




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
Date: <u>12/10/2021</u> Signature: 	

CASE No. 8323/2020

In the counter application between

BRADY, RICHARD JOHN

Applicant/intervening Party

(identity number: 7305085012082)

and

D&R FARMING CC

Registration number: CK 2001/048957/23)

First Respondent

WASLEY. DEREK JOHN

(Identity number: 6607165149081)

Second Respondent

JUDGMENT

MAHOMED, AJ

INTRODUCTION

1. The second respondent (Wasley) initially applied for the liquidation of the first respondent. The applicant applied to intervene and launched a counter application. The application for liquidation was withdrawn and the second respondent has agreed that the applicant has a direct and substantial interest in this matter to intervene. The counter application is now before this court for determination.

THE PARTIES

2. The applicant, Mr John Brady ("Brady"), and the second respondent Mr Derek Wasley ("Wasley"), both held 50% shares in the first respondent ("the corporation").
3. Brady invested the capital for the business. He was responsible for the finances and administration of the corporation, whilst Wasley, was responsible for the day-to-day management and operation of this farm, which operated on a holding which the parties leased, from Wasley's family.
4. The Corporation is a duly registered Close Corporation, in terms of the Close Corporation Act, 69 of 1984. which farms and sells avocados, both locally and internationally. The corporation commenced business in 2001 and has been a successful entity throughout, wherein both shareholders earned sizeable shares each year. It operates in Tzaneen in the Limpopo Province.

THE DISPUTE

5. On or about July 2019 Wasley offered to purchase Brady's interest share in the corporation for R1 million.

6. Brady applies for an order that Wasley pay him R1 174 659, 92 for his members interest in the corporation, whereupon Brady will resign as a member of the corporation and deliver a signed CK2 form.
7. Wasley is of the view, that a balance of R548 718, 75 only, is outstanding to Brady, which he has tendered, and which was rejected.

THE EVIDENCE

8. Advocate Berkowitz who appeared for the applicant, Brady and Botes SC who appeared for the second respondent, Wasley, both agree that this matter is a calculation exercise and that the disputes can be determined on the papers.
9. On 29 July 2019, Wasley in an email to Brady proposed to purchase Brady's 50% share interest in the corporation for R1million.
10. On 9 August 2019 at the farm, Brady agreed to sell his 50% member interest to Wasley for R1million plus half the agreed value of certain sundry assets and farming implements.
11. On 14 August 2019, Brady presented Wasley with the list of the items which were included in the sale price.
 - 11.1. Brady presented a document, CA3, which recorded the R1 million for his member's interest, the value of his share of the vehicles, his share of the equipment, the assessed tax loss, the value of their Afrupro shares, an Afrupro loan plus interest thereon.
 - 11.2. The total purchase price was R1 173 480.77. This amount increased to R1 174 659.92, due to an interest figure which he initially had underestimated.

12. This document was headed, "Sale Agreement Shares and Claims"
13. Wasley agreed with all the items and values which appeared on that document and accepted his liability for R1 174 659, 92, as amended, for Brady's share and claims.
14. It was further agreed that the parties would close off the books of the corporation at the end of July 2019 ("the cut -off date").
15. Wasley accepted the terms and conditions were accurately recorded in the document referred to in paragraph 11 above and the further terms and condition which was prepared by Brady on or about 1 December 2019.
16. Wasley, in his papers at paragraph 7 states:

This court can therefore unconditionally and irrevocably accept that we entered into and concluded an agreement in terms of which I was willing to by Mr Brady's 50% members interest and claims in an amount of R1 174 659,92 ("hereinafter referred to as "the amount"), as provided for and envisaged in the following documents which are attached to Mr Brady's affidavit:

- 7.1 *initial summary or calculation dated 14 August 2019 – Annexure "CA 3"*
- 7.2 *schedule of drawings dated 5 September 2019, - Annexure "CA1".*
- 7.3 *sale of members interest and claims agreement, dated 9 September 2019- Annexure "CA4",*
- 7.4 *Brian Brady Family Trust tax invoice, dated 9 October 2019, Annexure "CA4"*

