REPUBLIC OF SOUTH AFRICA

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

CASE NO. 28795/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO

_____ _____
DATE SIGNATURE

In the matter between:

DR LJ FAUL AND ASSOCIATES NO 14 INCORPORATED	First Applicant
(Registration Number: 1995/009634/21)	
DR CHRISTIAAN HARMSE	Second Applicant
DR ANNE VAN DER SPUY	Third Applicant
DR HERMANN ECKHARD HAMBROCK	Fourth Applicant
DR KEVIN PATRICK O'HARE	Fifth Applicant
DR NICHOLAAS JOHANNES GROBBELAAR	Sixth Applicant
DR HAROLD PLIT	Seventh Applicant
DR PAULINE MWIMBA SIAME	Eighth Applicant

and

MEDICROSS HEALTHCARE GROUP (PTY) LTD	Respondent
(Registration Number: 1992/002328/07)	

JUDGMENT

NOCHUMSOHN AJ

1. This is an application in which the Applicants seek an order for payment from the Respondent to the First Applicant only, of R1 913 005.34 plus interest thereon at the rate of 10,25% per annum calculated from 1 March 2019 to date of payment.

2. Pertinently, no relief is sought in favour of the Second to Eighth Applicants, inclusive.

3. The First Applicant is an incorporated professional company carrying on business as a medical practice. The Second to Eighth Applicants are doctors and members of the First Applicant.

4. The Respondent is the Medicross Healthcare Group (Pty) Limited, with whom the First Applicant only, had entered into a trio of agreements, which form the subject matter of this litigation.

5. The first of the trio of agreements, comprised an Administration Agreement, in terms of which the entire administration of the First Applicant's practice and all functions ancillary thereto was contracted by the First Applicant to the Respondent for payment of a monthly fee. The monthly fee is not an issue in dispute before me.

6. The second of the trio of agreements comprised a Financing and Loan Agreement, concluded on the same day as the Administration Agreement. In terms of this agreement, the Respondent would lend to the First Applicant, on a monthly basis, the aggregate amount payable by the First Applicant to the practitioners, in terms of their consultancy agreements with the First Applicant.

7. The third in the trio of agreements, comprised a cession of book debts, in which the First Applicant ceded to the Respondent *in securitatem debiti,* all claims as continuing covering security for the due payment of all sums of money which the First Applicant may owe to the Respondent.

8. The three agreements, although executed as separate instruments, are inextricably linked. In fact, the execution of the Financing and Loan agreement and the Cession Agreement are listed as being conditions precedent to the Administration Agreement under clause 3 thereof (Caselines 01-43). All three were contemporaneously signed by the parties, and together they constitute the matrix of the contractual relationship. The Administration Agreement cannot survive without the other two agreements, and vice versa.

9. Under the Administration Agreement, the Respondent was given and took total control of the business of the First Applicant. This included not only logistical, financial and accounting control, but the First Applicant actually gave the Respondent control of its bank account, The Respondent “swept” the bank account monthly, and applied the credit balance to the medical practitioners consultancy fees and practice over heads, and advanced any deficit on a month to month basis, as it was obliged to do under the Financing and Loan Agreement.

10. The Administration Agreement was terminable at the instance of either party on the giving of 90 days written notice.

11. On 13 November 2018, the Respondent gave such written notice, thereby terminating the Administration Agreement, with the effective date of termination being 28 February 2019. The trio of agreements remained binding until that day.

12. The Respondent failed to pay the consultancy fees to the First Applicant for the months of January 2019 and February 2019, which the First Applicant claims, pursuant to the Financing and Loan Agreement. The cause of action is primarily for payment of such consultancy fees, under the Financing and Loan Agreement. It is common cause between the parties that the quantum of this portion of the claim is R1 159 713.84. This concession was very specifically

clarified by me with Counsel for both Parties at the commencement of argument.

13. The balance of the cause of action constitutes a variety of claims, in the total sum of R 753 291.50, which I do not need to deal with in this judgement as such amount has been unconditionally tendered by the Respondent to the First Applicant. These two amounts total the amount of R1 913 005.34 as sought in the Amended Notice of Motion.Although the papers are prolix and entail a multitude of disputes, these all dissipated to the extent that ultimately the only issue for determination was the interpretation of Paragraphs 3 and 4 of the Financing and Loan Agreement, in the context of whether the obligation for the Respondent to pay such consultancy fees remained binding for the last two month of the contract, being January and February 2019.

