REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2013/19749

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

3/10/2013
DATE

SIGNATURE

In the matter between:

NESTADT, JONATHAN	Applicant
And	
BEACHAM CAPITAL LIMITED	First Respondent
SACKS, IRWIN	Second Respondent
ALTSHULER, ALAN	Third Respondent
BUSKIN, GARY	Fourth Respondent
KAHN, DAVID	Fifth Respondent
ANZOCARE (PTY) LIMITED	Sixth Respondent

JUDGMENT

CHOHAN AJ:

1. On 8 September 2011 the applicant concluded a sale of shares agreement with the respondents in terms of which he sold his 30% interest in the issued share capital of the sixth respondent, as well as his loan account in the sixth respondent, to the first respondent as one indivisible transaction.

2. In terms of the sale of shares agreement:

   2.1. the effective date was the date of payment of the purchase price or no later than 31 October 2011, whichever date was the earlier;

   2.2. the applicant would be paid compound interest on the purchase price, calculated and capitalised monthly in arrears at the rate equal to the prime overdraft rate charged from time to time by Investec to its most favoured corporate clients;

   2.3. the purchase price in respect of the sale shares and the loan account was the sum of R1 179 593.79 comprising:

      2.3.1. R30.00 in respect of the sale shares; and

      2.3.2. R1 179 563.79 in respect of the applicant's loan account;

   2.4. the payment of the purchase price was guaranteed by the sixth respondent and by the shareholders of the sixth respondent, namely the second, third, fourth and fifth respondents, who would only become liable to the applicant in the event of the purchase price not being paid by the first respondent on due

date and after each of the parties had been given seven days' written notice to remedy the breach.

3. Subsequent to the conclusion of the sale of shares agreement the parties, during November and December 2011, concluded an addendum thereto. In terms of the addendum:

3.1. the effective date of the sale of shares agreement was changed from 31 October 2011 to 31 August 2012;

3.2. the interest rate payable was varied to be the prime overdraft rate charged by Investec, plus 2%;

3.3. the sixth respondent undertook to pay to the applicant the gross monthly proceeds (less provision for VAT) received in respect of the monthly sales effected by the sixth respondent until such time as the loan account had been paid in full and the sixth respondent ceded, assigned and made over unto and in favour of the applicant its right, title and interest in and to such proceeds;

3.4. the remaining terms and conditions contained in the sale of shares agreement remained of full force and effect.

4. The first respondent, it is common cause, failed to effect payment of the purchase price of the shares to the applicant. As a result, on 15 August 2012 the second respondent addressed a letter to the applicant advising that the total amount of R1 051 682.00 was due to the applicant having regard to the applicant's loan, including his original contribution of R60 000.00, plus interest and less payments that had been made. The

second respondent proposed that the respondents discharge that debt by effectively paying R200 000.00 per month, plus interest on the outstanding monthly balance for four months, with the balance of R251 682.00 to be paid in the fifth month, such proposal commencing with effect from 31 August 2012.

5. That proposal was acceptable to the applicant, whose attorney on 17 August 2012 confirmed the payment proposal, but made it clear that by doing so the applicant was not novating or waiving any of his rights in terms of the sale of shares agreement or the addendum thereto.

6. The respondents, it would seem, made payment of the sum of R800 000.00, together with interest thereon to the applicant, but it is common cause, failed to make payment of the balance of R251 682.00 which had fallen due on 31 December 2012.

7. On 13 December 2012 the fourth respondent confirmed a subsequent proposal that the payment of R251 682.00, which was due to be paid on 31 December 2012, be deferred and be paid in three equal instalments of R83 894.00, plus interest on 31 January 2013, 28 February 2013 and 31 March 2013.

