REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 94421/2024

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) NOT REVISED

25/02/2026 [redacted]
DATE SIGNATURE

In the matter between:

SUNSTONE CAPITAL LIMITED	First Applicant
SUNSTONE MANAGEMENT COMPANY (PTY) LTD	Second Applicant
and	
BLACK MOUNTAIN INVESTMENT MANAGEMENT (PTY) LTD	First Respondent
MOHAMED SHAZIM ISMAIL DHORAT	Second Respondent
BLACK MOUNTAIN IM (PTY) LTD	Third Respondent

Heard: 18 November 2025

Delivered: 25 February 2026

JUDGMENT

Yacoob, J:

[1] The applicants (collectively "Sunstone") seek the payment of money by the respondents on the basis of a Put Option Agreement that Sunstone concluded with the first and second respondents ("Black Mountain" and "Dhorat" respectively, and "the Consortium" collectively) on 12 May 2023 in pursuance of

a shariah-compliant financing arrangement. The third respondent ("BMIM") is the nominee of Black Mountain for purposes of the Put Option agreement. Dhorat is the director of both Black Mountain and BMIM, and his email address is the email address of both entities.

[2] The essence of the arrangement, which is not encapsulated in the Put Option Agreement, but rather emerges from the Answering Affidavit read with the Replying Affidavit, is that Sunstone would provide a cash injection of R2 million, to an entity known as Everland, which is one of Dhorat's companies. The business of Everland was to trade in stock held by another of Dhorat's companies, Sunstone Stationery Company (Pty) Ltd ("Stationery"), which Everland traded in on an "on consignment" basis. Sunstone would cause the R2 million to be paid through another entity, Workspace Wares (Pty) Ltd, the shares of which were held and controlled by the Sunstone entities in different proportions, relative to the proportion of the R2 million each fronted. On the provision of the injection, Dhorat would cause the transfer of ownership of the trading stock from Stationery to WW. Despite the transfer of ownership of the trading stock, it would remain under control of Everland to trade on consignment. Sunstone would then exercise the Put Option within 90 days of 12 May 2023 for the Consortium to purchase the shares of WW for a predetermined price of R2 million plus 20% (a total of R2 400 000, divided proportionally between the two Sunstone entities), within 5 days of notice being given of the exercise of the Option. The ownership of the trading stock would then revert to Dhorat, through WW, and Sunstone would, through the payment for the shares, receive the cash injection back together with a return on investment. The Consortium would have to pay a penalty of R4 500 for each day that the payment was late.

[3] This methodology had been successfully followed by the parties in the past using Stationery as a vehicle for the transaction.

[4] In accordance with the arrangement, WW paid R2 million to Everland on 12 May 2023. On Dhorat's own version, WW then became the owner of the trading stock as provided for in the Sale and Purchase Agreement entered into between Everland and WW on the same date. It must be noted that, at the time of the sale

to WW, Everland had the power to sell the trading stock on consignment in the same way as it did after the sale to WW, but was not the owner of the stock.

[5] On 11 July 2023, after Everland had received the R2 million and had sold the trading stock to WW, but before the Put Option had been exercised, two other entities who are not parties to this application obtained a court order allowing them to execute and register a notarial bond over all movable assets belonging to Everland, and to simultaneously perfect the bond.

[6] According to Dhorat, the trading stock was attached even though it was not owned by Everland and he was advised to bring interpleader proceedings. Dhorat contends that at that late date, even though the R2 million had been paid almost two months before, he had "not been able" to pass ownership to WW. It is unclear why he contends that it did not happen in accordance with the Sale and Purchase Agreement on 12 May 2023, what he needed to do in order to pass the ownership in terms of the agreement, or why something that happened two months later prevented the transfer of ownership. Dhorat also makes the contradictory allegation in his affidavit that the agreement provided that ownership would pass to WW on payment of the R2 million (rather than him having to do something to pass ownership to WW), which was paid on 12 May 2023. At the hearing it was properly conceded on the respondents' behalf that ownership had already passed to WW.

[7] Sunstone notified Dhorat and the third respondent on 2 August 2023 that they exercised the Put Option. The R2 400 000 had to be paid within five days, on 7 August 2023. It was not paid, and Dhorat sent a number of emails and whatsapp messages to Sunstone promising payment and saying that he was awaiting incoming payments. The only payment that had been made by the time this application was instituted a year later was an amount of R750 000 paid on 18 August 2023.

