

SOUTH AFRICA / JUDGMENT

Mkhondo and Others v Boikanyo and Others (7597/2017) [2017] ZAGPPHC 1073 (6 December 2017)

[2017] ZAGPPHC 1073

COURT

North Gauteng High Court, Pretoria

BEFORE

Brand

CASE / FILE NUMBER

7597/2017

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case

number: 7597/2017

6/12/2017

In the

matter between:

VUSIMUZI
BRIAN MKHONDO
First Applicant
MICHAEL
JOSEPH
RAY
Second Applicant
SA
STOCKBROKERS (PTY) LTD
Third Applicant
and
YOLANDA
REBECCA BOIKANYO
First Respondent
MAHLODI
TEBOGO SHAKONG
Second Respondent
VUSIMUZI
BRIAN MKHONDO N.O.
Third Respondent
MICHAEL

JOSEPH RAY N.O.
Fourth Respondent
YOLANDA
REBECCA BOIKANYO N.O.
Fifth Respondent
MAHLODI
TEBOGO SHAKONG N.O.
Sixth Respondent
(In
their capacities as trustees of the Lefika
Securities
Trust (IT 3587/2016 (T))
LEFIKA
SECURITIES (PTY) LTD
Seventh Respondent
(Registration
No: 2004/003457/07)

JUDGMENT

BRAND AJ

Introduction

[1] The Applicants sought a final order on an urgent basis in terms of provisions of the Companies Act, 71 of 2008, in sum for the following:

[1.1] That the shareholding of the First and Second Respondents in the the Seventh Respondent, held by them both directly and through the Lefika Securities Trust (IT3587/2016(T)), be ordered to cease and/or terminate with immediate effect.

[1.2] That the shares held by the First and Second Respondents in the Seventh, are transferred to the First and Third Applicants against payment of a reasonable price, which is to be determined by this Court.

(These orders were sought in terms of section 163(2), alternatively section 161(1)(b)(ii)(bb) of the Companies Act.)

[3] Only the First and Second Respondents opposed the application. They also indicated that they do not oppose termination of their shareholding in the Seventh Respondent per se, but that their only remaining disagreement with the Applicants (apart from them contesting urgency) was the manner in which that termination was to be effected: in short, they insisted that instead of the shares being transferred to the First and Third Applicants for a reasonable price, the shareholding should remain with them until either a reasonable price had been determined for their sale to First and Third Applicants, or the shares were sold to a third party (in the interim they would execute instruments of transfer, blank as to the transferee, which would be held in escrow by the applicants' attorneys, together with the

share certificates). Two points in limine raised in the First and Second Respondents' answering affidavit, relating to the applicants' standing and this Court's jurisdiction, were not pursued at the hearing.

- [4] Accordingly, what remained for me to decide, apart from the question of urgency, was only the manner in which termination of the shareholding is to be effected, that is, whether immediately through transfer to the First and Third Applicants; or only once the First and Second Respondents had found a buyer, or a fair and reasonable price for the sale of the shares to the First and Third Applicants has been determined.

Background

- [5] The background to this matter, very briefly stated, is that the First and Second Respondents, in addition to being shareholders in the Seventh Respondent and traders on the Johannesburg Stock Exchange (JSE), were

also directors of the Seventh Respondent.

- [6] In 2016, the First and Second Respondents resigned as directors of the Seventh Respondent and surrendered their trading licenses. They did so pursuant to a settlement agreement with the Financial Services Board and the Directorate of Market Abuse in proceedings brought against them with respect to two instances of securities trading prohibited by the Securities Services Act, 36 of 2004.

- [7] They nevertheless remained shareholders of the Seventh Respondent, a fact that placed the Seventh Respondent's membership of the JSE and its ability to continue to operate in jeopardy, as the First and Second

Respondents were in terms of the JSE's rules no longer fit and proper persons to be shareholders, so that the Seventh Respondent no longer met the membership requirements of the JSE.

- [8] To address this problem the Seventh Respondent's shareholding was restructured through creation of the Lefika Securities Trust and transfer of the First and Second Respondents' shareholding to that trust.

- [9] The JSE, however, informed the Seventh Respondent that this restructuring was insufficient to render it compliant with the rules and that its membership remained in jeopardy.

- [10] This prompted the Applicants first to attempt to persuade the First and Second Respondents to transfer their shares to them and when that failed, to bring this application.

Urgency

- [11] Mr Whitcutt SC, for the First and Second Respondents, urged me at the hearing of this matter to find that it was, even shorn of the application for declaration of delinquency and determination of a fair and reasonable price, not

urgent, and to remove the matter for that reason.

