REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG, PRETORIA

CASE NO: 19463/2015

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

9/12/2015
DATE

SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -12- 09
JUDGE'S SECRETARY
REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

JOHANNES JURIE JANSE VAN VUUREN	Applicant
And	
KEVIN GARTH EVANS	First Respondent
JOHANNES WILLEM WESSELS	Second Respondent
UKUFISA INVESTMENT HOLDINGS (PTY) LTD	Third Respondent

JUDGMENT

NKOSI AJ:

1. The Applicant made an application seeking an order in the following terms:

Declaring that:

1.1. The contract of sale of shares, signed on 3 November 2014 and annexed to the record as X:

1.1.1. is incapable of being given effect to;

1.1.2. is void.

1.2. Whatever had been done pursuant to and in terms of the contract of sale, including any purported transfer of shares:

1.2.1. Is void and of no force and effect; and

1.2.2. Is set aside.

Directing the First and Second Respondent, jointly and severally, to pay the costs of this application and costs against the Third Respondent only if this application is opposed.

2. This application was preceded by an application for urgent interim relief

3. The Respondents gave notice of a special meeting of shareholders of the Third Respondent.

According to the notice meeting would be convened for the purpose of discussing the Applicant as a director of the Third Respondent. The notice purported the application for the urgent interim relief.

4. The interim relief was sought pending the outcome and final determination of a dispute between the Applicant and the First and Second Respondent regarding the status and validity of a contract of sale (of the Applicant's shares to the third respondent). This was the subject of this application.

5. The determination of the dispute regarding the status of the contract of sale will in turn be determinative of the dispute as to the Applicant's status as shareholder in the third Respondent.

6. The contractual framework; the transaction in question

6.1. The Third Respondent is the owner of a coal beneficiation facility. It further owns 75% of the shares in Ukufisa Mining (Pty) Limited ("Ukufisa Mining").

6.2. Ukufisa Mining carries on business as a coal miner.

6.3. Immediately prior to the conclusion of the contract of sale the shareholding in the Third Respondent was (and according to the Applicant, still is) as follows:

6.3.1. 33.3% (one third), held by the Applicant;

6.3.2. 33.3% held by the First Respondent and 33.3% held by the Second Respondent

6.4. Previously, the First and Second Respondents and the Applicant each held 25% shares in the Third Respondent. The remaining 25% was held by the late Dirk Slabbert ("Slabbert"). When Slabbert passed away, his

(25%) shares were distributed between the remaining shareholders (being the first and second Respondents and the Applicant).

6.5. The contract of sale has certain unusual features (in addition to those provisions that, according to the Applicant, render it void):

6.5.1. It is recorded, inter alia, that the ability of the first and second Respondents to pay the purchase price would be "**dependant on well well-being**" of the Respondent;

6.5.2. It is recorded that a purchase price in the amount of R8, 000, 000.00, or R15, 000, 000.00 might be paid. The higher purchase price would depend on the Kromkrans project being "**salvaged**"

6.5.3. Whilst payment of the payment purchase price is (as a best case *scenario)* deferred, the Applicant would be obliged, on signature to transfer his shares;

6.5.4. Whilst payment of the purchase price (and indeed, the obligation to pay the purchase price) would depend on the financial well-being and performance of the third Respondent.

7. **Applicable principles and case law: contractual certainty**

7.1. In ***Van Der Merwe et al:*** **Contract – General Principles 4th Edition at 192**, under the heading "Certainty the following is said

"It is a general requirement for a contract that the agreement must bring about certainty regarding its

legal consequences. Failure...to delineate the performances undertaken by them clearly or to spell out material aspects relating to the operation of the obligations will, to the extent that such detail is not supplied by admissible extrinsic evidence, the naturalia of the agreement and the general principles of contract, render the agreement a nullity."

7.2. A number of principles established by our courts are instructive.

7.3. In **Van Zyl v Government of The Republic of South Africa 2008 (3) SA 294 (SCA) [75]** it was held that a promise to contract is not a contract.

7.4. An "agreement to agree" (or an agreement to negotiate further in order to close gaps in an existing agreement) is, as a basic point of departure, unenforceable and insufficient to cure an incomplete agreement, specifically because the parties retain an absolute discretion to agree.

