

SOUTH AFRICA / JUDGMENT

Poole v Zephan (Pty) Ltd and Others (39110/2016; 39109/2016) [2018] ZAGPPHC 282 (22 January 2018) [2018] ZAGPPHC 282

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo

CASE / FILE NUMBER

39110/2016; 39109/2016

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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 39110/2016

39109/2016

SYDNEY CLARENCE WILLIAM POOLE

PLAINTIFF

And

ZEPHAN (PTY) LTD

1st DEFENDANT

NICOLAS GEORGIOU N.O

2nd DEFENDANT

MAUREEN LYNETIE GEORGIOU N.O.

3rd DEFENDANT

JOE CHEMALY N.O

4th DEFENDANT

NICOLAS GEORGIOU N.O

5th DEFENDANT

HIGHVELD SYNDICATION NO 22 LIMITED

6th DEFENDANT

PIC SYNDICATIONS (PTY) LTD

7TH DEFENDANT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Plaintiff, Sydney Clarence William Poole ("Poole") is applying for Summary Judgment in two (2) actions that he instituted against the 1st to 5th Defendants claiming specific performance in agreements that Poole alleges were concluded between himself and a company called Zephan (Pty) Ltd ("Zephan"), the 1st Defendant, and were binding to the 2nd to 5th Defendants of which the Defendants are in breach. The case numbers are 39109/16 and 39110/16.

[2] The 2nd Defendant, that is Nicolas Georgiou, 3rd Defendant, Maureen Lynette Georgiou and 4th Defendant, Joe Chemaly are trustees of the N Georgiou Trust TMP 757 ("the Trust")

and cited in their representative capacity as such. Nicolas Georgiou ("Georgiou") the 2nd Defendant is also cited in his personal capacity as the 5th Defendant. Georgiou is the sole shareholder and director of Zephan. They are all referred to as "the Defendants."

[3] There is no claim against Highveld Syndication No 22 Limited trading as Charles Crescent Syndication ("HFS 22) and PIC Syndications (Pty) Ltd ("PIC"), the 6th and 7th Defendants, respectively. They are only cited as interested parties in the matter. Neither of the two Defendants has entered an

appearance to defend.

[4] The remainder of the Defendants have raised defences on the point of law as well as procedure.

[5] Poole, on 20 May and June 2010, through the marketer and promoter PIC, ("hereinafter referred to interchangeably as "the promoter" or "PIC"), acquired HFS 22 shares in two transactions comprising each of 2000 units at a share price of R1 000.00 per unit amounting to a total investment of R2 000 000.00 (Two Million Rand) that were held by Zephan in HFS 22.

Poole relies upon the following averments made in his particulars of claim, that:

- [6] In terms of a Registrar of Companies and Close Corporation's duly registered prospectus, the promoter, acting on behalf of FHS22 marketed and offered to the public by way of public placing subscription to 657 391 ordinary shares with a par value of 100 cents each in the share capital of HFS 22 at an issue price of 100 cents per share plus a share premium of R999 per share with opening and closing dates 11 May and 10 August 2009.
- [7] Not all the shares in HFS 22 were subscribed to by members of the public by 10 August 2009, and therefore the remainder of the shares were acquired or taken up by Zephan who then became owner/holder of the shares under the same terms, conditions and warranties as set out in the registered prospectus of the FHS 22 offer to the public.
- [8] Zephan offered for sale the shares through PIC its duly authorised marketer/promoter. The shares offered were acquired by Poole, according to Zephan's instruction /mandate to the promoter, on the same terms, conditions and warranties set out in the prospectus.
- [9] During the sale, the promoter furnished Poole with a quotation in respect of Resale: Highveld Syndication 22...on shares bought from Zelpy (as Zephan was previously known), a copy of the registered prospectus of HFS 22 and Application Forms for purchase of Units in Highveld Syndication No 22 Ltd. Poole accepted the quotation and confirmed his intention to participate in the syndication company and to purchase
- [10] Besides the purchase price, the quotation sets out the following information:

Illustrative values:

(i) Capital growth over five years :100%

(ii) Buy back date 30 September 2014.

Income

No income is paid during the five years of investment.

Capital

The resale value of the investment before the buy- back agreement serves only as an indication, as the resale of the shares will be offered on the basis of supply and demand.

