IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023 – 100004

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

DATE
SIGNATURE

In the application by

LELEU, HERWIG TILLO CORNELIUS, *N.O.*	**First Applicant**
LELEU, MARLEEN AUGUSTA MARIE, *N.O.*	**Second Applicant**
in their capacities as co-trustees of the HTC LELEU FAMILY TRUST (IT2711/03)	

And

NUMACON (PTY) LTD	**First Respondent**
IOANNOU, MICHAEL	**Second Respondent**
BHAYAT, ADAM, *N.O.*	**Third Respondent**
BHAYET, RASHIDA, *N.O.*	**Fourth Respondent**
BHAYAT, RUCHSANA, *N.O.*	**Fifth Respondent**
BHAYAT, GADIJA, *N.O.*	**Sixth Respondent**
BRUK, HYMAN, *N.O.*	**Seventh Respondent**
In their capacities as trustees for the time being of the BHAYAT MOHAMMED FAMILY TRUST	

VREES INVESTMENTS (PTY) LTD	**Eighth Respondent**
DEMETRIADES, XENOPHON, *N.O.*	**Ninth Respondent**
DEMETRIADES, JOAN, *N.O.*	**Tenth Respondent**
DEMETRIADES, ALEXANDRA MARIKA, *N.O.*	**Eleventh Respondent**
DEMETRIADES, KIMON ANDREAS, *N.O.*	**Twelfth Respondent**
In their capacities as trustees for the time being of the FOVEROS FAMILY TRUST	
CONSTANTINIDES, HELEN, *N.O.*	**Thirteenth Respondent**
CONSTANTINIDES, CHRISTODOULAKIS, *N.O.*	**Fourteenth Respondent**
In their capacities as trustees for the time being of the DEMPAR FAMILY TRUST	
CONSTANTINIDES, DEMETRIOS, *N.O.*	**Fifteenth Respondent**
CONSTANTINIDES, MARIA, *N.O.*	**Sixteenth Respondent**
In their capacities as trustees for the time being of the DIMARIA TRUST	
SERFONTEIN, LUKAS CORNELIUS (SNR), *N.O.*	**Seventeenth Respondent**
SERFONTEIN, LUKAS CORNELIUS (JNR), *N.O.*	**Eighteenth Respondent**
PRINSLOO, PHILIPPUS CAREL, *N.O.*	**Nineteenth Respondent**
In their capacities as trustees for the time being of the SERFONTEIN FAMILY TRUST	
MANN, GORDON, *N.O.*	**Twentieth Respondent**
MANN, SONJA, *N.O.*	**Twenty First Respondent**
ENTEGRA TRUST (PTY) LTD	**Twenty Second Respondent**
In their capacities as trustees for the time being of the THE@WORK TRUST	

JUDGMENT

MOORCROFT AJ:

Summary

Urgent relief – Rule 6(12) – no case made out for shortening of time periods

Sale of shares – agreement does not provide for advance payment

Sale is subject to a determination of a residual value – not yet pronounced upon – price not yet payable

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*
2. *The applicants are ordered to pay the costs of the respondents, except for the costs of the second and third respondents in respect of whom no order is made, such costs to include the cost of two counsel where so employed.*

[2] The reasons for the order follow below.

Introduction

[3] The applicants seeks an order for payment of R15,836,178.00 jointly and severally from the twenty-two respondents. The indebtedness arises from a settlement agreement entered into by the parties. The amount will be payable at some point in time but the respondents dispute the allegation that the amount is due and payable at this point in time.

The parties

[4] Various trusts feature in this matter and for the sake of convenience I refer to them as entities even though in law trusts have no separate legal existence and they are represented by their trustees who are cited *nomine officio*. I therefore refer to the two applicants also as “Leleu” and to the fourth to seventh respondents as “Bhayat.”

[5] The first respondent is a company, referred to as “Numacon.” The eighth respondent is also a company.

