REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2020/3822

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

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SIGNATURE **DATE:** 1 April 2022

Applicant

BRYNALYN ROLAND TUCKETT 1st Respondent

PANAMO GLOBAL SOLUTIONS (PTY) LTD 2nd Respondent

EASTERN FOUNDER LIMITED 3rd Respondent

EQ EMPORIUM (PTY) LTD 4th Respondent

JUDGMENT

MANOIM J

Introduction

[1] In this matter, the applicant ("Segal") claims the outstanding balance on the purchase price of shares in the second respondent ("Panamo") that he sold to the first respondent ("Tuckett"). The second and third respondents are companies that had all provided security for Tuckett's obligations, hence their inclusion in the claim.

[2] Tuckett, along with the other respondents, resists this claim. In turn Tuckett brings a counterclaim in which he seeks to set aside and cancel the sale of shares and to reclaim from Segal the moneys he had paid thus far in respect of the sale.

[3] The respondents defences are two-fold. Firstly, they allege they were sold a non-existent *merx*. This is because the sale price was based on the value of Segal's loan account in Panamo. But, say the respondents, they have since discovered, despite Tuckett having already paid off part of the purchase price, that the loan account no longer exists.

[4] Second, as an additional self-standing defence, they allege that because Panamo was assisting Tuckett buy its own shares, this amounted to financial assistance for which no authorisation had been given as required by section 45 of the Companies Act, 71 of 2008. Similarly, as I go on to explain, the respondents allege that Tuckett, was a related party in respect of the other companies, and hence too, financial assistance was not permissible without the requisite authorisation. Tuckett's case is that no such authorisation was granted. But he went further in his section 45 defence. This deficiency not only condemned the validity of the surety granted by Panamo, and the other surety respondents, but also tainted the main transaction i.e., the sale of shares.

Background

[5] At the time of the sale of shares it appears that Panamo had three shareholders. I say 'appears' as none of the parties confirms this. However, in an email from Tuckett, dated 9 November 2018, addressed to Segal and a Martin Levick, and copying in his wife Penelope, Tuckett refers to the company having three shareholders.[1]

[6] This email is what precipitated the sale. In it, Tuckett, who signs himself as the Managing Director of Panamo, refers to an acrimonious conversation he had had with Levick concerning how he (Tuckett) was "*running Panamo*". Tuckett took great offence to this. The upshot was that Tuckett proposed that Levick and Segal sell their shares in the business to him.

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[1] Tuckett describes Penelope Ann Tuckett as the director and proprietor of various entities including the second and fourth respondents. (Answering Affidavit paragraph 5)77-2. Since Segal and Levick were two of the shareholders I assume that Penelope was the third. In the financial statements she is shown as having a loan account in the company.

[7] On 18 March 2019 Segal and Tuckett entered into the sale of shares agreement which is the subject matter of this litigation.

[8] The sale agreement is unusual in that the purchase price was based not on the value of the shares, but on the value of Segal's loan account. Segal, it records held 33% of the equity of the firm or 400 shares, which, according to the agreement he sold for R 1.00 (one rand). The claim against the loan account was valued at R 2 300 000.00.

[9] The agreement then records that Tuckett would pay the R2 300 000.00 amount in various instalments over a period stretching from March 2019 until it was fully paid off by December 2020.

[10] At the same time the second to fourth respondents stood surety for the obligations of Tuckett in terms of the agreement. Tuckett signed the surety on behalf of Panamo and the third respondent, whilst Penelope signed on behalf of the fourth respondent.

[11] Tuckett made the payments as and when they fell due in terms of the instalment schedule, until 17 August 2019. Segal's attorney wrote several letters to Tuckett to put him on terms to pay. This led to Tuckett requesting a meeting between his attorney at the time and those of Segal. Segal agreed to a without prejudice meeting being held between the respective attorneys but required a payment of R 50 000.00 to be made prior to the meeting as a "*gesture of good faith*". This payment of R 50 000.00 was then made on 17 September 2019.

[12] Since the meeting was without prejudice there is no detail on what transpired in the record. Suffice to say no further payments were made and hence Segal instituted this litigation in February 2020.

[13] When he filed his answering affidavit, Tuckett stated that he was subsequently advised *(he does not say when or by whom)* that the shareholders loan accounts as they were reflected in Panamo's accounts at the end of 2016 (February) had since been *"capitalised by the respective shareholders and accordingly they became assets in the name of the second respondent [Panamo], alternatively constitute a share premium."*

[14] He thus denied that Segal had a credit loan account to sell him. Accordingly, so he maintained, Segal had nothing to sell him and the sale was thus void.