*The investment value illustrates the capital growth of the investment if the investor should keep the shares for five years up to the guaranteed buy-back agreement of the investor's shares.

*The investment return illustrates the effect of the buy-back agreement calculated by the duration of the investment.

- [11] In the prologue to the prospectus, the directors of HFS 22 presented the key features of the offer to be, inter alia, that:

*CAPITAL: The capital is secured with a buy-back agreement. The shares will be brought back by Zelpy 2095 (Pty) Ltd (Zephan) or its nominee after 5 years from the investment date, providing 100% capital growth to the investor;

* COSTS: All costs, including commissions are paid for by the promoter. Investors have 100 % allocation of their investment capital

*BUY-BACK AGREEMENT: The guaranteed buy-back agreement ensures that the shares will be bought back from the investors five years from the investment date;

*INVESTMENT TERM: An investment period of five years and longer offers investors the maximum benefit; (as set out in the illustration of the return on an investment of R100 000.00 from the investment date to the guaranteed buy back of shares five years from the investment date)

[12] In the prospectus it is stated that:

[12.1] The main business: HFS 22 is a loan stock investment holding company, with its main investment policy in the following properties.

[12.2] The equity of FHS 22 will be divided into 888 000 authorised and 888 000 issued shares ,each consisting of R 1 share capital and a permanent non-separable linked loan account of R999 per share. Shares are available in multiples of R1000 with a minimum investment of R1000.00. These funds will be utilised to acquire properties.

[12.3] The purpose of the offer: is to raise capital to acquire the properties known as...and “to enable HFS 22 to raise funds to pay the purchase price for the seven properties.

[12.4] The minimum subscription that must be raised in order to provide the purchase price required to purchase the properties is R888 000 000.00

[12.5] Prospects, Financial Information and Assets to be acquired:

- (i) Investors receive capital growth on their investment with the buy- back of their shares according to the buy-back agreement pro rata to their share; Investors enjoy capital growth through the increase in the value of the property; and

[12.6] The material contracts which have been entered into by HFS 22 since its incorporation on 4 August 2005 to date of the prospectus, other than the ordinary course of business are :

- (i) The purchase agreements of the properties;
- (ii) The buy back agreement between HFS 22 and Zelpy 2095 (Pty) Ltd (Zephan) or its nominee.

[13] At all relevant times the promoter was duly represented by its duly authorised advisor and in terms of the Advise Record of Mutual Understanding it was agreed and recorded between Poole and PIC (Promoter) inter alia that:

- (a) Poole accepted the advice offered by the advisor;

(b) Poole instructed the advisor to implement the proposed investment product of which the key features, terms, conditions and exclusions are inter alia, that:

*the product is an investment in authorised, issued, unlisted shares, each consisting of R1 share capital and a permanent non-separable linked loan account of R999.00

*the investment capital is secured through a buy back agreement and the income through a head lease agreement as disclosed in the prospectus.

*the minimum proposed investment term of the product is 5 years and in order to achieve the benchmark it is not possible to guarantee the invest capital, nor the targeted return except where the buy-back and head lease agreements apply:

*Poole understands that it is possible to sell units of this investment at any time after the registration as described in the prospectus

*confirmation of investment will be sent to the Plaintiff by PIC ADM (Pty) Ltd and Eugene Krger & Co Inc. Attorneys

[14] He accepted, inter alia, the following terms and conditions as contained in the prospectus:

[14.1] Resale of Units: Shareholders are compelled to sell their shares five years from the investment date, according to the terms of the buyback agreement. However, they may sell their shares before the (buy-back) agreement comes into force.

[15] The promoter is also alleged, in the Application Form completed by Poole to have warranted:

[15.1] that Poole will be the effective owner of the shares as from the date of transfer of the shares in his name;

[15.2] that Poole shall have the right, power and authority to sell the shares free of any liens, options, charges or any encumbrances of whatever nature and any resale is subject to the provisions of clause 5.3.

[15.3] that Poole agrees to sell his shares in HFS 22 at a price of R1,001.00 per share with a linked account of R999.00 to Zephan or his nominee. The shares will be transferred against payment to Zephan. Any sale by Poole of the shares before the five year period from the abovementioned date must be subject to the buy-back agreement of the shares to Zephan.

[15.4] that Poole acknowledges that the units are sold without any warranties other than those set out in the prospectus and in respect thereof and all risk and benefit thereof shall pass to the investor on the date of registration of the shares in his name.

