REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 73169/2013

20/6/2014

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

SIGNATURE

20/6/2014
DATE

In the matter between:

NIEMCOR AFRICA (PTY) LIMITED Applicant

(IN LIQUIDATION)

and

BUSHVELD CHROME RESOURCES (PTY) LIMITED 1st Respondent

NIEMCOR BRACE (PTY) LIMITED 2nd Respondent

VENTER & CO 3rd Respondent

JUDGMENT

BASSON, J

The parties

[1] The Applicant is Niemcor Africa (Pty) Limited (in liquidation). The deponent to the founding affidavit is a co-liquidator of the Applicant. Prior to the liquidation Mr Johan Niemöller ("Niemöller") was the Managing Director of the Applicant, Mr Walter Murray ("Murray") the in-house legal advisor, Mr Willem Barnard ("Barnard") the Operations Manager and Mr Steward McQuade ("McQuade") the Geologist.

[2] The First Respondent is Bushveld Chrome Resources (Pty) Ltd (hereinafter referred to as "Bushveld Chrome" or "the First Respondent"). The same Murray, Barnard and McQuade are also the three directors of Bushveld Chrome. The Second Respondent is Niemcor Brace (Pty) Ltd – now Acacia Resources (Pty) Ltd (hereinafter referred to as "Niemcor Brace"). The same Murray, Barnard and McQuade are also directors of the Second Respondent. Mr Vincent Twalo is the fourth director of Niemcor Brace. No Answering Affidavit was filed on behalf Niemcor Brace. The Third Respondent is Venter & Co and is cited as the auditors of Niemcor Brace.

Nature of the application

[3] This is an application for relief in terms of section 341(2) of Chapter XIV of Act 61 of 1973 being Appendix 1 to the Companies Act[1] (hereinafter referred to as the "Companies Act"). The Applicant seeks the following orders:

(i) Declaring as void the sale by the Applicant of its shareholding in Niemcor Brace to Bushveld Chrome.

(ii) Declaring as void the transfer by the Applicant of its shareholding in Niemcor Brace to Bushveld Chrome.

(iii) Directing Niemcor Brace and the Third Respondent to rectify the share register in Niemcor Brace under registration number 2008/016470/70 by deleting therefore any reference to Bushveld Chrome Resources (Pty) Ltd and substituting therefore Niemcor Africa (Pty) Ltd (in liquidation – the Applicant).

Brief exposition of the salient facts

[4] In order to assess the issue before this Court it is necessary to give a brief overview of the salient facts that gave rise to the dispute before Court.

[5] The Applicant was registered in 2002 and was established for mining exploration, prospecting and mining purposes. Towards 2010 and early 2011 the Applicant ran into financial difficulty and it became clear that the Applicant could not pay its debts. The Applicant subsequently became commercially insolvent. Murray, who was the in-house lawyer at the time and also a mineral

[1] Act 71 of 2008.

rights lawyer and mineral property rights expert, advised Niemöller to consider the voluntary winding up of the Applicant. A special resolution winding up the Applicant was registered on 12 August 2011. This order was subsequently set aside by the South Gauteng High Court. I should mention that the parties are *ad idem* that the date of the commencement of the winding-up of the Applicant is 5 September 2011.

[6] The Applicant held shares in the Niemcor Brace. At the time Niemcor Brace was the holder of prospecting rights in respect of a portion of the farms Zwartklip 405JQ and Turfbult 404KQ, (which was issued on 19 November 2010). It appears that the prospecting rights in respect of portions 6 and 7 of the farm Nooitgedacht 406KQ were only granted on 15 February 2011. All of these farms form part of the so-called Nooitgedacht sector.

[7] According to Murray (the deponent to the Answering Affidavit on behalf of Bushveld Chrome Resources) during June 2011 Niemcor Brace was merely a shelf company and other than a prospecting right had not assets. Further according to Murray, the prospecting rights that it had in respect of a portion of the farms Zwartklip 405JQ and Turfbult 404KQ, had no value. In respect of the farm Nooitgedacht there was merely an application for a prospecting right which was only granted the subsequent year. According to Murray no value therefore contributed to the aforementioned prospecting rights during 2011 as it was known that the chrome deposit was approximately 200 to 250 meters deep and therefore not easily accessible from the surface.

