

SOUTH AFRICA / JUDGMENT

Lloyd v Richards and Another (4892/2022) [2025] ZAWCHC 41 (13 February 2025) [2025] ZAWCHC 41

COURT

Western Cape High Court, Cape Town

BEFORE

Van Zyl

CASE / FILE NUMBER

4892/2022

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IN

**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case number: 4892/2022**

In the matter between:

MORNE
LLEWELLYN LLOYD
Applicant
and
PAUL
JOHN RICHARDS
First
respondent
MARIUS
MALAN
Second
respondent

JUDGMENT

DELIVERED ON 13 FEBRUARY 2025

VAN ZYL AJ:

Introduction

1. The applicant seeks an order that the first and second respondents, jointly and severally, make payment of the amount of R210 142,06,

plus interest, as well as costs on the scale as between attorney and client. The capital amount claimed is the balance of the purchase price owed by the respondents to the applicant under a sale agreement concluded between the parties on 1 July 2021 for 100% of the members' interest in a close corporation running a business known as At364 Restaurant in Pringle Bay.[1]

2. Much water has flowed under the bridge since the institution of the application. It is not necessary to rehash all of the details. It is by now common cause that the R210 142,06 claimed should be paid to the applicant. The dispute lies in whether each of the respondents is liable for 50% of such amount (this is the first respondent's argument),[2] or whether the two respondents are jointly and severally liable to the applicant (which is the applicant's case).
3. There is, in addition, an argument as to who should pay the costs of the application, whether it should be paid on a punitive scale, and whether it should be paid on the magistrate's court tariff in light of the quantum of the claim, which falls well within the jurisdiction of the magistrate's court.

Are the respondents jointly and severally liable towards the applicant?

4. The applicant's notice of motion in its original form sought payment of the amount claimed from the respondents jointly. During January 2025 the applicant amended the notice of motion to seek payment from the respondents jointly and severally.
5. In the case of joint and several liability (also referred to as solidary co-debtorship) any one of a number of co-debtors is liable for the full performance. Performance is due once only and, if one of the debtors pays the full debt, the others are relieved of liability towards the creditor.[3] As a rule, joint and several liability only arises if it is clear, by express words or necessary implication, that the parties intended to create it.[4] If nothing to the contrary is indicated, then the situation is one of simple joint debtorship: "A number of persons may bind themselves to perform something to another ... if nothing further is agreed upon, [this] is a case of simple joint liability ... each joint debtor is liable for his or her pro rata share of the performance only ... This form of co-debtorship ... follows as a naturale of any contract which provides for more than one debtor ... (that is, it follows automatically in the absence of any agreement to the contrary)".[5]

6. There are a few exceptions in which joint and several liability is automatic, flowing from the nature of the contract. These are joint acceptors, drawers, and endorsers of bills of exchange, sureties who have renounced the benefit of division, and partners in respect of debts incurred in the ordinary course of the partnership business. If nothing to the contrary is provided for in the contract, and the contract is not one which automatically leads to joint and several liability, the co-debtors are merely jointly liable.[6]
7. The applicant argues that, although there is no express indication in the agreement that the respondents undertook the obligations thereunder jointly and severally, as opposed to jointly, a consideration of the agreement and its context indicates that it was the parties' intention to create joint and several liability. Counsel referred to the fact that the respondents, as purchasers, have always acted together, both in performing under the agreement and in corresponding with the applicant in relation thereto. They are referred to jointly as "the Purchasers" in the agreement. Counsel argues that, because the respondents purchased the members' interest jointly, and because they are jointly referred to in several clauses of the agreement and in subsequent correspondence, each of them in fact undertook the duty to render 100% of the performance due under the agreement. They are thus jointly and severally liable to pay the purchase price to the applicant.
8. I agree, however, with the first respondent's submission that the indicators upon which the applicant relies in fact point the other way, towards simple co-debtorship, and not towards joint and several liability. The sale of members' interest agreement is not a type of agreement from which joint and several liability flows automatically. Clause 4.4 of the agreement expressly stipulates that each of the respondents purchases 50% of the members' interest. Apart from this stipulation, they are referred to jointly ("the Purchasers") throughout the agreement. They have clearly acted jointly in respect of the business of and communications regarding the corporation because they each own half of the members' interest therein. All of the contextual references in the agreement point to the fact that the respondents assumed joint, and not joint and several, responsibility for the obligations under the agreement. The debt claimed by the applicant is not indivisible.[7]
9. Insofar as it might be said that the agreement is ambiguous in this respect (merely for the sake of argument, since I do not regard the agreement in the present matter as ambiguous) then there is the general principle that an ambiguous contract will be interpreted so as to impose the least burden on the debtors. The presumption that liability is joint, and not joint and several, is a strong one. It applies even where the co-debtors are associated together in a joint committee or joint venture falling short of a partnership.[8] The fact that, as counsel for the applicant commented, the applicant "does not care who the money comes from", is not sufficient to displace the presumption.

