THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 256/09

In the matter between:

SIMCHA PROPERTIES 6 CC **APPELLANT**

v

SAN MARCUS PROPERTIES (PTY) LTD **RESPONDENT**

Neutral citation:	*Simcha Properties v San Marcus Properties* (256/2009) [2010] ZASCA 54 (31 March 2010).
Coram:	Lewis and Mlambo JJA,and Hurt, Griesel and Seriti AJJA
Heard:	**4 March 2010**
Delivered:	**31 March 2010**

Summary: Company Law – s 228 of the Companies Act – director's authorisation by sole shareholder to dispose of the company's sole asset.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Swart AJ sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

MLAMBO JA (Lewis JA, Griesel and Seriti AJJA concurring)

[1] The respondent obtained an order in the South Gauteng High Court (Swart AJ) in terms of which the appellant was ordered to comply with its obligations under an agreement concluded between the parties. The appeal is with the leave of that court and the issue is the ambit of the authority of a director, for the purpose of s 228 of the Companies Act 61 of 1973, to conclude a transaction disposing of the sole asset of a company.

[2] On 11 September 2007 the appellant and the respondent concluded a written agreement in terms of which the appellant purchased from the respondent certain immovable property, described as portion 60 of the farm Blue Hills measuring 8.5653 ha held by deed of transfer no T204051/1972, for the purchase price of R12 677 517. The property was the respondent's sole asset.

The respondent was represented in concluding the agreement by its sole director, Davis Marcus Harris (Harris).

[3] The transaction was initially intended to be concluded with a company called Dynadeals Three (Pty) Ltd (Dynadeals). In further discussions with Harris, it was agreed that the appellant, which had an association with Dynadeals, be substituted as the purchaser and that Dynadeals be the surety and co-principal debtor for the appellant's obligations.

[4] The sale was subject to a suspensive condition that a final arbitration award, not subject to any appeal or appeal award, be obtained confirming the respondent's entitlement to cancel an earlier sale agreement of the same property concluded between it and a company called JFS Properties No 10 (Pty) Limited (JFS). The parties agreed that in the event that the suspensive condition was not fulfilled or waived by 31 October 2007 or such later date as the parties could agree in writing prior to that date, the agreement would automatically lapse and would be of no further force and effect. One of the issues in the arbitration proceedings was the respondent's entitlement to resile from the earlier agreement of sale concluded with JFS on the basis that Harris had not been properly authorised to conclude that transaction. It was the respondent's contention in those proceedings that the agreement with JFS was invalid for lack of compliance with the provisions of s 228 as Harris had lacked the requisite authority in terms of the section to conclude the transaction concerned.

[5] The suspensive condition was not fulfilled on 31 October 2007 with the consequence that the agreement lapsed. The parties, however, concluded another agreement on 27 November 2007, reinstating the original agreement concluded in September. The new agreement included an amendment altering the date by which the suspensive condition had to be fulfilled from 31 October 2007 to 31 January 2008. Harris again represented the respondent when concluding that agreement. I refer to these agreements as the September and

reinstatement agreements respectively. It is Harris' authority to conclude the reinstatement agreement that is the subject of this appeal.

[6] On 15 December 2007 the suspensive condition was fulfilled when a final arbitration award was published, confirming the respondent's entitlement to cancel the sale agreement concluded with JFS. No appeal against the arbitration award was made within the five business days provided for in the arbitration agreement and this rendered the September agreement, as reinstated, unconditional and of full force and effect.

[7] Despite the fulfilment of the suspensive condition the appellant failed to comply with its obligations in terms of the agreement. The appellant's breach persisted despite a demand by the respondent for compliance. This led the respondent to launch motion proceedings in the South Gauteng High Court seeking to enforce the agreement against the appellant and Dynadeals. In these proceedings the appellant contended that it was entitled to resile from the agreement as Harris was not properly authorised in terms of s 228 to conclude the reinstatement agreement on behalf of the respondent.

[8] The appellant's counsel's argument on appeal was on two bases. In the first place it was argued that the reinstatement agreement was not properly authorised. In this regard appellant's counsel argued that when the September agreement lapsed a new and specific authorisation was required for the reinstatement agreement to comply with s 228. The second basis is that when the reinstatement agreement was formally ratified by Monica Harris almost a year later, in 2008, s 228 had been amended (the amendment took effect in December 2007) and at that stage a special resolution of the company, duly registered, was required for the ratification to be effective. It was common cause that no special resolution had been taken or registered.

