

SOUTH AFRICA / JUDGMENT

S v Quantum Property Group Ltd (SH7/67/2016) [2016]

ZACOMMC 1 (21 July 2016)

[2016] ZACOMMC 1

COURT

Commercial Crime Court

CASE / FILE NUMBER

SH7/67/2016

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IN THE REGIONAL DIVISION OF THE WESTERN CAPE HELD AT THE SPECIALISED
COMMERCIAL CRIME COURT, BELLVILLE

Case No: SH7/67/2016

In the matter between

THE STATE

And

QUANTUM PROPERTY GROUP Ltd [Hereinafter referred to as the accused]

:a corporate body within the meaning of section 332 of Act 51 of 1977

[Represented by PETER MARTIN SHAFF]

PLEA AND SENTENCE AGREEMENT

IN TERMS OF SECTION 105A OF ACT 51 OF 1977

A.

INTRODUCTION

WHEREAS

The Public Prosecutor, Adv EVE Johnson, a Senior State Advocate (LP9) of the Specialised Commercial Crime Unit, Western Cape, (hereinafter

referred to as "the Public Prosecutor") has been authorized in writing by the National Director of Public Prosecutions, as required in Section 105A of Act 51 of 1977, to negotiate and enter into an agreement with the accused (see Annexure "A")

The Public Prosecutor, Adv E.V.E Johnson is duly authorized to conduct proceedings in Court on behalf of the State in connection with this agreement, after it has been duly entered into;

The Public Prosecutor, and the accused, who is legally represented by Mr W Booth, have negotiated and entered into an agreement in respect of a plea of guilty by the accused to the offences with which he is charged, as well as a just sentence to be imposed by this Honourable Court; and

The accused as represented by Peter Martin Shaff in a purely representative capacity and not in his personal capacity has been informed of his rights in terms of Section 105A (2) (a) of Act 51 of 1977, namely, that he has the right -

- (I) To be presumed innocent until proved guilty beyond reasonable doubt;
- (ii) To remain silent and not to testify during the proceedings, and
- (iii) Not to be compelled to give self-incriminating evidence

The Public Prosecutor has consulted with the police official, Warrant Officer G Bates charged with the investigation of the case. "Annexure B"

The State has consulted with the complainant, The Companies and Intellectual Property Commission (CIPC) represented by Mr A Chetty

".Annexure C"

The State has given due regard to the nature and circumstances of the offence, the accused personal circumstances and the interests of the community;

The accused has been informed that this agreement cannot bind the court not to exercise its discretion to make a specific order or conduct a specific enquiry.

The accused admits guilt to one count of contravening section 214(3) read with the provisions of section 171 and section 216(b) OF ACT 71 of 2008 (The Companies Act 71 of 2008)

The Public Prosecutor is prepared to accept such a plea of guilty,

NOW THEREFORE the Public Prosecutor and the accused, represented by Mr W Booth have entered into the following agreement in respect of a guilty plea and a just sentence.

B. THE SUBSTANTIAL

FACTS

1. The accused is a public company with limited liability registered and incorporated in terms of the Company laws of South Africa. Its registered place of business is GGD Accounting, Unit F3, Prime Park, Macke Road, Diep River.
- 2.. Peter Martin Shaff is the director (appointed 14 June 2010) and representative of the accused

3. Further directors of the accused are:

Tessa Margot Wolpe appointed 4 February 2011

Richard Bendel appointed 1 December 2011 Gary Neil Shaff appointed 14 June 2010(sequestered 31 March 2016)

John van der Berg appointed 27 January 2014

4. The complainant is the Companies and Intellectual Property Commission (CIPC) which was established in terms of section 185 of Act 71 of 2008 as amended (hereinafter referred to as the Act). It has its mandate inter alia the investigation of complaints in terms of section 169 of the Act

5. On the 25th August 2013, Gary Itzikowitz on behalf of Compass Projects (Pty)Ltd(Compass Projects)lodged a written complaint with

the CIPC in connection with the accused. In the complaint the following issues inter alia were raised:

5.1The accused had not called an annual general meeting for the financial year ending 2012 for its shareholders as required by s 61(7) of the Act.

5.2 The accused failed to prepare and provide shareholders with audited financial statements for the financial year ending 2012 in contravention of section 30(2) of the Act.

6. Gary Itzikowitz is the sole director and shareholder in Compass Projects.

7. Compass Projects is the registered holder of more than 10% of the accused's

issued share capital. The acquisition of the shares is however the subject of a legal dispute between the accused and Compass Projects.