7.5 *Mr Brady's email addressed to me, dated 9 October 2019- Annexure "CA5".*

7.6 *Mr Brady's email addressed to me dated 1 December 2019 – Annexure "CA7"*

7.7 *Sale of members interest and claims agreement dated 1 December 2019- Annexure "CA7.1"*

7.8 *The amended summary or calculation, dated 1 December 2019, Annexure "CA7.2".*

17. Through all the correspondences and time lines above both parties understood and agreed that the price for the interest share and claims is in the sum of R1 174 659.92.

18. The evidence further is that after the agreement was concluded for the above stated amount, Brady paid himself from the corporation's bank account a sum of R1 147 430.17.

19. It not disputed that the amounts withdrawn and the total value for the items were due and payable to Brady.

20. Furthermore, Brady claimed that amounts to settle the Brian Brady Trust (R115 000), plus a rebate loan of R92 792 which the Corporation received after the agreed cut-off date, and interest of R10 358, received from Afupro, as adjusted in CA 7.2, were additionally due to him.

21. This was not disputed either.

22. Having considered the above undisputed amounts, Wasley submits that the

balance outstanding to Brady is in the sum of R548 718.75.

22.1. The agreed purchase price = R1 174 659,92, plus the amounts in 20 above, less the total drawings of R1 147 430.17, which Brady withdrew as stated earlier, would result in an outstanding balance of R548 718. 75. **[003-67]**

23. Brady in his claim for specific performance, alleged that an amount of R625 941.17, being the profits from avocado crop for 2019, is still outstanding to him. Mr Berkowitz informed the court that this is the only issue that remains in this matter. This court is to determine whether the claim for the profits in the 2019 crop outside of the agreement is due to Brady.
24. Mr Berkowitz submitted that Wasley has “conflated” the liabilities of the corporation with his personal liability to Brady.
25. Counsel submitted that at the time of the agreement the parties had never contemplated that the 2019 profits would be included in the sale agreement.
26. It was submitted furthermore, that there was no evidence before the court that Wasley has paid any amount of money toward the purchase of the shares, it being his personal liability.
27. He argued that there are no reasons before the court as to why the corporation is to pay off Wasley's debt.

28. Botes SC, submitted that, in fact. "Brady" has conflated the amounts due and charged. In that regard he referred the court to CA 3, which sets out the R1 million for shares, various amounts for assessed loss, afropro shares, afropro loan, vehicles, equipment. He submitted that the afropro items, the assessed loss has nothing to do with Wasley, personally.

28.1. Counsel argued that the agreements, emails, and correspondences referred to in 16 above, through the months after the agreement was concluded and which are conceded, were drawn up by Brady and who, "put it all into one pot."

28.2. Wasley was never involved in any of the drafting of the documents which Brady relies on, and which were conceded as correct except for a claim for an additional R625 941,17.

29. Botes SC, referred the court to annexure H of Wasley's papers, which is a summary drafted by Brady which records:

29.1. *"avocado sales,*

29.2. *leaves a blank against "2019 crop rebate,*

29.3. *includes a page note at the end, "Wasley R625 941, 17*

29.4. *Brady R625 941.17*

This is just for calculation purposes = will not apply"

30. He submitted the payment of R625 941 is “an afterthought”, it was “introduced” after the agreement was concluded.
31. Botes SC proffered that the amount claimed for profits for 2019 arose only in the reply to Wasley’s opposing affidavit. It was not the case that Wasley had to meet, and if it was, he would have addressed it.
32. This amount was never part of the equation. This is evidenced by:
- 32.1. the document drafted by Brady, as in 29 above,
- 32.2. an email from Brady dated 9 October 2019, (after the agreement was concluded), which in essence states :
- “that the parties were still to discuss and finalise the share of profits in 2019 crop, the Afrupro loan/rebate and equipment.”*
33. Botes SC submitted this court is to consider the language used and apply an interpretation to ensure that the “intention of the parties” at the conclusion of the agreement is accurately “reflected and endorsed.”
34. He alerted the court to the potential risk of *“making a contract for the parties other than the one that they made.”*
35. Counsel for Brady submitted that there is no need for any interpretation of the agreement which is clear and Wasley has unconditionally agreed to its terms.

