REPUBLIC OF SOUTH AFRICA

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

CASE NO: 28760/21

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

SIGNATURE 24/12/2021 DATE

In the matter between:

BLUE NIGHTINGALE 709 (PTY) LTD	Applicant
and	
NKWE PLATINUM SOUTH AFRICA (PTY) LTD (IN BUSINESS RESCUE)	First respondent
NKWE PLATINUM LIMITED	Second respondent
LIEBENBERG DAWID RYK VAN DER MERWE N.O.	Third respondent
COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION	Fourth respondent

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J U D G M E N T (LEAVE TO APPEAL)

KEIGHTLEY, J:

1. The applicant seeks leave to appeal my order and judgment of 9 November 2021 dismissing its application for an order declaring the resolution to place Nkwe SA into business rescue void as well as alternative relief.

2. In my judgment I considered what I referred to as the oral evidence issue, the quorum issue, the bad faith issue and the extension issue. I refer to paragraph 15 of my judgment where each issue is described. I also considered the question of whether the applicant was entitled to a declaration that it is entitled to nominate directors (my judgment erroneously states "shareholders" in paragraph 18, an obvious typographical error), and found that such relief would not be compatible with a company under business rescue.

3. The applicant cites numerous grounds of appeal in their notice of application for leave directed at my findings on each of the issues save for the extension issue. At the hearing of the application for leave, I was advised that the applicant did not persist with the oral evidence issue, wisely so, in my view.

4. Under s17(1)(a) of the Superior Courts Act, leave to appeal may only be given where the Judge is of the opinion that the appeal (i) would have a reasonable prospect success or (ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration. The test for granting leave under this section is well settled. The question is not whether the case is arguable or another court may come to a different conclusion (*R v Nxumalo* 1939 AD 580 at 588). Further, the use of the word "would" in s 17(1)(a)(i) imposes a more stringent and vigorous threshold test than that under the previous Supreme Courts Act, 1959. It indicates a measure of certainty that another court will differ (*Mont Cheveaux Trust v Goosen* [20014] SALCC 20 (3 November 2014);

Notshokuvo v S [2016] ZASCA 112 (7 September 2016)). The *Mont Cheveaux* test was endorsed by a Full Court of this Division in the unreported case of *Zuma & Others v the Democratic Alliance & Others* (Case no: 19577/09, dated 24 June 2016).

5. As regards the submissions made in respect of leave to appeal on the quorum and bad faith issue, it is plain to me that the requirements to grant leave have not been met. I advanced full reasons for my findings on these issues in my judgment and, by and large, no new arguments were advanced by the applicant in the application for leave to appeal.

6. There was some attempt to persuade me that although I had found no merit in the applicant's contentions that the respondents had acted in bad faith, I should nonetheless now find that there is a reasonable prospect that another court would find that the respondents acted *in fraudem legis*. There is no such reasonable prospect, in my view. My judgment makes plain that there were no facts to support the contention of bad faith. It seems unlikely, therefore, that another court would find, on the same facts, that the respondents abused the business rescue process for a different purpose.

7. In addition to going over well trodden ground, the applicant raised a new issue in its grounds for leave to appeal. It advanced the argument that the meeting was irregular because two directors who had been nominated by the applicant were not invited to the meeting at which the board resolved to place Nkwe SA into business rescue. This issue was not the same as the quorum issue and had not been directly advanced at the original hearing, albeit that it is related to the right to nominate issue that was raised.

8. It was common cause between the parties that after the applicant's Mr Pandor had resigned as a director, the applicant sent a letter in which it indicated that it had "*resolved to invoke its rights in respect of clause 3a of the Subscription and Shareholders Agreement … by appointing the following two directors to the Nkwe SA Board*." It proceeded to identify a Dr van Schalkwyk and a Dr Manyeruke as the persons in question. Thereafter, the applicant stated that: "*The appointment of the two new directors is effective immediately*."

9. It is on this basis that the applicant now says that the meeting at which the business rescue resolution was adopted was irregular: its case is that these two new directors had been appointed, as a consequence of its letter, and ought properly to have been invited to the meeting.

10. It is common cause that the shareholders' agreement gives the shareholders the power to "*nominate*" and not to "*appoint*" directors. It is also common cause that the respondents did not give effect to the purported "*appointment*" by the applicant. Instead, the board gave notice of a meeting at which one of the items on the agenda would be the consideration of the appointment of, among others, Dr van Schalkwyk and Dr Manyeruke, as new directors. That meeting was never held, and the appointments were not effected, as the company was placed in business rescue. The business rescue practitioner elected to indefinitely postpone the meeting given that by virtue of s 140 of the Companies Act, full management control of Nkwe SA vested in him in substitution of the board, post business rescue.

