IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 24848/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 19 JANUARY 2023

SIGNATURE: ***ML SENYATSI***

In the matter between:

URVASHNI SINGH	First Applicant
BLACK MOON INVESTMENTS 62 CC	Second Applicant
And	
THE PROGRESSIVE COMPLIANCE FUND	First Respondent
PARAMOUNT FUND MANAGERS (PTY) LIMITED	Second Respondent
IAN MARK BROWN	Third Respondent
LISA AGBENAFA (MARY) TAIT	Fourth Respondent

Delivered: *By transmission to the parties via email and uploading onto Case Lines*

the Judgment is deemed to be delivered. The date for hand-down is deemed to be 19 January 2023.

JUDGMENT

[1] The applicants in this application seek the following relief:

PART A

1.1. The Arbitration Awards issued by advocate N Redman SC ("the arbitrator") made an order of Court. There are three Awards that were made on different dates in this regard;

PART B

1.2. Ms Singh is indemnified by the first respondent against all obligations and/or liabilities from any suretyship, indemnity guarantee, and/or co-principal debtor undertakings given by her in connection with the obligations of Xcelerate Verification Agency (Pty) Ltd, with registration number: 2016/ 294904/ 07 ("Xcelerate"), prior to the transaction, being 1 December 2018;

PART C

1.3. The General Partner of the first respondent, Paramount Fund Managers (Pty) Ltd (the second respondent) including the first respondents Limited Partner, Mr Ian Mark Brown (the third respondent) are jointly and severally liable with the first respondent, the one paying the other to be absolved for payment of all amounts, interests and

costs as set out in the arbitration awards.

PART D

1.4. The first respondent, jointly and severally with its General Partner, Paramount and its limited partner, Brown are liable to pay the actual attorney and own client costs incurred by Mr Singh and not covered by the arbitration awards, in the amount of R18 823.78 plus interest at the prescribed mora rate of 7% from the date of this application.

2. The first to third respondents jointly and severally pay the costs of this application irrespective of whether or not they oppose it.

[2] The application is opposed by all the respondents.

[3] The background that led to the award is that the applicant sold its shareholding in terms of the sale of shares agreement to the first respondent. A dispute arose between the parties regarding the purchase price. As a consequence, the dispute was referred to arbitration and an arbitrator was appointed by agreement between the parties.

[4] During the arbitration proceedings three awards were made in favour of the applicants. It is those awards that are the subject of this application.

[5] It must be stated that with the exception of the first respondent, none of the respondents were cited at the arbitration proceedings.

[6] The second and third respondents raised the following defences to part B, C and D of the application, namely that:

6.1. They are not contracting parties to the sale of the shares agreements;

6.2. They were not parties to the arbitration agreement or arbitration awards;

6.3. They contend that the application cannot succeed because of the operation of the:

a) The once and for all rule

b) The *exceptio rei judicatae vel litis finitae*

6.4. Non-joinder of various companies

[7] In order to deal with the defences raised by the second and third respondents, it is important to analyse the principles pertaining to the first respondent as a partnership consisting of its partners of various classes, namely, en *commandite*; limited and general partners.

[8] The applicants contend that the first respondent is an *en commandite* partnership which was represented by its General Partner, the second respondent. They furthermore contend that the second respondent was represented by one of its directors, the third respondent, who is a Limited Partner of the first respondent.

[9] The *en commandite* or anonymous partnership operates on the basis that the partners are unknown. However, there is no bar that "... the creditors of an anonymous partnership are not entitled to have their debts discharged out of the assets of the partnership, no matter by which partners they may have been advanced, before their anonymous partner is entitled to claim out assets repayment of the capital advanced by him or payment of debts due to him individually either by the partnership or by his pro partner.[1]

[10] If the limited partner holds himself or herself out of having acted, he or she loses the protection of being a limited partner.[2] The limited partner may not participate

actively in the business of the partnership.[3]

[11] I now deal with the legal frame work on each defence raised by respondent. It should be stated that no defence has been raised on behalf of the first respondent regarding Part A of the relief which seeks to have the three awards made buy arbitrator orders of this court. There is also no defence raised by the first respondent in regard to Part B of the relief which seeks that Ms Singh be indemnified against all obligation and / or liabilities from any suretyships, indemnity, guarantee and/ or co-principal debtor undertaking given by her in connection with the obligations of Xcelerate Verification Agency(Pty) Ltd prior to the transaction date, that is 1 December 2018.

