THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY

Hattingh v Furman and Others NNO (Case no 388/2019) [2020] ZASCA 123

From: The Registrar, Supreme Court of Appeal

Date: 5 October 2020

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of the Supreme Court of Appeal

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Today the Supreme Court of Appeal (SCA) handed down judgment in an application for leave to appeal against an order of the Gauteng Division of the High Court, Johannesburg (Tsoka J, sitting as court of first instance). The matter concerned the proceeds of a life insurance policy procured by the applicant, Mr Carl Frank Hattingh, on the life of Mr Milton Weinbren, which had become payable after the latter committed suicide on 31 October 2016.

On 28 November 2008 Mr Weinbren, then the sole member of Air & Allied Technologies CC (A & AT), sold to Mr Hattingh a 25 percent interest in the close corporation. The sale was recorded in a Memorandum of Agreement (MoA). Two further agreements – a Members' Association Agreement (MAA) and a Buy-and-Sell Agreement (BSA) – were simultaneously concluded between the same parties. The BSA provided inter alia that, upon the death of either Mr Weinbren or Mr Hattingh, the surviving member would be deemed to have purchased the deceased member's interest in A & AT. The purchase price was to be funded from the proceeds of the life insurance policy that each would procure on the life of the other. The BSA thus provided that the surviving member would, upon receipt of the policy proceeds, pay the full amount thereof to the deceased member as consideration for the latter's interest in A & AT.

When Mr Weinbren died the respondents, being the executors of his estate, claimed the policy proceeds from Mr Hattingh in terms of the BSA. Mr Hattingh resisted the claim, contending that the BSA had been terminated when he concluded a further agreement with Mr Weinbren, namely the Addendum to the MoA (the Addendum), in terms of which the MoA was cancelled and Mr Hattingh's 25 percent interest in A & AT disposed of. (The Addendum was concluded shortly after the death of Mr Hattingh's wife, to whom he was married in community of property, when he realised that his 25 percent member's interest in A & AT was in fact part of their joint estate and thus sought to avoid his late wife's undivided half share forming part of her deceased estate and thereafter going to her heirs.) On this basis Mr Hattingh argued that he had withdrawn from the business of A & AT for purposes of the BSA, which provided that it would terminate upon, amongst other things, one of the parties withdrawing from the business. Though no longer a member, Mr Hattingh nevertheless remained an employee of A & AT.

The high court found that the Addendum was a simulated agreement, aimed at avoiding the *ex lege* consequences of the Administration of Estates Act 66 of 1965, and thus invalid. It held in favour of the respondents (plaintiffs in the court a quo).

On appeal, the SCA was split on the outcome of the application for leave to appeal.

In Ledwaba AJA's view the issue was whether the Addendum was indeed a simulation. If not, the question would become whether the Addendum had the effect of terminating the BSA, ie whether one of the consequences of the Addendum was Mr Hattingh withdrawing from the business of A & AT. He found that there was nothing unusual about the Addendum and that the transaction had thus not been reversed. Mr Weinbren and Mr Hattingh had genuinely intended to cancel the MoA; and the BSA could not be enforced against a person who was not a member of A & AT. In his view, the application for leave to appeal should have been granted and the eventual appeal upheld with costs.

In the view of Ponnan JA (Mbatha concurring) the real issue was whether the conclusion and implementation of the Addendum had the effect of Mr Hattingh 'withdrawing from the business' and thereby terminating the BSA. On this construction the question of any simulated agreement would only arise if the effect of the execution and implementation of the Addendum was Mr Hattingh withdrawing from the business. Ponnan JA found that, according to the evidence, after the Addendum was concluded Mr Hattingh continued to run the business; there

was no suggestion that the BSA had been cancelled; and the insurance policies were not being maintained for the private advantage of Messrs Weinbren and Hattingh. Mr Hattingh remained actively involved in A & AT and had by no means withdrawn from the business for purposes of the BSA. Ultimately, he held that the envisaged appeal lacked any prospects of success and, accordingly, that the application therefor was to be dismissed with costs.

Van der Merwe JA (Molemela and Mbatha JJA concurring) was prepared to assume in Mr Hattingh's favour that the phrase 'withdrawing from the business' meant ceasing to be a member of A & AT, which meant that had the Addendum been a genuine agreement, Mr Hattingh would have withdrawn from A & AT and the respondents' claim would have to fail. If the Addendum was instead a simulated agreement (as the high court had held), the application for leave to appeal would have no prospect of success and would therefore stand to be dismissed. Relying on established authority, he found that what was conveyed to be the reason for the existence of the Addendum was a pretence; that the real purpose and effect thereof was not to divest Mr Hattingh of his member's interest, but rather to hide it from the executors of his late wife's deceased estate. This was to be achieved by Mr Weinbren holding it for Mr Hattingh until his late wife's estate had been finalised.

In the result, the application for leave to appeal was dismissed with costs, the applicant [Mr Hattingh] being directed to pay the costs of the application for condonation.