7.5. In **RH Christie: The Law Of Contract in South Africa (6th edition) pg 39** a distinction is drawn between "agreement to agree" (of the unenforceable variety, discussed above) and enforceable "agreement to agree".

7.6. An enforceable *pactum de contrahendo* falls within the latter category. An "agreement to agree" in the sense of enforceable *pactum de contrahendo* is perhaps something of a misnomer in that a *pactum de contrahendo* will have some effect (or

contractual status) where it is in the nature of an offer that is, in principle, capable of being accepted. The central question then becomes whether the offer is capable, without more, of being accepted. Where it is too vague, the *pactum* will not be capable of being accepted.

7.7. The duty (or obligation) to negotiate and the question of an agreement to agree have been considered more recently in the context of the concept of *Ubuntu,* which features in a number of different legal settings.

7.8. Our Courts have not settled the question as to whether the term can or should be imported into a contractual setting and importantly, precisely what the term involves.

7.9. In **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Limited 2012 (1) SA 256 (CC)** it was held that whilst there may, in principle, be scope for the application of *Ubuntu* in a contractual setting, it would involve the development of the common law which, in turn, would require a properly pleaded and motivated case to that effect. Similar sentiments were expressed in relation to the existence of a duty to negotiate in good faith. Leave to appeal was refused and the Court refused to allow the matter to be remitted to the High Court to determine whether the common law should be expanded because it regarded the prospects of a success as a "mere possibility". No allegations had been made of disparate bargaining power or contractual oppression or unfairness in the bargain the appellant had made.

7.10. Accordingly, an "agreement to agree", without more is not and will not be enforceable. The same principle should apply to "agreements to negotiate" and to a duty "to negotiate in good faith". Without there being an effective deadlock breaking mechanism in place (*qua* **Southernport Developments**) the "obligations" imposed by a duty, for instance, to negotiate in good faith, will be too vague to enforce.

8. The basic principles stated above, support also the following important propositions:

8.1. An agreement is void for vagueness, where it is incomplete, because and essential or material aspect has not been agreed upon.

8.2. The standard or mechanism adopted for the determination of contractual consequences:

8.2.1. is effective, if: (a) it is clear, in itself; (b) the facts required for its application have been established; and (c) the consequences of the agreement are rendered reasonably ascertainable, by it;

8.2.2. "objectively ascertainable" means that the arrangement adopted must be capable of rendering certainty by itself without the need for: (a) further agreement; or (b) extrinsic evidence.

8.3. A mechanism for the determination of a contractual price must therefore be capable of operation independently of the parties.

8.4. Where a contract is made to depend solely on the will of one party, as to what part will be performed, the contract will be legally unenforceable. It has been held as follows in **Erasmus v Senwes Ltd 2006 (3) SA 529 (T), at 537**

"If performance in terms of an alleged contract is entirely dependent on the will of the promisor (a condictio si voluero), the contract is void. That is so because any claim for performance by the promisee could be met with the defence that the promisor has decided not to perform."

8.5. An agreement that is uncertain in an essential or material respect creates no obligations.

9. **The Applicant's submissions**

9.1. It is submitted that the contract of sale is void and unenforceable on account of being vague.

9.2. In the contract of sale, it is recorded, *inter alia*, as follows:

9.2.1. In clause 8.1

...the ability of the purchaser to make payment of the amounts as agreed are dependent on the well-being of the company and on the income that the shareholders can derive from the company based on their shareholding.

9.2.2. In clause 8.2 :

Payment in respect of R8 000 000 will be made through income accruing to the purchasers through new projects that take effect after the date of signature.

9.2.3. In clause 8.5:

> Subject to Clause 8.6...in respect of the R8 000 000 [sic] will be made in 60 equal monthly payments...

9.2.4. In clause 8.6:

> The monthly instalment reflected in 8.5...is based on one new project being introduced, the Parties do however agree that this monthly amount will increase and repayment accelerated should further projects be introduced...

9.2.5. In clause 9.3 (with emphasis added):

> **Should the financial position of the Company deteriorate to such an extent that the Company can no longer operate**...all amounts paid... up to that time shall be considered to be payment of the purchase price in full...

