REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 73169/2013

10/10/2014

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

9/10/2014

SIGNATURE **DATE**

In the application for leave to appeal of:

BUSHVELD CHROME RESOURCES (PTY) LIMITED	1st Applicant
NIEMCOR BRACE (PTY) LIMITED	2nd Applicant
and	
NIEMCOR AFRICA (PTY) LIMITED	Respondent
(IN LIQUIDATION)	

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] This is an application for leave to appeal against the whole of my judgment and order dated 20 June 2014. The applicant in the application for leave to appeal is Bushveld Chrome Resources (Pty) Ltd (hereinafter referred to as "Bushveld Chrome") and the second applicant is Niemcor Brace (Pty) Ltd (hereinafter referred to as "Niemcor Brace"). The respondent is Niemcor Africa (Pty) Ltd (in liquidation).

[2] Before I briefly turn to the merits of the application a few comments about the test to be applied in applications for leave to appeal. This test is now regulated by section 17(1) of the Supreme Courts Act 10 of 2013 (hereinafter referred to as "the Act"):

> *"17 Leave to appeal*
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> *(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
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> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
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> *(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[3] In addition to the aforegoing, the legislature has also issued a directive in terms of section 17(6) of the Act which reads as follows:

> *"(6) (a) If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of tha Division, unless they consider-*
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> *(i) that the decision to be appealed involves a questionof law of importance, whether because of its general application or otherwise, or in respect of which a decision of Supreme Court of Appeal is required to resolve differences of opinion; or*

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

(b) Any direction by the court of a Division in terms of paragraph (a) may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, or such longer period as may on good cause be allowed, and may be replaced by another direction in terms of paragraph (a)."

[4] The test for leave to appeal is twofold: Firstly, is there is reasonable prospect of the appeal succeeding[1] and, secondly, is this a case of substantial importance not only to the parties, but also to the public at large?[2] As will be pointed out herein below, it was the applicants' contention that application for leave to appeal must be granted on the grounds of both considerations. I will return to the submissions herein below.

When did Niemcor Africa dispose of its shares?

[5] The principle issue which this Court was tasked to adjudicate was whether the respondent "disposed" of its shares in the second applicant before or after the commencement of the winding-up of the respondent – within the meaning

[1] *Janit v Van den Heever NNO (No 2)* 2001 (1) SA 1064 (W) at 1062F.

[2] *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty)* Ltd 1986 (2) SA 555 (A) at 560I.

ascribed to the word "disposed" in the Companies Act,[3] 1973 read with the Insolvency Act[4], 1963.

[6] In brief this Court held that the sale of the shares in issue took place *after* the date of liquidation of the respondent. The Court further held that there is no reason to exercise its discretion against declaring the sale and transfer void.

[7] The factual matrix against which this Court interpreted section 341(2) of the Companies Act, 1973 was not in dispute: (i) Niemcor Africa sold the shares it held in Niemcor Brace to Bushveld Chorme by means of a contract that was entered into on 2 June 2011. (ii) Niemcor Brace was liquidated on 5 September 2011. (iii) The registration of Bushveld Chrome in the stead of Niemcor Africa as shareholder of Niemcor Brace took place on 21 September 2011. (iv) Although the 2008 Companies Act commenced on 1 May 2011, item 9 of Schedule 5 of the new Companies Act provides that section 341(2) of the 1973 (old Companies Act) remains operative.

[8] This Court held that "disposition" (of shares) as used in section 341(2) of the Companies Act contemplates in relation to the disposition of shares a series of steps. The process is completed finally upon the registration of the shares in the company's members register in the name of the transferee. In arriving at this conclusion reliance was placed on two decisions: *Inland Property Development Corporation (Pty) Ltd v Cilliers*[5] and *Smuts v Booyensmarkplaas*

[3] Act 61 of 1973.

[4] Act 24 of 1936.

[5] 1973 (3) SA 245 (A).

(Edms) Bpk en 'n Ander v Booyens.[6] The Court concluded that because the shares were only registered *after* the date of liquidation, the disposition was therefore void.