36. Mr Berkowitz submitted that the parties have always in their relationship shared the profits of the crop, there is no reason to think it different now given that the crop was fully harvested and most statistics applicable to that harvest were finalised, as at the date the agreement was concluded. He submitted that the R625 941.17 was due and payable to Brady.
37. Obviously, Brady the applicant in this counterapplication, bears the onus to prove that the amount for the 2019 crop was payable to him and agreed upon.

THE LAW

38. In **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)** at par 26,

"motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities."

39. In **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA** at 634E – 635 D, the court stated,

"where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. The power of the court to give such final relief on the papers before it is however, not confined to such a situation. In certain instances, the denial by

a Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine, or bona fide dispute of fact. If in such a case the Respondent has not availed himself of his right to apply for the deponent's concerned to be called to cross-examination under Rule 6(5)(g) of the Uniform Rules of Court, and the court is satisfied as to the inherent credibility of the Applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the Applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the Respondent are so far-fetched or clearly untenable that the court is justified in rejecting them on the papers" [emphasis added].

40. Regarding the interpretation of contracts, the court in,

NATAL JOINT MUNICIPAL PENSION FUND v EDUMENI MUNICIPALITY

(2012 (4) SA 593 (SCA) at par 18 stated:

"... interpretation is the process of attributing meaning to the words used in a document,or a contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon it coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of those factors. This process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results that undermine the apparent purpose of the document. 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 regard to a statute or statutory instrument is to cross the divide between the interpretation and legislation, in a contractual context it is to make a contract for the parties other than the one they in fact made." [Emphasis added]

41. In **2021 UNIVERSITY OF JOHANNESBURG v AUCKLAND PARK TECHNOLOGICAL SEMINARY & ANOTHER**, [2021] ZACC 13 (11 June) at par 65, the court stated that interpretation is to be approached *holistically: simultaneously considering the text, context and purpose of an agreement.*"

JUDGMENT

42. The dispute is nuanced, in that I was to determine whether at the conclusion of the agreement, a sum of R625 941,17, being for the profits on the 2019 crop was still due and payable by Wasley to Brady.
43. Wasley, denied that he was liable to pay the amount to Brady in respect of the 2019 avocado crop. The legal representatives agreed that the dispute could be resolved on the papers, based on the approach to the calculation for the purchase price of the share interest.
44. I agree that the issue was a narrow one and can be determined by reference to the documents before me and by reference to the factual matrix, including the relevant time lines. It would have served no purpose to refer this matter to trial, all relevant facts are before the court. I therefor am of the view that the matter is properly before the motion court.
45. This court is to determine what amount Wasley should pay for Brady's 50% members interest in the corporation. Brady claims R1 174 659.92, whilst Wasley has tendered payment of R548 718.75, which tender has been rejected.

46. The difference in the amounts claimed is for an amount of R625 941,17 which Brady claims for his share of the 2019 avocado crop. Wasley is of the view he had never agreed to this on the date that they concluded the agreement and as of the “agreed cut-off date” of July 2019, when they agreed they would close off the books of the corporation.

47. It is common cause that Brady was responsible for the administration of the finances as well as for the drafting of the terms of the agreement.

48. Brady in his papers at 12.4.4.3 sets out:

“we would close of the books of the corporation at the end of July 2019 for purposes of identifying, qualifying and settling my claims and management fees, including the shortfall in my drawings of management fees relative to the drawings of Wasley.”