8. Compass Projects as the holder of at least 10% of the accused's issued shares issued a notice dated 25 July 2013 to the accused to convene a special general meeting of shareholders of the company for the purpose of passing certain proposed resolutions which would have the effect of removing Gary Neil Shaff and Peter Martin Shaff as directors.

9. Compass Projects also requested the accused to hold an annual general meeting (AGM) where the audited financial statements for the financial year ending 2012 were to be produced as required by the Act.

10. When the accused failed and/or refused to comply with the notices referred to in paragraphs 8 and 9 supra, Gary Itzikowitz on behalf of Compass Projects,

lodged a complaint with the CIPC who in turn investigated the matter in terms of its mandate.

11. On the 25th October 2013 the CIPC addressed a letter to the board of directors of QPG informing them of the complaint and gave them an opportunity to respond to the allegations levelled against them by Compass Projects.
12. The letter was addressed to Gary Neil Shaff, (the CEO of the board of directors) who responded to the letter indicating that, the accused had not prepared the required annual financial statement nor did it cause a financial audit of the financial statements to be conducted due to lack of sufficient funds. Also, since no audited financial statements were prepared to present to shareholders no AGM was held.
13. Gary Neil Shaff, on behalf of the accused undertook to comply with its statutory obligations and engage the services of financial
auditors.
14. He, on behalf of the accused, had the option of convening a special general meeting of shareholders in order to raise the funds to appoint an auditor but failed to do so.
15. The accused failed to honour the undertaking given to CIPC. This resulted in the CIPC issuing the company(as represented by him)with a compliance notice dated 20 January 2014 calling on him to submit within 40 days from the date of the notice the following:
 - 15.1 All the required annual financial statements as required by s30 of the Act for the financial year 2012 to the registered auditors
 - 15.2 Proof to the CIPC that the annual financial statements were submitted to the registered auditors
 - 15.3 Proof to the CIPC that the accused convened an AGM by forwarding the notice of the AGM with a list of the shareholders to whom it was sent, the Memorandum of Incorporation and a certified copy of the attendance list signed minutes of the preceding AGM and draft minutes of the AGM for the financial year ending 2012.
16. The accused however failed to satisfy the compliance notice issued by the CIPC.

C. PLEA OF GUILTY AND ADMISSIONS MADE BY THE ACCUSED

NOW THEREFORE Peter Martin Shaff in his representative capacity of the accused makes the following admissions:

1. He understands the terms unlawfully, intentionally and voluntarily';
2. The accused admits the facts as contained in the summary of substantial facts referred supra.
3. The accused admits guilt to contravening section 214(3) read with the provisions of section 171 and section 216(b) OF ACT 71 of 2008

4. The accused admits that the CIPC did not apply to court in terms of section 171 of the Act for the imposition of an administrative fine and no administrative fine was imposed on it by any court in respect of the compliance notice issued.
5. The accused admits that he is duly authorized by the company to plead guilty, all internal processes of the company have been complied with in order for him to plead guilty and pay any subsequent fine which may be imposed on the company.
6. The accused admits that the compliance notice referred to in paragraph 15 supra was received and admits knowledge of its contents

at the time.

7. The accused admits that it gave an undertaking to the CIPC to satisfy the compliance notice but failed to honour the undertaking.
8. The accused admits that it has no valid reason why it failed to comply with the CIPC notice
- 9.1 The accused admits that he was in no way unduly influenced or threatened to plead guilty nor was any promise made to him if he pleads guilty.
- 9.2 Peter Martin Shaff admits that he is in his sound and sober senses whilst making this statement on behalf of the accused.
10. The accused admits that it has no valid defence to the charges.
11. The accused committed all the crimes voluntarily while it could distinguish between legal and illegal conduct and act accordingly.

D. FACTORS RELEVANT TO SENTENCE

1. The gravity of the offences, the interests of the community and the personal circumstances of the accused have been duly considered and taken into account by both parties. The personal circumstances of the accused cannot, however, be over-emphasised when looking at the interests and the seriousness of the offence committed by the accused.

2. The aggravating factors are as follows:

2.1 The Company as a public legal entity is accountable to its shareholders.

2.2 The place where shareholders can hold the company directly accountable is at its annual general meeting (AGM). By failing to call the AGM, the company denied the shareholders of exercising its rights under the ACT.

2.3 It is incumbent upon the CIPC to protect the legal interests of the company and in turn its shareholders. Publicly listed companies will especially come under close scrutiny where they fall foul of the Act

because the public who have invested in the company need their funds to be protected.

2.4 The intervention of the CIPC makes it possible for the company to be held accountable without the shareholders incurring the exorbitant expense of approaching a civil court in order to enforce their rights.

2.5 When the accused failed to comply with the compliance notice its actions amounted to undermining the statutory functions and rights of the CIPC.

