REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No.: 82322/14

22/6/2015

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

19/6/15 .... DATE

Hiemstra .... SIGNATURE

In the matter between:

ANNE-MARIE L. DE LANGE	**PLAINTIFF**
and	
ZEPHAN (PTY LTD	**1ST DEFENDANT**
MAUREEN L. GEORGIOU N.O.	**2ND DEFENDANT**
JOE CHEMALY N.O.	**3RD DEFENDANT**
N. GEORGIOU	**4TH DEFENDANT**

J U D G M E N T

<u>HIEMSTRA AJ</u>

[1] The plaintiff is one of 46 plaintiffs who instituted action against the defendants based on the same cause of action. The parties to all the actions have agreed that the judgment in this matter will be determinative of all the other matters. The particu-

lars of the other plaintiffs and their case numbers are attached to this judgment as Annexure A.

[2] Although there is only one plaintiff under this case number, I shall use the plural when the matter under discussion concerns the plaintiffs in all 46 cases and I shall use the singular when the matter under discussion concerns only the plaintiff in this case.

[3] The issues in this, and the other matters, arise from the purchase by the plaintiffs of shares in either Highveld Syndication Company No. 21, trading as Tyger Manor Syndication, previously known as Abrina 1639 Limited (HSC 21) or Highveld Syndication Company No. 22, trading as Charles Crescent Syndication, previously known as Abrina 1642 Limited (HSC 22). I shall refer to the companies collectively as the Highveld Syndication Companies (HS Companies). The agreements for the purchase of shares in the two HS Companies differ in some respects but these differences have no bearing on the issues between the parties. Where necessary, I shall indicate in which respects the agreements differ.

[4] All 46 plaintiffs apply for summary judgment against the defendants for the repayment of the purchase price of their shares against delivery of their share certificates in the respective HS Companies. The plaintiff in this matter claims an amount of R520 000 from HSC 21 against delivery of her share certificate. The total of the 46 claims amounts to R29 955 000.

BACKGROUND

[5] On 9 February 2009 the Registrar of Companies and Close Corporations registered prospectuses accompanied by offers by the HS Companies to the public for subscription by way of public placing of 1 091 512 and 657 391 ordinary shares, respectively, with a par value of 100 cents each in the share capital of the HS Companies plus linked loan accounts of R999.00 per share. The promotor of the offerings was PIC Syndications (Pty) Ltd.

[6] In a "*Directors' Prologue*", included in the prospectus of HSC 21, the following is recorded:

"*As the leader in the property syndication industry since 1998, PIC Syndications* (as promotor) *is proud to announce its latest and largest investment product. Tyger Manor Syndication* (HSC 21), *totals R1 332 000 000 and comprises of eleven properties. It enables investors to invest in the commercial property sector, which is currently benefiting from South Africa's growing retail trade. Tyger Manor Syndication offers a unique opportunity because it includes a head lease agreement as well as a buy-back agreement, providing investors with peace of mind in the knowledge that their money is safe and assured of guaranteed yields.*"

It is recorded in the prospectus that the promotor purchased eleven properties at specified purchase prices and sold them to HSC 21 at specified prices.

[7] The "Directors' Prologue" further states that the following are key features of the offer:

"*HEAD LEASE AGREEMENT*

From the investment date, and for five years until the buy-back of the investor's shares, the income is secured by a head lease agreement.

INCOME

The investor earns 12,5% per annum from the date of the investment. A head lease agreement ensures the investor's income for a period of five years from the investment date.

CAPITAL

The capital is secured by a buy-back agreement. The shares will be bought back after 5 years from the investment date, equally to the purchase price.

BUY-BACK AGREEMENT:

The guaranteed buy-back agreement ensures that the shares will be bought back from the investors five years from the investment date."

