REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO. 2023-42867

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

28 June 2024 _[redacted]
DATE SIGNATURE

In the matter between:

ALEKOS VONOPARTIS First Applicant

YIANNAKIS FOTIOU Second Applicant

and

DEANAN DHARAMRAJ Respondent

JUDGMENT

GOTZ AJ

Introduction

[1] This is an application, primarily, for specific performance of a Members Share Sale Agreement concluded between the applicants and the respondent on 24 March 2023 ("the Agreement"). The Agreement related to the sale, by the applicants, of their member's interests in a Close Corporation known as Sawatdi Flowers and Gifts CC ("Sawatdi") to the respondent. Despite its name, at the time of the conclusion of the Agreement, Sawatdi was trading as a licensed liquor store in the suburb of Alberton, Johannesburg.

[2] The applicants allege that the respondent has failed to make full payment of amounts that are owing under the Agreement. More particularly, although the respondent has paid the purchase price for the applicants' members interests, being an amount of R 1 500 000.00, an additional R 348 813.40 for stock that was held by the liquor store at the time that the agreement was signed, has not been paid in full. The respondent has paid only R 36 000.00 towards the amount owing for the stock, the applicants contend, leaving a balance of R 312 813.40 outstanding.

[3] In addition, the applicants have claimed R 40 260.98, an amount apparently made up of monies paid to various suppliers by the applicants after the respondent took ownership of Sawatdi.

[4] The respondent opposes the application, on several grounds. First, and as a point *in limine*, he highlights that the Agreement contains an arbitration clause, which he submits ought to have been invoked by the applicants. Second, in the heads of argument filed on the respondent's behalf, it is argued that I should direct that this matter be referred to mediation in terms of rule 41A(3)(b) of the Uniform Rules of Court. Third, the respondent places the amounts claimed by the applicants in dispute. In particular, he alleges that the applicants' claim for the amount of R 40 260.98, has not been proven. Fourth, the respondent

alleges that the applicants have failed to perform their obligations in terms of various clauses of the Agreement. Fifth and finally, the respondent has brought a counterclaim for latent defects in the premises from which Sawatdi conducts its business.

Nonappearance by the respondent

[5] Before dealing with the merits of the matter, it is necessary for me to highlight that there was, unfortunately, no appearance for the respondent on the day of the hearing.

[6] The respondent was represented by both an attorney and counsel until early November 2023. Before this date, heads of argument had been filed on behalf of the respondent. The matter had also been set down for hearing, and the notice of set down had been duly served by way of email on 13 September 2023.[1] On 8 November 2023, the respondent's erstwhile attorney filed a notice of withdrawal as attorney of record for the respondent, providing the respondent's last known physical address, as well as an email address.

[7] In the week preceding the hearing of this application, considering that an underrepresented litigant may not have ready access to the Caselines file or my roll for the week, I addressed an email, through my registrar, to the applicants' attorneys as well as to the respondent at the email address provided on the notice of withdrawal. I advised that the matter would be heard at 2 PM on 6 February 2024.

[8] In the morning on the day preceding the hearing, a response was received from the respondent. He advised my registrar that he had only just received the correspondence relating to the matter. He then said: "*I currently do not have an Attorney to represent myself in this matter. I would like to kindly request that*

[1] The notice of intention to defend filed on behalf of the respondent on 24 May 2023 clearly indicated that the respondent consented to the service and/or exchange all subsequent notices, documentation and affidavits in the matter by way of email at the attorney' s email address. I have satisfied myself that the notice of set down was duly served.

you afford me the opportunity to find an attorney and reschedule a new date for this hearing".

[9] In a subsequent email from my registrar to the parties they were advised that it was not possible to simply "reschedule" the hearing in the manner requested by the respondent. The email suggested to the applicants' attorneys and the respondent that an attempt be made to reach agreement on a possible postponement of the application. The parties were, however, advised that failing such an agreement, the respondent would need to appear personally and an application for postponement would need to be made, albeit that he could make submissions in writing before the hearing. The email also set out the issues that would have to be addressed by the respondent if he sought the postponement. Details of the date and time, and the venue for the hearing were provided.