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[1] See venter v Naude NO 1951(1) SA 156 (O) at 163 C-D
[2] See Butcher v Barano 1905 26 NLR 589
[3] See Sabatelli v Saint Andrew's building.

Non-contracting parties to the arbitration agreement

[12] Our law accepts that only parties to the agreement will be bound by the terms and conditions thereof. The second respondent contends, as stated, that they were not parties to the sale of shares agreement as well as the arbitration agreement.

[13] When one considers the content of the sale of shares agreement, it is apparent from the face thereof that the purchaser of the shares is "The Progressive Compliance Fund, an *en commandite* partnership, herein represented by its General Partner, Paramount Fund Managers (Pty)Ltd (Reg No 2018/443571/07) (hereinafter referred to as the "Purchaser"), duly represented by Mr Mark Brown with identity number: 760409 5082 089." The is no doubt from the quoted statement that the first respondent was indeed the purchaser and not the second and third respondents.

[14] It is for the reasons stated above that when there was a dispute and the matter was referred to arbitration, the second and third respondent were not cited. This, in my considered view, was the correct approach in the arbitration.

[15] Mr Phenduka submitted on behalf of the applicant that because the second and third respondents actively participated in the negotiation of the sale of shares agreement, they gave themselves out as partners and should therefore be jointly and severally held liable for the debts of the first respondent. This argument has not been supported by any authority. There is no doubt that when the sale of shares agreement was concluded, the first

respondent was represented by the second and third respondents. Their capacity was, in my view, akin to a director representing a company at the conclusion of their agreement. In the absence of an allegation of fraud or breach of fiduciary duty by such a director, I cannot understand how a director can personally be held liable for the debts of the company. It follows therefore that the defence that second and third respondents were not parties to the sale of shares agreement is well supported.

[16] The contention by the second and third respondent that they were not parties to the sale agreement and the arbitration agreement is furthermore supported by the fact that if it was the intention of parties that they also form part and parcel of the purchaser, the agreement would have clearly said so in no uncertain terms. In regard to the arbitration agreement, the negotiations were carried out by the third respondent in his representative capacity. If the arbitration proceedings sought do cite both the second and third respondents and join them therein; then it ought to have done so and it did not.

[17] The joinder of parties with interest in the matter is a fundamental principle of our law. This is regulated by the Uniform Rules of Court.[4] Rule 10(1) states that any plaintiff or defendant may join in an action subject to certain conditions.The plea of non-joinder is permissible in our law. [5] Accordingly the general principles applicable to non-joinder are also applicable to misjoinder as well.[6]

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[4] See Rule 10(1) of the Uniform Rules of Court.
[5] See Bezuidenhout v Goldberg 1905 TS 127; Hopewell NO v Kajee 1942 NPD 126;Mahomed v Lockhat Bros & Co Ltd 1944 AD 230 at 240.
[6] See YB v SB 2016(1) SA 47 (WCC) at 53G-H.

[18] As to whether all the necessary parties had been joined in the proceedings does not depend upon the nature of the subject matter of the suit , but upon the manner in which , and the extent to which, the court's order may affect the interests of third parties.[7]

[19] The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal interest in the subject of the litigation which may be affected prejudicially by the judgment of the court.[8] A mere financial interest is an indirect interest and may not require joinder of a person having such interest.[9]

[20] Having considered the law and the facts of this case, the application cannot succeed at this late stage to hold the second and third respondents liable for the debts of the first respondents.