14. In open court, at the commencement of the hearing Adv van der Berg SC for the Applicants, and Advocatess Stockwell SC and Posthumus for the Respondent, unanimously agreed and conceded that if I interpret the clauses to mean that the consultancy fees are payable by the Respondent to the First Applicant for the months of January and February 2019, then the undisputed quantum of such payment would be R 1 159 713.84. As such it became unnecessary for me to deal with the many factual disputes in the papers pertaining to the quantum of the claim

15. An examination of the Financing and Loan agreement, reveals the following:

15.1. “Consultancy Agreement” is defined to mean the agreements entered into between the First Applicant and ‘the practitioners’, in terms of which the practitioners have undertaken to provide medical services to patients of the First Applicant;

15.2. Loan accounts are defined to mean the loan accounts referred to in clause 3;

15.3. Practitioners are defined to mean the persons listed in annexure “A” to such agreement, who are both shareholders of the First Applicant, and have entered into consultancy agreements;

15.4. In the preamble, it is recorded that “*the company [*the First Applicant*] may require financing in order to pay the consultancy fees payable to the practitioners in terms of the consultancy agreements. Medicross has agreed to lend and advance sufficient amounts to the company so that the company can pay the aforementioned consultancy fees*”;

15.5. Under the heading "**THE LOAN"**, paragraph 3 of the agreement reads as follows:

"3.1 *Medicross agrees to lend and the Company agrees to borrow, on a month to month basis, the aggregate amount payable by the Company:*

3.1.1 to the practitioners in terms of the consultancy agreements, for the relevant month; and

3.1.2 in respect of all materials, consumables and injections used by the practitioners in rendering medical services in terms of the consultancy agreements, for the relevant month.

3.2 A loan account in the books of the Company will be opened in the name of Medicross and credited, from time to time, with all amounts lent and advanced to the Company in terms of clause 3.

3.3 In the event that the Company is unable to make payment of the full amount of the monthly consideration due to Medicross in terms of

the administration agreement, the loan account in the books of the Company will be increased, from time to time, with all amounts owing by the Company to Medicross in terms of the administration agreement."

16. In its plain and ordinary meaning, paragraph 3.1, as read with paragraph 3.1.1. can only mean that the Respondent agreed to lend to the First Applicant, who agreed to borrow, on a month-to-month basis, the aggregate amount payable by the First Applicant to the practitioners in terms of the consultancy agreements, for the relevant month. In the Founding Affidavit, the First Applicant alleged that it had not paid the consultancy fees to the Second to Eighth Applicants for months of January and February 2019 (Caselines 01-11, paragraph 19.5).

17. One possible escape for the Respondent lay in the fact that only three of the Applicants met the definition of "*practitioners"*. Only three of them were listed in annexure "A" to the Financing and Loan Agreement. There is no evidence reflecting that the remaining Applicants had also entered into consultancy agreements. Whilst this defence was raised in both in the Respondent's Answering Affidavit, and in Mr Stockwell's Heads of Argument, he completely abandoned this defence during the course of his argument. ..

18. As such, the fact that not all the Applicants meet the definition of "*practitioners*", became a non-issue, and it would be wrong to non-suit the First Applicant on this ground

19. Paragraph 3.2 of the Financing and Loan Agreement specifically provides that a loan account would be opened in the books of the First Applicant, in the name of the Respondent and credited with all amounts lent and advanced in terms of clause 3.

20. Paragraph 4 of the Financing and Loan Agreement created a mechanism for the Respondent to hold security from the First Applicant, for all amounts to be loaned by the Respondent to the First Applicant.