[10] There was no response to my registrar's email. On the day of the hearing, neither the respondent nor a representative for him appeared. Furthermore, I was advised by the applicants' attorney, Mr Friedland, that the respondent had not contacted him to discuss a possible postponement of the application.

[11] In the circumstances, having satisfied myself that the respondent had received proper notice of the hearing and had been afforded a fair opportunity to seek a postponement, I proceeded with the hearing of the application.[2]

[12] The respondent's physical absence on the day of the hearing does not, of course, mean that I should not take account of the answering affidavit that he has filed or the heads of argument prepared by counsel on his behalf when he was still represented. I have done so.[3] I should also note that I also did not understand Mr Friedland, for the applicants, to be asking that I proceed to grant default judgment, and indeed no such application was made from the bar.

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[2] See, generally, Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at paras 60 and 61.

[3] See, analogously, the remarks made by Wilson J in the context of strike-out and dismissal procedures, in *Capitec Bank Ltd v Mangena and Another* (2021/28660) [2023] ZAGPJHC 194 (16 March 2023) at paras 4 to 6.

Background

[13] As noted above, the Agreement was duly concluded on 24 March 2023.

[14] In terms of clause 4 of the Agreement, the applicants, as sellers, sold their beneficial interest in Sawatdi to the respondent, as purchaser, together with the stock held by the liquor store on the effective date.

[15] Clause 5.1 of Agreement provided:

> *"The Purchase price payable in respect of the sale and acquisition of the interest in and to SAWATDI shall be the sum of R1,500,000.00 payable on or before 25th March 23, together with the agreed upon amount for the stock as reflected in Annexure A, which amount is payable on or before 7 April 23."*

[16] Clause 4.1, clause 5 and the definition of the term "stock/inventory" in the definitions section make it clear that the sale includes the stock referred to in Annexure A. The preface to Annexure A records that:

a. it is intended to be a "*list of alcohol to be itemised, numbered and valued*";

b. the inventory shall be prepared and agreed to by the parties by 31 March 2023; and

c. payment of the amount reflected shall be made to the applicants by no later than 7 April 2023

[17] The Agreement itself does not reflect the final inventory. Nevertheless, it is clear that a stock-take was completed and a list of the inventory was prepared by the parties. A summary of this list is annexure "FA2" to the founding affidavit.

[18] The applicants' founding affidavit makes the allegation, in paragraph 11, that on 24 March 2023, the parties met and took stock of the current stock of liquor at the premises and compiled a detailed stock take comprising some 21 pages, and with a separate summary page (being annexure FA2).

[19] In paragraph 12 of the founding affidavit, the applicants allege: "*In terms of FA2 it was agreed that the amount owed arising from such stock amounted to the sum of R 348 813.40*".

[20] The respondent's answer to this allegation is contained in paragraph 17 of his answering affidavit. Critically, the respondent does not deny the factual allegations made in paragraphs 11 and 12 of the founding affidavit. Paragraph 17 reads as follows:

> "*17. AD PARAGRAPHS 11, 12 and 13 THEREOF:*
>
> *I deny that I am responsible for the payment of the amount as set out herein as the applicants did not perform in terms of the agreement and also because I have a claim against the applicants arising out of the defects in the premises for which the applicants were responsible to fix.*"

[21] Put differently, the respondent's answer to the claim is not that there was no agreement on the amount owed for the stock, following the stock-take on 24 March 2023. Rather, it is that he is not liable for payment of the amount of *R 348 813.40* because the applicants did not perform their obligations in terms of the Agreement, and because he has a claim against the applicants arising out of alleged defects in the liquor store premises.

[22] It appears to be common cause between the parties that only R 36 000.00 was paid towards the stock by the respondent.