[15.5] That the signature of the agreement by the parties shall be deemed to supersede any previous verbal or written agreements between the parties.

[15.6] that the agreement is subject inter alia to the conditions stipulated in the prospectus of which the Poole is fully aware of.

[15.7] That if Poole sells his shares before the date of the buy-back agreement, h5will be responsible for the cost of the resale.

[16] The material terms of the buy-back agreement which was concluded between HFS and Zephan,N Georgio and the Trust duly representred by Georgiou who was also duly authorised by all the trustees (2nd to 5 Defendants) are said to be that :

[16.1] Zephan,the Trust and N Geogiou (5th Defendant) jointly and severally herby irrevocably undertakes to re-purchase all the shares sold by FHS 22 to the original purchasers of the shares five years after the individual initial purchase date (herein referred to as “Repurchase Date “) at R 1,001.00 per share with the share premium of R 999.00{hereinafter referred to as the “Repurchase Price”};

[16.2] Should Zephan, the Trust and Georgiou, jointly and severally, fail to pay the relevant shareholders the Repurchase Price of the shares on the Repurchase

Date:

[16.2.1] The shareholders may elect to either:

[16.2.1.1] Claim the full amount of rental income received by Zephan, the Trust and the Georgiou, jointly and severally, in respect of the immovable properties owned by HFS 22, together with mora interest at a rate of 10% per annum on the aforesaid amount, (which) amount will immediately become due and payable by Zephan, the Trust and Georgiou jointly and severally to HFS 22; or

[16.2.1.2] Claim specific performance for the repurchase of the shares at the Repurchase Price.

[17] Poole therefore alleges that:

[17.1] at all relevant times he relied upon the truth and correctness of the statements and representations made in the quotation, the prospectus and application form. He had paid the purchase price and as a result was issued with a share certificate number HFS2234613 dated 26 October 2010.

[17.2] it was the intention of Poole, Zephan, the Trust and Georgiou at all relevant times that the terms and conditions contained in the prospectus and the buy-back agreement will be mutatis mutandis applicable to the agreement entered into between Poole and Zephan, the parties;

[17.3] Zephan, the Trust and Georgiou in terms of the buy-back agreement contractually bound themselves jointly and severally, to re-purchase all the shares bought by Poole on 30 September 2014, alternatively after 5 years from 01 July 2010 alternatively after five years from the initial purchase date at R1001.00 per share with inked loan account of R999.00

[17.4] he irrevocably contracted and undertook to sell his shares in HFS 22 on 30 September 2014 alternatively after five years from 1 July 2010 alternatively after five years from 01 July 2010 alternatively after 5 years from the initial purchase date of the shares (the Repurchase Date) at a price of R4000 (Four Million Rand) (the Repurchase Price”) to Zephan read with the terms and conditions contained in the buy-back agreement.

[18] He therefore elects to claim specific performance for the repurchase of the shares by Zephan, the Trust and Georgiou, jointly and severally in the amount of R4 000 000.00 (Four Million Rand). He tenders to fulfil his undertaking and offer for his sale of shares in HFS to Zephan on the terms and conditions set out as aforementioned, and the share certificate issued to him and transfer of the shares to Zephan, alternatively the Trust and alternatively Georgiou against payment to him of the re-purchase price by Zephan, the Trust and Georgiou, jointly and severally the one paying the other to be absolved.

Defendants Opposition

[19] In opposing the Applications the 2nd to 5th Defendants have filed identical Answering Affidavits deposed to by N Georgiou making allegations based on the following defences, that:

[19.1] There is no contractual nexus between Poole and the Defendants, therefore no contractual rights that Poole can enforce against the Defendants. As a result there is no *vinculum juris* between Poole and the Defendants. Poole's specific claim against the Defendants based on the terms of the buy-back agreement is therefore denied.

[19.2] Even if the buy-back agreement did create enforceable rights in Poole's favour, those rights were novated through the implementation

of a business rescue plan in respect of the HFS Syndication Companies including HFS 22, which plan is binding on all the shareholders of these companies, including Poole.

