REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 20008/22

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

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Name: FARBER AJ **Date:** 12 October 2023

In the matter between:

KLOOFZICHT PROPERTY PROPRIETARY LIMITED	**FIRST APPLICANT**
PETRUS PHILIP BOSHOFF	**SECOND APPLICANT**
DISIREE BOSHOFF	**THIRD APPLICANT**
THESEN ISLAND H1 PROPRIETARY LIMITED	**FOURTH APPLICANT**
BOSCAR PROPRIETARY LIMITED	**FIFTH APPLICANT**

And

BERYL PROPERTY PROPRIETARY LIMITED	**RESPONDENT**

JUDGMENT

FARBER AJ:

[1] On 29 March 2021, and pursuant to the conclusion by them of a written agreement, the First, Second, Third and Fourth Applicants ("*the sellers*") sold the First Applicant's shares in and their claims against the Fifth Applicant to the Respondent ("*the purchaser*").

[2] Two obligations of the purchaser under the written agreement form the focus of the relief sought by the sellers. The first required the purchaser to make payment to the sellers of the sum of R65,000,000.00, which sum was comprised of two components, namely an amount of R45,000,000.00 and an amount of R20,000,000.00. The former was payable in nine equal monthly installments of R5,000,000.00 payable on or before the 7th day of each month commencing on 7 April 2021. The latter was payable in two equal monthly installments, each in an amount of R10,000,000.00 payable on or before the 7th day of each month commencing on 7 January 2022. Additionally, the purchaser undertook to pay the sellers, certain legal fees, being the amounts incurred and due and payable by the First Applicant to its Attorneys for the preparation, negotiation and finalization of the written agreement, which amount was not to exceed R380,000.00 (excluding value added tax). This amount was required to be paid to the First Applicant within 30 days after the date of signature of the written agreement.

[3] It is common cause that the purchaser failed to comply with the obligations set out in paragraph [2] hereof and on the 8 August 2022 the sellers

instituted motion proceedings against the purchaser for relief which was framed in the notice of motion thus: -

"*1.* *The Respondent be directed to specifically perform its obligations as purchaser in terms of the agreement of sale, (annexed to the order marked Annexure "A") to the Applicants in respect of the sale of 1000 ordinary shares in the capital of the Fifth Applicant, held by the First, Applicant representing 100% of the total issued shares of the Fifth Applicant;*

2. *The Respondent to pay the amount of R65 000 000.00 (Sixty Five Million Rand), free of any deductions or set off, within 7 days of the granting of the Court order;*

3. *The Respondent to pay the legal fees in respect of the costs incurred in respect of the agreement of sale, within 7 days of the granting of a Court order;*

4. *Costs of the suit on the attorney and client scale;*

5. *Further and/or alternative relief.*

IN THE ALTERNATIVE

1. *The Applicants seeks cancellation of the agreement of sale and payment of damages and prejudice amount in the amount of* ***R 2 787 079.00****; (Two Millon Seven Hundred and Eighty Thousand and Seventy Nine Rand).*

2. *Costs of the suite on the attorney and client scale;*

3. *Further and/or alterative relief."*

[4] The relief sought is resisted on the following discrete grounds: -

- The purchaser failed to make payments under the agreement and by virtue thereof "*no agreement exists*".

- A fresh agreement or an amendment to the existing written agreement needed to be concluded and as this did not occur the written agreement lapsed.

- The written agreement made provision for arbitration and that consequently the sellers' recourse to curial action was premature.

- There was in existence a dispute of fact which precluded the grant of relief on motion.

- A claim for specific performance would bear onerously on the purchaser, which would be forced to proceed with a sale which it was no longer interested in pursuing as the subject matter thereof no longer held the value which it had held when the written agreement was concluded.

[5] I shall deal with each of these defences in the order in which they were raised.

THERE IS NO LONGER AN AGREEMENT BECAUSE THE PURCHASER FAILED TO EFFECT PAYMENT THEREUNDER

[6] This somewhat novel defence cannot be sustained. The fact that the purchaser has not complied with its obligations under the written agreement does not by any stretch of the imagination hold the legal consequence that it somehow lapsed or otherwise became non-actionable at the instance of the sellers.

THE ABSENCE OF AN AMENDMENT TO THE WRITTEN AGREEMENT OR THE FAILURE TO CONCLUDE A FRESH AGREEMENT

[7] It is clear from the papers that the purchaser was experiencing much difficulty in discharging its payment obligations under the written agreement. It quite openly addressed its difficulties with the sellers who, so it seems, were prepared to enter into negotiations to restructure the payment schedule thereunder. This emerges from a message which the Second Applicant sent to the purchaser on 18 October 2021 recording the following: -

"*To agree on Amendments and procession of payment of the Sale of Shares and Claims Agreement*"

[8] On the following day Ms Neveri Kambasha, a representative of the purchaser, addressed an e-mail to Mr Gareth Osterioh, a representative of the sellers, which e-mail reads as follows: -

"*As discussed earlier please kindly find below what we are working on in order conclude the transaction.*

I will make the initial payment of R5m towards the SPA on or before the 27th of October,2021.