[6] The second and third respondents are deceased. All the respondents are represented by the same attorney and the respondents therefor say that the deceased estate of the second respondent instructed the attorneys to represent the estate. The executor is however not property cited and not order will be made in respect of the second respondent. The third respondent is also deceased but nothing turns on this as all the surviving trustees of Bayat have been cited.

[7] Unless the context indicates otherwise I refer to all the respondents, excluding the second and third respondents in respect of whom no order is made, collectively as “the respondents.”

Principles of interpretation

[8] This judgment deals with the interpretation of a written agreement. I approach the interpretation of the document on the basis set out below and in various judgments.[1]

[9] It is accepted that text, context, and purpose from a triad of interpretative aids in determining meaning.[2] Wallis JA clarified the principles and placed the emphasis on a contextual approach to interpretation in preference to a textual approach in a number of decisions in the early 2010's. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[3] Wallis JA said:

> *[18] ……. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document … 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….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…."* [emphasis added]

---

1 See *Beadica 231 AA and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *Cassiem v Standard Bank of South Africa Ltd* 1930 AD 366 368; *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA); *Glenn Brothers v Commercial General Agency Co Ltd* 1905 TS 737 740–741; *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 (1) SA 365 (SCA); *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA); *Ma-Afrika Hotels (Pty) Ltd and Another v Santam Ltd (a division of which is Hospitality and Leisure Insurance)* [2021] 1 All SA 195 (WCC); *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA); *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] 4 All SA 417 (SCA); 2016 (1) SA 518 (SCA); *Schoeman and Others v Lombard Insurance Co Ltd* 2019 (5) SA 557 (SCA); *South African Football Association v Fli-Afrika Travel (Pty) Ltd* [2020] 2 All SA 403 (SCA); *Stiglingh v Theron* 1907 TS 998 1002, 1007; *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA).

2 See also *Richter v Bloemfontein Town Council* 1922 AD 57 at 67 and *Swart v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) 202.

3 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

The settlement agreement

[10] This application requires the interpretation of a settlement agreement entered into on 1 September 2022. The agreement involved the compromise of a dispute then before the Supreme Court of Appeal, following on a judgment by Twala J in the Johannesburg High Court on 12 October 2020 under case number 2018/34449.

[11] The judgement by Twala J was given in an application by Leleu in terms of section 163 of the Companies Act, 71 of 2008 for the compulsory buyout of its 10.02% interest in Numacon. Twala J granted the buyout relief and ordered that the shares be purchased at fair value as at 12 October 2020 calculated *pro rata* the total issued share capital of Numacon. The defendants (now respondents) appealed to the Supreme Court of Appeal with the leave of the Supreme Court of Appeal. Argument in the appeal stood down for settlement negotiations and eventually on 1 September 2022 the matter was settled in terms of the written settlement agreement.

[12] The agreement provided that the appeal be removed from the roll with no order as to costs and that the respondents buy out the applicants shareholding in Numacon for *"fair value, subject to the determination of the Residual Dispute."*[4]

[13] *"Residual Dispute"* is defined as the question *"whether the purchase price for the respondents shareholding in the company is subject to a minority discount."*[5]

[14] There is no sale until such time as the Residual Dispute has been determined. The suspensive condition reflected by the words *"subject to"* must first be fulfilled.

[15] There is nothing in the settlement agreement that indicates that the sale is anything other than a cash transaction - It is certainly not a credit transaction - and the agreement does not provide for payment of an advance on the purchase price. [6] The price is not yet payable as the sale is not yet complete.

---

4 Clause 3.2.

5 Clause 1.2.6.

6 See also section 51(5) and (6) of the Companies Act, 71 of 2008 also Delport *Henochsberg on the Companies Act 71 of 2008* 208(13).

[16] It follows that the purchase price or any portion thereof is not payable as yet. For this reason the application must fail on the merits.