11. The applicant placed reliance on the judgment in *Gholke & Scheider v Westies Minerale Bpk* 1970 (2) SA 685 (A) at 690A-F in support of its proposition that under clause 3a of the shareholders' agreement a nomination by a shareholder of a new director was sufficient to effect their immediate appointment. In other words, that

no further formalities were required for their appointment, and accordingly, that they ought to have been invited to the meeting at which the company was placed into business rescue.

12. The applicant submitted that *Gholke* was authority for the principle that the power to "*nominate*" a director is synonymous with the power to "*appoint*", and that upon nomination by a shareholder, a replacement director is automatically appointed. However, unlike in this case, *Gholke* dealt with a shareholders' agreement that stated that the relevant shareholders: "*… shall be entitled to appoint two directors each to the board… .*" (My emphasis). It was submitted in that case that this meant they had the power to nominate only, and not to appoint.

13. The judgment in *Gholke* dealt with the meaning of "*appoint*" and it was with reference to the definition of "*appoint*" (not nominate) that the court in *Gholke* made the statement the applicant relied on in paragraph 14 of its supplementary heads of argument. This is clear if one has regard to the full dictum, and not only the portion of the dictum cited by the applicant. What Trollip JA stated at 690C was:

> "According to the Oxford English Dictionary the meaning of 'appoint' in the sense relevant here is to 'determine authoritatively, prescribe, decree, ordain, and, specifically in regard to an office, 'to ordain or nominate a person to an office … (or) to be an official'. In that context, 'nominate', I think, means to appoint a person … to hold some office … rather than 'to propose, or formally enter, (one) as a proper person or candidate for election', which is also given as another meaning of 'nominate' in that dictionary." (My emphasis)

14. The applicant commenced citing from the sentence commencing: "*In that context…*" without referring to the previous sentence. The previous sentence makes it clear that the court in *Gholke* was not saying that the ordinary meaning of nominate is to appoint automatically, as the applicant submitted it did. It is also clear from the last portion of the dictum I have underlined. The finding in *Gholke* was very much dependent on a particular interpretation of the particular provision in the particular

shareholders' agreement in question. For this reason, too, it is not general authority for the proposition that a power to nominate a director means the power to appoint such that no further formalities are required.

15. There is a further reason why in my view there is no reasonable prospect of the applicant persuading another court that its submission is correct. *Gholke* dealt with an entirely different statutory regime than that governing the present case. I dealt extensively in my judgment with s 15(7) of the Companies Act which provides that in instances where a shareholders' agreement is in conflict with the MOI, the latter will prevail. Clause 35 of the MOI requires that: "*An annual general meeting or other general meeting of the company may fill any vacancy … .*" This is consistent with s 68 of the Companies Act that also requires directors to be elected in an election. The election must be conducted by a series of votes, and a vacancy is filled only if the majority of the voting rights exercised supports the candidate. It is thus plain from the MOI read in the context of the statutory regime that an election is required before a vacancy for a director is filled. Even if the right to "*nominate*" in clause 3a could be interpreted to mean "*appoint*" (contrary to what in my view is the correct position, and the one likely to be followed by another court) it would be in conflict with the MOI because it would negate the necessity for an election.

16. For all of these reasons, I am not persuaded that there is a reasonable prospect that another court would find that *Gholke* means that in this case the applicant's "*appointment*" of its choice of new directors, purportedly on the basis of its power to do so under clause 3a of the shareholders' agreement, had the automatic effect that they were so appointed. There is no reasonable prospect that another court would find, on this basis, that the meeting at which it was decided to place the company under business rescue was irregular. Accordingly, it is unlikely that another court

would find that the business rescue resolution, and hence the business rescue process should be set aside for this reason.

17. The application for leave to appeal is dismissed with costs, such costs to include those of two counsel, one being senior counsel, in respect of both the first and third respondents, and the second respondent.

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 December 2021.

R KEIGHTLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date Heard (Microsoft Teams):	03 December 2021
Date of Judgment:	24 December 2021
On behalf of the Applicant:	S Vivien SC L Hlalethoa
Instructed by:	MNCEDISI NDLOVU & SEDUMEDI INC
On behalf of the First & Third Respondent:	MM Antonie SC MJ Cooke
Instructed by:	WERKSMANS ATTORNEYS
On behalf of the Second Respondent:	D Fine D Louw
Instructed by:	ENS Africa