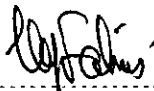


**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO. NO	
(2) OF INTEREST TO OTHER JUDGES (YES/NO). NO	
(3) REVISED. ✓	
23/11/12	
DATE	SIGNATURE

Case Number: 73663/2010

23/11/2012

In the matter between:

RICHARD GERALD BAHRE

1ST APPLICANT

RICHARD GERALD BAHRE N.O.

2ND APPLICANT

SUSANNA FRANCINA BAHRE N.O.

3RD APPLICANT

and

ROYALE ENERGY LTD

1ST RESPONDENT

EYABANTU PEROLEUM (PTY) LTD

2ND RESPONDENT

SANCHIA BAHRE N.O.

3RD RESPONDENT

BAREND JACOBUS STRYDOM N.O.

4TH RESPONDENT

BERTJAN BOLINK N.O.

5TH RESPONDENT

STEPHANUS JAN NOTHNAGEL N.O.

6TH RESPONDENT

MARGARET SUSAN NOTHNAGEL N.O.

7TH RESPONDENT

PATILIZWE CASWELL MDODA N.O.

8TH RESPONDENT

LODEWICUS JACOBUS KRUGER

9TH RESPONDENT

PATILIZWE CASWELL MDODA

10TH RESPONDENT

JUDGMENT

Fabricius J,

1.

In this application the Applicants seek an order that the First Respondent make payment to the Bahre family trust in the amount of R15,400,000.00 within 30 days from the date of an order, that on making payment, the family trust shall transfer all shares it owns to the First Respondent, and that it shall sign all necessary documentation to reflect this transfer, and that in the event of the First Respondent failing to pay this amount, the First Respondent be finally wound-up. A cost order is also sought if the main relief is granted.

2.

A summary of Applicants case follows.: the family trust of which the 2nd and 3rd Applicants are the duly authorised trustees, holds 15.4% shares in the First Respondent. A dispute arose between the First Applicant and the First Respondent which, for present purposes, I classify as a dispute in the context of the Labour Relations Act. The First Applicant referred this dispute to the CCMA, and he alleges that after certain negotiations a settlement agreement was reached. It was alleged that in terms of this agreement the said shareholding would be purchased by the remaining shareholders, or failing them, by the First Respondent at the selling prize to be determined by an independent auditor. The agreement provided that such valuation would be final and binding on the parties, and that no appeal or review would lie against the process followed by the auditor or his finding.

The independent auditor, Mr Harris, valued the said 15.4% shareholding in the amount of R15,400,000.00. This evaluation was never taken on review by the Respondents. The other shareholders did not express any interest to take

up any of the shares, and accordingly the First Respondent was in terms of the said agreement obliged to take up the shareholding, and liable for payment of the said amount which was payable by 25 October 2010.

3.

The Respondents opposed the application on the following grounds: the settlement agreement was void, alternatively unenforceable, for the following reasons:

- 3.1 The shareholders agreement stipulates that no agreement varying, adding to, deleting or cancelling it shall be effective, unless reduced to writing and signed by or on behalf of all the parties. Not all the parties signed the settlement agreement;
- 3.2 There was no compliance with the provisions of the trust deed of the Nothnagel Family Trust empowering the trustees to act on behalf of the trust in order to legally bind such trust;
- 3.3 The articles of association of the First Respondent contain no provision for the acquisition of its own share as required by Section 85(1) of the repealed Companies Act 61 of 1973, alternatively there was no decision taken by a "*substantial majority*" of the shareholders to acquire its own shares as prescribed by the shareholders agreement in respect of a "*specially protected matter*" as envisaged by Clause 10.2 of the shareholders agreement;

- 3.4 The First Respondent alleges that it is not bound by the valuation of the shares by the said Harris as the valuation arrived at by him was irregular, unreasonable and improper;
- 3.5 It would not be just and equitable to liquidate the First Respondent;
- 3.6 There was a alternative to winding-up available i.e. a buy-out of the shares of the Bahre family trust in terms of section 252 of the repealed Companies Act at the price of R3,400,000.00, which price the Respondents contend represents the correct, proper en accurate value of such shares as determined by a certain Prof. Steyn.

