THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 9937/2019

In the matter between

CHRISTIAAN LE COURDEUR ROSSOUW N.O.	**FIRST APPLICANT**
YVONNE ROSSOUW N.O.	**SECOND APPLICANT**
CHRISTIAAN LE COURDEUR ROSSOUW N.O.	**THIRD APPLICANT**
GEORGE NICOLAAS WEGNER N.O.	**FOURTH APPLICANT**

and

JOHANNES PETRUS JORDAAN STOFBERG	**FIRST RESPONDENT**
STOFBERG BERRIES (PTY) LTD	**SECOND RESPONDENT**

Coram: Rogers J

Heard: 15 August 2019

Delivered: 23 August 2019

JUDGMENT

Rogers J

[1] This application was launched on 11 June 2019 as one of urgency for hearing on 26 June. On the latter date it was postponed to 15 August with a timetable. The applicants are the trustees of the CY Trust ('CYT'). CYT and the first respondent, Mr J P J Stofberg ('Stofberg'), are equal shareholders in the second respondent, Stofberg Berries (Pty) Ltd ('the company'). CYT alleges that in terms of a shareholders agreement Stofberg's shareholding has been diluted to zero. CYT seeks a declaration to this effect and an order requiring Stofberg to transfer his 50 per cent shareholding in the company to CYT. Whether CYT is entitled to this relief turns on what was decided and agreed at a meeting of 14 December 2018.

[2] Since CYT seeks final relief on motion, disputes of fact must be resolved in Stofberg's favour unless his denials and assertions are so far-fetched that they can be dismissed on the papers.

[3] In its dealings with Stofberg, CYT was mainly represented by the first applicant ('Rossouw'). In the correspondence he is often referred to as Chris. The third applicant, who shares the same name, is his father.

[4] During 2017 CYT and Stofberg agreed to embark on a joint venture in blueberry farming. The company was established as the vehicle for the enterprise. Stofberg and CYT each held 60 shares in the company. CYT nominated Rossouw's son, Tiaan, as a director of the company. Stofberg was the other director.

[5] In July 2017 the parties concluded a shareholders agreement. This was followed in August 2017 by a cooperation agreement which described itself as an addendum to the shareholders agreement. In November 2017 the company bought the farm Nuutbegin from Stofberg for a price of R12 million. Half of this amount was paid against transfer, the balance being credited to a loan account in Stofberg's name. The blueberry farming enterprise was established on Nuutbegin. For this purpose the company obtained a funding facility with Overberg Agri. The first harvest was in the closing months of 2018.

[6] As 2018 drew to an end it became apparent that the company needed more funding to meet immediate pressing obligations and to pay development and operational costs to bring the 2019 harvest to fruition, the income from which would only be received in January 2020.

[7] Clause 5 of the shareholders agreement deals with funding. Clause 5.6 provides that if the shareholders agree in writing to make loans to the company, they shall do so in their prescribe ratio (for present purposes 50:50). If any shareholder declines to advance the funds due under the clause, the excess portion of the other shareholder's loan account bears interest at the prime rate or as may be agreed in writing between the shareholders.

[8] Clause 5.7 is styled, inaptly, the "waterfall clause". It reads thus:

'Following approval of a cash call by an ordinary resolution by ordinary shareholders of the Company, the Company shall make cash calls from time to time for further capital and/or operational expenditure of the Company and/or its operations. A party receiving a cash call must contribute its share equal to its shareholding within fifteen (15) days, or such period as may be agreed between the shareholders, of receiving the cash call notice. Failure by any party to participate in the cash call shall result in straight-line dilution of its equity stake in the Company. Dilution will occur equal to the value of the cash call failed to be met by the party,

using the value of equity at inception of the Company or value when the failed party first entered as a shareholder into the Company, which ever is the lowest.'

[9] Monya Jonck is an accountant who works for Rossouw's family business, Rossgro. The parties agreed that she would assist in the company's financial management. Lesha Auret is an accountant with Auret Stofberg Accountants, the company's accountants. On 23 November 2018 Jonck emailed the directors, shareholders and Auret, pointing out that the company had outstanding creditors of R1,8 million of which R200 000 (including salaries and wages) had to be paid by the end of the month. She attached a cash flow prepared by Auret which projected a shortfall of about R528 000 at the end of December. She continued (I translate from the Afrikaans):

'If Chris [ie Rossouw] is expected to contribute these funds to Stofberg Berries [ie the company], and Johan [ie Stofberg] makes no contribution, Chris proposes that Johan transfers one share to Chris for every R500 000 that Chris pays into Stofberg Berries.

