IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 1097/18

In the matter between:

ROSHAN KRISHNA **APPLICANT**

and

MAGNET ELECTRICAL SUPPLIES (PTY) LIMITED **RESPONDENT**

ORDER

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1. The respondent is directed to pay to the applicant the sum of R560 000 within five (5) days of the date of this order.
2. The respondent is directed to pay interest on the above amount at the prime rate, calculated from the due date of payment to the date of actual payment, both days inclusive.
3. The respondent is directed to pay the applicant's costs of suit on the attorney and own client scale.

JUDGMENT

HENRIQUES J

Introduction

[1] The word "agreement" by its very definition suggests a state of being of the same opinion, concord or in harmony. Such definition inadvertently equates to a non-sequitur when courts are called upon to intercede in resolving disputes emanating

from the conclusion of an agreement, which in current times, occurs more often than not. The present dispute between the parties which served before me as an opposed application, is a typical illustration of the above.

Background

[2] The antecedents and factual matrix is of significant relevance in this matter for reasons that will become apparent later in this judgment.

[3] The applicant was employed by the respondent on or about 25 March 1993 and his working relationship with the respondent endured for a period of approximately twenty five (25) years. The applicant was subsequently appointed as a director of the respondent and acquired a shareholding of 13 per cent in the respondent, which the applicant held under Certificate No.20.

[4] The acquisition of the applicant's shareholding in the respondent was formalised in a shareholder's agreement dated 30 December 2004. It warrants mentioning that the parties are not in consensus as to the underlying basis on which the applicant became the owner of such shareholding in the respondent. The respondent seems to suggest that the applicant was "given" such shareholding, whilst the applicant contends that the allocated shares were sold by the respondent and paid for by him. The shareholder's agreement is silent on this issue. Nevertheless, this uncertainty is neither germane nor relevant to the material dispute in the present application.

[5] On 21 December 2016, the applicant and respondent entered into an agreement described as the "repurchase of shares agreement" (the agreement), in terms whereof the applicant agreed to sell his full shareholding to the respondent. The applicant would continue to be employed by the respondent, albeit in a different capacity and the parties recorded such agreement in a further formal employment contract dated 21 December 2016

[6] During October 2017, the applicant was charged by the respondent with two (2) counts of misconduct arising from a misappropriation of the respondent's assets breach of contract and breach of a restraint of trade. Pursuant to a disciplinary hearing held on 3 November 2017, the applicant was found guilty and a sanction of summary dismissal was conveyed to the applicant on 7 November 2017.

[7] The applicant's and respondent's legal representatives subsequently exchanged correspondence, copies of which are annexed to the papers, wherein the applicant demanded payment of the balance of the purchase price of the shares in terms of the agreement and the respondent advanced its reasons and justification for not effecting such payments.

[8] The above general factual matrix is common cause between the parties and inherently not in dispute.

A summary of the applicant's case

[9] A brief summary of the applicant's case is as follows:

(a) The applicant, pursuant to the conclusion of the agreement, sold to the respondent 13 ordinary shares held under Certificate No.20 for a purchase consideration of R2 673 808.25. The respondent, subject to the fulfilment by the applicant of certain conditions undertook to effect payment of the purchase consideration by way of an initial set off to discharge the applicant's loan account in the respondent, and the balance by way of monthly instalment payments.

[b] The suspensive conditions as set out in clause 3 of the agreement were fulfilled by both the applicant and respondent, hence the agreement became of full force and effect. It warrants mentioning that such fact was not disputed by the respondent, who however challenged the validity and viability of the agreement on different grounds.

[c] The applicant contended that in having discharged his obligations in terms of the agreement and in light of the respondent's breach of the agreement in failing to pay the monthly instalments since October 2017, he is entitled to claim performance from the respondent *in forma specifica*.

[d] The applicant accordingly instituted an application seeking inter alia payment of the amounts due by the respondent, being the balance of the purchase price. By way of a supplementary affidavit filed prior to the hearing of the application, the applicant clarified the total amount due by the respondent in terms of the agreement to be in the sum of R560 000, the calculation of such amount not being disputed by the respondent.