[9] In essence the enquiry on the first basis of the appellant's argument must therefore focus on whether the reinstatement agreement was properly authorised. This requires that attention be given to s 228 as it applied when the September agreement was concluded. The section provided:

'(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company, to dispose of –

(a) the whole or substantially the whole of the undertaking of the company; or

(b) the whole or the greater part of the assets of the company.

(2) No resolution of the company approving any such disposal shall have effect unless it authorises or ratifies in terms the specific transaction.'

[10] The authorisation relied on by the respondent is in the form of a resolution signed by Monica Harris on 29 June 2007. Monica Harris is the sole shareholder of the respondent and is Harris's mother. The resolution reads:

'RESOLUTION PASSED BY THE COMPANY
IN TERMS OF SECTION 228 OF THE COMPANIES ACT
NO 61 OF 1973 AT SANDTON
ON 29 JUNE 2007

RESOLUTION THAT –

1. the Company dispose of its property, Portion 60 of the Farm Blue Hills 397, J.R, Province of Gauteng, measuring 8,563 hectares, held by the Company under Deed of Transfer No 204051/1972, to Dynadeals Three (Proprietary) Limited (Registration No 1999/27597/07) in terms of a sale agreement which will be concluded between the Company and Dynadeals Three (Proprietary) Limited; and

2. David Marcus Harris is hereby authorised to conclude the abovementioned sale agreement on behalf of the company and to sign all such documents and do all such acts and things as may have be required to give effect to Resolution No. 1 above.'

[11] The respondent also relies on a subsequent resolution signed by Monica Harris on 3 October 2007 in which it was recorded that:

'1. The signature of the Agreement by David Marcus Harris as director of the Company on 11 September 2007 be and hereby is ratified; and
2. David Marcus Harris be, and hereby is, authorized to sign all such documents and do all such things as may be necessary to give effect to the Agreement.'

[12] Section 228 is clear in its terms that when a company wishes to dispose of all its assets or a major part thereof the transaction by which this objective is to be achieved requires the authorisation to be expressed by the shareholders. In a one-shareholder company, as we have here, it is that shareholder's explicit expression of her authorisation, being her will regarding the transaction concerned, that will suffice for the transaction to comply with s 228.

[13] The court a quo, in rejecting the appellant's argument, reasoned that Harris was properly authorised to conclude both agreements, in view of the application of the principle of unanimous assent. In this regard the court found that the resolution signed on 3 October 2007 empowered Harris to dispose of the property in terms of the September 2007 agreement. That court further found that the fact that that agreement had lapsed and then been reinstated in November was irrelevant. In this regard the court found that until the authority bestowed on Harris in terms of the resolution of 3 October 2007 was revoked, Harris was and remained authorised to dispose of the property in terms of the September 2007 agreement. The court found that that was exactly what the reinstatement agreement sought to achieve.

[14] The reasoning of the court a quo, and the authorities there cited,[1] cannot be faulted. The appellant's argument loses sight of the fact that on a formal level

[1] *Levy & others v Zalrut Investments (Pty) Ltd* 1986 (4) 479 (W) where it was stated at 485F that: 'I am hence of the opinion that the unanimous consent of the shareholders of a company to a

Harris was properly authorised in two important respects. In this regard the earlier resolution authorised him in the first place to conclude the transaction on behalf of the respondent, ie the sale per se, and in the second place to sign 'all such documents and do all such acts and things as may be required to give effect' to that transaction. In so far as the reinstatement agreement is concerned that too fell under the ambit of the earlier formal authorisation as Harris was empowered to sign all documents necessary to give effect to the sale. This effectively rendered irrelevant the lapsing of the September 2007 agreement.

[15] The resolutions signed by Monica Harris in June and October 2007 represent her explicit expression of will that as the sole shareholder she gave Harris the authority, to conclude the sale transaction and to sign all and any documents necessary to give effect to that transaction.

[16] The argument suggesting that new and specific authorisation for the reinstatement agreement was required loses sight of the fact that that agreement did not introduce a new transaction. It was the same transaction that Harris had authority to conclude and that agreement became necessary when the September agreement lapsed due to the non-fulfilment of the suspensive condition. There is nothing to displace the clear foresight implicit in the earlier authorisation to cover future circumstances requiring attention 'to give effect' to the resolution disposing of the property. The authorisation of 3 October was, in my view, not necessary, but it put the issue beyond doubt in terms of Harris's authority to sign the September agreement, by ratifying his signature thereon, as well as authorising him to sign all other necessary documents to give effect to the transaction.

