



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Watson NO v Ngonyama and Another (453/2020) [2021] ZASCA 74 (9 June 2021)

Today, the Supreme Court of Appeal (SCA) upheld an appeal brought by Mr Jared Michael Watson NO, in his capacity as the executor of the estate of the late Mr Gavin Watson (the executor), against the decision of the Gauteng Division of the High Court, Johannesburg (the high court). The appeal was upheld with costs, including the costs of two counsel. The decision of the high court was thereby set aside.

The case concerned an application in the high court by Mr Lulama Ngonyama (Ngonyama) and Thunder Cats Investments 92 (Pty) Ltd (Thunder Cats), the first and second respondents, respectively, for the restoration of certain shares in a company called Ntsimbintle Mining (Pty) Ltd (Ntsimbintle), which was successful. The respondents in the high court were Mr Gavin Watson (Watson) and Bosasa Youth Development Centres (Pty) Ltd (Bosasa Youth). Watson passed away on 24 August 2019, after the high court's order and before the high court granted his application for leave to appeal. He was represented in the appeal by the executor of his estate. In the high court, Ngonyama and Thunder Cats withdrew their case against Bosasa Youth. Mr Sabelo Macingwane's (Macingwane) name featured in the case, though he did not participate in the proceedings in the high court or in the appeal. A belated attempt by him to intervene in the appeal was advisedly aborted. Macingwane had instituted action in the high court, in which he sought essentially the same relief as that sought by the respondents in this appeal. Those proceedings are pending. The case proves, once more, how very lucrative for some, BBBEE transactions can be

The facts of the matter were as follows. Ngonyama, Macingwane and Watson concluded an agreement, in terms of which they would each take up an equal (33.3 percent) shareholding in an investment company to be formed, which would, in turn, take up shares in a mining company, which Mr Saki Macozoma, a prominent and influential businessman, intended to establish. The envisaged investment company, Quantum Leap Investments 715 (Pty) Ltd, was incorporated in February 2003. The name of that company was later changed to Nkonjane Economic Prospecting and Investment (Pty) Ltd (Nkonjane). The purpose behind the incorporation of Nkonjane was to participate in an opportunity that arose in relation to manganese mining. The mining company through which that objective was to be achieved, and which later came into being, was Ntsimbintle Mining (Pty) Ltd.

Additionally, Ngonyama, Macingwane and Watson had initially agreed that, in order to meet Broad-based Black Economic Empowerment (BBBEE) objectives, a portion of their equity in Nkonjane would be transferred, in equal shares, to historically disadvantaged entities, via two empowerment companies which they intended to establish. Later it was agreed that the company through which BBBEE objectives were to be achieved, at the instance of Watson, but with which the other two were happy to go along with, was Bosasa Youth. It was agreed that Bosasa Youth would hold 25 percent of Nkonjane.

During 2003, the opportunity to benefit from manganese mining materialised and Nkonjane acquired its shareholding in Ntsimbintle. During 2004, Watson transferred his shares in Nkonjane, which he held through a nominee company, to Bosasa Operations (Pty) Ltd, which later became known as African Global Operations (Pty) Ltd (Operations). In 2007, there was a sale of some of the shareholding in Ntsimbintle to a Chinese investor and each of the shareholders, including Nkonjane, contributed a pro rata share of their shareholding to facilitate the sale. After the sale was implemented, Nkonjane held 2200 shares in Ntsimbintle, which translated into a 20.04 percent shareholding in that company. Bosasa Youth's 25 percent shareholding in Nkonjane meant that it indirectly held 5.1 percent of the shares in Ntsimbintle. Since one-third of Bosasa Youth's 25 percent shareholding in Nkonjane (ie 8.33 percent) had been donated to it by Ngonyama, the latter's donation equated indirectly to 1.7 percent of the shares in Ntsimbintle.

The relationship between Watson, Macingwane and Ngonyama deteriorated and eventually broke down completely. Mr Macozoma, through an investment company in which he held an interest, sought to buy out the shares held in Ntsimbintle by the then constituent shareholders of Nkonjane. In order to facilitate the sale of shares to Macozoma's company, and after the relationship between the three protagonists had broken down, Bosasa Youth and Operations launched proceedings for the winding-up of Nkonjane. The Gauteng Division of the High Court, Johannesburg granted a liquidation order on 10 August 2012, which was upheld by the SCA on 26 November 2013. During the course of the winding-up, it was agreed that each Nkonjane shareholder would buy from the liquidator its pro rata portion of Nkonjane's shares in Ntsimbintle so that they would thereafter hold their shares directly in Ntsimbintle. At the time of liquidation, Nkonjane still held 20.4 percent of the shares in Ntsimbintle. The envisaged substitution was implemented in October 2016. At that time, according to Ngonyama, he and Macingwane were firmly under the impression that the 'beneficial shareholders' in Bosasa Youth had BBBEE credentials. At the time the litigation culminating in this appeal was launched, Ngonyama's investment vehicle, Thunder Cats, held 5.1 percent of the shares in Ntsimbintle; Turquoise Moon Trading 8 (Pty) Ltd (Turquoise Moon), Macingwane's investment vehicle, held 5.1 percent in Ntsimbintle; Bosasa Youth held 5.1 percent; and Operations, held 5.1 percent on behalf of Watson.