[15] In the alternative, he alleged that Segal had fraudulently represented to him that he had the credit loan account when in fact he did not have one. Tuckett says for tax reasons he wanted to purchase a loan account and not shares so he could withdraw

money without a tax implication, something he says he would not be able to do if he took money out in the form of dividends.

[16] To support his allegations of the non-existent loan account, Tuckett seeks to rely on two of Panamo's annual financial statements. According to these financial statements both Segal and Levick had credit loan accounts in Panamo in 2016. But in the 2017 these are no longer reflected in the financials. The same holds for the following year, 2018. In that year only Penelope is reflected as having a credit loan account with the company. Tuckett speculates that the loan accounts may have been capitalised.

[17] In a replying affidavit Segal denies that this took place or if it did – denies that it took place with his knowledge and consent. Segal notes that if the loans had been capitalised there should have been an increase shown in the share capital of the firm in the subsequent financial statements, i.e., 2017 and 2018, but this is not reflected.

[18] Segal then attaches from 2016 a management account evidencing his credit loan account.[2]

[19] Tuckett does not explain the mechanics of how the credit loan accounts had mutated into share capital if that is what happened. This is remarkable because unlike Segal, Tuckett is an insider. His wife Penelope is the sole director of Panamo. She signed the annual financial statements. She also signed the suretyship for the fourth respondent and gave a confirming affidavit to his answering affidavit. In short, she would have been fully aware if the loan accounts had vanished or been transmogrified by some feat of accounting.

[20] But there is a second respect in which Tuckett is an insider. As the email I quoted from earlier indicated, he described himself as the managing director and refers to his 'running the company'. He too must have known what was going on with finances and if he did not, an explanation was required.

[21] Nor does Tuckett explain how he acquired this information about the disappearance of the loan account between the time he entered into the agreement (February 2019 and thus at time he must have been aware of at least the 2017 annual financial statements) and September 2019 when he stopped making payments.

[22] Yet even when he did, he gave no explanation at the time of why he had stopped paying. He needed to do so. How had he found out this information and why had he, as

[2] In written heads of argument by Tuckett's attorney he suggested this account was for another company. But as Mr. Hoffman pointed out this was Panamo's prior name as evidenced from CIPC records that the respondents had filed.

an insider and his wife not known this before and then acted upon it instead of waiting to be sued and then counterclaiming. The answering affidavit is the first time where he gave this explanation.

[23] The more probable reason why he stopped paying is that he ran out of money to do so. He had after all bitten off more than he could chew. He says in the email he would have to borrow money from his sister. The generous payment period also suggests he needed time to find the money. Moreover, even when he experienced difficulties and the respective lawyers met, he still paid out R 50 000 as the good faith gesture to secure the meeting.

[24] I therefore reject the explanation of Tuckett on this aspect as improbable. He is liable for the payment of the balance of the purchase price.

Suretyships

[25] The respondents rely on two defences in respect of the suretyships although based on the same point of law.

[26] Section 45 of the Companies Act, 71 of 2008, (the 'Act') regulates the circumstances under which a company can grant financial assistance to a director or related person.

[27] Since Tuckett is married to Penelope he is a related person as far as any company of which she is a director is concerned. [3] She is according to Tuckett a director of the second and fourth respondents. He is a director of the third.

[28] The respondents contend that none of the sureties (the second to fourth respondents) had been entered into following proper compliance with the provisions of section 45. The sureties were thus void.

[29] Proper compliance with section 45(3) requires that if financial assistance is given by a company to a related person, there must be several steps in place. These steps are mandatory. In brief they require that a special resolution to this effect would have been passed by its shareholders within the previous two years and that the board is satisfied that the financial assistance would not adversely impact the solvency and liquidity of the company, and is fair and reasonable.

[30] Segal is not able to refute the fact that the second to fourth respondents had never complied with these requirements in respect of the financial assistance given to Tuckett. However, he relied on section 20 of the Act; this is the statutory enactment of the well-known *Turquand Rule* which provides that an outsider is entitled to presume that a

[3] In terms of section 2(1)(a)(i) of the Act an individual is related to another if they are married.

company has followed all the necessary procedures required by the Act unless the person in the circumstances ought reasonably to have known the company had not.[4]

[31] As far as the second respondent, Panamo's security is concerned, Mr. Hoffman for Segal, conceded that he could not raise this presumption against a company of which he was at the time of the sale a shareholder and thus an insider. I thus do not need to pursue this issue further. Accordingly, the second respondent cannot be held liable on the suretyship for want of compliance with section 45.

