REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 0041802/2017

[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED.

12/10/18
Date:

WHG VAN DER LINDE

In the matter between:

Jassat Mahomed (Baboo) — Applicant

and

Casoojee Insurance Brokers CC (CK19854/007970/23) — 1st Respondent

Casoojee: Faruck Suliman — 2nd Respondent

Judgment

Van der Linde, J:

[1] The applicant and the 2nd respondent were the two sole members of the 1st respondent, an insurance brokerage close corporation. The applicant sold his interest in the brokerage to the 2nd respondent in terms of a written agreement of sale for R2 350 000,00 with effect from 1 March 2010. The written agreement which was signed on 8 March 2010 has a sole memorial clause in clause 10.1, and a non-variation clause other than in writing in clause 10.2. What was sold in terms of

clause 2.1 of the agreement was the seller's member's interest and his loan account in the brokerage.

[2] The present dispute between the parties concerns certain shares held in Santam Limited in the name of the brokerage but – according to the applicant - not actually constituting assets of the brokerage. The applicant says that in terms of an agreement that he and the 2nd respondent had concluded orally, those Santam shares would not be an asset of the brokerage, but would simply be registered in the name of the brokerage until, after the passage of three years, the brokerage would be entitled to transfer those shares to the applicant and the 2nd respondent respectively.

[3] The applicant therefore contends in these proceedings that he is the owner of 55% of the Santam shares registered in the name of the brokerage (55% represents the size of the applicant's member's interest in the brokerage CC before he sold it); and the applicant wants all dividends on those shares that may have been received by the brokerage, to be paid over to him.

[4] The 2nd respondent disputes the applicant's factual version. The 2nd respondent says that those Santam shares were assets of the brokerage, and when the applicant sold his interest in the brokerage close corporation with effect from 1 March 2010, he lost all interest, direct or indirect, in those Santam shares.

[5] The second respondent, by way of a point *in limine*, also argues that Santam at least should also have been joined to these proceedings. The applicant contests this, saying that Santam's interest is limited to being entitled to ensure that the brokerage close corporation remains BBBEE compliant.

[6] This argument relies on the written agreement that came into existence between Santam Limited and the brokerage close corporation when on 26 November 2008 the applicant, expressly acting on behalf of the brokerage CC, in writing accepted the

award of Santam dated 3 November 2008. The relationship that came into existence between the parties is contained in the letter by Santam dated 3 November 2008 at page 51 of the papers, read with the letter of the same date at page 52 of the papers by the Emthunzini Black Economic Empowerment Business Partners Trust, both addressed to the brokerage; and then the written acceptance at pages 56 and 57 of the award concerned by the applicant on behalf of the brokerage close corporation.

[7] It is sufficient for present purposes if the structure of the shareholding which the close corporation would acquire is set out in basic terms. It was as follows: the brokerage was selected for participation under the Santam Black Economic Empowerment Business Partners Trust scheme, and through its participation in that Trust, the brokerage would be awarded the rights to units in the BEE Business Partners Trust. Those rights would entitle the brokerage to a *pro rata* distribution of ordinary shares in the issued share capital of Santam Limited held by the BEE Trust (using an abbreviated description).

[8] In other words, the BEE Trust would acquire shares in Santam Limited, whether by way of transfer or by way of fresh issue not being material; the BEE Trust would then in due course, depending on the number of units that the brokerage would hold into the BEE Trust, transfer to the brokerage the determined number of shares held by the Trust into Santam Limited.

[9] It was an express term of that award of the rights to units in the BEE Trust, and consequently upon that, the acquisition thereafter by the brokerage of shares into Santam, that Santam reserved the right to conduct verification audits from time to time on all the unit holders who hold units or Santam shares, to ensure that those unit holders "*... are black people or black entities ...*" as contemplated in the Trust

Deed, and the unit holder or shareholder undertook to provide Santam with all information, records and assistance as Santam might require for such purposes.

[10] It was also an express term of the agreement so reached that Santam was granted a right of pre-emption should the unit holder or shareholder wished to sell, transfer or otherwise dispose of the shares.

[11] Reverting then to the dispute between the applicant and the 2nd respondent: after the sale agreement had been concluded and executed, the applicant began corresponding with the 2nd respondent, claiming an entitlement as to 55% of the Santam shares (and dividends) that were registered in the name of the brokerage. There is some dispute as to whether the correspondence concerned show definitively that the 2nd respondent accepted that the Santam shares were never an asset in the brokerage, or whether what happened was that the applicant's entitlement to dividends up to the effective date of the sale agreement, not thereafter, was being acknowledged. Be that as it may, the applicant then eventually launched the present application on 27 November 2017, pleadings (in the form of affidavits) were exchanged, and the matter is now ripe for hearing.

[12] In the notice of motion the applicant claims first to be declared the beneficial owner of 55% of the shares which the 1st respondent ostensibly holds into Santam Limited. Following on that prayer, the applicant then claims that the 1st respondent should be ordered to do all things necessary to transfer 55% of those shares into the name of the applicant.

[13] Alternative relief is sought in prayers 3 and following. The relief there sought is an order directing the brokerage to address a written offer to Santam advising that it intends to transfer 55% of the shares to the applicant at no cost, and offering to sell those shares to Santam, in compliance therefore of the pre-emption in terms of the agreement between the brokerage and Santam. Prayers 4 and following of the

notice of motion are prayers consequent upon the primary relief to which I have referred.

[14] The applicant's case for ownership of the shares is set out in paragraph 19.4 of the founding affidavit. That is a critical paragraph and it is necessary that I quote it in full:

"In the course of discussions with the 2nd respondent, we agreed that although the share offer had to be accepted by the 1st respondent, same would not become an asset of the 1st respondent and all shares allocated would, once the scheme allowed same, be divided between and transferred to the two of us in the percentage of our member's interest in the 1st respondent, namely 55% to me and 45% to 2nd respondent. We also agreed that any dividends received in respect of the shares would be divided between us in the same proportion."

