IN THE HIGH COURT OF SOUTH AFRICA

KWA-ZULU NATAL DIVISION, PIETERMARITZBURG

CASE NO: 9902/2017P

In the matter between:

CEDARWOOD PROPERTIES (PTY) LIMITED	**Applicant**
and	
DICKINSON AND THEUNISSEN INC	**First Respondent**
JASON IAN DOLD	**Second Respondent**
and	
JASON IAN DOLD	**Third Party**

Coram: Koen J
Heard: 10 and 11 June 2019 and 31 July 2019
Delivered: 29 August 2019

ORDER

---

1. The first respondent is directed to pay the sum of R3 662 423.41 to the applicant with interest thereon at the rate of 10,25 per cent per annum from 21 July 2017 to date of payment;

2. The first respondent is directed to pay the applicant's costs, such costs to include that of senior counsel where employed, but excluding all costs relating to the answering affidavit, the replying affidavit, and the costs of the hearing before Mbatha J on 27 August 2018.
3. The third party is directed to pay the sum of R3 662 423.41 together with interest thereon at the rate of 10,25 per cent per annum from 21 July 2017 to date of payment of that amount by the first respondent to the applicant, to the first respondent;
4. The third party is directed to pay the first respondent's costs in respect of the third-party proceedings against him.

J U D G M E N T

KOEN J:

[1] The applicant, on motion, claims payment of the sum of R3 662 423.41 together with interest thereon at the rate of 10,25 per cent per annum *a tempore morae* from 21 July 2017 to date of payment, and the costs of the application.[1] The amount claimed represents a portion of the nett proceeds of the purchase price of an immovable property sold by the applicant to Rospa Trading 231 CC ('the purchaser'). The first respondent was the conveyancer appointed to attend to the registration of transfer of ownership of the property. The amount claimed was paid by the first respondent to the second respondent, Mr Dold ('Dold') whose trust, the Dold Family Trust, holds 50 per cent of the shares and a loan account in the applicant. The other two shareholders each holding 25 per cent are the Regsty Trust, represented by Mr Styger ('Styger'), and the Herman Klopper Family Trust, represented by Mr Herman Klopper ('Klopper'). Dold, Styger and Klopper are the directors of the applicant. Styger and Klopper also, indirectly, through Austin Crossing (Pty) Limited hold a loan account in the applicant. Nothing material to this judgment turns on the separate identity of the entities referred to above, unless specifically raised, and the various role players shall hereinafter be referred to by the main protagonists of each, simply

[1] In the applicant's heads the applicant asks that the costs include the costs of senior counsel.

as Dold, Styger or Klopper. In their discussions and dealings Dold, Styger and Klopper did not always maintain a clear distinction between these entities and their personal interests.

[2] The applicant contends that the amount claimed should have been paid to it on registration of transfer. The first respondent and Dold contend that contractually the amount was to be paid to Dold, as indeed it was, whether directly to him or his trust or indirectly to creditors at his direction. In the event of the court however finding that this was not so, and directing the first respondent pay the amount claimed, or any amount to the applicant, then the first respondent claims, as against Dold as third party, that he be directed to pay the amount and costs so ordered to the first respondent.

[3] The aforesaid conflicting contentions of the applicant and the first respondent gave rise to material disputes of fact between the parties as to what the agreement regarding the payment of this nett balance of the proceeds on registration of transfer entailed. On 27 August 2018 Mbatha J referred the following issues to oral evidence:

(a) whether an agreement was concluded on 21 July 2016 between the shareholders and the directors of the applicant as to the first respondent's disbursement of the free residue of the proceeds of the sale, which sale occurred in terms of the Sale Agreement and Addenda thereto (annexures 'C2', 'C3' and 'C4' to the applicant's founding affidavit), and if so, what the terms of such agreement were.

(b) whether the first respondent, as elected conveyancer, had acted in terms of the agreement (if established), alternatively whether the first respondent had breached the applicant's mandate to it, when it paid the amount of R3 662 423.41 to the second respondent.

(c) whether the first respondent as appointed conveyancer was obliged to pay the amount of R3 662 423.41 directly into the bank account of the applicant, pursuant to the sale of the going concern upon transfer of such concern to the purchaser.

(d) whether the first respondent, as appointed conveyancer, is obliged to pay the amount of R3 662 423.41 to the applicant.

(e) whether the third party should indemnify the first respondent in the event of the court finding that the first respondent is liable to pay the applicant the amount of R3 662 423.41.