No *vinculum juris*

[20] It is submitted by the Defendants that Poole seeks to enforce specific performance of an agreement to which he was never a party, or to which he was not privy since the buy-back agreement was concluded between HFS, Zephan, the Trust and Georgiou. In order for him to have pleaded an unassailable cause of action, he would have had to plead that he was a party to the contract that he is seeking to enforce, alternatively that the buy-back agreement constituted a *stipulatio alteri* in his favour, the benefit of which he has accepted. He had instead pleaded that the parties to the buy-back agreement were indeed HFS, Zephan and the Trust.

[21] Furthermore it is submitted that the agreement allegedly entered into between Poole and Zephan upon which Poole's claims is based does not exist. The agreement has not been pleaded or attached. The only agreement pleaded or attached to which Poole is a party are the advice record of mutual understanding and the Application form for the purchase of

unites I Highveld 22 entered into between Poole and the PIC. If the agreement is Poole's cause of action (which is not clear) the claim is impeachable since Poole has failed to comply with Rule 18

- (6) pertaining to the pleading of agreements, and therefore not entitled to summary judgment.

Lapse of the benefit prior to acceptance (or exercise)

- [22] If it is accepted that the buy-back agreement did constitute a stipulatio alteri in Poole's favour, the Defendants argue that the benefit was no longer open for acceptance by the time the benefit became ripe for

acceptance, the reason being that Poole could only have elected to accept the benefit conferred by the buy-back agreement once the five year period had lapsed and the Plaintiff has not sold the shares as is illustrated by the provisions of the prospectus that:

"Shareholders are compelled to sell their shares, five years from the investment date, according to the buy-back agreement. However, they may sell their shares before the agreement comes into force." (my emphasis)

- [23] The Defendants submit that in the light thereof Poole's contention that the mere acquisition of shares constituted acceptance of the alleged benefit cannot be correct. Prior to the benefit being ripe for acceptance, the business rescue plan however effectively Intervened by restructuring the rights of HFS 22 shareholders, and also restructuring HFS 22's rights (if it had any) in terms of the buy-back agreement prior to Poole being able to accept te benefit and step into the shoes of FHS 22 after the lapse of five years.

Shares purchased falling outside the scope of the buy-back agreement

- [24] the Defendants argued that the buy-back agreement makes it clear that it was applicable to shares sold by HFS 22 to the original purchasers of those shares. On Poole's own version he however purchased the shares not from HFS 22 but after Zephan had taken up the shares and instructed PIC to on-sell the shares. Poole was therefore not the original purchaser as contemplated in the buyback agreement, he would therefore never have been able to enforce the terms thereof.
- [25] Lastly HFS 22 together with other Syndication Companies, ran into financial difficulty and were placed under business rescue on 7 September 2011 with a business rescue practitioner being appointed. A business plan was voted upon and approved by 99% of the investors in the HFS 22 who were present and voted at a meeting convened in terms of s 151 of the Companies Act 71 of 2008 ("the Act").
- [26] All the investors are bound to the terms of the business rescue plan by virtue of the provisions of s 152 (4) of the Act. The business rescue plan not only restructured the rights of the HFS Syndication Companies and the creditors of the HFS Syndications It also novated the right of the shareholders in HFS 22.

Determination

by the court

[27] For the Defendant to defeat a motion for Summary judgment he should present a defence that is bona fide and good in law whilst conversely the Plaintiff is to establish a cause of action with lucidity and accuracy, setting out the terms relied upon (in a written agreement if applicable), upon which the cause of action is based to succeed in the motion for Summary Judgment; *Moosa and Other NNO v Hassam* 201 92) SA 410 (KZP) at 413 B-414B; *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 426.

[28] The issue of nexus raised by the Defendant is of serious importance as it relates to the locus standi of the Plaintiff. Absent the establishment of contractual nexus there can be no action against the Defendants. The plaintiff in an action must show a proprietary right or a contractual nexus in or with the parties before the merits of the case could be considered. The particulars of claim should, therefore to my mind, prima facie cloth the Plaintiff with legal standing to sue Zephan for the specific performance arising from the buy-back contract concluded by

Zephan and HFS 22 as alleged. If such standing is not apparent ex facie the particulars of claim or contract mentioned, the particulars

lack the precision or lucidity that is required to entitle it to a summary judgment.