[8] Against this background, Murray explained that it was then agreed during a meeting held on 2 June 2011 that Niemöller (representing the Applicant) will

sell its shareholding in Niemcor Brace to Buschveld (represented by Barnard, McQuade and Murray) for a purchase consideration of R1.00 (one rand).

[9] On 25 October 2011 Murray wrote a letter to Benhouse Mining (Pty) Ltd referring to a discussion which took place on 18 October 2011. In this letter Murray expressly refers to the prospecting rights Bushveld Chrome has in respect of the Nooitgedact sector which includes the prospecting rights Bushveld Chrome has over portion 3 of the farm Kameelhoek 408KQ, the farm Zwartklip 405KQ, Turfbult 404KQ and portions 6 and 7 of the farm Nooitgedacht 406KQ. In this letter a possible proposal for the sale of the Nooitgedacht sector prospecting rights is mooted. It is significant to note that Murray specifically states in this letter that *"[I]t is BCR's[2] submission that this resource is worth no less than R 380 000 000 (three hundred and eighty million rand)"*. It is further significant to note that this offer to Benhouse was made barely two months after Bushveld Chrome bought the Applicant's shareholding in Niemcor Brace for a mere R1.00 (one rand).

[10] It is also noteworthy to point out that when Murray testified at the inquiry in terms of section 417 of the Companies Act, he failed to disclose the aforementioned correspondence between himself and Benhouse. More in particular when he was pressed about the discussion that took place, he was particularly evasive. Firstly, he stated that the shares had no value in June or August 2011 and that he was merely testing the waters when the prospecting rights were offered for millions to Benhouse. Secondly, to a question whether

[2] Bushveld Chrome Resources (Pty) Limited.

Murray had offered the shares for a price of R380 million he merely stated that he could not remember despite the fact that he was the author of the letter to Benhouse.

The dispute before Court

[11] It was initially in dispute exactly on which date the agreement to sell the shares in Niemcor Brace to Bushveld Chrome was concluded in light of the fact that various agreements dealing with the disposition of the shares were concluded in June and August. It is, however, no longer in dispute that the agreement providing for the disposition of the shares was concluded *prior* to the date of the commencement of the winding up. (I will return to the various agreements herein below). It was initially also not the case for the First Respondent that, should the Court conclude that the transfer of shares fall within the ambit of section 341(1) of the Companies Act, the Court should nonetheless invoke its discretion to validate the disposition by "*ordering otherwise*" in the context of the provisions of section 341(2) of the Companies Act. The question that now serves before Court is somewhat different in light of certain developments subsequent to the papers having been filed.

[12] It is now common cause that the date of the commencement of the winding up is 5 September 2011. It is also common cause that the date of the registration of the transfer of the shares is 21 September 2014 – which is a date *after* the date of the commencement of the winding up. I should also point out that it is not in dispute that the Applicant is hopelessly insolvent.

[13] What is now in dispute is different from what was in dispute before the First Respondent had filed a supplementary affidavit. The only issue in dispute now is what is meant by the term "disposition" of shares. Put simply, does it mean that shares are considered to be disposed of on the date the contract to sell the shares have been concluded (in this case August 2011) or does it mean that the "disposition" of shares only take place once the shares disposed of have been registered (in this case 5 September 2011)?

The legislative framework

[14] The applicant brought this application relying on section 341 of the Act. This section reads as follows:

> "341. Dispositions and share transfers after winding-up void.—(1) Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void.
>
> (2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders."

[15] This section makes it clear that any disposition of shares after the commencement of the winding-up is void. However, even if all the requirements

are present for the application of this section, the Court still has discretion in terms of section 341(2)[3] of the Companies Act to order "otherwise".

What does "disposition" in the context of shares mean?

