IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 2017/26036

Date: 24 April 2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

28/4/18
DATE SIGNATURE

In the matter between:

ZEPHAN (PTY) LTD	**1st Applicant**
NICOLAS GEORGIOU N.O.	**2nd Applicant**
MAUREEN LYNETTE GEORGIOU N.O.	**3rd Applicant**
JOE CHEMALY N.O.	**4th Applicant**
NICOLAS GEORGIOU	**5th Applicant**

and

SURAIYA BEGUN NOORMAHOMED	**Respondent**

JUDGMENT

DATE OF HEARING:	24 APRIL 2018
DATE OF JUDGMENT:	14 MAY 2018

ATTORNEY FOR APPLICANT:	KYRIACOU INC
ADVOCATE FOR APPLICANT:	ADV MOSTERT
ATTORNEY FOR RESTPONDENT:	DP DU PLESSIS INC
ADVOCATE FOR RESPONDENT:	AND L BOLT

1. On 11 April 2017 respondent launched an application seeking an order that applicants pay to respondent the sum of R 6 000 000.00, together with interest at 15,5% per annum from 9 August 2014, and costs, jointly and severally, against delivery to them of share certificate HSF 2234137 in Highveld Syndication no.22 Ltd ("HS 22").

2. On 4 July 2017 judgment was granted against applicants by default. Applicants now seek rescission of the judgment.

BACKGROUND FACTS

3. During May 2010 respondent entered into discussions with one Meyer, an agent for PIC Syndication (Pty) Ltd, relating to the possibility of respondent purchasing shares in a property syndication company. She was advised that first applicant had acquired shares in HS 22, and that it was offering those ~~sales~~ shares for sale. The offer included a buy-back agreement in terms of which applicants undertook to re-purchase the shares at the end of a five-year period ending on 9 August 2014, at 100% capital growth.

4. Respondent was given a resale quotation, which illustrated that with an investment of R 3 million (for 3000 shares in HS 22), respondent would reap a return of R 5 701 750.00 (after capital gains tax), upon the resale of the shares after five years. Respondent accepted the quotation by filling in an application form, and subsequently received 3000 shares in HS 22.

5. Respondent also received a prospectus in which the following is stated: *"The capital is secured by a buy-back agreement. The shares will be bought back by Zelpy 2095 (Pty) Ltd or its nominee five years from the investment date, providing 100% capital growth to the investor."*

6. The erstwhile Zelpy 2095 (Pty) Ltd is now Zelpy (Pty) Ltd, the first applicant. On 13 December 2008 a written buy-back agreement was entered into between HS 22, and applicants in terms whereof applicants irrevocably undertook to re-purchase all the shares sold by HS 22, five years after the initial purchase date.

7. The agreement contained a non-variation clause which read as follows: *"No variation or consensual cancellation of this agreement shall be of any force and effect unless reduced to writing and signed by the parties to this agreement accompanied by a Special Resolution passed by 75% of the shareholders of the FIRST PARTY, authorizing the variation of cancellation of the agreement."*

8. HS 22, and a number of other associated property syndication companies ("Highveld Syndication") fell into financial difficulties, and were placed in business rescue during September 2011. On 14 December 2014 a business rescue plan was adopted in terms of which a company named Orthotouch would purchase certain properties from the Highveld Syndication. The proceeds of the sale would result in shareholders receiving interest on their initial investment, and payment

in full of the investment on the fifth anniversary of the date of adoption of the business rescue plan.

9. Orthotouch experienced difficulty in maintaining the payment plan, and consequently an arrangement in terms of section 155 of the Companies Act, 2008 was entered into. The arrangement was accepted by 93.44% of the investors in Highveld Syndication, and was sanctioned by court on 26 November 2014.

10. Against the aforesaid background, respondent took the view that the buy-back agreement required applicants to repay her investment, plus 100% capital growth, five years after the initial investment had been made. Applicants took the view, however, that the adoption of the business rescue plan, and the later arrangement, novated the original buy-back agreement, and that its obligations to respondent to re-purchase the shares had lapsed.

EVENTS LEADING UP TO JUDGMENT

11. Respondent launched her application seeking repayment in terms of the buy-back agreement on 11 April 2017. After the application was served on applicants, and on 10 May 2017, applicants' attorney sent an email to respondent's attorney. The heading of the email was "Zephan (Pty) Ltd and 6 others//Suraiya B Noormohamed (Z625)."

12. The email read:

We hereby serve the Notice of Intention to Oppose in terms of Rule 4 A."

