REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: **19454/18**

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

26/11/2018 .....
DATE SIGNATURE

In the matter between:

STEYN JOHAN HATTINGH	1st Applicant
DYNAMIC PLASTIC PACKAGING CC	2nd Applicant
and	
GERT JOHANNES SWART	1st First Respondent
COMBINED BROKER NETWORK (PTY) LTD	2nd Respondent

JUDGMENT

KEIGHTLEY J

1. This is an application for the setting aside of a writ of execution issued under case number 36584/2015 against the first applicant, Mr Steyn, on the basis that there was no *causa* for the writ. The first respondent, Mr Swart, is the party in favour of whom the writ was issued. He opposes the application to set it aside. The writ authorised the Sheriff of

this court to take into execution movable goods of Mr Steyn to the value of R12, 455, 152. 00.

2. The writ was sought some two years after a judgment was granted by this court under the aforementioned case number on 27 May 2016 ("the 2016 judgment"). That judgment concerned a dispute between the parties emanating from an agreement entered into between them in October 2014 in terms of which Mr Swart sold his member's interest in an entity called Dynamic Plastic Packaging CC ("Dynamic") to Mr Steyn ("the agreement"). The outcome of the present application depends on an interpretation of certain clauses of the agreement.

3. There is no dispute that the parties entered into the agreement. For present purposes, a number of terms are relevant. The scheme of the agreement envisaged that Mr Steyn would be liable to pay a purchase price made up of two elements: the first, was a price of R12.5 million (for simplicity I refer to this as the basic price); the second element was excluded from the basic price, and it was constituted by "the loan account that has to be determined". It seems to be common cause that the splitting of the purchase price into these two elements was because there was some dispute between the parties (who had previously been jointly involved in Dynamic) as to the actual value their drawings from, and loan accounts with, the company.

4. This is why, it seems that provision was made, under "conditions precedent" for the appointment of an accountant to quantify the second element of the purchase price. The relevant clause of the agreement is 5.2 and it provides as follows:

> "The seller through his attorney and the purchaser also through his attorneys will jointly appoint a professional accountant for the sole purpose of quantifying the seller's loan account as well as any further amounts that may be due to the seller for

drawings not taken up by the seller during his lifetime of involvement with the Business, which amount, excluding the sellers loan account, shall not be more that the drawings taken up the purchaser for the same period."

5. Clause 5.3 provided that Mr Steyn would account to Mr Swart and pay him the value of the loan account, taking into account the percentage entitlement, and a calculation to ensure that the drawings from the business would be equal. Clause 5.5 is one of the clauses the interpretation of which is disputed. It provides that:

   "The parties endeavour to finally appoint a professional accountant within 14 business days from the Effective date which will include the scope of work of the quantification of the seller's loan account and drawing as stated in clause 5.2 above. The decision of the professional accountant will be final after both parties accepted such quantification after finalisation of the determination of the loan account." (Emphasis added)

6. The sale was made subject to the fulfillment of the conditions (clause 6.1) and clause 6 set out a payment schedule for the basic purchase price (clauses 6.2.1 - 6.2.3), with the payment of the loan account being provided for as follows in clause 6.4:

   "After the quantification of the loan account and other drawings due to the seller, further payments of R200 000.00 per month until the loan account amount and other drawings due to the purchaser which was quantified by the auditor and agreed upon between the parties has been settled. ..." (Emphasis added)

7. Finally, clause 10.2.2 dealt with orders for specific performance and damages on breach. It provided that if Mr Steyn was the defaulting party, Mr Swart's right to claim specific

performance would include "the right to claim immediate payment of the full balance of the purchase price and any other amount then outstanding".

8. What led to the 2016 judgment was Mr Steyn's breach of the agreement by failing to comply with his obligations to the auditor that was appointed. Under the agreement, the parties were obliged to consult with the auditor at his request, give him access to financial records regarding historic business dealings, and not unreasonably withhold any information requested. The court found that Mr Steyn's conduct in failing to render co-operation to the auditor amounted to a breach of these obligations. It also found that because of such breach, Mr Swart was "also entitled to the benefits of the acceleration clause contained in the agreement". This was presumably a reference to clause 10.2.2 cited above. On this basis, the court ordered, among other things, that Mr Steyn pay to Mr Swart "the balance of the purchase price outstanding". The judgment does not specify an amount.

9. What led to the present dispute between the parties is that the auditor appointed by agreement between them eventually provided the parties with his "Factual Audit Dynamic Plastic Packaging CC" ("the audit report"). It concluded with paragraph 7:

> "Recommendation
>
> It is therefore recommended that Steyn pay Swart the amount of R12 455 152. 00 as calculated per annexure 19".