[16] The singular question which now remains to be decided is whether the "disposition" of the shares in the Niemcor Brace took place before or after the commencement of the winding-up of the applicant. This question must be decided against the common cause facts that the contract disposing of the share was concluded *before* the date of the commencement of the winding up (5 September 2011) and the common cause fact that date of the registration of the shares occurred *after* the date of the commencement of the winding-up (21 September 2011). In order to decide the issue it is necessary to determine what is meant by the word "disposition" within the context of section 341 of the Companies Act.

[17] The stance taken by the First Respondent is that, because the contract "disposing" of the shares was concluded before the date of the commencement of the winding up of the company, the date of the conclusion of the contract should be regarded as the effective date. The fact that the shares were registered on a later date is irrelevant simply because the contract contains the rights and obligations (including the obligation to register the shares in the name of Bushveld Chrome) of the parties and therefore constitutes the effective date in respect of the disposition of the shares. In support of this submission

[3] Section 341(2) remains operative by reason of the express provisions of Item 9 of Schedule 5 to the Companies Act 71 of 2008.

the Court was referred to the matter of *Estate Jager Appellant v Whittaker and Another Respondents*[4] where Watermeyer, C.J. held as follows:

> "Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."
>
> The word "disposition" is defined as follows:
>
> > "'disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the Court."
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> This definition is important. *It shows that a disposition may take the form of a contract which creates rights and obligations and may also take the form of an alienation of property.*"[5]

[18] I am not persuaded that this judgment is authority for the proposition that the disposition of shares suggests a singular step namely the conclusion of the contract. If regard is had to what the Court says, a disposition can take the form of a contract but can also take the form of an alienation of property. In so far as shares are concerned I am in agreement with the submission on behalf of the Applicant that a "disposition" of shares contemplates a series of steps. I will now briefly turn to this submissions on behalf of the Applicant.

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[4] 1944 AD 246.
[5] My emphasis.

[19] On behalf of the Applicant it was submitted that the word "disposition" and "property" have the meanings assigned to them in section 2[6] of the Insolvency Act.[7] "Disposition" is defined in the Insolvency Act as follows:

> "Disposition" means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and "dispose" has a corresponding meaning."

[20] It was further submitted that the word "disposition" used in section 341(2) of the Companies Act contemplates - in relation to a disposition of shares - the transfer of rights to shares after completion of a series of steps. This process is only completed finally upon the registration of the transfer of the shares. In this regard the Court was referred to *Inland Property Development Corporation (Pty) Ltd v Cilliers* where the Court held as follows:[8]

> "In regard to shares, the word 'transfer', in its full and technical sense, is not a single act but consists of a series of steps, namely an agreement to transfer, the execution of a deed of transfer and, finally, the registration of the transfer. As was put by Lord Reid in the House of Lords in *Lyle and*

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[6] See *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another* 1980 (4) SA 669 (SWA) at 674: *"Pursuant to the provisions of s 339 of the Companies Act 61 of 1973 the provisions of the law relating to insolvency apply mutatis mutandis. According to the definition of the word "disposition" in s 2 of the Insolvency Act 24 of 1936, a "disposition" includes "any transfer or abandonment of rights to property", and "property" includes "movable property wherever situate within the Republic"."*

[7] Act 24 of 1936.

[8] 1973 (3) SA 245 (A).

Scott Ltd. v *Scott's Trustees and British Investment Trust Ltd.*, 1959 A.C. 763 (a case which dealt with the word 'transfer' in the articles of association of a company) at p. 778:

> 'The word transfer can mean the whole of these steps. Moreover, the ordinary meaning of 'transfer' is simply to hand over or part with something and a shareholder who agrees to sell is parting with something. The context must determine in what sense the word is used.'

Because of the view I take of the matter it is, however, unnecessary to determine the true meaning of the word 'transfer' in sec. 24 *bis* (1), and it will be assumed, for the purpose of this judgment, that it ought to be given its 'ordinary' meaning, that is the delivery or transfer of shares in a company to its subsidiary, without the necessity of registration in the company's register. It will also be assumed, in favour of the appellant, that the prohibition in sec. 24 *bis* (1) against the transfer of shares in a company to its subsidiary nullifies not only the actual transfer itself but also any transaction contemplating such a transfer."

