IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA) 12/3/14.

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

10/03/2014
DATE

SIGNATURE

CASE NO: 63884/11

In the matter between:

BALINTULO, LINDIKHAYA COLIN	**APPLICANT**

And

Q-HOLD (PTY) LTD	**1ST RESPONDENT**
GXOYIYA, THEMBA ERROL	**2ND RESPONDENT**
MAKHAFOLA, RICHARD	**3RD RESPONDENT**
JOUBERT, STEPHENS PIERRE N.O.	**4TH RESPONDENT**
JOUBERT, DIANE N.O.	**5TH RESPONDENT**

JUDGMENT

KGANYAGO AJ

[1] The applicant brought an application against the respondents for the relief set out in the notice of motion as follows:

1.1 Judgment is granted against the first to fifth respondents jointly and severally the one paying the others to be absolved in the sum of R3 448 012. 86 (three million four hundred and forty-eight thousand and twelve rand eighty six cents) together with interest at the rate of 15.5% per annum calculated from 24th October 2012 to date of final payment;

1.2 The first to fifth respondents are ordered to pay the costs of this application on attorney and own client scale jointly and severally the one paying the others to be absolved;

1.3 Granting such further and/or alternative relief as may be just under the circumstances.

[2] The first respondent has brought a counter application against the applicant for the relief as set out in their application as follows:

2.1 That the first respondent be ordered to make payment to the applicant in the amount of R3 448 012. 86;

2.1 That payment of the amount in prayer 1 shall be effected through seventeen monthly instalments in the amount of R200 000. 00 each and one final instalment in an amount of R48 012. 86 with the first instalment payable on the first day of the calendar month immediately following on this order and monthly thereafter on or before the first day of every consecutive calendar month alternatively in such manner as

directed by the court in terms of prayer 4 of the court order dated 25th May 2012;

2.3 That the applicant be ordered to pay the costs of the counter application only in the event of opposition;

2.4 Further and/or alternative relief.

[3] This application originates from an application in which the applicant was seeking to wind up the respondents. The parties reached an agreement concerning their dispute. The draft order was prepared and it was made an order of court before His Lordship Mr Justice Phatudi. The order reads as follows:

"Having read the documents filed of record, heard counsel, considered the matter and having been informed of the agreement between the parties, the following order is made an order of court:-

3.1 The first to fifth respondents, jointly and severally are to purchase in terms of section 163(2) (g) of the Companies Act 71 of 2008 ("The Companies Act"), the applicants shareholding in the first Respondent at a value to be determined in accordance with the provisions of section 163 (2) (i) of the Companies Act, by an independent auditor appointed by the Public Accounts' and Auditor's Board of the Republic of South Africa which appointment is to be made within 15 days of the date of this order;

3.2 The parties to this application shall provide their full co-operation to the independent auditor and to all things necessary in order for him/her to arrive at a proper and accurate determination of the value of the applicant's shareholding in the first respondent including providing

him/her with such access to financial records of the first Respondent and/or its subsidiaries as he/she deems necessary in order to discharge his/her obligations in terms of this order;

3.3 *The determination of the independent auditor shall be final and binding on the parties;*

3.4 *Any party is entitled to approach the court for such directions as may be necessary regarding the execution and implementation of the relief sought in paragraph 1 above;*

3.5 *The costs of this application reserved for determination at a later stage;*

3.6 *In the event of any of the respondents frustrating, in any manner or form whatsoever, the implementation of paragraph 1 above, the applicant is entitled to approach the court for an order directing that the first respondent be wound up and placed in in the hands of the Master of the Court in terms of Section 8 (1) (d) (iii) of the Companies Act on the grounds that it is just and equitable to do so and shall have the right to supplement his founding affidavit to the extent necessary;*

3.7 *Should the applicant decide to approach this Honourable Court as contemplated in prayer 6 above, then in such event:*

3.7.1 *The applicant shall do so on not less than 5 Court days written notice to the respondents;*

3.7.2 *After the applicant has supplemented its founding affidavit, as the case may be, the Respondents shall have 15 days to file their answering affidavit and applicant will have 10 days to file his replying affidavit, if any.*

[4] An auditor was appointed and the shares were valued at R3 500 000. 00. Both parties were jointly liable to the costs of the auditor. The applicant's share of the auditor's fee amounted to R51 987. 14. The applicant share of the auditor's costs was paid by the respondents and a deduction was made from the capital amount leaving a net balance of R3 448 012. 86.