- [12] In short, his submission in this respect was that, as long as the JSE could see that the Seventh Respondent was in the process of taking steps to address the shareholding problem, even though the First and Second Respondents in the interim remained shareholders, it would be satisfied.
- [13] I am not persuaded. It seems only logical to me both that an institution such as the Seventh Respondent, having been told that it is in breach of the JSE's rules and that its membership is in jeopardy, would and should seek to rectify that breach in all due haste and that the JSE would progressively grow more and more impatient as time passes. This is especially so in a case such as this, where the Seventh Respondent has already once tried through the restructuring of its shareholding

to rectify the breach and that attempt has been found wanting.

- [14] Given further that the abrogation of the time periods with respect to service and filing of documents in this matter due to urgency was by no means severe, I find that the matter, at least as presented in its distilled form to me at the hearing (and that is all that was before me on an urgent basis), is indeed urgent.

The merits

- [15] The position of the Applicants and the First and Second Respondents on the merits with respect to the transfer of shares progressively converged as the hearing proceeded.
- [16] The Respondents' position was that the shareholding should remain with them (with executed transfer instruments, transferee left blank and the share certificates left in escrow with the applicants' attorneys) until a fair and reasonable price is determined for sale to the First and Third Applicants, or the shares are sold to an acceptable third party. This, Mr Whitcutt submitted, is necessary so that the Respondents remain in the position that they can themselves look for an acceptable buyer at an acceptable price.
- [17] As against that, the Applicants maintained that the shares should be transferred to the First and Third Applicant immediately, whatever the arrangements are with respect to determination of a fair and reasonable price or sale to a third party. At stake here, Mr Terblanche SC for the Applicants submitted, was satisfying the JSE - that is, being able to show tangibly that the First and Second Respondents are no longer shareholders and that fit and proper persons instead are, while the details of the transaction with respect to price are sorted out.
- [18] This deadlock around whether or not the shares should be transferred immediately or only once a fair price has been determined or they are sold to a third party was to my mind broken by a draft order handed up during

the course of the hearing on behalf of the Applicants.

[19] In terms of this draft order, the shares will be immediately transferred to the First Applicant. He will then execute instruments of transfer, with the transferee left blank, which will be left in escrow with the Applicants' attorneys until such time as the valuation of the shares for purposes of determination of a fair and reasonable consideration for their transfer is concluded (the draft order proposed that this valuation occurs either through mediation or arbitration - on this

process the parties were agreed).

[20] I find this an eminently practical arrangement, which simultaneously addresses the interests asserted by the the Applicants and the First and Second Respondents in support of there respective erstwhile proposals. In short, this arrangement allows first and obviously for the immediate divestment of shareholding by the First and Second Respondents, which

continued shareholding was the mischief that the Applicants sought to address through this application. Second, it also allows the First and Second Respondents to exercise their options in seeking a third party buyer for the shares at a market-related price, while the valuation is pending.

[21] Despite this, the First and Second Respondents, although agreeing during the hearing to all the other terms of the draft order, elected still to hold out on the question of transfer of shares. Mr Whitcutt, having taken instructions to this effect during an adjournment, offered no submissions in support of this position.

[22] On this, I have to find against the First and Second Respondents. As stated above, I am persuaded that the arrangement as set out in the draft order places the First and Second Respondents in exactly the same position to shop

around for a buyer on the market themselves as they would be were they to retain shareholding. This consideration they are offered by the Applicants despite the fact that they are, after all, the guilty parties who caused the Applicants' predicament.

[23] Accordingly, the application is granted in the terms set out in the draft order referred to above, which I have signed (now marked "A"), is attached to this judgment and is made the order of this court.

JFD BRAND

Acting judge of the High Court

Appearance:

For the Applicants - FH Terblanche SC

H Struwig

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Instructed by Weavind & Weavind Attorneys

For the First and Second Respondents - C Whitcutt SC

I Tsoma

Instructed by Sefalafala Inc Attorneys

(GAUTENG DIVISION, PRETORIA)

CASE NO: 75975/17

Held this 5th day of December 2017

before Mr/Ms Justice BRAND AJ

In the matter between: -

VUSIMUZI BRIAN MKHONDO

First Applicant

MICHAEL JOSEPH RAY

Second Applicant

SA STOCKBROKERS (PTY) LTD

Third Applicant

(Registration No: 2000/019936/07)