[9] The applicant advanced two main reasons in support of its argument that there is a reasonable prospect that another Court may come to a different decision and that another Court may interpret the law relied on by this Court differently. In essence the applicant took issue with this Court's finding that the disposition of shares only takes place when the very last step is taken in a process of transfer where different steps are required that the disposition occurs. Firstly, the applicant took issue with this Court's reliance on the decisions in *Smuts v Booyensmarkplaas (Edms) Bpk en 'n Ander v Booyens* and *Inland Property Development Corporation (Pty) Ltd v Smuts,* and secondly, relying on the decision of *Botha v Fick*, the applicant submitted that there is a reasonable prospect that another Court may find and apply the law differently.

[10] The entire application for leave to appeal is premised on the findings in the matter of *Botha v Fick.* [7] Before I deal with the merits of the submissions on behalf of the applicant, I must point out that the argument based on the decision in *Botha v Fick* was raised for the first time in these proceedings. More in particular, the submission that the rights against a company constituting a share can be transferred by mere cession was not raised when the matter was initially argued and was only raised for the first time in these proceedings. Be it as it may, this submission has now been raised and needs to be considered in

[6] 2001 (4) SA 15 (SCA).

[7] 1995 (2) SA 750 (A).

deciding whether to grant leave to appeal.[8] The respondent also did not raise any objections against this Court considering the new legal point. The respondent, however, submitted that the decision in *Botha v Fick* did not apply.

[11] I do not intend referring to the submissions on behalf of the applicant in detail. Briefly, the applicant submitted (with reference to the decision in *Botha v Fick*) that a share is freely transferable by cession. In other words, cession is the method by which rights ('vorderingsregte") against a company constituting a share is transferred. This process (the transfer), so it was submitted, requires nothing more than a share to be ceded and this is done by mere consensus. When this happens the cessionary becomes the owner of the share there and then. The Court was referred to the following extract by Howie, JA where he said the following in *Botha v Fick*:

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[8] See: *Shraga v Chalk* 1994 (3) SA 145 (N) at 159F- 151B: *"In what sort of situation account may properly be taken of a point arising on appeal for the first time is a subject which has often been judicially considered. To mention but three of the many judgments written on the topic that one can find in the law reports, I refer to those delivered in Cole v Government of the Union of SA 1910 AD 263 (at 272-3), A J Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk1985 (1) SA 399 (A) (at 415B-D) and Workmen's Compensation Commissioner v Crawford and Another 1987 (1) SA 296 (A) (at 307G-I). Innes JA dealt in the case of Cole with the kind of situation that was conducive to the course, saying in the passage cited above:*

> *'The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and, there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In the presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.'"*

"Wat die tersaaklike regsbeginsels betref, bestaan 'n aandeel in 'n maatskappy uit 'n konglomeraat of versameling van vorderingsregte wat die reghebbende daarvan geregtig maak op 'n sekere belang in die maatskappy, sy bates en dividende (Randfontein Estates Ltd v The Master 1909 TS 978 te 981) en in hierdie verband is die reghebbende die persoon in wie die vorderingsregte setel, dit wil sê óf die geregistreerde aandeelhouer óf die persoon namens wie hy die aandele hou (Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others 1983 (1) SA 276 (A) te 288H-289C). Dit is lank gevestigde reg dat 'n vorderingsreg slegs by wyse van sessie oorgedra kan word.

'(Sessie) geskied deur middel van 'n oordragsooreenkoms . . . tussen die sedent en die sessionaris uit hoofde van 'n justa causa waaruit die bedoeling van die sedent om die vorderingsreg op die sessionaris oor te dra . . . en die bedoeling van die sessionaris om die reghebbende van die vorderingsreg te word . . . blyk of afgelei kan word. Die oordragsooreenkoms kan saamval met of voorafgegaan word deur 'n justa causa wat 'n verbintenisskeppende ooreenkoms . . . kan wees. . .' (Johnson v Incorporated General Insurances Ltd1983 (1) SA 318 (A) te 331G-H.)"[9]

[12] In the *Botha v Fick* matter it was the intention of the parties that, at the time of the signing or at least at the time of payment, Fick would cede his right to Botha and that Botha would there and then become the owner of the shares. The transfer was thus effective by simple consensus there and then. With reference to this decision it was submitted that it is not a requirement for the transfer of rights by cession that any document be transferred or that any registration process be followed unless this is made a requirement in the cession agreement or it is imposed by statute – something which the Companies Act does not do. The Court in *Botha v Fick* summarized its conclusions as follows:

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[9] *Ibid* at 762D.