[4] Styger testified for the applicant and Mr Clinton Smith ('Smith'), an admitted attorney (but not an admitted conveyancer[2]) testified on behalf of the first respondent. The applicant also adduced the evidence of Mr de Beer as an expert in accounting matters relating to the applicant. The second respondent/third party (i.e. Dold) was in default of appearance.

[5] The evidence to resolve these disputes of fact must be viewed against the background which resulted in the property being sold and transferred.

[6] For some time, prior to the events giving rise to this application, there had been discord amongst the shareholders of the applicant. The detail thereof is irrelevant to this judgment. It however resulted in a meeting being held on 21 July 2016 at Cathkin Valley attended by Styger, Klopper, Dold, Smith and Dold's accountant, Mr Raymond Govender, to discuss various options to terminate the shareholders' shareholding in the applicant. These included amongst others the property being sold and the applicant thereafter being would up voluntarily with all creditors being paid (which would inter alia include the South African Revenue Service for amongst other capital gains tax on the sale of the property, any outstanding income tax, and dividends tax in respect of the final distribution, and the loan accounts being discharged) and final dividend distributions thereafter being paid to the shareholders. If no offer for the purchase of the property from a third party materialized then Dold would buy out the other shareholders, or failing him securing the required finance, Klopper or his nominee would purchase Dold's shareholding.

[7] At the conclusion of the meeting, Smith authored a memorandum, signed by Dold, Styger and Klopper, which recorded inter alia that:

(a) The applicant would sell the property to one Goolam or an entity nominated by him;

(b) The directors agreed not to disburse an amount of R1 million until the company's auditors and the parties agreed the final loan account figures;

(c) In the event of the offer not materialising within 30 days of the signed sale agreement, the management company must expedite the main and/or lease agreement. Within 30 days of the Dold Family Trust being advised of same,

[2] The first respondent however conducts a practice as admitted conveyancers, the conveyancing being attended to by other professionals in the firm. The instructions as to what had to happen to the balance of the net proceeds on registration of transfer however emanated from Smith.

guarantees for 50 per cent of the company shares must be delivered in the sum of R4,75 million.

(d) In the event of the Dold Family Trust not securing the guarantee for the shares within 30 days of being advised of the renewed lease, Herman Klopper or his nominee would purchase Jason Dold's 50 per cent shares in the entity from him in the sum of R3,75 million within 30 days after the Dold Family Trust is unable to provide the guarantee.

Subsequent to the meeting, and on his return to his office, he prepared a typed version of the memorandum and also dictated a file note, the contents of which was consistent with the above memorandum. The file note in addition recorded that once he was in possession of all the details and documents, he would be able to prepare the sale agreement in which the first respondent would be appointed as the conveyancers to attend to the transfer of the property.

[8] Smith testified that it was at this meeting that it was agreed that there would be a split of the net proceeds and payment made to the shareholders in the percentages that they held shares, so Dold would get 50 per cent thereof and the other shareholders would get the balance of 50 per cent between them. They thereafter would 'sort out' the loan accounts once they either reached agreement on the loan account balances due to each, or not, and he thought that they gave themselves a month to try and sort out such loan account disputes.

[9] According to Styger it was also agreed at this meeting that the outstanding rates and taxes on the property would, contrary to normal practice, be paid from the proceeds of the sale. He maintained that Smith confirmed that this could be done. Smith did not dispute this evidence.

[10] Neither the agreement that the rates and taxes would be paid from the proceeds of the sale, as contended for by Styger, nor the split in the payment of the proceeds of the sale, as contended for by Smith, was recorded in either the minute or the subsequent file note.

[11] On 21 July 2016 the board of directors of the applicant resolved to sell the property for an amount of R9,5 million, excluding VAT, and authorised Styger to sign all the required documentation on its behalf to give effect to the sale. A written resolution to that effect was signed by all three directors dated 21 July 2016.

[12] In compliance with the instructions he had received at the meeting, Smith prepared a written agreement between the applicant and the purchaser in respect of the sale of the property. The last dated signature appearing thereon is 30 August 2016. The terms of this agreement material to this application included the following:

(a) the property was sold for a purchase price of R9,5 million;

(b) the effective date of the agreement would be the date of transfer of the property;

(c) the attorneys attending to the transfer of ownership would be the first respondent;

(d) the purchase price would be paid by the purchaser to the attorneys on the seller's behalf upon the effective date, without deduction or demand at Pinetown and such payment would be effected within 14 days of signature of the purchaser and/or seller, calculated from whichever is the last dated signature of the agreement. The payment would be affected in cash or in the form of an approved guarantee acceptable to the seller for payment of the purchase price;

(e) any cash moneys held by the attorneys would be retained in an interest-bearing account with such interest earned prior to the effective date to accrue to the purchaser;

(f) payment of the purchase price would only be regarded as having taken place once the proceeds thereof had been cleared in the applicant's bank account;

(g) the agreement constituted the whole contract between the parties and no variation, addition thereto or deletion from or cancellation thereof would be effective unless reduced to writing and signed by or on behalf of the parties.