[23] As full payment for the balance of the stock was not made by 7 April 2023, the applicants' attorneys addressed a letter of demand to the respondent on 19

April 2023. In its relevant part, the letter of demand said:

> *"In terms of the agreement, you are responsible for the acquisition of stock in the form of alcoholic beverages and were to pay for same by no later than 7 April.*
>
> *A stock counting took place on 24 March and was agreed in the sum of R348 813,40, and to date only an amount of R36 000 was paid in reduction of your stock related indebtedness leaving a balance of R312 813,40.*
>
> *To be added to such amount are 6 further payments totalling, R40 260,98 as reflected below.*

No.	*Supplier*	*Amount*
1	*Spineker*	*R3 960,60*
2	*Tabooz Franchise*	*R3 450,00*
3	*Fox Security*	*R500,00*
4	*Insurance*	*R1 902,66*
5	*Halewood*	*R23 638,32*
6	*Petty Cash advanced by Mr. Fotiou*	*R6 810*
	Total	*R40 260,98*

> *You are currently indebted to our clients in the sum of R353 074,38.*"

[24] It appears that there was no written response to this letter of demand. On 2 May 2023, the applicants' attorneys addressed an email to the respondent, as well as to his attorney at the time, stating that since payment had not been received, "*We are now proceeding in terms of the Sale agreement regarding the setting up of the arbitration hearing and you will only have yourself to blame for the resultant costs*".

[25] Ultimately however, the applicants did not proceed with an arbitration. Instead they launched this application on or about 9 May 2023.

The arbitration defence

[26] The respondent's preliminary point is that there is a dispute between the parties which should be resolved by arbitration in terms of the arbitration clause of the Agreement.

[27] The arbitration clause reads as follows:

> "*11. ARBITRATION*
>
> *11.1 Should any dispute arise between the Parties to this Agreement with regard to the interpretation, implementation, execution or termination of this Agreement, such matter shall be resolved amicably by the Parties first and if not so resolved, the dispute will be submitted to arbitration;*
>
> *11.2 The arbitration shall be conducted in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965, as amended from time to time), provided that: -*
>
> *….*
>
> *11.8 This arbitration clause shall not prevent the Parties from access to an appropriate court of law for:*
>
> *11.8.1 Interim relief in the form of an interdict, mandamus or order for specific performance, or acceleration pending the outcome of an arbitration in terms hereof or in respect of such arbitration or expert determination, as the case may be;*
>
> *11.8.2 An order for the payment of a liquidated amount of money on the basis of facts which are not bona fide in dispute at the commencement of such proceedings;*
>
> *11.8.3 Or any other relief that may be sought by the parties.*"

[28] In my view, it is clause 11.8.2 which is decisive in this matter. In clear terms, and read within its context, this clause permits a party to bypass the submission to arbitration, otherwise required by clause 11.1, and approach a competent court provided two conditions are met. First, the order sought must be for the payment of a liquidated amount of money. Second, the claim must be based on facts which were not *bona fide* in dispute at the commencement of such proceedings.

[29] A liquidated amount of money is an amount which is either agreed upon or capable of speedy and prompt ascertainment or, to put it differently, where the determination of the amount in issue is a "mere matter of calculation".[4]

[30] The applicants have sought to argue that, as regards their claim, there is no dispute at all and, consequently, that there is nothing to refer to arbitration. In essence, as I understand the argument, the applicants, rely on the words "*should any dispute arise between the Parties to this Agreement*" in clause 11.1, to contend that I should find that no dispute has arisen between the parties in relation to the amounts claimed. Accordingly, they say, the arbitration clause is not triggered at all. I was referred to *Altech Data (Pty) Ltd v M B Technologies (Pty) Ltd*[5] in support of this proposition. In that case, the Court embarked on a detailed analysis of the relevant circumstances, as they appeared from the pleadings, and the provisions of the agreement containing the arbitration clause, in order to determine whether the applicant's claim could be said to be "undisputed", and therefore capable of determination by the Court without a referral to arbitration.

