

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
JOHANNESBURG

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

CASE NO: 2023-068926

.....

DATE

SIGNATURE

IN THE MATTER BETWEEN

**APIS GROWTH 8 BEE SOUTH AFRICA
Proprietary Limited, APIS Growth 8
Limited**

APPLICANT

AND

**SPE Mid-Market Fund I General Partner
Proprietary Limited**

RESPONDENT

JUDGMENT

LOXTON AJ

1. On 22 March 2022 the applicant (“Apis SA”), APIS Growth 8 Ltd (“Apis Mauritius”), RM1 and Brut Capital entered into a sale of shares agreement (“the Sale of Shares Agreement”) in terms of which RM1 purchased shares held by Apis Mauritius in Q Link Holdings (Pty) Ltd (“Q Link”).¹
2. Also on 22 March 2022, the respondent issued a guarantee and indemnity (“the Guarantee”) to Apis Mauritius, in terms of which the respondent guaranteed payment by RMI to Apis Mauritius of the Apis Mauritius Purchase Price (as defined in the Sale of Shares Agreement) and a “*Top-Up Purchase Price*” (also defined in the Sale of Shares Agreement). Apis SA alleges that RM1 failed to meet its obligations under the Sale of Shares Agreement in that it failed to pay a remaining balance due under that agreement (“the Remaining Balance”). I will deal with the calculation of the Remaining Balance later in this judgment.
3. RM1 explained its failure to pay the full Apis Mauritius Purchase Price and the Top-Up Price under the Sale of Shares Agreement by saying that although it had submitted an application for exchange control approval in terms of the regulations promulgated under the Currency and Exchanges

¹ The mechanism through which the sales were to be acquired has been simplified for the purposes of this judgment.

Act, 1961 (“the Regulations”), its authorised dealer, FirstRand Bank Ltd (“the Authorised Dealer”) had only granted exchange control approval for payment of the “*base amount*” of R349,526,234.79 (“the Base Amount”).

4. As a result of RM1’s failure to pay the full price due under the Sale of Shares Agreement, Apis Mauritius demanded payment from the respondent of the Remaining Balance in terms of the Guarantee.
5. On 8 May 2023 Apis Mauritius ceded to Apis SA the former’s rights under the Guarantee, in terms of a written agreement of cession (“the Cession”). As a result, Apis Mauritius was deprived of all its rights arising under and in connection with the Guarantee which, in consequence of the Cession, were enjoyed exclusively by Apis SA.
6. In this regard it is worth noting that the respondent objected to the citation in this application of Apis Mauritius as a second applicant on the basis that it had no interest in the litigation by virtue of the Cession. In consequence, Apis Mauritius withdrew as the second applicant.
7. The respondent does not dispute that the Guarantee is a self-standing contract, that its obligations under the Guarantee are as principal debtor, and that the Guarantee is a valid and enforceable contract. The respondent does however raise the following defences to Apis SA’s claim for payment under the Guarantee:

7.1 RM1 has made full payment of the Apis Mauritius Purchase Price (save for a modest amount in respect of interest) and there is

accordingly no amount due by the respondent to Apis SA in respect of the Apis Mauritius Purchase Price.

7.2 The respondent admits that it is liable to pay the Top-Up Purchase Price, but pleads that it is precluded from doing so because of the Regulations. In this regard, the respondent contends that absent exchange control permission to do so, it cannot pay any amount due under the Guarantee to Apis Mauritius, or to anyone else.

7.3 The respondent also contends that the Cession is not a genuine transaction but a simulated one. That defence was not pleaded however and is accordingly not available to the respondent. To the extent that the respondent argues that the Cession has no “commercial validity” or is *contra bonos mores*, the respondent has failed to show that that is so. Indeed, in my view there is nothing unusual or untoward about the Cession. It was neither unlawful nor improper for Apis SA to avoid the difficulties posed in regard to the payment of the Remaining Balance to Apis Mauritius by concluding the Cession.

7.4 The obvious difficulty with the defence that the respondent is precluded by the Regulations from paying the Remaining Balance to Apis SA is that since the Cession deprived Apis Mauritius of any rights under the Guarantee, and any payments to be made under the Guarantee were to be paid by the respondent to Apis SA, the Regulations are inapplicable.