[17] That Monica Harris was clear in her intent is borne out by her experience in the arbitration proceedings. She was clearly aware of the ambit of the authority

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specific transaction has the same effect and validity as the approval of such transaction by a general meeting of the company.'

she had to bestow on Harris for the transaction to be concluded successfully. The resolutions she signed evince this awareness and were clearly compliant with s 228.

[18] This conclusion effectively disposes of the appellant's argument on the first issue and inevitably determines the outcome of the appeal. The second leg of the appellant's argument about an enquiry regarding the need for a special resolution in terms of the amended s 228 need therefore not be undertaken.

[19] The following order is under the circumstances granted:

The appeal is dismissed with costs including the costs of two counsel.

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D MLAMBO

JUDGE OF APPEAL

Hurt AJA (Lewis JA, Griesel and Seriti AJJA concurring):

[20] I have read the judgment of my colleague Mlambo JA. I agree with the result but write separately in order to expand upon the issues. Two questions arise for decision. The first is whether the contract was invalid for want of proper authorisation of the person who concluded the contract on behalf of the respondent. The second is whether, at the material times, the respondent had acted in conformity with the current provisions of s 228 of the Companies Act 61 of 1973.

[21] As its name indicates, the respondent is a property-owning company. In fact its sole asset is an immovable property in Midrand, to which I shall refer simply as 'the property'. The sole shareholder in the respondent is Ms Monica Harris and her son, Mr David Marcus Harris ('Harris'), is the sole director.

The History

[22] In July 2004, Harris, purporting to represent the respondent, concluded a contract for the sale of the property to JFS Properties No 10 (Pty) Ltd. Disputes arose between JFS Properties and the respondent as to the validity of the contract, the respondent contending that it was not bound by the contract and JFS claiming to be entitled to enforce it. In the first half of 2007 these disputes were referred to arbitration. In June 2007, while the arbitration was still pending, Harris negotiated the sale of the property to a company called Dynadeals Three (Pty) Ltd. On 29 June, Ms Harris, in her capacity as the sole shareholder in the respondent, signed a document headed 'Resolution Passed by the Company in Terms of Section 228 of the Companies Act No 61 of 1973'. It recorded that the company had resolved to dispose of the property to Dynadeals. It also recorded that Harris was authorised to conclude the necessary sale agreement and to perform any other acts necessary to dispose of the property.

[23] During September 2007 there were discussions which resulted in the parties agreeing that the property would be purchased by the appellant, a company in which Dynadeals was the sole shareholder. Dynadeals was to stand surety for the due performance by the appellant of its obligations in terms of the contract. According to the unchallenged evidence of Ms Harris in this connection, she was aware of the change in identity of the proposed purchaser and was satisfied that the sale would proceed on this basis. There was, however, one stumbling block in the way of the sale and that was that the arbitration was still pending. If the arbitrator's award turned out to be in favour of JFS Properties, the respondent would not be able to perform its obligations to the appellant. To cater

for this contingency, it was agreed that the sale to the appellant would be subject to the respondent obtaining a favourable award from the arbitrator. As a matter of practicality, 31 October 2007 was set as the limiting date for this suspensive condition.

[24] Accordingly, on 11 September 2007 a written contract of sale was concluded by which the appellant purchased the property for R12 677 517. In clause 3.1 the contract (save for certain executory provisions) was stated to be subject to the respondent being held, in the arbitration proceedings or in any appeal therefrom, to be entitled to cancel the contract with JFS. The following stipulation was set out in clause 3.2:

'In the event that the aforementioned condition is not fulfilled or waived by the Parties, on or before 31 October 2007, or such later date as the Parties may agree to in writing prior to the said date, this Agreement shall automatically lapse and be of no further force and effect between the Parties.'

[25] Ms Harris stated in her replying affidavit that she had been alerted to the requirement of proper authorisation of Harris to conclude contracts on behalf of the respondent, by the dispute with JFS Properties. Accordingly, and notwithstanding the ambit of the resolution passed on 29 June 2007 and her acceptance of the decision to substitute the appellant as purchaser of the property in the place of Dynadeals, she had executed a further resolution (expressly stated to be 'in her capacity as sole shareholder' of the respondent) on 3 October 2007, which was in the following terms:

' WHEREAS :

The Company entered into a sale of property agreement with Simcha Properties 6 CC on 11 September 2007 ("the Agreement").