[31] I am cognisant of the judgment of Didcott J in *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D), in which it was held (at 305E–H) that:

> *"Arbitration is a method for resolving disputes. That alone is its object,*

[4] See, for example, *Tredoux v Kellerman* 2010 (1) SA 160 (C) at para 18; *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 738
[5] 1998 (3) SA 748 (W).

and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise.

….

That the plaintiff's claim was undisputed seems beyond doubt. The defendants plainly admitted it. They had an answer, to be sure, in the counterclaim. But that was not truly a defence to the claim. It was an excuse for not meeting a claim to which there was no defence. Whether the excuse was a good one may well turn out to be disputed. Any such dispute will, however, concern the counterclaim. It will not be a dispute about the claim."

[32] Nevertheless, in my view, it is unnecessary to follow this line in this case. It is certainly not necessary to engage in the detailed analysis of pleadings and contractual terms undertaken in the *Altech Data* judgment in order to determine whether or not the applicants' claim is an "undisputed" one.

[33] An arbitration clause, like all clauses of agreements between parties, must be interpreted with reference to its terms, elucidated by context and purpose.[6] The triad of text, context and purpose which must give meaning to the clause at issue in this case suggests that the parties agreed that a "dispute" over a liquidated amount of money on the basis of facts which are not *bona fide* in dispute would not be arbitrable, or at least would not have to be submitted to arbitration. The parties agreed that clause 11.8.2 would regulate the matter. Put differently, if the twin requirements of clause 11.8.2 are satisfied, the arbitration clause does not prevent a party from seeking an order in an appropriate court. Conversely, if either one of the requirements is not fulfilled, then on a proper interpretation of clause 11 as a whole, the matter must be submitted to arbitration.

[6] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* (470/2020) [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) (9 July 2021) at para 51.

The applicants' claim for the unpaid stock

[34] In my view, the applicants' claim for R 312 813.40, being the balance owing for the stock, is clearly one for payment of a liquidated amount of money. As already noted, the amount of R 348 813.40 was agreed between the parties on 24 March 2023. In terms of clause 5.1 of the Agreement, the full amount was payable by 7 April 2023. Only R 36 000.00 has been paid. At the very least, the balance that is owing is an amount which is readily ascertainable.

[35] I am also of the view that this claim is based on facts which were not *bona fide* in dispute at the commencement of these proceedings. In this regard, clause 5.1 of the Agreement is clear. Liability for the "agreed upon amount for the stock" arose upon its valuation in accordance with Annexure A and this exercise was duly completed on 24 March 2023. The respondent does not dispute that the valuation was done. Nor does he dispute the value agreed, as reflected in annexure FA2 to the founding affidavit. These, in my view, are the relevant facts on which the applicants' claim is based and it is plain that they were not *bona fide* in dispute when the application was launched.

[36] It follows that the applicants' claim for R 312 813.40 did not have to be submitted to arbitration, by virtue of clause 11.8.2 of the Agreement.

[37] This does not of course mean that the applicants will automatically succeed in relation to this aspect of the claim. It is still necessary to consider the other defences that the respondent has raised, and I do so below.

The applicants' claim for payments to suppliers

[38] The applicants' additional claim for R 40 260.98 stands on a different footing.

[39] The allegations in the founding affidavit in relation to this claim are sketchy to say the least. They are contained in paragraphs 14 and 16.2, which read as

follows:

> *"14. In the interim Respondent had run up certain debts on the Sawatdi account which were still payable by the Applicants.*
> *….*
>
> *16. … in terms of "FA3" demand made for: -*
>
> *16.2 A further amount of R40 260,98 in respect of monies paid to various suppliers.*"

[40] I have already quoted the relevant portions of annexure FA3 above.

[41] These paragraphs of the founding affidavit have been clearly and unequivocally denied by the respondent. It is clear, therefore, that a dispute exists in relation to this aspect of the applicants' claim.

