

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

10/1/24

DATE

SIGNATURE

Case No: 2022-057556

In the matter between:

PIOTR SERGIUSZ KISZKURNO

APPLICANT

AND

SAIL HOLDINGS (PTY) LIMITED

RESPONDENT

JUDGMENT

KAPLAN AJ:

1. Applicant seeks an order placing Respondent under final winding up on the basis that Applicant is a creditor of Respondent in an amount of “at least” USD 198 111 (“the debt”), that Applicant delivered a Notice to Respondent in terms of Section 345(1)(a) of the Companies Act 61 of 1973 (“the Act”) and that Respondent has failed to make payment of the debt and is thus deemed to be unable to pay the debt as envisaged in terms of the said Section of the Act.
2. In his Founding Affidavit Applicant avers in regard to the debt that:
 - 2.1 he was appointed as Chief Executive Officer of Respondent in terms of an agreement concluded on 6 October 2020, a copy of which is attached to the Founding Affidavit marked “P4” (“the employment agreement”) in terms whereof he was entitled to a monthly salary of USD 24 409.00;
 - 2.2 his salary was reduced from July 2021, and it was agreed that the portion of salaries held back would be paid to him when Respondent’s financial position stabilised;
 - 2.3 as at April 2022 the total outstanding in salary payments due to him together with the reduced portion amounted to USD 139 090.00 and he was also owed amounts in respect of a bonus for the year end 2020 in the sum of USD 73 227.00, business expenses paid by him in the sum of USD 2 607.00 and accrued annual leave amounting to USD 28 187.00;
 - 2.4 as a result of the ever-growing debt owing to him, he met with William Yang (“Yang”) a director of Respondent and a written

agreement was concluded between Applicant and Yang on 29 April 2022, a copy of which is attached to the Founding Affidavit marked "P5", ("the agreement") wherein it was recorded that Applicant and Yang were able to come to an agreement regarding the manner in which Respondent / Sail Group would be able to resolve his employment concerns which they discussed and are outlined therein.

2.5 Part A of the agreement provides as follows:

"A. Employment concerns

When I was initially appointed as Chief Executive Officer at Sail Holdings (Proprietary) Limited, the agreement was that I would receive a monthly salary of \$24 409.00.

Leading up to July 2021, due to the Sail Group's operations being placed into administration and care and maintenance, we agreed on an adjustment of an amount of \$9 409.00 from my salary, and thereby reducing it to \$15 000.00 a month.

The balance of \$9 409.00 would, however, be paid back to me once the Sail Group was able to.

The following are a few of the factors:

- 1. The \$15 000.00 reduced salary remains unpaid from February 2022 to April 2022;*
- 2. The total unpaid salary owed to me since February 2022 now amounts to \$45 000.00 (\$15 000.00 for each month of February, March and April 2022) ("Unpaid Salary");*

3. *Between July 2021 to April 2022, an amount of \$94 090.00 has accrued on the adjusted portion of my unpaid salary ("Adjusted Portion");*
4. *My FY2020 bonus of three months' salary awarded towards me on 6 January 2021 remains unpaid and amounting to \$73 227.00 ("FY2020 Bonus");*
5. *My business expenses of \$2 607.00 remains unpaid ("Business Expenses"); and*
6. *I have accrued annual leave of 24.25 days amounting to \$28 187.00 ("Annual Leave")."*

2.6 Paragraphs 1 to 3.2 and 3.6 of Part B of the agreement provides as follows:

"B. Proposed way forward

"The ultimate purpose of this letter is to record what we agreed to during our meeting of 13 April 2022 in respect of the way forward. To that end, the following was agreed:

1. *Sail Holdings (Proprietary) Limited, Sail International Marketing Pte Ltd / Sail Group, being jointly and severally liable, will pay Unpaid Salary of \$45 000.00 by end of May 2022 to me or my nominee.*
2. *Sail Holdings (Proprietary) Limited and my Kiskurno Family Trust or its nominee will conclude a subscription agreement and a shareholders agreement.*

