IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***31st January 2020*** Signature: _____

~~APPEAL~~ CASE NO: 25136/2019

DATE: 31st January 2020

In the matter between:

GEWU, HOWARD CENGANI Applicant

- and -

MBANZENI, ANDILE MOSES First Respondent

WAX ENGINEERING AND CONSULTANTS (PTY) LTD Second Respondent

Coram: Adams J

Heard on: 28 January 2020

Delivered: 31 January 2020

Summary: Contract and Company Law – agreement to transfer shares in private company – interpretation of agreement – transfer of shares not registered in Companies Office – effect of non-registration

Directorship and employment in company v shareholding – right and duties separate and distinct – only certain relief granted in favour of the applicant –

ORDER

(1) The first and second respondents shall, within thirty days from date of this order, transfer into the name of the applicant forty percent of the shares in the second respondent, and the first and second respondents shall do all things necessary and sign all documents necessary to ensure that the aforementioned shares are in fact transferred into the name of the applicant.

(2) The first and second respondents or their duly authorised representative shall, within thirty days from date of this order, issue the share certificate relating to the forty percent shareholding in the first respondent in favour of the applicant.

(3) The first and second respondents or their duly authorised representative shall, within thirty days from date of this order, amend and ensure that its share register is amended to reflect that the applicant is the owner of forty percent shares in the second respondent.

(4) The first and second respondents shall within thirty days from date of this order furnish the applicant with copies of the 2017 and 2018 annual financial statements of the second respondent.

(5) The first and second respondents shall within thirty days from date of this order furnish the applicant with copies of the bank account statements of the second respondent relating to Absa Bank account no: 405 398 9920 for the period from January 2019 to July 2019.

(6) The first respondent and second respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's cost of this opposed application.

JUDGMENT

Adams J:

[1]. This is an opposed application by the applicant for an order which would have the effect of compelling the first and second respondents to transfer into his name forty percent of the shares in the second respondent. The applicant's case is based on an agreement or agreements concluded between him (the applicant) and the first and second respondents during March 2015. The applicant also applies for relief ancillary to his prayer for the transfer of the shares.

[2]. The main agreement between the parties, entitled 'Certificate of Shareholding', was reduced to writing and signed by the contracting parties. The agreement itself is common cause. It is in the interpretation of the agreement where the parties part ways.

[3]. The application is opposed by the first respondent, who is the managing director and major shareholder of the second respondent, and by the second respondent. The respondents contend in essence that the agreement is not enforceable. The said agreement, so the respondents contend, was subject to certain suspensive conditions contained in the agreement, which had not been complied with by the applicant. This is denied by the applicant, who contends that, if regard is had to the wording of the written agreement, there can be no doubt that it contained no suspensive conditions.

[4]. The said agreement, which, as I indicated above was styled 'Certificate of Shareholding', and was in the form of a letter addressed to the applicant, therefore requires legal interpretation. The important portions of the agreement provides as follows:

'I, Andile Moses Mbanzeni, the managing director on behalf of WAX Engineering Consultants (Pty) Ltd, take the responsibility to confirm your shareholding portion of 40% with effect from the signing of this document. According to the Memorandum of Incorporation and the Rules and Regulations of the company the 40% shareholding equates to 400 ordinary no par value fully paid shares.

In consideration of contractual obligations within your current employment, the management of WAX Engineering (Pty) Ltd hereby further confirming that the registration of the shares with the appropriate statutory body, being the Companies and

Intellectual Property Commission shall commence upon your resignation from the company you are currently employed, noted being Megatron Federal, and with a condition that you would be joining WAX Engineering Consultants (Pty) Ltd in full and permanent bases and be part of management.'

[5]. The respondents interpret these two clauses in the agreement as conditions precedent that the applicant would resign from the employment of his then employer, Megatron Federal. There is one difficulty with this interpretation and that is that the wording of the contract does not support such an interpretation. Firstly, the agreement itself says that effective the date of signature of the agreement, that being the 27th of March 2015, the applicant would become a forty percent shareholder in the second respondent. Secondly, at best for the respondents, the agreement states that the registration of the transfer of the shares into the name of the applicant would 'commence upon [his] resignation from [Megatron]'. I read this to mean that the shares vested in the applicant on the 27th of March 2015, but would only be transferred to him on his resignation from his previous employer.

[6]. Factually, the applicant left the employ of Megatron at the end of October 2015, which means that the applicant then became entitled to the transfer of the shares, which vested in him on the 27th of March 2015. This, according to me, puts paid to the respondents' contention that there was a suspensive condition. There was none. But, in any event, if there was such a condition, same was complied with.

[7]. It is also the case of the respondents that it was a condition of the agreement that the applicant would become entitled to the shares only if he did not 'embark upon a course of action designed to prejudice the integrity, credibility and reputation of the second respondent'. The applicant, so the respondents allege, was also under an obligation to ensure the growth, sustainability and well-being of the second respondent.

[8]. Again, I am of the view that there is no merit in this contention. One needs look no further than the instrument itself to see that these provisions, far from being conditions precedent, are simply indicative of the duties and

responsibilities of the applicant in terms of the contract. Under the heading 'Memorandum of Understanding', the agreement provides as follows:

'Memorandum of Understanding:

The shares presented are issued by the company to Mr Howard Cengani Gewu at no cost. In good faith Mr Howard Gewu agrees to embody and take ownership of all responsibilities demanded as part of obligations assigned to all shareholders of the company to ensure continuous growth, sustainability and wellbeing of the company, this also include reasonably assisting the company financially whenever a need arise.