[42] Unlike the applicant's claim for the balance of the amount owing for the stock, the basis for this claim does not appear to lie in the Agreement. Certainly, the applicants have not pleaded any clause of the Agreement which might be said to give rise to the respondent's obligation to pay the amounts claimed. To the extent that there was a separate oral agreement between the parties, this has not been pleaded. In my view, it is insufficient for the applicants to simply allege, in the vaguest of terms, that amounts have been paid to "suppliers" and then refer to Court (and the respondent) to a letter of demand in which the various suppliers and the amounts paid to them have been set out.

[43] In my view, the applicants have not pleaded sufficient facts to establish that the requirements of clause 11.8.2 are satisfied. As the respondent has pointed out, the allegations that have been made, even when read with annexure FA3, do not suffice to establish that the claim is for a "liquidated amount of money". The applicants have not attached the invoices for the suppliers referred to annexure FA3, nor proof that payment was made by either of them. There is no liquid document attached to the founding affidavit in support of these claims.

[44] In paragraph 17 of the founding affidavit, the applicants allege as follows:

> "*On receipt of "FA3" Respondent telephoned me and a meeting was subsequently held at which Respondents attorney certain Vardarkis was present and it was agreed he effect payment and his attorney advised same would be confirmed by him to my attorneys.*"

[45] The allegation appears to be that the respondent's attorney attended a meeting with the first applicant (being the deponent to the founding affidavit) at which it was agreed that the respondent would effect payment and that this would be confirmed by the respondent's attorney to the applicants' attorneys. No such confirmation was, however, provided. In response paragraph 17, the respondent's answering affidavit merely states: "*The contents are noted*". While this is not a denial, it is not an admission either. The applicants' recordal of the meeting is, in my view, too vague to be able make a definitive finding as to what was agreed. This may of course be explained by the fact that the meeting was almost certainly held on a without prejudice basis, but the lack of detail does not assist the applicants in discharging the onus that they have. For example, it is not stated what payment would be effected, or even when it would be made, or whether the agreement was unconditional. In my view, particularly in the absence of any subsequent written confirmation of precisely what was agreed, either by the respondent's attorney or for that matter by the applicants or their attorney,[7] it is not possible for me to find that the respondent made an unconditional tender to pay or that there was an unequivocal acknowledgement of indebtedness to the applicants in the amount of R 40 260.98.

[46] It is necessary to mention that the applicants sought to persuade me that the respondent's failure to respond in writing to the letter of demand (annexure FA3), ought to be construed as an admission of liability. There are cases where a party's failure to reply to a letter, and therefore their silence, may be taken to constitute an admission by them of the truth of an assertion contained in such

[7] It is notable, for example, that annexure FA4 to the founding affidavit does not reference the meeting or any alleged agreement which was reached at it.

letter.[8] But this is not such a case. On the applicants' own version, the respondent did indeed respond to the letter of demand. As noted above, the applicants say in their founding affidavit that in response to FA3, the respondent's attorney telephoned the first applicant and a meeting was arranged, and then attended by at least the two of them. This plainly does not constitute a *failure to reply* to annexure FA3. The principle upon which the applicants seek to rely does not find application on the facts of this case.

[47] It follows from the above that I am not persuaded that the applicants have brought the claim for R 40 260.98 within the four corners of clause 11.8.2 of the Agreement. It must be noted that the onus in the present application is upon the applicants to satisfy the Court "... *that it should not, in the exercise of its discretion, refer the matter to arbitration* ...".[9] Moreover, as the Full Bench held in *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* l 983 (2) SA 630 (T) at 653:

> "*The Courts have been consistent in their approach in requiring a very strong case to be made out by a party seeking to be absolved from a contract to have a dispute referred to arbitration."*[10]

[48] In my view, there is, in relation to this claim by the applicants, clearly a dispute, within the contemplation of clause 11.1 of the Agreement, which should be submitted to arbitration. In such proceedings, the applicants will have the opportunity to properly plead the cause of action and present the necessary evidence to prove the payments that were made.