10. Mr Swart's attorney wrote to Mr Steyn's attorney thereafter and advised, with reference to the recommendations in the report, that Mr Steyn owed Mr Swart this amount, with interest. Further, the letter advised that the attorney's instructions were that:

"In terms of clause 5.5 of the Agreement of sale of members interest our client hereby accepts the decision of Wehmeyer and accepts the quantification of the loan accounts and drawing as per the report. Since the loan accounts and drawing have now been quantified and your client has been found to be in breach of the agreement causing our client to enforce the acceleration clause, the whole amount is due and payable immediately ... in terms of clause 10.2.2 of the sale agreement. Kindly revert back to us re your client's stance ... ." (Emphasis added)

11. Mr Steyn did not agree and instructed his attorneys to advise that he did not accept the audit report. His view was that in terms of clause 5.5 of the agreement, the report was required to be accepted by both him and Mr Swart before it was binding. In the usual manner of litigation, further communications flowed between the attorneys. Mr Swart sent a letter of demand for the amount he claimed was owed, and when he did not receive satisfaction, he applied for the writ on 20 April 2018. The writ was issued on 24 April 2018.

12. Mr Steyn's application proceeds on the basis that on a proper interpretation of the relevant clauses of the agreement, the auditor's quantification of the amount due by him under the second element of the purchase price is not final and binding until both parties have agreed to it. He also takes issue on various grounds with what he says are irregularities (including alleged grounds of unreasonableness) perpetrated by the accountant who compiled the report, and he contends that the report is liable to be set aside for these reasons.

13. As to the latter contention, Mr Steyn submits that it is permissible to seek the setting aside of the report on the basis that it is akin to a report of a referee appointed in terms of section 38 of the Superior Courts Act 10 of 2013. Further, that if I find the report is

reviewable as he contends, the effect will be that there is no *causa* to sustain the writ. However, there is no application before me to set aside the report of the accountant and in the absence of such an application, I cannot find that the report should be set aside. At best for Mr Steyn, his contentions in this regard may be relevant to the *bona fides* of his refusal to accept the report, and to show that his preferred interpretation of the relevant clauses of the agreement are not unreasonable.

14. As regards the correct interpretation of the agreement, Mr Steyn points in particular to clause 5.5 and clause 6.2.4. He submits that both of these clauses plainly say that the quantification by the auditor must be agreed upon by the parties before he is liable to Mr Swart in the amount so quantified. Mr Steyn's case is that because he refused to accept the quantification of the auditor (on what he says are reasonable grounds), Mr Swart could not rely on it as a lawful *causa* for the writ. Mr Steyn further submits that the auditor himself referred to his quantification as a "recommendation", and that this is in line with his (Mr Steyn's) interpretation of the relevant clauses of the agreement. In addition, he says that even Mr Swart's conduct on receipt of the audit report is in line with his interpretation. He points to Mr Swart's attorney's letter of 10 March 2018 in which it is recorded that Mr Swart accepts the quantification in the report. The implication of this is that Mr Swart understood that both parties had to accept the quantification before it would fall due.

15. Mr Steyn also submits that the application for the writ incorrectly stated that the 2016 judgment had ordered him to pay an amount of R12 455 152. 00 to Mr Steyn. What the court ordered was that the balance of the purchase price was payable, but, says Mr Steyn, as this amount was not final until both parties had accepted the quantification, the judgment did not provide a lawful *causa* for the writ.

16. Mr Swart submits that Mr Steyn's interpretation of the contract is not a commercially sensible construction,[1] and that it would be absurd to interpret the agreement as requiring that both parties must accept the quantification, as this would be inconsistent with the ordinary meaning of "final".

17. In his written heads of argument, Mr Swart submits that in order to give a sensible and businesslike meaning to clause 6.2.4, the existing word "and" between "auditor" and "agreed" should be altered to read "as". In other words, this clause must be read as: "*.. until the loan amount and other drawings due to the purchaser which was quantified by the auditor [and] as agreed upon between the parties has been settled.*" (The "and" in square brackets must be removed, and the underlined "as" inserted, on Mr Swart's interpretation.)

18. As to clause 5.5, Mr Swart submits that the only sensible interpretation that can be given to this clause is to read it to mean that the parties would accept the decision of the auditor, and that it should be read as "*The decision of the professional accountant will be final [after] and both parties would [accepted] accept such quantification after finalization of the determination of the loan account*". Once again, the words in square brackets are deleted from the original on Mr Swart's proposed interpretation, and the underlined words are added on his proposed interpretation.

19. In oral submissions before me, counsel for Mr Swart submitted that the word "quantification" in clause 5.5 and clause 6.2.4 was to be given its ordinary meaning, being the process of determining an amount, rather than the actual amount determined. In

[1] *Airports Company South Africa Ltd v Airport Bookshop (Pty) Ltd t/a Exclusive Books* 2017 (3) SA 128 (SCA) at [21]

other words, he submitted that what the parties intended was that they would have to agree on the process of quantification, but not on the amount determined through that process. Once again, it was submitted that this was the most commonsense and business-like meaning to be ascribed.