13. A notice of intention to oppose was attached to the email, which later transpired to refer to another matter altogether. Applicant's attorney was however unaware of the error, and believed that he had delivered a notice to oppose to respondent's attorney.

14. Respondent's attorney apparently did not become aware of the notice to oppose. He believes that the reason is that someone in his office must have noticed that the notice to oppose was not for one of his matters, and they did not deal with the notice any further.

15. On 18 May 2017 the correct notice to oppose was filed at court, as is evident from the court stamp thereon. The original notice has however disappeared, and no explanation for its disappearance has been given.

16. In the belief that the matter was unopposed, respondent's attorney set the matter down for default judgment on 4 July 2017. He did not serve the set down on applicants, because the rules did not require him to do so.

17. On 3 July 2017 fifth applicant, whilst under the impression that the matter was properly opposed, deposed to an answering affidavit which was served by email on respondent's attorney 5 July 2017. On 7 July

2017 respondent's attorney advised that judgment had already been granted.

18. The attorneys have resorted to accusing each other of fraud and unprofessional conduct. Applicant's attorney was unaware of the fact that ~~the~~ our incorrect notice to oppose had been sent to respondent's attorney, and in the founding affidavit he accused respondent's attorney and counsel of failing to advise the court that the matter was opposed, and ~~therefore~~ thereby having perpetrating a fraud on the court.

19. Respondent's attorney responded by attaching to the answering affidavit the actual notice to oppose that his office received which clearly refers to another matter altogether. Respondent now accuses applicant's attorney of willfully failing to enter opposition. Respondent questions the authenticity of the notice to oppose. In argument it emerged that respondent believed that the notice to oppose was forged, which includes the court stamp thereon, and that the answering affidavit was only drafted once applicant's attorney gained knowledge, somehow, of the default judgment. Respondent contends in argument that the commissioner of oaths also perpetrated a fraud by backdating the date on which the answering affidavit was actually signed.

20. Given applicants' belief that their notice to oppose had been properly delivered, the initial attack on the judgment was that it had been erroneously sought and erroneously granted, and stood to be set aside

in terms of rule 42 (1) (a). In light of the actual facts of the matter, that contention cannot stand.

21. The application should therefore be considered in accordance with the common law. The applicants are required to show:

21.1 That they were not in willful default of opposing the application;

21.2 That the application is *bona fide;*

21.3 That they have a *prima facie* defence to the claim.

22. Respondent has made serious allegations against applicant's attorney. I find no evidence that applicant's attorney was guilty of fraud, or that he willfully failed to oppose the application. He sent an email on 10 May 2017, which clearly revealed his intention to deliver a notice to oppose ~~in this~~ the matter. It makes no sense that he would send the email if he did not intend to oppose the matter. Clearly the judgment was the result of a comedy of errors. I find therefore that applicants did not willfully fail to oppose the matter.

DEFENCES

23. Applicants set out the following defences in the founding affidavit, and in the answering affidavit (to the main application) attached thereto as an annexure:

23.1 That respondent failed to join Orthotouch to the application which constituted non-joinder;

23.2 That the application did not sustain a cause of action in that the quotation, the prospectus, the buy-back agreement and the application form did not form a composite buy-back agreement between respondent and applicants;

23.3 That the business rescue plan had in any event resulted in the novation of the respondent's rights in terms of the buy-back agreement;

23.4 That the subsequent arrangement had re-arranged the obligations of the parties, and that respondent had accepted the terms thereof by accepting interest payments paid ~~as a result~~ in terms of the arrangement resulting in the buy-back agreement being novated.

24. In argument counsel for applicants indicated that applicant relied only on the latter point, that the arrangement between HS 22 investors and Orthotouch had novated the original buy-back agreement.

25. I will nevertheless deal briefly with the joinder argument. In **Judicial Service Commission v Cape Bar Council**[1] it was held:

"It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties

[1] 2013 (1) 170 (SCA)

CC and another 2007 (5) SA 391 (SCA) at paragraph 21 [also reported at [2007] JOL 20008 (SCA) – Ed]). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea."

26. The agreement between respondent and applicants stands independent of the agreement between Orthotouch and the HS 22 investors. Orthotouch has no interest in whether applicants buy back the shares in HS 22 or not. In terms of the arrangement Orthotouch will at the end of the five year period repay the investor, whoever that may be, the value of its investment. Therefore, although Orthotouch may have a peripheral interest in the shares, I find that it does not have a direct and substantial interest in the litigation between applicants and respondent.

LACK OF CAUSE OF ACTION

27. Although applicants have raised the absence of a cause of action in their founding affidavit, counsel did not persist with this aspect. Essentially applicants contend that the quotation, together with the prospectus, the application and the buy-back agreement could not have resulted in a contract for the benefit of a third person. The argument goes that no agreement to re-purchase the shares came into effect between respondent and applicants.

