

Question :

Is it permissible according to the Shariah to subscribe for SASOL BEE ordinary shares (hereinafter referred to as "the shares") pursuant to the cash invitation option ?

Relevant Background

1. The purpose of the discounted offer as stated in the prospectus is to "further the Sasol Group's black economic empowerment objectives" in accordance with the objectives of the Broad-Based Black Economic Empowerment Act, 2003 (hereinafter referred to as "the BEE Act").
2. The purpose of the BEE Act is the "economic empowerment of all black people", with a view *inter alia* to "increasing the numbers of black people that manage, own and control enterprises and productive assets" -(see section 1 read with section 2 of the BEE Act).
3. The cash invitation application constitutes " an irrevocable offer on the terms of the cash contract ("the contract") to subscribe for Sasol BEE ordinary shares" (See Part F of the Application).
4. The contract provides that the offeror/applicant is allotted and issued with the shares in the stated capital of Sasol, and accordingly becomes a registered direct shareholder of Sasol ("the shareholder"), with effect from date of allotment.
5. The contract however stipulates in clause 5.3 that the shareholder undertakes not to:
  - 5.1 sell the shares prior to the expiry of 730 days, commencing from the date of allotment and issue of the shares in the name of the shareholder. ("minimum investment period")
  - 5.2 sell the shares after the minimum investment period but prior to the end of 10 years to anyone who is not a black person or black group. (hereinafter collectively referred to as the "restrictive conditions")

## The Shariah Issues

6. The relevant Shariah issues are:
  - 6.1 What is the correct categorization of the transaction, upon a proper interpretation of the contract? Is the acquisition under the contract pursuant to a partnership or a sale?
  - 6.2 Are the restrictive conditions permissible in the context of a partnership or sale (as the case may be)?

## The Shariah Analysis

7. At the outset, it is clear that upon a plain interpretation of the contract the offeror subscribes for shares directly in the stated capital of Sasol.
8. This means that the offeror/applicant through his or her shareholding acquires a proportionate undivided share in the underlying assets of Sasol. ("mahal ul aqd")
9. It follows that the offeror is in substance a partner, sharing pro rata in the profits and losses of the business carried on by Sasol.
10. Once this is accepted, the validity of the restrictive conditions should be considered in the context of partnership (shirkah) rules.
11. It is a settled principle of shirkah that this contract permits restrictive conditions (with a commercial rationale), even if those conditions benefit the one contracting party only, (provided that the restrictive conditions do not directly negate profit-sharing itself, and thereby change the essential character of the contract itself). In any event, a restrictive condition (not affecting the essence of profit and loss sharing) found to be invalid is severed from the contract of shirkah itself, the contract in such event remaining valid (see for example, Badai – by Imam Khassani, in the chapter dealing with Mudarabah, and Al Mabsut of Imam Saraksi).
12. On the assumption that the transaction, embodied in the contract is a sale, then in such event the restrictive conditions are permissible for the following reasons.

- 12.1 In terms of the Hanafi Mazhab, the restrictive conditions are valid on the grounds of local custom ("urf - see article 188 of Majallah"). The shares in order to achieve the objectives of the BEE Act can only be sold, subject to the restrictive conditions. A recent example is the MTN offer.
- 12.2 According to the Maliki Mazhab, similar restrictive conditions (not contrary to the very essence of the contract) are permissible. Two examples may be quoted of permissible conditions in this regard:
- 12.2.1 The seller sells an article on condition that the buyer cannot dispose of the same in any manner until the full credit price is paid over the agreed period.
- 12.2.2 A seller sells an article on condition that the buyer may only sell the same to a stipulated defined group of persons. (See Al Hattab , vol 4 ,pg 373-375)
- 12.3 In both the Maliki and Hanafi Mazahib, the original position is that conditions in a contract of sale are permissible. Invalid conditions are the exception , and are generally severed from the contract, without affecting the validity of the contract of sale itself. (see Mugni of Ibn Qudama, Rule 3117 , on sale).

### Conclusion

- 13.1 accordingly conclude that the acquisition of Sasol BEE Ordinary Shares according to the Cash Invitation, as governed by the cash contract, is permissible according to the Shariah.

And Allah Knows Best

Mahomed Shoaib Omar

E-mail: [msolaw@mweb.co.za](mailto:msolaw@mweb.co.za)

7 July 2008

Durban, South Africa

Tel: 031 3063282

Fax: 031 3053539

Cell: 0832525622

M.S Omar & Associates