[21] The approach that the disposition of shares comprises of a series of steps was also confirmed by Cameron JA (as he then was) in *Smuts v Booyensmarkplaas (Edms) Bpk en 'n Ander v Booyens* as follows:[9]

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[9] 2001 (4) SA 15 (SCA).

"[9] Tweedens vereis die Wet dat 'die reg' om aandele oor te dra, beperk moet word. Die gebruik van die omvattende begrip 'die reg' in art 20(1)*(a)* is opvallend. Dit dui op die wetgewing se bedoeling dat die aandeelhouer se bevoegdheid om die maatskappy se aandele hoegenaamd oor te dra in die statute beperk moet word.

[10] *Derdens behels 'n oordrag in die volle en tegniese sin van die woord 'n reeks stappe wat die aangaan van 'n oordragsooreenkoms insluit*[10]. Soos Rumpff AR verduidelik het in *Inland Property Development Corporation (Pty) Ltd v Cilliers* ('n saak aangaande art 24*bis* van die Maatskappywet 46 van 1926):

> 'In regard to shares, the word "transfer", in its full and technical sense, is not a single act but consists of a series of steps, namely an agreement to transfer, the execution of a deed of transfer and, finally, the registration of the transfer.'

Daar is geen aanduiding in die Wet te bespeur dat die beperking van slegs een van hierdie stappe in art 20(1)(a) beoog word nie. Inteendeel, dit blyk na my mening uit die bepaling dat dit die wetgewing se bedoeling was dat 'n privaatmaatskappy se statute die oordrag van sy aandele in die 'volle en tegniese sin' waarop Rumpff AR wys, moet beperk; wat die statute gevolglik moet beperk, is 'die reg' om die hele reeks stappe wat in 'n oordrag behels word, aan te gaan. En dit omvat die aangaan van 'n

[10] Court's emphasis.

ooreenkoms om oor te dra, die verlyding van 'n oordragsakte en die uiteindelike registrasie van die oordrag."[11]

[22] In light of the above, it was submitted on behalf of the Applicant that the steps which result in the disposition of shares are not limited to the agreement to transfer – as is submitted on behalf of the First Respondent – but include the execution of a deed of transfer and is only completed finally upon the registration of the transfer of shares. Applying this to the facts of the matter, it appears that the following therefore took place:

(i) On 2 June 2011, the parties took the first step in a series of steps to dispose of the shares when they concluded an oral agreement in terms of which the Applicant assented to transfer the shares.

(ii) On 8 July 2011 the parties concluded a deed of transfer (sale agreement). This constituted the first step in the execution of a deed of transfer and therefore amounted to the second step in the series of steps to dispose of the shares.

(iii) On 19 August 2011 the parties concluded a further deed of transfer (sale agreement) which constituted a deed of transfer that superseded the 8 July 2011 deed of transfer. This amounted to the completed second step in the series of steps to dispose of the shares.

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[11] *Ibid.*

(iv) The final step in the series of steps that completed the disposition of the shares was the registration of the transfer of the shares on 21 September 2011.

[23] According to the Applicant, the disposition of the shares therefore was only completed upon the taking of all the steps in the series of steps to transfer the shares. The final step (the registration of the shares) only took place on 21 September 2011. The Applicant's shares was therefore disposed of *after* the commencement of the winding up of the Applicant and consequently the transaction in terms of which the shares were disposed of *after* the commencement of the winding up falls squarely within the ambit of the provisions of section 341(2) of the Companies Act.

"May order otherwise"

[24] It was submitted on behalf of the First Respondent in the alternative that, in the event the Court finds that the disposition of the shares falls within the ambit of section 341(2) of the Companies Act, the Court should nonetheless find "otherwise". At the outset it should be pointed out that the First Respondent did not initially elect to rely on this point in the Answering Affidavit. However, insofar as the point is raised in the Heads of Argument and insofar as it may be argued that it is in the interest of justice for this Court to deal with this point, I will do so.