"Om op te som:

1. Blote consensus is voldoende om sessie daar te stel.

2. Sessie geskied deur middel van 'n oordragsooreenkoms wat sal saamval met, of voorafgegaan word deur, 'n justa causa. Die justa causa kan 'n verbintenisskeppende ooreenkoms wees.

3. 'n Vorderingsreg wat in 'n dokument beliggaam word en wat nie onafhanklik van die dokument kan bestaan nie, soos 'n verhandelbare stuk, moet onderskei word van 'n vorderingsreg wat deur 'n dokument bewys word en wat onafhanklik van die dokument bestaan, soos 'n aandeel in 'n maatskappy ten opsigte waarvan 'n aandelesertifikaat uitgereik is.

4. Waar laasgenoemde soort vorderingsreg gesedeer word, is nóg lewering van die geskrif aan die sessionaris nóg voldoening deur die sedent aan die sogenaamde leerstuk van 'all effort' 'n geldigheidsvereiste vir die sessie.

5. Die regsplig wat op 'n geregistreerde aandeelhouer rus wat sy aandele verkoop om 'n aandelesertifikaat en 'n voltooide oordragsvorm aan die koper te lewer, spruit voort uit die verbintenisskeppende verkoopooreenkoms en is nie 'n geldigheidsvereiste van die sessie deur middel waarvan die reg en titel ten opsigte van die aandele oorgedra word nie.

6. Die reël waarna in Labuschagne v Denny (supra te 543 in fine-544B) verwys is, is nie 'n reël van die substantiewe reg nie en dit stel geen geldigheidsvereiste vir sessie daar nie.

7. Laasgenoemde reël kom slegs op 'n bewysaangeleentheid neer waarvolgens lewering as 'n belangrike faktor - moontlik 'n deurslaggewende faktor - beskou sal word waar die vraag ontstaan of sessie bewys is al dan nie. Hierdie benadering is van toepassing ook in 'n geskil tussen sedent en sessionaris inter partes."[10]

[10] *Ibid* at 779B *et seq.*

[13] In the light of this decision it was submitted on behalf of the applicant that there is a reasonable prospect that another Court may find that the "disposition" of the shares actually took place when the contract of sale was *concluded* which was 2 June 2011 and not (as this Court held) when the shares were *registered*.

[14] On behalf of the respondent is was submitted that the act of disposition of property, in particular the disposition of shares, does not consist of a single act but that it rather consists of a series of steps which culminates finally in the registration of the transfer. The respondent submitted that this Court was correct in its interpretation of the word "*disposition*" in that it has the meaning assigned to it in terms of section 2 of the Insolvency Act.

[15] I have considered all the submissions raised in respect of the main issue namely the question as to *when* Niemcor Africa disposed of its shares in Niemcor Brace in favour of Bushveld Chrome. Having regard to all the submissions, I am of the view that there is a reasonable prospect that another Court may come to a different conclusion than the one this Court arrived at especially in light of the legal submissions raised for the first time during these proceedings. I am also of the view that this question is of considerable importance not only to the parties involved but also to the public at large. Leave to appeal should therefore, in my view, be granted.

[16] In light of the fact that I have granted leave to appeal on this point, it is not, in my view, necessary to consider the further issue namely whether this Court

ought to have declined to issue a discretion as contemplated in section 341(2) of the Companies Act.

[17] Lastly, the parties appear to be *ad idem,* that application for leave to appeal should be granted to the Supreme Court of Appeal. As the question before this Court involves a question of law of importance, I am of the view that leave should be granted to the Supreme Court of Appeal. I have further decided that costs should be costs in the cause of the appeal.

[18] In the event the following order is made:

1. Application for leave to appeal to the Supreme Court of Appeal is granted against the whole of the judgment and all orders made therein.

2. Costs of this application to be costs in the cause of the appeal.

AC BASSON
JUDGE OF THE HIGH COURT