10. The relief sought by the Applicant is premised on the express wording of the contract of sale. This – the express wording – ought properly to constitute the primary basis on which the dispute is determined and on which it is submitted, the relief sought ought to be granted.

11. Accordingly, the "background" as set out by the Respondents does not support their construction or interpretation of clause 9.3.

12. Further considerations and weighing up of all submissions

12.1. Once a court is called upon to determine whether an agreement is fatally vague or not it must have regard to a number of factual and policy considerations amongst other things the court will consider the a parties initial

desire to have entered into a binding legal arrangement. This view was expressed and supported by the Appellate Division it was referred to by then in ***Namibian Minerals Corporation Ltd v Benguela Concessions Ltd 1997 (2) SA 548 at pg 561 F/G –I/J*** where it was noted that the court should strive to uphold and not destroy bargains "made prior to the conclusion of a contract". The court must give effect to the ordinary meaning of a clause in a contract.

12.2. In our present case clause 9.3 states that "should the financial position of the company deteriorate to such an extent that the company can no longer operate the parties agree that all amounts paid in respect of clause 7.1 and 7.2 shall be considered to be the payment of the purchase price in full and the purchasers shall have no further obligation towards the seller and the seller on its part have no further claims against the purchasers".

One can look further than the signed contract to find the meaning and to give contextual meaning to it.

12.3. Applicant's submissions are based on the fact that the contract is void and that it is incapable of being given effect to. This is disputed by the Respondent.

12.4. This question was cleared by the court in the case of Benguela Concessions (above) that whether a contract is void for vagueness or otherwise needs an objective consideration. It was further indicated that subjective intentions and desires of parties must be of no account as this can lead to obscurity of reasonableness in the interpretation. I agree with this view.

12.5. One must look at the background of their negotiations which produced this agreement. Applicant purchasing shares in a mining setup which is dependent on securing further contracts to sustain the 3rd Respondent to fail to honour its obligation or what one could call a supervening impossibility to

perform. Obviously, this could give rise to alternative relief to the aggrieved party, for the losses suffered or to be suffered.

12.6. Self-created impossibility, which is, impossibility resulting from the act of one of the parties, does not discharge the contract, but leaves the party whose act created the impossibility liable for the consequences. This was expressed by ***Wireohms SA (Pty) Ltd v Greenblatt 1959 (3) SA 909 (C)*** at 912 that it will be so whether or not the act that causes impossibility is wrongful.

12.7. This view was also accepted by Levisohn J in the ***Gordon v Pietermaritzburg Msunduzi Transitional Local Council 2001 (4) SA 972 (N)*** at 978 *"if a state uses legislative stratagem to avoid its obligations under a contract, this would amount to self-created impossibility."* I find this view reasonable for consideration in this matter.

12.8. Coming back to this matter, one has to express the view that the court is not there to draft a new contract with acceptable clauses by the parties. Parties must create protective clauses for themselves before they signed the contract. This court cannot find that the element of *ad idem* between the parties was not fulfilled before signing. Their contract has always been valid, binding and enforceable to all parties.

12.9. A question arises as to when did the Applicant realise that clause 9.3 of the signed contract is void and unenforceable. The Notice of Motion was signed on 17 March 2015 and the Contract of Sales of Shares was signed on 3 November 2014.
What might have triggered to doubt on the validity of the contract to be declared void and unenforceable. It is not clear from the Applicant's submissions except self – created perception to the contrary.

12.10. The court had the opportunity to consider all the submissions from both sides and the case law referred to. This court respects the views and judgments and divisions of a similar status. I am here considering another mater which has to be dealt with on its merits. My finding is that the Applicant aggrieved

as may be, ex post facto after the conclusion of the agreement is not left without a remedy as stated above.

Consequent upon this, I make the following order:

a) The application is dismissed with costs.

VRSN NKOSI

Acting Judge of the High Court (North Gauteng)

Counsel for the Applicant: Adv. J Daniels

Instructed by: Attorneys: Barker & McKenzie

Counsel for Respondent: Adv. A Els

Instructed by: Anton Claassen Attorneys

Date of hearing:

Date of judgment: