



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: **725/10**

In the matter between:

GREY GLOBAL GROUP INC

Appellant

and

BONGANI KHUMALO

First Respondent

GREY GROUP SOUTH AFRICA (PTY) LTD

Second Respondent

Neutral citation: *Grey Global v Khumalo* (725/10) [2011] ZASCA161 (28 September 2011)

Coram: Lewis, Maya, Malan and Theron JJA and Petse AJA

Heard: 13 September 2011

Delivered 28 September 2011

Summary: Where option to sell shares is exercised, binding agreement of sale comes into existence and prescribed modes of performance of obligations do not make sale conditional.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Maluleke J sitting as court of first instance):

1 The appeal is upheld with costs including those of two counsel.

2 The order of the high court is set aside and replaced with:

‘The orders sought in prayers 1 and 2 of the notice of motion are granted, with costs.’

JUDGMENT

LEWIS JA (MAYA, MALAN and THERON JJA and PETSE AJA concurring)

[1] In July 2003 Mr B A Khumalo, the first respondent in this appeal, bought 25.1 per cent of the shares in Grey Group South Africa (Pty) Ltd (Grey Group), the second respondent, from Grey Global Group Inc (Grey Global), the appellant, for R8 million. Payment was made by the delivery of a promissory note in the form prescribed by the agreement by Khumalo to Grey Global. A share certificate was delivered to Khumalo as agreed. The sale agreement was made conditional on the conclusion of a shareholders’ agreement. That too was concluded by the parties.

[2] The shareholders’ agreement contained various provisions regulating the positions of the respective parties. I shall refer to them in due course. Central to this appeal is an option given to Khumalo to sell his shares (a put right) to Grey Global after the fifth anniversary of the conclusion of the shareholders’ agreement, at a price to be determined in accordance with a formula. Khumalo exercised the option, but when the price was determined at zero, he asserted that the option was conditional and that he was not obliged to deliver the share certificate to Grey Global. Grey Global applied for an order compelling Khumalo to deliver the share certificate. Maluleke J in the South

Gauteng High Court, Johannesburg held that the option was conditional and dismissed the application but granted leave to appeal to this court.

[3] I shall turn to the core of the appeal shortly. It should be noted first, however, that pursuant to the shareholders' agreement, Khumalo was appointed as a non-executive chairman of Grey Group, and received director's fees as remuneration.

[4] The dispute between the parties centered on the interpretation of clauses 3.2.3, 3.2.5 and 3.5 of the shareholders' agreement. Clause 3 as a whole dealt with the future sales of shares by the parties. So, for example, Grey Global had the right to purchase Khumalo's shares (a call right) on or within 90 days of the fifth anniversary of the agreement (clause 3.2.2). The put right conferred on Khumalo was expressed as follows:

'3.2.3 Khumalo Put Right. On or within 90 days following the fifth anniversary of the Agreement, Khumalo shall have the right, but not the obligation, to require Grey to purchase all, but not less than all, of the Shares then owned by Khumalo ("Put"). Any exercise of the Put shall be made in accordance with the terms and procedures set forth in section 3.5.'

[5] Clause 3.5.1 required that put or call rights should be exercised by written notice. Clause 3.5.2 provided that the 'closing' for the purchase and sale of shares pursuant to the exercise of a put or a call should be within 60 days after the exercise of the put or the call, and clause 3.5.2(i) provided that Khumalo was required to deliver the share certificate with a declaration of transfer signed by him 14 days before the date of delivery.

[6] Clause 3.5.2 is the clause that was found by the high court to make the put right conditional. It provided:

'Closing. The closing for the purchase and sale of Shares (the "Closing") pursuant to an exercise of a Put or Call under Section 3.2 hereof shall be within 60 days after the exercise of the applicable Put or Call.

3.5.3 Deliveries at Closing. At any Closing:

(i) Khumalo shall deliver a certificate or certificates representing the Shares sold hereunder together with declaration for the transfer thereof in blank as to transferee, duly signed by the Seller/registered holders on a date not being more than 14 . . . days before the date of delivery . . . together with his resignation as Non-Executive Chairman of the Company.

(ii) Grey shall deliver the Purchase Price, and, if applicable, the cancelled Promissory Note, to Khumalo.'

[7] The parties agreed also that their agreement would be construed 'under the laws of the Republic of South Africa' and that it could be amended only by written agreement signed by the shareholders.

[8] On 11 September 2008, Khumalo exercised the put right by sending a written notice to Grey Global in accordance with the provisions of clause 3.2.3 of the shareholders' agreement. He undertook in the notice to lodge his share certificate in trust with the company's auditors within 48 hours, as required by the agreement.

[9] On 14 April 2009, the chief financial officer of Grey Global designated Mr A Graham to determine the purchase price in terms of clause 3.4(f) of the agreement. The latter did so. Using the formula agreed, Graham determined that the price was zero and this was communicated to Khumalo on 17 April 2009 by Grey Global's attorneys.

