

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE

SIGNATURE

Case No.: 15/35612

In the matter between:

SIAFA Investment Holdings (Pty) Ltd

Applicant

and

**Motlekar, Faizel
Motlekar Capital Partners (Pty) Ltd**

**First Respondent
Second Respondent**

Coram: VALLY J

Heard: 18 MAY 2016

Delivered 28 JULY 2016

Summary: Lien-Contract-Misrepresentation-Share Certificates

ORDER

The applicant is to return the Share Certificate issued to it by the second respondent. The first and second respondents are to, jointly and severally the one paying the other to be absolved, make the following payments to the applicant; (US\$9 286 439); (5 961 768 United Arab Emirates Dirham) and (R6 000 000.00). The payments referred to in paragraph 2 are to be made within ten court days of this order. The first

and second respondents are to jointly and severally pay the costs of this application the one paying the other to be absolved, which costs are to include those occasioned by the employment of two counsel and are to be taxed on an attorney and client scale.

JUDGMENT

Vally J

Introduction

[1] The applicant, SIAFA Investments Holdings (Pty) Ltd (SIAFA) claims that it was enticed by a fraudulent misrepresentation to subscribe for shares in Motlekar Capital (Pty) Ltd (Motlekar Capital) by a director of Motlekar Capital, one Mr Faizel Motlekar (Motlekar). Motlekar claimed to have owned a number of companies either wholly or in majority. These companies he claimed constituted the Motlekar Group. The ownership was retained by a holding company, called Motlekar Holdings (Pty) Ltd (Motlekar Holdings), which was described by Motlekar as “a 100% black-owned diversified private equity firm founded by the very well connected entrepreneur, Mr Faizal Motlekar.” SIAFA subscribed for shares in Motlekar Capital. The subscription actually took the form of an agreement (the subscription agreement). Its case is that but for the fraudulent misrepresentation it would not have subscribed for the shares. It seeks repayment of the amounts it disbursed in terms of the subscription agreement. Those amounts are:

[1.1] Nine million, two hundred and eighty-six thousand and four hundred and thirty-nine United States dollars (US\$9 286 439);

[1.2] Five million nine hundred and sixty-one thousand seven hundred and sixty-eight United Arab Emirates Dirham (5 961 768 United Arab Emirates Dirham); and,

[1.3] Six million rands (R6 000 000.00).

Undisputed facts

[2] The applicant wished to invest in this country. SIAFA was set up as a special purpose vehicle through which it would direct its investments in South Africa. One of the shareholders of SIAFA was a member of a family resident in Saudi Arabia. The family is referred to in the papers as the Vasaiwala family. Two members of this family visited South Africa in 2012. They were introduced to Motlekar by a theologian whom they respected and trusted. The theologian vouched for the integrity of Motlekar.

[3] Eventually members of the Vasaiwala family had a number of meetings with Motlekar. These meetings took place in South Africa, Dubai and in Saudi Arabia. During these meetings they were told by Motlekar that the Motlekar Group had interests in a large range of businesses operating in the mining,

construction, development and roof tile manufacturing sectors. Motlekar claimed that these companies were collectively worth R400m and they produced a net profit of R100m each year. He also claimed to own a private jet. Impressed by these claims they decided to subscribe for shares in Motlekar Holdings. The agreement reflecting this is captured in a single email sent on 5 September 2013. The contents of the email serve as a minute of a meeting held on 4 September 2013 in Jeddah, Saudi Arabia. The contents read:

"Motlekar Holdings:

- The value of the holdings was placed at 400 Million Rands with a N.P of almost 100 Million Rands.
- Siafa Holdings decided to buy 50% shares worth R200 Million Rands.
- Siafa will pay the capital in terms of new investments and acquisitions.

Siafa will pay for the investments as follows:

1. 10M Rands immediately.
 2. 70M Rands by the end of December 2013, includes hyrax investment of 6M USD if agreed.
 3. 20M Rands by June 2014
 4. 20M Rands by June 2015
- Remaining investment will be decided on the go as the business expands.
 - Siafa's profit share will begin from the 1st of September 2013.
 - Motlekar Holdings financial year ends on 28th February and dividends are distributed 2 months after.
 - Charity will be paid as 2.5% Zakat and 2.5% Waqf."

[4] That essentially was the agreement SIAFA concluded with Motlekar Holdings, which was represented by Motlekar. SIAFA was represented by members of the Vasaiwala family.