[13] On 30 August 2016 an addendum to the agreement was also concluded. The contents thereof is irrelevant to this judgement. On or about 9 September 2016 a further addendum was concluded which in its final form provided that an amount of R4,5 million of the purchase price would be paid to Meyer Van Sittert & Kropman Attorneys (the 'applicants attorneys') within two working days of signature which would be invested by them in an interest-bearing account with a recognised financial institution pending registration of transfer, when the amount would be released to the applicant, with interest accruing thereon to accrue to the purchaser. It was further provided that the balance of the purchase price in the sum of R5 million would be payable on registration of the transfer from the proceeds of a loan granted to the

purchaser and secured by a guarantee to be furnished to the conveyancers within 14 working days of written request by the conveyancers.

[14] Pro forma distributions headed 'Cedarwood Properties Pro forma Distribution' were provided to give the shareholders an idea of what the ultimate dividend would be. However there were calculations still to be done of what had to be paid before the balance representing the final dividend could be distributed amongst the shareholders.

[15] Styger correctly pointed out that the applicant always retained the obligation to pay the capital gains tax liability on the sale of the property. He also communicated this to Smith on 19 September 2016. On 20 September 2016 he addressed a further letter to Smith clarifying any 'misunderstanding on the way forward'. This letter confirmed that after the loan accounts were agreed to and the rates were paid from the proceeds of the sale, the balance of the moneys accruing to the applicant would be paid to the management company on behalf of the applicant, for it to pay all the tax liabilities of the applicant, to wind down its affairs and finally pay the closing dividend. In his reply on 22 September 2016 Smith confirmed this as 'the correct way to go forward …' Styger found comfort in this assurance. He added that he was never advised that the first respondent intended to distribute any of the proceeds to Dold. That evidence was not disputed.

[16] On 10 October 2016 Styger signed an 'Instruction to register transfer' prepared by Nalini Santigen of the first respondent's conveyancing department instructing the first respondent to attend to the registration of the transfer and to pay inter alia, rates, taxes, levies owing to any local authority and for the balance to be paid into the account of the account holder in the name of the applicant held with First National Bank.

[17] On 20 July 2017 an email was forwarded by the first respondent to Styger, Klopper and Dold to which was attached a conveyancer's final statement of account dated 17 July 2017. The statement reflected the nett balance of funds under the control of the first respondent, in the sum of R3 662 423.41, as due to Dold. This immediately resulted in a written demand by the applicants attorneys addressed to the first respondent that this amount was to be paid to the applicant and not Dold. The first respondent's response was that 'Jason Dold and our offices have always held the view that … we were to disburse the money held by us as per Mr Dold's instructions save for the R1 million.'

[18] Mr Styger denied that there was any agreement that the free residue of the sale would be paid out to the three shareholders. He said it might have been discussed but he was adamant that there was no agreement on such a distribution. He maintained that whatever was agreed was recorded in the signed minute. If it was not recorded in the minute (or the sale agreement) then it was not agreed. He also disputed that Dold or the first respondent could have come under such an impression based on the 'Pro forma distributions' as according to those statements Mr Dold had the prospect at best to receive R2.9 million, and not the R3 662 423.41 which he was paid by the first respondent. He was adamant that before one starts winding up a company one needs to know what the liabilities are, not only outstanding tax liabilities but also other liabilities. He admitted that on 21 July 2017 R2 million was paid from the applicant's account to Austin Crossing, in respect of its loan account and that this was an overpayment. He agreed that this was a 'knee-jerk' reaction to the payment of portion of the net proceeds by the first respondent to Mr Dold, as the loan account balances had not been agreed. On 10 August 2017 he and Klopper paid R440 825 in respect of the overpayment of the loan account. He described the fact that the rates and taxes on the property would be paid from the proceeds of the sale (on which the sale agreement was silent) as being 'a mere arrangement on the transfer attorneys instructions'.

[19] Although the property was sold and capital gains tax has been paid in respect of the capital gain to the applicant on the sale of the property, the applicant has not been wound up, but is basically dormant. The final dividend has not been calculated, nor dividends tax or a final dividend paid. Mr De Beer, a chartered accountant, confirmed that there was still a dispute as to the balances owing in respect of the loan accounts and the dividends tax cannot be calculated as long as this dispute remains. According to him there is also no money for payment thereof.

