

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

APPEAL CASE NO: A5008/2022

CASE NO: 8323/2020

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

12 September 2022

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Date

ML TWALA

In the matter between:

**BRADY,
APPELLANT**

RICHARD

JOHN

(Identity Number: [...])

And

D & R RARMING CC
RESPONDENT
(Registration Number: CK2001/048957/23)

FIRST

WASLEY, DEREK JOHN
RESPONDENT
(Identity Number: [...])

SECOND

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 12th September 2022

TWALA J with (FRANCIS et MAHALELO JJ concurring)

[1] Central to this appeal is the question whether the agreement of sale of the member's interest concluded between the parties on the 1st of December 2019 included the sharing of the 2019 profit of the crop and other amounts owing to the appellant by the first respondent. If not, whether the second respondent was entitled to reduce his indebtedness to the appellant by deducting the amounts withdrawn by the appellant from the first respondent's bank account against the agreed purchase price of the member's interest in terms of the agreement.

- [2] This is an appeal against the whole of the judgment and order per Mahomed AJ handed down on the 19th of October 2021 dismissing the appellant's counter application and ordering the appellant to pay the second respondent a sum of R548 718.75 in respect of the 50% member's interest in the first respondent. It was ordered further that each party pays its own costs.
- [3] It is noteworthy that both the first and second respondents are not participating in this appeal and the second respondent has specifically filed a notice to abide by the decision of this Court. Furthermore, it is convenient to refer to the appellant as Brady, the first respondent as the Corporation and the second respondent as Wasley.
- [4] The foundational facts to this case are in essence common cause and has been succinctly stated in the judgment appealed against. They are briefly as follows: Brady and Wasley held 50% members' interest each in the first respondent, (*"the Corporation"*), which is duly registered as a Close Corporation in terms of the Close Corporation Act, 69 of 1984. It farms and sells avocados locally and internationally.
- [5] In July 2019 Wasley offered to buy Brady's 50% member's interest in the Corporation for the sum of R1 million. Brady testified that this came as a surprise since the relationship between himself and Wasley was good at the time. He however accepted Wasley's offer in terms of which Wasley was to pay him a sum of R1 174 659.92 which included 50% of the value of some assets and farming implements of the Corporation. It is further common cause that, before the Corporation's cash book was closed on the 30th of July 2019, it owed Brady certain moneys in respect of loan claims, agreed shortfall drawings, management fees and his share in the 2019 crop profit.

To settle all the amounts owed to him by the Corporation, Brady withdrew all the outstanding amounts from the Corporation's bank account. The effective date of the sale of the member's interest was agreed to be the 1st of October 2019.

[6] By the first week of October 2019 Wasley had not yet paid the agreed purchase price in the sum of R1 174 659.92 and when Brady enquired about the payment, Wasley said he was awaiting approval of his loan from the bank. On the 1st of December 2019 Brady drafted another agreement of the sale of the 50% member's interest with the same amount of R1 174 659.92 as the purchase price. Considerable time went by and Wasley failed to make the payment as agreed. On the 2nd of March 2020 Wasley sent an e-mail to Brady that he was unable to buy his 50% member's interest in the Corporation for he did not qualify for the bank loan. He offered to pay Brady only R300 000 which Brady refused to accept. On the 16th of March 2020 Brady was served with an application to liquidate the Corporation launched by Wasley.

[7] It is the liquidation application that galvanised Brady to launch an application to intervene and oppose the liquidation proceedings and launch a counter application against the Corporation and Wasley for the purchase of his 50% member's interest in the Corporation in the sum of R1 174 659.92. In his answering affidavit to the application to intervene, Wasley conceded that Brady has a substantial interest in the liquidation of the Corporation since he held 50% member's interest. Wasley therefore did not per se oppose the application to intervene by Brady but raised issues on the counter application. Furthermore, Wasley accepted that the terms of agreement between himself and Brady as recorded by Brady were correct and accepted

that he was liable to pay Brady the sum of R1 174 659.92 as per the agreement.

- [8] However, Wasley contended that Brady made certain withdrawals from the Corporation's bank account which were not part of the agreement between the parties. He therefore tendered payment of the sum of R548 718.75 to Brady as the balance of the purchase price of his 50% member's interest in the Corporation after deducting what was withdrawn by Brady from the Corporation's bank account. On the 28th of September 2021 Wasley withdrew the application to liquidate the Corporation and tendered the costs for the application. However, Brady persisted with his counter application and for the relief sought therein. That is the application which served for determination before the Court *a quo*.
- [9] The first cause of complaint by the appellant is that, when making the order, the Court *a quo* mixed up and confused the appellant, who is the applicant in the counter application, and the second respondent, who was the applicant in the main application which was no longer before the Court *a quo* for determination since it had been withdrawn.
- [10] It is apparent that the Court *a quo* committed an error in identifying the parties to the counter application when it made the order. It is the appellant who is the applicant in the counter application who is claiming payment of the agreed purchase price of his 50% member's interest in the Corporation. He could therefore not be ordered to pay the second respondent a sum of R548 718.75 which is the same amount tendered by Wasley to pay to Brady as a balance of the purchase price for his member's interest. This error occurred only on the order since the Court *a quo* stated it clearly in paragraph 59 of its judgment that the total amount of R543 718.75 being the

balance outstanding for the 50% member's interest in the corporation is to be paid by Wasley.

