**HIGH COURT OF SOUTH AFRICA**

**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

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**Case No. 44754/14**

In the matter between:

**THE SIEBELS HARD ASSET FUND LIMITED** Applicant

And

**LOUCAS CHRISTOS POUROULIS** Respondent

**Case Summary: Interpretation of *merx* provision of agreement of sale of shares – the description of the *merx* - '. . . all the shares purchased by Siebels Hard Asset Fund in TAR and DAU . . . ' - when read in context and taking into account the circumstances in which the agreement of sale came into existence, means the applicant's 3 311 337 odinary shares in Transafrika Resources Limited (TAR), a company registered and incorporated in Mauritius, converted to 2 848 413 redeemable and 313 008 ordinary shares in TAR and 299 833 shares in Desert Gold Ventures Inc (DAU), a company registered and incorporated in Canada.**

**Practice and Procedure – Founding Affidavit - facts which should be set out in a founding affidavit are not only determined by the relief a party seeks, but also by the context within which the dispute arose and the nature of the issues between them.**
**Practice and Procedure – Replying Affidavit - an applicant may adduce any evidence in a replying affidavit that is relevant to an issue and which serves to refute the case put up in the answering affidavit.**

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**JUDGMENT**

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**MEYER, J**

[1] The applicant, The Siebels Hard Asset Fund Limited, claims payment from the respondent, Mr Loucas Christos Pouroulis, of the sale price in the sum of US$4 842 005,50 or the South African Rand equivalent as at the date of payment for shares that were sold by the applicant to the respondent in terms of a written agreement of sale of shares. The respondent resists the applicant's claim on the basis that the applicant has not delivered nor tendered to deliver the shares that were contracted for and purchased by him and that as a result of the applicant's breach or repudiation he has cancelled the agreement of sale.

[2] The applicant, represented by Mr Joseph Byrne, the chief operating officer of its investment manager, Green Cay Private Client Limited, and the respondent, represented by his attorney, Mr Terry Mahon, concluded a written agreement of sale comprising of a written offer dated 24 April 2012 from Mr Mahon on behalf of the respondent and written acceptance thereof dated 25 April 2012 by Mr Byrne on behalf of the applicant. In terms of the sale agreement the applicant sold to the respondent,

who purchased from the applicant, all the shares purchased by the applicant and owned in Transafrika Resources Limited (TAR), a company registered and incorporated in Mauritius, and in Desert Gold Ventures Inc (DAU), a company registered and incorporated in Canada, (the relevant provision of the sale agreement, the construction of which is presently in dispute, reads as follows: '. . . all the shares purchased by Siebels Hard Asset Fund in TAR and DAU . . . ') at a purchase price of US$1,50 per share. The purchase by the respondent of the shares would be effective '. . . as soon as the Tharisa [Tharisa PLC] listing has taken place'. Tharisa listed on the Johannesburg Stock Exchange (the JSE) on 10 April 2014. The purchase consideration would be paid as against delivery of the relevant share certificates together with the share transfer forms signed in blank.

[3] The shares purchased by the applicant and owned in TAR at the time of the conclusion of the sale agreement numbered 3 311 337 ordinary shares. The applicant, to the knowledge of the respondent, had not purchased and did not own any shares in DAU at that time. Once the listing of Tharisa had taken place on the JSE on 10 April 2014, the applicant tendered the delivery of 313 007 ordinary shares and 2 848 413 redeemable shares in TAR and 299 833 shares in DAU to the respondent against payment of the agreed purchase price.

[4] I now turn to the factual matrix within which the agreement of sale came into existence on 25 April 2012. The respondent has been a non-executive director and the (non-executive) chairman of TAR since 9 November 2007. He is also the founder (non-executive) chairman and a non-executive director of TAR Cyprus. Certain family members of the respondent, being Mrs Artemis Pouroulis (wife), Mr Adonis Pouroulis

(son), Mr Phoevos Pouroulis (son and chief executive officer of Tharisa), Ms Salome Pouroulis (daughter) and Ms Helene Pouroulis (daughter) are shareholders of TAR with a combined shareholding of 17.85%.