[5] Thereafter, these parties held several meetings with each other over the period 15 to 22 September 2013 in South Africa. During these meetings Motlekar gave a presentation of, amongst others, the financial state of Motlekar Holdings. The presentation he gave painted a picture of Motlekar Holdings being a conglomerate with vast tentacles spread over numerous industrial sectors. Acting in his capacity as the sole director of Motlekar Capital, Motlekar expressly warranted that as at 1 January 2014 (the date of the subscription agreement) Motlekar Capital held shares in the following entities:

[5.1] 100% of the issued share capital of Motlekar Communication (Pty) Ltd;

[5.2] 100% of the issued share capital of Mobro Investments (Pty) Ltd;

[5.3] 100% of the issued share capital of Motlekar Developments (Pty) Ltd;

[5.4] 100% of the issued share capital of Motlekar Roof & Tile (Pty) Ltd;

- [5.5] 30% of the issued share capital of Cyclocor Motlekar (Pty) Ltd;
 - [5.6] 35% of the issued share capital of Tarman (Pty) Ltd;
 - [5.7] 30% of the issued capital of Motprop (Pty) Ltd;
 - [5.8] 26% of the issued share capital of Citrine Construction Limited;
 - [5.9] 100% of the issued share capital of Motlekar Coal;
 - [5.10] 100% of the issued share capital of Motlekar Coal KZN (Pty) Ltd;
 - [5.11] 100% of the issued share capital of Motlekar Resources (Pty) Ltd; and,
 - [5.12] 35% of the issued share capital of Kilken Platinum (Pty) Ltd.
- [6] The warranty was material and induced SIAFA to conclude the subscription agreement.
- [7] Finally, on 1 January 2014 SIAFA, represented by one member of the Vasaiwala family, Mustafa Vasaiwala (Mustafa), and Motlekar Capital represented by Motlekar concluded the subscription agreement. In terms of this agreement SIAFA subscribed for 200 ordinary shares at a subscription price of R110 647 079.00. Once the price of the shares was paid by SIAFA, Motlekar Capital would issue and allot the shares to SIAFA and deliver a share certificate to this effect. Just prior to the conclusion of the agreement Motlekar informed Mustafa that Motlekar Capital owned most of the businesses that he previously claimed were owned by Motlekar Holdings. Mustafa accepted these representations to be true and correct and relied upon them when committing SIAFA to the terms of the subscription agreement.
- [8] The obligations of SIAFA to make payments for the subscription of the shares of Motlekar Capital were fulfilled before the actual subscription agreement was signed. The payment took the following form:
- [8.1] the sum of US\$9 286 439;
 - [8.2] the sum of 5 961 768 United Arab Emirates Dirham; and'
 - [8.3] the sum of R6 000 000.00
- [9] The payments were made between the period 12 September 2013 and 6 October 2014. The total payment is in excess of R120m. The payments were made to various third parties on the instructions of Motlekar who acted on behalf of Motlekar Capital.
- [10] Before the payments were made SIAFA was not provided with copies of any financial statements of Motlekar Capital. After the payments were made representatives and directors of SIAFA made contact with Motlekar and

requested that he furnish them with financial reports of the Motlekar Capital as well as with a share certificate reflecting their holdings in SIAFA. They sought copies of financial statements, management accounts, loan agreements and a reconciliation of the payments made by SIAFA. None of the information sought was provided. Sometime in July or August 2014 Motlekar met with, amongst others, members of the Vasaiwala family in Saudi Arabia to discuss issues relating to SIAFA's investment in Motlekar Capital. At this meeting Motlekar informed them that he had invested an amount of R70m of SIAFA's money with a South African businessman named Mr Zunaid Moti (Moti). Following this meeting representatives of SIAFA were able to verify that R70m of the monies paid by SIAFA was directed to Moti by Motlekar. SIAFA was not able to establish the veracity of the claim that this was an investment made by Motlekar Capital in the form of a loan to Moti.

[11] In September 2014 Motlekar produced two share certificates, one reflecting SIAFA's shareholding of 200 shares and the other reflecting Motlekar Holdings' shareholding of 400 shares. The share certificates are signed by Motlekar in the capacity of "Director/Authorised Signatory". Also in September SIAFA learnt that the issuing of the SIAFA share certificate followed upon the passing of a number of resolutions by Motlekar Capital over a period of three consecutive days – 7, 8 and 9 September 2014. One of the resolutions passed concerns a declaration of a dividend of R200m in favour of Motlekar Holdings. This particular resolution was taken by Motlekar Holdings in its capacity "*as sole shareholder*" of Motlekar Capital. All the resolutions were signed by one person only, Motlekar. In other words, he alone signed the resolutions for Motlekar Capital as well as for Motlekar Holdings. The resolutions for Motlekar Capital recorded the amount paid by SIAFA for the shareholding in Motlekar Capital (the amount recorded is R110 647 049.00), authorised the issuing of a share certificate in the name of SIAFA and declared a dividend of R200m in favour of Motlekar Holdings, while the resolution taken by Motlekar Holdings consented to the declaration of a dividend by Motlekar Capital in favour of itself.