[8] There is no similar "Directors' Prologue" in the prospectus attached to the particulars of claims relating to HSC 22. However, both prospectuses contain a paragraph entitled "Material contracts". It is recorded in both prospectuses that the relevant company had entered into a buy-back agreement with Zelpy 2095 (Pty) Ltd or its nominee. Copies of the buy-back agreements are included in the prospectuses. In the case of HSC 21 it is marked "Annexure D" and in the case of HSC 22 it is marked "Annexure C". These annexures are identical agreements between HSC 21 and HSC 22 on the one hand, and Zelpy 2095 Pty Ltd (or nominee), the N. Georgiou Trust and N. Georgiou, the other hand. Zelpy 2095 has in the meantime been renamed Zephan (Pty) Ltd (the first defendant.)

[9] Annexures C and D, mentioned above, record the following:

"*1.* *The SECOND, THIRD AND FOURTH PARTY* (Zelpy 2095 Pty Ltd (or nominee), the N. Georgiou Trust and N. Georgiou), *jointly and severally, hereby ir-*

revocably undertake to re-purchase all of the shares sold by the FIRST PARTY (HSC 21 or HSC 22, as the case may be*) to the original purchasers of the shares five years after the individual initial purchase dates (herein referred to as the 'Repurchase Date' at R1.00 per share with a link loan account of R999.00 (hereinafter referred to as the 'Repurchase Price'.*"

These are the "Buy-Back Agreements" envisaged in the prospectuses.

Clause 6 of the buy-back agreements is also relevant in that it provides for a special resolution passed by 75% of the in HS Companies for the variation of the agreement, which must be reduced to writing and signed by all parties. The relevance will appear later in this judgment.

[10] The prospectuses included identical application forms for subscription to the shares. Clause 5.3 of the application forms provides as follows:

"*5.3 Die belegger stem hiermee onherroepelik saam om sy aandele in die Maatskappy, vyf jaar na 1/1/2009 te verkoop teen 'n prys van R1.00 per aandeel met 'n gekoppelde leningsrekening van R999.00 aan Zelpy 2095 (Edms) Bpk of sy genomineerde. Die aandele sal teen betaling van die koopprys aan Zelpy 2095 (Edms) Bpk oorgedra word. Enige verkoping van die aandele voor die periode van vyf jaar vanaf die datum soos hierbo vermeld verloop het, moet onderhewig wees aan hierdie verkoopsooreenkoms van die aandele aan Zelpy 2095 (Edms) Bpk.*"

[11] The offers to purchase shares in the various HS Companies were accepted and share certificates were issued to the plaintiffs.

[12] The plaintiffs claim in their particulars of claim that the buy-back agreement is a contract for the benefit of a third party. They have accepted the benefit by filling in the application form and the subsequent allocation of the shares to them.

[13] The defendants deny that it is such a contract. Counsel for the defendants, Mr P. Rossouw SC, referred to the well-known judgment of Corbett JA (as he then was) in *Joel Melamed and Hurwitz v Vorner Investments* 1984 (3) SA 155 AD at 291B-F where he said "... *a contract for the benefit of a third party is not simply a contract designed to benefit a third person: It is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one or the other two ... the typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to the contract between himself and A ... but broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other.*"

[14] Mr Rossouw argued that it can be distilled from the above that there are two elements which have to be satisfied, neither of which appears from the agreements:

1. It is essential that the agreement contains enforceable contractual rights between the original parties thereto. He argued that this requirement has not been met since the buy-back agreement, at best for the plaintiff, only consti-

tutes an undertaking, given by the defendants to the HS Companies, to purchase the shares that they sold to the plaintiffs after a five-year period. The HS Companies, so goes the argument, could not enforce this undertaking.

2. The agreement must be designed to enable a third person to come in as a party whilst the other party falls away. The buy-back agreements contain no indication that a third person (the plaintiffs) could replace the HS Companies as a party to the agreements.

The first element

[15] I accept that it is a necessary element for a contract for the benefit of a third person that it must create enforceable rights between the original parties thereto. However, I do not agree that the HS Companies had not acquired enforceable rights against the defendants.