[32] I return later to a second argument raised by Mr. Saint for Tuckett in respect of the section 45 implications for the sale agreement.

[33] Tuckett is a director and signed the surety on behalf of the third respondent. But the third respondent is not a South African company. Mr. Hoffman argued that for this reason it was not subject to the strictures of the Act citing the decision in the *Steinhoff* case. There Bozalek J held that:

"On the interpretation which I favour, section 45 's strictures apply only to South African companies and are extended to foreign companies only to the extent that such companies may not be the recipient of financial assistance from South African companies unless the provisions of section 45 are met by the local company. Seen from this perspective, interpreting section 45 (2) as extending to foreign companies makes sense, is in keeping with apparent purpose of section 45, provides a sensible and business-like meaning to the subsection and accords with those purposes of the Act highlighted above. "[5]

[34] This was not disputed by Mr. Saint, and I agree that the third respondent cannot rely on the section 45 defence. This means it has no defence in terms of the Act in respect of its liability in terms of the surety to Segal.

[35] The fourth respondent is a South African company. Little is known about it other than that Penelope is a director. Segal is an outsider as far as this company is concerned. Segal was entitled to rely on it having performed the necessary formalities. There is a *proviso* in section 20(7) that this would not apply if the third party knew or ought reasonably to have known that the company had failed to comply.[6] No reason has been given by Tuckett or Penelope of why Segal should have known this.

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[4] INSERT

[5] *Trevo Capital Ltd and others v Steinhoff International Holdings (Pty) Ltd and others* [2021] 4 All SA 573 (WCC)

[6] For the interrelationship between the two sections see for instance Afrasia *Special Opportunities Fund Pty Ltd v Royal Anthem Investments 130 Pt Ltd 2016 JDR 1366(WCC).*

[36] I am satisfied that the fourth respondent cannot rely on section 45 of the Act to avoid liability for the suretyship.

[37] In now turn to the final argument made by Mr. Saint of the implications for non-compliance with section 45 for the sale agreement.

[38] He argued that if the second respondent had not complied with section 45 this vitiated the main agreement (i.e., the sale agreement) as well.

[39] He based on a reading of section 45(6). This section states:

> (*6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with-*
>
> *(a) this section; or*
>
> *(b) a prohibition, condition or requirement contemplated in subsection (4).*

[40] However, the reference in that section to an agreement cannot be extended to vitiate the main agreement. The main agreement is not an agreement that contemplates the provision of financial assistance by a company. This takes it outside of the prohibition contemplated in section 45(6).

[41] The attempt to hoist the voidness of the second respondent's surety, an ancillary agreement, to vitiate the main agreement cannot succeed. The policy underlying restrictions on a company giving financial assistance, cannot be given an interpretation that extends it, beyond its prescripts, to apply to an agreement that the company was not party to. I was not given any authority where such an approach had been followed in respect of a suretyship's relationship to a main agreement. This argument too must fail.

[42] Since the first respondent is liable in terms of the main agreement the counterclaim must fail.

Conclusion.

[43] The first, third and fourth respondents are liable to the applicant. The second respondent is not. As far as costs are concerned the applicant is entitled to his costs on an attorney-client scale, as provided for in terms of both the main agreement and the respective suretyships.[7] There is no reason to reduce these costs because although Segal was not completely successful, he has been substantially. Although interest was claimed in the Notice of Motion none was claimed in terms of the proposed draft order, so I must give the respondents the benefit of the doubt here.

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[7] Paragraph 14.2 of the main agreement and paragraph 3.1 of the respective suretyships.

ORDER

I make the following order:

1. The First, Third, and Fourth Respondents shall pay, jointly and severally the one paying the others to be absolved, to the Applicant the amount of R1 875 000.00;

2. The First, Third, and Fourth Respondents shall pay, jointly and severally the one paying the others to be absolved, the Applicant's costs on an attorney and client scale; and

3. The counterclaim is dismissed with costs.

N MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 1 April 2022.

Date of hearing:	9 February 2022
Date of Judgment:	1 April 2022

Appearances:

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