REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/013215

Reportable: No
Of Interest to other Judges: No

18 October 2023 Vally J

In the matter between:

BOXFUSION HOLDINGS (PTY) LTD **APPLICANT**

and

AFRIMOOLA (PTY) LTD **RESPONDENT**

JUDGMENT

Vally J

Introduction

[1] The applicant Boxfusion Holdings (Pty) Ltd (Boxfusion) asks for an order winding-up the respondent Afrimoola (Pty) Ltd (Afrimoola). Boxfusion and Afrimoola entered into a 'subscription agreement' (agreement), during or about June 2021. In terms of the agreement the respondent would allot and issue Subscription Shares to the Subscribers, of which the applicant was one, on the Subscription Date. Boxfusion subscribed for 750 (seven hundred and fifty) Class B Shares and 260

Class C Shares. It eventually paid an amount of R6 182 000.00[1] as the subscription price. The respondent failed to meet its obligations in terms of the agreement. On 1 June 2022, the applicant issued a notice in terms of s 345 (notice) of the Companies Act, 61 of 1973 (Act) calling upon Afrimoola to pay it R6 182 000.00. No response was received from the respondent. The applicant followed the s 345 notice with the present application.

The agreement

[2] The agreement is lengthy and detailed. However, the key aspects of the agreement for the determination of this matter are the following: (i) it contains a condition precedent that the board of directors of Afrimoola pass all resolutions 'as may be necessary to procure the allotment and issue of the Subscription Shares' on or before 23 September 2021; (ii) it obliges Afrimoola to 'allot and issue the Subscription Shares to' Boxfusion 'against payment of the Subscription Price in full'; (iii) it stipulates the effective date of the agreement to be the date all the condition precedents are met; (iv) it contains the standard non-variation clause; and (v) it contains a clause advising the parties to seek recourse to arbitration should they find themselves in dispute over any aspect of the agreement.

[3] Thus, upon payment of the full Subscription Price, Afrimoola was obligated to deliver to Boxfusion an issued share certificate reflecting it as a registered shareholder, and a certified copy of a resolution of its board of directors approving the allotment and issuance of the shares.

[1] In terms of the agreement the subscription price was R6 000 000.00, but Boxfusion paid R6 182 000.00. The reasons for the discrepancy is not explained in the papers.

The notice

[4] Section 345 of the Act provides that a company is deemed to be unable to pay its debts if a creditor, which is owed more than one hundred rands and which is due, has served upon the company a demand to pay the sum, but the company has for three weeks thereafter failed or neglected to pay it.

[5] The notice was served upon Afrimoola between 1 June and 9 June 2022 Afrimoola's attorneys responded to the notice by letter.

Application by Afrimoola to strike-out the letter and the averments relating to the letter

[6] The letter has been annexed to the founding affidavit of Boxfusion. Boxfusion relies on its contents for the relief it seeks. Afrimoola asks for the letter to be struck-out, as well as the averments that introduce the letter and provide the literal meaning of a key sentence in the letter. Afrimoola contends that the letter itself constitutes a privileged communication, as a result of which its contents cannot be disclosed to the court. The claim to privilege is based on another claim, namely, that the communication is a without prejudice proposal made in confidence and aimed at settling a dispute between itself and Boxfusion.

[7] I find myself unable to agree with Afrimoola's contentions. This is so because (i) nowhere in any letter is it indicated that it constitutes without prejudice communication - it cannot go unnoticed that the author of the letter is an attorney, who should know the importance of unambiguously specifying that the communication is without prejudice; (ii) nowhere in the letter is it indicated that the

parties are clearly in dispute and what the dispute is; and (iii) there is nothing in the letter or in any other communication between the parties to indicate that they were in negotiations with each other to settle any dispute between themselves. For there to be a dispute there must be irreconcilable difference in the respective positions. Here their respective positions are the same. They both agree that Boxfusion paid R6 182 000.00, which is now refundable.