[16] I can see no reason why the respective HS Companies would not have been able to enforce the agreements in the event of the defendants failing to repurchase the shares from the investors, as they have undertaken to do. The HS Companies would have been saddled with the obligation to repurchase the shares by virtue of the prospectus, read with the terms of application form. The HS Companies would have been entitled to sue for specific performance in order to relieve them from their obligation, undertaken in the prospectus.

[17] Mr Rossouw referred to *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) in which a purported contract for the benefit of a third person had been struck down. I find no support for his submission in that judgment. The issue in that case was not whether the contract created enforceable rights between the parties. The facts in *Total SA* are not on all fours with facts in this matter. I do not intend to set out the facts in the *Total SA* matter in detail, but the essence was that a certain Van Vuuren was indebted to Total SA. A certain Fourie agreed with Total SA that: "*Subject to the condition that Fourie faithfully carries out the terms of this agreement and performs the obligations herein contained on the dates thereof, Total agrees not to proceed against Van Vuuren arising out of a settlement that was made ....*"
The court found in the circumstances of that case that there was no intention between Total and Fourie that Van Vuuren could by acceptance of the benefit become a party to the agreement. Total and Fourie could at any time cancel their agreement without reference to Van Vuuren. Moreover, there was no allegation that Van Vuuren had accepted the benefit.

[18] Based on the judgment in *Total SA*, it must firstly be determined whether there had been an intention between the HS Companies and the defendants that the plaintiffs could by accepting the benefit become a party to the agreement. I find that there was manifestly such an intention. It is the whole substratum of the agreement that the defendants would "*repurchase all of the shares sold by the first party* (the relevant HS Company) *to the original purchasers* (the plaintiffs)." The HS Company and the defendants could not cancel this agreement without reference to the plaintiffs. Each plaintiff clearly and unequivocally accepted this benefit by undertaking in his or her application form by agreeing "*onherroepelik... om sy aandele in die Maatskappy, vyf*

jaar na 1/1/2009 te verkoop teen 'n prys van R1.00 per aandeel met 'n gekoppelde leningsrekening van R999.00 aan Zelpy 2095 (Edms) Bpk of sy genomineerde."

The second element

[19] Mr Rossouw argued that the agreement must be designed to enable a third person to come in as a party whilst the other party falls away. According to the argument the buy-back agreements contain no indication that the plaintiffs could replace the HS Companies as parties to the agreement. I do not agree. By the plaintiffs' acceptance of the benefit, the HS Companies were relieved from their obligations towards the plaintiffs and they replaced the HS Companies as parties to that clause of the agreements. The plaintiffs did not replace the HS Companies as parties to all the provisions of the agreements because some provisions have no bearing on them.

[20] I find that the second element identified by Mr Rossouw has been met. The shareholders, by accepting the benefit, have replaced the relevant HS Company as a party to the transaction in terms of which Zephan undertook to repurchase their shares.

[21] Mr Rossouw informed me at the outset of the trial that he and his junior, Mr M. Mostert, had the previous night discovered another reason why the plaintiffs cannot succeed, namely that it turned out that the buy-back agreements, Annexures C and D, had not yet been signed when the plaintiffs accepted the benefit. In other words, the contract for the benefit of the shareholders had not come into existence and there was nothing for the plaintiffs to accept.

[22] I hasten to say that this is an opportunistic point. The plaintiffs purchased the shares because of the security of the buy-back agreements. That made the investment ostensibly risk-free. The investors were made to believe that contracts in that form had in fact been signed. It is highly probable that such contracts had in fact been entered into, at least orally. If that was not the case, the HS Companies had attempted to commit fraud involving millions of Rands. In the event, the buy-back agreements were ultimately signed and the undertakings contained therein stand. It matters not that the buy-back agreements had been signed after the plaintiffs had accepted the benefit.

[23] It is not uncommon for parties to a main contract to sign it only after the third party had accepted the benefit. A good example thereof is contracts of sale of land where an estate agent more often than not accepts his entitlement to commission even before the parties to the contract of sale have signed it.