[11] It is a trite principle of our law that the privity and sanctity of a contract should prevail and the Courts have been enjoined in a number of decisions to hold parties to honour their contracts in which they entered freely and voluntarily. Parties should only be allowed to deviate from their agreements 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] The thread that runs through the above authorities is that the sanctity of contracts should be protected in order to advance constitutional rights. Since

it is undisputed that the purchase price of Brady's 50% member's interest in the Corporation is the sum of R1 174 659.92 in terms of the agreement between the parties and that Wasley in his answering affidavit accepted his liability and indebtedness to Brady in that amount, Wasley is bound to honour the terms of the agreement and should therefore pay the sum of R1 174 659.92 to Brady.

[16] In his attempt to reduce his indebtedness to Brady in the sum of R 1 174 659.92, Wasley deducted certain amounts which Brady withdrew from the Corporation's bank account as moneys owed to him by the Corporation on the basis that this was not part of the agreement between them. Brady does not dispute that he withdrew certain amounts of money from the Corporation's bank account but testified that it is money that he was entitled to and as it was owed to him by the Corporation for services rendered, loan claims, agreed shortfall of the drawings and his share of the profit of the crop for the year 2019.

[17] It is correct that the profit share for the 2019 crop and the other moneys owed to Brady by the Corporation were not part of the agreed purchase price of the 50% member's interest payable to Brady. It is further not in dispute and in fact was accepted by the Court *a quo* in paragraph 19 of its judgment that the amounts withdrawn by Brady from the Corporation's bank account and the total value for the items were due and payable to Brady. The irresistible conclusion is therefore, that the withdrawal of money from the Corporation's bank account by Brady to settle the indebtedness of the Corporation has no bearing on the agreed purchase price of Brady's member's interest as it was found by the Court *a quo* as money due and payable to Brady.

[18] Even if it were to be accepted for a moment that Brady was not entitled to the money that he withdrew from the Corporation's bank account, it is not open to Wasley to deduct same from the agreed purchase price of Brady's member's interest in the Corporation. It is the Corporation that would be entitled to claim that money from Brady for the Corporation is a separate entity from Wasley. The Corporation is cited in these proceedings but it chose not to participate nor even to file a counter-claim against Brady's claim. Furthermore, Wasley also did not lodge a counter claim nor did he plead any set off against Brady's claim. It is therefore not competent of Wasley to reduce his indebtedness to Brady by deducting the money that was withdrawn by Brady from the Corporation's bank account. The inescapable conclusion is that Brady was entitled to refuse the tender by Wasley to pay him R543 718.75 instead of the full purchase price in the sum of R1 174 659.92.

[19] It is clear from the record that an agreement for the sale of the member's interest was concluded between the parties on the 1st of December 2019 and that Wasley failed to honour his part of the agreement. It is apparent that Wasley's launching of the liquidation proceedings in March 2020 was an attempt to scuttle the agreement in order to purchase the 50% member's interest at a lesser amount than was agreed upon. Wasley ended up withdrawing the liquidation application because it was frivolous. Wasley's opposition to Brady's claim is meritless since the money withdrawn by Brady from the Corporation belonged to the Corporation and it is the Corporation that is entitled to challenge Brady's claim and not Wasley.

[20] It has not been demonstrated why this Court should deviate from the normal principle that the costs for an action should follow the results. However, the issue of costs is in the discretion of the Court. Although Wasley did not

oppose this appeal and filed a notice to abide by the decision of this Court, it is apparent that he was not genuine in his defence of Brady's action. He agreed to pay the purchase price as agreed upon but attempted to reduce that purchase price by other means including the launching of the liquidation proceedings. This is tantamount to the abuse of the Court process and the Court would not countenance such a behaviour by a litigant. Such conduct deserves to be censored with an adverse costs order.

[21] In the circumstances, the following order is made:

1. The appeal is upheld
2. The order of the Court *a quo* is set aside and replaced with the following order:
 - 2.1 The second respondent is ordered to pay the appellant the amount of R1 174 659.92, for the appellant's 50% members interest in the first respondent, on receipt of which the appellant is directed to resign as a member and deliver up a signed CK2 form,
 - 2.2 the second respondent is directed to pay interest on the amount of R1 174 659.92 at the rate of 10% per annum from the 1st of October 2019 to date of payment;
 - 2.3 The second respondent is directed to pay the appellant's costs of the counter application on the scale as between attorney and client; and
 - 2.4 The second respondent is directed to pay the costs associated with the application for leave to appeal and the appeal on the scale as between attorney and client.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 24th August 2022

Date of Judgment: 12th September 2022

For the Appellant: Advocate PL Carstensen SC
Advocate AB Berkowitz

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**For the First and Second
Respondent:** No Appearance