Ngonyama alleged that it was only in September 2017 that he and Macingwane learnt for the first time that at no relevant time had there been BBBEE shareholders in Bosasa Youth and that Bosasa Youth was a wholly owned subsidiary of Operations, which itself was wholly owned by Bosasa Empowerment and Management Services (Pty) Ltd, later renamed African Global Holdings (Pty) Ltd (Holdings), the holding company of the group of companies formerly known as the Bosasa Group. Ngonyama alleged further that the donation of the shares by him and Macingwane was premised on ensuring that historically disadvantaged individuals would benefit from an investment opportunity and would be entitled to lay claim to and enjoy the benefits thereof, including the receipt of dividends. He claimed that he and Macingwane were induced to make the donation on the strength of Watson's assurances concerning BBBEE

shareholders and, had they known that in reality he intended to benefit himself and his family, they would not have made the donation. The donations, so they claimed, were the very basis for Bosasa Youth's initial indirect, and now direct, 5.1 percent shareholding in Ntsimbintle.

Accordingly, Ngonyama considered himself entitled to cancel the donation and demand the return of the shares he had donated. He and Thunder Cats caused a letter to be served on Watson and Bosasa Youth cancelling the donation and calling on Watson and Bosasa Youth to take all the necessary steps to restore the shares to them. The demand was not met. This resulted in the approach to court by Ngonyama, seeking against both Bosasa Youth and Watson the restoration of his donation to Bosasa Youth to his investment vehicle, Thunder Cats, together with all dividends earned, and interest thereon. Macingwane did not join in the application. Ngonyama referred to the payment of the total dividend of R300 million paid by Ntsimbintle in July 2017 and claimed that he was entitled to his proportionate share of that dividend on the shares he had donated to Bosasa Youth (effectively 8.33 percent of the total dividend, being one-third of the 25 percent share of the dividend attributable to Bosasa Youth).

Watson and Bosasa Youth both opposed the application. Firstly, the respondents contended that it was always clear to both Ngonyama and Macingwane that Bosasa Youth was a wholly owned subsidiary of Operations, which, at material times, held 50 percent of the shares in Nkonjane (25 percent directly, and 25 percent indirectly through Bosasa Youth). There was thus no false representation by Watson. Secondly, that whatever claims concerning the return of the shares that Ngonyama and Macingwane might have had against Watson and/or Bosasa Youth were compromised under the so-called 'Fluxmans agreement'. Pursuant to the winding-up of Nkonjane, the Fluxmans agreement, signed by the parties in September 2016, was concluded, in terms of which Nkonjane would sell its shares in Ntsimbintle to each of Operations, Bosasa Youth, Turquoise Moon and Thunder Cats, and that each would subsequently hold 25 percent of the shares.

The issues identified by the high court for determination were as follows. Firstly, whether Watson misrepresented to Ngonyama and Macingwane the true nature of Bosasa Youth and, if so, whether that misrepresentation induced them to each donate 8.33 percent of their shares to Bosasa Youth. Secondly, whether the Fluxmans agreement constituted a compromise agreement in respect of the shares.

The SCA held that it was unable to conclude in motion proceedings, as the high court had held, that there was a misrepresentation that induced the donation of the shares. This, on the basis that there was material doubt as to whether, at the time Ngonyama and Macingwane donated the shares to Bosasa Youth, Watson made any fraudulent misrepresentation as to an existing fact. The SCA found that even on the version of the respondents there were unanswered questions concerning the envisaged BBBEE shareholding and how it was to be monitored. The SCA held further that the high court was, however, correct to reach the conclusion that the Fluxmans agreement did not constitute a compromise. It was a share substitution agreement. The Fluxmans agreement was concluded to deal with the deadlock between the shareholders concerning the sale of their shares to Macozoma's investment company and was unconnected to the dispute about the BBBEE shareholding, which dispute had not yet come to a head. Importantly, the SCA held further that the high court's order was ultimately ineffective and could not be executed upon. This was because parties necessary to the court proceedings were not joined- the case against Bosasa was withdrawn and the liquidators were not joined and neither were any of the parties said to be the beneficial owners of the shares that had been donated - and thus any order made had no practical effect against

them. Thus, the withdrawal of the case against Bosasa Youth and then not involving the liquidators pursuant to its erstwhile liquidation, as well as the exclusion of entities who had a direct and substantial interest in the litigation, such as those said to be the ultimate share beneficiaries, were fatal errors, as the order would not bind them. Finally, the SCA notably cautioned that there were a series of procedural and substantive missteps in the litigation before the Court, which was regrettably beginning to emerge as an unwelcome trend in litigation in SCA.

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