28. That contention was decided in the matter of **Anne-Marie de Lange v Zephan (Pty) Ltd**[2]. The facts in that case are on all fours with the facts in this case. Hiemstra AJ held:

"Based on the judgment in Total SA, it must firstly be determined whether there had been an intention between the HS companies and the defendants that the plaintiff could by accepting the benefit become a party to the agreement. I find that there was manifestly such an intention. It is the whole substratum of the agreement that the defendants would 'repurchase all the shares sold by the first party (the relevant HS company) to then original purchasers (the plaintiffs)'.

29. The above ~~conclusion of~~ Hiemstra AJ was confirmed on appeal.[3] I am respectfully in agreement that a valid agreement was entered into resulting in applicants being obliged to re-purchase respondent's shares at the end of the five year term.

NOVATION BY BUSINESS RESCUE AND BY THE ARRANGEMENT

30. The founding affidavit raised a further point of law that was not persisted with in argument, to the effect that the business rescue plan had novated the respondent's rights arising from the buy-back agreement.

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[2] unreported case number 82322/2014 at par. 18
[3] Zephan (Pty) ltd v Anne-Marie Leonie de Lange [2016] ZASCA 195

31. This contention was also dealt with in the De Lange case (*supra*), and confirmed on appeal[4]:

"The BRP has, however been adopted and has been implemented. It stands until impeached by a court of law. The question is whether it effectively altered or varied the buy-back agreement. I have already found that the plaintiff (and other plaintiffs) became parties to the buy-back agreements by virtue of their acceptance of the benefits.

Even if the BRP had been properly adopted in terms of the Act, it does not satisfy the requirements of clause 6 of the buy-back agreement. It cannot be inferred from its adoption that 75% of the shareholders had agreed to the variation. Clearly no special resolution has been passed and the variation has not been signed by the parties.

The BRP also does not constitute a novation of the rights of the shareholders. A novation implies a waiver of a party's original rights. It is trite that there is a presumption against a novation or waiver. It is not necessary to refer to the host of cases in which this was held and confirmed. I find that there has been no novation of the rights of the plaintiff."

32. Applicants have argued that subsequent to the business rescue plan being implemented, an arrangement was entered into in terms of which the obligations of Orthotouch were re-structured. On 12 November

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[4] at paragraphs 35 to 37

2014 a meeting of Highveld Syndication investors was held at which meeting 93.44% of the investors voted in favour of the arrangement. The arrangement was subsequently sanctioned by court order.

33. Applicants contend that the arrangement resulted in a novation of respondent's rights in terms of the buy-back agreement.

34. It is common cause that respondent did not vote in the arrangement. However, applicants contend that she received interest payments of more than R 376 000.00 as a result of the arrangement, and that by so-doing she had accepted the terms of the arrangement. The arrangement contained a *stipulatio alteri* which is not part of the papers, but which apparently made the arrangement effective as between Orthotouch and other parties. This had, the argument goes, resulted in her rights towards applicants being novated.

35. This situation is no different to that found in the De Lange case. The SCA held[5]:

"The BRP relates only to the restructuring of the business of the HS companies and not the appellants. When the HS companies went into business rescue the appellants were the primary carriers of the obligation to buy back Mrs De Lange's shares. The fact that the HS companies might have been in business rescue was irrelevant to the appellant's discharge of their obligations under the buy-back

[5] at paragraph [19]

agreement. Neither was the fact that she accepted payments of the reduced annual interest. Such interest was never part of the buy-back agreement. There could be no basis for a finding that Mrs De Lange had compromised her rights under the buy-back agreement."

36. Respondent denies accepting the terms of the arrangement or of even being aware of the *stipulatio alteri*. At the very least, before she can be bound by a *stipulatio alteri*, she should have knowledge of the terms thereof, and be shown to have accepted such terms. In any event, the alleged *stipulation alteri* is not one to which applicants are party.

37. Finally, the non-variation clause in the buy-back agreement requires that a variation or cancellation be in writing, be signed by the parties thereto, and be accompanied by a special resolution of at least 75% of the shareholders of HS Syndication. Those requirements have not been met.

38. In the result I am satisfied that applicants have not disclosed a *prima facie* defence to the claim. I make the following order:

    38.1 The application is dismissed with costs;

    38.2 Applicants shall pay the costs of the application jointly and severally, the one paying the other to be absolved.

Swanepoel J
Acting Judge of the High Court,
Gauteng Division