NOW THEREFORE IT IS RESOLVED THAT:

1 the signature of the Agreement by David Marcus Harris as director of the Company on 11 September 2007 be and hereby is ratified; and

2 David Marcus Harris be, and hereby is, authorized to sign all such documents and do all such things as may be necessary to give effect to the Agreement.'

[26] On 31 October 2007 the contract of sale lapsed because the arbitration award had not yet been received, nor had the parties waived or extended the period of the suspensive condition before that date. However, on 27 November 2007 the parties concluded what they referred to as a 'reinstatement agreement'. The preamble to this agreement recorded the fact that the contract concluded on 11 September 2007 had lapsed and stated that the parties wished 'to reinstate the Sale of Property Agreement and make certain amendments thereto'. The reinstatement and amendment were then set out in the following terms:

> '2 REINSTATEMENT OF SALE OF PROPERTY AGREEMENT
>
> Notwithstanding that –
>
> 2.1.1 the suspensive condition stipulated in clause 3.1 of the Sale of Property Agreement was not fulfilled on the date stipulated therefor; and
>
> 2.1.2 the Sale of Property Agreement has lapsed as a result thereof,
>
> the parties hereby reinstate the Sale of Property Agreement and agree to be bound by the terms and conditions thereof with effect from the original date of signature, but subject to the amendment contained in clause 3 below.
>
> 3 AMENDMENT
>
> The parties hereby amend clause 3.2 of the Sale of Property Agreement by deleting "*31 October 2007*" and inserting "*31 January 2008*" in the place thereof.
>
> 4 REMAINING PROVISIONS
>
> All the remaining terms and conditions of the Sale of Property Agreement shall continue in full force and effect.'

[27] The final arbitration award, upholding the respondent's contention that it was entitled to resile from the contract with JFS Properties, was delivered to the arbitration parties on 15 December 2007 and, neither party having given notice of an appeal within the prescribed period of five business days, the award became final on 21 December 2007. On that date, too, the suspensive condition in clause

3 of the reinstatement agreement was fulfilled and the contract of sale took effect.

[28] For the purpose of completing the history of the transactions between the parties, it will suffice to say that, during the early part of 2008 the respondent sought, without success, to enforce the delivery, by the appellant and/or Dynadeals, of the guarantees necessary to enable the conveyancer to proceed with the transfer of the property to the appellant. Eventually, in June 2008, the respondent lodged the application which resulted in it obtaining the order referred to in para 1, above. The basis upon which Swart AJ granted the order will be discussed shortly.

[29] The sequence of events and facts set out above reflect those aspects of the affidavits in the application which were common cause together with certain findings of fact made by the learned judge in the course of reaching his conclusions on the merits of the matter. Although counsel for the appellant sought to question the reliability of the evidence of Ms Harris by reference to certain evidence she had given in the arbitration proceedings, he candidly acknowledged, in the course of argument, that the appellant was not in a position to challenge the assertions in Ms Harris's replying affidavit, and the facts which are set out above treat those assertions as having been satisfactorily proved.[2]

The Provisions of the Companies Act

[30] As indicated, the property was the sole asset of the respondent. It is common cause, therefore, that the respondent could not dispose of it without a general resolution of the respondent's shareholders authorising such disposal. This was a specific requirement of s 228 of the Companies Act prior to 14 December 2007. The section read:

[2] As, indeed, they were found to be proved by the judge in the lower court.

'228 (1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company, to dispose of –

(a) the whole or substantially the whole of the undertaking of the company; or

(b) the whole or the greater part of the assets of the company.

(2) No resolution of the company approving any such disposal shall have effect unless it authorizes or ratifies in terms the specific transaction.'

