

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No.: D9160/2023

In the matter between:

PANSUN INVESTMENTS (PTY) LTD

Applicant

and

JORGEN ENERGY (PTY) LTD

First Respondent

(Registration No. 2021/321868/07)

OMNIFUELS AFRICA (PTY) LTD

Second Respondent

(Registration No. 2019/406381/07)

LIBERTY MAYA

Third Respondent

(Zimbabwean Identity 3[...])

CAREL STOCKENSTROM

Fourth Respondent

(Identity No. 7[...])

ORDER

The following order shall issue:

1. Judgment is granted in favour of the applicant against the respondents, jointly and severally, the one paying the other to be absolved for:

- 1.1 Payment of the sum of R1 311 925.40;

1.2. Interest thereon at the rate of 15% per annum calculated from 1 August 2021 to date of final payment.

2. Costs of the application.

JUDGMENT

HARRISON AJ

[1] The applicant ("Pansun") seeks a money judgment for R1 311 925.40 together with interest at 15% per annum from 1 August 2021 to date of final payment arising out of a written acknowledgement of debt including a deed of suretyship and co-principal debtorship.

[2] Pansun's claim is based on a written document which clearly sets out that it is not only an acknowledgement of liability but also a deed of suretyship and co-principal debtorship. The document is signed by all the parties and it is clearly marked that each of the respondents' signs independently.

[3] That acknowledgement of liability, annexure "FA2", is for payment of the sum of R1 311 925.40 date together with interest at 15% per annum from 1 August 2021. Annexure"FA2" was signed and dated 1 August 2021.

[4] The date for payment is defined as being within "3 days of Pansun demanding payment of the debt" and is set out in clause 3 of the acknowledgement of debt.

[5] That demand was duly made on 20 July 2023 and there is no dispute that Jorgen Energy (PTY) LTD ("Jorgen"), Omnifuels Africa (PTY) LTD ("Omnifuels"), Liberty Maya ("Maya") and Carel Stockenstrom ("Stockenstrom"), (collectively as "the respondents") received the demand.

[6] Pansun made the demand. There were no payments and this application followed.

[7] In opposing the application, Maya deposed to an answering affidavit on behalf of all the respondents.

[8] In opposing the application, Maya sets out that there were discussions for Pansun to pay R2 500 000.00 to acquire a 50 per cent shareholding in Jorgen. This arrangement according to Maya was "... never implemented for unexplained reasons ...". The respondents thereafter contend that an amount of R1 251 925.40 was paid for the purchase of certain "ingredients needed for blending products" but contended that the wrong product was delivered. This is suggested as being some sort of "'proof of concept' test".

[9] The answering affidavit thereafter contends that the acknowledgement of liability incorporating the deed of suretyship and co-principal debtorship was signed in good faith. Maya says this exercise of good faith was part of the overriding agreement. The answering affidavit is ambiguous and confusing as to whether the respondents are contending that there was an intention to purchase 50 per cent of the shares by Pansun in Jorgen or whether there was a partnership with Jorgen. The problem with both versions is that they are mutually exclusive and ignores the very terms of the agreement itself which provides:

'The parties record that Pansun intends to purchase a 50% shareholding in both Jergen and Omnifuels, and that the parties intend concluding separate agreements to cater for such sale and shareholding" and "Pansun undertakes only to demand payment of the debt, in the event of the parties being unable to reach agreement as to the intended share purchase as referred to above.'

[10] On the undisputed facts and specifically the statement by Maya in the answering affidavit that the 50 per cent shareholding was "never implemented" it is clear that that on the respondents' own version, the acknowledgement of debt is payable.

[11] In order to demonstrate that this so-called defence of an alternative agreement is a recent fabrication, Pansun in reply put up in reply the WhatsApp messages from Stockenstrom on 21 July 2023 in which Stockenstrom stated:

'I don't have a problem to pay you back with interest Should be done before month end'

[12] It is clear from the papers that there was no agreement for the purchase of the shares came to fruition. This is conceded by the respondents. Accordingly, Pansun was entitled as it duly did to demand payment of the monies as set out in the acknowledgement of debt.

[13] The matter was set down for hearing on 30 August 2024 and the respondents failed to file any heads of argument in opposition.

[14] Despite not having filed any heads of argument, Ms *Malungani* appeared on 30 August 2024 based on a notice of appointment of attorneys of record dated 29 August 2024.

[15] I must point out that Mphatlalazana Attorneys appointed themselves as attorneys of record for all the respondents identifying themselves as the "1st-4th Respondents' Attorneys."

[16] Ms *Malungani* then referred me to a "NOTICE OF MOTION: COUNTER CLAIM TO CASE NUMBER 09160/2023: SHARE LOSSES ARISING FROM A JOINT VENTURE BETWEEN PANSUN INVESTMENTS (PTY) PTD AND JORGEN ENERGY (PTY) LTD". (I shall henceforth refer to this as "the counter- application".)

