REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 23833/2022

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

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SIGNATURE **DATE** 14 December 2023

In the matter between:

MERCHANT WEST (PTY) LTD	Applicant
and	
JONATHAN MICHAEL MOLYNEUX-KILLIK	First Respondent
ANTON EUGENE VAN DEN HEEVER	Second Respondent
FLIGHTSHARE MAINTENANCE COMPANY (PTY) LTD	Third Respondent
FLIGHTSHARE (PTY) LTD	Fourth Respondent

JUDGMENT

STAIS AJ:

This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

[1] The respondents bound themselves in favour of the applicant as sureties and co-principal debtors for the due and timeous payment by the principal debtor, Sheziphase (Pty) Ltd (in business rescue) ("Sheziphase") of the balance of R10, 258,794.53 (plus interest) due in terms of a master instalment sale agreement ("instalment agreement") relating to the sale of various aircraft. The instalment agreement was concluded on 28 February 2019 between the applicant, as seller, and Sheziphase, as buyer. The respondents are alleged to be liable in terms of three virtually identically-worded suretyships – one concluded between the applicant and the first and second respondents, and a further two suretyships respectively binding the third and fourth respondents ("suretyships").

[2] Save for stating that the instalment agreement provides for interest and costs, it is not unnecessary to interrogate the terms thereof or of the suretyships, for reasons that shall soon become apparent.

[3] The terms of the suretyships were not in dispute. The respondents, in their answering affidavit, chose to direct their attack at the instalment agreement. Save for a single defence, all were abandoned in the heads of argument filed on the respondents' behalf. In the result, it was submitted that the sole issue for determination was framed thus: (a) "*the cumulative effect of all the pleaded defences is simply this: there was no meeting of the minds*" between the applicant and Sheziphase and therefore the only remaining question related to the "*true intention of the contracting parties in relation to the meaning of the term 'loan facility'*" as used in the instalment agreement, and (b) this issue cannot be resolved on the papers and requires a referral to evidence.

[4] Shortly before the hearing of this matter, the respondents took the unusual and ill-advised step of issuing a formal and substantive interlocutory application by way of long-form notice of motion for the unopposed roll of 8 January 2024, for an order that the determination of the matter be referred to trial and ancillary relief, including setting *dies* for the filing of pleadings ("referral application"). A few days before the hearing of the matter, the respondents' attorneys of record sought a directive that the matter be postponed pending the determination of the referral application. The applicant's attorneys of record responded that the question whether a *bona fide* dispute of fact exists is required to be dealt with as part and parcel of the matter enrolled before me. I directed that the respondents request for a postponement would be dealt with in the usual manner and not by way of correspondence, and that the parties should be prepared also to argue the merits of the enrolled matter.

[5] Ms Benson, who appeared for the respondents (but who is not the author of the respondent's heads of argument) properly conceded that the referral application was irregular and that she would confine her argument for a referral to trial to the papers before me. I say 'properly', because the interlocutory application flies in the face of accepted practice underscored by Rule 6(5)(g) of the Uniform Rules of Court:

"*Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.*" [emphasis added]

[6] There are two features of the Rule that merit attention. The first is that it is for this court (*i.e.*, the court hearing the enrolled application) to determine whether "*an application cannot properly be decided on affidavit*" because there exists a *bona fide* dispute that is irresoluble on the papers. The second, if it so finds, is to grant the appropriate order in the circumstances. The sub-rule is of wide import and if the court does not dismiss the application, the court is empowered to grant an order that will achieve a just and expeditious conclusion of the matter.

[7] It is unusual for a respondent to seek a referral to resolve factual disputes, considering that the Plascon-Evans rule requires that final relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A)) or if the respondent's denials plainly lack credence and can be rejected outright on the papers (*Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* 2022 BCLR 1 (CC) at [40] footnote [15]) required such evidence to be adduced at a hearing. It was not suggested that the respondents required evidence to be adduced at a hearing because they were unable to furnish the necessary evidence on affidavit because of recalcitrant or unavailable witnesses (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163).