[31] Swart AJ held, and his finding in this regard was not challenged on appeal, that the resolution of 3 October 2007 complied with the statutory requirements in force at that date. In this regard, he relied on the well-established principle of 'unanimous assent': where all the shareholders of a company unanimously assent to a transaction, such assent is as effective as would have been a resolution passed at a formal general meeting of the company.[3]

[32] On 14 December 2007, an amendment to s 228 took effect. It is not necessary for the purpose of this judgment to quote the amended section in full. It is sufficient to state that the new section required a special resolution for the valid authorisation of a disposal of the sole asset, or the greater part of the assets, of a company. By virtue of the provisions of ss 200 and 202 of the Companies Act, a special resolution is not effective unless it has been registered by the Registrar of Companies within a month of its passing. Although there was a belated attempt by Ms Harris to ratify the reinstatement contract by special resolution in August 2008, I consider that this matter falls to be decided on the basis that the provisions of the amended s 228 had not been complied with at any material time.

[3] *Gohlke and Schneider & another v Westies Minerale (Edms) Bpk & another* 1970 (2) SA 685 (A) at 693 to 694.

The Judgment of the High Court

[33] Swart AJ found, as a matter of fact, that Harris had been properly authorised, and the conclusion of the contract of 11 September ratified, by the resolution of 3 October 2007. That resolution, the learned judge held, was equivalent to a general resolution, based on the principle of unanimous assent and the fact that Ms Harris was the only shareholder in the respondent. Therefore the fact that no general meeting had been held did not detract from the validity of the ratification. In regard to the contention that the reinstatement agreement constituted a different contract to the agreement of 11 September, Swart AJ said:

'The fact that the (11 September) agreement lapsed and was later reinstated in terms of the November 2007 agreement is irrelevant. Until the authority bestowed in terms of the resolution of 3 October 2007 was revoked, Harris was and remained empowered to dispose of the property in terms of the September 2007 agreement. That is exactly what the reinstatement agreement sought to achieve.'

The Appellant's Contentions

[34] As indicated in para 1 above, two issues were debated by counsel in argument before us. It will be convenient to dispose of the second of those issues first. It concerned the applicability of the amendment to s 228 of the Companies Act to the transactions between the parties. The contention of counsel for the appellant was that, since the contract of sale had not yet taken effect (because the suspensive condition had not yet been fulfilled) by 14 December 2007, it was hit by the provisions of the amendment. The attempt by Ms Harris to ratify the conclusion of that agreement in August 2008 had come after the appellant had already sought to resile from the contract and was therefore too late to 'breathe life into' the contract.

[35] It seems to me that the short answer to this submission is that the reinstatement was not, as a matter of fact or law, hit by the amendment to s 228. As counsel for the respondent submitted, the conclusion of the 11 September agreement, whether subject to a suspensive condition or not, was the result of a decision on the part of the company (at least the sole director thereof) to dispose of the asset. The ratification which took place on 3 October was plainly a ratification of 'the specific transaction' within the contemplation of the then s 228. That transaction was simply an agreement by the company to sell the property to the respondent provided it was liberated from any possible obligations to JFS Properties. This was the 'transaction' which was ratified and which Harris was authorised to proceed with to finality. To hold that the advent of the amended s 228 could affect the authority thus conferred would be to vest the amendment with retrospective effect. That would be contrary to the fundamental principle that statutes are not to be construed as having such effect unless their language specifically provides for it. There is nothing in the amended s 228 which can be so construed. It follows that Swart AJ was correct in his view that the amendment to the section did not affect the legal relationships between the parties.

[36] That leaves the first issue. In this regard, counsel for the appellant very properly conceded that if it is found that Harris was authorised to conclude the reinstatement agreement, the appeal could not succeed. The submission that he was not (the issue about the effect of the statutory amendment having been disposed of) depended upon the court taking the view that the reinstatement agreement was something different from the agreement of 11 September 2007. There is no basis for taking such a technical and artificial view of the transactions in which the parties were involved. The shareholder specifically approved of the company's asset being disposed of. She intended to ratify whatever her son had done, up to 3 October 2007, to dispose of it and to authorise him to proceed to finality with such disposal on the terms set out in the September agreement. It is idle to suggest that what he did to resuscitate that agreement, on its original terms save for the termination date of the suspensive condition, constituted a

resort to a different form of ‘disposal’. As Swart AJ stated, the reinstatement agreement was aimed at achieving precisely what Harris had been authorised (and impliedly instructed) to achieve.

[37] I thus agree that the appeal should be dismissed with costs, such costs to include the costs of two counsel.

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N V HURT

ACTING JUDGE OF APPEAL

APPEARANCES

APPELLANT:	P J van Blerk SC Instructed by Geoffrey Sutherns Attorneys, Johannesburg Lovius-Block Attorneys, Bloemfontein
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