20. Although the approach to interpretation has been refined by a plethora of judgments of our higher courts in recent years, these judgments do not suggest that courts should ignore the actual wording a contract to which parties have agreed, when its meaning is disputed. In fact, they have reinforced the need to pay proper regard to the language used. As the SCA stated in the first of this recent series of judgments:

> "*The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background*".[2] (Emphasis added)

21. In other words, the objective of trying to achieve a sensible and businesslike meaning to commercial contracts does not imply that a court may depart freely from the language used in order to do so. In the same judgment, the SCA warned that:

> "*Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so ... in a contractual context ... is to make a contract for the parties other than the one they in fact made.*"[3]

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[2] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at 604, recently referred to with approval by the Constitutional Court in Trinity Asset Management (Pty) Ltd v Grindstone Inc 132 (Pty) Ltd 2018 (1) SA 94 (CC) at [52]-[55]

[3] Endumeni, above, at 604

22. In considering clause 5.5 I am unable to see the absurdity alleged by Mr Swart to emanate from the plain wording. While it does refer to the report being "final", this is immediately qualified by "after both parties accepted such quantification". It seems to me to be clear that what the clause means is that the quantification will be done, but must be accepted as final by both parties before the amount determined will be regarded as final, due and payable under clause 6.2.4. This latter clause, which deals specifically with the issue of when the second element of the purchase price will become due, and how it will be paid, echoes clause 5.5 in this regard: it plainly states that the quantification must be agreed upon. This linked reference to the requirement of agreement between the parties cannot have been placed in the agreement for no purpose, and effect should be given to what appears to have been a deliberate repetition of the necessity for agreement between the parties before Mr Steyn would have to pay the loan element of the purchase price.

23. I was not referred to any particular dictionary definitions of the word "quantification" by counsel for Mr Swart to support the oral argument that what the clauses mean is that all the parties were required to agree to was the quantification process by which the accountant would determine the amount of the loan and drawings. The Oxford Dictionary of English gives the meaning of "quantification" as being: "*the expression or measurement of the quantity of something.*" I am not sure that this definition is particularly helpful to Mr Swart's argument: it seems to me that the definition includes both the process of reaching a quantity or amount, as well as the actual expression of that quantity or amount arrived at. In any event, it seems to me that clause 6.2.4 puts paid to the interpretation favoured by Mr Swart. It makes it plain that it is the amount that was quantified which must be agreed upon (" ... the loan account amount and other

drawings due to the purchaser which was quantified by the auditor and agreed upon between the parties ...." (my emphasis)

24. To adopt the changed wording that Mr Swart contends reflects the true meaning of these clauses would be to embark upon the type of folly that the SCA has warned should not be attempted: it would remove words with one plain meaning from the clauses, and replace them with different words, rendering a very different meaning. In my view, this would amount to nothing less than an impermissible exercise on the part of the court in making a contract for the parties that they did not intend to make.

25. I am also not persuaded in any event that there is anything necessarily unbusinesslike in the parties committing to agreement on the quantification determined by the accountant. It seems to be common cause that the drawings and loan accounts was a bone of contention between the parties. Against this background, the need for agreement between them on the amount arrived at by the accountant makes sense. To put it differently, it would make sense that the parties reserved their rights to dispute the amount determined by the accountant by insisting that both parties agreed to the amount determined. This does not mean that either party could simply refuse, without reason, to agree to the determined amount. If that occurred, the other party would have appropriate remedies available to enforce its rights under the agreement. In any event, that is not the case here, as Mr Steyn alleges various bases on which he says he reasonably disputes the amount determined. Whether those grounds are sustainable is not for me to determine. It must await possible further litigation between the parties.

26. I conclude, for these reasons, that the interpretation contended for by Mr Steyn is correct. Under the agreement, the amount due by Mr Steyn in respect of the loan element of the purchase price was to be finally determined not simply by the quantification of the

accountant. The agreement further required that the parties would both accept that quantification. As Mr Steyn did not accept the quantification, it could not lawfully provide a *causa* for the writ, and the writ must be set aside.

27. I make the following order:

1. The writ of execution under case number 36584/2015 dated 20 April 2018 issued by the Registrar on 24 April 2018, a copy of which is annexed to this Order is set aside.

2. The Respondent is ordered to pay the costs of the application.

R M, KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING : 30 OCTOBER 2018

DATE OF JUDGMENT : 26 NOVEMBER 2018

APPEARANCES

APPLICANT'S COUNSEL : L HOLLANDER

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1ST RESPONDENT'S COUNSEL : RS SHEPSTONE

INSTRUCTED BY : JS BERG ATTORNEYS