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

CASE NO: 14337/2022

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

PAULO JOSE MONTEIRO FERREIRA
(Identity Number:[...])

Applicant

and

MAZANTSI CABLES PROPRIETARY LIMITED
(Registration Number: 2018/362008/07)

First Respondent

MARK JAMES HUGES
(Identity Number:[...])

Second Respondent

CARLOS MIQUEL TAVARES PALINHOS
(Identity Number:[...])

Third Respondent

Neutral Citation: *Paulo Jose Monteiro Ferreira v Mazantsi Cables Proprietary Limited & 2 Others* (Case No. 14337/2022) [2023] ZAGPJHC 580 (26 May 2023)

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 26 May 2023.

JUDGMENT

MALINDI J:

Introduction

[1] The applicant lodged this application on 14 April 2022 claiming payment of R2 655 000.00 with interest at a rate of 7% per annum against the three respondents and costs on an attorney and client scale.

[2] Notice of intention to oppose was filed on 29 April 2022 on behalf of the respondents.

[3] On 29 April 2022 the respondents issued a Rule 30A notice alleging an irregularity in that a Rule 41A notice was not launched simultaneously with the notice of motion.

[4] Instead of filing an answering affidavit the respondents challenged the claim only by raising a point of law in terms of Rule 6(5)(d)(iii) on 23 May 2022.

The Parties

[5] The applicant, Mr Ferreira, sues in his personal capacity.

[6] The respondents are Mazantsi Cables (Pty) Ltd, Mark James Hughes and Carlos Miguel Tavares Palinhos.

[7] The second and third respondent are cited as sureties for the first respondent's alleged indebtedness to the applicant, arising out of the annexed Memorandum of Agreement ("the Main Agreement") and the Deed of Suretyship ("the Suretyship").

Issues for Determination

[8] The averments contained in the founding affidavit are not contested. The only issue for determination is whether the questions of law raised in the respondents' Rule 6(5)(d)(iii) notice have merit.

Discussion

[9] The first respondent has acknowledged its indebtedness to the plaintiff in the amount of R4 425 000. It acknowledged this indebtedness on the basis of Intakobusi's defaults in payments to Ashdem. The plaintiff and the first respondent had agreed that the first respondent's indebtedness under the Main Agreement would be defrayed by Intakobusi's payments in set monthly amounts to Ashdem. Ashdem is a company owned solely by the plaintiff and the second and third respondents are Directors of Intakobusi. There is a Service Agreement ('the Service Agreement') between Intakobusi and Ashdem. In short, the plaintiff alleges that the first respondent's indebtedness to him was to be discharged through payments by Intakobusi to Ashdem.

[10] Clause 7 of the Main Agreement provides that the full amount outstanding would become due and payable upon default by the first respondent to pay any amount under the Main Agreement. This meant that Intakobusi's default under the Service Agreement would be the first respondent's default. Having complied with the breach provisions under the Service Agreement, Ashdem cancelled the Service Agreement and that rendered the first respondent's inability to pay the applicant. Put differently, the applicant could no longer receive payment of the debt under the Main Agreement through the mechanism devised between him

and the respondents through the Service Agreement. Upon the cancellation or collapse of the Service Agreement the Main Agreement's terms and conditions had to be complied with. It rendered the amount owed thereunder due, owing and payable.

[11] Rule 6(5)(d)(iii) provides as follows:

“... Any person opposing the grant of an order sought in the notice of motion shall –

...

(iii) if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.”

[12] Two questions are whether there is a legal remedy or cause of action raised by the applicant and whether competent relief may be granted if a legal remedy exists.

[13] The respondents contend first, that the applicant has failed to allege or prove that Ashdem fulfilled or performed its reciprocal obligations under the Service Agreement. As a result, there being no proof of averments to prove breach on the part of Intakobusi, the cancellation of the Service Agreement is invalid.

[14] Aligned to the submission above, the respondents allege that there was no notice of breach given to them and that what purports to have been notice was not compliant with the terms of the breach clause.

[15] Secondly, the respondents contend that the applicant has failed to prove breach of the Main Agreement and the basis that the terms of breach and

acceleration set out therein were not adhered to before demand and action was taken thereunder.

The Law

[16] I can first easily dispose of the respondents' request that if their Rule 6(5)(d)(iii) contention fails, they must be afforded an opportunity to file answering papers. When a party elects to raise a point of law only it means exactly that. The rule is explicit in its provisions. It does not permit a piecemeal hearing as proposed by the respondents in the event that they do not succeed on the "question of law only". The notice is filed in lieu of an answering affidavit.¹

[17] No exceptional circumstances were advanced to justify a further indulgence to file an answering affidavit if the respondents were to be unsuccessful on the point of law and to deflect whatever prejudice that the applicant would suffer.

[18] Regarding whether there was compliance with the breach clauses in the Main Agreement and the Service Agreement this Court has to accept the averments in the only affidavit before it as true.² However, the respondents are correct that it is for this Court to interpret the provisions of the Main and Services contracts³ and whether the averments in the founding affidavit disclose a cause of action or legal remedy.⁴

¹ *Minister of Finance v Public Protector and Others* 2022 (1) SA 244 (GP) at [13].

² *Valentino Globe BV v Phillips and Another* 1988 (3) SA 775 (SCA) at 779; *Minister of Finance (supra)* at [15].

³ *Natal Joint Municipalities Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

⁴ *Boxer Superstores Mthatha and Another v Mbenga* 2007 (5) SA 450 (SCA) at [4].

[19] As regards whether a cause of action has been disclosed in view of allegations of default being made against Intakobusi but not the first respondent, it is clear, as stated above, that Intakobusi's default would be attributed to the first respondent who in turn would be required to remedy the default by a seamless continuation of payments. The parties had agreed the repayment of the loan amount on a monthly basis in the set amounts as set out in the Services Agreement. Failure by the first respondent to meet the monthly payment resulted in the acceleration of the total outstanding amount and rendered it due, owing and payable. The demands made to Intakobusi applied automatically to the first respondent.

[20] The fact that the third respondent acknowledge the debt by Intakobusi to Ashdem seals the case as to Intakobusi's liability which transmitted to the first respondent automatically.

Conclusion

[21] The applicant has made out a case as prayed for in the notice of motion. The respondents' liability under the Memorandum of Agreement was to be discharged by payments made by Intakobusi, of which the second and third respondents were Directors, to Ashdem, a company owned solely by the applicant. The payments were to be on a monthly basis from the commencement date to date of discharge of the debt at specified amounts.

When Intakobusi defaulted and the applicant issued notice of such default, which was acknowledged by the respondents, and resulted in the cancellation of the Services Agreement, such liability automatically transmitted to the first respondent and the second and third respondents as sureties in the event that the first respondent fails to make payment.

[22] When the first respondent failed to meet the next payment after assuming liability the total amount became due and payable.

[23] In the circumstances the following order is made:

1. The first, second and third respondents are ordered to pay, jointly and severally, the one paying the others to be absolved, the applicant the amount of R2 655 000.00;
2. The first, second and third respondents are ordered to pay, jointly and severally, the one paying the others to be absolved, interest on the amount of R2 655 000.00 at a rate of 7% per annum from date of application to date of final payment.
3. The respondents are to pay the cost of this application jointly and severally, one paying the others to be absolved.

G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

JOHANNESBURG

COUNSEL FOR APPLICANT:	Adv L Hollander
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COUNSEL FOR RESPONDENTS:	Adv D Williams
INSTRUCTED BY:	Malherbe Rigg & Ranwell Inc
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