

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2024-015687**

- | | |
|-----|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED: YES/ NO |

11 March 2025

DATE

JRG

SIGNATURE

In the matter between:

KENNETH KEVIN CRITCHFIELD

APPLICANT

And

ORANGE PALLET (PTY) LTD

1ST RESPONDENT

CYRIL WHITBREAD ATKINSON

2ND RESPONDENT

JOHN RICHARD GIBB

3RD RESPONDENT

THE COMPANIES AND INTELLECTUAL

4TH RESPONDENT

PROPERTY COMMISSION

JUDGMENT

Johann Gautschi AJ

- [1] In this application the Applicant seeks orders to set aside the transfer and registration of shares in the Third Respondent on the basis that those shares had been registered in the name of the Applicant and that the Second and Third Respondents had fraudulently caused those shares to be transferred and registered the names of the Second and Third Respondents.
- [2] The relief sought by the Applicant to achieve the foregoing includes orders setting aside a resolution dated 25 August 2009 signed by the Second and Third Respondents as directors of the First Respondent as well as orders declaring and directing the setting aside of the two CM 42 securities transfer forms which were lodged to effect registration of the shares respectively into the names of the Second and Third Respondents.
- [3] The application is opposed by the First Second and Third Respondents (hereinafter also referred to as the Respondents).
- [4] At first blush it is indeed startling that the Applicant chose to institute these motion Court proceedings despite anticipating that the Second and Third Respondents would raise disputes of fact in response to the Applicant's allegations of fraudulent conduct on their part.
- [5] The Applicant submits that it was justified proceed by way of notice of motion on the basis that when applying a "*robust common sense approach*", the Respondents' version falls to be rejected on the papers because Respondents' it is so "*far-fetched, wholly fanciful and untenable*" that it does not constitute real, genuine and bona fide dispute.
- [6] During oral argument I expressed my *prima facie* reservations to counsel for the Applicant as to whether it would be appropriate to grant the relief sought having regard to the issues raised by the Respondents. That resulted in counsel for the Applicant submitting that on the facts of the present case it would be appropriate to refer this matter to trial and reserve the costs of this application to be determined by the trial court.

- [7] Having carefully considered the heads of argument and oral submissions of the parties, I am persuaded that on the facts of the present case and on the authorities referred to by counsel for the Applicant,¹ this is indeed a matter which should be referred to trial and to preserve the costs of this application for determination by the trial court. I shall briefly explain my reasoning in coming to this conclusion.
- [8] The following facts are not in dispute.
- [9] In November 2006 the Applicant was appointed as a director of the First Respondent and was allocated 138 shares in the First Respondent which were registered in his name as also reflected in a share certificate dated 27 November 2006.
- [10] By letter dated 25 August 2009 the Applicant formally and in writing resigned as a director of the First Respondent.
- [11] There exists no document recording the Applicant having relinquished his shares in the First Respondent.
- [12] There is a resolution of the First Respondent dated 27 November 2010 signed by the Applicant and the Second and Third Respondents recording that *“We, the undersigned, being members representing the total issued share capital of the company hereby consent to the appointment of Octagon as auditors of the company – –”*.
- [13] Contrary to that document which recognises the Applicant as a shareholder of the First Respondent as at 27 November 2010, the Respondents’ case is that on 25 August 2009 the Applicant had already relinquished his shares in favour of the Second and Third Respondents. The Respondent’s heads of argument submit that because it was so *“orally agreed and understood”* on 25 August 2009, the Second and Third Respondent *“immediately became the beneficial owners of the shares”*. This must be read with the following statement in the Respondents’ attorney’s letter dated 24 January 2024: *“Your client walked away*

¹ Pressma Services (Pty) Ltd v Schuttler and another 1990 (2) SA 411 (C); Van Aswegen And Another v Drotskie nd another 1964 (2) SA 391 (O)

from the company when he resigned and the shares were transferred pursuant to the agreement between the parties. This is furthermore borne out by the fact that your client had no contact with or involvement with the business affairs of the company until 23 August 2023 (approximately 14 years after your client severed ties with the company) when your client's asset manager Mr Dean West enquired as to the status of your client's alleged shareholding."

- [14] Also contrary to the aforementioned 27 November 10 resolution, there is a document headed *"Resolution passed by the directors of the company at Johannesburg on the 25th day of August 2009"* signed by the Second and Third Respondents which states: *"Resolved that the following share transfers be and are hereby approved and confirmed – – 3 Shares registered in the name of Kenneth Kevin Critchfield turn into the name of John Richard Gibb"* and *"135 Shares registered in the name of Kenneth Kevin Critchfield to and into the name of Cyril Whitbread Atkinson"*.
- [15] Finally, the two CM 42 forms (securities transfer form) relating to the aforementioned 25 August 2009 transfer of the Applicant's shares to the Second and Third respondents are undated do not contain the signature of the Applicant.
- [16] In my view the aforementioned undisputed facts justified the Applicant's decision to proceed by way of motion proceedings in anticipation that the Respondents would not be able to raise a genuine and bona fide dispute of fact.
- [17] However, despite that, having regard to the contents of the affidavits filed by the parties, I am of the view this is not a matter in which it would be appropriate to grant the relief sought by dismissing the Respondents' version on paper. In arriving at this conclusion I specifically refrain from making any comments on the probability or otherwise of the Respondents' version as this should be left to the trial court.

ORDER:

- [1] This matter is ordered to be referred to trial, with the notice of motion to stand as a simple summons.
- [2] The Applicant is directed to file a declaration within 20 days after the date of this judgment.
- [3] The costs of this application are to stand over for determination by the Trial Court.

Johann Gautschi AJ

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicants: ADV S P PINCUS SC
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For the First,Second,and Third Respondents: ADV H B MARAIS SC
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