REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

27 December 2024
DATE SIGNATURE

CASE NO: 133934/2023

In the matter between:

URBAN GROWTH INVESTMENTS (PTY) LTD Applicant

and

MESH VC (PTY) LTD Respondent

JUDGMENT

(*The matter was heard in open court and judgment was reserved. The reserved judgment was handed down and uploaded onto the electronic file of the matter on CaseLines and the date of uploading of the judgment onto CaseLines)*

BEFORE: **HOLLAND-MUTER J:**

[1] The relief claimed by the Applicant, Urban Growth Investments (Pty) Ltd, instituted application against the Respondent, Mesh VC (Pty) Ltd, is for a judgment **ad pecuniam solvendam,** a judgment sounding in money in performance of a contractual obligation between the parties. The contractual obligation is pursuant to a Sale of Shares Agreement previously concluded between the parties.

[2] The Applicant was represented by Colin Young ("Young") and the Respondent by Frans Munnik Basson ("Basson") in concluding the Sale of Shares Agreement.

[3] The Sale of Shares Agreement, (referred to as the "Sales Agreement") was concluded between the parties on 11 July 2022.

DEFENCE OF FACTUAL DISPUTE:

[4] Before turning to the merits of the application, the court will first deal with the Respondent's defence that a genuine dispute of facts exit and that the matter should have been ventilated on oral evidence, either on action ("trial") or after referral for the hearing of oral evidence by the court.

[5] It is trite that application procedure is a rather robust procedure on affidavit and that a court may decide on the evidence contained in the sets of affidavits although it may seem that there are differences of facts in the opposing affidavits.

[6] A court has a wide discretion where, at the hearing of an application, a dispute of facts arises from the affidavits filed and cannot be decided without the hearing of oral evidence. If a real dispute of facts arises, the court may (i) dismiss the application; (ii) order that oral evidence be heard in terms of the Rules of Court, or (iii) order that the parties go on trial. **Herbstein & Van Winsen: The Civil Procedure of the Supreme Court of South Africa, 4th Ed p 383.**

[7] The court, in exercising its discretion in this regard, should follow the principal way dealing with real disputes of facts as encapsulated in **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (SCA) at 1163.**

[8] A real dispute of facts arises most obviously when the Respondent denies material allegations made by deponents on behalf of the Applicant and produces evidence to the contrary. A mere denial in general terms may not be sufficient to find that a genuine dispute of facts exists. In **Soffiantini v Mould 1956 (4) SA 150 E at 154 G-H** it was held that it is necessary from time to time to take a robust approach to a dispute to prevent that the functioning of the court be hamstrung and circumvented by simple and blatant stratagem. The court should not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.

[9] Having heard both counsel and after a thorough reading of the affidavits, I am not convinced that the differences between the parties' versions justify a referral to oral evidence. It is underlying in most applications that the parties

differ in version but seldom to such extent that referral to oral evidence in necessary. It is the duty of the court having heard the parties and examined the evidence to decide on the facts in most instances. It will be clear below why the matter is adjudicated on the affidavits without any further oral evidence. The application for referral for oral evidence is refused.

FACTUAL ISSUES:

[10] The material terms of the sales agreement, expressly, alternatively implied, further alternatively tacitly, are *inter alia* the following:

10.1 The Applicant purchased from the Respondent fifteen percent (15%) of the total number of the ordinary shares, then equating fifteen shares (The "Shares"), in an entity known as **Megs App (Pty) Ltd ('Megs App').** The Respondent sold, ceded and transferred the Shares to the Applicant.

10.2 The consideration for the purchase of the Shares, taking place in a piecemeal fashion, was that the Applicant would pay to the Respondent, into the Respondent's nominated bank account, a total of R 13 500 000-00 (thirteen million five hundred thousand rand) as follows:

10.2.1 An amount of R 8 500 000-00 on date of signature of the Sale of Shares Agreement; and

10.2.2 An amount of R 5 000 000-00 on 15 January 2023.

10.3 Possession of risk and effective control over the shares would pass to the Applicant as follows:

10.3.1 An initial 10% of the shares would immediately vest in the Applicant upon payment of the amount of R 8 500 000-00 to the Respondent; and

10.3.2 The balance of 5% of the shares would vest in the Applicant upon payment of the amount of R 5 000 000-00 to the Respondent.

10.4 Clause 5.2 of the Sales Agreement entitled the Applicant to exit the transaction after 12 (twelve) months from the effective date of the agreement, that date to be 11 July 2022. Should the Applicant elect to exit the agreement, upon payment of the full purchase price (or such portion thereof paid at that stage), the purchase price will be converted into a loan to the Respondent and would be paid back to the Applicant on terms and conditions agreed upon by the parties in the subsequent loan agreement concluded by consensus between the parties after the Applicant notified its exit from the agreement. The Applicant relies upon this clause 5.2 in these proceedings having exercised the election contemplated therein.

[11] The Applicant alleges that it paid an amount of R 8 500 000-00, the initial portion of the sales agreement for the 10% shares in Megs App on 11 July 2022 to the Respondent. This is not completely true. There was an outstanding amount of R 255 000-00 on 11 November 2022 which was only paid thereafter. See Annexure “AA-4” on CaseLines 02-108.