[17] The fair value as described in the agreement is to be determined by the *"Valuer who shall act as a referee."* [7] The Valuator's valuation shall be final and binding on the parties and he or she *"shall be requested to complete the valuation as expeditiously as possible and the Parties shall cooperate with the Valuer in all respects and as expeditiously as possible."*[8]

[18] The Valuer is required to determine the fair value at two specified dates, namely 30 June 2020 and 30 June 2022.[9]

[19] Once the valuation has been published[10] the Residual Dispute *"will be referred to arbitration before the Arbitrator,*[11] *who will determine"*

19.1 whether or not the shareholding is to be purchased with or without the minority discount,

19.2 whether the shareholding is to be valued as at 30 June 2020 or as at 30 June 2022 and if the former whether the interest is to run on that value from 12 October 2022[12] and if so, what rate of interest should apply.

[20] The Valuer proceeded to fulfil his mandate and determined the fair value as at 30 June 2020 and 30 June 2022. He determined the value as in 2020 at R15,838,178.00 and the value as in 2022 at R17,838,429.00. However, no sale took place upon the valuation of the shareholding as the Residual Dispute has not yet been decided by the arbitrator.

[21] The arbitration is scheduled to take place in November 2023. The arbitrator is to

7 Clause 3.3.

8 Clause 3.3.5 and 6.

9 Clause 3.3.1

10 Clause 3.4.

11 Clause 1.2.3.

12 It is argued that the date should be 2020, being the date of the order and that the reference to 2022 is an error.

decide which of the two dates is the correct date for the determination of fair value, and whether the shareholding is to be purchased with or without the minority discount. The determination of the correct date would also decide the question whether or not interest would be payable and if so at what rate.

In summary therefore,- the arbitration the arbitrator will decide the question of interest and the question whether a further R2,000,251.00 is also payable to Leleu.

[22] Once the Arbitrator has given his award the purchase price will become payable against performance by Leleu.

[23] The applicants argue that the amount of R15,838,178.00 is payable on any possible construction and that the Court can order payment of this amount at this stage. The question whether an additional R2,000,251.00 will also be payable and the question of interest will be decided at arbitration but there is no dispute as to the indebtedness of R15,838,178.00.

[24] This argument loses sight of the terms of the settlement agreement as set out above. The application must fail on the merits for this reason. There is, as yet no sale that has taken place.

Urgency

[25] The applicants deal with commercial urgency rather cursorily in the founding affidavit. They say that they require payment in order to finance their legal expenses in the arbitration set down in November. There is no evidence to merit the inference that funding is not available from other sources and that the applicants are strapped for cash.

[26] An analysis of the chronology shows that the urgency was self-created. The respondents argue that the payment of R15,838,178.00 became due, if at all, on 18 April 2023 when the Valuer made his ruling. On 31 August 2023 the respondents rejected the contention that the amount of R15,838,178.00 was now due and payable.

The application was served (by agreement on the respondents' attorneys of record) on 3 October 2023 and notice of intention to oppose was given on 5 October 2023. The respondents were required to give file answering affidavits by 10 October 2023 and the matter was enrolled in the urgent Court on 17 October 2023. Service of the application was preceded by unsigned papers late in September 2023.

[27] As I have indicated above, the merits of the application are not such as to justify a hearing in the urgent court. The application also falls short on the merits.

[28] I therefore find that no case is made out for the order sought and I make the order in paragraph 1 above.

[29] For the reasons set out above I make the order in paragraph 1.

_____

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **2 NOVEMBER 2023**.

COUNSEL FOR THE APPLICANT:	R S VAN RIET SC A NEWTON
INSTRUCTED BY:	DGF ATTORNEYS
COUNSEL FOR THE RESPONDENTS:	A J EYLES SC C L ROBERTSON
INSTRUCTED BY:	CLIFFE DEKKER HOFMEYR INC

DATE OF ARGUMENT: 17 OCTOBER 2023

DATE OF JUDGMENT: 2 NOVEMBER 2023