10. In conclusion, there is nothing in the sale of members' interest agreement that points towards the respondents having accepted joint and several, as opposed to joint, liability thereunder. There is no provision indicating that the respondents were anything other than co-debtors, and the applicant has not adduced any evidence to show that it was the parties' intention to create joint and several liability.
11. I accordingly find that the respondents are each liable towards the applicant for 50% of the R210 142,06 claimed.

The issue of costs

12. The issue of costs is hotly disputed. The principal question is whether it was necessary at all to institute the application. The first respondent says that it was prematurely instituted, and that a costs order should be granted against the applicant for that reason.
13. The relevant background is, briefly, that prior to the sale of the applicant's members' interest to the respondents, the applicant financed a vehicle on the corporation's name. The applicant subsequently purchased the vehicle from the corporation and, at the time of the sale of the members' interest in July 2021, the vehicle was not a corporation asset. The corporation was, however, still the debtor under the vehicle financing agreement with Wesbank. The applicant paid the monthly instalments on the corporation's behalf, and finally settled the entire outstanding amount on 16 February 2023.[9]
14. Prior to the settling of the Wesbank debt, and following the conclusion of the sale of members' interest agreement in July 2021, the applicant demanded the balance of the purchase price (being the R210 000,00-odd claimed in this application) from the respondents in January 2022.[10] There was some correspondence between the parties, in which the respondents raised the fact that they regarded the payment as not yet due because the corporation was not yet debt-free. This was because clause 4.3 of the sale of members' interest agreement provided that corporation and its assets would be debt-free on the effective date (which was the date of the transfer of the applicant's members' interest and claims to the respondents). The applicant had also warranted, under the agreement, that the corporation would have no other debts than the debts expressly set out in the agreement. The Wesbank debt was not one of the specified debts.
15. There were negotiations in respect of further debts, which were resolved between the parties. The respondents remained steadfast regarding payment of the R210 000,00. The applicant instituted this application in May 2022, arguing that the withholding of the balance of purchase price was not a term of the sale of members' interest agreement. The respondents admitted all along that the R210 000,00 was owing to the applicant, but denied that it was due at the time of the institution of the application because the existence of the Wesbank debt meant that the corporation was not debt-free as agreed between the parties.
16. Under clause 5.6 of the agreement, the total purchase price would be retained and invested for the benefit of the applicant by an

appointed firm of attorneys until such time as the applicant had signed over all risks and benefits to the respondents, and further

against settlement of all outstanding creditors of the corporation which came into existence before or on the effective date.[11]

17. The respondents submitted, therefore, that the applicant had failed to ensure that the corporation was debt-free at the time of the effective date under the sale agreement. It only became debt-free for the purposes of the agreement in February 2023. It was only then that payment of the R210 000,00 fell due.
18. The parties accuse one another of not acting in accordance with the agreement and the breach terms of the agreement in relation to the Wesbank debt and the subsequent non-payment of the R210 000,00. There are further arguments to the effect that the applicant ignored the alternative dispute resolution process provided for in clause 15[12] of the sale of members' interest agreement. The applicant retorts that the respondents did not invoke section 6 of the Arbitration Act 42 of 1965 to seek a stay of proceedings. The respondents argue that the applicant proceeded in the High Court despite the fact that the quantum of his claim falls well within the jurisdiction of the magistrate's court.[13] The applicant submits that he could not approach the Magistrate Court, despite the quantum of the claim, because that court does not have jurisdiction over applications such as the present.[14] Both parties seek punitive costs in their favour, because clause 14.2 of the agreement provides for costs orders on the scale as between attorney and client in the event of litigation arising from a breach of the agreement.
19. Be that as it may, on consideration of the matter as a whole it seems to me that this is a case where neither side should be mulcted in the other side's costs. I agree with the first respondent that it was not necessary to institute the application at the time when it was done. The applicant cannot escape the fact that the amount owing to Wesbank constituted a debt of the corporation as at the effective date, even if the applicant himself stood surety for the due payment thereof. The proper