4.

Applicants Argument:

The settlement agreement did not vary, add, delete or cancel the shareholders agreement, and the non-variation clause cannot have any effect on the settlement agreement arising out of the dispute between the parties to the shareholders agreement. In this context reliance was placed on ***CHRISTIE, The Law of Contract in South Africa, 6th edition, at pages 464 – 466, Brisley vs Drotsky 2002(4) SA 1(SCA) and Rand Coal Services Ltd vs Rand Gold and Exploring Company Ltd 1998(4) SA 825 (A) at 841E – 842D.*** In this case it was held that a non-variation clause must be interpreted restrictively regarding the subject matter of the agreement.

It was also contended in the replying affidavit that the shareholders agreement contained a tacit term to the effect that should a dispute arise between the parties, and should the dispute be settled by way of a written settlement agreement, the non-variation clause would not be applicable. The founding affidavit is silent on this topic. To support the submission, applicants relied on *Wilkins vs Voges 1994(3) SA 130 (A) at 136 – 137*. It will be convenient to paraphrase the relevant finding of the Appellate Division. A tacit term can be actual or imputed. It is actual, if both parties thought about the matter which is pertinent but did not bother to declare their assent. It is imputed, if they would have assented about such matter if only they have thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. It is clear from the settlement agreement that only the First and Second Applicants were parties thereto, together with the First Respondent.

As I have said, the submission that a tacit term is contained in the shareholders agreement was not debated in the affidavits. In my view a basis for any such terms is not properly laid in a replying affidavit. No such tacit terms appear at all from the shareholders agreement, and no-one would ever remotely have contemplated that an agreement relating to an employment dispute in the future, would have such drastic and intrusive consequences for the shareholders in the context of their agreement. In any event, whether a tacit term can be enforced depends on the interpretation of the document and not on evidence, except on background circumstances. See **KPMG v Securefin Ltd 2009(4) SA 399 SCA at 409 par 39 and 411 par 43**. Applicants also contended that to uphold the non-variation clause under the circumstances would also be contrary to Section 34 of the Constitution, as well as against public policy, insofar as it would amount to a mala fide and fraudulent attempt to avoid a settlement agreement to which all shareholders have agreed. The founding affidavit lays no basis for this contention. Section 34 of the Constitution deals with access to Courts. During argument I was referred to **Nyandeni Local Municipality v Hlazo 2010(4) SA 261 E.C. (Full Bench)**. In that case section 34 was used, together with section 1(c) of the Constitution as the foundation to justify a departure from the principle contained in **SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964(4) SA 790 (A)**. The simple principle is that a non-variation clause which requires a variation in writing, cannot be varied orally. Applicants' point was that in *hoc casu* Respondents defences were unconscionable and, with reference to the now deceased *exceptio doli* (See: **Bank of Lisbon and South Africa Ltd v De Ornelas 1988(3) SA 580 (A)**)

and/or the line of thinking followed in *Nyandeni supra*, I ought to dismiss the defences as being against public policy. In my view the facts in Nyandeni were vastly different. Other policy considerations were considered and applied. In my view that case ought to have been decided on a non-constitutional basis, and with great respect, its reliance on section 34 of the Constitution is too strained on the facts of the case.

It is clear that sound judicial policy requires Courts to decide only that which is demanded by the facts of the case and is necessary for its proper disposal.

See: ***ALBUTT v CENTRE FOR THE STUDY OF VIOLENCE AND RETRIBUTION 2010(3) SA 293 (CC) AT 321 par 82.***

Contextually speaking, the point where we are in our law is the following- one can regulate ones own affairs, contractually or otherwise. That is part of freedom, part of dignity.

See: ***Barkhuizen vs Napier 2007(5) SA 323 CC par 57,58;***

Bredenkamp v Standard Bank of South Africa Ltd 2010(4) SA 468 SCA at 50.

Absent any incapacity, undue pressure and fraud (for example), a Court will not find that misty infinite considerations allegedly relating to ever-changing public policy concerns, will make (a voluntary) agreement unenforceable. If there is to be a change it needs to be done extremely circumspectly for very sound objective reasons, and only after the relevant cause of action or defence has been properly pleaded. After all, the real public interest is very concerned with sanctity of agreements.