49. He drafted the document, marked CA 3, and headed “*Sale Agreement Shares and Claims*” , being the initial summary or calculations dated 14 August 2019 and later amended this document where he made provision for an increase in interest earned.

Wasley, agreed to all the terms and conditions as set out therein.

50. I considered the claims and calculations as set out in paragraphs 11.1, 20 and 22 above and noted the events and time lines after the cut-off date of July 2019.

51. After that date, Brady carried out various financial/ administrative duties for

the period August to December 2019.

52. He noted interest that had to be adjusted upwards, in the sum of approximately R500.00 for each shareholder and he effected amendments to reflect same to the agreed purchase price,

52.1. he made at least 14 withdrawals from the corporation's bank account and paid himself what he was due,

52.2. some of the amounts drawn were relatively small, R20 000

52.3. he remembered to draw out monies due by a trust, debtor.

52.4. he remembered to adjust his drawings in line with what Wasley had drawn, in profits and adjusted the relevant calculations.

He was meticulous at his accounting duties. He kept Wasley informed of those debts and that they were to be factored in.

53. However, he seemed to have "relaxed" on his alleged claim for R625 941,17 in respect of his share of profits in the avocado crop for 2019.

54. This is a sizeable sum of money, that would significantly impact on the amounts agreed upon. The amounts agreed upon is as appears on the document CA 3 for the items listed including the R1 million for the shares, as offered by Wasley and accepted by Brady.

55. I agree with Mr Botes that the claim for R625 941.17 is an “afterthought”, and this is borne out by the fact that even in his “suite of documents” as put by Mr Berkowitz, he leaves the item blank with a “?” against it, he made a post script note, that clearly reads, “*this won’t apply ...*” as set out earlier.
56. I noted Mr Botes’s submissions that the claim “emerged” only in Brady’s reply to Wasley’s opposing and replying papers. Obviously, Mr Botes would have addressed this point in the opposing papers had he known it was the case Wasley was to meet. It is trite that a party stands or falls on the papers.
57. What is more telling is in Brady’s email dated 9 October 2019, addressed to Wasley, in which he stated:

“The purchase price mentioned in the agreement obviously only takes into account the sale of my 50% members share in the business and not the 2019 crop income. Afrupro loan/rebate, farm assets, etc etc, that we still need to discuss to finalize.”

- 57.1. The is well after the date of the agreement in August 2019. It is clear to me that the item “profits for 2019 crop” was not agreed upon at the date the agreement was concluded. This is the objective fact and on Brady’s version. To find differently, would effectively be making a contract for the parties.
- 57.2. Mr Berkowitz proffered that the amount was not included in CA3 or CA7 because it was a cost to the corporation not to Wasley. By implication. all that appears in CA3 are costs to Wasley. This cannot be correct. That document includes items which can easily be

identified as a cost to the corporation as well. This argument cannot assist Brady at this point.

58. "A contract must be interpreted to give it a commercially sensible meaning", and "public policy demands that where they are freely and consciously entered into, they must be honoured." See **Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2010(2) SA 29 at 498 (SCA)** at paragraph 13 and **North East Finance v Standard Bank of SA Limited at par 25**

59. I am of the view the method of calculation as set out in paragraph 22, would result in the correct amount outstanding to Brady and payable by Wasley. The total amount of R548 718.75 being the balance outstanding for the 50% members interest in the corporation, is to be paid by Wasley.

I make the following Order:

1. The counter application is dismissed.
2. The applicant is to pay R548 718.75, to the second respondent, in respect of the 50% members interest in the corporation.
3. Each party is to pay its own costs.



MAHOMED, AJ

Date of Hearing: 24 August 2021

Date of Judgment: 18 October 2021

For Applicant: Adv A Berkowitz
Instructed by: Hutcheon Attorneys
Tel: 011 454 3221

For Second Respondent: Botes SC
Instructed by: Johan Steyn Attorneys
Tel: 011 333 7790
Email: pa1@mblaw.co.za