8. In response to that difficulty, the respondent advanced the following argument:
- 8.1 The Cession cannot have any effect on the requirement that, absent exchange control permission to do so, the respondent cannot make any payment under the Guarantee;
 - 8.2 Apis Mauritius could only cede those rights that it had under the Guarantee and accordingly could not transfer Apis SA more rights than it had.
 - 8.3 In particular, the right of Apis SA to payment under the Guarantee suffers from the same limitation as the right enjoyed by Apis Mauritius prior to the conclusion of the Cession, namely that the approval of FinSurv must first be obtained before payment may be effected.
9. In my view there is no merit in this argument. As a result of the Cession, all rights under the Guarantee enjoyed by Apis Mauritius passed to Apis SA. After the Cession, Apis Mauritius had no further interest in the Guarantee and no payment under the Guarantee will be made to it. In those circumstances the Regulations are simply inapplicable. In particular, the application for exchange control permission initially brought by RM1 in respect of its payment to Apis Mauritius prior to the Cession is irrelevant to the obligation of the respondent to make payment to Apis SA in terms of the Guarantee.
10. RM1's obligation to obtain exchange control permission before making payment to Apis Mauritius did not constitute a limitation on the right of Apis Mauritius payment under the Sale of Shares Agreement. Instead, the

Regulations imposed a restraint upon RM1's ability to make payment to Apis Mauritius under the Sale of Shares Agreement. That limitation does not apply to the respondent's obligation to pay Apis SA under the Guarantee.

11. Accordingly, on the respondent's own version, it is liable to pay the Top Up Purchase Price..
12. I turn now to deal with the question of the extent of the respondent's obligation to make payment under the Guarantee.
13. In this regard, it will be recalled that the respondent's defence is that it has paid the Apis Mauritius Purchase Price. In effect, the respondent raises a dispute about the proper interpretation of the Apis Mauritius Purchase Price. In response, APIS SA argues that the respondent is not entitled to raise that dispute, since its obligation is to make payment under the Guarantee and any dispute about the Apis Mauritius Purchase Price is one between RM1 and APIS Mauritius, and not between the respondent and Apis SA.
14. I do not believe that that approach is correct. In order to obtain payment under the Guarantee, Apis SA must establish what the Apis Mauritius Purchase Price is. That is, after all, what is payable under the Guarantee. It is apparent from the papers that the respondent does not dispute the facts relied upon by Apis SA in its calculation of the Apis Mauritius Purchase Price. Instead it challenges the contractual interpretation of the Sale of Shares Agreement upon which the calculation is based.

15. On the approach adopted by Apis SA, the calculation of the Apis Mauritius Purchase Price – namely R450,985,587.94 – is a relatively simple arithmetic calculation. In terms of the Sale of Shares Agreement, the Apis Mauritius Purchase Price is calculated in accordance with the following formula:

15.1 the Base Amount;

15.2 divided by the “*Base FX Rate*”;

15.3 multiplied by the prevailing ZAR/USD exchange rate on the Apis Payment Date.

16. The “*Base Amount*” is defined in the Sale of Shares Agreement as “*such amount as will be set out in the Ultimate TSM Fundsflow Schedule*” (“the Schedule”). Item 7.1 of the Schedule records that the Base Amount which would be used to calculate the Apis Mauritius Purchase Price would be R349,526,234,00.

17. The “*Base FX Rate*” is defined as the “*ZAR/USD Exchange Rate equal to 14.09/1*”. If that calculation is performed, the result is an amount of USD24,806,688.01.

18. The “*prevailing ZAR/USD Exchange Rate*” was as reflected on the Blumberg site at 10am SAST on the relevant date, being 12 October 2022. On that date, the ZAR/USD Exchange Rate was ZAR18.18/USD1.00. The Apis Base FX Amount, when multiplied by 18.18, amounts to R450,985,587.94. That, according to Apis SA, is therefore the Apis Mauritius Purchase Price.

19. As indicated, the respondent does not deny its liability (subject to its exchange control defence) pay the Top-up Purchase Price, nor does it appear to deny that the amount at that price is R24,515,259,05. On those calculations, the Remaining Balance is R125,974,612.20.

In the circumstances APIS SA seeks an order in the following terms:

“1. The Respondent is directed to make payment to the First Applicant (namely, Apis SA) of the following amounts:

1.1 interest on the amount of R475,500,846.99 calculated at the rate of 9.75% per annum for the period 13 October 2022 – 14 November 2022;

1.2 interest on the amount of R125,974,612.20 calculated at the rate of 9.75% per annum from the period 15 November 2022 – 16 November 2022 alternatively, 26 April 2023);

1.3 the Remaining Balance of R125,974,612.20; and

1.4 interest on the amount of R125,974,612.20 calculated at the rate of 15% per annum from 16 November 2022 (alternatively, 26 April 2023 to date of final payment.