[21] The second and third respondents also raised a defence that the once and for all principle applies to this litigation. In terms thereof, our law requires a party with a single cause of action to claim in one and the same action whatever remedies are available to him or her upon such cause.[10]

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[7] See Segal v Segil 1992(3) SA 136 (C) at 141A-C; New Gardens Cities Inc Association Not for Gain v Adhikarie 1998(3) SA 626 (C) at 631C and Sikhutswa v MEC for Social Development, Eastern Cape 2009 (3) SA 47 (TkHC)at 56I -57A.
[8] See Selborne Furniture Store (Pty) Ltd v Steyn NO 1970 (3) SA 774 (A) at 779G; Fluxman Incorporated v Lithos Corporation of South Africa (Pty) and Another (No.2) 2015(2)322(GJ)
[9] See Hartland Implimente (Edms) Bpk v Enal Eiendomme BK 2002 (3) SA 663E-H;
[10] See Custom Credit Corporation (Pty)Ltd v Shembe 1972(3) SA 462 (A) at 472A-E.

[22] In *Road Accident Fund v Mphirime*[11] the Court held as follows in amplification of the principle:

> "5. In consequence of the so-called 'once and for all principle' of the common law, a court is generally obliged to determine all items of a plaintiff's loss, both past and future, in the same proceeding. In respect of future losses, the assessment of loss is often speculative involving, as it does, 'a prediction as to the future without the benefit of crystal balls, soothsayers, or oracles'.[12] As this Court stated in *Anthony & another v Cape Town Municipality*[13] '(w)hen it comes to scanning the uncertain future, the court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess . . .' As a result, the process of calculating future loss may obviously result in an award potentially to the substantial prejudice of one side or the other."

[23] In *Coetzee v SA Railways and Harbours* [14] it was held that:

> "The cases, as far as I have ascertained, go only to this extent, that is aperson who sues for accrued damages, must also claim for prospective damages, or forfeit them. Such a party cannot bring a further action for any further damage he or she may discover after the date when he or she obtained judgment." This principle has never been departed from and it is still good law applied by our court. Mr. Phenduka on behalf of the applicants, has

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[11]

[12] Per Nicholas JA in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113G

[13] 1967 (4) SA 445 (A) at 451B-C.

[14]

not been able to provide me with an authority which controverts this principle, correctly so because there is none.

[24] I need not consider the other defences such as *res judicata* because once the arbitrator has made an award which will later be made an order of this court, the defence is indeed sustainable. This is so because the award by the arbitrator remains unchallenged.

[25] Accordingly, the following order is made:

PART A

(a) The arbitration awards in the Arbitration proceedings between the Applicants and the First Respondent issued by Mr Nigel Redman SC on 20 October 2020 referred to as Annexure “US10” to the founding;11 January 2021 referred to as Annexure “US 11” to the founding affidavit and 11 April 2021 referred to as Annexure “US6” to the founding affidavit are made orders of the Court in terms of section 31 of Arbitration Act, No. 42 of 1965 and no order as to costs as this was not opposed.

PART B

(a) The first applicant, Ms Singh is hereby indemnified by the first respondent against all obligations and/or liabilities from any suretyship, indemnity, guarantee given by her in connection with the obligations of Xcelerate Verification Agency Prior to 1 December 2018 no order as to costs as this was not opposed.

PART C

(a) The application to hold the second and third respondents jointly liable and severally liable with the first respondent is hereby dismissed with costs.

PART D

(a) The application to have a cost order made against the first and second respondents is refused with costs.

~~(b)~~

~~(c)~~

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 06 June 2022

DATE JUDGMENT DELIVERED: 19 January 2023

APPEARANCES

Counsel for the Applicant	Mr V Phenduka
Instructed by	NLA Legal Inc
Counsel for the Second and Third Respondents:	Advocate RF De Villiers
Instructed by:	Duvenhage Attorneys