[12] One of the resolutions passed by Motlekar Capital reads:
"Solvency and Liquidity

For purposes of the Companies Act, the company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at the time –

The assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued,

It appears that the company would be able to pay its debts as they become due in the ordinary course of business for the period of 12 months after the date the test is considered or in the case of distribution, 12 months following the distribution."

[13] At the time the resolutions were passed, SIAFA in terms of the subscription agreement already owned 50% of the shareholding of Motlekar Capital.

[14] Motlekar Capital was not solvent at the time the resolutions were passed. It was indebted to the National Empowerment Fund to the tune of R50m and was unable to pay the debt. Motlekar Holdings had committed itself as guarantor for the payment of the debt of Motlekar Capital and it, too, was unable to liquidate this debt. Thus, both Motlekar Capital and Motlekar Holdings were insolvent.

[15] Representatives of SIAFA contacted Motlekar on a number of occasions thereafter in the quest to obtain financial records. Instead of being furnished with the financial records they were verbally informed by Motlekar that Motlekar Capital was indebted to him personally for the sum of R200m. He claimed to have loaned this money in cash to Motlekar Capital. They were unsuccessful in obtaining the financial records. They asked for proof of the loan, but this, too, was not furnished to them. Eventually, in October 2014 SIAFA decided to withdraw from the investment in Motlekar Capital.

[16] On 21 November 2014 Motlekar met with representatives of SIAFA in Dubai. During this meeting he represented himself as well as the companies, Motlekar Holdings and Motlekar Capital. Motlekar was informed that SIAFA had decided to terminate its relationship with him, with Motlekar Holdings and with Motlekar Capital. Motlekar accepted the decision and on behalf of Motlekar Capital agreed to refund it the original investment it made in Motlekar Capital. He went further and committed himself personally to refund the amount invested in Motlekar Capital. The agreement to this effect was subsequently recorded in the form of email exchanges. On 25 December 2014 a representative of SIAFA, Mustafa, wrote to Motlekar stating: "Further to our meeting in (sic) 21st November 2014 in Dubai, I wish to confirm on behalf of SIAFA Investments (Pty) Limited that the following was agreed:

1. Motlekar Holdings (Pty) Limited and SIAFA (Pty) Limited will terminate its business relationship with immediate effect.
2. The total sum of R120 million that was paid to Motlekar Holdings (Pty) Limited and/or its nominees as directed by Motlekar Holdings (Pty) Limited will be paid back to SIAFA Investments (Pty) Limited.
3. It is further understood and agreed that while the shareholders of SIAFA Investments (Pty) Limited's funds are in credit in Motlekar Holdings, all profits will accrue to SIAFA Investments (Pty) Limited.
4. It was agreed that Mr Faizal Motlekar will present a short-term payment plan in January 2015."

[17] The fact that the above correctly reflects the agreement reached in Dubai is manifest in the reply of Motlekar to the email. His reply reads: "Your e-mail is noted and I will discuss the repayment once I have full forecast from all my subsidiaries on how we will pay this amount back Inshallah."

[18] Motlekar was given some time to arrange his affairs and produce a payment plan. After several attempts by representatives of SIAFA to meet with Motlekar a meeting was finally held on 21 January 2015. However, no re-payment plan was produced by Motlekar. At this meeting the following was agreed:

"We hereby record that Mr Faizal Motlekar will by no later than end of February 2015 give detailed payment schedule of total amount (referred to in email dated 25th December 2014). However, Mr Faizal has also recorded that he is making an effort to obtain an external loan, and if he is successful he will pay the amount earlier. By the end of February Mr Faizal will pay some amount to SIAFA Group against investment account. We hereby also agree that Mr Faizal will give Mr Zahir Ragie an amount of R1 500 000 (one million five hundred thousand Rand) against Sasol filling station to assist with the cash flow for Angel Cosmetics"

[19] Motlekar did not comply with this agreement. Again after some to-ing and fro-ing a further meeting was held between representatives of SIAFA and Motlekar on 25 February 2015. At this meeting it was, once again, agreed that he accepted personal responsibility for the indebtedness of Motlekar Capital. Motlekar failed to meet his obligations in terms of the agreement. Motlekar was threatened that legal proceedings would be instituted against him and against Motlekar Capital. In response thereto, he sent an email on 19 March 2015 to a representative of SIAFA which reads:

"We are awaiting a tax directive from the attorneys to be finalised. This is due to external people getting no of the transaction, we needed to take advice on the matter." (the quotation is verbatim)

[20] Motlekar still did not make any payment or present any payment plan. Representatives of SIAFA tried to pin him down in this regard but to no avail. However, on 11 May 2015 he wrote to a representative of SIAFA stating:

"I have secured to refund the payments and payment will be repaid to the accounts that it originated from. The process will take approximately 60 days from Monday 11 May 2015.