[25] In order to evaluate this submission it is necessary to briefly revisit some of the facts as they stand before the Court. Three former employees (Murray, Barnard

and McQuade) - who at all times stood in a fiduciary duty[12] *vis à vis* their employer (the Applicant) - bought the shares held by the Applicant in Niemcor for R1.00. On 25 October 2011 - barely two months after buying the shares for a mere R1.00 and barely one month after the registration of the Applicant's shareholding in Niemcor Brace into the name of Bushveld Chrome (21 September 2011) - Murray (on behalf of Bushveld Chrome), in a letter to Benhouse Mining (Pty) Ltd, offered the prospecting rights over portions 3 of the farm Kameelhoek 408KQ, the farm Zwartklip 405KQ, Turfbult 404KQ and portions 6 and 7 of the farm Nooitgedacht 406KQ for sale at a consideration of R 380 000 000.00 (three hundred and eighty million rand). This offer to Benhouse took place in the context of a disposition of shares for a consideration of R1.00 by a company (the Applicant) that was hopelessly insolvent.

[26] Against this background the question must be considered whether this Court should exercise the discretion it has in terms of section 341(2) in favour of Bushveld Chrome? It is trite that this Court's discretion generally entails what would be fair and just[13] in the circumstances of the case. Normally where the disposition amounts to no more than the result of the *bona fide* carrying on of

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[12] An employee has a fiduciary duty towards their employer and as such is expected to conduct itself *vis à vis* his employer with total honesty and integrity. In this regard, the Supreme Court of Appeals, in *Volvo (Southern Africa) (Pty) Ltd v Yssel,*[12] held as follows: '[13] Over a century ago in *Robinson v Randfontein Estates Gold Mining Co Ltd* Innes CJ expressed in general terms the legal principle that is applicable in a case of this kind as follows: "Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway Company v Blaikie Bros. (1 Macqueen 474), the doctrine is to be found in the civil law (Digest 18.1. 34.7), and must of necessity form part of every civilised system of jurisprudence."

[13] See for a general discussion: Meskin *Henochsberg on the Companies Act APPI-24.*

the company's ordinary business or where the disposition took place to keep the company financial afloat, the Court will exercise its discretion in favour of a respondent[14]. The Court in *Excellent Petroleum (Pty) Ltd (in Liquidation) v Brent Oil (Pty) Ltd* reaffirmed the principle or guidelines that a Court must consider in exercising its discretion in terms of section 341(2) of the Companies Act:[15]

"[59] Of relevance is the efforts made by the learned judge to list, at 386C – 387B, a series of guidelines applicable when it comes to the exercise of this particular discretion. I will deal with them briefly, without quoting the authorities relied upon by the learned judge, barring to state that he also referred to *Herrigel* and *Rousseau:*

(a)The discretion should be controlled only by the general principles which apply to every kind of judicial discretion...

(b)Each case must be dealt with on its own facts and particular circumstances...

(c)Special regard must be had to the question of good faith and the honest intention of the persons concerned...

(d)The court must be free to act according to what it considers would be just and fair in each case.

[14] See in general Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another 1980 (4) SA 669 (SWA) at 679 – 680.
[15] 2012 (5) SA 407 (GNP) at 59.

(e) The court, in assessing the matter, must attempt to strike some balance between what is fair vis-à-vis the applicant as well as what is fair vis-à-vis the creditors of the company in liquidation....

(f) The court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation...

(g) The court should investigate whether the disposition was made to keep the company afloat or augment its assets...

(h) The court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up, which otherwise he would not have enjoyed, or with the intention of giving a particular creditor a preference and which latter factor may be decisive...

(i) The court should enquire whether the recipient of the disposition was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties...

(j) Little weight should be attached to the hardship which will be suffered by the applicant (here the recipient) if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally...

(k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions...

(l) Generally a court will refuse to validate a disposition by a company when it occurs after the winding-up has commenced

unless the liquidator (duly authorised) consents accordingly and there is a benefit to the company or its creditors..."

[27] It was submitted on behalf of the First Respondent that the Court should decide this question on the First Respondent's papers in the light of the so-called *Plascon Evans-Rule.*[16] In response hereto the Applicant submitted that it is not asking this Court to reject the version of the First Respondent in deciding this issue and submitted that even if reliance is placed on the version of the First Respondent, the Court should not exercise its discretion in favour of the First Respondent. I will therefore proceed to evaluate the facts as they emerge from the First Respondent's papers.

