



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

CASE NO: 58132/2007

NOT REPORTABLE

DATE: 30/4/2009

In the matter between:

TSENELO MEDIA SOLUTIONS (PROPRIETY) LIMITED Applicant

And

BRAND IQ (PROPRIETARY) LIMITED First Respondent

MORNING TIDE INVESTMENTS 77 (PTY) LTD Second Respondent

JUDGMENT

LEDWABA, J

INTRODUCTION

[1] Initially in December 2007 the applicant brought this application as an urgent application for the liquidation of the first respondent on the basis that it is just and equitable as contemplated by **section 344(h) of the Company Act 61 of 1973**, (The Act), especially, because there was a deadlock. The application was set down for hearing on 12th December 2008.

- [2] The respondents opposed the application, filed answering affidavits and a counter-application. In the counter-application the first respondent sought for an order in the following terms:

“2. *In the event of the Applicant proceeding with the main application after the filing of the Respondent’s Answering and Founding Affidavit, and in the event of the Applicant failing to transfer all shareholding in the First Respondent to the Second Respondent-*

a. *an order directing the Applicant to sign all documents and do all things necessary to transfer its shareholding in the first Respondent to the second Respondent; and*

b. *an order directing that, should the Applicant fail to comply with the provisions of paragraph 2a. hereof within 5 days after the granting of the order, that the sheriff for the district of centurion be authorised and directed to sign all documents and do all things necessary to transfer the Applicant’s shareholding in the first Respondent to the Second Respondent, in the place and stead of the Applicant.”*

- [3] On 12th December 2008, by agreement, proceedings were postponed *sine die* and costs reserved. Applicant’s replying affidavit and answering affidavit to the counter application were filed on the 2nd April 2008.

Applicant filed a supplementary affidavit on the 7th October 2008 and respondents filed a replying affidavit on 22nd October 2008.

- [4] When the matter was argued before me, in early December 2008, applicant's counsel, Mr. Korf, said the applicant is no more pursuing the liquidation order prayed for in the notice of motion. However, the applicant is now seeking relief in a form of an order in terms of **section 252 of the Act** on the a factual basis set out in the founding papers read together with the replying affidavit and the supplementary affidavit.
- [5] The order now sought by the applicant is along the lines set out in the draft order that was handed to the court which reads as follows:
- "1. That the Applicant be ordered to sell to the Second Respondent its 40% shares in the first Respondent against payment of the fair and reasonable net market value of such shares.*
 - 2. That the purchase price in respect of the shares shall be determined by any suitably qualified valuer to be appointed by the President/Chairperson of the South African Institute of chartered Accountants (SAICA) (hereinafter referred to as the "valuer"), which appointment is to be made by no later than 15 January 2009.*

3. *That the valuer shall determine the fair and reasonable value of the Applicant's 40% shares.*
4. *That the First Respondent be ordered to furnish to such valuer any and all documents, financial statements, source documents that such valuer deems necessary within his own absolute discretion, within 7 days from being requested therefore.*
5. *That the determination of the purchase price is to be made within 30 days from the date of delivery of all documents in terms of prayer 4 hereabove.*
6. *That the parties shall contribute 50/50 towards the costs of such valuation, which is to be paid within 7 days from demand and before the determination is communicated to either party.*
7. *That the purchase price so determined shall be paid by the Second Respondent to the Applicant within 7 days of communication of such determination.*
8. *That the applicant shall sign and hand to second respondent any and all documents necessary to transfer the shares from applicant to second respondent.*
9. *..."*

RELEVANT FACTUAL BACKGROUND

- [6] The first respondent was created in 2006 as a vehicle for the applicant and the second respondent as shareholders to conduct a 'black economic empowering' outdoor advertising company.
- [7] The second respondent held 60% of the allotted shares of the first respondent, and the applicants held 40% of such shares.
- [8] In terms of the shareholders agreement, the second respondent appointed two directors to the first respondent's board of directors, and the applicant appointed one director.
- [9] In about September 2007 conflicts between shareholders started.
- [10] Mr. Wagenaar SC informed the court that since the urgent application was instituted the applicant has not been part of the operation of the business of the first respondent and the director appointed by the applicant on the first respondent's board of directors has not attended any meeting of the directors.
- [11] Both counsel argued lucidly and referred me to some letters forming part of the record to convince me as to which party caused the conflict. However, having regard to the fact that the applicant now seeks a new relief, viz a viz, the first respondent's prayer in the counterclaim, it is, in my view, not

necessary to make a finding on the issue. I therefore deem it not necessary to delve into who caused the dispute.