[29] Poole's legal standing in relation to the buy-back agreement that was concluded by HFS 22 and Zephan is not apparent and the challenge raised by the Defendants bona fide and good in law and since it is not clear in the particulars of claim, Plaintiff has to prove the existence of a business relationship/locus standi and or the nexus between himself and the Defendants upon which the Defendants can be held liable in terms of alleged contract and the law of agency, See

also *Potchefstroomse Stadsraad v Kotze* 1 960 (3) SA 6 I 6 (A); *Seal a Cafe v Rand Advance (Pty) Ltd* 1975 (1) SA 28 (N); and *Glofinco v Absa Bank Ltd ta United Bank* 2002

(6) SA 470 (SCA) referred to in Defendants' heads of argument.

[30] The Defendants have further raised a contention in respect of the conciseness and clarity of Poole's cause of action due to his failure to refer to any terms or annex a copy of the agreement that he allegedly concluded with Zephan from which the specific performance claim allegedly arose (or is based).

[31] It is evident from Poole's particulars of claim that the agreement is an important link in the chain of Poole's cause of action against Zephan, however no information/terms of the agreement in relation thereto are pleaded nor is a copy thereof annexed to the summons. The particulars of claim are therefore lacking or not concise for the

purposes of a summary judgment. A Plaintiff that relies upon a written contract is bound by the requirements of the subrule 18 96) of the High Court Rules and obliged ,if possible.to give the information required in precise terms; South African Railway and

Harbours v Deal Enterprises 9Pty) Ltd 1975 930 SA w AT 953a.

- [32] Furthermore the Defendants have the alternative contented that the buy-back agreement that Poole seeks to rely upon has been offered in the agreement between HFS 22 and Zephan to the purchasers who originally bought the shares from HFS 22 and Poole is not the original purchaser having bought the shares from Zephan. The defence prima facie is a good defence and challenges Pooles Locus Standi to sue reliant on the terms of the buy back agreement. Poole In his particulars of claims has indeed alleged that the material terms of the buy-back agreements which was concluded between HFS and Zephan,N Georgiou and the Trust duly represented by Georgiou were that Zephan, the Trust and NGeorgio jointly and severally, irrevocably undertake to repurchase all shares sold by FHS 2 to the original purchasers .Poole would therefore have to prove the right disputed by the Defendants.
- [33] The aforementioned content ions already raised indicate that there are triable issues upon which particulars of claim can be challenged.
- [34] In the alternative the Defendant has also alleged that if the court might not agree with it on the aforementioned issues it has a good defence still , due to the fact that before the buy-back agreement was to come into effect on a date stipulated as September 2014 or 5 years from date of purchase of the shares, HFS 22 with whom Zephan concluded the agreement and whose right Poole alleges to have acquired when he subscribed to the shares held by Zephan, has been placed under business rescue and encumbered by the business rescue plan that was adopted prior the effective date of the buy-back agreement. The Defendants also refer to a moratorium on legal proceedings as contemplated in s 133 of the Act that was operative till 31 December 2016.
- [35] According to Poole, it is Zephan, the Trust and Georgiou who are supposedly bound by the agreement. Consequently, the impact of HFS 22's encumbrance by the business rescue plan to the alleged specific performance required by Poole has not been elucidated with clarity in the Defendant's affidavit. Zephan has failed to indicate how (if contractual nexus is found) is it incapacitated from buying back the shares by the HFS 22's shareholders adoption of a business rescue plan, or put in other words how Poole's alleged claim becomes unenforceable against Zephan, the Trust and Georgiou. The averment that the rights of shareholders has been substituted with the rights in the business rescue plan is not sufficient to indicate the nature of the defence. The court is unable to make out if the allegations will constitute a defence to the Plaintiff's claim against Zephan, the Trust and Georgiou if proven at the trial; see Maharaj. It therefore remains in doubt with this specific defence if the Plaintiff's claim can be met on trial. Nonetheless since it is pleaded in the alternative to defences which the court has found to be bona fide and good in law, it would be of no prejudice if the matter is referred to tri al : see Gruhn v M Pupkewitz & Sons (Pty)

Ltd 1973 (3) SA 49 (A) at 58. The court discretion could be exercised in the Defendant's favour if there is doubt as to whether the Plaintiff's case is unanswerable; see *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA).

[36] Under the circumstances the following order is made:

1. The Application for Summary Judgment is refused with costs to be costs in the action.
2. The Defendants are granted leave to defend Plaintiffs actions under the abovementioned case numbers;
3. The parties are to file their papers as applicable in the rules

N V KHUMALO

JUDGE OF THE GAUTENG HIGH COURT -PRETORIA

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