[8] The letter contains the following relevant paragraphs

> ‘ …
> 2. We are instructed to advise that our client is fully solvent and are (sic) able to meet its obligations. There may be some disputes between our respective clients, but the threat of liquidation has no legal relevance.
>
> 3. Our client is desirable to settle the matter amicably and in the interest of all parties concerned.
>
> …
>
> 12. Your client’s demand is acknowledged and duly accepted. Kindly note that the R6 182 0002.00 share deposit and any other payments made by Boxfusion were spread over a period as monthly payments and not as a lumpsum.
>
> …
>
> 14. We are instructed by our client to propose that the R6 182 000.00 refundable to your client is paid as follows:
>
> 14.1 1st payment R2 000 000.00 -30 June 2022
> 14.2 2nd payment R2 000 000.00 -29 July 2022
> 14.3 3rd payment R2 182 000.00 -30 August 2022.’ (underlining added.)

[9] Paragraph 2 does not say that there is a dispute between the parties, while paragraph 3 merely says that Afrimoola is ‘desirous to settle the matter’ and that, too, is not a reference to a dispute. Read with paragraphs 12 and 14 ‘the matter’ means no more than that the claim of R6 182 000.00 is acknowledged and will be repaid. There is no dispute in that regard. The proposal that the repayment takes

the form of three monthly payments is not a proposal to settle a dispute. It is simply a proposal to pay the sum due in a particular form. For there to have been a dispute there should be allegations of, amongst others, non-compliance with the agreement, non-receipt of all or part of the amount received (R6 182 000.00), non-refundabilty of all or part of the amount received, and the dueness of the debt. There being no such allegations, there is no dispute between the parties. The letter cannot, therefore, be a without prejudice proposal to settle a dispute. This is notwithstanding the fact that the phrase ‘without prejudice’ is not to be found anywhere in the letter. The application to have it struck-off on the basis that it is privileged communication stands to be dismissed.

[10] Similarly, the two averments in the founding affidavit, which introduces the letter as evidence, should not be struck-off. The one averment merely says that the letter is ‘annexed hereto’. There is no basis in law or logic to strike-out such an innocuous averment. This is so even if the letter was struck-off. The other averment merely says that the attorney of Afrimoola has responded to the demand by way of letter, the contents of which acknowledge Afrimoola’s indebtedness of R6 182 000.00 to Boxfusion. Since the letter does not constitute a without prejudice confidential communication, the averment which merely repeats what is contained therein cannot constitute such protected communication. The application to have the two averments struck-off has to fail.

Referral to arbitration

[11] Afrimoola submits that this court should postpone the application and instead should refer the matter to arbitration, because that is what the parties have agreed

to. Afrimoola relies on a clause in the agreement to support its claim. There are two main parts to the clause. The first is that ‘any dispute arising from or in connection with’ the agreement is to be ‘finally resolved’ through arbitration. The second clause empowers ‘any party’ to demand that the dispute be determined at arbitration.

[12] The submission is wrong for two reasons: firstly, as has already been demonstrated above, there is no dispute between the parties; and secondly, neither party has made any demand that they refer their dispute to arbitration. The court, too, cannot refer the matter to arbitration.

[13] Hence, the request to postpone the application and refer the matter to arbitration fails.

Afrimoola’s resistance to the relief on the merits

[14] Afrimoola contends that Boxfusion should be denied its claim for relief because Boxfusion relies on an acknowledgement of debt, when no such acknowledgment of debt has been proven. The contention, in my judgment, misconceives the case of Boxfusion. Its case is that Afrimoola is indebted to it in a sum exceeding one hundred rands, the debt is due, it has made a demand for repayment from Afrimoola, Afrimoola has failed to accede to the demand and therefore in terms of s 345(1)(a) it is deemed unable to pay its debts. In short, it is a conclusion of law that Afrimoola, having received a legitimate demand to pay a due debt of more than one hundred rands and having failed to meet the demand, is unable to pay its debts. In the circumstances, it should be placed in provisional winding-up. Boxfusion, I therefore, hold is entitled to the relief it seeks.

Order

[15] The following orders are made:

a. The respondent's application to strike-out paragraphs 26 and 27 of the founding affidavit as well as annexure "FA10" to the founding affidavit is dismissed.

b. The respondent is hereby placed under provisional winding-up in the hands of the Master of the High Court.

c. The costs of this application shall be costs in the winding-up.

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Vally J

Gauteng High Court, Johannesburg

Date of hearing:	10 October 2023
Date of judgment:	16 October 2023
For the applicant:	T Mathopo
Instructed by:	Mathopo Moshimane Mulangaphuma Inc t/a DM5 Inc
For the respondent:	B van der Merwe
Instructed by:	Nardus Grove Attorneys