21. Paragraph 4, under the heading "**Cession of Book Debt and Waiver of Claim"** of the agreement reads:

> "*4.1 It is recorded that the Company has ceded all amounts owing to it, arising out of or in connection with the practice ("the book debts") to and in favour of Medicross, in securitatem debiti, as continuing covering security for the due payment of all sums of money which the Company may now or at any time hereafter owe to Medicross, and for the due performance of every obligation which the Company may now or at any time hereafter owe to or become bound to perform in favour of Medicross, arising out of this agreement and/or the administration agreement.*
>
> *4.2 If, on* ***termination of this agreement and/or the administration agreement****, the aggregate values of the loan accounts exceeds the*

face value of the book debts ceded by the Company to Medicross in terms of the above mentioned deed of cession, then Medicross **hereby waives its claim against the Company for that portion of the loan accounts which exceeds the face value of the book debts ceded**.*"*
{my emphasis}

22. In a simple interpretation of paragraph 4, the First Applicant ceded its book debt to the Respondent, *in securitatem debiti* for the due payment of all monies which the First Applicant would owe to the Respondent. However, to the extent that the loan debt on termination exceeded the value of the book debt so ceded, the Respondent clearly was at risk.

23. To this end, under paragraph 4.2, if on termination of the Financing and Loan Agreement or the Administration agreement, the loan accounts exceeded the book debts, then the Respondent waived its claim for the excess.

24. There is no evidence of either the value of the loan account or the quantum of the book debt, as at 28 February 2019. I am thus unable to determine the amount of the excess between the two. Neither am I called upon to make such determination. The applicability of the waiver of such excess portion (if there was an excess) is thus incapable of determination and becomes a red herring. This is so because the quantum was not in issue, having been agreed upon by Counsel for the parties.

25. Such waiver, under paragraph 4.3, was conditional upon the Applicants not being in breach.

26. Whilst the papers are replete with suggestions that the Applicants were in breach, Mr Stockwell did not raise this in argument. After the lunch adjournment and before handing the floor to Mr van der Berg for reply, I asked Mr Stockwell if he wanted to address me on the alleged breaches. Mr Stockwell abandoned this line of argument, leaving me to conclude that if indeed, there is an excess, then the waiver is intact.

27. Although I make no firm ruling, I merely observe that if judgment is granted as sought, any right of clawback for repayment of the loan, would be limited to the value of the book debt as at 28 February 2019. There is no evidence before me of such value. I am not called upon to make any determination in this regard.

28. Mr Stockwell drew my attention to the judgment of Wallis JA in ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) 593 SA at paragraph 18 page 603***, which reads:

"[18] *Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows: Interpretation be it legislation, some other statutory instrument, or 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 its 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 all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines 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 interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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 to the preparation and production of the document."

29. Applying *Endumeni*, Mr Stockwell argued that to give meaning to the enforceability of the loan agreement, in relation to the claim, it is to be interpreted and viewed in the wider context of the full trio of the agreements, as read with a fourth agreement which was signed between the First Applicant and the Respondent on 28 February 2019.

30. Before dealing with this fourth agreement, I repeat that the trio of agreements are all inextricably linked. The effective date of cancellation of the Administration Agreement is effectively also the date on which the Financing and Loan Agreement came to its end. Ergo, to my mind, the Respondent was obliged to perform in terms thereof up until 28 February 2019. This entails that the Respondent was not entitled to refuse to advance consultancy fees for January and February 2019. Distilled in this way, I can find no valid reason as to why the Respondent should be excused from performing up until the effective date of cancellation of the trio of agreements.

31. That said, there was a fourth agreement concluded on or about 27 February 2019, styled the “Exit Agreement”. It sought to regulate the cessation of the relationship, and it embodies specific provisions pertaining to the termination of the contractual relationship between the parties, foreshadowed by all of the agreements. The Respondent sought refuge in this agreement. The main thrust of its argument in this regard was that the First Applicant had not dealt with the payment of consultancy fees for January and February 2019, in the Exit Agreement. Mr Stockwell argued that it was not the intention of the Respondent to advance further funds, on loan account, to meet the obligation under paragraph 3 of the Financing and Loan Agreement. Mr Stockwell argued that the silence on this point, in the Exit Agreement, should be taken to novate such obligation.I find this argument unmeritorious. Surely, the contrary applies in that if was the intention of the Parties that the Respondent be excused from performing for the months of January and February 2019 (just as it had historically done in all prior months from inception of the relationship), then such a provision should have specifically been written into the Exit Agreement.

