IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 048096/2022

DATE: 09-05-2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 21/10/24
SIGNATURE [redacted]

In the matter between

STEPHEN WHITE Applicant

and

FLUOROVIZION HOLDINGS (PTY) LIMITED Respondent

J U D G M E N T

[00:53:32]

DEN HARTOG, AJ: This is an application for the rescission of a default judgment granted by Senyatsi J on 13 March 2023. I will give judgment *ex tempore*. The respondent as plaintiff came to Court based on an oral agreement concluded in May 2020 in terms of which the defendant sold to the plaintiff certain FVZ Trauma shares. (I will refer to the parties herein as plaintiff and defendant.)

In particular it was agreed that 10 percent of the shares in FVZ Trauma would be sold to the plaintiff for a

purchase consideration of R5 million payable by way of a deposit of R2 million and thereafter monthly instalments, which monthly instalments would be implemented by the appointment of the plaintiff as a general manager, and would be paid by salary sacrifices as the parties phrased it in their papers, i.e. by way of reduced salary.

There were two conditions precedent to the agreement namely:

- an acquisition agreement to be concluded between FVZ Trauma and an entity known as Macromed and;
- an acquisition agreement concluded between FVZ Trauma and an entity known as Ortho-Dynamics planning,

failing which the agreement of sale of shares would become of no force and effect.

The allegation by the Plaintiff is that the condition precedents were not met and on this the basis the agreement did not come to fruition and consequently the plaintiff is entitled to repayment of the purchase consideration made by him for the shares.

Let us deal with the wilful default first. The transaction was pleaded as an oral sale agreement, but it later in the affidavits as set out by the defendant, appeared that there is a written shareholders agreement, which according to the defendant destroys the plaintiff's claim.

A dispute arose according to the allegations made

by Mr Furstenberg on behalf of the defendant relating to the acquisition agreements which led to discussions between him and the plaintiff surrounding the repayment and fulfilment of the condition's precedent.

Mr Furstenberg states that the relationship between himself and the plaintiff was an amicable relationship. As pointed out by Mr Elliot there is a dispute of fact as to whether the plaintiff in fact granted an indulgence to the defendant that it would only issue summons in order to protect its rights on prescription and that they would proceed no further unless having given proper notice to the defendant in this regard.

I cannot make a factual finding on this on these papers however in light of the fact that the relationship did appear to be amicable, or cordial as mentioned by the plaintiff and there is indeed a hint, and a concession on the part of the plaintiff that he adopted a soft approach, causing the Court to lean somewhat in favour of the defendant in this matter.

It is trite law that if the explanation for the default is weak but there does appear to be a *bona fide* defence that a Court would favour an applicant in a rescission application in light of the *bona fide* defence.

One more issue however on wilful default, one would, however have expected Mr Furstenberg, to at least

when the papers were served, despite the undertaking as he states by the plaintiff that he would not proceed with the matter unless further notice was given having regard to his allegation that he had had a long relationship with his attorneys Ms Roeland certainly by way of caution he should have at least just entered an appearance to defend to err on the side of caution.

That he did not do. That in respect of wilful default.

Considering the defence on an initial reading of the particulars of claim and the answering affidavit the defendant raises a reference to an initial agreement in the particulars of claim.

That reference seemed trivial until one reads further and establishes the existence of the shareholders agreement concluded pursuant to the sale of shares agreement. That places the matter somewhat in a different light because there is a hint of a second agreement with two references in the particulars of claim to an initial agreement.

The defendant states that the shareholder's agreement superseded the oral agreement. This in the face of the admission by the plaintiff that he is the *de facto* party to the shareholder's agreement and not Orif.

The plaintiff in paragraph 16 of the answering affidavit admits that he did not insist on the oral agreement being made written before they started implementing its

terms which included the drafting and signing of the shareholders agreement.

Now this does infer that the shareholders agreement somehow did have an effect on the oral agreement because he says the implementation thereof comes in the shareholders agreement, which included the drafting and signing of the shareholders agreement.

The oral agreement for the sale of shares was for 10 percent shares.

When we get to the shareholders agreement, we see it is only 4 percent shares and 12 shares. Somewhere something must have happened to cause this variation.

When I come to the conditions precedent as I put it to Mr Elliot and Mr Gradidge the allegation in the particulars of claim simply states that these conditions precedent are not fulfilled.

I was referred to certain passages, but these passages do not tell us when the agreements with Macromed and Otho-dynamics were concluded, and we do not know other than there is arbitration pending and we are awaiting the outcome of such arbitration. Whether they have thus been fulfilled or not is an open question.

That in itself in my view constitutes a triable defence for the defendant in this matter.

When we come to ANNEXURE GRF6 to the founding

affidavit which is an offer of sale of shares dated 5 January 2022 in terms of which the plaintiff offers his shares for sale with certain conditions in terms of the shareholders agreement paragraph 17 thereof.

Why would he offer these shares for sale if the sale of shares agreement was a subject of a dispute. Having regard to all of these facts it is my view that the defendant has certainly disclosed a *bona fide* defence to various triable issues even though his default remains suspect.

For reasons as aforesaid I grant the rescission of the judgment given by my brother Senyatsi but due to the reasons for default I direct that the defendant is to pay the costs of this application and that such costs ought to be taxed on scale C when it comes to taxation.

In the result, I make the following order:

1. The default judgment granted by Senyatsi J on 13 March 2023 is hereby rescinded.
2. The defendant is to pay the costs of the application on a party and party high court scale (scale C).

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DEN HARTOG, AJ

JUDGE OF THE HIGH COURT

DATE: 21/10/24.