[8] Dhorat contends that the Put Option agreement is a sham and that by exercising the Put Option after the trading stock was attached Sunstone is showing its *mala fides*. He contends that WW was and is a shell company of no value and that

Sunstone are being opportunistic by trying to make him pay for the trading stock which he will not get back.

[9] On the respondents' own version, there is no merit in those contentions. In terms of the Sale and Purchase Agreement, ownership should have been passed to WW on 12 May 2023. Even if it did not, the court order applied to movable property of Everland. Before ownership was passed to WW, the trading stock was still not the property of Everland. Even if the property was attached because it was in the possession of Everland, the actual owner, whether WW or Stationery, would have recourse. In any event, it is clear that WW is the owner of the trading stock, and is therefore not without assets.

[10] Secondly, there is no dispute that Everland received the R2 million and did not pay it back. Even if the trading stock was no longer owned by WW, there is no basis on which Dhorat can contend that there is no obligation to repay the money plus the 20%. He asks the court to look at all the surrounding circumstances and the various agreements between entities not before the court, but, in doing that, the court must still take into account that Everland received the benefit that the Put Option agreement was designed to allow it to receive, and that the Consortium must then do its part. In addition, had ownership of the trading stock not been transferred to WW, then it would still be an asset of Stationery, and Dhorat would not be able to claim that the only reason for the payment in terms of the Put Option is to regain ownership that he already had through a different entity.

[11] Dhorat makes allegations that Sunstone was in league with the parties who attached the trading stock. Even if that is the case, it is irrelevant, as, looking at the arrangements put in place by the various agreements, the attachment changes nothing. It was open to WW to challenge the attachment, or, if Dhorat had not caused the transfer of the trading stock as required, for Stationery to do so. It is true that Dhorat alleges that WW did not co-operate with him in dealing with the attachment of the trading stock, but he simultaneously alleges that WW was not the owner, so it is unclear what he expected WW to do. He cannot have it both ways.

[12] All this is evident from the respondents' version. The respondents' submission that there is a dispute of fact which cannot be determined on the papers therefore has no merit.

[13] It is clear that the Put Option was properly exercised and that Sunstone is entitled to an order that the Consortium, whether in the person of Black Mountain and Dhorat, or Dhorat and BMIM (which appears to have been the nominee only of Black Mountain) or just BMIM (if the intention was that BMIM become the nominee of both parties to the Consortium) make the required payment, of R2 400 000 less the R750 000 that has already been paid. Sunstone claims the amount as R1 571 129 due to the first applicant, and R78 871 due to the second applicant, a total of R1 650 000.

[14] The respondents also raised as part of their defence that Sunstone sent notices to remedy the breach not to BMIM, the nominee, but to Black Mountain. In my view nothing turns on this. Notices to both BMIM and Black Mountain were required to be sent to the same email address, which is Dhorat's. The fact that the notices were addressed to the incorrect entity does not take away the fact that they came to the attention of Dhorat, the person who had to take action on behalf of both BMIM and Black Mountain. Nothing would have changed had the notices had BMIM's name on them rather than Black Mountain's. In any event, Dhorat clearly considered that he had the obligation to pay, through whichever entity. Dhorat's affidavit also makes clear that all the entities were used as alter egos for him, for example where he says that he had ownership of the trading stock through Stationery, and that he would regain that ownership through WW once he repurchased the shares, even though when Sunstone exercised the Put Option Dhorat asked Sunstone to transfer the shares to BMIM.

[15] The second issue that needs to be dealt with is whether and to what extent the two Sunstone entities are entitled to the claimed penalty amount, of R4500, per entity, per day. In addition to the penalty amounts, Sunstone claims interest *a tempore morae* on the main amount. As at 28 February 2025, Sunstone calculates the penalty amount as R2.574 million per applicant, over R5 million in total. The respondents contend that the penalty was intended to be only a single penalty amount.

[16] Sunstone submitted that on a proper interpretation of the Put Option agreement, there were two separate parties on the Sunstone side, and it was clear that the penalty clause gave the right to each party separately to levy the penalty. The respondents, on the other hand, contend that Sunstone was a consortium, the agreement dealt with a single transaction, and that only one penalty could be levied by the one consortium against the other.

[17] Sunstone relied on the basic principle set out in *Endumeni*[1]as articulated in *Betterbridge (Pty) Ltd v Masilo & Others*,[2] that interpretation "is a unitary endeavour requiring the consideration of text, context and purpose".[3]

[18] This is of course correct, as is the contention that the plain meaning of the actual language used in the text is the departure point.[4] The penalty clause provides:

Should any payment under or arising from this Agreement fail to be made on the due date thereof then, without prejudice to such other rights as may accrue to the payee consequent upon such failure, a fee of R4 500 (four thousand five hundred rand) per day shall be levied.