I therefore beg your indulgence for the process to be fulfilled over the next week or so. I will need the account numbers in Dubai and Saudi Arabia to make arrangements for the refund of the advance payments on behalf of SIAFA.

I appreciate your patience thus far, but I needed to work on a plan to resolve the issue. The funds will be returned from the source it was paid to. This is the process that I was working on to repay the amount that was advanced, so in the interest of resolving the issue and not to prolong unnecessary delays I request that you be patient and wait for this to be concluded."

[21] On 14 May 2015 the attorneys acting for SIAFA sent Motlekar an email where they recorded that at a meeting between Motlekar and a representative of the SIAFA on 13 May 2015 Motlekar was informed, amongst others, that:

"(He had) represented to (SIAFA) that the assets in terms of Clause 4.1.8 of the **Subscription Agreement** do belong Motlekar Capital Partners (Pty) Ltd whereas this is not the case. This is tantamount to a material misrepresentation." (Bold in the original)

[22] Motlekar did not respond to the email.

[23] Subsequent to the failure of Motlekar Capital to fulfil its obligations in terms of the agreement with SIAFA, representatives of SIAFA investigated some of the affairs of Motlekar Capital as well as other companies in the Motlekar Group, which were subsidiaries of Motlekar Holdings. They learnt that the NEF was seeking R50m from one of the subsidiaries of the Motlekar Holdings, i.e. Cyclocor Motlekar (Pty) Ltd (Cyclocor Motlekar), and that the Motlekar Group was not worth the R400m claimed by Motlekar when he made the pitch to SIAFA in Jeddah on 5 September 2013 to invest in the Motlekar Group. They discovered that the true situation was that Motlekar Holdings was already insolvent for some time before that. They also discovered that Motlekar had concluded a number of loan agreements with the NEF and that he deliberately concealed these loan agreements from them. Furthermore, in or during April 2012 Motlekar Holdings gave an “*unconditional and absolute guarantee*” to the NEF in regard to the R50m debt of Cyclocor Motlekar, (at that stage operated under the name and style of Cyclocor Western Cape (Pty) Ltd (Cyclocor Western Cape) and was renamed later to Cyclocor Motlekar). A month before, Cyclocor Western Cape had ceded all its bank accounts and book debts to the NEF. Cyclocor Western Cape had also ceded all its shares to the NEF.

[24] Hence, in January 2014 when Motlekar represented to SIAFA that Motlekar Capital owned 30% of Cyclocor Motlekar¹, (which we know is Cyclocor Western Cape renamed) he knew this was not true. He also failed to inform SIAFA that all the bank accounts of Motlekar Capital were ceded to the NEF, when he knew that this information was material and would have affected SIAFA’s decision to enter into the subscription agreement. Furthermore, at the time that Motlekar made the pitch for SIAFA to subscribe for shares in Motlekar Holdings he was aware that the representations he made regarding the assets of Motlekar Capital were false. Furthermore, he made them with the intention to induce SIAFA to conclude a subscription agreement.

[25] On 26 August 2014 Cyclocor was finally liquidated by the Western Cape High Court. An insolvency enquiry was held in terms of ss 417 and 418 of the Companies Act, read with item 9 of Schedule 5 of the New Companies Act, 71 of 2008. During this enquiry it transpired that Motlekar Capital was not a shareholder of Cyclocor Motlekar as was claimed by Motlekar during his representations to SIAFA prior to SIAFA subscribing for the shares.

SIAFA’s claim

[26] Relying on the above undisputed facts, SIAFA contends that it was induced by the false representations of Motlekar to conclude the subscription agreement with Motlekar Capital. But for these false representations SIAFA claims it would not have concluded the subscription agreement. It claims further that once it discovered that the representations were false, it was

¹ See [5.4] above

entitled to rescind the agreement and receive a refund from Motlekar Capital. It goes further and seeks an order holding Motlekar personally responsible for the refund. For this order it relies on the provisions of the new Companies Act and on the undertaking made by Motlekar to it that he does accept personal liability for the refund.