32. I pause to mention that whilst there was lengthy debate in the papers, as to whether or not the Exit Agreement was binding, during the course of argument, after I indicated that I would uphold the estoppel raised by the Respondent in relation to the alleged non-authority of Dr O’Hare to bind the First Applicant to its terms, Mr Van der Berg conceded that the Exit Agreement is binding. Hence, the issue of the alleged estoppel also became a non-issue.

33. In making such concession, Mr van der Berg argued that the terms of the Exit Agreement were of no moment and did not serve to take the First Applicant's case any further. In response to Mr Stockwell's submissions *via-a-vis* novation in relation to the exit arrangements, Mr van der Berg contended that the Exit Agreement does no more than add to the trio of agreements, rather than substitute, novate or supersede such agreements.

34. Mr Stockwell based his argument upon paragraph 18.1 of the Exit Agreement, which reads:

"*This agreement constitutes the sole record of the agreement between the parties in relation to the subject matter hereof. Neither party shall be bound by any express, tacit or implied term, representation, warranty, promise, or the like not recorded herein. This agreement supersedes and replaces all prior commitments, undertakings or representations, whether oral or written, between the parties in respect of the subject matter hereof." (*my emphasis*)*

35. I do not see how the above paragraph serves to release the Respondent from the binding provisions of paragraphs 3 and 4 of the Financing and Loan Agreement. Such paragraphs were far more than mere **prior commitments**, **undertakings** or **representations** foreshadowed under paragraph 18.1 of the Exit Agreement. The Financing and Loan Agreement was one of the three

fundamental agreements upon which the entire contractual arrangement hinged, for the whole duration of the agreement.

36. Paragraph 18.1 of the Exit Agreement cannot be read to overwrite the anchor contract in its notice period. I find that this clause is intended to supersede and replace prior commitments and discussions pertaining to the exit mechanisms preceding the signature of the Exit Agreement. It does not exonerate the Respondent from its contractual obligations under the Financing and Loan Agreement. It would be abusive of the trio of Agreements to find that this is the case. Paragraph 4.2 of the Financing and Loan Agreement specifically speaks to termination of the Administration or Financing and Loan Agreement. I do not believe that clause 18.1 of the Exit Agreement effectively removes the obligations created in paragraphs 3 and 4 of the Financing and Loan Agreement.

37. As referenced above, had it been the intention of the parties to remove such obligations, the Exit Agreement would have spoken to such removal. On the contrary, it did not, but remained deathly silent on the point. To read such removal into the Exit Agreement, would be to manufacture a new agreement for the parties, which they did not create. This is the very danger that Wallace JA warned against in ***Endumeni*** *supra*, where he said "*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."*

38. In bargaining for this position, Mr Stockwell argued that in relation to the exit provisions, the four agreements were inextricably linked and indivisible. When I pointed out to Mr Stockwell that paragraph 31 of his Heads of Argument stated the contrary position, he advised that his Heads were incorrect in this respect.

39. Mr Stockwell's starting point in linking all four agreements, commenced with the Administration Agreement. He drew my attention to paragraph 6.1 thereof, under which the Respondent and First Applicant would form a management committee, who would meet once per month to review the administration services. He referred to paragraph 7.2, under which, upon termination, the First Applicant would pay to the Respondent all outstanding amounts due in terms of clause 11. Clause 11 merely speaks to the administration fee and has no bearing upon the loan obligation created in paragraph 3 of the Financing and Loan Agreement.

40. Mr Stockwell referred me further to paragraph 18.3 of the Administration Agreement, under which the First Applicant undertook to write off all bad debts in accordance with the bad debt protocol annexed to the Consultancy Agreement. He then drew my attention to the mechanisms created in the Consultancy Agreement, to which the Respondent was not a party, for the writing off of bad debts. Such mechanisms provided for monthly reconciliation

accounts for each practitioner, whose consultancy fees would be reduced by all debt write-offs, in respect of the patients treated by them.

41. The dynamic of this argument was to demonstrate that in the final analysis, it would not be possible for the First Applicant to owe any one of its practitioners any amount in excess of the book debt applicable to the patients of that practitioner. I do not see how this argument advances the Respondent's case.