[19] The word "payee" is not defined in the Put Option agreement. Sunstone contends that it obviously means "any payee" and therefore entitles each to levy the penalty separately and independently. This is not obvious to me. The language in the clause clearly contemplates a single "payee". If it was intended that multiple penalties could be levied, separately by each payee, it would have been very easy for the clause to simply say so.

[20] Sunstone refers me to the fact that each member of the Sunstone consortium is referred to separately in the Put Option agreement, and has a different Option price defined, and different Option shares defined. Also, according to Sunstone, there is no obligation in terms of the agreement for the Sunstone entities to exercise their Options simultaneously. This, Sunstone contends, means that each entity has its own right to levy the penalty.

---

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)
[2] 2015 (2) SA 396 (GP)
[3] *Betterbridge* above, at para 8.
[4] *Betterbridge* at para 12.

[21] In my view, this does not take into account that, although there is no definition of "payee", there is a definition of "parties" in the Put Option agreement:

> *...collectively, the Black Mountain Consortium and the Sunstone Consortium; and "**Party**" means either of them, as the context may require...*

[22] This clearly means that, unless the entities are specifically separated and referred to, the intention was that for purposes of the Put Option agreement, the Sunstone entities were to be considered as one party and the Consortium as one party.

[23] It is also not clear to me that the agreement contemplates separate exercise of the Put Option by the Sunstone entities. This is because the relevant clause speaks of the exercise of the Option by "the Sunstone consortium". Even if Sunstone disposes of the Option shares to an "affiliate" (as defined) the exercise of the Option by the Sunstone consortium applies also to shares held by any affiliates. It is a single right, granted to the two Sunstone entities individually, but as a single right and option. The exercise of it is to be done by "the Sunstone consortium". Clause 2.5.2 provides that the Put Option may be exercised on only one occasion and Clause 2.5.3 that it (singular) operates in respect of all of the Option Shares, which are defined as the Option Shares held by both Sunstone entities. The Sunstone entities may not, therefore, exercise the Option separately.

[24] Sunstone contends that Clause 5 of the Put Option agreement supports its interpretation. The Clause provides that nothing in the agreement means that "there is an agency, joint venture or partnership relationship between the Parties", or authorises one party to bind the other party. Reference to the definition of "Parties" demonstrates that this refers to the relationship between the Sunstone entities on the one hand and the Consortium on the other. It does not refer in any way to the relationship between the Sunstone entities.

[25] In the context of the agreement itself, the textual interpretation leads ineluctably to the conclusion that "the payee" is the Sunstone consortium, or the "Party" which receives payment on the exercise of the Put Option. This is consistent, in my view, with the overall context set out above and with the purpose of the

agreement. The purpose was to ensure that Sunstone was paid back its R2 million plus 20%. The division between the Sunstone entities was merely an acknowledgement of an internal arrangement between them, and not relevant to the Consortium. This is also borne out by Sunstone's own calculations attached to the demand made on 9 November 2023.

[26] It is clear to me that only one penalty may be levied in terms of the penalty clause.

[27] In their heads of argument, the respondents also raised the question of whether the penalty, on either interpretation, was appropriate, citing the Conventional Penalties Act, 15 of 1962 ("the Act").

[28] The Act provides in s 3:

> *If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.*

[29] The respondents submit that the penalty should only apply until the day when final demand was made, whereafter *mora* interest should apply. Alternatively, the respondents submit that the penalty should be capped at 100% of the original amount.

[30] Sunstone did not choose to make supplementary written submissions to deal with the issue of the reduction of the penalty. However, the matter was fully canvassed at the hearing. It was submitted for Sunstone that the reduction of penalty was not pleaded, but it was also conceded that there was enough before the court for the court's discretion to be engaged.

[31] The court has to consider the creditor's prejudice and whether the penalty is in proportion to that prejudice. This is an exercise of the court's equitable jurisdiction. Sunstone referred me to a judgment of a Full Bench of the erstwhile

Natal Provincial Division, *Maiden v David Jones (Pty) Ltd*,[5] in which the court held that it was for the debtor to establish, on a balance of probabilities, that the penalty is disproportionate. There was no obligation on the creditor to prove its prejudice.