[10] Khumalo contested the result and the application of the formula. (This was not pursued in argument on appeal.) And on 28 April, his attorneys responded with a letter stating that, while Khumalo had 'effectively' exercised his put right, he was not aware of any sale that had come into existence. The basis for this was that Grey Global had not complied with the provisions of clause 3.5: no sale of shares agreement had been drawn up, and there was thus no obligation to sell the shares nor to deliver the share certificate.

[11] The stance that Khumalo took was that the exercise of the put right was conditional on closing taking place in terms of clause 3.5. And that was the finding of the high court when it dismissed the application by Grey Global for the delivery to it of Khumalo's share certificate. The put right, it held, was conditional on the delivery by Khumalo of the share certificate and a share transfer form, in the format prescribed; and

on the payment by Grey Global of the purchase price and, if applicable, the delivery of the cancelled promissory note. In other words, the put right was conditional on closing within 60 days of the exercise of the put right.

[12] The high court found that Grey Global bore the onus of proving the existence of an unconditional purchase and sale contract. Since there was no delivery of the share certificate nor payment of the price, the conditions had not been fulfilled and no sale had been concluded.

[13] Grey Global's contention on appeal was that clause 3.5 did not impose any conditions. Once Khumalo had exercised his right to sell the shares a binding contract of sale came into existence. A put right is no more than an option. Once the right holder exercises the right – accepting the offer to buy – a sale is concluded. That is indeed the usual construction of an option: it is an irrevocable offer which, when accepted, becomes a binding contract. Grey Global would not have been entitled to revoke its offer to buy the shares, just as Khumalo would not have been entitled to revoke his offer to sell his shares – the call right. The principle that an option is binding on the offeror is trite.¹

[14] The construction of the provisions of clause 3.5, dealing with closing, as imposing conditions on the sale, is also incorrect. Again, it is trite that a condition in the true sense is the occurrence (uncertain at the time of entering into the contract) of an event that is not entirely dependent on the will of any of the parties. Clause 3.5 imposed obligations to perform on the exercise of the put or call rights. The seller was required to deliver the share certificate and the buyer to pay the price. Whereas a condition cannot be made to materialize by any of the parties, each has the right to compel performance of an obligation imposed on the other. Thus once the put right was exercised by Khumalo he had the right to demand payment of the price (if it had not amounted to zero) and Grey Global had the right to compel delivery of the share certificate and transfer form.

¹ R H Christie *The Law of Contract in South Africa* 5 ed (2006) at 53-54.

[15] Counsel for Khumalo placed some emphasis on the use of the word 'closing' in clause 3.5, arguing that it required that performance take place before a contract could be concluded. The shareholders' agreement was drafted in America, and there is American authority on the meaning of the term (which is not defined in the agreement). 'Closing', it is said, according to *Black's Law Dictionary*, is the final meeting between the parties to a transaction at which the transaction is consummated – a definition relied on in *Benavidez v Benavidez*.² But the case makes it plain that by consummation is meant performance. *Benavidez* cited also *McMillan Ltd v Warrior Drilling & Eng's Co*³ where the court said that the acceptance of an offer to sell 'real estate' creates a binding obligation, and that closing is the fulfillment of the obligations created.

[16] Counsel for Khumalo did not point to any authority that suggested that a sale is conditional on closing. And since the contract is governed by South African law, there is no doubt, in my view, that clause 3.5 governed the mode of performance of the parties' respective obligations and did not make the sale conditional.

[17] Khumalo raised various other issues in an attempt to persuade the court that the put right had not been exercised. Two were argued on appeal. The first was that on 7 January 2009 Graham had written an email to Khumalo stating that he assumed that Khumalo was retaining his shareholding in Grey Group but that Graham was discussing with others the possibility of their acquiring shares too. This, submitted Khumalo, meant that Grey Global had accepted that the put right had not resulted in a binding sale. But Grey Global's response was that the email was sent at a time when Khumalo and Graham were negotiating about the determination of the price, and that the email was meant to convey only that Khumalo had not yet accepted that the price was zero. No agreement was ever reached in this regard. In any event, once the put right had been exercised, it was not open to either Graham or Khumalo to reverse its effect. This contention thus fails.

[18] Secondly, Khumalo argued that he continued to be the non-executive chair of Grey Group after he had exercised the put right and that that too meant that there was a

²*Benavidez v Benavidez* Court of Appeals of New Mexico (2006) 145 P.3d 117.

³*McMillan Ltd v Warrior Drilling & Eng's Co* 512 So 2d 14, 23 (Ala 1986).

common understanding that there had been no sale in place. Grey Global's response was that since Khumalo had not delivered the share certificate, he retained his shareholding, and with that went his duty to chair the board. He was not asked to resign since Grey Global did not wish to create a dispute in respect of this issue. In my view this stance could not have changed the legal position: a sale had occurred but performance had not taken place and Grey Global was entitled to compel performance – delivery of the share certificate by Khumalo. This argument too must fail.

[19] In the circumstances the appeal must be upheld. It is ordered that:

1 The appeal is upheld with costs including those of two counsel.

2 The order of the high court is set aside and replaced with:

'The orders sought in prayers 1 and 2 of the notice of motion are granted, with costs.'

C H Lewis

Judge of Appeal