[24] Christie in *The Law of Contract in South Africa* 5th Ed. at 57 said: "*The proposition that an offeree can accept and notify the offeror of his acceptance before the offer is made is an odd one. But it has found its way into judgments in which estate agents have recovered their commission by relying on clauses in contracts preprepared by themselves and signed by the buyer and seller. Despite the phraseology of these judgments it is clear that in such cases the estate agent makes the offer, which is accepted by signature of the contract.*"

George Ruggier & Co v Brook 1966 (1) SA 17 (NPD) is a case in point. In that matter, the appellant, George Ruggier & Co (the plaintiff in the court a quo), was an estate agent. The respondent, Brooks (defendant in the court a quo), was the purchaser of a property, which he bought from one Forster. Brooks wrote to the plaintiff, after indicating an increased offer to the seller, and stated *inter alia* the following:

"*The offer is subject to the following conditions:*

(1) – (4) ...

(5) Of the amount of R1 000 (one thousand rand) which will be paid to you as commission and fees for assistance and services rendered in effecting the sale I am agreeable to pay you half this amount namely R500 (five hundred rand). The offer shall remain open until 4 p.m. on the 11th August 1961."

The plaintiff himself had inserted the stipulation into the contract between the purchaser and the seller. The court held that "*By itself inviting the defendant to make the offer in terms of the exh. "E" it furnished, in advance, the communication of its acceptance of the offer made to it ... once Forster's condition was agreed to by the defendant, the intended contract between the defendant and the plaintiff had become completed.*

At the time that the plaintiff inserted the stipulation, whereby he communicated his acceptance thereof, there had been no contract. However, that did not matter. The court upheld the stipulation which was intended for the plaintiff's benefit.

[25] Similar scenarios exist in the case of sales of land by public auction. In *Taylor and Gibson v Behr and Company* 21 SC 277 auctioneers were held to be entitled, in their own name, to demand from the buyer of land at a public auction a fair and reasonable amount for auctioneers' charges where the conditions of sale provided that the purchaser should pay the auctioneers' charges.

[26] Solomon J said at 85, following *Tradesman's Benefit Society v Du Preez* 5 SC 269:

"When the conditions at an auction provide that the purchaser is to pay the auctioneers' charges, any person bidding at the sale knows that he is liable for those charges; and when he bids, and the property is knocked down to him, surely there is a vinculum juris *between him and the auctioneer, under which he undertakes to pay the auctioneer his fair and reasonable charges."*

These cases were expressly approved by the Appellate Division in *Mutual Insurance Company v Hotz* 1911 AD 565 at 567.

[27] I therefore find that there is nothing incongruous about the plaintiffs accepting the benefit by submitting their application forms in which they agreed "*onherroepelik... om sy aandele in die Maatskappy, vyf jaar na 1/1/2009 te verkoop teen 'n prys van R1.00 per aandeel met 'n gekoppelde leningsrekening van R999.00 aan Zelpy 2095 (Edms) Bpk of sy genomineerde.*" The defendants duly accepted that undertaking by the plaintiffs by entering into the Buy-Back Agreement, and they are therefore bound.

BUSINESS RESCUE

[28] The defendants raised a further unrelated defence, namely that the rights of the plaintiff and other plaintiffs have been restructured by virtue of a business rescue plan (BRP). It is submitted that the plaintiffs can therefore not rely on the buy-back agreement. Their rights have been novated by the terms of the BRP.

[29] The effect of the BRP on the investors, including the plaintiff, is that another company, Orthotouch Limited, would purchase the properties of the HS Companies and take over the obligations of the defendants to repurchase the shares of the investors. However, the repurchase would take place 5 years from the date of the adoption of the BRP instead of 5 years from the date of the purchase of the shares. Moreover, the income from the investments, whether by way of interest or dividends, would be reduced.

