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PROPERTY LAW UPDATE

| SUMMARY OF JUDGMENT |

BUYER SIGNING ON BEHALF OF AN ENTITY TO BE FORMED HELD PERSONALLY LIABLE

***Jordaan v Rajcic* (2023/034165) [2024] ZAGPJHC 525 (31 May 2024)**

For sound commercial reasons, it is sometimes necessary for a purchaser to sign an agreement as promoter for a company that he intends to incorporate. When incorporated, the company would formally be the seller. What happens when the promoter delays incorporation of the company but at the same time continues to perform the obligations of the purchaser under the agreement?

The judgment and summary below highlight the reasoning of the court.

FACTS

In January 2017, Jordaan sold his immovable property to Rajcic for R5 million. Rajcic signed the agreement in his capacity as a representative of a company to be formed (i.e., as promoter of an unincorporated entity). The agreement stipulated that the purchase price was to be secured by delivery of a bank guarantee within 90 days of the fulfilment of the last suspensive condition.

The last suspensive condition required from the purchaser to succeed in an application for rezoning of the property, at his own costs. Rajcic had made an application and the rezoning was granted on 1 September 2021. Thereafter the 90 day period had elapsed without delivery of a the bank guarantee.

Whilst the rezoning application was pending, Jordaan and Rajcic concluded an addendum (February 2018) in terms of which Rajcic would take occupation of the property and pay a monthly occupational rental of R18 000. Rajcic fell into arrears.

Due to the breach of both the sale agreement and the addendum, Jordaan launched the present application for an order obliging Rajcic to specific performance of his obligations under the sale agreement. Jordaan relied on section 21(2)(a) of the Companies Act 71 of 2008 ("the CA") and argued that Rajcic is jointly and severally liable for the liabilities created in the sale agreement and the addendum. (Section 21(2) essentially provides that persons entering into contracts on behalf of a company to be formed, are jointly and severally liable in terms of the pre-incorporation contract in certain circumstances.)

At the time of the launching of these proceedings, a new company had not been formed by Rajcic; it was only established in the course of the litigation.

HELD

- Both the sale agreement and the addendum indicate that Rajcic was acting on behalf of a company to be formed.
- Nonetheless, with regard to the addendum, the beneficial occupation and usage was enjoyed by Rajcic – a company not yet incorporated was incapable of taking occupation, using water, electricity and armed responses as it did not exist and never existed as at the commencement of the litigation.
- Accepting for purposes of the judgment that the liabilities attracted in the sale agreement, particularly the one to deliver a bank guarantee/s is the liability of the company to be incorporated, the question arises what the position was after the 90 days had expired and the company was not formed. Who was in breach?

Determining which party breached the agreement

- In terms of the sale agreement, the purchaser is defined as a company to be formed, at the time represented by Rajcic. In his representative capacity, Rajcic agreed that the purchase price will be secured by a bank guarantee to be delivered within 90 business days of fulfilment of the last suspensive condition.
- Rajcic is the party who ensured the fulfilment of the last condition (the rezoning), the company named in the sale agreement not having been formed at that time. Applying a literal, contextual and purposive approach, it must follow that Rajcic, and not the entity to be formed, was obligated to deliver the bank guarantee within the stated period. Notably, there was no provision in the agreement stating that the purchase price would be "secured by the company to be incorporated" and to be delivered by the company to be incorporated.
- Therefore a sensible and business-like interpretation of the relevant provision in the sale agreement, and taking into account the circumstances, it is safe to conclude that it was within the contemplation of both parties that Rajcic *personally* shall (a) secure the bank guarantee; and (b) deliver it within 90 days of the fulfilment of the last suspensive condition. An interpretation of the provision to the contrary would lead to absurdity – as the parties would not fix a date for fulfilment of the conditions within a limited time and, at the same time, entertain the option that the company may be incorporated long after the fulfilment of the last condition.
- In *Jones v Burlington Industries Inc* the following was said:
  "The liability of the promoter for a contract will depend upon the terms of the contract and the intent of the parties. There is a strong inference that a person intends to make a contract with an existing entity, rather than the to-be-formed corporation..It is settled by the authorities that a promoter, though he may assume to act on behalf of the projected corporation and not for himself, will be personally liable on his contract unless the other party agreed to look to some other person or fund for payment…"
- The same applies in the present matter. The question of liability is dependent on the terms of the agreement.
- On the facts the outcome is that by failing to comply with the undertakings, Rajcic personally breached the sale agreement. Since Jordaan has not elected to cancel the agreement, Rajcic must be held to his contractual undertakings.

Was section 21 of the Companies Act applicable?

- Although not necessary to make a finding in this regard (as the court found that Rajcic was personally liable) the following considerations would apply of section 21(1) of the CA was applicable. The section authorises a person to enter into a written agreement on behalf of an entity that is contemplated to be incorporated in terms of the CA but does not yet exist at the time. Rajcic presented himself as such a person.
- In terms of section 21(2)(a) of the CA, such a person is jointly and severally liable for the liabilities provided for in the pre incorporation contract while so acting, if the contemplated entity is not subsequently incorporated. In terms of the relevant section Rajcic would escape liability in his personal capacity if the entity is indeed formed.
- In contractual parlance, joint and several liability arises when two or more persons jointly promise in the same contract to do the same thing, but also separately promise to do the same thing. In this matter, having found that Rajcic promised to secure the undertaking and to deliver it to Jordaan in his personal capacity, the joint and several liability will not find application.
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CONCLUSION

Rajcic is directed to forthwith deliver to Jordaan, as agreed, a bank guarantee in the amount of R5 million from a recognised financial institution.