See for instance the reasoning of Brand JA (with which I agree), In **South African Forestry Co. Ltd v York Timbers Ltd 2005(3) SA 323 (SCA)** at par 27.

7.

Nyandeni does not assist the Applicants. The effect of their prayers and arguments is that I must also incisively intrude into the articles of association, and the shareholders agreement as well, besides ignoring the relevant provisions of the Companies Act. This I decline to do. The articles of association of First Respondent were annexed to the founding affidavit. They do not provide for the purchase by it of its own shares. At common law such an acquisition was illegal and therefore void.

See: ***The Unisec Group Ltd and Others v Sage Holdings Ltd 1986(3) 259 T at 264 H-265B. (Full Bench).***

The Companies Act of 1973 (now repealed) made provisions for such an acquisition in section 85(1), stipulating strict prerequisites however.

It must be common cause that none of those prerequisites have been met herein.

The result is that any such agreement is illegal and unenforceable.

See: ***Capitex Bank Ltd v Qorus Holdings Ltd and Others 2003(3) SA 302 W at 308-309.***

8.

The relevant shareholders agreement was also annexed to the founding affidavit. It is necessary to refer to certain of its provisions.

- 8.1 A "*Specially Protected Matter*" means any of the matters set out in annexure 1.2.37 thereto. In terms of par 7 "*the purchase by the Company of any of its Shares in terms of section 85 of the Act and/or the distribution by the Company of any assets or amount to a Shareholder in terms of section 90 of the Act, other than in terms of the Company's dividend policy or as otherwise identified in the approved business plan or the annual budget*".
- 8.2 Paragraph 10 deals with "*Approvals Framework And Specially Protected Matters*". Clause 10.2 reads as follows: "*Notwithstanding anything to the contrary contained in the Approvals Framework, in order to be of any force or effect, resolutions of the Company and/or the Shareholders relating to Specially Protected Matters must be approved by a Substantial Majority of the Shareholders. Notwithstanding anything to the contrary contained herein or in law, a resolution in respect of any Specially Protected Matter shall not- constitute a valid decision of the Company and/or the Shareholders, as the case may be, unless or until that resolution has been approved as contemplated in this clause 10.2.*"
- 8.3 Clause 22.2 and 22.3 are also relevant. Clause 22.2 reads "*Save as provided in this agreement no equity may, without the prior written signed consent of all the shareholders, be transferred pledged or otherwise encumbered*". In terms of clause 22.3 the

Board may not register any transfer of shares unless such transfer is pursuant to a disposal which is permitted in terms of the agreement.

It should be obvious does all the mentioned prerequisites do not exist, and, should I grant prayer 1, I would intrusively invade the provisions of an agreement relating to the rights and duties of shareholders who were not even party to the settlement agreement.

- 8.4 Clause 26.3 is headed "*entire contract*" and reads as follows: "*this Agreement contains all the provisions agreed on by the Parties with regard to the subject matter of the Agreement and the Parties waive the right to rely on any alleged provision not contained in the Agreement.*" Clause 26.5 deals with variation, cancellation, suspension and waiver and reads as follows: "*No contract varying, adding to, deleting from or cancelling this Agreement, and no suspension or waiver of any right under this Agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties.*" As I have said, the Respondents contend that the settlement agreement is void, alternatively unenforceable, insofar as it constitutes a variation or amendment of the existing shareholders agreement, while the settlement agreement does not comply with the prescripts of the shareholders agreement for amendment thereof. It was contended that one shareholder Eyabantu did not sign the settlement agreement at all; another shareholder, the Nothnagel Trust did not properly sign the

agreement insofar as only one of its two trustees signed, while there was no compliance with the legal requirements for the signatory to represent the said Trust, as stipulated in the trust deed and required by law, and further that a settlement agreement in any event purported to be an agreement between the first two Applicants and the First Respondent only. In this context reliance was placed on the dictum appearing in ***Thorpe and Others v Trittenwein and Another 2007(2) SA 172 (SCA) at par 14 and 15***. On the facts this is so.

9.

Respondents also contended that the purchase of its own shares by First Respondent is in conflict with the provisions of Section 85(1) of the repealed Companies Act, and is therefore invalid, not binding on the First Respondent and unenforceable.