A summary of the respondent's case

[10] Paragraph 4 of the respondent's heads of argument refer to the common cause facts. The respondent in limine challenged the applicant's right to institute motion proceedings, averring that the applicant was aware of the material disputes of fact pertaining to the viability of the agreement. These disputes of fact are contained in para 5 of its heads of argument

[11] Apart from the point in limine, the respondent's defences and opposition to the relief sought is as follows:-

[a] it opposes the granting of the order and claims a reduction of the purchase consideration agreed for the shares arising from the applicant's alleged dishonest conduct;

[b] it alleges the applicant's breach of the restraint of trade clause and the applicant's dishonesty in his dealings with it, has caused it to suffer damages.

[c] payment in terms of the agreement was suspended pending an assessment of its claim for damages.

[d] it intended terminating or varying the agreement as a consequence of the applicant's prejudicial conduct and misrepresentations specifically in breaching the restraint of trade provisions in his employment agreement.

[e] the applicant committed acts of fraud and theft which has caused it to suffer damages assessed in an interim amount in the sum of R252 714.60. Accordingly, the respondent has a counterclaim for damages arising out of the applicant's alleged breach of the restraint of trade provisions coupled with the claim for damages as a result of the applicant's perpetrated fraud/theft against the respondent.

[12] The respondent further indicates that it intended to seek an order declaring the repurchase of shares agreement to be *void ab initio*, alternatively an order for the variation of the purchase consideration reflected in the agreement.

[13] Consequently, the respondent contended that the present application should be stayed pending a determination of an action to be instituted against the applicant, alternatively that the application be referred to trial for conjunctive determination, together with the respondent's proposed counterclaims.

[14] The respondent also contended as referred in its heads of argument that in consequence of the applicant's dismissal as an employee of the respondent, he had no contractual right to payment of his shares in the respondent.

Analysis

[15] As referred to earlier, the applicant's claim against the respondent is premised on the express provisions of the repurchase of shares agreement. The applicant's contentions relating to the express written terms of the agreement have not been challenged nor disputed by the respondent.

[16] The applicant has established the conclusion of the agreement, the fulfilment of the conditions, payments effected by the respondent and the respondent's failure to pay the balance of the purchase price, hence the applicant's entitlement to claim specific performance.[1]

[17] The onus of establishing a legal justification for suspending performance of its obligations in terms of the agreement accordingly shifts to the respondent. The respondent in attempting to discharge such onus relied on extraneous factors pertaining to the conduct of the applicant in his dealings with the respondent, which alleged conduct has caused inter alia damages to the respondent.

[18] The respondent on its own version acquired constructive knowledge of the applicant's alleged misconduct during the latter part of 2017 and on 31 October 2017, instituted disciplinary proceedings against the applicant and subsequently dismissed the applicant from its employ.

[19] On or about 24 January 2018, the respondent laid a formal complaint with the South African Police Service (SAPS) of fraud and/or theft against the applicant wherein it claimed that the conduct of the applicant had caused the respondent to suffer a loss of R252 714.60.

[20] The applicant instituted the present application on or about 31 January 2018 and the respondent deposed to its answering affidavit on 07 March 2018. The application was enrolled as an opposed motion and set down for hearing on 20 November 2018.

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[1] *Basson & others v Hanna* 2017 (3) SA 22 (SCA).

[21] As at the date of hearing, the respondent had not instituted any action against the applicant in respect of its alleged losses nor any proceedings to vary or challenge the validity of the agreement. Counsel for the respondent submitted that the respondent's failure to institute any proceedings against the applicant was primarily due to the respondent's ongoing investigations into the applicant's conduct and the computation of its total damages.

[22] The respondent, as is evident in its attorneys' letter dated 11 December 2017,[2] reserved all its rights against the applicant subject to the completion of its investigations and recorded that its performance under the agreement would be held in abeyance.

[23] The respondent's stance as set out above, is untenable and unsustainable as a defence to the applicant's claim. In *Merry Hill (Pty) Ltd v Engelbrecht*[3] the Supreme Court of Appeal expressly gave approval to the statement of Friedman JP in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd*:[4]

'When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. *Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party.*'

[24] Further, in the matter of *Sasol Pension Fund & another v Love Bitez CC t/a Love Bites & another*,[5] the court was tasked with adjudicating the effect of misrepresentation and fraud on a contract and considered the remedies available to a party including the doctrine of election.

[25] Both Friedman JP and Legodi J relied on the dictum expatiated by Innes CJ in *Bowditch v Peel and Magill*:[6]

'A person who has been induced to a contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission. *Voet*z 4.3, secs 3, 4, 7). It follows that he must make his election between those two

[2] Index to application – Volume 1 page 57.
[3] *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA).
[4] *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 542E-F.
[5] *Sasol Pension Fund & another v Love Bitez CC t/a Love Bites & another* (26492/2013) [2016] ZAGPPHC 530 (20 April 2016).
[6] *Bowditch v Peel and Magill* 1921 AD 561 at 572-573.

inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessary involves the abandonment of the other. He cannot both approbate and reprobate.'

