENT

RABIE, J

1. The plaintiff claimed from the first defendant payment of the amount of R 556 189,12 being the balance due and owing to him for the sale of 16% of the total issued shares in the second defendant. The first defendant denied being indebted to the plaintiff.
2. During December 2008 the plaintiff was the holder of 40% of the shares of the second defendant. The second defendant was part of a group of companies in the High Voltage industry. In order to maximise the BEE credentials of the second defendant a number of changes in, inter alia, the shareholding, were made which included the transfer of 16% of the shareholding of the plaintiff in the second defendant, to the first defendant. It is not necessary to refer herein to the nature of the activities of the separate companies nor to the manner in which their activities were structured.
3. It is common cause that the plaintiff was not amenable to sell the aforesaid shares at the 2008 value thereof and wanted to retain his shareholding until 2010. That would have enabled the plaintiff to build value into the company and consequently also into the shares thereof. The future of the second defendant appeared to be very bright and had secured long-term contracts, inter alia with Escom, which the plaintiff wanted to benefit from. On the other hand the parties realised that the second defendant would significantly benefit if the first defendant could purchase the shares immediately to enable the company to proceed with its business plan. After the sale of the 16% shares, the first defendant would have possessed 51% of the second defendant's shares.
4. The plaintiff and the first defendant consequently agreed that the sale and transfer of the 16% shares of the plaintiff would be effected forthwith and that, in order to compensate the plaintiff for the loss of any benefit that may have accrued to him from the value of the 16% shares over this timing difference, he be compensated by way of a deferred payment to him of the value of the shares equivalent to the value thereof calculated in terms of the shareholders agreement as at the date of 31 May 2010.
5. In order to give effect to the aforesaid agreement between the parties the first defendant signed a written Acknowledgement of

Indebtedness dated 8 December 2008 which recorded the aforesaid background and the indebtedness of the first defendant.

6. According to the plaintiff a provisional valuation of the shares was done during 2010 in the amount of R 1 205 445,49 which was paid to the plaintiff in the reduction of the purchase price for the sale of the 16% shares. According to the plaintiff the value of the shares as at 31 May 2010 could not be finally determined on that date for the reason that the net future value of orders and future orders on existing contracts including contracts with Escom, could only be accurately determined at a later date.
7. The value of the shares as at 31 May 2010 was finally determined on 1 November 2012 at R 1 761 634, 61. Having regard to the aforesaid payment made on the provisional valuation the first defendant is consequently, according to the plaintiff, indebted to the plaintiff in the amount of R 556 189,12, which is the amount claimed in the summons.
8. The first defendant's case is that he was only liable to the plaintiff in the amount of R 1 205 445, 49 which was the first valuation, and which had been paid.
9. The parties were in agreement that this court should only decide the dispute as to whether the aforesaid payment to the plaintiff

constituted the full purchase price or only part of thereof. The first defendant accepted the 2012 calculation with the result that this court only had to decide the issue of liability for the amount of R556 189,12 and not the calculation thereof. Similarly, the parties were in agreement as to the date from which interest should run in the event of the first defendant being ordered to pay the aforesaid amount.

10. In support of the plaintiff's case the evidence of Mr David Tromans was presented. The first defendant did not testify and neither did anybody testify on behalf of him.
11. Mr Tromans is a qualified Chartered Accountant who joined High Voltage Technology ("HVT"), one of the group of companies,

as a Director and shareholder on 1 March 2000. He was also the financial director of this company. Mr Tromans testified to the

activities of the group of companies during the period concerned and more particularly the decision that the first defendant would

purchase 16% of the shares of the second defendant from the plaintiff to enable him to become a majority shareholder. He testified that the shares sold to the first defendant were transferred to him on 9 March 2010 and in terms of a back- to-back agreement same were transferred to HVT. Although the aforesaid amount for the shares was paid by HVT, the further negotiation and payment for the shares are not relevant for purposes of the present dispute.

12. Mr Tromans testified that he was tasked by Mr G. Naidoo, the CEO and majority shareholder of HVT, to see through the aforesaid transaction of the sale of shares and to do the valuation thereof. Mr G. Naidoo is the father of the first defendant.

13. Mr Tromans further testified that at the time the second defendant held three- year contracts for the provision of high-voltage

equipment to Escom and that there were other contracts which had not yet run their course. The issue was thus how the value of the company was to be determined. This issue affected not only the sale of shares between the plaintiff and the first defendant but also the sale of shares by the plaintiff to other minority shareholders. During February 2010 Mr Tromans made the required valuation and according to the written notes to his valuation, and also according to his evidence, the valuation had to be reassessed and adjusted with reference to actual orders and audited accounts covering the following year. In other words, the valuation had to be done with reference not to estimated orders but to actual orders which could only accurately be done after expiry of the relevant contracts.