3. *My Kiszkruno Family Trust or its nominee will subscribe for 3% (Three Percent) effective issued shares in Sail Holdings (Proprietary) Limited at par value ("the 3% Shares"), in light of the Sail Group key assets, such as Sail Minerals (Pty) Limited, Sail Contracting (Proprietary) Limited and Black Chrome Mine (Proprietary) Limited, currently being insolvent and under administration and care and maintenance. It is noted that all property companies such as Calculated Property Investment (Proprietary) Limited, 25 Sunninghill (Proprietary) Limited and Sunninghill Offices (Proprietary) Limited are not intended to form part of this agreement. We shall investigate and find solution to exclude these property companies:*

3.1 *the subscription agreement and subsequent shareholders agreement will be concluded by my Kiszkruno Family Trust or my nominee, the shareholders of Sail Holdings (Proprietary) Limited and the company itself;*

3.2 *the subscription agreement will be concluded and become unconditional by no later than 30 June 2022, failing which, the Adjusted Portion, FY2020 Bonus, Business Expenses and Annual Leave collectively totalling \$198 111.00 will be paid to me within 10 days after the date of 30 June 2022.*

3.3 *.....*

3.4 *.....*

3.5

3.6 *Once para B1 and B3 above are fully implemented and become unconditional, my employment with Sail Holdings (Pty) Limited / Sail International Marketing Pte Limited / Sail Group of Companies ("Sail Group") will be fully settlement and terminated."*

2.7 Because of the failure to conclude the subscription agreement referred to in the agreement, a breach notice was sent to Respondent, Yang and Sail International Marketing (Pte) Limited on 3 October 2022 wherein:

- (a) it was alleged that Respondent, Yang and Sail International Marketing (Pte) Limited failed to fulfil their obligations in terms of the agreement more particularly in that a subscription agreement and shareholders agreement had not been concluded;
- (b) it was demanded that Respondent, Yang and Sail International Marketing (Pte) Limited, within seven days, present a satisfactory subscription agreement and shareholders agreement or effect payment of the sum of \$198 111.00 within ten days of date of receipt thereof.

2.8 Applicant caused a letter of demand in terms of Section 345 of the Act to be served on Respondent wherein reference was made to the agreement which recorded that in the event that the subscription agreement was not concluded and became

unconditional by 30 June 2022, Applicant would be entitled to payment of the sum of \$198 111.00 and demanding payment of the said sum within three weeks of receipt of the letter.

3. Respondent opposed the application and filed an Answering Affidavit wherein:

- 3.1 Respondent admitted the conclusion of the employment agreement and averred that the reference to him being appointed as Chief Executive Officer of Respondent is an error and that he was in fact employed by Sail International Marketing (Pte) Limited and was to render his services as Chief Executive Officer of the Sail Group.

- 3.2 Respondent admitted the conclusion of the agreement but denied that it was binding on the basis that it was induced by duress.

4. The application for the winding up of Respondent is thus squarely based on the terms of the agreement and in particular the provision therein that in the absence of the conclusion of the subscription agreement and same becoming unconditional by no later than 30 June 2022, the sum of \$198 111.00 would be paid to Applicant within ten days after the date of 30 June 2022.

5. The following appears from the agreement:

- 5.1 as appears from the last page thereof it is concluded between Applicant and Yang;

- 5.2 the caption thereto refers to Applicant's employment with Respondent / Sail International Marketing (Pte) Limited / Sail Group of Companies;

