

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-013086

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

DATE

SIGNATURE

In the matter between:

RISKOWITZ VALUE FUND LP

First Applicant

PROTEA ASSET MANAGEMENT LLC

Second Applicant

and

MOHAMED HOLDINGS (PTY) LTD

First Respondent

GO DUTCH HOLDINGS (PTY) LTD

Second Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 17 March 2025.

DE OLIVEIRA, AJ

- [1] This is an application in which the applicants (the first applicant as principal and the second applicant as an agent) seek a money judgment against the first respondent in terms of a guarantee that is in the nature of a demand guarantee.
- [2] When the matter came before me on 13 March 2025, Mr. Mafu, who appeared before me on behalf of the first respondent, requested a postponement of the matter from the Bar. Mr. Vetter, who appeared before me on behalf of the applicants, correctly pointed out that there was, in truth, no application for postponement before me, but merely a request for same from the Bar. I accordingly restricted Mr. Mafu in his submissions to facts and issues that were before me and formally on record. Mr. Mafu nonetheless requested a postponement of the application on the vague ground that the first respondent's attorneys, who had formally come on record on 6 February 2025, had insufficient time to gather information and to take instructions for purposes of supplementing the first respondent's defence to the application. There was no evidence before me to support the submission, not that such "facts" would have weighed with me without more. The request for postponement was opposed by the applicants on the basis, *inter alia*, that the matter had already postponed on two previous occasions because of the dilatory conduct of the first respondent.

- [3] Having regard to and having considered the trite principals applicable to the adjudication of applications for postponement,¹ I dismissed the “application” for postponement and ordered the first applicant therein (that is the first respondent in the main application) to pay the costs thereof.
- [4] As far as the merits of the matter are concerned, on or about 25 November 2022, the applicants launched action proceedings against the second respondent in this court under case number 2022/050010 for the payment of a debt of approximately R25 million that was due and payable by the second respondent to the applicants.
- [5] On or about 10 December 2022, the parties settled the aforesaid proceedings by way of two agreements. Those agreements are styled as a “*Share Purchase Settlement Agreement*” and a “*Loan Settlement Agreement*”. In short, the parties agreed to settle the previously instituted court proceedings in terms of the two agreements and by providing, *inter alia*, for the settlement of the respondents’ indebtedness to the applicants.
- [6] In terms of the Share Purchase Settlement Agreement, the second respondent acknowledged its indebtedness to the applicants in the sum of approximately R13 million and undertook to make payment of same by way of various instalments

¹ See for example and generally *National Police Service Union & Others v Minister of Safety and Security & Others* 2000 (4) SA 1110 (CC) at 1112C-F.

and in various sums, with at least the first R1 million being due and payable within two business days from the signature date of the Share Purchase Settlement Agreement. In the event of the second respondent failing to pay any amount owing to the applicants on the due date in terms thereof, the entire indebtedness provided for in the Share Purchase Settlement Agreement would become immediately due and payable. In addition, the first respondent irrevocably and unconditionally guaranteed in favour of the second applicant, as a separate principal and independent obligation, the due, proper and timeous performance by the second respondent of its obligations to the applicants in terms of the Share Purchase Settlement Agreement. Within five business days of written notice being given by the second applicant to the first respondent, the first respondent would become obliged to make payment of the indebtedness under the Share Purchase Settlement Agreement to the applicants.

- [7] In terms of the Loan Settlement Agreement, the second respondent acknowledged itself to be indebted to the applicants in the sum of R12 million. That sum was payable by the second respondent on or before 29 April 2023, and the accrued interest thereon by 31 May 2023. Again, in the event of the second respondent breaching the terms of the Loan Settlement Agreement by, *inter alia*, failing to pay any amount due in terms thereof, the total amounts outstanding under the Loan Settlement Agreement would become immediately due and payable.

[8] In terms of clause 4.2 of the Loan Settlement Agreement:

“[The first respondent] shall within 5 (five) Business Days from written notice by [the second applicant] that [the second respondent] is in breach of any of the Guaranteed Obligations, pay to [the second applicant] all amounts that are due and payable in respect of the Guaranteed Obligations, as its [the first respondent] with worthy principal obliger, this is subject to the Reserve Bank clearance obtained between [the second applicant] and Luxe on the registered loan being transferable to [the first respondent] and or if funds need transfer via Luxe, that Luxe passes the liquidity and solvency test in terms of related party settlement.” (Emphasis added)

[9] Similar to the Share Purchase Settlement Agreement, the first respondent also bound itself as a guarantor for the due, proper and timeous performance by the second respondent of its obligations in terms of the Loan Settlement Agreement.

[10] The second respondent breached the Share Purchase Settlement Agreement by failing to make payment of the first R1 million within two business days after the signature date thereof. In consequence, the entire debt under both the Share Purchase Settlement and Loan Settlement Agreements, comprising the capital amount of approximately R25 million, together with interest thereon, become immediately due and payable to the applicants.

[11] Notwithstanding demand, which was given on behalf of the applicants by their attorneys in and during January 2023, neither the first nor the second respondents remedied the breach of the Share Purchase Settlement Agreement,

and accordingly the applicants instituted the proceedings before me for payment of the amounts outstanding from the first respondent *qua* guarantor.