Johan, please reply by email as to whether:

1. You will surrender shares to Chris OR

2. You will be in a position to contribute half of the expenses until an inflow of cash is realised.'

[10] Stofberg's response on 26 November was that he would talk to Rossouw. On 27 November Jonck again wrote to the parties about urgent payments the company had to make. What arrangements were made for those payments is unclear. On 10 December she circulated an email as follows (again my translation):

'Stofberg Berries currently finds itself in cash flow problems and there are insufficient funds to pay Friday's wages. According to the shareholders agreement a cash call can be made where cash is needed for capital and/or operational expenses. We are now at the point where it is necessary to make such a cash call for the company to meet its running expenses.

Chris and Johan, can the two of you please meet as soon as possible to discuss the above. An ordinary resolution must be drafted by tomorrow in order to do the cash call which must contain the following terms:

- An amount of R2,3 million must be contributed by each shareholder in the ratio of 50/50 (see attached creditors plus cash flow expenses for December).
- The contribution must be paid by Thursday, 13 December 2018, to be in a position to pay wages on Friday.
- If a party cannot make a contribution dilution will take place as set out in the shareholders agreement: "dilution will occur equal to the value of the cash call failed to be met by the party, using the value of equity at inception of the Company or value when the failed party first entered as a shareholder into the Company, which ever is the lowest."'

[11] The upshot was a meeting held on 14 December attended by Rossouw, his son Tiaan, Stofberg and Auret. There is a factual dispute about what was decided and agreed. CYT's version is the following.[1]

(a) In terms of clause 5.7 the shareholders (CYT represented by Rossouw, and Stofberg) resolved to approve the making of a cash call of R7 million (ie R3,5 million from each shareholder).

(b) In terms of clause 5.7 the directors (Tiaan and Stofberg) resolved that the company should make the said cash call.

(c) By way of a separate agreement between the shareholders (which CYT styles the indulgence agreement), CYT undertook to pay Stofberg's share of R3,5 million in return for a 10 per cent dilution of his shares (rather than the dilution contained in clause 5.7), this undertaking being subject, however, to fulfilment of the following two conditions by 31 May 2019, namely (i) that Stofberg find a purchaser for the balance of his shares; and (ii) that Stofberg secure refinancing of

[1] Founding affidavit paras 34-38, 77. See also replying affidavit paras 10, 13, 25-27, 100-103.

the entire project, which would entail improved repayment terms to those forming part of the existing Overberg Agri capital development loan.

(d) It followed, so CYT contends, that if Stofberg failed to meet the two conditions by 31 May 2019, he was required to 'fully participate' in the cash call by contributing R3,5 million, failing which clause 5.7 would apply. It is not in dispute that if that clause applies Stofberg's shareholding would be reduced to zero.

[12] Stofberg denies that the shareholders and directors passed resolutions in terms of clause 5.7 or that there was a separate so-called indulgence agreement. There was, he says, a single agreement, the parties to which were the shareholders and Rossouw personally, on the following terms:[2]

(a) CYT and he would each make a contribution of R3,5 million to the company.

(b) Rossouw would lend him R3,5 million to enable him to make his contribution.

(c) Unless the two conditions mentioned in CYT's version were met by 31 May 2019 (the first of which would, if fulfilled, enable Stofberg to repay Rossouw in cash), Rossouw's loan to him of R3,5 million would be converted into shares by way of a 10% dilution of Stofberg's shareholding, so that after the dilution CYT and Rossouw would collectively have a shareholding of 55 per cent while Stofberg would have a shareholding of 45 per cent.

(d) The worst outcome which Stofberg faced was the 10% dilution.

