

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
PRETORIACASE NO: A22/2015
18 MAY 2016

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED. <u>L</u>
..... 18-5-16
DATE	SIGNATURE

In the matter between:

Q-HOLD (PTY) LTD
 GXOYIYA, THEMBA ERROL
 MAKHAFOLA, RICHARD
 JOUBERT, STEPHEN PIERRE N.O.
 JOUBERT, DIANE N.O.

1ST APPELLANT
 2ND APPELLANT
 3RD APPELLANT
 4TH APPELLANT
 5TH APPELLANT

and

LINDIKHAYA COLIN BALINTULO

RESPONDENT

 J U D G M E N T

WRIGHT J

1. The shares in the appellant company are held by the second to fifth appellants and the respondent. I shall refer to the second to fifth appellants as the second appellant. The second appellant and the respondent had a falling out. The respondent launched an application against the first appellant and the second appellant in which he sought the winding up of the first appellant or alternative relief. After some delay regarding the filing of an answering affidavit and after some correspondence had passed between the parties' legal practitioners the case was settled. By agreement Phatudi J made the agreement an order of court on 25 May 2012.

2. The order reads:

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

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 Applicant's 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 Accountants' and Auditors' Board of the Republic of South Africa which appointment is to be made within 15 days of the date of this order.

2. *The parties to this application shall provide their full co-operation to the independent auditor and do 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. *The determination of the independent auditor shall be final and binding on the parties.*
 4. *Any party is entitled to approach the Court for such further directions as may be necessary regarding the execution and implementation of the relief sought in paragraph 1 above.*
 5. *The costs of this application are reserved for determination at a later stage.*
 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 the First Respondent to be wound up and placed 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 the founding affidavit to the extent necessary.*
 7. *Should the Applicant decide to approach this honourable court as contemplated in prayer 6 above, then in such event:*
 - 7.1. *The Applicant shall do so on not less than 5 court days written notice to the Respondents;*
 - 7.2. *After the Applicant has supplemented its founding affidavit as contemplated in prayer 6 above or has informed the Respondents of his intention not to supplement his founding affidavit, as the case may be, the Respondents shall have 15 days to file their answering affidavit and the Applicant will have 10 days to file his replying affidavit, if any."*
3. Pursuant to the order the parties agreed that an auditor would value the shares in the first appellant and accordingly the respondent's 16.26% shareholding in the first appellant would be valued. The auditor valued the respondent's shareholding at R3 500 000 on 22 October 2012. The next day the appellants' attorney wrote to the respondent's attorney suggesting that the R3 500 000 be paid in instalments of R1 100 000 by 31 December 2012 and thereafter at R200 000 per month for a period of 12 months. It was suggested

that interest would not accrue. This suggestion was rejected by the respondent. The respondent took the view that the purchase price was payable in full against tender by the respondent to take the steps necessary in relation to the transfer of the shares by the respondent to the appellants. The tender was made. The correspondence shows that there was an unsuccessful attempt by the parties to settle the impasse.

4. The respondent launched an application in which he sought an order that the first and second appellants be ordered to pay the price of the shares as determined by the auditor. Interest was sought at the rate of 15.5% per annum from 24 October 2012 to date of payment. I point out that after the auditor had made his award the parties agreed to split his fee equally. As a result the precise amount claimed by the respondent was after deduction of his half share of the auditor's fee.
5. The application was successful before Kganyago AJ who granted the appellants leave to appeal to the present court.
6. The respondent's case is that the agreement of settlement which was made an order of court imports no term allowing the purchase price to be paid in instalments. The appellants' case is that clause 4 includes the right of either party to approach the court for directions as to different matters, including the paying of the price in instalments or otherwise. The appellants say that they (more particularly the first appellant) need time to pay in instalments and that at the date of the order, 25 May 2012, the respondent was aware of the cash flow difficulty.
7. In my view, the appellants must fail. It is well known, and was known to the parties as at 25 May 2012 that money depreciates over time. If the appellants are correct then the effect of their being allowed to pay in instalments means that they pay a lower price than that determined by the auditor. This was never contemplated or agreed by the parties. This finding makes it unnecessary for me to deal with other arguments raised in the appeal.
8. The only remaining consideration is what meaning to put on clause 4 of the order. In my view, what the parties intended was not a question as big as the paying of the price in instalments or otherwise. Clause 4 covers lesser issues,

for example a possible failure by the Public Accountants and Auditors Board to appoint an auditor, the possible failure by the auditor to get on with the job, the possible failure by one of the parties to co-operate with the auditor, possible bias on the part of the auditor and the like.

9. The appellants quibble with the order of Kganyago AJ that the appellants jointly and severally are liable for payment. I fail to see the difficulty. In the first line of clause 1 of the order the parties agreed that the appellants "jointly and severally" are to purchase the shares.
10. Part of the opposition to the application was a counter-application by the appellants in which they sought an order that the respondent be ordered to pay the purchase price in instalments. Kganyago AJ found that it was unnecessary to deal with the counter-application given the finding on the main application. Assuming in favour of the appellants that there is before us an appeal against the failure of Kganyago AJ to rule on the counter-application, in my view the appeal as a whole must fail. I propose the following order.

ORDER

1. The appeal is dismissed with costs.



GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA



Mngqibisa-Thusi J

I agree/disagree


De Vos J

I agree/disagree

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On behalf of the Appellants:

Adv B H Swart SC

J Vorster

Instructed by:

Van Huysteens Commercial Attorneys

012 349 2306

On behalf of the Respondent:

C Bester

Instructed by:

Fluxmans Inc

C/o Friedland Hart Solomon & Nicolson

012 424 0200

Date of Hearing:

18 May 2016

Date of Judgment:

18 May 2016