THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: **23** November 2023

Status: Immediate

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Armitage NO v Valencia Holdings 13 (Pty) Ltd and Others (638/2022) [2023] ZASCA 157 (23 November 2023)

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs including costs of two counsel. The appeal emanated from the full court of the Gauteng Division of the High Court, Johannesburg (the full court) with special leave being granted by the SCA.

The appellant, Mrs Michelle Armitage NO, in her capacity as the executrix of the estate of her late husband, Mr Armitage (the deceased), instituted an action against the respondents in the Gauteng Division of the High Court, Johannesburg (the high court) claiming payment of R6 768 900, being the proceeds of a life insurance policy paid to the respondents. She alleged, amongst the numerous grounds for the action, that the respondents engaged in oppressive and prejudicial conduct envisaged in s 163 of the Companies Act 71 of 2008 (the Act). The deceased was a minority shareholder in the first respondent, Valencia Holdings 13 (Pty) Ltd (Valencia). The second to fifth respondents (the respondents) were co-shareholders in Valencia together with the deceased.

In terms of Clause 15.1 of the shareholders' agreement, the shareholders agreed that the value in Valencia lay in their collective skills and expertise. They decided to take out and maintain a 'buy and sell' indemnity insurance on each other's lives in the event of the death or disability of one of them. The insurance policy was issued in May 2012. From 29 February 2012 to 29 February 2016, the deceased and the respondents devised a mechanism to fund their personal financial needs by way of 'interest free shareholder loans' (the loans). They styled the loans as 'advance payments on future dividends'. The scheme operated in this manner. When one of the shareholders required funds for personal expenses, these would be sourced from one of Valencia's subsidiaries. Since Valencia did not possess a bank account, payments would then be made by the subsidiary to the shareholder or to a third party on behalf of the requesting shareholder.

At each financial year end, the subsidiary from which the funds were drawn, would record the amounts advanced against the name of the requesting shareholder, and furnish a single journal entry of all the shareholder loans advanced to Valencia. The amounts paid on behalf of each shareholder would be recorded against that shareholder's loan account as an 'interest free shareholder loan'. As and when Valencia declared a dividend, it would first amortise the loans against the dividend due to the relevant shareholder. To the extent that a balance stood in credit after settling the loan, it would be paid to that shareholder.

The insurance policy taken out on the life of the deceased was paid out to the surviving shareholders in an aggregate sum of R6 768 900. In April 2014, the respondents tabled an offer to the appellant to acquire the deceased's shares. Negotiations faltered and the respondents withdrew the offer. Three years after the death of the deceased, in March 2017, following the institution of the action in January 2017, the respondents made another offer 'without prejudice' to purchase the deceased's shares for R6 768 900. They offered to pay the purchase price over 60 months with interest at the rate of 10.25% from the date of the signature of the settlement agreement. The appellant declined the offer, and alleged that the respondents enjoyed a substantial benefit by way of 'huge interest free loans made by Valencia' to her exclusion. She made a counter-offer which was not accepted.

In the high court, the appellant, in claim 1, alleged that there was an oral agreement between the respondents and the deceased that the proceeds of the insurance policy would be paid to the survivor or executor of the estate of the first dying shareholder. In the alternative, she claimed that the death of the deceased was a 'trigger event' in terms of the shareholders' agreement. In Claim 2, which she pleaded in the alternative to Claim 1, that the respondents acted in concert and engaged in 'oppressive and/or unfairly prejudicial' conduct under s 163(1) and (2) of the Act in disregard of her interests. She attacked the advance of the loans to the respondents on the grounds that they were prohibited financial assistance to the directors, made in breach of ss 45(3)*(a)* and *(b)* of the Act. Lastly, the appellant sought an order declaring the second to fifth respondents, delinquent directors and placing them under probation in terms of s 162 of the Act (the delinquency claim).

The high court dismissed the appellant's claims based on: (a) the oral agreement; (b) the breach of s 45 of the Act; and (c) the delinquency claim however, it found that there was unfair and oppressive conduct ordered the respondents to pay a sum of R6 768 900 in terms of s 163(2)*(j)* of the Act, in proportion to the proceeds received when they realised the insurance. Upon challenging this order on appeal to the full court, the appellant was also granted leave to cross-appeal against the refusal to declare the respondents as delinquent directors. The full court reversed the decision of the high court and found that the conduct complained of did not entitle the appellant to relief in terms s 163 of the Act. It also dismissed her reliance on s 45. The full court further dismissed the cross-appeal to declare the respondents, delinquent directors. Dissatisfied with the outcome, the appellant turned to the SCA.

The issue before the SCA was whether the oppressive or unfairly prejudicial conduct had been established by the appellant.

In coming to a conclusion, the SCA found that the deceased consented to the loans. It held that there was no evidence of a diminution of benefits to the estate after the deceased died. The SCA reasoned that in the present appeal, the rights and dominium in the shares remained vested in the deceased estate. The appellant's role was to administer the deceased estate in accordance with the deceased's last will and testament. The provisions of the Memorandum of Association, read with the shareholders' agreements, bound the appellant in relation to the management of the deceased's assets in Valencia. The proceeds of the indemnity insurance were not equal to the value of the shares since the value had not been determined.

The SCA held further that, the conduct of the minority is relevant when considering relief in terms of s 163. Viewed objectively, the appellant's allegations do not withstand the scrutiny required for relief under s 163 of the Act. The fact that there may be difficulties with the valuation of the shares compounded by the effluxion of time, was not a basis to grant the relief sought.

In the result, the SCA held that the requirements for relief under s 163 were not established and accordingly dismissed the appeal with costs including costs of two counsel.

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