[17] The counter-application cites Jorgen as the applicant. Pansun is cited as the first respondent and Stockenstrom as the second respondent.

[18] The counter-application is set down for 23 October 2024 and Jorgen seeks payment of the sum of R1 897 938.71 from Pansun and Stockenstrom.

[19] In effect Jorgen now seeks to sue Pansun as well as Stockenstrom in circumstances where Mphatlalazana Attorneys are acting both for and against Stockenstrom, which is clearly an untenable situation.

[20] Ms *Malungani* sought to argue that the application before me stands to be adjourned to be dealt with and consolidated with the counter-application.

[21] The basis for the adjournment and the consolidation as submitted by Ms *Malungani* was that it involved the same parties.

[22] Notwithstanding the clear conflict of interest of acting both for and against Stockenstrom, the submission was made without there being any application for condonation for the late filing of the counter-claim or any substantive application for an adjournment. The submission was further made without heads of argument or an application for condonation for the late filing of the heads of argument.

[23] The only argument which Ms *Malungani* raised was that the parties involved are the same parties.

[24] When I raised with Ms *Malungani* whether the counter-application was under the *actio pro socio* or the *actio communi dividundo* the answer that I received was that this was a counterclaim between the same parties.

[25] The explanation given as to why there was no substantive application for an adjournment or any form of condonation for either the late filing of the counter-application or indeed any other condonation for failure to comply with the practice directives relating to opposed motions, the only answer given to me was that the attorneys of record had come on board the day before.

[26] It is clear to me that the counter-application and the filing of the notice of instatement as attorneys of record the day before the hearing of the opposed motion was nothing more than a stratagem to avoid the consequences of an opposed motion.

[27] Whilst it is not my intention to examine or deal with the so-called counter-application, the thrust of the allegations contained therein related to the existence of a "joint venture". There is a repetition in the counter-application that the payments

which were made were a proof of concept "... to entitle Pansun Investments to a 50% shareholding in Jorgen Energy (Pty) Ltd ...".¹

[28] The very basis for this so-called counter-application ignores what I have set out above namely that in the application before me, the respondents concede that the agreement to purchase the 50 per cent shareholding "... was however never implemented". It is clear that the submissions were simply *mala fide* and to obtain an adjournment where there had been absolutely no compliance with any of the rules of practice of this division.

[29] Mr. Bigby referred me to the recent judgment of Mossop J in the KwaZulu-Natal Division, Pietermaritzburg in *Dodd N.O. and Others v Duff* ² where the learned judge states:

'... If an attorney lacks the capacity to deal with matters in the High Court and is not familiar with the Uniform Rules of Court or the practice directives of this division, then he has no place litigating before this court. This court has exacting standards and they are jealously enforced. Those standards will be maintained. Those who cannot meet those standards should either bring themselves up to the standard immediately or litigate elsewhere where a premium is not placed on excellence ...'

[30] To come to court, hand up a document and then contend that the matter should be adjourned from the bar without any condonation, explanation or even an affidavit does not meet any of the standards of any court, and especially not in this division.

[31] In the circumstances the application for an adjournment for the matter to be heard with the counter-application is refused.

[32] Turning to the main application, as I have set out above, no sale of shares came about. This was conceded. Once the share deal failed, the debt could be demanded and that occurred.

¹ Paragraph 18 of the affidavit in the counter-application.

² *Dodd N.O. and Others v Duff* [2024] ZAKZPHC 62 para 14.

[33] The so-called defences as raised by the respondents fly in the face of the very document which they have signed which clearly states that "this document constitutes the entire agreement between the parties".

[34] With the respondents having conceded that the purchase of the 50 per cent of Jorgen and Omnifuels by Pansun did not eventuate, they cannot seek to raise the so-called other defences in light of what they have clearly acknowledged in the agreement. Parties are bound by the agreements they sign. This is the principle of *pacta sunt servanda*.

[35] Applying the *Plascon-Evans* test, the respondents have admitted signing the agreement and have admitted that the agreement to purchase the 50 per cent in Jorgen and Omnifuels did not eventuate. Having made such admissions, it is clear that Pansun is entitled on the admitted facts to relief under the acknowledgement of debt.

Order

[36] In the circumstances I grant the following order:

1. Judgment is granted in favour of the applicant against the respondents, jointly and severally, the one paying the other to be absolved for:

1.1 Payment of the sum of R1 311 925.40;

1.2. Interest thereon at the rate of 15% per annum calculated from 1 August 2021 to date of final payment.

2. Costs of the application.

HARRISON AJ

Appearances

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For the respondents: Ms Malungani

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Date reserved: 30 AUGUST 2024

Date of delivery: 13 SEPTEMBER 2024