Rule 41A(3)(b) of the Uniform Rules of Court

[49] In the heads of argument that have been filed on the respondent's behalf, it is contended that I ought to direct the parties to consider agreeing to refer this

[8] See McWilliams v First Consolidated Holdings (Pty) Ltd 1982(2) SA 1 (A) at 10E-H; and see also Benefit Cycle Work s v Atmore 1927 TPD 524 at 530-1; Hamilton v Van Zyl 1983 (4) S A 379 (E) at 388E-H.
[9] See *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333H.
[10] See also, Altech Data (Pty) Ltd v MB Technologies (Pty) Ltd 1998 (3) SA 748 (W) at 754H, where the Court said: "*I am required to determine in this application whether circumstances constituting a 'very strong case' or 'compelling reasons' exist to justify a refusal to hold the present applicant to the agreement to have 'any dispute' resolved by arbitration as provided in clause 19 of this agreement*."

matter to mediation in terms of rule 41A(3)(b) of the Uniform Rules of Court.

[50] The respondent's heads of argument make the concession that it was the *applicants*, in their notice of motion, at the very outset of these proceedings, that consented to mediation in terms of rule 41A, but there was no acceptance of this invitation by the respondent. The respondent did not file a notice in terms of rule 41A, notwithstanding the provisions of rule 41A(2)(b) and took no other steps to respond to the applicants' invitation.

[51] Rule 41A(3) provides as follows:

> "*(3)(a) Notwithstanding the provisions of subrule (2), the parties may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced the parties shall obtain the leave of the court.*
>
> *(b) A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.*"

[52] There is, at present, no agreement between the parties to refer their disputes to mediation. Given the stage of these proceedings, and given that most of the disputes between the parties are likely to be referred to arbitration, I do not believe that the direction contemplated in rule 41A(3)(b) of the Uniform Rules of Court is warranted. In my view, it is in the interests of justice that the issues raised in the application, that can be determined by the Court are dealt with, rather than the matter being removed from the roll in order for the parties to pronounce on whether they would agree to or oppose mediation.

The respondent's defence to the claim for unpaid stock

[53] As I have noted above, while the applicants' claim for unpaid stock falls within the exception contained in clause 11.8.2 of the Agreement, and need not be

submitted to arbitration in terms of clause 11.1, I must still consider whether the respondent has a defence to the claim.

[54] The respondent has sought to excuse his non-payment of the balance of the amount owing for the stock by alleging that the applicants have failed to comply with a raft of their obligations under the Agreement.

[55] First, the respondent alleges that the applicants have breached clause 7.1 of the Agreement, and more particularly clauses 7.1.2; 7.1.3; 7.1.5; and 7.1.6. Clause 7.1, in relevant part, provides:

> *"7.1 The Seller shall without undue delay after the Signature Date, deliver to the Attorneys and/or sign:*
>
> *7.1.1 …;*
>
> *7.1.2 Confirmation in writing of the waiver of the Claims as at the Effective Date;*
>
> *7.1.3 A certified copy of the resolution of the SAWATDI members;*
>
> *7.1.4 …;*
>
> *7.1.5 The cession and assignment of the Retso's Liquor Licence in favour of the PURCHASER and undertake to sign any further documentation required to give effect to the cession/transfer of such licence.*
>
> *7.1.6 The relevant waiver of the current lease agreement to enable the PURCHASER to acquire such PREMISES in her name or the name of SAWATDI as the new tenant.*"

[56] "*The Attorneys*" referred to are the applicants' attorneys. The respondent alleges that the applicants have failed to deliver these documents to him. The difficulty with the respondent's complaint is that clause 7.2 of the Agreement

makes it clear that the respondent must first comply with his obligation to pay not only the purchase price for the members interest but also the amount agreed for the stock, before he is entitled to receipt of any of the documents specified in clause 7.1. It states that the "*the documents referred to in Clause 7.1 shall be held by the Attorneys until the SELLERS notify the Attorneys in writing that the PURCHASER has complied with [his] obligations as set out in Clause 5.1, and that such documents may be released to the PURCHASER, or upon being provided with satisfactory proof from the PURCHASER that she has complied with her obligations as set out herein*".