14. In regard to the valuation of the 16% shares sold to the first defendant and the shares sold to the other minority shareholders an agreement was reached on 15 July 2010. It was agreed that a reassessment of the share price will be made on 31 May 2011 and that an adjustment will be made either positive or negative to the interim price. This course was decided upon to avoid the valuation

being done on the basis of an estimation of the value of future contracts and to rather revisit the issue a year later when the

actual figures would be known after the contracts had been completed. Mr G Naidoo who represented HVT, which had purchased the shares from the first defendant, was not prepared to go along with this agreement and left the meeting without making any proposal as to the final settlement in respect of the 16% shares originally purchased by the first defendant.

15. The valuation was done, according to Mr Tromans, by using the formula set out in paragraph 1.1.1.13 of the shareholders agreement which relates to the "net asset value" of the company and also having regard to paragraph 10. Paragraph

1.1.1.13 reads as follows:

"' net asset value' - for the purposes of clause 10 - the net asset value of the Company as at the relevant date determined in accordance with the audited financial statements of the Company as at the financial year end immediately preceding the date when the net asset value is required to be determined as certified by the auditors and which shall comprise -

1.1.1.13.1 the total market value of the fixed assets, current assets, other assets of the Company, the net future value of orders on hand and work in progress on a going concern basis at such time (excluding goodwill and other intangible assets) less

1.1.1.13.1. 1 the total of all provisions (made in terms of generally accepted accounting practice) in respect of such assets; and

1.1.1.13.1. 1 the current and long-term liabilities (including shareholders loans) of the company including the primary loan account;

"net future values of orders on hand" - shall mean the gross sales value, less: 1.1.1.13.1.3 direct costs and;

1.1.1.13.1.4 a relevant portion of indirect overheads and; 1.1.1.13.1.5 Company Tax."

16. Paragraph 10 reads as follows:

"10.1.1 in determining the valuation of any shareholder's equity for the purpose of any sale or disposition thereof whether to the remaining shareholders or to any third party, the valuation shall not be less than:

10.1.2 the net asset value of the company as at the date of the valuation. (Refer to definitions 1.1.1.13)

10.1.3 the value of the shareholder's equity as determined in terms of this clause constitutes the fair value there of for the purposes of this agreement and for determination of the purchase price of thereof as at the date of departure, or sale as the case may be.

10.1.4 should any of the parties dispute the valuation in terms of 10.1.1, such dispute shall be resolved in terms of the provisions of clause 21 hereof."

17. Clause 21 provides that disputes should be referred to arbitration.

18. As stated before, there is no dispute between the parties regarding the correctness of the valuations by Mr Tromans. This means that the parties accept that the value of the company and that of the shares as at 31 July 2010 was correctly valued by Mr Tromans in 2012 when he had regard to the actual figures and not estimations.

19. The minority parties paid the share prices as calculated by Mr Tromans but, as stated before, the first defendant refused to do so.

20. The evidence of Mr Tromans was that a contract such as the second defendant had with Escom is to be regarded as an asset of the company. It is however not the gross income that constitutes the asset but the net value thereof after deduction of inter alia

operating expenses and tax. It is for this reason as well as for the reason that actual orders are only known at the expiration of a particular contract, that the correct valuation of the shares in terms of the provisions of the shareholders agreement, can only be done at such a time. To do so instead of applying estimations is, according to Mr Tromans, in line with accepted commercial practice. There is furthermore nothing in the shareholders agreement that militates against that this approach.

21. Clause 1.1.1.13 also makes mention of the net future value of orders on hand which must be used in the calculation of the value of the company. The reference to the "future value" similarly indicates that future orders which would emanate from existing

contracts should be considered in the valuation process. This in my view is the only commercially sensible construction to be given to this clause.

22. I agree with the approach of the plaintiff. The payment made to the plaintiff during 2010 was not a final payment or a payment made in respect of a final calculation. There was going to be a deferred payment. The parties were also at all times aware of the value of the contracts which had not yet expired and the fact that accurate calculations could only be done of the value of such contracts once they had expired. In doing so the value of the particular asset could be established with reference to the correct facts instead of with reference to estimations and guesswork. The evidence of Mr Tromans is to the same effect and so are the notes made by him on his valuation documentation. It is also of significance that there had been no doubt with any of the other minority shareholders as to what the shareholders agreement provides in respect of the calculation of the value of the shares of the company.
23. The acknowledgement of debt signed by the first defendant also did not stipulate when the valuation had to take place. It only had to be made with reference to the 31 May 2010. Nothing precluded the actual valuation to be done at a later date. This was done with reference to accurate facts and the valuation of Mr Tromans complied with the intention of the parties as expressed in the acknowledgement of indebtedness.
24. Consequently the plaintiff should succeed with his claim. I have been informed that the parties have agreed that interest should run as claimed from 24 February 2013 to date of final payment.
25. In the result the following order is made:
 1. The first defendant is ordered to pay to the plaintiff the sum of R556189,10 together with interest thereon at the rate of 3% above the prime rate charged by the First National Bank from the 24 February 2013 to date of final payment.
 2. The first defendant is ordered to pay the plaintiff's costs of suit which costs shall include the costs of senior counsel.

C.P. RABIE

JUDGE OF THE HIGH COURT

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Prepared on 9 October 2026 · Esheria