- [12] On careful analysis of the matter as now stands it is clear that the liquidating of the first respondent is not sought. Of importance the first respondent, in particular alleged that the applicant's 40% shareholders has been properly sold in terms of the shareholders agreement (the agreement) whilst on the contrary, applicant disputes that the alleged sale complied with in terms of the agreement. Hence, in the draft order an order that the applicant be ordered to sell its shareholdings is sought. Applicant's counsel described first respondent alleged sale as a 'forced buy out'. However, applicant's counsel submitted that applicant had no problem with the alleged sale but it definitely has a problem with the calculation of the purchase price as calculated by the respondents. Applicant wanted an opportunity to compare first respondents financial records and do their own calculations. See: page 17 of the recording of the address by counsel.

THE AGREEMENT

- [13] I will hereunder quote and refer to certain clauses for the agreement to the extent necessary for the conclusion that will be reached. Clauses 5.1-5.3 reads as follows:

"5.1 As from the moment a person becomes a Shareholder, the Company acquires and retains a lien over the share holding of such Shareholder in the Company for all monies owing by such Shareholder to

the Company, in respect of any debt, obligation or undertaking to the Company and irrespective of whether the time for payment, performance or execution has arrived or not. The lien referred to in this clause, operates also as a lien over any payment payable by the Company to a Shareholder (other than in its capacity as creditor or as employee or officer of the Company. The lien will be secondary to the obligations and the conditions as agreed upon between the parties, regarding the right which a party will obtain on the shares of the other party, if the latter party is not in a position to contribute towards the capital requirements of the Company.

5.2 The company may sell, in such manner as it thinks fit, any shares over which the Company has a lien, but the shares shall not be sold unless the sum in respect of which the lien exists, shall then be payable or until the expiration of 30 (THIRTY) days after a Notice in writing has been given to the Shareholder holding such shares, stating the intention to sell the shares if payment is not made of the amount then payable before the expiration of the period of 30 (THIRTY) days.

5.3 The nett proceeds of the sale of the shares after deducting reasonable expenses, shall be applied in payments of the amount payable. The balance shall remain subject to a lien in respect of any further sums

owing but not yet payable and after payment of such sums, the balance then remaining shall be paid to the entity registered as a Shareholder at the date of the sale, or if not further sums remain owing, the balance shall be paid immediately. The purchaser of the shares shall be registered in respect thereof, but he shall not be under any duty to attend to the application of the purchase consideration, nor shall his right to the shares be affected by any irregularity or invalidity in the proceedings relating to the sale."

[14] I am mindful of the fact that the applicant is no more challenging the sale. The nub of applicant's case is, in my view, how the shares were evaluated. The respondents attached a report on the valuation of the business prepared by auditors wherein it has been explained in detail how the value of R 5920 000 being the 100% shareholders interest in Brand IQ (Pty) Limited (first respondent) on 25th January 2008 was calculated.

[15] The applicant has not criticised the report and advanced reasons why the valuation should not be accepted. Since the applicant, as said earlier, has no problems with the sale, I see no reason why the uncontested valuation by the auditors should be disregarded and a new valuation is to be calculated.

- [16] Mr. Wagenaar submitted that the applicant did not dispute the factual figures financial statements, method of evaluation and the objectivity of Mr Van Tonder, the auditor.
- [17] Even though applicant conceded that it has no problem with the sale of the shares, it was argued on applicant's behalf that there were some irregularities with the sale having regard to the agreement. In clause 5.2 of the agreement it is stated that the 'company may sell, in such a manner as it thinks fit.'
- [18] On the facts in the papers I cannot find any justification to grant the order sought by the applicant in terms of **section 252 of the Act.**
- [19] In my view, the respondents have proved on the balance of probabilities that the counter application should be granted.
- [20] **I therefore, make the following order:**
- (i) Applicant's application is dismissed.**
 - (ii) Prayers 2(a) and 2(b) of the counter application are granted.**
 - (iii) Applicant is ordered to pay respondents costs in respect of applicant's application and respondents counter application, including the costs which were reserved on 12th December 2008.**

A. P. LEDWABA
JUDGE OF THE HIGH COURT

Date of hearing: 8 December 2008

Counsel for Applicants: Advocate C. A. C Korf

Instructed by: Werksmans Incorporated

%: Matloga Mabuela Inc

Counsel for Respondent: Advocate S. D. Wagener SC

Instructed by: Coetzer & Partners