[57] Put differently, the applicants' obligations to deliver the documents referred to in paragraph 7.1 to the respondent arise only once he has made full payment of the amounts referred to in clause 5.1, which includes payment for the stock.

[58] In any event, the applicants have explained in detail in the replying affidavit that the relevant documents have been prepared and/or provided to the respondent. In many instances, the applicants' compliance is also evidenced by documents attached to the replying affidavit.

[59] The respondent also relies upon an alleged failure to comply with clause 7.3 of the Agreement. This clause requires delivery of certain additional documents "*without undue delay after the Signature Date*". In contrast to clause 7.1, however, these documents must be delivered directly to the respondent, and the obligation is not contingent upon the fulfilment of the respondent's payment obligations. The documents in issue include: all minute books, books of account and records of Sawatdi (7.3.1); the original CK1 documents (or a certified copy) (7.3.2); all other documentation relevant to Sawatdi and a complete list of any assets and liabilities of Sawatdi (7.3.3).

[60] The respondent makes much in its answering affidavit of the importance of these documents for the proper functioning of the business.

[61] On the papers before me, however, I am unable to find that the applicants have

breached this clause. In relation to each of the categories of documents, the applicants have said in their replying affidavit that they have indeed delivered them to the respondent. For example, in relation to the requirement that all minute books, books of account and records of Sawatdi be delivered, the applicant states that: "*Such documents were hand delivered to Respondent after the consummation of the agreement*". Similar allegations are made in relation to the applicants' obligations under clause 7.3.2 and 7.3.3.

[62] Notably, the applicants also make the point that, prior to the filing of the answering affidavit, on or about 20 July 2023, the respondent had never complained that he had not received any of these documents, nor called for any additional information falling into these categories.

[63] Given that this is a defence raised by the respondent, I must consider the applicants' version in the reply, and the probabilities. In light of the respondent's protestations as to the importance of these documents, it is extremely doubtful that he would not have called for them to be produced much earlier than 20 July 2023 if he had indeed not received them as alleged. There is however no evidence of this, nor of a complaint from the respondent that the applicants had failed to comply with clause 7.3 prior to the answering affidavit being filed. It follows, in my view, that it is more probable than not that the applicants have substantially complied with their obligations in relation to the documents.

[64] In addition to the above, the respondent alleges that there has been a breach of clause 10.1, the indemnity clause of the Agreement, in that the overdraft on the account of Sawatdi was not settled by the applicants. In the replying affidavit, in response to this allegation, the first applicant states that the overdraft was settled by him prior to the take-over date, whereafter the bank account was closed. Regrettably, neither party has produced evidence by way of bank statements in support of their allegations. In my view, it is the applicants' version in reply that I must favour. Notably, if the respondent's allegation in this regard is correct, then it is somewhat surprising that he has not instituted a counterclaim for the amount alleged to be outstanding. If the

amount had been specified, and supporting documents in the form of bank statements attached to the answering affidavit, and the respondent had counterclaimed for the amount, I may well have been inclined to grant such an order. In the absence of a counterclaim for this amount, particularly given that the respondent has instituted a counterclaim (which is dealt with below), the probabilities, on the papers before me, are that overdraft has been settled.

[65] Finally, the respondent refers obliquely to a number of other complaints against the applicants, including that a separate arrangement made with the applicants in relation to the installation of an inverter at an Internet café owned by the applicants was not honoured, and that the applicants are attempting to recover their deposit paid to the landlord. In my view, particularly given the paucity of information in the respondent's answering affidavit relating to the terms of the café arrangement and the cost of the inverter, or what was agreed between the parties in relation to the rental deposit and its value, these also do not justify the respondent's refusal to pay the balance of the amount owing for the stock. In this regard, it should also be noted that the Agreement contains a non-variation clause. The parties agreed, *inter alia*, that no amendment or waiver of the Agreement shall be of any force or effect unless reduced to writing and signed by the parties. Even if there were separate oral arrangements in relation to the inverter and the rental deposit, these do not affect the applicants' rights under the Agreement, not having been reduced to writing and signed by the parties.