[5] The main dispute now is about the manner of payment of R3 448 012. 86. According to the applicant's view, in terms of the court order, the transaction was a cash sale and the respondents are supposed to pay the full amount in one lump sum. According to the respondent's view, they are entitled to approach the court for directions and implementation of court order. The respondents contend that this includes payment of the applicant by instalments.

[6] The court is now called upon to interpret the court order to determine whether the applicant is entitled to payment of the aforesaid amount in cash or whether the court can give directions and order that the capital amount be paid in instalments as suggested by the respondents.

[7] In the case of Engelbrecht NO and Another v Senwes Ltd (63/05) [2005] ZASCA at paragraph 6 the court said the following:
"The Court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. The approach to be followed was summarised in Coopers & Lybrand and Others v Bryant:

'I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of construction are available to ascertain their common intention at the time of concluding the [contract]. According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. . . .

The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself. . . . The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract . . . ;

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted. . . ;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions".

[8] In determining the intention of the parties, one has to ascertain from the language used, evidence of the surrounding circumstances and the conduct of the parties.

[9] In clause 1 of the court order, it is clear that the first to fifth respondents were to purchase the applicant's shareholding in the first respondent at a value to be determined. In other words, the parties had agreed to purchase the shareholding of the applicant but could not agree on the purchase price, hence the appointment of the auditor to value the shareholding.

[10] The valuation of the auditor was accepted by both parties, and now the main issue is how that amount should be paid, is it a cash sale or a credit sale. The court order is silent on whether the transaction was a cash sale or a credit sale. In De Wet v Santam Bpk 1996 (2) SA 629 (A) the court cited with approval in the case of Lendalease Finance (Pty) v Corporation de Marcadeo Agricola and others 1976 (4) SA 464 (A) where the court held that, whether a sale is for cash or credit, is a matter of agreement between the contracting parties, either expressly or tacitly; and in the latter case must be judged from all the terms of the contract, the surrounding circumstances and the conduct of the parties... In the absence of express terms as to the sale being cash or credit there is a presumption that it is for cash. This may be rebutted in various ways but the giving of credit cannot be inferred from mere delivery by the seller without receiving the purchase price.

[11] It is clear that the court order does not state whether the transaction was cash sale or a credit sale. The presumption is that it is a cash sale, what is left, is for the respondents to rebut that presumption. In my view, the respondents have failed to do so.

[12] From the language of the court order, everything was settled except the purchase price. It is clear that all the respondents intended to purchase the shareholding jointly and severally. If one looks at the financial statements of the respondents, for 2011, the respondent was able to loan "Parent" R5 788 047. 00 and for 2012, they were able to loan parent R6 339 515. 00.

[13] Taking into consideration the language of the court and the surrounding circumstances under which the agreement was reached, it is my considered view that the parties intended the transaction to be a cash sale.

[14] This conclusion makes it unnecessary for me to deal with the first respondent's counterclaim.

[15] In the result I make the following order:

(1) The first to the fifth respondents jointly and severally the one paying the others to be absolved are to pay the applicant in the sum of R3 448 012. 86 (three million four hundred and forty eight thousand and twelve rand and eighty six cents) together with interest at the rate of 15,5 % per annum calculated from 24th October 2012 to date of final payment.

(2) The first to fifth respondents jointly and severally, the one paying the other to be absolved, must pay the costs of the applicant.

M F KGANYAGO

ACTING JUDGE OF THE HIGH COURT