[5] The board of TAR considered a capital restructuring of TAR from June 2011 and proposed a change in its capital structure during October 2011. During February 2012 the shareholders of TAR proposed by way of a resolution the change in the capital structure of TAR whereby 100 000 000 of the 110 439 412 ordinary shares of TAR would be converted into 100 000 000 redeemable shares, and 5 000 000 of the 100 000 000 redeemable shares would be redeemed by TAR, the consideration for which redemption would be two shares in DAU for each redeemable share redeemed. The proposed change in the capital structure of TAR is referred to in shareholder communications during February 2012 and thereafter. The effect of the proposed change in the capital structure of TAR on the applicant's shareholding in TAR was that 2 998 330 of the applicant's 3 311 337 ordinary shares in TAR would be converted into redeemable shares of which redeemable shares 149 917 would be redeemed in exchange for 299 833 shares in DAU.

[6] The change in the capital structure of TAR was implemented and officially recorded with the registered office of TAU on 17 August 2012. The corporate action resulted therein that 2 998 330 of the applicant's 3 311 337 shares in TAR were converted into redeemable shares, 149 917 were redeemed and the applicant was issued with 299 833 shares in DAU. The applicant's share certificate in respect of DAU is dated 10 August 2012. Delivery of the share certificates relating to these shares in TAR and in DAU together with share transfer forms signed in blank are what the

applicant subsequently tendered to the respondent against payment of the purchase consideration.

[7] The issue now to be decided is whether the applicant has a contractual right derived from the agreement of sale to payment of the amount of US$4 842 005,50 or the South African Rand equivalent as at the date of payment. This requires a proper construction of the agreement of sale. Its provisions must be interpreted in accordance with the established principles of interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.)

[8] As to the language used in the agreement of sale, the *merx* is described as '. . . all the shares purchased by Siebels Hard Asset Fund in TAR and DAU . . . '. The number and class or classes of shares are not described. But contextually we know that on 1 July 2011 the applicant purchased 3 311 337 ordinary shares in TAR at a purchase price of US$4 967 006,00, which shares were owned by the applicant at the time of the conclusion of the agreement of sale and that the applicant, to the knowledge of the respondent, had not purchased nor owned shares in DAU at the time of the conclusion of the agreement of sale. Furthermore, the ineluctable inference is that the respondent was aware prior to the conclusion of the sale agreement of the intended change in the capital structure of TAR and the effect of the change on 'all the shares purchased by' the applicant, including the redemption of shares and the receipt of two 'consideration' shares in DAU for each one redeemed.

[9] The shares which the applicant tendered to the respondent remain 'the shares purchased by' the applicant in TAR. The resolution by which the shareholders of TAR proposed the change in its capital structure states *inter alia* that '100 000 000 of the Ordinary Shares of the Company be converted into Redeemable Shares . . . *by altering the terms of issue of such shares to make provision for redemption at the option of the Company'*. (Emphasis added.) The *merx* provision of the agreement of sale - '. . . all the shares purchased by Siebels Hard Asset Fund in TAR and DAU . . . ' - when read in context and taking into account the circumstances in which the agreement of sale came into existence, means the applicant's 3 311 337 odinary shares in Transafrika Resources Limited (TAR), a company registered and incorporated in Mauritius, converted to 2 848 413 redeemable and 313 008 ordinary shares in TAR and 299 833 shares in Desert Gold Ventures Inc (DAU), a company registered and incorporated in Canada. These are the same shares which the applicant has tendered to the respondent against payment of the purchase consideration.

[10] My conclusion on the interpretation of the *merx* provision of the agreement of sale makes it unnecessary to consider the applicant's alternative argument that, even if the *merx* had changed, the sale became *perfecta* upon the conclusion of the sale agreement – the provision relating to the listing of Tharisa, so it is argued, being a time clause and not a suspensive condition – when the benefit and risk attaching to the *merx* passed to the respondent.

[11] But there remains the respondent's argument that 'the applicant has sought to contend, for the first time in its replying affidavit, that what was contracted for was something other than what is expressly stated to be the *merx* in the contract itself.'