[13] I shall refer presently to the contemporaneous documents casting light on what was decided and agreed, but I mention here that on 24 February 2019 Stofberg emailed Auret, Rossouw and Tiaan to say that he no longer accepted the 10 per cent dilution without further discussion. He felt that the dilution did not

[2] Answering affidavit paras 15.9-5.1, 13.6, 16.3, 28.7, 30, 31.1-31.5, 35. 38.1.

take account of the fact that he had mortgaged another of his farms, Meulplaas, as security for the company's facilities, whereas CYT had not furnished any security. Rossouw should not worry – he would get his money back from the company with interest.

[14] CYT alleges that this communication was a repudiation of the alleged indulgence agreement, which repudiation it accepted on 1 March 2019 by terminating the agreement. On CYT's version, this left standing the alleged resolutions of the shareholders and directors in terms of clause 5.7. Since Rossouw did not contribute his share of R3,5 million, his shareholding was diluted to zero.

[15] Stofberg, on the other hand, alleges that Rossouw failed to lend him the sum of R3,5 million. In any event, so he contends, if his communication of 24 February 2019 was a repudiation, it was a repudiation of the single agreement he claims was concluded. Whatever other consequences the accepted repudiation might have, there were no resolutions in terms of clause 5.7.

[16] CYT alleged in the founding papers that, following the meeting of 14 December 2018, it advanced R5 million to the company during December 2018 and January 2019, and would have no alternative but to advance the balance of R2 million within a month or two of the date on which the application was issued. Stofberg claimed in the answering affidavit to have no knowledge of these advances but stated that Rossouw did not honour his obligation to lend him R3,5 million. In a supplementary affidavit, filed by CYT without opposition shortly before the hearing, CYT alleged that on 24 July 2019 it lent the company a further R4,93 million. It has thus by now provided funds in excess of the R7 million discussed in December 2018.

[17] To return to the contemporaneous documentation, immediately after the meeting on 14 December 2018 Auret emailed the parties as follows (again my translation):

'Just to set out today's discussion points on which agreement was reached:

- Chris is going to put R7 million into Stofberg Berries to cover creditors, wages and the Overberg instalment.
- This loan is convertible into a further 10% shareholding in favour of Chris Rossouw and a dilution of 10% from Johan Stofberg's shareholding with a deadline ['*sperdatum*'] of 31 May 2019 provided ['*mits*'] the following conditions are complied with:
    - If Johan Stofberg finds a buyer for his shares and is in a position to cover his 50% contribution to Stofberg Berries (R3,5 million of R7 million).
    - Johan Stofberg can refinance the project.
    - The deadline ['*sperdatum*'] to get the above in place is 31 May 2019.

Johan can you please confirm that you agree with the points. I shall also minute it formally.'

[18] Stofberg immediately replied, saying that this was fine with him. Everyone then left for their year-end holidays. Rossouw alleges that in mid-January he asked Auret to have the resolutions and indulgence agreement properly minuted but that she only managed to convene a meeting for 22 February 2019. The same parties were present as before and they all signed what was described as the minutes of a meeting held on the earlier date. The document reads thus (in translation):

'THE FOLLOWING WAS DISCUSSED AND CONFIRMED DURING THE MEETING:

CASH SHORTFALL AND CAPITAL CONTRIBUTION:

As at 14 December 2018 there was a cash shortfall of R7 million for the company to meet its obligations.

According to the shareholders agreement shareholders must contribute in equal shares towards the company's capital requirements. If any party cannot contribute a dilution in his shareholding will take place.

At the present time Johan Stofberg did not have sufficient funds to provide a 50% contribution of R3,5 million.

Chris Rossouw offered to stand in for Johan Stofberg ['*om vir Johan Stofberg in te staan*'] and to provide his R3,5 million contribution on his behalf. This loan of R3,5 million is convertible into a dilution of 10% of Johan Stofberg's shareholding provided ['*mits*'] all the following conditions are complied with:

- Johan finds a buyer for his shares which will put him in a position to provide his capital contribution;
- And Johan Stofberg can refinance the project;
- Before the deadline of 31 May 2019.'

[19] Although CYT's version of what was decided and agreed was supported by Rossouw, Tiaan and Auret, I cannot on that account reject Stofberg's version merely because he stands alone. If the two contemporaneous documents, each of which Stofberg approved, clearly supported CYT's version, this might well be a basis for rejecting his version on the papers but I do not think the documents provide such support.