Section 85(1) of the repealed Companies Act reads as follows: “(1) *subject to the provisions of the section and any other applicable law, a company may by special resolution of the company, if authorised thereto by its articles, approve the acquisition of shares issued by the company.*”

The Articles of Association of First Respondent does not provide for the purchase by it of its own shares. Neither the directors, nor the shareholders could therefore have legally bound the First Respondent to acquire its own shares. In order to do so, the Articles of Association of First Respondent needed to be amended and/or augmented by special resolution in compliance with section 87 and 88 of the said Companies Act. Such a special resolution which has its own requirements also, was not taken. It was furthermore

contended that the acquisition of its own shares by the First Respondent is specially protected matter as defined in the Shareholders Agreement, and that a substantial majority, again as defined in the Shareholders Agreement, was required to approve such an acquisition. No such substantial majority was called for/or obtained. In the context of the mentioned Clause 10.2 of the agreement, it was contended that First Respondent had no approved dividend facility/plan.

10.

The result of these contentions which, I may add, can factually not be disputed, is that for the settlement agreement to be valid and binding, the shareholders agreement clearly places an obligation on the First Respondent to only acquire its own shares if such acquisition was approved by 75% of the First Respondent shareholders. Since the authorised representatives of Eyabantu did not sign the settlement agreement, there was no substantial majority approval. The settlement agreement also indicates that it is between the first two Applicants and First Respondent. It must of course also be seen in the context of the dispute that was between these parties at the time, which was a labour dispute, if I can refer to it as such. This is clear from Clause 11.1 of the agreement which reads as follows: *"this agreement settles any and all disputes between the parties, whether it be as a result of delict, contract or otherwise. It is specifically recorded that the unfair dismissal dispute referred by Mr Bahre to the CCMA would be viewed as settled once the provisions of this agreement relating to the sale of shares are complied with."* I am therefore of the view that the Applicants reliance on the decision in

Rand Coal Services *supra* is misplaced in this specific context, and the mentioned dispute between Applicant and First Respondent.

11.

Applicants, in answer to the Respondents defence, purport to make out a case based on estoppel. It was alleged that all relevant parties to the settlement agreement assured Applicants representatives that they were in agreement therewith, and that they would be bound thereby. Neither *estoppel*, *quasi-mutual assent* or the Turquand Rule can assist the Applicants herein. The majority of shareholders were not party to the agreement. They made no representation. The Applicants all have intimate knowledge of internal functioning of the Company, and are not *bona fide* outsiders who relied on express or implied representations.

12.

In my view the Applicants have not discharged the onus of showing that the shareholders agreement contains the tacit terms contended for. In my view it could not have been an impugned term that if a labour dispute arose between certain parties, and was settled, such could lawfully amount to a variation of the shareholders agreement without further ado. Accordingly, Applicants reliance on the authorities that I was referred to in this context is totally misplaced in my opinion.

13.

The result is that no case has been made out by the Applicant for the main relief sought in this Application.

14.

As far as the prayer for winding up is concerned there is again a factual dispute on the affidavits, which I must decide according to the mentioned principles announced in *Plascon-Evans Paints Ltd v van Riebeek Paints (Pty) Ltd 1984(3) SA 623 AD at 634*. In my view no proper case has been made out for the winding up on the First Respondent on the basis that it is just and equitable, and in any event, if I had to exercise a discretion in this context on the facts contained in the affidavits before me, which I do, I exercise such discretion in favour of the Respondents on the basis that no justifiable case has been made out in the founding affidavit for such relief. Having regard to the conflicting versions of the parties in this context, I must rely on Respondents version. In any event Respondent has placed sufficient documentation before me to convince me that there is no basis for such a winding-up.

15.

As far as the provisions of s252 of the Companies Act (as repealed) are concerned I do not, as I have said, intend making an order which would alter the shareholders agreement, and ignore the mentioned statutory provisions. Applicants have other remedies.

16.

In the result the application is dismissed with costs including the cost of two counsel, including costs previously reserved.



JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH
COURT

Date of hearing: 6 November 2012

Date of Judgment: 23 November 2012

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