8. The subsequent proposal was likewise accepted by the applicant, but no payment in terms thereof was received by the end of January 2013. Instead, on 31 January 2013 the second, third and fourth respondents addressed an e-mail to the applicant alleging, for the first time, that the amount that had been calculated as owing to the applicant, incorrectly included the applicant's original capital contribution of R60 000.00 and in consequence that amount ought to be deducted from the sum of

R251 682.00 which had been agreed would be paid to the applicant. The second, third and fourth respondents moreover proposed that the outstanding sum of R182 553.00 (after the deduction of R60 000.00) be paid to the applicant out of the first cash proceeds of any sales made by the sixth respondent if, as and when these funds are received by the sixth respondent, alternatively that a lump sum payment of R100 000.00 be paid by the second, third, fourth and fifth respondents in full and final settlement of all amounts that were due to him.

9. This further alternative proposal was not acceptable to the applicant, whose attorney accordingly demanded payment of the outstanding balance in the sum of R259 239.50.

10. As no response was received to the applicant's attorney's letter, the applicant launched this application on 6 June 2013 seeking an order that the respondents jointly and severally pay the sum of R251 682.00 to him, together with interest at the prime overdraft rate charged by Investec Bank Limited, plus 2% reckoned from 1 January 2013 to the date of payment.

11. The respondents' have opposed the relief sought by the applicant. Their opposition is essentially premised on the proposition that the addendum that had been concluded varied the first respondent's obligations in respect of the payment of the purchase price and made same payable from the gross monthly proceeds received in respect of the monthly sales effected by the sixth respondent. They moreover contended that until such time as a buyer or buyers are found for the large amount of unsold stock held by the sixth respondent, the obligation to make payment to the applicant did not arise.

12. The respondents admit that there is a balance to be paid to the applicant in terms of the sale of shares agreement[1], but contend that the first respondent is only liable to make payment thereof as and when income was generated from the sale of stock and as no sales have taken place, the amount that was agreed that would be paid to the applicant was not due and payable.

13. The respondents moreover deny that they are liable jointly and severally with the first respondent to the applicant.

14. The proposition that the addendum varied the first respondent's obligations or that payment to the applicant was to be made only upon income being generated by the sixth respondent from the sale of stock is, as counsel for the respondents rightly conceded, a strained interpretation. Not only does such a proposition not find a home in the express wording contained in the addendum, it is also contrary to the proposals that were made by the respondents when seeking to defer payment to the applicant. In this regard, both proposals made by the respondents[2] proceed on the basis that an amount is indeed payable to the applicant, but that an indulgence is sought to stagger the payment on a monthly basis. In terms of the respondents' third proposal[3], the respondents proposed to liquidate the debt owed to the applicant out of the first cash proceeds of any sales made by the sixth respondent. Such a proposal would not have been made had the addendum had the effect contended for by the respondents in their answering affidavit.

---

1 Answering affidavit: p 88, para 25
2 JN24 and JN26
3 JN8

15. In these circumstances, the interpretation advanced by the respondents is unmeritorious.

16. The question that now arises is whether or not the respondents are jointly and severally liable to make payment to the applicant in the sum of R251 682.00.

17. The respondents contend that no provision is made for such joint and several liability and that clause 3.3 of the sale of shares agreement[4] merely reflects joint liability such that each of the respondents are only liable for one-fifth of the amount to be paid to the applicant.

18. The applicant however contends that it would be incongruous and indeed incompatible with the context in which the sale of shares agreement was concluded and the addendum thereto to impose only joint liability as opposed to joint and several liability. Ms Milovanovic, who appeared for the applicant, argued that the requirement that the applicant furnish written notice to each of the respondents before they become liable was indicative of a joint and several liability. That is because, so she argued, it would not be necessary to provide each respondent with notice if liability was only joint as then notice would only have to be furnished to that respondent against whom payment was being sought.

19. It is true that clause 3.3 of the sale of shares agreement does not expressly refer to joint and several liability, but what is required is an interpretation of that clause in context.[5] Seen in context:

---

[4] Founding affidavit: p 31

[5] Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (SCA)

19.1. the sixth respondent's shareholding was compartmentalised into *consortia*;

19.2. proposals that were being made to discharge the debt to the applicant were done collectively and not on an individual basis;[6]

19.3. joint liability would subvert the very purpose behind the security that was sought by the applicant.