[20] One obvious gap in Auret's email and subsequent minutes is any reference to the shareholders or directors having passed any resolutions, whether in terms of clause 5.7 or otherwise. In her email of 10 December 2018 Jonck explicitly stated that an ordinary resolution should be prepared, and she spelt out what it should contain. If the shareholders and directors had seen themselves as adopting resolutions in terms of clause 5.7, one would have expected Auret's email and minutes to say so.

[21] The fact that the minutes signed on 22 February 2019 refer by way of preamble to the provisions of the shareholders agreement does not in my opinion significantly advance CYT's case. When it comes to what was actually decided by those present, her email and minutes simply record an agreement reached between

the shareholders, perhaps including Rossouw personally (though he says, and this may well be so, that he acted at all times on behalf of CYT, not in his personal capacity). The recorded agreement as formulated reads as a single indivisible transaction. There is no hint of independent resolutions in terms of clause 5.7 on the one hand and a separate 'indulgence agreement' on the other.

[22] The next difficulty is the nature of the two conditions for which the deadline was 31 May 2019. In the email and minutes they are introduced with the Afrikaans word '*mits*', which means 'provided that'. On the face of it, this supports CYT's version – the 10 per cent dilution would occur provided the two conditions were fulfilled. Stofberg says, however, that the parties agreed that the dilution would occur only if the conditions were not fulfilled.

[23] The *HAT: Verlarende Handwoordeboek van die Afrikaanse Taal*, after setting out the correct meaning of the word '*mits*' ('*opvoorwaarde dat*'; '*indien*'), notes that '*mits*' and '*tensy*' ('unless') are sometimes confused. In the heads of argument filed for Stofberg, his counsel – whose first language, I think I may judicially notice, is Afrikaans – gave an English translation of the minute of 22 February 2019 in which he rendered the word '*mits*' as 'unless'.[3] I confess that – perhaps led astray by what I had read in the papers – I had understood the email and minute the same way. This aspect of the conflicting versions offered by the parties only came to the fore during oral argument, and my impression is that Stofberg's counsel was genuinely taken aback that the literal meaning of the Afrikaans was the opposite of what he had understood.

[24] Stofberg's email of 26 February 2019 suggests that at the time he, too, understood the meaning to be 'unless' rather than 'provided that'. He did not want to suffer a 10% dilution. On his version, he would have been at risk of this 10%

[3] Para 8.

dilution unless he could sell some of his shares (so that he could repay Rossouw) and refinance the company. Since it did not lie within his exclusive power to bring about fulfilment of the conditions, the risk of a 10 per cent dilution was real. If, on the other hand, dilution would only occur if the conditions were fulfilled, dilution would not in his mind have been a real risk, since if he took no steps to find a buyer or to refinance the company dilution would not occur (though he would then be subject to a claim by CYT for repayment of the loan of R3,5 million).

[25] On CYT's version, the 10 per cent was not a risk or penalty faced by Stofberg but rather a benefit. CYT has to say that if the conditions were not fulfilled (so that the 10 per cent dilution did not operate), the supposed resolutions passed by the shareholders and directors in terms of clause 5.7 had the effect that dilution operated to the full extent specified in the clause (effectively a 100% dilution) rather than to the limited extent of 10%. However, if this was what the parties agreed and intended, one would have expected Auret's email and minutes to record what would happen if the conditions were not fulfilled, since this would be the real sword of Damocles hanging over Stofberg's head. Yet there is no hint of this in her documents.

[26] It is also commercially implausible that Stofberg would have agreed to follow a course of action involving a risk of dilution in terms of clause 5.7. Everyone knew on 14 December 2018 that he did not have cash to make a contribution of R3,5 million. On CYT's version, the only way Stofberg could have avoided dilution in terms of clause 5.7 was by procuring fulfilment of the two conditions. However, and as I have observed, fulfilment of the two conditions did not lie solely in his own power. He must have realised that there was a real risk that the conditions would not be fulfilled by 31 May 2019. Dilution in terms of clause 5.7 would have meant the loss of his entire shareholding in the company without consideration.

