REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 22460/2014

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

4 MARCH 2015 **FHD VAN OOSTEN**

In the matter between

IVAN SOLOMON **APPLICANT**

And

RICARDO GIOVANNI GRAHAM **FIRST RESPONDENT**

EXECUTIVES ONLINE SOUTH AFRICA (PTY) LTD **SECOND RESPONDENT**

EXECUTIVES ONLINE NORTH (PTY) LTD **THIRD RESPONDENT**

Contact - Sale of shares agreement - claim for balance of purchase price of shares - addendum to agreement concluded - acknowledgement of debt signed - interpretation of - defence raised - claim premature as notice period provided for in lex commissoria not complied with - time for performance in terms of agreement by now expired - notice of motion constituting demand - defence rejected - respondent raising claims that would reduce balance due - absence of bona fides in raising claims - no reason why payment of amount due should be further delayed - application granted

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J U D G M E N T

VAN OOSTEN J:

[1] This application has its origin in an agreement of sale of shares (in the second and third respondents) concluded on 31 May 2012 between the applicant as seller and the first respondent (the respondent) as purchaser (the agreement). The agreement was orally amended and an addendum thereafter concluded together with an acknowledgement of debt signed by the respondent. The applicant in this application claims from the respondent payment of the sum of R600 000-00, being the balance of the purchase price of the shares, together with interest thereon and costs. Only the first respondent defends the claim on a narrow basis and relies on three claims for a reduction of the purchase to which I shall revert.

[2] The background facts, which are common cause between the parties, are briefly the following. The agreement resulted from a break down in the business relationship between the applicant and the respondent conducted through the vehicle of the second and third respondents of which they were both directors. The parties decided to part ways and after protracted negotiations the agreement was concluded. In terms thereof the respondent purchased the applicant's 50% ordinary shares in the issued share capital of the second and third respondents for a purchase price of R1,5m, payable by way of three instalments, as follows: R400 000-00 or before 1 June 2012, R800 000-000 on or before 5 July 2012 and R300 000-00 within a period of 18 months of the date of signature of the agreement. The respondent paid the first but failed to pay the second instalment. Further negotiations ensued and agreement was eventually, in December 2012, orally amended to provide for the payment of the second instalment by way of a payment of R500 000-00 on or before 18 December 2012 and the balance of R300 000-00 within 18 months of the date of signature of the agreement. The first payment of R500 000-00 was duly made on 18 December 2012. In the meanwhile and in terms of the agreement, the applicant commenced with the transfer of his shareholding in the second and third respondents to the respondent and he resigned as director of both entities.

[3] On 10 December 2013 the parties concluded a written addendum to the agreement, as well as an acknowledgement of debt. In terms of the addendum the purchase price of the shares was reduced to R1,4m and the respondent would pay the sum of R500 000-00 within 60 days of the date of its signature, failing which the

original purchase price of R1,5m, less the payments that had already been made, would become immediately due and payable. In the acknowledgement of debt the respondent acknowledged his indebtedness to the applicant in the sum of R500 000-00 payable within 60 days of the date of signature thereof.

[4] It is the applicant's case that the respondent failed to pay the sum of R500 000-00 and that consequently the original purchase price of R1,5m revived in respect of which the sum of R600 000-000 (R1,5m less payments totalling R900 000-00) became due and payable

[5] This brings me to the defence of the respondent. It is this: the applicant's claim, being for specific performance, was instituted prematurely having regard to the *lex commissoria* clauses contained in the agreement as well as in the addendum thereto, both providing for a 14 days' notice period to the respondent to purge his default before the full balance of the purchase price would become due and payable. Only 7 days' notice was in fact given which, so the argument went, rendered the applicant's claim premature. The defence should not detain me for long: the contention overlooks firstly, that the notice of motion in itself was a demand for payment affording, in its effect, the respondent a period for payment well in excess of 14 days and secondly, and decisively, that the time periods for payment provided for in the agreements have all by now expired. I therefore do not consider it necessary to comment any further on this defence as it is without merit and it falls to be rejected.

[6] The respondent in addition asserts three claims, in the total sum of R318 438-46, against the applicant, which he contends should be deducted from the amount claimed by the applicant. The particulars of those claims are briefly the following. The first relates to an assessment of the third respondent by SARS on 7 January 2014, for which it became liable in respect of an underpayment of R394 840.19, by which amount the respondent maintains the nett asset value of the third respondent, on which the purchase price in terms of the agreement was based, should be reduced. At 50% of that amount R197 420.08 falls to be deducted. The second is a claim of Conscript Africa, in the sum of R192 000-00, made against the second respondent, which the respondent states he managed to settle at R70 000-00, which together with legal costs incurred, he maintains, entitles him to a reduction of 50% of

the total expenditure, in the sum of R85 280-50. Lastly, the respondent claims a reduction in the sum of R35 737-88 in respect of the applicant's alleged personal expenses which, after his resignation an director of the entities, continued to be paid by way of bank debit order by the second and third respondents.

[7] Counsel for the respondent asked for the matter to be referred for the hearing of oral evidence in view of irreconcilable factual disputes existing regarding the respondent's claims for a reduction. The agreement contains an arbitration clause in terms of which these claims may have to be adjudicated. Counsel submitted that all the issues in this application should be referred to arbitration. Counsel for the applicant, with ample justification, contended that the claims are unsustainable and nothing but a concocted afterthought. A more fundamental reason, in my view, exists for disregarding the claims for the purpose of this application. The *bona fides* of the respondent recede into oblivion if regard is had to the history of this matter revealing several indulgences for payment and an incentive of a reduced purchase price that were negotiated and agreed upon. That the claims emerged for the first time only in a letter by the attorneys acting for the respondent shortly before the filing of the respondent's answering affidavit, is difficult, if not impossible, to reconcile with the respondent's promise, in an email to the applicant, in response to a demand by the applicant's attorneys to pay the outstanding balance, to 'fulfil the agreement' and requesting the applicant's 'patience as a friend', some 2 months prior to the launching of this application. The respondent's claims have not been brought by way of a counter application but merely in answer to the applicant's claim. Nothing of substance has been put forward that would justify any further delay in the applicant being paid what is due to him. In these circumstances the respondent should not be afforded the opportunity of further delaying the inevitable which is to pay the amount claimed by the applicant.

[8] Finally, in regard to the order I propose to make, the *mora* date in respect of the running of interest, is fixed at 9 February 2013, which was the final date for payment, being 60 days after the date of signature of the addendum to the agreement, as provided for in clause 2 thereof. Attorney and own client costs are provided for in the acknowledgement of debt.

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

1. The first respondent is ordered to pay to the applicant the sum of R600 000-00, together with interest thereon, at the rate of 9,5% per annum from 9 February 2014 to date of final payment.
2. The first respondent is ordered to pay the costs of the application on the scale as between attorney and own client.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV L HOLLANDER***
APPLICANT'S ATTORNEYS	***JEFF AFRIAT INC***
COUNSEL FOR FIRST RESPONDENT	***ADV C VAN DER MERWE***
FIRST RESPONDENT'S ATTORNEYS	***WERKSMANS ATTORNEYS***
DATE OF HEARING	***26 FEBRUARY 2015***
DATE OF JUDGMENT	***4 MARCH 2015***