2. The Respondent is to pay the First and Second Applicant’s costs of suit on an attorney and own client’s scale.”

20. As I understand the respondent's answering affidavit in this regard, it contends that in terms of the Schedule all that RM1 was obliged to pay for acquiring the outstanding Apis Mauritius shares that it did not own was an amount of R349,526,234.00. The respondent alleges that RM1 paid that amount to Apis Mauritius and accordingly that all that is left is a modest liability for interest.

21. As already indicated, the respondent does not contest the facts upon which Apis SA relies in its calculation of the Remaining Balance. Instead, it contends that the definition of the Apis Mauritius Purchase Price in the Sale of Shares Agreement was amended by the Schedule. The effect of that contention is that the exchange rate adjustment contemplated by the Step 7 SPA is excluded. In my view however the purpose and effect of that Schedule was not to amend the definition of the Apis Mauritius Purchase Price and the exclusion of the exchange rate adjustment would not make commercial sense.

22. Moreover, the interpretation now adopted by the respondent is inconsistent with the approach adopted earlier by RM1. In its replying affidavit, Apis SA pointed out that representatives of RM1 have always referred to the calculation contained in Step 7 SPA and not the amount in the Fundsflow Agreement, when seeking exchange control authorisation for payment to Apis Mauritius. In this regard Apis SA attached to its replying affidavit two emails from a representative of RM1 to its Authorised Dealer, motivating its

application for its exchange control approval and referring to the formula under Step 7 SPA.

23. Thus, in an email sent by RM1 to its Authorised Dealer on 9 November 2022, RMI referred to the Fundsflow Agreement but adopted the formula in Step 7 SPA. In particular, RM1 made the following statement in its email:

“The circa 475m is as a result of the dollarisation at ZAR/USD14.09 of the evaluated fair and market value of R349,526,234,79 plus the R19,000,000,00 top-up payment”.

24. In those circumstances, I agree with Mr Berridge SC, counsel for Apis SA, that the interpretation of the Sale of Shares Agreement now sought to be advanced by the respondent is contrived.

25. In his heads of argument, Mr Van Eeden SC for the respondent sought an order striking out the emails referred to in Apis SA's replying affidavit and the paragraph dealing with them, alternatively argued that those portions of the affidavit should be ignored, because they contained “new evidence”. In my view the relevant paragraph of the replying affidavit and the attached emails dealing with the manner in which RM1 approached the calculation of the Apis Mauritius Purchase Price do not constitute new evidence. They were instead a legitimate response to the new interpretation of the Sale of Shares Agreement advanced by the respondent. Apis SA was entitled to point out

that this interpretation was contrary to the position adopted by RM1 in its application for exchange control permission. It was open to the respondent, if it so wished, to apply to deliver a supplementary answering affidavit explaining the approach which RM1 had previously adopted in relation of the Ais Mauritius Purchase Price. It did not do so.

26. In the circumstances, I conclude that Apis SA has demonstrated that on a proper interpretation of the Sale of Shares Agreement, and on the basis of undisputed facts, the Apis Mauritius Purchase Price is R450,985,587.94 and the Remaining Balance is accordingly R125,974,612.20.

27. Apis SA has sought interest on the amount of R125,974,612,20, either from 16 November 2022 or from 26 April 2023. The alternative dates from which interest is claimed arise from the fact that Apis SA relies in the alternative upon two demands for payment, the first made in November 2022 and the second on 26 April 2023. In my view the first demand did not constitute a sufficiently clear demand for payment to establish a *mora* date. Accordingly, I intend awarding interest from the later date of 26 April 2023.

28. Apis SA also claims costs of suit on an attorney and own client scale. That claim is based on clause 8.1 of the Guarantee. In the present circumstances I see no reason to deprive Apis SA of its contractual right to an order for costs on that scale.

29. In the circumstances, I make the following order:

28.1 The respondent is directed to make payment to the applicant of the following amounts:

28.1.1 Payment of the amount of R125,974,612.20;

28.1.2 Interest on the amount of R475,500,846.99 calculated at the rate of 9.75% per annum for the period 13 October 2022 – 14 November 2022;

28.1.3 Interest on the amount of R125,974,612.20 calculated at the rate of 9.75% per annum for the period 13 October 2022 to 26 April 2023;

28.1.3 Interest on the amount of R125,974,612.20 at the rate of 15% per annum as from 27 April 2023 to date of payment;

28.2 Costs of suit on an attorney and own client scale.

CDA LOXTON
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
GAUTENG DIVISION,
JOHANNESBURG

Appearances:

Date of hearing : 13 March 2024

Date of Judgment : 03 April 2024

For the Applicant : Adv B Berridge SC

Instructed by : Herbert Smith Freehills South Africa

For Respondent : Adv H van Eeden SC

Instructed by : Walkers Inc