



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2021/7285

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED: NO

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In the matter between:

SOUTH AFRICAN ENTERPRISE DEVELOPMENT (PTY) LTD

Applicant

and

KERANI BTW CC

Respondent

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 1 June 2022.

BALOYI AJ:

- [1] This is an application in which the applicant seeks the liquidation of the respondent in terms of sections 66(1) and 69(1)(a) of the Close Corporation Act No. 69 of 1984, read with sections 344(f) and 345 of the Companies Act No 61 of 1973. The application is opposed by the respondent. Before I discuss as set out below, I must apologise to the parties for the delay in rendering the judgment and do so without attempting to explain the delay, well aware that any explanation should excuse the delay
- [2] The applicant's affidavit deposed to by David Pimstein, the Chief Executive Officer, describes the applicant as a company which invests in specialised companies with a view to taking equity and funding the companies with the company ZAR X (Pty) Ltd ("ZAR X") being one such company. The applicant and the respondent each owns 24% and 16% shares respectively ZAR X. The other shareholders are Public Investment Corporation Limited, Government Employee Pension Fund, Black and White Innovations and JGW Family Trust. Mr Geoffrey Martin Cook is the respondent's sole member.
- [3] The applicant seeks the liquidation of the respondent on the ground that it is commercially insolvent, having failed to honour a contractual obligation to pay the share purchase price in accordance with a share sale agreement in terms of which the applicant agreed to sell and the respondent agreed to purchase the applicant's shares in ZAR X. The applicant seeks the liquidation of the respondent on the ground that it is unable to pay its debts and as a creditor as contemplated in section 345 of the Companies Act, 1973 and on the ground that liquidation is just and equitable in accordance with section 68(d) of the

Close Corporation Act, read with section 344(h) of the Companies Act, 1973.

[4] The relevant facts as set out in the founding affidavit may be summarised as follows.

[5] On 10 September 2020, the applicant and the respondent, represented by Mr Cook, concluded a share sale agreement in terms of which the applicant sold to the respondent its entire shareholding in ZAR X for the price of three million five hundred rand (R3 500 000) (the agreement was signed by the respondent on 8 August 2020). The sale agreement is subject to the fulfilment of certain suspensive conditions to be fulfilled on or before 22 September 2020 and the agreement states that it shall become effective on "*the first Business Day after the fulfilment of the last of the Conditions*". The suspensive conditions are:

5.1 The remaining shareholders waive any pre-emptive, come along, tag along or similar rights which they may have in regard to the Sale Shares (clause 2.1.1).

5.2 Any required Shareholder and Board approvals necessary to give effect to the sale agreement are obtained (clause 2.1.2).

5.3 Any required regulatory approvals necessary to give effect to the sale agreement are obtained (clause 2.1.3).

[6] Clause 3.1 provides that "*on and with effect from the Effective Date ...*", the applicant sells to the respondent the shares and, in terms of clause 3.2 the risk in and ownership and benefit of the shares will pass to the respondent on the Effective Date.

- [7] Clause 6, under the heading "*Implementation and Delivery*" prescribes the obligations with which each party must comply on the Effective Date. This includes that the applicant shall, against compliance by the respondent with specified obligations, including payment of the purchase price, deliver to the respondent the original share certificate together with a proper instrument of transfer in accordance with section 51(6)(a) of the Companies Act (clause 6.1.2.1.1).
- [8] The respondent was unable to comply with any of the suspensive conditions within the time stipulated in the agreement and, following numerous agreed extensions to the date for fulfilment of the suspensive conditions, by letter dated and signed by the parties on 9 November 2020, the parties agreed that any suspensive conditions which remain unfulfilled on or before 10:00, 30 November 2020 shall be deemed to have been fulfilled, failing which they are waived with effect from that date, and that the respondent indemnifies and holds the applicant harmless against any loss, liability or damages suffered as a result of the deemed fulfilment or waiver of the suspensive conditions. The parties further agreed that to the extent that the share sale agreement may have lapsed, they agreed that they conclude and revive the sale agreement as amended by specified correspondence exchanged between the parties during September 2020 and October 2020. Thus, with this agreement, the "Effective Date" of the sale agreement became the first business day after 30 November 2020, the date when the parties each would discharge their obligations agreed in clause 6.1.
- [9] It came to pass that the conditions were not fulfilled on 30 November 2020 and

that the respondent was unable and failed to pay the sale price on the Effective Date and after numerous extensions of the date for payment of the sale price and, in a letter dated 12 January 2021, the applicant's attorneys served on the respondent a letter of demand in terms of section 69(1)(a) of the Close Corporation Act 69 of 1984, in terms of which the applicant made demand that the respondent pay the purchase price within 21 days of delivery of the letter. This application is the culmination of the respondent's failure to make payment as demanded in the letter.

[10] The applicant seeks the liquidation of the respondent on the basis that the purchase price is a debt that is due and payable to it by the respondent and that the respondent is commercially insolvent.

[11] In its answer affidavit opposing the application, the respondent disputes that it is indebted to the applicant, that the debt is due and payable. It does so on the grounds, *inter alia*, that the share sale agreement never came into effect for non-fulfilment of the suspensive conditions, including absence of ZAR X shareholder and directors' approval and absence of regulatory approval, required in terms of section 67 of the Financial Markets Act, Act No. 19 of 2012. I return to this issue.