[27] Although the company had a cash flow problem, the blueberry venture was thought to be very promising. CYT said in the founding papers that the 2019 harvest would yield sales sufficient to meet all its operational costs and most of its capital expenditure. The farm Nuutbegin was valued in February 2018 at R35,48 million and in August 2018 at R43,5 million. During the course of the present year CYT has indicated a willingness to buy Stofberg's shares for R20 million (subject to a deduction of his loan account) and to sell its own shares for R100 million. It is implausible that Stofberg would in the circumstances have agreed to an arrangement in terms of which he ran the risk of losing his entire shareholding for no consideration, while still remaining contingently liable to Overberg Agri as a surety for an amount of R44 million secured to the extent of R15,8 million by a bond over his farm Meulplaas.

[28] The 'unless' understanding of the conditions appears to make commercial sense. One of the conditions was the finding by Stofberg of a buyer for (some of) his shares. If this happened, he would have cash with which to repay CYT/Rossouw. One would expect conversion in lieu of repayment to operate if he could not find a buyer for his shares. In other words, dilution/conversion (to the extent of 10 per cent) was the risk he faced if he could not bring about fulfilment of the conditions.

[29] It is telling that when CYT first came to spell out its version, following Stofberg's alleged repudiation of the indulgence agreement, its attorneys – acting one must assume on CYT's instructions – expressed the matter in a manner more consistent with Stofberg's version than CYT's allegations in the founding papers. In paras 3.3 and 3.4 of their letter of 1 March 2019, CYT's attorneys, after referring to the alleged resolution by the shareholders to contribute R7 million in equal shares, said that the following was also resolved at the meeting my underlining):

‘3.3 That an extension be granted to you for you to effect payment of your aforesaid contribution in the amount of [R3,5 million] until 31 May 2019, failing which our client shall exercise his right in terms of [clause 5.7] by diluting your equity in the company with 10%.

3.4 The extension referred to in para 3.3 above was subject thereto that you also procure a purchaser for your shares to enable you to contribute pro rata to the additional funding required referred to in 3.1 above [viz R7 million] and that you succeed in obtaining refinancing for the farming operation in its entirety prior to 31 May 2019.’

[30] Even in affidavits CYT is not entirely consistent on this question. Although CYT alleges that the 10 per cent dilution would only be operative if the conditions were fulfilled, elsewhere it says that the indulgence agreement was concluded because Stofberg said (a) that although he did not currently have R3,5 million in cash he would be able to pay that sum if he could sell some of his shares to a third party and (b) that the potential buyer he had in mind, Praxis, would be willing to refinance the company.[4] If CYT was giving Stofberg time to come up with cash sufficient to cover the amount of R3,5 million, it does not make sense that the 10 per cent dilution would occur if he came up with the cash; rather, the dilution would be the consequence of his failure to cover his contribution in cash.

[31] A further disjuncture between the contemporaneous documents and CYT’s version is the identification of what it is that was made subject to the two conditions (either in their ‘provided that’ or ‘unless’ sense). The documents indicate that what was qualified by the two conditions was the conversion of CYT/Rossouw’s loan from debt to shares. This accords with Stofberg’s version. In the founding affidavit, however, CYT claims that the undertaking to advance Stofberg the loan of R3,5 million was made in return for a 10% dilution, and that the undertaking was itself subject to the two conditions. On this version, the 10% dilution was a done deal once CYT lent Stofberg R3,5 million, but the money

[4] Founding affidavit para 77; replying affidavit para 26.

would only be lent if the two conditions were fulfilled. In the commercial circumstances confronting the parties, this makes no sense. The company needed money urgently. They could not have intended that Stofberg's contribution of R3,5 million (funded via a loan from CYT) would only go to the company after 31 May 2019.

[32] A final difficulty worth mentioning is this. Clause 5.7 operates only if a shareholder fails to make his contribution pursuant to a cash call. If the agreement alleged by CYT had been implemented to the point of CYT/Rossouw lending Stofberg R3,5 million by paying same to the company on his behalf, and if the conditions had then not been fulfilled by 31 May 2019, by what mechanism would clause 5.7 have operated? On the assumed facts, Stofberg would have contributed his share of R3,5 million to the company, albeit with funds made available to him by CYT/Rossouw. When I put this difficulty to CYT's counsel, the response was that the loan of R3,5 million from CYT/Rossouw to Stofberg and from Stofberg to the company would have been automatically undone and reconstituted as part of a loan of R7 million made directly by CYT to the company. That may perhaps be implied though it is an important provision which does not find expression in the contemporaneous documents.