3. The personal circumstances and mitigating factors are as follows:

3.1 Funding for the company was not made available to conduct the audit required.

3.2 The Accused was effectively a dormant company with no trading activity

3.3 Efforts were made to complete the QPG audit as required, unfortunately enough funds were not available.

3.4 On the 18th March 2014 a letter was sent to the CIPC regarding the commencement of the QPG audit as well as the calling of a shareholders meeting.

3.5 On the 15th of April 2014 a meeting with the Partners of Mazars was held to progress the QPG audit. The meeting was arranged to establish what was required in the QPG audit as well as a quotation for the work involved.

3.6 The newly acquired quotation for the financial audit was still outside of the financial means of the Accused.

3.7 As a result thereof a non-executive director, John van der Berg, who is a qualified chartered accountant, was tasked to investigate alternative audit firms and advise the Accused on the way forward.

3.8 As a result of Mr van der Berg's research, QPG enlisted the services of Cobus Smit from Coraz Inc Chartered Accountants to assist in finding an affordable solution to the QPG audit.

3.9 Several quotes were received, however the funder of the Accused did not make the funds available to conduct the audit which totaled approximately R 500 000.00 (Five Hundred Thousand Rand).

3.10 In the last week of August 2014, Mr Peter Martin Shaff was contacted by Warrant Officer Botes to arrange a date to ask questions pertaining to the CIPC complaint.

3.11 On the 13th October 2014, Both Mr Gary Neil Shaff as well as Mr Peter Martin Shaff attended the meeting, alongside Mr William Booth as their attorney and Warrant Officer Bates.

3.12 Discussions were had between the offices of William Booth attorneys and the Prosecution, represented by Advocate Johnson.

3.13 The Accused has not committed any previous offences.

3.14 By pleading guilty the accused has shortened a potentially lengthy and costly trial for both the state and defence.

E. AGREEMENT IN RESPECT OF A JUST SENTENCE

WEHREAS the Public Prosecutor and the accused agree that, with due regard to the seriousness of the offence, the interests of the community and the personal circumstances of the accused, the following is a just sentence in the circumstances mentioned above.

In terms of section 276(1)(f) of Act 51 of 1977, the accused is sentenced to pay a fine of Forty Thousand Rand (R40 000) of which R15 000 is wholly suspended for 5 (five) years in terms of section 297(1)(b) of Act 51 of 1977 on the following condition:

the accused is not convicted of contravening any of the provisions of ACT 71 of 2008 (The Companies Act 71 of

2008) committed during the period of suspension.

It is further agreed that no liability of the accused will be imputed to Peter Martin Shaff or any of his co-directors as mentioned in paragraph B(3) supra. Furthermore, Peter Martin Shaff is not held criminally liable in his personal capacity for the offence committed by the accused.

The fine shall be paid to the clerk of the court Bellville on or before 25 July 2016.

SIGNED at BELLVILLE on this the 21 DAY of July 2016.

ADV E JOHNSON

SENIOR STATE ADVOCATE:

SPECIALISED COMMERCIAL CRIME UNIT, WESTERN CAPE

SIGNED at BELLVILLE on this day the 21 DAY of July 2016.

PETER MARTIN SHAFF (on behalf of the accused)

ACCUSED

W BOOTH

ATTORNEY FOR THE ACCUSED

NATIONAL PROSECUTING AUTHORITY

South Africa

AUTHORISATION IN TERMS OF SECTION 105A(1)(a) OF THE CRIMINAL PROCEDURE

ACT, 1977 (ACT 61 OF 1977)

I, MENZISIMELANE, National Director of Public Prosecutions, hereby in terms of section 105A(1) (a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) authorise the following prosecutors to negotiate and enter into plea and sentence agreements in criminal proceedings within their areas of jurisdiction:

- (a) Any District Court Prosecutor on salary level LP4 and any prosecutor on a higher salary level in respect of matters in the District Court: Provided that a prosecutor on salary level LP4 must negotiate and conclude the agreements in consultation with his or her immediate supervisor.
- (b) Any Regional Court Prosecutor on salary level LPS and any prosecutor on a higher salary level in respect of matters in the Regional Court: Provided that a prosecutor on salary level LP6 must negotiate and conclude the agreements in consultation with his or her immediate supervisor.
- (c) Any Senior State Advocate on salary level LP9 and any prosecutor on a higher salary level in respect of matters in the High Court.

This authorisation is subject to the policy directives on plea and sentence agreements issued from time to time by the National Director of Public Prosecutions.

Given at Pretoria on this 20th day of July 2011.

ADV. MENZI SIMELANE

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

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