[8] There can be no doubt that the Rule envisages that it is the court seized of hearing the matter that is best suited to determine the nature of the factual dispute/s and the appropriate order in the circumstances. Why should the parties be subjected to delay and the further costs of an opposed referral application, and an already-overloaded court system be engaged yet again, only for another court to peruse the same set of papers and consider the same referral issue?

[9] But there is a further reason why a substantive interlocutory application for a referral to evidence or trial was ill-advised. It is this. An application, albeit interlocutory, requires a supporting affidavit; thereby allowing the applicant to motivate for a referral by introducing factual allegations and documents that were not present in the main application or creating new, or embellishing old, disputes. What would be the point of a supporting affidavit if merely to refer to the annexed main application? And, *in casu*, it appears from the supporting affidavit that the respondents attempted to use the referral application to bolster their case for a referral. I believe it would have been improper for me to have regard to the referral application when considering this issue.

[10] I accordingly informed Ms Benson that I would not entertain the referral application but would hear her argument for a referral from the Bar. I also informed Mr Stockwell SC (who appeared for the applicant together with Mr Venter) that, because of his election at the outset to argue the matter on its merits, I intended in the circumstances to follow the judgment of Meyer J (as he then was) in *Nel v Ramwell t/a Ramwell Attorneys* [2019] ZAGPJHC 28 (1 March 2019) and dismiss the application and not permit him to apply for a referral should his main argument on the merits fail.

[11] Having heard their arguments, and for the reasons that follow, there were no disputes of fact that I was unable to resolve on the papers. The applicant has since filed a notice of intention to oppose the referral application. In light of the order that I intend to make, the abandoned referral application has become moot and it is not necessary to consider an appropriate costs order for dismissing it.

[12] I turn then to the only remaining issue – the respondents alleged that the instalment agreement is a simulated agreement that does not accurately reflect the intention of the parties, which was to conclude an agreement whereby the applicant would provide funds in the form of a shareholders' loan, granted to Sheziphase by a subsidiary of

Sheziphase (established as a special purpose vehicle for this purpose) as a revolving facility that allowed for drawdowns as and when required.

[13] Mr Stockwell, who appeared together with Mr Venter, raised three responses to the respondents' version. Each of them is, in my opinion, dispositive of the matter.

[14] The first submission was that the respondents did not produce a single document that speaks to their version. The instalment agreement and all other documents, in particular relevant correspondence, confirm that an instalment sale agreement was concluded between the applicant and Sheziphase. Ms Benson could suggest no reason why I would be precluded from applying the *caveat subscriptor* rule, and I can conceive of none in the circumstances. The first respondent signed the instalment agreement. In deposing to the respondents' answering affidavit, he explains much about what various parties are alleged to have discussed over time and concludes with the statement that the applicant "*was aware of the true nature of the finance granted and continued to suggest, by the conduct of its duly authorised representatives that same was not a Master Instalment Sale Agreement, but rather a shareholder loan facility.*" The applicant also addresses the discussions around various financing options that culminated in the instalment agreement. This, then, is the document signed by the first respondent, noticeably titled 'MASTER INSTALMENT SALE AGREEMENT'. He was undisputedly aware that it contained important terms and conditions, yet was apparently indifferent thereto. Having entered into what was quite obviously a significant contract, his defence is that the applicant's representatives knew or ought to have known that he was unaware of the nature of the document, believing that they should actually have read and provided for a completely different document. One is hard-pressed to believe that the first respondent could have been under any misapprehension as to the consequences of signing the document. Even so, he does not unequivocally allege that his misconception was induced by the applicant

(vacillating between error, unfair treatment and deceit) but conspicuously fails to address the terms of the instalment sale agreement and why he signed this document if it was not what it was supposed to be or even whether he read it or not. It is trite law that contracting parties are bound by their written agreements not wrongfully induced by another. In the circumstances, the first respondent's unilateral mistake was not excusable, and he (and his fellow sureties) are bound by the *caveat subscriptor* rule (*National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958(2) SA 475 (A) at 479G-H; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007 (2) SA 599 (SCA)).