[12] Before turning to the defences raised by the respondents to the relief sought by the applicants, it was pointed out by Mr. Vetter that the first respondent was in contempt of a court order granted on 16 May 2023 in terms of which it was ordered to deliver its answering affidavit by no later than 25 May 2023. The answering affidavit of the first respondent was only delivered on the morning of 7 August 2023, when the application had been enrolled on the unopposed motion court roll for the second time (this in view of the fact that the first respondent had, by then, failed to deliver its answering affidavit in terms of the Uniform Rules of Court). I am inclined to agree with Mr. Vetter that no case for condonation, nor an explanation of the first respondents' contempt of the May 2023 court order, has been made out or given,² and that accordingly the answering affidavit should not be admitted into the record. In light of the view that I take of the matter, however, I am prepared to accept that the answering affidavit is admitted into the record.

[13] The sole ground of opposition raised by the first respondent to the applicants' case is that the abovementioned quoted excerpt from the Loan Settlement Agreement, properly construed, amounts to a "qualification" upon which the first respondent may or may not be in breach of either of the two agreements. It is not

² Apart from some unconvincing allegations pertaining to the deponent's illness and arrest, none of which, in my view, adequately explain the delay or contempt, no evidence was placed before me to substantiate the delay or even to explain the entire period thereof.

certain what is meant by the word qualification, but it appears to me to be contended on behalf of the first respondent that the provision in question amounts to a condition precedent, which has not been fulfilled.

[14] As Mr. Vetter correctly submitted in his heads of argument, however, there are various unassailable responses to the first respondent's purported ground of opposition, namely:

(a) The provision in question is not contained in the Share Purchase Settlement Agreement, and in the circumstances it has no bearing on the applicants' right to enforce, as a separate, principal and independent obligation, the first respondent's guarantee obligations.

(b) The trigger event for liability under the guarantee as contained in the Share Purchase Settlement Agreement is the second respondent's breach of *that* agreement. The effect of the breach is that all amounts due under the Share Purchase Settlement Agreement *and* the Loan Settlement Agreement immediately became due and payable by the first respondent as a consequence of its guarantee obligations contained in the Share Purchase Settlement Agreement. In terms of clause 1.1(6), 3.4 and 4 of the Share Purchase Settlement Agreement, the first respondent's obligations to the applicants in the event of the second respondent's breach are unqualified.

(c) In any event, and with regard to the Loan Settlement Agreement, Reserve Bank clearance (which can only be construed as exchange control approval

under the South African Reserve Bank Act, 1989) is not required to be obtained nor capable of being provided to the second applicant and Luxe Holdings Ltd for purposes of “transferring” the loan to the first respondent. The rights under the loan advanced by the applicants to Luxe was acquired by the second respondent from the applicants and as such there was merely a cession of rights to the second respondent. Furthermore, the rights in and to the loan cannot validly be transferred to the first respondent prior to the second respondent making payment to the applicants pursuant to the terms of the Loan Settlement Agreement. As such, the purported “qualification” in clause 4.2 of the Loan Settlement Agreement is incapable of being compiled with and is therefore a nullity and of no force and effect. Mr. Vetter submitted that, at worst for the applicants, the “offending” provision should be severed from the remaining terms of the Loan Settlement Agreement. In view of the fact that the earlier responses are, in my view, dispositive of the first respondent’s defence, a formal severance is not required.

- (d) It otherwise remains to add that, according to Mr. Vetter, the clause in question is, at best, a resolute condition (as opposed to a condition precedent). As was correctly submitted, the first respondent did not place any facts before court to discharge its onus of proving that the resolute condition had been fulfilled.

[15] As far as the reference to the insolvency and liquidity test in the clause is concerned, the obligation to make payment to the applicants vests with the second respondent, as guaranteed by the first respondent. The obligation to pay under the Loan Settlement Agreement does not vest in Luxe, nor is there any requirement that Luxe provide the necessary funding to enable compliance by the first respondent with the guaranteed obligation. Put differently, it is not clear on what basis that liquidity and solvency test applies or which of the respondents, or Luxe, was required to undertake and pass such test. To the extent that the first respondent is reliant on Luxe to facilitate payments which would enable it to comply with a guaranteed obligation, there is no solvency and liquidity test that is required, as it concerns payment of a contractual obligation, as opposed to distributions as contemplated in the Companies Act 71 of 2008. This, if true, but which is not in any event pleaded, is an internal Luxe matter into which the applicants have no insight and which does not, in any event, absolve either of the respondents from making payment under the Loan Settlement Agreement.

[16] In all of the circumstances, the first respondent has not raised a sustainable defence to the applicants' claim and I accordingly grant the following relief.

Order

[17] In the circumstances, judgment is hereby granted against the first respondent in favour of the applicants (with payment to the one reducing liability to the other) for payment of:

- (a) the sum of R12 957 199.00;
- (b) the sum of R12 000 000.00;
- (c) interest on the aforesaid amounts, compounded monthly in advance, at the prevailing prime rate of interest plus 5% to be calculated from the due date until payment in full; and
- (d) cost of the application (including the reserved costs of the hearings on 7 August 2023 and 16 May 2023) on an attorney and client scale.³



DE OLIVEIRA AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

³ I agree with Mr. Vetter that, at best for the first respondent (though I am inclined to think that its conduct of delay and frivolous opposition is deserving of this court's censure), its opposition is vexatious and effect, the costs of which the applicants should not have to bear – see in this regard *In re Alluvial Creek* 1929 CPD 532 at 535.

Counsel for the applicants:

Adv. C T Vetter

Instructed by:

Norton Rose Fulbright South
Africa Inc.

Counsel for the first respondent:

Adv. P Mafu

Instructed by:

Mayet Vittee Inc.

Date of hearing:

12 March 2025

Date of Judgment reserved:

12 March 2025

Date of Judgment delivered:

17 March 2025