[66] I should mention that nothing, including my findings on these issues above, precludes the respondent from submitting a dispute to arbitration, including a claim for delivery of any documents that may be outstanding, or payments of any amounts still alleged to be owed in terms of clause 10.1 of the Agreement. For present purposes, my findings are solely to the effect that the respondent has not established that his failure to pay the outstanding amount for the stock is justified.

The respondent's counterclaim

[67] Finally, the respondent alleges that he has a counterclaim in the amount of R 90 000.00 against the applicants, being the reasonable cost of repair of the air conditioning system at the premises of the liquor store. The respondent's allegation is that there was a latent defect in the premises as the air conditioning is totally defective. The respondent says that "*According to a quote that I have received, and which is discussed underneath, it will cost approximately R90 000 to repair and I have a counterclaim in this regard*". The quote referred to is, however, not attached to the answering affidavit.

[68] In my view, this is clearly not a claim for a liquidated amount of money. The reasonable costs of the repair will have to be proven. Accordingly, this is not a claim within the purview of clause 11.8.2. While the respondent may have a claim against the applicants, this is one that must be submitted to arbitration in accordance with clause 11.1.

[69] I emphasise that it does not follow that because I am permitted to exercise jurisdiction, by virtue of clause 11.8.2, over the applicants' claim for unpaid stock, that I must necessarily exercise jurisdiction over the counterclaim. The respondent's counterclaim is not for liquidated amount of money. Nor is it a defence to the claim.[11] In *Altech Data (Pty) Ltd v M B Technologies (Pty) Ltd*[12] the Court concluded:

> *"In the result, in my judgment, applicant's claim for payment of the portion of the purchase price is therefore an undisputed claim and the counterclaim for damages (which is in dispute) cannot be set off against applicant's claim (see the approach of Didcott Jin Parekh's case supra).*

[70] I reach the same conclusion in this case in relation to the respondent's counterclaim. Following the order in that judgment, however, it appears to me

[11] See *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others*, supra, at 305F–H.
[12] *Supra*, at 763 D–E.

to be inappropriate to grant an order dismissing the respondent's counterclaim, lest it be considered to have the effect of *res judicata* between the parties.

Condonation and strike out applications

[71] The respondent's answering affidavit was filed out of time. It had to be filed 28 June 2023 but was 11 business days late.

[72] The respondent has applied for condonation, which is opposed by the applicant. I am satisfied that a case for condonation has been made out.

[73] Finally, I should mention that the applicant has taken umbrage at the respondent's reference to various without prejudice letters that were exchanged between the parties in June 2023, and their attachment to the answering affidavit. The applicants have applied for the allegations and the attachments to be struck out of the answering affidavit. This judgment has not turned on any aspect of these letters. It is accordingly unnecessary for me to strike them out.

Order

[74] In the circumstances, I make the following order:

1. The late filing of the respondent's answering affidavit is condoned;

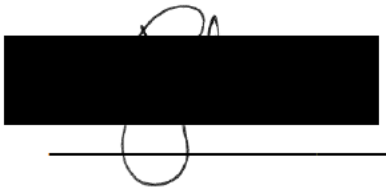
2. The respondent is ordered to pay the applicants:

    a. the amount of R 312 813.40;

    b. interest on that amount at the prescribed rate of interest *a tempore morae* from 19 April 2023 to date of payment;

3. All other disputes between the parties may be submitted to arbitration in terms of clause 11.1 of the Agreement;

4. The respondent is ordered to pay the applicants' costs of this application.



GOTZ AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 6 February 2024
Date of Judgment: 28 June 2024

Appearances:

For the Applicant: S B Friedland (Attorney) of Beder-Friedland Inc

For the Respondent: No appearance