42. Mr Stockwell was attempting to give credence to the supposition that the enforcement of the consultancy fees for the determination period, would make no commercial or rational sense.

43. Even if this is true, it is superfluous because the Respondent did indeed agree to the very specific and unequivocal contractual regime in the so-called trio of agreements. As such, the Respondent is bound to the terms of the Agreement until the effective date of termination. The Respondent was well able to regulate its position differently within the notice period. It did not do so. It is not for this court to change the terms of an agreement.

44. Notably, the Respondent has not filed a conditional counterclaim for repayment of the loan, the quantum was admitted as being common cause during the hearing, and there was no information put before me as to the value of the book debt verses the value of the loan account as at date of termination.

45. Had a counterclaim been instituted, I may then have been able to take cognisance of the quantum of any clawback. There may possibly then have been room for argument of the commercial dynamics, if the right of clawback had equalled or exceeded the quantum of the consultancy fees. Absent evidence of this, it would be speculative and indeed reckless, to delve into those potential assumptions and attempt to re-write the agreement.

46. To my mind, the question of divisibility, is a non-issue. Whether the agreements are divisible or indivisible, they interlink and there is no room for the argument that the Exit Agreement constitutes the sole treaty of the exit arrangements. From a further plain read of paragraph 2.2 of the Exit Agreement, it records that the parties had entered into the Financing and Loan Agreement in order for the Respondent to advance funds to the First Applicant. There is nothing in this agreement which serves to short-change the plain and ordinary meaning of the Financing and Loan Agreement, or to diminish from any of the rights and obligations created thereunder in the twilight months of the contract.

47. Accordingly, the Respondent accepted the risk that the loan obligation under the Financing and Loan Agreement may exceed the security held under the cession. The First Applicant thus submitted that the Respondent remained liable to pay the consultancy fees during the determination period, regardless of whether it held sufficient security. I am in agreement with this notion.

48. The termination notice was given on 13 November 2018, under which notice, the Administration Agreement would terminate upon 28 February 2019. Accordingly, the First Applicant submitted that both parties were liable to comply with the contractual obligations until 28 February 2019, including the payment of consultancy fees up until such date. There is no reason to find to the contrary.

49. In the Respondent's Fourth Affidavit, where it removed its claim to legal fees, it increased its tender to pay to the Applicant the sum of R753 291.50.

50. Curiously, such tender was made unconditionally. As such, the Respondent should have paid such amount unconditionally. To date such tender stands, leaving the Respondent liable to pay to the First Applicant, the R753 291.50, which on its own version was unconditionally owing. The failure alone, to have paid such amount unconditionally, renders the Respondent liable for the Applicant's costs of these proceedings.

51. Having considered the case in the context of all the submissions, I find that the arguments presented for the Respondent against all of the evidence and concessions made, do not support the ousting of its liability to pay the consultancy fees for the final two months of the contact, being January and February 2019. The terms of the Exit Agreement do not displace such liability.

52. Finally, on the issue of interest, the Respondent's attorneys held an amount in trust which had been paid to them by the First Applicant, in order to secure control of its bank account. Such amount was sufficient to cover the tendered amount. The First Applicant unreasonably refused to consent to such trust deposit being held in a separate interest-bearing account under Section 86(4) of the Legal Practice Act. The effect of this refusal disentitles the First Applicant to interest upon the tendered amount.

53. Accordingly, I make the following order:

53.1. The Respondent shall pay to the First Applicant, the sum of R1 913 005.34, plus interest at the rate of 10,25% per annum, which interest is to be calculated only upon the amount of R1 159 713.84, from 1 March 2019, to date of payment.

53.2. The Respondent is ordered to pay to the First Applicant's costs on the scale as between party and party, which costs are to include to the costs of senior counsel.

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NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

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Date of Hearing:	05 August 2022

Date of Judgment: 08 August 2022

This judgment was authored by Nochumsohn AJ and is handed down electronically by circulation to the parties / their legal representatives, by email, and uploading to the electronic file of this matter on Caselines. The date of this Judgment is deemed to be 08 August 2022.