

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 14824/2015

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

Date:

WHG VAN DER LINDE

In the matter between:

Oosthuizen, Kennith Martin

Applicant

And

**Metsep SA (Pty) Ltd
Whelan, David Michesl Joseph
Watchorn, Robert Patrick
Miwac (Pty) Ltd**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

JUDGMENT

Van der Linde, J:

[1] This is an application for payment of a portion of the purchase price that will become owing by the second and third respondents to the applicant in terms of a written settlement

agreement. That agreement provides, in the main, for the sale by the applicant of his shares in the first respondent to the second and third respondents, to whom I shall refer simply as “the purchasers.” (I will therefore, to keep the reading coherent, refer to the applicant as “the seller”).

[2] The agreement provides for a mechanism whereby the purchase price will be fixed. That mechanism has not yet run its course; in fact, the parties are agreed that the issue of the determination of the purchase price payable should be referred to the trial court. Such an order is made at the end of this judgement.

[3] At issue now is whether the seller is entitled to payment of a portion of the purchase price which, on the seller’s case, is undisputed. The purchasers dispute this. They say that for so long as the entire price for the shares has not been determined, no portion of it at all is due and payable. They point to the written agreement and its Shifren¹ clause and they say there is no provision for part-payment, as is effectively contended for by the seller.

[4] The seller’s answer to this contention is that his case is not founded on the written agreement; rather, his case is founded on the affidavits in this application, from which it appears that it is undisputed that the purchase price, undetermined as it is, can never be less than R8 725 500. That being so, according to the argument, the seller is entitled now to judgment in this amount, on account of the purchase price.

[5] The issue in this application is whether that argument is sound.²

[6] In principle, the seller’s argument is unassailable. Parties have always been free to decide to perform their obligations in a particular way; and if they will have done so, it is not open to

¹ After SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren, 1964 (4) SA 760 (A).

² I will not now consider whether it is permissible to make out a case in motion proceedings based on what is said or not said in the answering affidavit. Normally, the courts have insisted that the cause of action must be completed already when the notice of motion is issued. Courts have however also held that they have a discretion in this regard, particularly when at least a part of the cause of action already existed when the initiating process was issued. In any event, the respondents did not argue the point.

the other side afterwards to contend that the contract was not strictly performed in accordance with its letter.³

[7] Moreover, Shifren is not offended if in terms of a collateral agreement the purchaser decides to make to the seller, on account of the purchase price, a down-payment. The only proviso is that the terms of the collateral agreement should not offend the terms of the written (main) agreement.

[8] Our courts have often enforced undertakings to pay in their terms, irrespective of whether there was an enforceable underlying causa.⁴ The undertaking itself becomes the causa, because it itself is held, if the facts sustain it, to be a contract deliberately entered into. But it has to be a contract deliberately entered into by the parties with the intention to be bound by its terms.

[9] Cameron, J (writing for the Constitutional Court) put the issue this way:⁵

“Did the 2008 notice give rise to an enforceable undertaking?”

[30] The 2008 notice clearly constituted an undertaking by the department to pay the schools, to which the notice was directed, the approximate amounts set out in it. In argument, counsel for the respondents confirmed that the undertaking was given with an intention to honour its terms. This is undoubtedly correct. The question is whether the courts can enforce the undertaking, or any part of it.

[31] Courts enforce undertakings when parties agree by contract to be bound by their terms; when the undertaking gives rise to a legitimate expectation and administrative fairness requires some measure of their enforcement; or when any other legal principle or rule requires enforcement. In its affidavits, the applicant said its case was that it relied purely on a promise or undertaking to pay. It said that it was 'neither here nor there' whether this

³ Van der Walt v Minnaar, 1954 (3) SA 932 (O), referred to with apparent approval in Telcordia Technologies Inc v Telkom SA Ltd, 2007 (3) SA 266 (SCA).

⁴ Minister of Home Affairs and Another v American Ninja IV Partnership and Another, 1993 (1) SA 257 (A), esp at 269 per Nestadt, JA.

⁵ Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal and Others, 2013 (4) SA 262 (CC).

derived from administrative action or 'something akin to a contractual obligation'. But the form of the applicant's case is important. If enforcement is sought on the basis of administrative action, the proceedings should have been instituted under the Promotion of Administrative Justice Act 8 (PAJA), in the form of a review, and (subject to condonation) within the 180-day period PAJA allows. None of this was done.

[32] ...

[33] ...

[34] ...

[35] On what basis can the applicant claim enforcement of the undertaking? I do not think that the undertaking is enforceable because of an agreement. A contract is an agreement between parties, entered into with the intention of creating binding obligations, to perform according to the terms agreed...Our courts have indeed enforced agreements concluded in response to circulars or notices setting out the terms on which governmental subsidies may be procured. But here there was no contract. The undertaking was not extended as part of a bilaterally binding agreement, which is the hallmark of contractually enforceable obligations.

[36] Nor was there any intention on the part of the department, or indeed the schools, to be contractually bound by a private agreement... This is distinct from an intention to enter into legal obligations for the purpose of concluding an enforceable contract.

[37] Nevertheless, the setting in which the 2008 notice promised payment to its recipients indicates that it was seriously given, in the expectation that it would be relied upon, and that payment in its terms would indeed be forthcoming, subject only to the possibility of due revocation. These indications are set out in the ensuing paragraphs."