I will also make an additional payment towards the legal fees on the or before the 27th Octiober,2021.

As soon as these payments are made I will schedule a call with both yourselves to discuss schedules for further payments."

[9] The intent was undoubtedly good. However, an amendment or fresh agreement was not concluded. The legal effect is clear. The written agreement previously concluded by the parties remained fully effectual and the purchaser was required to perform according to the tenor thereof. This much is plain from clause 18.2 of the written agreement which provides as follows: -

"*No variation, termination or consensual cancellation of this agreement or any of its terms nor any settlement of disputes arising out of, pursuant to or in connection with this agreement shall be of any force or effect unless embodied in a written document signed by or on behalf of the parties."*

THE REFERENCE TO ARBITRATION

[10] There is no evidence to suggest that a dispute arose between the parties prior to the institution of the proceedings. Absent that, the sellers had no cause to refer the matter to arbitration. An arbitration clause in all events does not oust the jurisdiction of the Court and I see no reason to delay the matter by suspending the proceedings pending the outcome of an

arbitration. The issues between the parties are clear and may easily be disposed of. The purchaser's reliance on the arbitration clause under the written agreement cannot succeed.

THE EXISTENCE OF A DISPUTE OF FACT WHICH PRECLUDES THE GRANT OF RELIEF ON MOTION.

[11] There is in my view no dispute of fact whatsoever. The purchaser has simply failed to put up cognisable defences in law.

SPECIFIC PERFORMANCE

[12] The general rule concerning specific performance has in part been formulated in Paragraph 251 of Volume 5 Part 1 of the Second Edition of the Law of South Africa (footnote omitted) thus: -

"***The general rule*** *As a rule, the innocent party in the case of breach of contract is entitled to enforce performance of the contract* <u>*in forma specifica*</u>*, that is, performance of precisely that which was agreed upon or specific performance. A creditor has a* <u>*prima facie*</u> *right to specific performance regardless of the nature or content of the obligation, and irrespective of whether an award of damages would adequately compensate him or her.*

The right to specific performance applies to both positive and negative obligations. Specific performance of a negative obligation takes the form of an interdict prohibiting the debtor from doing what he or she is bound to do or an order compelling the creditor to remove what he or she has brought into existence contrary to his or her duty not to act.

The innocent party's right to specific performance is not absolute. The court cannot grant a decree of specific performance where performance has become impossible or where the debtor is insolvent. And even where the debtor is able to carry out his or her side of the contract, the court has limited discretion to refuse an order for specific performance if, in the circumstances, this would produce a result which is unjust or contrary to legal or public policy. Some of the different categories of exceptions which have become recognised under this discretionary rule are dealt with in the next paragraph……."

[13] The learned authors then proceed in paragraph 252 to identify the different categories thus: -

- *"Performance entails the rendering of services of a personal nature*
- *It would be difficult for the court to supervise or enforce its decree*
- *Damages would adequately compensate the plaintiff*
- *The cost of performance considerably exceeds the benefit*
- *Performance would severely prejudice third parties"*

[14] The purchaser has not brought itself within the ambit of one of the recognised exceptions. It has advanced scant reason why an order for payment should not issue in this case. Its sole case is that should an order for payment be granted it will be forced to continue with the agreement of sale in circumstances where it no longer desires to do so. This in my

judgment does not constitute a proper basis upon which a discretion might be exercised in its favor.

CONCLUSION

[15] In the result the application must succeed. The legal fees which form the subject matter of prayer 3 of the notice of motion amount to R330,434.78. I arrive at this figure by deducting the Vat component of the amount of R380,000.00 referred to in annexure "*PB 5*" to the founding affidavit. The written agreement makes provision for the payment of costs "*in accordance with the High Court tariff, determined on an attorney-and-client scale*". There is no reason why I should not give effect thereto.

In the result I make the following orders:

1. The Respondent is directed to pay the Applicants: -

    1.1. The sum of R65,000,000.00;

    1.2. The sum of R330,434.78, to which amount value added tax is to be added;

    both payments to be made free of deduction or set off within 7 days of the date of Judgment.

2. The costs of the application are to be paid by the Respondent on the scale as between attorney and own client.

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G Farber

ACTING JUDGE OF THE HIGH COURT

Date of Hearing:	9 October 2023
Date of Judgment:	12 October 2023

APPEARANCES

For the Applicants:	Adv. R. Andrews
Instructed by:	Hengst & McMaster Inc. Attorneys
For the Respondents:	Adv. E. Prophy
Instructed by:	Jenings Inc. Attorneys