20. In addition, there is much to be said for the applicant's submission that the requirement of notification to each of the respondents' liability to ensure is indicative of a joint and several liability rather than only joint liability.

21. In the result, I am not swayed by the respondents' submission that clause 3.3 of the sale of shares agreement did not contemplate or provide for joint and several liability. [7]On the contrary, I find that the clause does envisage joint and several liability.

22. The respondents have urged me to find a dispute of fact on the papers particularly in relation to the amount that was paid by the respondents. Mr Kuny, who appeared for the respondents directed my attention to paragraph 17 of the applicant's reply which he submitted contained an acknowledgement that an amount of R1 178 850,11 had been paid and if that was so, then it fell to reason that no further amount (save perhaps for an nominal sum of some R700) was payable to the applicant having regard to the fact that the purchase price was R 1 179593,79. I am unable to agree with that interpretation of paragraph 17. In my view, that paragraph simply

---

6 See JN4 as an example

7 Although the respondents contended that it was never the intention to have joint and several liability, this was denied by the applicant and the probability is that joint and several liability was clearly intended and encapsulated in clause 3.3

demonstrates the improbability of the respondents version by expressly relying on what the respondents had said to show that even on their version, the respondents could not have paid such some to the applicant. In any event, the respondents various proposals put paid to any doubt as to the amount that they themselves claimed was owing to the applicant. There is accordingly no dispute of fact on the papers.

23. In the circumstances, I would grant the applicant the order sought in prayers 1 and 2 of the notice of motion dated 6 June 2013.

24. That leaves then only the issue of costs. In this regard, Mr Kuny, who appeared for the respondents, submitted that such costs should be awarded on the Magistrates' Court scale in light of the fact that the amount claimed by the applicant falls within the jurisdiction of the Regional Magistrates' Court.[8]

25. The essential enquiry, it would seem to me, is whether or not the matter was of such complexity that it warranted proceedings having to be instituted in the High Court? If one has regard to the application and the founding papers, self-evidently the claim for payment was not complex or complicated. The fact that the respondents have raised a number of defences (some of which required careful analysis) does not of itself mean that the matter was complex or that it had became complex.

26. I would think that it would be prudent for an an applicant who launches an application in the High Court in respect of an amount that falls within the jurisdiction of the Magistrates' Court to lay the foundation in the founding papers to satisfy the court as to why such application is to be heard by the

[8] The jurisdiction in the Magistrates' Court appears to be R300 000.00.

High Court and not the Magistrates' Court having jurisdiction. In the absence thereof, the High Court may be inundated with matters that ought rightly to be brought before the Magistrates' Court. A party thus wishing to have his or her matter heard before the High Court runs the risk of costs being awarded on a Magistrates' Court scale, unless of course a case as to the complexity or other circumstances warranting High Court costs to be awarded has been made out.

27. In the present instance, and as I have said, the matter was not of such complexity and in these circumstances I am swayed by the respondents' submission that the costs to be borne by the respondents be on the Magistrates' Court scale.

28. In the result I make the following order:

28.1. the respondents are jointly and severally liable to pay the applicant the sum of R251 682.00, together with interest on the said sum, calculated at the prime overdraft rate charged by Investec Bank Limited, plus 2%, reckoned from 1 January 2013 to date of payment;

28.2. the respondents are jointly and severally liable to pay the applicant the costs of this application on the Magistrates' Court scale.

M A CHOHAN
ACTING JUDGE OF THE
HIGH COURT

HEARD: 30 SEPTEMBER 2013
DELIVERED: 3 OCTOBER 2013

COUNSEL FOR APPLICANT:	A MILOVANOVIC
INSTRUCTED BY:	DARRYL ACKERMAN ATTORNEYS
COUNSEL FOR RESPONDENTS:	S KUNY
INSTRUCTED BY:	DAVID KAHN & ASSOCIATES

(jmt.4.6.13)