The shares owned remains a sole proprietary of WAX Engineering Consultants (Pty) Ltd and are not transferrable to any third party and cannot be sold to any other party without prior consent from the founder and currently the managing director of the company, being Mr Andile Moses Mbanzeni. It is further confirmed that the founder of the company is entitled to be the first candidate to be consulted and offered the opportunity to purchase the shares considered being on selling and the purchase value of the shares shall be reasonable and agreed by the company's management. A waiver to purchase the shares shall be in writing and signed by Mr Andile Moses Mbanzeni.'

[9]. I reiterate that, in my judgment, the wording of the above clauses do not lend itself to an interpretation as contended for by the respondents. The clauses clearly contemplate and provide for the duties and obligations of the applicant pursuant to the agreement. Even more telling are the events and the conduct of the parties subsequent to the signing of the agreement. As I indicated above, the applicant commenced employment with the second respondent during November 2015. His official title and capacity in the second respondent was described by the company as that of 'Business Development Director'. He remained in that capacity until his dismissal on the 3rd of July 2019. This factual matrix, in my view, supports a conclusion that the shares vested in the applicant on the 27th of May 2015 as does the actual wording of the agreement.

[10]. The applicant also applies for orders which would have the effect of compelling the respondents to make available to him certain documentation, notably the annual financial statements and the bank account of the first respondent. It that regard, the applicant places reliance on the shareholders agreement and applies for these orders *qua* shareholder. The question is this:

does the said agreement give him that right. Again, reference to the following wording of the agreement is instructive:

'It is the responsibility of all shareholders to participate in decision making and ensure a healthy running of the company. Shareholders are entitled to continuous update regarding the performance of the company. All information related to the company's performance and its finances shall be acquired through appropriate structures of the company and shall be deemed and treated as confidential at all times. It is every shareholder's responsibility to protect the integrity and credibility of the company and by every measure all shareholders shall disassociate themselves to any behaviour or engagement and what so ever that can destroy the company's reputation and put the company into disrepute.

[11]. In view of the express provisions of the agreement, I am of the view that the applicant, in his capacity as a shareholder, is entitled to have access to the books of account, as well as to any documents indicative of the financial situation of the second respondent. The above clause makes express provision for such rights. I therefore intend granting the applicant an order compelling the respondents to allow inspection of these documents.

[12]. The balance of the orders sought by the applicant in this application relates, in my view, to the applicant's employment with the second respondent. The applicant, for example, prays for an order that a company house which he presently occupies be transferred into his name. His occupation seems to arise from his employment contract and it appears to be a fringe benefit enjoyed by him as senior employee. There is presently a dispute between the parties relating to his employment. That dispute is not before me. I therefore am of the view that the applicant is not entitled to the relief relating to any employment contractual issues. I say so notwithstanding the fact that the shareholders agreement makes reference to these fringe benefits. It provides as follows:

'Upon signing of this document Mr Howard Cengani Gewu shall be entitled to benefit from all incentives issued by WAX Engineering Consultant (Pty) Ltd which are not part of remuneration. Every incentive shall be measured and payable per individual owner in a relation proportional to the percentage of the shareholding owned by the particular individual, unless otherwise specified and agreed by the management of the company.

The arrangement for registration of Mr Howard Cengani Gewu's shares with the Companies and Intellectual Property Commission in consideration and fulfilment of above conditions is considered to be firm and irrevocable upon signing of this document.'

[13]. My above conclusions are in accordance with the applicable legal principles. My interpretation leads me to the conclusion that the agreement in question entitles the applicant to some of the relief prayed for by him.

[14]. There is one other issue which I intend to deal with briefly and that relates to a point *in limine* raised by the respondents. They contend that the applicant's claims have become prescribed if regard is had to the provisions of the Prescription Act,

[15]. The applicant's claim in this application is in the nature of a *rei vindicatio* – it is clearly a claim to ownership in a thing, namely shares in a company. It cannot on any reasonable interpretation be described as a claim for payment of a debt. If the *rei vindicatio* were to be extinguished after a period of three years, the owner, *in casu* the applicant, would thereafter be an owner in name only. He would never be able to exercise any of the powers that comprise ownership. The possessor of the thing, first respondent in the postulated scenario, would not be the owner of the thing but *de facto* he would be able to exercise all such powers except the institution of the *rei vindicatio* which, as he would not be the owner, would not be available to him. This would be anomalous.

[16]. For these reasons, I am inclined to the view that applicant's *rei vindicatio* did not become prescribed after a period of three years. The point *in limine* by the respondents is therefore bad in law, and stands to be dismissed.

Cost

[17]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[18]. I can think of no reason why I should deviate from this general rule. The applicant, who was substantially successful with his application, should therefore be awarded the cost of the application.

Order

Accordingly, I make the following order:-

(1) The first and second respondents shall, within thirty days from date of this order, transfer into the name of the applicant forty percent of the shares in the second respondent, and the first and second respondents shall do all things necessary and sign all documents necessary to ensure that the aforementioned shares are in fact transferred into the name of the applicant.

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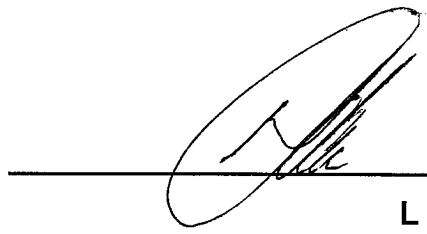

L R ADAMS

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON:	28th January 2020
JUDGMENT DATE:	31st January 2020
FOR THE APPLICANT:	Adv Mogapi
INSTRUCTED BY:	Maema Attorneys
FOR THE RESPONDENT:	Attorney S Snyman
INSTRUCTED BY:	Snyman Attorneys