[33] I have said enough to show that I cannot dismiss Stofberg's version out of hand. The most important point, for purposes of the relief claimed by CYT, is that I am unable to find that the shareholders and directors ever passed resolutions or saw themselves as acting in terms of clause 5.7 of the shareholders agreement or that the funding arrangement actually adopted at the meeting involved divisible elements including a so-called indulgence agreement.

[34] Stofberg's email of 24 February 2019 may well have constituted a repudiation, on his own version, of the agreement reached between the parties. An

acceptance of the repudiation with resultant cancellation might entitle CYT to recover what it paid to the company or to Stofberg under the cancelled agreement and to sue for damages. On Stofberg's version, however, there were no independent resolutions under clause 5.7 which could survive the cancellation.

[35] CYT's counsel urged me to refer the matter to oral evidence if I felt unable to find for CYT on the papers. This fallback position was foreshadowed in their heads of argument. CYT's counsel envisaged a focused enquiry in which the four attendees at the meetings of 14 December 2018 and 22 February 2019, all of whom have made affidavits, would give evidence as to what took place.

[36] Stofberg's counsel resisted a referral to oral evidence, asking me to dismiss the application with costs. He submitted that it was apparent from the pre-litigation correspondence that Stofberg disputed CYT's version of the decisions and agreements. Furthermore, an oral hearing could not be as confined as CYT would have it, because an assessment of the probabilities required consideration of a broader factual matrix. At an oral hearing Stofberg would also want to pursue contentions (a) that clause 5.7 (if found to be applicable) was unconscionable and unenforceable; and (b) that it was an excessive penalty which fell to be reduced in terms of s 3 of the Conventional Penalties Act 15 of 1962.

[37] In my discretion I decline to refer the case for hearing of oral evidence. The pre-litigation correspondence placed the alleged resolutions and agreement squarely in issue. As I have shown, the contemporaneous documents could not reasonably have been thought to form a basis for inviting the court to reject Stofberg's version out of hand. The probabilities on the papers do not cause me to think that the hearing of oral evidence is likely to clinch the case for CYT.

[38] I also take into account that clause 30 of the shareholders agreement requires disputes in connection therewith to be resolved by an expert in

accordance with the rules of the Arbitration Forum of South Africa. Stofberg relied on this clause in his opposing papers and heads of argument though his counsel did not press the point in relation to urgent relief. Clause 30.9 states that the clause does not preclude a party from obtaining urgent relief on motion or from instituting interdict or similar proceedings. However the court's inability to grant CYT relief on the papers means that urgent relief is no longer obtainable. Although the hearing of oral evidence by this court could be expedited, there is no reason why arbitration proceedings, including oral evidence, could not be prosecuted expeditiously.

[39] In relation to the ambit of oral evidence, the broader factual matrix would probably have to be investigated. On the papers as they stand, unconscionability and the Conventional Penalties Act do not arise, since they have not been pleaded. I can nevertheless see scope for an argument based on the Conventional Penalties Act. If CYT were left to pursue fresh proceedings, whether in this court or by way of arbitration, Stofberg could raise these matters by way of defence.

[40] I should mention in conclusion that Stofberg raised several preliminary defences. The first was that the application was not urgent. It may not have been urgent enough to warrant a hearing on 26 June 2019 but I am satisfied that there was enough urgency to justify a hearing on the semi-urgent roll on 15 August 2019. Since affidavits were filed and full argument presented, it would in any event not be consistent with the attainment of justice to dismiss the application for want of urgency. A second preliminary point was whether the shareholders agreement was duly authorised by CYT's trustees. That complaint was resolved by a supplementary affidavit filed shortly before the hearing. A third preliminary point was that the matter should have been referred to arbitration. Stofberg's counsel jettisoned that point as an objection to the hearing of the urgent application.

[41] I make the following order:

The application is dismissed with costs, including the costs reserved on 26 June 2019.

O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

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