[10] What this all tells us, in relation to the seller's case, is that the affidavits must be read to justify the inference of the existence of a new contract, collateral to the written settlement agreement, not offending the latter's terms, and reflecting a reciprocal meeting of minds to pay the R8 725 500 for which the seller contends.

[11] The seller relies for the cause of action he advances on paragraph 60 of his founding affidavit, but particularly the nature of the purchasers' response to it. The paragraph concerned states, with reference to the valuation⁶ that the seller is disputing, as follows:

"60. I am advised and state that there is no possibility that the third and fourth respondents could be liable to the applicant in an amount of less than R8 725 500.00 (eight million seven hundred and twenty five thousand five hundred rand). There is no reasonable possibility that an adjustment of the first valuation to rectify the manifest errors (referred to above) could result in an amount lower than R8 725 500.00 (eight million seven hundred and twenty five thousand five hundred rand) being owed by the respondents to the applicant. Rectification of the errors can only result in a higher amount being owed to the applicant as illustrated above."

[12] The purchasers' response to this paragraph is paragraph 73:

"73. Ad paragraphs 57 to 60 thereof

73.1 I admit that the Respondents' attorney sent the correspondence dated 17 September 2014, attached to the founding papers is (sic) annexure 'KO15'.

73.2 Given the circumstances, I deny that the Respondents are liable to make payment of any 'minimum' purchase price.

73.3 Either the Applicant's position is that Mackinnon's valuation is binding or it is not. If it is binding, there ought to be no dispute, at least from the Applicant's perspective, and if it is not binding, he is not entitled to payment on the basis thereof.

73.4 The remaining allegations are denied."

⁶ The written sale agreement provides that the purchase price would be the appropriate fraction of the mean (p34 cl 4.4.6) of two valuations, one to be obtained by the seller and one by the first respondent (p33 cl 4.4.1 and cl 4.4.3). Two valuations were obtained, the one by the seller valuing the shares at R44 804 000, and the one by the first respondent valuing the shares at R25 000 000. The seller disputes the lower of the two, that obtained by the first respondent, and says that it contains manifest errors. See, for a comparable case and the meaning of "manifest error", JFH James v Micor Holdings Ltd and Another, case no. 87/23279, unreported judgment handed down in the then WLD, on 26 November 1998.

[13]The seller's argument is that the purchasers have not, by their response, issuably engaged the seller's contentions in paragraph 60 of the founding affidavit, specifically the contention that the purchase price could never be less than R8 725 500. On this basis the seller argues that this court is able to arrive at a factual finding on these papers to this effect; in other words, to the effect that the purchase price, even if the contested valuation is set aside for containing manifest errors, will never be less than R8 725 500.

[14]The purchasers dispute this. They argue that their response to the seller's paragraph 60 is being taken out of context; and that their answering affidavit, read as a whole (as it must), is a detailed challenge to the seller's contentions.

[15]I will accept for the purposes of this judgment that the seller's contention concerning paragraph 60 is correct. However, the difficulty for the seller's case is that all that that does, is to take one to a factual finding that the purchase price, once determined, will never be less than R8 725 500. That is still not evidence, let alone a finding, that the seller and the purchasers have actually agreed that the purchasers are now indebted to the seller in the amount of R8 725 500, and have agreed to pay that amount to the seller now.

[16]Put differently, for the seller's argument to succeed, he would have to show that the purchasers formulated paragraph 73 of their answering affidavit *animus contrahendi*, meaning with the intention of agreeing with the seller that they owe the seller R8 725 500, and further, that they were by their paragraph 73 agreeing to pay that amount to the seller now. I do not believe that that inference can be drawn either from paragraph 73 of the answering affidavit or from the purchasers' affidavit, read as a whole.

[17]Rather, the purchasers' contention in their affidavit is that for so long as the valuations remain in dispute, the purchase price will not have been settled for purposes of the written settlement agreement. It is an essential ingredient of an enforceable agreement of sale that there is either firm agreement on the *pretium*, or alternatively on a mechanism for

determining the *pretium*. In this case the alternative applies; the parties expressly agreed a mechanism for determining the purchase price.

[18]No-one has suggested, at least not thus far in these proceedings, that that mechanism has failed, inevitably leaving the sale agreement inchoate for lack of firm agreement on the *pretium*.

[19]But the purchasers have said that thus far there is no firm agreement on the purchase price, and that is their contention; not that there is firm agreement on a portion of the purchase price. In other words, to the extent that their affidavit does not dispute that the purchase price will not be less than R8 725 500,⁷ all they are saying is that the ultimate determination will not be less than this amount; they are not saying that they are agreeable to paying that amount to the seller now on account of the purchase price.

[20]It follows that all aspects of the disputes between the parties will have to go to trial; there is no room for any carve-out at this stage. I agree that a fair costs order will allocate responsibility for the costs relating to the set-down of the matter on the opposed motion court roll, and the costs of 4 May 2016, to the seller; but that for the rest, the costs should be in the cause.

[21]In the result I make the following order:

- (a) The application is referred to trial, with the notice of motion being deemed a simple summons.
- (b) The applicant is to file his declaration within 21 days of this order.
- (c) The applicant is to pay the costs relating to having set the application down on the opposed roll for this hearing, as well as the costs of 4 May 2016.
- (d) All other costs are in the cause.

WHG van der Linde

⁷ This is on the assumption that I have made in favour of the seller.

Judge, High Court
Johannesburg

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Date of hearing: 04 May 2016

Date of judgment: 06 May 2016