YOLANDA REBECCA BOIKANYO

First Respondent

MAHLODI TEBOGO SHAKONG

Second Respondent

VUSIMUZI BRIAN MKHONDO N.O

Third Respondent

MICHAEL JOSEPH RAY N.O

Fourth Respondent

YOLANDA REBECCA BOIKANYO N.O

Fifth Respondent

MAHLODI TEBOGO SHAKONG N.O

Sixth Respondent

(In their capacities as trustees of Lefika Securities

Trust (IT 3587/2016(T))

LEFIKA SECURITIES (PTY) LTD

Seventh Respondent

DRAFT ORDER

Having read the papers filed of record and heard Counsel for the parties, by agreement between the parties and without any concession by any of the parties

IT IS ORDERED THAT:

1. The relief sought in paragraph 7 of the notice of motion is postponed

sine die, with the costs associated therewith to be reserved;

2. The first and second respondents sign the necessary instrument(s) of transfer and such other documents as may be required to effect the transfer of the shares held by each of them in their personal capacities in the seventh respondent to the first applicant;
3. The third, fourth, fifth and sixth respondents (in their capacities as Trustees) are ordered to pass all resolutions and sign the necessary instrument(s) of transfer and all other documents as may be required

to effect the transfer of the shares in the seventh respondent (which are currently held by the Lefika Securities Trust IT (3587/2016(T))

on behalf of and to the benefit of the first and second respondents respectively) to the first applicant.

4. The said instruments of transfer and the share certificates (to the extent that the share certificates pertaining to the shares to be transferred in accordance with paragraph 2 and 3 above, are in the possession of the first and second respondents) shall forthwith be delivered to the auditors of the seventh respondent who shall forthwith procure:

4.1. the registration of the shares in the name of the first applicant;

4.2. the updating of the share register of the seventh respondent to reflect the said transfer of the shares as set out herein; and

4.3. the issuing of new share certificates in the name of the first applicant

5. The first applicant shall simultaneously with the issue of the new share

certificates in his name, execute instruments of transfer in respect of the shares transferred to him (blank as to transferee) and place same together with the new share certificates in escrow with the applicants' attorneys pending the finalisation of the valuation process referred to below;

6. The first and third applicants respectively are ordered to pay the first and second respondents respectively the consideration for the transfer of shares as aforesaid as determined either by mediation proceedings or the arbitration proceedings below (as the case may be) within five days of the valuation being made.
7. The disputes between the parties raised in this application (including the question of costs), and the first and second respondents' loan accounts (if any) and any other issues to which the parties agree in writing, are referred to mediation by an accredited commercial mediator to be agreed by the parties and, failing such agreement within five days of date of this order, to be nominated by the chairman of AFSA.
8. The mediation shall take place within ten court days of the date of appointment of the mediator who shall facilitate meetings between the parties in order to settle the disputes.
9. Legal representatives shall be allowed during mediation at the election of any party and the costs thereof will be for each party's own account.
10. Should the parties not resolve the dispute as to the valuation of the shares transferred as set out above through mediation-
- 10.1. the issue of the valuation of the shares and the first and second respondent's loan accounts (if any) and any other issues to which the parties agree in writing, will thereupon immediately be referred for determination by way of arbitration in terms of clause 24 of the shareholders agreement dated April 2007 ("the shareholders agreement"). The applicants are ordered to furnish the written instruction to the Auditors in terms of clause 24.1 within three days of the date of termination of the mediation failing which the first and/or second respondent may furnish the written instruction aforesaid;
- 10.2. the provisions of the shareholders agreement as to the transfer of the shares as aforesaid, including clause 25 relating to pre-emptive rights should there be a bona fide third party offer for the shares, shall continue to apply; and
- 10.3. The arbitrator is authorised to make an order for the costs of this application and the costs of the mediation and the arbitration.
- 10.4. If, before the finalisation of the valuation of the shares, an offer to purchase the shares transferred to the first applicant in terms of this Order is received by the first applicant from a willing and able buyer, who is a fit and proper person for the purposes of the seventh respondent's membership with the Johannesburg Stock Exchange Limited ("the JSE"), the first applicant shall advise the first and second respondents accordingly and shall, if the first and second respondents instruct the first applicant to do so, sell and transfer the shares to such buyer,

against payment of the agreed purchase price, and pay the full amount received from such buyer to the first and second respondents in equal portions. The foregoing remains subject to the provisions of clause 25 of the shareholders' agreement and any pre-emptive rights which the first and/or third applicant may have, whether in terms of the shareholder's agreement or otherwise.

10.5. There shall be no right of appeal against the award of the arbitrator.

10.6. The parties shall use their best endeavours to finalise the arbitration before 31 March 2018.

BY ORDER

THE REGISTRAR

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Prepared on 14 October 2026 · Esheria