way to resolve the issue at that time was to settle the corporation's debt with Nedbank, as the applicant subsequently did in February

2023. It was then that the applicant could lay claim to the balance of the purchase price.

20. On the other side of the coin, however, the respondents have failed to pay the R210 000,00 owing, despite acknowledging that it fell due in February 2023. It has still not been paid. No satisfactory reason for such non-payment appears from the record. A further two years have since elapsed, and the parties have continued running up legal costs on an issue that should have been laid to rest long ago. I was informed from the Bar that the parties had attempted to settle the matter, without success. When those negotiations failed, the applicant amended his notice of motion to seek payment of his claim on a joint and several basis. I have already determined that issue in the respondents' favour.

21. In the interests of fairness to both parties given the history to this matter and the parties' conduct, I am of the view that each of them should be liable for his own costs of suit.

Order

22. In the circumstances, the following order is granted:

22.1. The applicant's supplementary affidavit dated 3 April 2023 is admitted into the record.

22.2. The respondents are jointly liable (in the proportion of 50% each) to the applicant for payment of the sum of R210 142,06, together with interest thereon at the prescribed legal rate from 17 February 2023 to date of final payment.

22.3. Each party will pay his own costs of suit.

VAN ZYL AJ

Appearances:

For the applicant:

Mr S. Kelly, instructed by Rynhart Kruger Attorneys

For the first respondent:

Ms R. van Wyk, instructed by Burger Malherbe Attorneys

No appearance for the second respondent

- [1] A further claim relating to the respondents' compliance with another obligation under the agreement was not persisted with.
- [2] The second respondent did not deliver heads of argument, and did not appear at the hearing.
- [3] Joubert et al *The Law of South Africa* Vol. 9 (3ed) at para 348.
- [4] See *Tucker and another v Carruthers* 1951 AD 251; *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd and others* 2019 (3) SA 441 (SCA) at para [17].
- [5] Joubert op cit at para 347; and see *Roelou Barry (Edms) Bpk v Bosch* 1967 (1) SA 54 (C), in which it was held (at 59-60) that if a creditor sues from several co-debtors without indicating in the pleadings what amount he wishes to recover from each, it is assumed that he wishes to recover only a proportionate share from each.
- [6] Joubert op cit at para 348; and see *Bradfield Christie's Law of Contract in South Africa* (7ed) at pp 294-296.
- [7] See *Bradfield* ibid.
- [8] *Bradfield* op cit at p 294; *Shraga v Chalk* 1994 (3) SA 145 (N) at 154B-D.

- [9] This was explained in a supplementary affidavit which was admitted into the record by agreement between the parties.
- [10] The balance of the purchase price having been paid to the applicant.
- [11] There is no evidence on the papers as to whether the total purchase price was so invested, and counsel could not elucidate the Court as to the present state of the investment, but given that the rest of the purchase price (apart from the R210 000,00 in dispute) had in fact been paid over the applicant I assume that the investment did take place.
- [12] Providing for mediation and, thereafter, arbitration. Clause 15.2.4 provides, however, that the parties are not prevented from approaching a court “for judgment in relation to a liquidated claim”.
- [13] Clause 14.3 of the agreement provides that the “parties agree to the jurisdiction of the Magistrate’s Court, despite the fact that the monetary value of a claim may exceed the jurisdiction of the Magistrate’s Court, but without detracting from the rights of the parties to approach any competent court with jurisdiction including the High Court”.
- [14] With reference to section 29, read with section 46, of the Magistrates’ Courts Act 32 of 1944.
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Prepared on 9 October 2026 · Esheria