[20] Smith reiterated that it was agreed at the meeting of 21 July 2016 that there 'would be a split of the proceeds between the shareholders in the percentages that they hold shares. So, Dold would get 50 per cent and the other shareholders would get the balance of 50 per cent between them. They thereafter would sort out the loan accounts….' He explained that this term was omitted from the minute prepared by him, that it should have been included, but that the omission was an oversight on his part. He pointed out that there were discussions which the applicant accepted but which were also not contained in the minute, namely the rates being payable from

the proceeds of the sale prior to transfer, rather than by the applicant. Regarding the subsequent addendum providing for payment of the R4,5 million to the applicant's attorneys trust account he said that he 'understood' that to mean that it was the portion of the proceeds that would go to those two shareholders. He accepted that on the scenario he envisaged, the shareholders would have to refund the applicant to pay liabilities and that if any of the shareholder trusts would have been sequestrated before that could be achieved, it would have resulted in a problem and created a number of risks.

[21] Smith confirmed that the amount of R3 662 423.41 was paid to creditors of Dold and to Dold himself. He conceded that 'in the ordinary course of (a) conveyancing transaction the seller will be paid' but maintained that the instruction from Dold, Styger and Klopper was that they would receive their moneys and fight about the loan accounts later, although that would deviate from the norm. He accepted that this could create an 'unworkable situation' and that it is 'hugely messy.' He further agreed that the first respondent would take its instructions from the terms of the sale agreement but explained that there was a deviation from the terms of the written agreement as to the split of the proceeds. He accepted that this should have been incorporated in the sale agreement concluded after that initial meeting, which agreement did not contain such a provision and in fact also contained a non-variation clause.

[22] It is significant that although it was maintained that Dold had given him the express instruction regarding the splitting of the proceeds, Dold did not raise the omission of that instruction from the memorandum which he signed. In fact all the signatories did not notice this alleged omission. Smith was unable to point to any provision in the sale agreement, or any mandate, that the proceeds be split as he contended for. The manner of distribution he contended had been agreed would also not be business like. Neither Govender nor Dold, who both attended the initial meeting, testified to support Smith's version. There was no suggestion that they were not available to testify.

[23] Smith also accepted that the actual distribution was not in accordance with what he contended had been agreed. The reality is that he simply took what was reflected as the remaining balance, and paid it to Dold. He candidly conceded that he did not follow the mandate from the applicant as contained in the 'Instruction to register transfer'.

[24] On the probabilities, the case presented by the applicant was overwhelming. The written sale agreement required payment of the proceeds to the applicant, which is in accordance with normal conveyancing practice. According to the express terms of the agreement payment would only have occurred once the funds were cleared in the applicant's account. The subsequent correspondence and 'Instruction to register transfer' are consistent only with payment having to be made to the applicant to discharge all liabilities, including any disputed liabilities regarding the loan accounts once resolved, capital gains tax, outstanding income tax and dividends tax as part of the liquidation of the applicant which it was contemplated was to follow. The contrary 'agreement' contended for by Smith is not business like, not workable and fraught with dangers. It is improbable that such an agreement was concluded. Not a single document was forthcoming from Smith to reflect the terms of the agreement which he contended applied. Indeed the documents that were produced are all inconsistent with the agreement he contended for. The amount claimed should have been paid by the first respondent to the applicant and not to Dold and his creditors.

[25] A point raised in argument was whether the applicant's claim for payment of the amount claimed was one for specific performance of what the first respondent should have performed, or whether more appropriately the applicant's claim is one for contractual damages arising from the breach of the mandate granted by the applicant to the first respondent. The first respondent never incurred a contractual obligation in its own right to pay the sum of R3 662 423.41 to the applicant. The obligation it incurred in terms of its mandate was to pay the balance of the net proceeds from the sale, which happen to be R3 662 423.41, to the applicant, which it failed to do. The applicant's remedy would accordingly more appropriately be one for contractual damages according to its positive interesse to place in the position it would have been in had the breach of the mandate not occurred.

[26] Mr Ploos van Amstel for the first respondent urged me to accept, with reference to the contemplated liquidation of the applicant and accepting certain amounts as representing at least the minimum balances of liabilities and potential proposed distributions, that the applicant's damages would be significantly lower than the amount claimed. Alternatively, the argument would be that the applicant had simply failed to prove its damages.

[27] In my view, that argument proceeds on an incorrect factual premise. As much as a liquidation of the applicant was contemplated, it has as yet not been affected,

and for a variety of reasons may never proceed. Even if the claim was to be treated as properly one for contractual damages, the damages of the applicant must be assessed with reference to the position it would have been in immediately after the balance of the proceeds from the sale should have been paid to the applicant rather than to Dold and his creditors.

