



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 81936/2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<div style="text-align: center;"> <div style="border-bottom: 1px dotted black; display: inline-block; width: 100px;">18/4/2019</div> DATE </div>	<div style="text-align: center;"> <div style="border-bottom: 1px dotted black; display: inline-block; width: 100px;"></div> SIGNATURE </div>

In the matter between:

MASONGWA, RAMA ANDREW

First Applicant

PADDY, STEPHEN ALBIE

Second Applicant

and

MAXIMUM PROFIT RECOVERY (PTY) LTD

Respondent

JUDGMENT

AVVAKOUMIDES, AJ

1. The Applicants and the Respondent concluded an agreement called a Holistic Resolution Agreement consisting of some 72 pages. This agreement served one purpose, i.e. the separation between the Applicants and the Respondent from their joint business activities.
2. The Applicants were directors and shareholders in and to the Respondent and due to the inability of the Applicants and the remaining director in the Respondent to work harmoniously, it was decided that the Holistic Resolution Agreement would be concluded, providing for the exit of the First and Second Applicants from the Respondent.
3. The agreement contemplates a termination date by which the Applicants' involvement with the Respondent would cease. Under clause 9.17 the termination date is defined as:

"Shall mean in relation to clause 13.2 hereof the date the last of the NEWCO performances has been fully (not substantially) performed".

Clause 13.2 provides that the employment relationship between the Respondent and each of the Applicants shall terminate:

"13.2.2 In the case of Andrew and Stephen only when Newco performances have been complied with and until such termination they will be remunerated for their services as set out in clause 13.3".

4. In turn, the term “Newco performances” is defined to meaning the following matters:

“9.14.1 Payment of all remuneration to the employees as per clause 13.3 thereof;

9.14.2 Delivery of the releases as per clause 15 hereof; and

19.14.3 The implementation of all the matters referred to in clause 18 thereof, which shall be fully performed; substantial performance shall not suffice”.

5. The Applicants submitted that the Respondent had complied with the performances in terms of clauses 19.14.2 and 19.14.3 on 17 August 2017 and paid the last payment to the Applicants on 14 September 2017 of the amount accrued to the Applicants as at 17 August 2017. It is thus the Applicants’ case that the Respondent, in failing to pay the Applicants on 17 August 2017 and only doing so on 14 September 2017, caused the non-fulfilment of the Newco performances resulting in the non-attainment of the termination date.
6. The Holistic Resolution Agreement provided for the ongoing payment by the Respondent to the Applicants whilst the Respondent had to procure the release of the Applicants in terms of suretyship documents and the removal of identifying names from everything associated with the Respondent’s name. Whilst this process was ongoing and, as counsel for the Applicants submitted, they would

be paid for their continuous risk in being bound as sureties and co-principal debtors for the obligations of the Respondent. The Applicants' case thus is that the Respondent is liable to continue payment to the Applicants from 17 August 2017 to date.

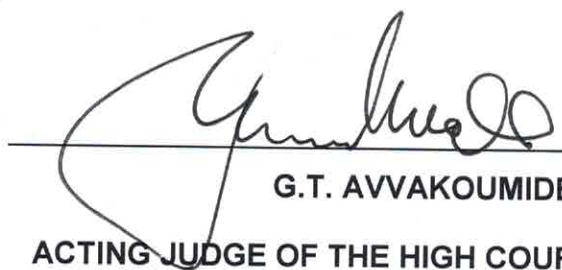
7. In answer to the question posed to the Applicants' counsel if the Applicants were paid on 17 August 2017, counsel responded that that would be the end of the matter and the parties would be totally separated from each other. The mere fact that payment for the amount accrued as at 17 August 2017 had only been paid on 14 September 2017 had prevented the fulfilment of the requirements contained in the definition "*termination date*" and consequently the Respondent remains liable to the Applicants for their monthly salary to date.
8. The application thus revolves around the interpretation of the agreement, more particularly certain of its clauses. The Respondent contended that on a purposive and contextual interpretation of the agreement, the employment relationship between the parties terminated on 17 August 2017.
9. It is clear from the contents of the various affidavits that the parties wanted a clear break from each other and went to a great length to describe how untenable their ongoing working relationship with each other was. The Applicants do not dispute the Respondent's version that the purpose of the agreement was to ensure that the parties would fully and finally part ways.

10. The court is thus called upon to interpret clause 13.2.2 of the agreement. On a simple reading of the clause and the clauses connected therewith it appears clear that the release from the suretyships and removal of all identifying names and logos were the dominant two of the three Newco performances and that the third would serve only to ensure that the Applicants would receive their remuneration on the date on which the remaining two performances were achieved.
11. Both parties went to great lengths to make submissions surrounding the correct approach to the interpretation of the relevant clauses and with reference to the allegations made in the various affidavits. The Respondent's counsel submitted that the correct approach to interpreting the contract is to apply the approach appearing in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F-604D. Briefly, in terms of the aforesaid decision the court has to take into account the document as a whole including the circumstances attendant upon its coming into existence. The apparent purpose of the agreement to which it is directed and the material known to those responsible for its production are to be taken into account and a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The Supreme Court of Appeal further stated that the inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and introduction of the document.

12. In my view, having considered all of the allegations contained in the affidavits, the submissions made by counsel for both parties, it is clear that the Newco performances were aimed mainly at the release of the Applicants for all sureties signed by them for the obligations of the Respondent and the removal of all identifying names, logos from all physical, material and internet based sources and upon the attainment of both, the Applicants would be entitled to remuneration as at that date. To read the Newco performances in any other manner would lead to an insensible interpretation of the meaning to the words used in the agreement.
13. Counsel for the Respondent submitted that even if I did not find for the Respondent on the interpretation issue, the Respondent, in addressing a response to the Applicants' letter of demand for payment stated therein, approximately one year prior to the issuing of the notice of motion, that the payment made on 14 September 2017 was made in full and final settlement and accordingly this was a compromise which the Applicant had, by their failure to respond appropriately, accepted. In the light of my view on the interpretation of the relevant clauses, I deem it unnecessary to deal with the aspect of compromise any further.
14. Counsel for the Applicant submitted that if the court found in favour of the Respondent, the Applicants would not oppose an order for costs which include the costs of two counsel.

15. In the premises I make the following order:

- (a) The application is dismissed;
- (b) The Applicants are ordered to pay the Respondent's costs, jointly and severally, the one paying the other to be absolved, which costs shall include the cost of two counsel.



G.T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT

Representation for Applicants:

Counsel: Adv. A Botha SC

Instructed by: Brian Kahn Attorneys

Representation for Respondent:

Counsel: Adv J Vorster and Adv MTM Phehane

Instructed by: EY Stuart Inc.