- 5.3 the second paragraph in the introductory paragraphs refers to the manner in which Respondent / Sail Group will be able to resolve Applicant's employment concerns;
 - 5.4 it was agreed that Respondent / Sail International Marketing (Pte) Limited / Sail Group being jointly and severally liable will pay Applicant's unpaid salary of \$45 000.00 by end of May 2022 to Applicant or his nominee;
 - 5.5 Respondent and the Applicant's Kiskurno Family Trust or its nominee will conclude a subscription agreement and a shareholders agreement;
 - 5.6 Applicant's Kiskurno Family Trust or its nominee will subscribe for 3% (three percent) effective issued shares in Respondent at par value;
 - 5.7 the subscription agreement and subsequent shareholders agreement will be concluded by Applicant's Kiskurno Family Trust or his nominee, the shareholders of Respondent and the company itself;
 - 5.8 the subscription agreement will be concluded and become unconditional by no later than 30 June 2022, failing which, the Adjusted Portion, FY2020 Bonus, Business Expenses and Annual Leave collectively totalling \$198 111.00 will be paid to Applicant within 10 days after the date of 30 June 2022.
6. Applicant alleges in the Founding Affidavit that the unpaid salary of \$45 000.00 was paid.

7. In the course of the hearing, I put to Counsel for both parties that I had difficulties as to whether Applicant had made out a case in its Founding Affidavit as read with the agreement for the debt being due, owing and payable to him. This is because:
 - 7.1 The agreement is concluded between Applicant and Yang. (On the signatory page of the agreement, page 4 thereof, the agreement is signed by Applicant in his personal capacity and by Yang in his personal capacity). Further, in this regard, it is averred by Applicant in paragraph 36 of the Founding Affidavit that discussions culminated in the conclusion of the agreement between him and Yang.
 - 7.2 The introduction to the agreement provides that the Applicant and Yang were able to come to an agreement regarding the manner in which Respondent / Sail Group will be able to resolve his current employment concerns which had been discussed and which are outlined therein.
 - 7.3 There is no averment in the agreement as to who will effect payment of the sum of \$198 111.00 in the event of the subscription agreement not being concluded and becoming unconditional by no later than 30 June 2022.
 - 7.4 There is no averment in the Founding Affidavit as to why Respondent is obliged to effect payment of the sum of \$198 111.00 in the event of the subscription agreement not being concluded and becoming unconditional by no later than 30 June 2022.

8. Thus:

8.1 Apart from the fact that Respondent is not a party to the agreement, on a plain reading thereof, it does not contain an obligation on Respondent to effect payment of the debt.¹

8.2 Apart from reliance on the agreement, the Applicant does not make out any other case in the Founding Affidavit in support of Respondent's obligation to effect payment of the debt.

9. In the course of argument, I put to Counsel for both parties my difficulty that Applicant's Founding Affidavit as read with the agreement does not make out a case for Respondent being liable to effect payment of the debt to Applicant. Argument was presented to me in this regard by Counsel for both parties.

10. For the reasons set out aforesaid, I am not satisfied that Applicant has made out a case that Respondent is liable to effect payment of the debt to him. This finding is fatal to the success of the application. As a result thereof, it is not necessary for me to deal with Respondent's defence that it concluded the agreement under duress or any other issues on the papers.

11. The point on which I have decided the application was not raised by Respondent either in its Answering Affidavit or in its Heads of Argument. It was a point drawn to the attention of the parties by the Court. In these circumstances, it would in my view be appropriate for each party to bear its own costs.

¹ It is settled law that the point of departure in interpreting a contract is the language of the document. *Natal Joint Municipal Fund v Endumeni Municipality*, 2012(4) SA 593 (SCA), para 18. *Tshwane City v Blair Athol Homeowners Association*, 2019 (3) SA 398 (SCA).

12. Accordingly, I order that:

12.1 The application is dismissed. Each party is to effect payment of its own costs.



JL KAPLAN

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

Appearance for Applicant:

L Acker

Instructed by:

Ulrich Roux Incorporated

Appearance for Respondent:

T Ohannessian SC

MCJ van Kerckhoven

Instructed by:

Beech Veltman Incorporated

Date of hearing:

10 November 2023

Date of judgment:

10 January 2024