There is no merit in this argument. The applicant's case is the converse: that what was contracted for is on a contextual interpretation of the *merx* provision of the agreement of sale precisely the shares which the applicant tendered to the respondent against payment of the purchase consideration. The change in the TAR capital structure after the applicant had purchased the 3 311 337 shares at US$1.50 per share on 1 July 2011 which had the effect 'that the Applicant's shareholding in TAR became 2 848 413 redeemable shares and 313 008 ordinary shares' and the applicant's shareholding in DAU, are matters that were pertinently raised in the founding affidavit.

[12] It should be borne in mind that facts which should be set out in a founding affidavit are not only determined by the relief a party seeks, but also by the context within which the dispute arose and the nature of the issues between them (*Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (WLD)* at p 78 E – J). The respondent's defence that the applicant has not delivered nor tendered to deliver that which was contracted for was raised for the first time in the respondent's answering affidavit and particularly not in the correspondence from his attorney that preceded the present application. The only issue raised by the respondent prior to the filing of his answering affidavit in regard to non-payment of the purchase consideration to the applicant is the contention that the respondent's shares in Tharisa 'are "locked-in" for a period of 12 months from the listing' and that the respondent 'is accordingly unable to realise any of the shares at this stage', an issue that is not persisted with in his answering affidavit.

[13] In his answering affidavit the respondent states as follows:

'As indicated above, our common intention was for the applicant to sell me 3 311 337 ordinary shares in TAR. It was never intended that the amount of 3 311 337 ordinary shares should be

reduced to only 313 008 ordinary shares and that I would be obliged to take delivery of 2 848 413 redeemable shares in lieu of the balance of the ordinary shares which I wished to purchase'.

And also:

'I wish to point out, however, that at the time that Mahon addressed the email of 27 May 2014, neither he nor I appreciated the fact that the applicant would be tendering something different to what I had purchased. . . . As stated above when the email of 27 May 2014 was sent, I was not aware of the restructuring of TAR. Had I been aware of this and the fact that the applicant was unable to deliver the 3 311 337 shares, I would not have made the proposal contained in Manon's aforesaid email.'

[14] An applicant may adduce any evidence in a replying affidavit that is relevant to an issue and which serves to refute the case put up in the answering affidavit (*Reiter v Bierberg & Others 1938 SWA 13* at pp 14 – 15). This is precisely what the applicant set out to do in its replying affidavit. It adduced evidence, including documentary evidence, which serves to refute the case put up for the first time in the respondent's answering affidavit, including the respondent's allegations that the common intention of the parties was for the applicant to sell to him 3 311 337 ordinary shares in TAR and that he 'was not aware of the restructuring of TAR' when the email of 27 May 2014 was sent. It is unthinkable, unless explained (which did not happen), that the respondent, who as I have mentioned is the non-executive chairman of TAR and also one of its directors and whose immediate family members held 17.85% of its shares, would not have been fully aware prior to the conclusion of the sale agreement of the intended change in the capital structure of TAR and after the conclusion of the sale agreement of the change that was brought about in its capital structure. The respondent elected not to make

application for the striking out of the allegations from the replying affidavit which according to him could and should have been included in the founding affidavit (*Seymour v Seymour 1937 WLD 9; Victor v Victor 1938 WLD 16*; *Titty's Bar & Bottle Store v A.B.C. Garage & Others 1974 (4) SA 362 (TPD)* at p 369 A – B), nor did he seek permission to reply to any such allegation.

[15] In the result the following order is made:

Judgment is given in favour of the applicant and against the respondent for:

(a) Payment of the amount of US$4 842 005,50 or the South African Rand equivalent as at the date of payment.

(b) Interest on the amount of US$4 842 005,50 at the rate of 9% per annum from 11 April 2014 to date of payment.

(c) Costs of suit, including the costs of two counsel.

**P.A. MEYER**
**JUDGE OF THE HIGH COURT**

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| DATE OF HEARING: | 6 August 2015 |
| DATE OF JUDGMENT: | 28 October 2015 |
| APPLICANT'S COUNSEL: | Adv A Subel SC (assisted by Adv L Hollander) |
| INSTRUCTED BY: | Darryl Furman & Associates, Illovo, Johannesburg |
| RESPONDENT'S COUNSEL: | Adv JG Wasserman SC (assisted by Adv D Mahon) |
| INSTRUCTED BY: | Terry Mahon Attorneys, Sandton |