

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 06923/2019

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

11/04/22

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Date

ML TWALA

In the matter between:

STRUCTRA GROUP (PTY) LTD

APPLICANT

And

VAN NIEKERK, DIRK ANTON

FIRST RESPONDENT

**GOUWS, WILLEM FREDERICK JAKOBUS
RESPONDENT**

SECOND

**VAN DER WESTHUIZEN, GERHARD FRANCOIS THIRD
RESPONDENT**

**TOBUN AND TOBUN (PTY) LTD FOURTH
RESPONDENT**

**ONE STEEL ENGINEERING (PTY) LTD FIFTH
RESPONDENT**

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 11th of April 2022

TWALA J

[1] In this application, the applicant sought an order against the first to the fifth respondents in the following terms:

- 1.1 That the first to fifth respondents be and hereby are ordered to pay the sum of R2 000 000 (Two Million Rand) to the applicant;
- 1.2 Interest at the current Nedbank prime overdraft rates from 1 May 2018 to date of final payment, which current rate is 10.25%;
- 1.3 That clause 17.1 of the Agreement be rectified by replacing the word “Purchasers” where it appears in the first sentence with the word “Company”;

- 1.4 That, in the event of the first to fourth respondents failing to make payment of the sum of R2000 000 together with interest thereon within 7 (Seven) days hereof, or such period as this Honourable Court may deem meet, the applicant is entitled to apply, in terms of clause 17.1 of the Sale of Shares Agreement dated 25 May 2018 (“the Agreement”), the value of the assets as listed in Annexure A” to this Notice of Motion to the reduction and/or satisfaction of sum in prayer 1 hereof, in which event such assets shall remain the property of the applicant;
- 1.5 Costs of the application on the attorney and client scale.

- [2] Initially the application was only opposed by the first, second and third respondents. However, the third respondent later filed his notice of withdrawal of his opposition of the applicant’s claim after concluding a settlement agreement with the applicant. Judgment by default had already been entered against the fourth respondent prior to the hearing of this case. No relief is sought against the fifth respondent – hence it did not participate in these proceedings. Furthermore, at the hearing of this matter, the applicant indicated that it does not persists with its alternative prayer as set out in the notice of motion.
- [3] For the sake of convenience in this judgment, I propose to refer to the first and second respondents as the respondents and shall refer to the other parties by name where it is necessary to refer to them. I also propose to concentrate my efforts on the parties that are relevant in this judgment, which is the applicant and the first and second respondents.
- [4] The applicant is Structra Group (Pty) Ltd, a company with limited liability duly registered and incorporated in terms of the relevant company laws of

the Republic of South Africa with registration number 2007/025670/07 with its registered address at 21 Merriman Avenue, Vereeniging.

- [5] The first respondent is Mr Dirk Anton van Niekerk, and adult businessman and director of the fifth respondent of 58 Lebombo Street, SE8, Vanderbijlpark.
- [6] The second respondent is Mr Willem Frederick Jakobus Gouws, an adult businessman and director of the fifth respondent of 15 Duggie Morkel Street, Unitaspark, Vereeniging.
- [7] The genesis of this case is that the applicant and the first to the fourth respondents concluded a Sale of Shares Agreement on the 25th of May 2018 whereby the applicant, represented by its director Mr Lourens Alexander Booysen and the first to third respondents representing themselves and the fourth respondent represented by Mr Kudus Popoola Tobun, sold the whole of its fifty-three point zero three percent (53.03%) shares in the fifth respondent to the first to fourth respondents for the total sum of R2 000 000.
- [8] It is undisputed that the agreement provided the respondents with a payment holiday of six (6) months from the effective date which was the 1st of May 2018 for payment of the purchase price in the sum R2000 000 which became due and payable on the 1st of November 2018. Thereafter the purchase price was to be redeemed with interest over a period of sixty (60) months. On the 1st of November 2018 the respondents failed to make payment of the said sum of R2 000 000 or any part thereof to the applicant. On the 7th of January 2019 the respondents started the voluntary winding proceedings and placed the fifth respondent in the hands of the Master of the High Court. To date the

respondents have failed to pay the sum of R2 000 000 – hence these proceedings.