Motlekar Capital and Motlekar's response to the claim

[27] Both Motlekar and Motlekar Capital claim in the answering affidavit filed on their behalf that the applicants lack the necessary *locus standi* to seek the relief they are requesting from this court. They base their claim on the following two facts:

[27.1] that SIAFA did not pay the monies out of bank accounts held in the name of SIAFA; and,

[27.2] that neither of them were the recipients of the monies paid by SIAFA.

[28] In my judgment, there is no merit in this point. There are four main reasons for this, namely:

[28.1] It is not disputed that the monies were paid on behalf of SIAFA for the subscription of the shares in Motlekar Capital. There are three facts that militate against the claims of Motlekar and Motlekar Capital. They are:

[28.2] there is no dispute that the monies were only paid to third parties on the instructions and at the instance of Motlekar, who at all times acted as the duly authorised representative of Motlekar Capital;

[28.3] throughout the interactions between SIAFA and Motlekar, Motlekar accepted that the monies were paid to Motlekar Capital; and,

[28.4] in a meeting held in Dubai between Motlekar and representatives of SIAFA Motlekar admitted that the total sum of R120m was paid by SIAFA to Motlekar Capital.²

[29] In fact, in the light of all the undisputed facts, and not only the four mentioned above, it is difficult to understand why Motlekar and Motlekar Capital would raise and persist with the claim that SIAFA did not pay the monies and that Motlekar Capital was not the recipient of the monies.

[30] Having raised the issue of SIAFA's standing to bring the application Motlekar and Motlekar Capital then put up no significant opposition to the merits of the claims.

[31] The undisputed facts demonstrate that SIAFA was deliberately deceived by Motlekar Capital into concluding the subscription agreement with Motlekar Capital. Put differently, SIAFA was induced by various fraudulent misrepresentations made to it by Motlekar Capital into concluding the

² See [16] – [17] above

subscription agreement. Consequently, it is entitled to rescind the subscription agreement and to reclaim all the monies it has paid to Motlekar Capital. However, it has to return the Share Certificate given to it by Motlekar Capital should it elect to rescind the subscription agreement. In other words, the subscription agreement is voidable at SIAFA's election.³ SIAFA has elected to avoid it and has tendered this Share Certificate to Motlekar Capital. The amount it has paid and which it is reclaiming is reflected in [8.1], [8.2] and [8.3] above.

[32] Furthermore, the undisputed facts show that Motlekar has accepted personal liability for the repayment of the amount given to Motlekar Capital.⁴ Hence, SIAFA is entitled to look to him for the repayment should Motlekar Capital fail to repay it.

[33] Accordingly, Motlekar Capital and Motlekar are liable for the loss sustained by SIAFA as a result of the fraudulent misrepresentation of Motlekar Capital.

Costs

[34] SIAFA asks for Motlekar Capital and Motlekar to pay the costs of this application on an attorney and client scale. They say that the fact that Motlekar's conduct was knowingly dishonest from the beginning, and that his dishonesty continued throughout the period, compelled them to bring this application. It points out that it granted Motlekar numerous opportunities to settle its claim before it sought the assistance of this court. These facts they say justify a punitive order. I agree with these submissions for there is great merit in them.

[35] For the aforesaid reasons the following order is made:

Order

[36] It is the order of this court that:

1. The applicant is to return the Share Certificate issued to it by the second respondent.
2. The first and second respondents are to, jointly and severally the one paying the other to be absolved, make the following payments to the applicant:
 - 2.1 Nine million, two hundred and eighty-six thousand and four hundred and thirty-nine United States dollars (US\$9 286 439);
 - 2.2 Five million nine hundred and sixty-one thousand seven hundred and sixty-eight United Arab Emirates Dirham (5 961 768 United Arab Emirates Dirham); and,
 - 2.3 Six million rands (R6 000 000.00).
3. The payments referred to in paragraph 2 are to be made within ten court days of this order

³ *Kopelowitz v West and Others* 1954 (4) SA 296 (W) at 300F; *Preller and Others v Jordaan* 1956 (1) SA 483 (A) at 496E

⁴ See [16] – [20] above

4. The first and second respondents are to jointly and severally pay the costs of this application the one paying the other to be absolved, which costs are to include those occasioned by the employment of two counsel and are to be taxed on an attorney and client scale.

Vally J

Date of hearing: 18 May 2016

Date of judgment: 28 July 2016

For the applicant: T N Aboobaker SC with Goolam Ameer

Instructed by: A R Kazi and Company

For the respondent: Mphiri Mashilo

Instructed by: Aphane Gani Attorneys