[28] It was submitted that the Court should take into account that the prospecting rights had no value at the time of the disposition of the shares and that the prospecting rights in respect of the Nooitgedacht sector was only granted on 15 February 2012.

[29] It can, however, not be ignored that Bushveld Chrome (represented by Murray) offered the prospecting rights (as they were at the time) at a sales price of

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[16] *Plascon Evans Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd [1984] 2 All SA 366 (A). See also: *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA): *"[26] 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 because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

R380 million merely two months after the disposition of the shares. It is instructive that it appears from the response from Benhouse that they were clearly considering the offer although they are of the view that the purchase price of the "*prospecting rights at Nooitgedacht*" was not warranted. It is certainly was not the position of Benhause that it considered the prospecting rights as being worthless as the First Respondent attempted to make this Court to believe. This much is clear from the response from Benhouse and the references to the current sales price of chrome. Murray furthermore attempted to make this Court believe that Nooitgedact was worth nothing because the prospecting rights were only issued in February 2012. In this regard he stated the following: *"The prospecting right for Nooitgedacht, was only issued during February 2012. It is important to note that a prospecting right when granted merely grants the prospecting rights holder authority to prospect / search for the required minerals. A prospecting right in itself has only a nominal value and merely grants a right to prospect in order to determine the mineral contents in the area. It is only when a mining right is granted that it becomes of value."*[17] This is clearly misleading and, if regard is had to the offer made to Benhause, it is clear what was in fact being offered:

> "The Nooitgedacht sector includes the prospecting rights BCR has access to over portion 3 of the farm Kameelhoek 408KQ, the farm Zwartklip 405KQ, Turfbult 303KQ and portions 6 and 7 of the farm Nooitgedacht 405KQ"

[17] Paragraph 24.4 of the Answering Affidavit.

At the time this offer was made, on the First Respondent's own version, the prospecting rights over the farm Nooitgedacht have not yet been issued. Clearly Murray was not of the view that the prospecting rights in existence (even without the rights issued in February 2012), were of no value.

[30] I also had regard to the various considerations (guidelines) set out by the Court in *Excellent Petroleum (Pty) Ltd (in Liquidation) v Brent Oil (Pty) Ltd.* I do not intend revisiting each and every consideration. Suffice to point out that I am, in the context of the facts before this Court, satisfied that the Court should not exercise its discretion in favour of the First Respondent. More in particular, I am not persuaded on the papers that the disposition was made in good faith. In this regard I had regard to what Murray stated in his Answering Affidavit and the attempts made at persuading this Court that the shares had no value. I have no hesitation to find on the facts that this is not a true reflection of the facts for the reasons stated hereinabove. It is furthermore patently clear, in light of the fact that the shares were disposed of for a consideration of R 1.00 and soon thereafter offered for sale at a consideration of R 380 million that the disposition was not made in good faith. A case can also not be made out that the recipient of the disposition (the First Respondent) was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties: Murray (a director of the First Respondent) was also an employee of the Applicant and what is more, he was the in-house legal advisor of the Applicant.

[31] In light of the aforegoing, I am of the view that the transaction disposing of the shares of the Applicant in Niemcor Brace ought not to be validated.

Conclusion

[32] In the premises the following order is made:

1. The sale by the Applicant of its shareholding in Niemcor Brace to Bushveld Chrome is declared to be void.

2. The transfer by the Applicant of its shareholding in Niemcor Brace to Bushveld Chrome is declared to be void.

3. Niemcor Brace and Venter & Co are directed to rectify the share register in Niemcor Brace under registration number 2008/016470/70 by deleting therefore any reference to Bushveld Chrome Resources (Pty) Ltd and substituting therefore Niemor Africa (Pty) Ltd (in liquidation).

4. Buschveld Chrome Resources (Pty) Ltd is directed to pay the costs of this application.

AC BASSON
JUDGE OF THE HIGH COURT