[26] It is patently clear that the respondent's approach is contrary to the principles of election. The respondent, confronted by the applicant's breach as alleged, whether such breach was actual or anticipatory, was obliged to elect a remedy within a reasonable time. In addition, the respondent's failure to take any positive steps in instituting proceedings against the applicant, armed with information allegedly establishing misconduct on the applicant's part is inexplicable.

[27] The respondent's submission that the applicant's failure to act in good faith and specifically the applicant's breach of the restraint of trade provisions in the employment agreement, is tantamount to a repudiation of the agreement is equally without substance or merit.

[28] The repurchase of shares agreement was perfected to the extent that the parties complied with the conditions contained therein and the applicant handed over his shares to the respondent. In the absence of any proceedings to challenge the validity of the agreement, the terms and conditions contained in the agreement are both binding and enforceable.

[29] After careful analysis of the provisions of the agreement and the contract of employment, no real impediment affected the respondent in instituting proceedings challenging the viability of the agreement or any other proceedings arising out of the alleged breach of the restraint of trade provisions in the contract of employment. At the very least, the respondent on its own version had constructive knowledge of the damages it allegedly suffered as a consequence of the applicant's conduct as set out in its criminal complaint referred to earlier.

[30] It further warrants mentioning that the above findings are not an expression of any views in regards to the respondent's allegations against the applicant as such proceedings are not before this court and accordingly, the veracity of the respondent's allegations ought to be the subject matter for consideration by another court. There is accordingly no restriction to the respondent instituting such proceedings.

[31] The respondent further submitted in view of the dispute of fact, that this court should exercise its discretion to refer the application for the hearing of oral evidence in conjunction with the respondent's action to be instituted.

[32] Counsel for the applicant and respondent relied on the authority of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd,*[7] wherein it was stated:

'It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment. . . .'

[33] A dispute of fact must be bona fide and genuine on all material aspects before a court in the exercise of its discretion should refer a matter to trial or for the hearing of oral evidence.[8] For the reasons referred to above, the disputes raised by the respondent cannot be viewed as being bona fide nor genuine on material aspects in this application. I readily align myself with the submission by applicant's counsel that the viability of the agreement, particularly in the absence of any proceedings instituted by the respondent, is a question of law and not an enquiry of fact.

[34] The respondent's submission that the applicant's application should be stayed pending the adjudication of its counter-action to be instituted is neither reasonable nor equitable. The respondent did not see fit to institute any application for such stay of this application and in any event could not advise the court as to when its suggested counter-action would be instituted. In such circumstances, it is neither equitable nor judicious for this court in the exercise of its discretion to grant an order staying the application.

[35] In the premises, the inevitable conclusion is that the respondent cannot succeed in establishing just and legal cause for its failure to perform in terms of the agreement and it axiomatically follows that the application should succeed.

[36] The applicant filed a supplementary affidavit dealing with the quantum of the relief initially sought when the application was instituted and at the time the application was argued. Such amendment to the quantum was foreshadowed in the notice of motion and there can be no prejudice to the respondent.

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[7] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.

[8] *Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others* 2008 (2) SA 184 (SCA).

Costs

[37] It is trite that the issue of costs is inherently within the discretion of the court. The agreement concluded between the parties however provided for attorney and own client costs in the event of a breach. I can find no legitimate reason to deviate from the written provisions of the agreement regarding costs.

Order

[38] In the result the following orders will issue:-

1. The respondent is directed to pay to the applicant the sum of R560 000 within five (5) days of the date of this order.
2. The respondent is directed to pay interest on the above amount at the prime rate, calculated from the due date of payment to the date of actual payment, both days inclusive.
3. The respondent is directed to pay the applicant's costs of suit on the attorney and own client scale.

HENRIQUES J

CASE INFORMATION

APPEARANCES

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Counsel for the Respondent	:	Advocate K Gounden
Instructed by	:	Woodhead Bigby Incorporated 92 Armstrong Avenue La Lucia Durban Ref: JSB/MAT13468 Tel: 031 360 9700 Email: jamesb@woodhead.co.za
Date of Hearing	:	20 November 2018
Date of Judgment	:	10 June 2019