[30] This defence must be considered in the light of clause 6 of the buy-back agreement. Clause 6 is a "non-variation clause". It provides as follows:

"6 *No variation or consensual cancellation of this agreement shall be of any force or effect unless reduced to writing and signed by all the parties to this agreement accompanied by a special resolution passed by 75% of the shareholders of the FIRST PARTY (the HS Companies), authorising the variation or cancellation."*

[31) This is a variation of the buy-back agreement. The defendants, however, argue that the shareholders have, by adopting the BRP agreed to the variation. The question is therefore whether the adoption of the BPR satisfies the requirements of clause 6 of the buy-back agreement.

[32] The deponent to the affidavit resisting summary judgment said that the HS Companies had run into financial difficulties and were placed under business rescue. A business rescue practitioner was appointed. A meeting in terms of s 151 of the Companies Act 71 of 2008 of all creditors and holders of voting interests was held on 14

December 2011. He says that 99% of the investors voted in favour of the proposed BRP. This, however, is a flimsy statement. This was a meeting of creditors *and holders of voting interests* (the investors). Subsections (2) and (3) of section 152 set out detailed voting procedures. Subsection (2) provides exclusively for voting by creditors. Subsection (3)(c) specifically sets out a procedure for voting by shareholders whose rights are altered by the BRP. It provides for a separate meeting of holders of securities whose rights are altered by the proposed BRP. The BRP negatively alters the rights of the shareholders. I would have expected of the deponent to have elaborated on the procedures adopted.

[33] The manner in which a BRP must be adopted is set out in s 152 (2) and (3). They provide as follows:

"(2) In a vote called in terms of subsection (1)(e), the proposed business rescue plan will be approved on a preliminary basis if-
(a) it was supported by the holders of more than 75 percent of the creditors' voting interests that were voted; and
(b) the votes in support of the proposed plan included at least 50 percent of the independent creditors' voting interests, if any, that were voted.

(3) If a proposed business rescue plan-

(a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153;

(b) does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent; or

(c) <u>does alter the rights of any class of holders of the company' securities</u>-
(i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities whose rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and

(ii) *if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised-*
(aa) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or
(bb) oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 153." [My emphasis]

[34] This action, and those of the other plaintiffs, are only in respect of HSC 21 and HSC 22. It must be noted that the meeting held in terms of s 151 was in respect of HS Company Nos. 15, 16, 17, 18, 19, 20, 21 and 22. There is no allegation regarding the outcome of the voting in respect of HSC 21 and HSC 22.

[35] The BRP has, however, been adopted and has been implemented. It stands until impeached by a court of law. The question is whether it effectively altered or varied the buy-back agreement. I have already found that the plaintiff (and other plaintiffs) became parties to the buy-back agreements by virtue of their acceptance of the benefits.

[36] Even if the BRP had been properly adopted in terms of the Act, it does not satisfy the requirements of clause 6 of the buy-back agreement. It cannot be inferred from its adoption that 75% of the shareholders had agreed to the variation. Clearly no special resolution has been passed and the variation has not been signed by the parties.

[37] The BRP also does not constitute a novation of the rights of the shareholders. A novation implies a waiver of a party's original rights. It is trite that there is a presumption against a novation or waiver. It is not necessary to refer to the host of cases in

which this was held and confirmed. I find that there had been no novation of the rights of the plaintiff.

SUMMARY JUDGMENT

[38] It is only necessary to refer to one of the requirements for resisting summary judgment, namely that the defendant must set out a defence that is *bona fide* and good in law. As set our above, I have reached the conclusion that the defences of the defendants are not good in law.

[39] The order that I make is only in respect of the above matter. In accordance with the agreement between the parties, this judgment will be determinative of all 46 cases. This order will therefore *mutatis mutandis* apply to all the cases.

In the result I make the following order:

Summary judgment is granted against the defendants jointly and severally, the one paying the others to be absolved, for

1. Payment of the amount of R520 000.00 against delivery of share certificate HFS 2124500 to the defendants;
2. Interest at 9% per annum on the said amount from 9 December 2014 to date of payment;
3. Cost of suit.

J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:	2015-06-08
Date of judgment:	2015-06-~~1[illegible]~~ 22
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