[28] In so far as the claim would be one for specific performance, it is of course trite law that such remedy is always subject to a court's discretion.[3] The plaintiff always has the election whether to proceed for a claim for specific performance or to claim damages for the breach. It is however not a choice which the defendant enjoys.[4] It is for the defendant who seeks to avoid its application to allege and prove facts on which the court can exercise its discretion in its favour.[5] No such facts were alleged by the first respondent, or proved.

[29] It seems to me more appropriately that the claim is properly one for damages for breach of the mandate. Such damages are however capable of prompt and ready ascertainment on the facts of this matter and happen to coincide with the amount that should have been paid by the first respondent to the applicant on registration of transfer. No facts have been proved which would justify these damages being reduced in any way.

[30] At best, it was argued that the applicant would be benefited unduly as it would allegedly receive the full balance of the net proceeds whilst at the same time also enjoying the benefit that the loan account in respect of the Dold Family Trust would have been discharged. That argument overlooks the legal principle that in order for a debt to be discharged it is required that there be agreement between the parties to that effect.[6] Whatever was paid by the first respondent to Dold did not discharge whatever might be owing by the applicant to the Dold Family Trust. The appropriate remedy is that the applicant should succeed for the amount of its claim with the first respondent being entitled to proceed against Dold for the amount it has to pay to the applicant. In the event of the former not being able to reimburse the first respondent, the normal remedies on execution would be available to the first respondent

---

[3] See inter alia *Candid Electronics Pty Ltd versus Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) at 463 – 465.
[4] *Hayes v King Williams Town Municipality* 1951 (2) SA 371 (A) at 378.
[5] *Tamarillo (Pty) Ltd v Aitken (Pty) Ltd* 1982 (1) SA 398 (A).
[6] *ABSA Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) para 18.

including attaching for example Dold's right title and interest to any amounts to which he may become entitled from the Dold Family Trust.

[31] To the extent that the applicant's claim is properly one for damages and the applicant has used the application procedure, I am of the view that it should not be non-suited for that reason as the damages are capable of prompt and ready ascertainment.[7]

[32] Regarding costs, although the first of respondent's version has been rejected following the hearing of oral argument, its initial response to the demand received from the applicant's attorneys suggested an agreement with different terms to that contended for by the applicant. That gave rise to a material dispute as to the manner in which the balance of the proceeds should have been disbursed. The applicant was perhaps fortunate that the application was not dismissed for that reason when the matter initially came before Mbatha J, rather than it being referred to oral evidence.

[33] The applicant has been successful and is entitled to its costs, such costs include the costs of senior counsel. The costs shall however exclude all costs relating to the answering affidavit, the replying affidavit, and of the hearing before Mbatha J on 27 August 2018.

[34] The first respondent has been successful with the third party proceedings. It is entitled to its costs of the third-party proceedings against the third party. The first respondent was however not justified in believing that it was entitled to act as it did. I am therefore not disposed to granting an order that it be entitled to recover in respect of the costs order made against it in favour of the applicant, from the third party.

[35] The following order is granted:

1. The first respondent is directed to pay the sum of R3 662 423.41 to the applicant with interest thereon at the rate of 10,25 per cent per annum from 21 July 2017 to date of payment;
2. The first respondent is directed to pay the applicant's costs, such costs include that of senior counsel where employed, but excluding all costs relating to the answering affidavit, the replying affidavit, and the costs of the hearing before Mbatha J on 27 August 2018.

---

[7] See also *Manuel v Economic Freedom Fighters & others* [2019] ZAGPJHC 157; [2019] 3 All SA 584 (GJ)

3. The third party is directed to pay the sum of R3 662 423.41 together with interest thereon at the rate of 10,25 per cent per annum from 21 July 2017 to date of payment of that amount by the first respondent to the applicant, to the first respondent;
4. The third party is directed to pay the first respondent's costs in respect of the third-party proceedings against him.

_____

KOEN J

APPEARANCES

APPELLANT'S COUNSEL:	Mr L. Combrink SC
INSTRUCTED BY:	Meyer Van Sittert & Kropman c/o Tomlinson Mnguni James (Ref: R Stuart Hill)
RESPONDENT'S COUNSEL:	Mr J Ploos van Amstel
INSTRUCTED BY:	Bowman Gilfillan Inc (Ref T Nichols/cn/6174960) Trudie.nichols@bowmanslaw.com c/o AK Essack Morgan Naidoo (Ref. Mr Naidoo)