[12] The Applicant notified the Respondent on 5 December 2022 that it would not take up the further 5% of the shares in Megs App. The Applicant’s attorneys, Messrs Barnardt Vukic Potash & Gats (“BVPG”) informed the Respondent in writing on 18 May 2023 notifying the Respondent of the Applicant’s election to exit the transaction, i e the Sale of Shares Agreement, in accordance with clause 5.2 of the Shares Agreement. The Applicant acknowledged that it would remain bound to the provisions of the agreement

up and until 11 July 2023, being one year after the effective date of the agreement.

[13] The Applicant demanded repayment of the R 8,5 million together with the accrued interest thereon and tendered, and on payment of the R 8,5 million, the return of the 10 (ten) % issued shares owned by it in Megs App.

[14] The Applicant invited the Respondent to revert by 22 May 2023 to its proposal as to the repayment of the abovementioned R 8.5 million to be recorded in a loan agreement between the parties as contemplated in clause 5.2 of the agreement. Certain repayment terms were proposed and there was a response from Basson that the sale of an unrelated property would avail the necessary funds to repay the loan. This did not realise and further letters were exchanged between the parties without any positive results.

[15] The Applicant's evidence, as in the founding affidavit, and probably without noticing it, denotes at least two versions. The first is that the Applicant's case is only reliant on the Sale of Shares Agreement (clause 5.2) while the second version is that both the Sale of Shares Agreement ***and*** the Shareholders Agreement apply to the issue between the parties. See par [18] below.

[16] The Applicant's first version is reliant upon that only the Sale of Shares Agreement was applicable and that the Shareholders Agreement has no bearing on the relationship between the Applicant and the Respondent. If so, then reliance on clause 5.2 of the Sale of Shares Agreement will dictate the repayment of loans.

[17] The second version is that the Shareholders Agreement and the Sale of Shares Agreement equally applies. If so, then clause 8.3.2 of the Shareholders

Agreement determines how loans will be repaid if no other loan agreement was agreed upon.

[18] The Applicant ("Young") admits that both the Sale of Shares Agreement and the Shareholders Agreement applies to the matter between the parties. See Annexure "AA-4" CaseLines 02-108. This admission that both agreements apply between the parties in my view takes the sting out of the case of the Applicant with regard to the terms of repayment of the loan by the Respondent in terms of clause 5.2 of the Sale of Shares Agreement towards the Applicant.

[19] Clause 8.3.2 of the Shareholders Agreement is clear that loans will only be repaid once the company (Megs App) reaches 100 000 customers with an ARPU (Average Revenue per User) of R 100-00. This is a critical threshold to be achieved before loans will be repaid.

[20] This threshold was not yet reached when the Applicant gave notice of its exit from the agreement and if applied, the loan towards the Applicant is not yet due.

[21] Should the first version of the Applicant that only clause 5.2 of the Sale of Shares Agreement apply, the question arises whether and if so, when and on what terms did the parties reach a subsequent loan agreement that the full purchase price will be converted into a loan and when it be paid back to the purchaser on terms and conditions the parties agreed to in the loan agreement. It is trite that no such loan agreement, but for the loan in clause 8.3.2 of the Shareholders Agreement, came into existence.

[22] It is the Applicant's version that after notifying the Respondent of its intention to exit from the agreement after 12 months from the effective date,

in the absence of any formal loan agreement reached between the parties, that the full purchase price and interest is due and payable. This can only take place ***after*** the parties reached consensus on the required loan agreement to be negotiated. In the absence of such loan agreement, clause 5.2 cannot apply.

[23] The Applicant cannot rely on one version while admitting the other version. It implodes on the value of its version because it can only be the one or the other, not both.

[24] It is clear that the parties did not reach a subsequent loan agreement with its own terms governing the repayment of the converted purchase price into a loan agreement.

[25] The next question is whether the Applicant, in view thereof that no subsequent loan agreement other than that governed by the Shareholders Agreement was reached, can now demand repayment on other terms as to what is stated in the Shareholders Agreement.

[26] The argument on behalf of the Applicant that the Respondent conflates the provisions of the Shareholders Agreement with those in a separate agreement, to wit the Sale of Shares Agreement, cannot fly. The Applicant in its own version states that no loan agreement came in to existence after its exit from the agreement. Young supra [18] stated that both agreements applied.

[27] The facts that the parties set a threshold to be reached by Megs App is nothing new to the Applicant. The Applicant is a party to the Shareholders Agreement and at one stage demanded a directorship in Megs App. The Applicant was aware of the threshold and the possible non-achieving thereof. This did not deter the Applicant to purchase the shares in Megs App.

[28] The only inference to be drawn from the admitted facts is that no later subsequent loan agreement came into existence resulting that the purchase price was not yet converted into a loan agreement. The claim to repayment is premature.

COSTS:

[29] Costs are within the discretion of the court. The normal rule is that costs follows success. As it stands today, the loan was not finalised and the investment is in limbo. The repayment can only materialise after the loan agreement is formed and terms of repayment are negotiated in such loan agreement. Until then, the only possible recourse is in clause 8.3.2 of the Shareholders Agreement.

[30] In view of the above, it will be fair that the Applicant be ordered to pay the costs of the Respondent, costs to include cost of counsel on Scale B as provided for on Rule 69 of the Uniform Rules of Court and within the discretion of the Taxing Master.

ORDER:

The applicant is dismissed with costs.

HOLLAND-MUTER J

JUDGE OF THE PRETORIA HIGH COURT

Matter was heard on 4 September 2024

Judgment handed down on 27 December 2024

Appearances:

Applicant: Adv L Stansfield

Respondent: Adv J Sullivan