[12] The respondent further contends that the sale agreement provides a dispute resolution mechanism, namely mediation and arbitration, and as a result, the court lacks jurisdiction. This is easily disposed on the basis that the relief claimed by the applicant is not one capable of mediation and or arbitration. The applicant does not seek specific performance, namely, that the respondent be

ordered to comply with the contract. Rather, the applicant seeks the respondent's liquidation, a remedy which is not competent in mediation or arbitration. Accordingly, this defence does not avail the respondent and must fail.

[13] The respondent's defence that the debt on which the applicant relies for the relief claimed is not due and payable on the other hand requires different treatment. In its replying affidavit, the applicant admits or at least does not deny that the transfer of shares as contemplated by the parties cannot be given effect to without regulatory approval. Further, it does not dispute that the transfer of share is subject to approval by the directors of ZAR X - it is common cause that both these conditions have not been complied with. The applicant however contends that the suspensive conditions, including approval of the directors of ZAR X and the regulators (clause 6.2), are deemed fulfilled alternatively waived by virtue of the agreement of the parties that I have referred to above. I do not agree.

[14] The requirement that the share sale must be approved by the regulatory authorities is prescribed in section 67 of the Financial Markets Act under the heading "*Limitation on control of and shareholding or other interest in market infrastructure*". Section 67(1) defines who is an "associate" for the purposes of the section. Section 67(3) prescribes that "*a person may not, without prior approval of the Authority, acquire or hold shares or any other interest in a market infrastructure if the acquisition or holding results in that person, directly or indirectly, alone or with an associate, exercising control within the meaning of subsection (2) over the market infrastructure.*" A person controls a market

infrastructure within the meaning of section 67(2) if the person controls a market infrastructure, *inter alia*, that is a company, if that person, alone or with associate, holds shares in the market infrastructure of which the total nominal value represents more than 15% of the nominal value of all the issued shares thereof (s67(2)(a)(i); is directly or indirectly able to exercise or control the exercise of more than 15% of the rights associated with securities of that company (67(2)(a)(ii). Section 67(4) prescribes that “*a person may not, without prior approval of the registrar, acquire shares or any other interest in a market infrastructure in excess of that approved under subsection (3).*” A “market infrastructure” includes an exchange licenced under section 9 (sec 1). It is common cause that ZAR X is a market infrastructure.

[15] The respondent holds more than 15% shares in ZAR X and the applicant concedes, or at least does not dispute, that approval in accordance with section 67 is required. Sections 67(3) and 67(4) are peremptory in their terms and the respondent has no discretion to opt out of its requirements, as the parties purported to do with the agreement that the condition to obtain regulatory approval is deemed fulfilled alternatively is waived. The parties had no such power, and their agreement has no legal effect in the light of the peremptory terms of subsections (3) and (4). It is, for the purposes of this application and the relief claimed by the applicant, irrelevant that the respondent was aware of these hurdles to the completion of the transaction, as the applicant alleges, and either led the applicant down the garden path or has become opportunistic in the face of the application for liquidation.

[16] Without the approval required by section 67, the applicant was never in a

position to give transfer of the shares and the respondent's obligation to pay the purchase price has not arisen.

[17] Section 69(1)(a), Close Corporation Act, provides that a corporation shall be deemed unable to pay its debts if a creditor to whom it is indebted in a sum not less than two hundred rand (R200.00) then due has served on the corporation at its registered office a demand to pay the sum so due and the amount remains, after expiry of twenty one (21) days, unpaid, unsecured or uncompounded for to the satisfaction of the creditor. Accordingly, to succeed in the relief claimed, an applicant must show that the amount owed is due.

[18] In the light of the peremptory provisions of section 67(3) and (4) of the Financial Markets Act, Without the prescribed approval, payment to the applicant is not due, or as the Appellate Division (as it then was) put it in *The Master v IL Back & Co. Ltd and others 1983 (1) SA 983 (A)*, the amount is not immediately claimable by the applicant in the absence of the obligatory approvals or put differently, to be due "*the debt must be one in respect of which the debtor is under an obligation to pay immediately*" (at 1004F-G). The absence of approvals of the shareholders and directors of ZAR X has the same consequence.

[19] If the absence of the obligatory approvals is an impediment to the completion of the transaction, it cannot be that the respondent was under an obligation to pay the purchase price with the commensurate obligation of the applicant to give transfer of the shares. The obligation would only arise when the obligatory approvals are procured or granted. It is only then that the respondent would

become liable to immediately pay the purchase prices. This occasion had not yet arisen at the time of the institution of this application.

[20] On the facts, the applicant has not shown that the respondent is indebted to it and that the debt is due and payable within the meaning of section 69(1)(a) of the Close Corporation Act. The applicant therefore cannot succeed in the relief claimed.

[21] I accordingly make the following Order:

1. The application is dismissed with costs.

MS BALOYI
ACTING JUDGE

Date of Hearing: 9 November 2021

Judgment Delivered: 1 June 2022

APPEARANCES:

For the Plaintiff: Adv JE Smit

Instructed by: Fluxman Inc Attorneys

For the Defendant: Adv K Naidoo

Instructed by: Kapdi Twala Inc t/a Dentons