- [9] The respondents contended that the applicant is not entitled to the relief it seeks for it has failed to join the liquidators of the fifth respondent in these proceedings. The fifth respondent, so the argument went, was placed in liquidation on the 7th of January 2019, a month before these proceedings were instituted and therefore the liquidators should have been joined as a party since they have an interest in this matter. Furthermore, so it was contended, the applicant committed fraud by misrepresenting its financial statements and financial situation. The contract between the parties was concluded in May 2018 and fraud was discovered by an independent reviewer, AFS Audit was employed by the respondents and produced the review report in September 2018.
- [10] It was contended further that the respondents require rectification of the contract since it does not state the individual percentages of the shares bought by each of the respondents. Furthermore, so the argument went, the respondents cannot be held jointly and severally liable for they did not bind themselves jointly and there was no agreement to that effect. There is further a dispute of fact as what was purchased by the respondents and that it was not explicitly stated that the fifth respondent will remain as part of the group of the companies of the applicant. The respondents by conduct made their election to resile from the contract in September 2018. In December 2018 the respondents resolved to place the fifth respondent in liquidation under the hands of the Master of the High Court.
- [11] It is a trite principle of our law that the privity and sanctity of a contract should prevail and the Courts have been enjoyed in a number of decisions to

enforce such contracts. Parties are to observe and perform in terms of their agreement and should only be allowed to deviate therefrom if it can be demonstrated that the contract is tainted with fraud or a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy.

[12] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017)* the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of the contract and stated the following:

“paragraph 23 The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.”

[13] The Court continued and quoted with approval a paragraph in *Wells v South African Alumenite Company 1927 AD 69 at 73* wherein the Court held as follows:

“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.”

[14] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others CCT 109/19 [2020] ZACC 13* also had an opportunity to emphasize the principle of *pacta sunt servanda* and stated the following:

“paragraph 84 Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

*Paragraph 85 The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.”*

[15] It is necessary at this stage to restate the relevant clauses of the agreement between the parties to put matters in the correct perspective:

“Clause 2 Interpretation

2.1 In this agreement, unless the context otherwise indicates:

2.1.1

2.1.3 ‘Effective date’ means 1 May 2018.

2.1.7 *'the Purchasers'* means Dirk Anton Van Niekerk, identity number: 640516 5053 088, WFJ Gouws, identity number: 821002 5253 086, GF van der Westhuizen, identity number: 850116 5061 085, Tobun and Tobun (Pty) Ltd, Registration number: 2015/028671/07 (hereinafter referred to as the Purchasers).

2.1.8 *'the Purchase Price'* means the sum of R2 000 000 (Two Million Rand) plus the Settler's outstanding loan account as at the effective date.

2.1.9 *'the shares'* means 53.03% (Fifty-Three pint Zero Three Percent) of the issued share capital of the Company.

[16] In clause 5 the agreement deals with the purchase price and the payment thereof and provided the following:

5. *Payment of the Purchase Price*

5.1 *The purchase price shall be R2 000 000 (Two Million Rand) plus the outstanding loan account of the Seller as at the effective date, payable as set out hereunder.*

5.2 *The purchasers will have a 6 (six) month payment holiday, starting on the effective date being 1 May 2018. Therefore, the purchasers shall make their first payment no later than 1 November 2018. Interest in this 6 (six) month period will apply and be calculated at the current Nedbank prime overdraft rates.*

5.3 *Thereafter the amount will be redeemed over a 60 (sixty) month period, calculated at the same interest rate as set out in Clause 5.2.*

5.4 *It is recorded that the 53.03% (Fifty-three point zero three percent) shares that the Purchasers will become entitled to in terms of this Agreement shall formally be registered in his name on the effective date.*

[17] In clause 9 the agreement deals with the possession and control of the benefits arising therefrom and provides as follows:

9. *Possession, Control and Risk*

9.1 *All benefits in and to the subject matter shall pass to the Purchasers with effect from the Effective Date, and possession of the shares shall be given to and taken by the Purchasers on the Effective Date, from which date all risks in such shares and effective control and authority there over, subject to the warranties in terms of this Agreement, shall pass to the Purchasers and the Seller shall be released of all liabilities towards the Seller's bankers.*

9.2

[18] I do not agree with the respondent that the applicant failed to join the liquidators of the fifth respondent and therefore is not entitled to the relief it seeks. The applicant is suing the respondents based on the sale of shares agreement and the fifth respondent was not a party to the agreement. The liquidators have no interest in this matter since they are not parties to the contract. Furthermore, the applicant does not seek any relief against the fifth respondent but only against the respondents based on the agreement of the sale of shares concluded between the parties. The fifth respondent did not own the shares but individual members owned the shares in the fifth respondent.