[32] It seems to me that, where there is a penalty clause such as the one in this case, which part of an agreement with a short duration, contemplating a relationship between the parties of a mere 90 days, or, at a maximum 95 days (since payment must be made within five days of the exercise of the Option which is within 90 days of the agreement coming into existence), and levying a penalty for each day that payment is delayed, the obvious prejudice to a creditor is that it loses access to liquidity which it was entitled to expect to regain on a specific date. The penalty is a deterrent to the debtor, as well as a restitutionary measure to the creditor who entered into an agreement which was to have resulted in a predictable payment to it.

[33] However, the penalty should not result in a bumper payment to the creditor. Taking into account the relatively low amount of the main debt, the penalty amount as calculated by Sunstone, even for a single penalty, is shockingly high. Adding *mora* interest to this increases the amount even more.

[34] Despite no payment being made in response to the demand in November 2023, Sunstone only instituted proceedings in August 2024. It is unclear what the reason was for the delay, but that is another reason why the period for which the penalty may be awarded should be truncated. Where instituting proceedings was within Sunstone's power, it delayed doing so and continued accumulating R4 500 per day in the interim. As an illustration, at the current *mora* interest rate of 10.5% per annum, on the full R2.4 million, a simple calculation (based on the interest being capitalised annually rather than daily) amounts to approximately R700 per day. Naturally the true calculation would be slightly more, but still fall far short of the R4 500. Over the period of a year, taken as 365 days, the penalty amount is R1 642 500, whereas the *mora* interest on the R2.4 million would have been

[5] 1969 (1) SA 59 (N)

R252 000. *Mora* interest on the amount claimed in this application (R1.65 million) would have been R173 250 per year, again on a simple calculation.

[35] Sunstone seeks an order that *mora* interest be calculated from the date on which the payment was due, 7 August 2023. In my view that is not appropriate, as it amounts to a double penalty for the non-payment.

[36] In my view it would be appropriate to permit the penalty claim until a reasonable date for the institution of this application for the following reasons:

a. While Sunstone should be permitted to claim its penalty, it should not benefit from the unexplained delay in instituting proceedings.

b. It is appropriate that from a date on which it would have been reasonable to expect legal proceedings to have been instituted that *mora* interest applies and not a penalty.

[37] The Founding Affidavit includes a calculation for the penalty amount up to the end of June 2024. This tends to suggest that the application could have been instituted by that date at the latest. Sunstone does not have the justification that it needed to get legal advice, since it seemed already to have obtained that advice by November 2023. However, some leeway must be given for the vagaries of other obligations and commitments. Since the Founding Affidavit refers to the amount as at end of June 2024, I will take that as the defining date, whereafter *mora* interest will apply.

[38] In terms of the Put Option agreement, the first applicant held and was to sell to the Consortium 69% of the shares in WW, while the second applicant held and would sell 31% of the shares. The penalty can conveniently be divided in those proportions.

[39] It was argued for the respondents that BMIM should be ordered to pay the relevant amounts to the applicants, as it was the nominee. However, it is not clear from the papers that BMIM was the nominee of both Black Mountain and Dhorat, nor is it clear that it was intended by the Consortium that BMIM was to make the payment as well receive the shares. The only evidence annexed to the

papers suggests that the shares were to be transferred to BMIM once the money was paid. Dhorat does not disclose which of his entities paid the R750 000, and in the scheme described in the answering affidavit, it appears that it does not matter. Dhorat causes payment to be made, from wherever or whichever entity he is able to. An order that the respondents pay jointly and severally will allow Dhorat to make that payment from the most suitable vehicle.

[40] There is no reason why costs should not follow the result.

[41] I make the following order:

1. The Respondents, jointly and severally, the one paying the others to be absolved, are to pay:

1.1 to the First Applicant:

1.1.1 R1 571 129 together with interest thereon at the prescribed rate of interest *a tempore morae*, calculated from 1 July 2024 to the date of final payment, and

1.1.2 69% of the accrued penalty amount (as at end June 2024) of R1 480 500, and

1.2 to the Second Applicant:

1.2.1 R78 871 together with interest thereon at the prescribed rate of interest *a tempore morae*, calculated from 1 July 2024 to the date of final payment, and

1.2.2 31% of the accrued penalty amount (as at end June 2024) of R1 480 500.

2 The Respondents shall pay the costs of the application jointly and severally, the one paying the other to be absolved, including counsel's fees taxed on scale B.

[redacted]

S YACOOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines/ Courtonline. The date for hand-down is deemed to be 25 February 2026.

For the Applicants: M Cooke
Instructed by: Darryl Ackerman Attorneys

For the Respondents: S Freese
Instructed by: Smiedt & Associates