[15] There was some vacillation at the Bar about this oral agreement. In particular, the applicant was uncertain whether the impact of this agreement was that the brokerage would be a nominee shareholder on behalf of the applicant and the 2nd respondent of the Santam shares; or whether the brokerage would in fact be the true beneficial owner, subject to a condition that at some future date it would become obliged to transfer those shares to the applicant and the 2nd respondent respectively.

[16] This is of course a critical issue, because if the brokerage was not to become the owner, in the true beneficial sense, of the shares, as is asserted in this paragraph 19.4 of the founding affidavit, then the question arises as to who in law became the owner of those shares when they were transferred by the BEE Trust to the brokerage. The only conceivable owners could be the applicant and the 2nd respondent.

[17] But, contrary to that scenario, counsel for the applicant abandoned the relief sought in prayers 1 and 2 of the notice of motion. That was, as will appear presently, in my view unavoidable.

[18] If the applicant and the 2nd respondent were to become the owners of those shares from the get-go, then that is inconsistent with the written terms of the award by Santam and its acceptance by the brokerage of the units in the BEE Trust, for this reason. The whole point about the BEE Trust was to distribute shares in Santam to BEE entities; the express power given to Santam from time to time to inspect the entity to which the shares were allocated to ensure that it remained BEE compliant, underscores this notion.

[19] It is inconsistent with the allocation of the units in the BEE Trust and, pursuant thereto, the transfer of Santam shares to the brokerage, if the applicant and the 2nd respondent, and not the brokerage, were to become the owner of those units and the owner of those shares. The inconsistency lies in this: the written agreement unqualifiedly describes only the brokerage as the beneficiary of the units and of the shares; not the applicant and the 2nd respondent. And there is no provision in the award of the units in the BEE Trust and the prospective transfer of the shares in Santam, for a mere nominee holding by the brokerage of those shares.

[20] It follows therefore that, as I see it, the agreement upon which the applicant relies could not have conferred upon the applicant and the 2nd respondent any immediate true ownership of the Santam shares, because the brokerage had no immediate right to confer such true ownership upon the applicant and the 2nd respondent. It was the brokerage that would become the true beneficial owner of the units and consequent upon that of the shares. That was what Santam intended, and the transfer of shares pursuant to that agreement vested the brokerage, and no-one

else, true owner of the units in the BEE Trust and consequent upon that, true owner of the shares in Santam.

[21] It is of course not notionally inconceivable that the applicant and the 2nd respondent could have agreed with the 1st respondent that the 1st respondent would first become true owner of those shares; but that in due course the 1st respondent would transfer 55% of those shares to the applicant and 45% of those shares to the 2nd respondent. But such an agreement is not borne out by what the applicant alleges in paragraph 19.4 of the founding affidavit.

[22] It follows that in my view the applicant's cause of action for the relief it seeks is excipiable as disclosing no cause of action. But if I am wrong, then there is in the way of success for the applicant the difficulty that the 2nd respondent disputes the factual basis of the applicant's cause of action. Mr Basslian, SC for the applicant argued persuasively that there are probabilities strongly favouring his client's version and are inconsistent with the respondents' version.

[23] The difficulty with that submission is that it was held by the Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* (572/08) [2009] ZASCA1 (12 January 2009) at [26] (emphasis supplied):

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues <u>because they are not designed to determine probabilities</u>."

[24] In this matter the applicant applies for final relief and therefore cannot succeed, under the *Plascon-Evans* rule, unless the facts alleged by the applicant which the 2nd respondent admits, together with the 2nd respondent's version, would justify such an order. In view of the 2nd respondent's denial of the agreement on which the applicant relies, no final relief in favour of the applicant can, irrespective of the legal difficulties to which I have alluded above, be granted.

[25] Faced with these problems, Mr Basslian applied in the alternative for a reference to oral evidence. But a Full Bench of this Division in the matter of *Absa Bank Limited v Molotsi, TT* in an unreported judgment Appeal Case No. A5022/2015 delivered on 8 March 2016 declined such an application on the basis that it was not made at the outset of the hearing.

[26] That judgment, to which I am bound, referred to *Marques v Trust Bank of Africa Limited and Another* 1988 (2) SA 526 (WLD) at 530E-531F, in which Morris, AJ permitted an applicant to argue in the alternative: to ask for final relief and then to ask, conditional on the court refusing the final relief, for a referral order. That judgment was followed recently by Spilg, J in *Fikre v Minister of Home Affairs and Others* 2012 (4) SA 348 (GSJ).

[27] However, as the Full Court pointed out, the Supreme Court of Appeal in *Law Society, Northern Provinces v Mogani,* 2010 (1) SA 186 (SCA) at [23] said that an application for the hearing of oral evidence must, as a rule, be made *in limine* and not only once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional, so held the SCA, before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.

[28] In so reasoning, the court referred to *De Reszke v Marais and Others* 2006 (1) SA 410 (C) at paragraphs [32] to [33] where the Full Court of the then Cape Provincial Division said:

> *"It is my impression in this Division, however, that the pendulum has swung too far the other way. Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits."*

[29] The reference here to the Supreme Court of Appeal is a reference to judgments in which that court has widened the exceptions to that general rule, but they still remained only exceptions. No basis for such an exception was placed before this court.

[30] It seems to me therefore inevitable that the application must fail. In the result I make the following order:

(a) The application is dismissed with costs, including the costs of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

Date argued: 8 October 2018
Date judgment: 12 October 2018

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