[15] The second submission was that the respondents' version contradicts the terms of the instalment agreement in all material respects. I am mindful of the oft-referenced warning that the purpose of interpreting contracts is not to ascertain the actual intention of the parties but rather to determine what the language used in the contract means by means of employing a unitary consideration of text, context and purpose (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)). The apex court, in affirming an expansive approach to the use of extraneous evidence to determine context and purpose, held that the Parol Evidence rule excludes evidence directed at amending a written agreement and therefore did not prevent the bringing of contextual evidence which was aimed at interpreting the agreement. Whilst parol evidence may be used to assist the court to interpret a contract, save in exceptional circumstances not here applicable, extrinsic evidence is inadmissible to contradict, add to or modify the contract (*University of Johannesburg v Auckland Park Theological Seminary & Anor* 2021 (6) SA 1 (CC) at [90]-[92]; see also *Capitec Bank Holdings Ltd & Anor v Coral Lagoon Investments 194 (Pty) Ltd & Others* 2022 (1) SA 100 (SCA [38]-[47]). The respondents' version of a revolving loan facility contradicts the terms of the instalment agreement and seeks to change the

"*erroneously granted*" instalment sale agreement to "*a facility [that] would function as a revolving credit facility"*.

[16] But, as Mr Stockwell demonstrated, the respondents have a third problem. They were less than frank in their disclosure of relevant facts by failing on several occasions to produce relevant documents that purportedly support their version. One such document is a 'facility letter' that speaks to the conclusion of the instalment agreement and should have been attached to a 'term sheet' but was not. Another is the resolution dated 20 February 2019 whereby Sheziphase was authorised by its board (comprised of the first and second respondents) to enter into the instalment agreement and further informs that the board "*acknowledges and accepts the terms and provisions of the relevant agreements…which have been approved and agreed to at this meeting.*" These and several other documents that were produced by the applicant in reply, including tax invoices between the applicant and Sheziphase and authority to release goods to Sheziphase, are destructive of the respondents' version of a shareholders' loan revolving facility. An argument that funding of "*Group Companies*" excluded Sheziphase was based on a misread of the shareholders' agreement, which is defined the words to mean Sheziphase and/or its subsidiaries or any one of them. The shareholders' agreement furthermore refers frequently to the "*Merchant West Facility*" which, in context, is evidently a reference to the instalment agreement loan facility and not a shareholders' loan facility. This reveals that the respondents raised, at worst, spurious disputes, or disputes that are, at the very least, plainly untenable. In all the circumstances, whilst I accept the applicant's version as inherently credible and correct, I find the respondents' version so clearly implausible as to be rejected it on the papers (*Da Mata v Otto NO* 1972(3) SA 858 (A) at 869D-E; *Democratic Alliance supra*).

[17] In conclusion, I should mention that there was a delay in the parties providing me with legible copies of several documents that were relevant to this judgment. I received the documents on 13 December 2023.

[18] In the circumstances, I make the following order:

1. The interlocutory application for a referral to trial is dismissed.

2. The first, second, third and fourth respondents jointly and severally, the one paying the other to be absolved, shall pay to the applicant –

   2.1. the amount of R10,258,794.53;

   2.2. interest on the amount in 2.1 above at the rate of the prime rate plus 5% per annum from 8 February 2021 to date of payment, both days inclusive; and

   2.3. the applicant's costs, including the costs of the interlocutory application in 1 above, on the scale as between attorney and client.

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P STAIS
Acting Judge of the High Court
Johannesburg

APPEARANCES:

Applicant:	Advv R Stockwell SC and AJ Venter
Instructed by:	Uys Matyeka Schwartz Attorneys
Respondents:	Adv G Benson
Instructed by:	Barter MCKellar Attorneys
Date of hearing:	9 November 2023
Date of judgment:	14 December 2023