- [19] Moreover, the applicant has abandoned its alternative claim which was in relation to the ownership of the property which belonged to the company, being the fifth respondent. With regard to the alternative claim, the applicant was bound to join the liquidators of the fifth respondent for it involved the property of the fifth respondent. I hold the view therefore that there was no reason for the applicant to cite the fifth respondent in the first place nor to join the liquidators in these proceedings.
- [20] There is no merit in the argument that there is a dispute of fact which necessitates that this matter be referred to trial. It is clear and plain from the agreement that the applicant sold and the respondents bought fifty-three point zero three percent (53.03%) of the shares in the fifth respondent. The resolution taken in 2017 to donate twelve percent (12%) of the shares in the fifth respondent to Bokamoso Ba Basadi Trust bears no relevance in this case. The applicant sold (100%) one hundred percent of its shares in the fifth respondent, which is (53.03%) of the shares in the fifth respondent. The shares were bought by the respondents and how they were to distribute them amongst themselves was a matter left to the respondents and of no concern to the applicant.
- [21] It is now settled that a contract tainted by fraud or fraudulent misrepresentation made knowingly that it was false or made recklessly to induce the other party to enter into a contract, can be voided by the injured party and it (the injured party) may proceed to recover damages from the other party. However, the onus of proof is on the party alleging that there was misrepresentation and that such misrepresentation induced it to enter into the contract. Had it known the exact facts, it would not have concluded the contract. Once the injured party has proven the existence of the

fraudulent misrepresentation, then it has to make an election whether to resile from the contract or to continue with the contract.

[22] In *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another* (case no: 201/2019) [2020] ZASCA 74 (29 June 2020) the Supreme Court of Appeal had an opportunity to deal with the effects of fraudulent misrepresentation that induced a party to enter into a contract and made the following observation:

“Paragraph 29: It is trite that fraud is conduct which vitiates every transaction known to the law. In affirming this principle, this court, in Esorfranki Pipelines (Pty) Ltd, referred with approval to Lord Denning’s dicta in Lazarus Estates Ltd v Beasley, when he said:

‘No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever’”

[23] I do not understand the respondents to be disputing the applicant’s contention that the review report they place reliance upon is not on the letterhead of the company purporting to be issuing the report and does not bear the signature of the author thereof. Furthermore, the company that prepared the review report or the person who compiled the said report is not a company of auditors or an auditor and it is not independent as contended for by the respondents since the alleged author of the report is the husband of the accountant of the fifth respondent. The respondents do not seem to dispute these contentions of the applicant. I am of the firm view therefore

that the respondents have not proven the authenticity of the review report and therefore its contents are not of any assistance to this Court.

[24] However, even if I were to accept that there was fraudulent misrepresentation made by the applicant to induce the respondents to conclude the contract, it is plain that the respondents exercised their right to make an election whether to resile from or abide by the contract and they chose to abide by the contract. In the end it is the respondents who took full responsibility and placed the fifth respondent in voluntarily winding up in the hands of the Master of the High Court. The argument that the respondents resiled from the contract by conduct is misplaced since the respondents in their answering affidavit contend that, notwithstanding the financial situation of the company as alluded to by the independent review report, they kept on trying to proceed with the business and made arrangements with the creditors.

[25] Given that the respondents elected to abide by the agreement of the parties, the ineluctable conclusion is therefore that they are bound by all the terms of the agreement. The sale of shares agreement between the parties is clear, plain and unambiguous that on the effective date all the benefits in and possession of the shares shall pass and be given to and taken by the respondents. From the effective date, all risks in such shares and effective control and authority there-over, shall pass to the respondents and the applicant shall be released from all liabilities towards the applicant's bankers. It is therefore clear that the possession and control of the shares passed to the respondents on the effective date in terms of the agreement and they are therefore liable for payment for the shares.

[26] As indicated in the preceding paragraphs, the courts are enjoined to hold parties to their contract and this case is no exception. The respondents made their election to abide by the contract and they are in breach of the contract since they failed to meet the terms of the agreement by not paying the applicant the agreed sum of R2 000 000 for the fifty-three point zero three percent shares of the applicant in the fifth respondent. It is my respectful view therefore, that the applicant has succeeded in its case against the respondents and is entitled to the relief it seeks as against.

[27] In the circumstances, I make the following order:

1. That the first and second respondents are ordered to pay the sum of R2 000 000 (Two Million Rand) to the applicant;
2. That the first and second respondents are to pay interest on the said sum of R2 000 000 at the current Nedbank prime overdraft rates from 1 May 2018 to date of final payment;
3. The first and second respondents are liable, jointly and severally the one paying the other to be absolved, to pay the costs of this application.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 14th of March 2022

Date of Judgment: 11th of April 2022

For the Applicant: Advocate C.E Thompson

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