THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: April 2019

Status: Immediate

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***CDH Invest NV v Petrotank South Africa (Pty) Ltd & others* [2019] ZASCA #**

Today the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant and upheld the order of the Gauteng Division of the High Court, Johannesburg.

The issue for determination was whether a decision adopted by written consent of the majority of the directors in terms of s 74 of the Companies Act 71 of 2008 (the Act) was valid.

In 2013 CDH a Belgium company and Amabubesi, an empowerment company caused Petrotank, a partnership vehicle, to be incorporated. The memorandum of understanding (MOU) provided that there would be five directors, three appointed by CDH and two by Amabubesi. At all material times the directors appointed by CDH were Messrs D'Hondt, Mabale and Stadler as managing director. The directors appointed by Amabubesi were Messrs Moyo and Ntsaluba. Due to an error on the part of the person responsible for the incorporation of Petrotank, its memorandum of incorporation (MOI) recorded that it had authorised shares of 1 000 ordinary no par value shares rather than 100 000. At the time CDH and Amabubesi were unaware of this error.

On 31 March 2014, notwithstanding Ntsaluba's objection, the three CDH directors signed a round robin resolution made in terms of s 74 of the Act. It was apparent that the asserted error in the resolution was the fact that it increased the number of authorised shares to 1 000 000 instead of to 100 000 as agreed in the MOU. It was also apparent that Amabubesi's nominees on Petrotank's board were unaware at this stage that CDH's nominees had already signed the impugned resolution. CDH offered no explanation for its failure to have any regard to the objections raised by Amabubesi's directors to the round robin resolution.

The SCA held that CDH's directors knew on 28 March 2014 that the round robin resolution upon which the directors were called to vote was contrary to the proclaimed purpose. They also knew that it was contrary to the MOU. Nonetheless on 31 March 2014 they signed the resolution. These actions of the directors of Petrotank, who were appointed by CDH, amounted to a misrepresentation of the real purpose behind the introduction of the resolution. By their actions and their continued refusal to provide a justification for the need to increase the authorised shares to 1 000 000, they committed a misrepresentation, which at the very least was designed to obfuscate the real purpose behind the resolution. Their conduct did not comport to the standard of good faith required of directors in terms of s 76(3) of the Act and thus raised the question as to whether they exercised their powers as directors for a proper purpose.

The SCA therefore in conclusion said that what was surprising was that CDH never sought to explain the reason why, in supposedly 'correcting' the patent error in the MOI, its nominees on Petrotank's board resolved to pass a resolution to increase the authorised shares to 1 000 000 rather than 100 000. This clearly called for an explanation on at least the two occasions when Amabubesi's directors questioned the conduct of CDH's directors. The court accordingly found that the round robin resolution signed on 31 March 2014 was invalid.