REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2022/050939

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

28/4/2023
DATE

SIGNATURE

In the matter between:

TFM HOLDINGS (PTY) LTD	First Applicant
TFM WYNBERG PROPERTIES (PTY) LTD	Second Applicant
TFM CUSTOMISING CENTRE (PTY) LTD	Third Applicant
TFM GAUTENG (PTY) LTD	Fourth Applicant
TFM MANUFACTURING (PTY) LTD	Fifth Applicant
TFM CONVERSIONS (PTY) LTD	Sixth Applicant
SIGNS FOR YOU (PTY) LTD	Seventh Applicant

and

SPECIALISED VEHICLE MANUFACTURER (PTY) LTD	First Respondent
TFM INDUSTRIES (PTY) LTD (in liquidation)	Second Respondent
ANNEKE BARNARD NO	Third Respondent
RALPH FARREL LUTCHMAN NO	Fourth Respondent
RANJITH CHOONILALL NO	Fifth Respondent

Neutral Citation: TFM Holdings (Pty) Ltd vs Specialised vehicle Manufacturer (Pty) Ltd (Case No: 2022/050939) [2023] ZAGPJHC 391(28 April 2023)

JUDGMENT

WESLEY AJ:

[1] This matter was originally launched in November 2022 as an urgent application but now comes before me as an opposed motion in the ordinary course. The applicants seek an order declaring that a memorandum of agreement that they, together with the second respondent ("TFM Industries"), concluded with the first respondent ("SVM") on 30 August 2022 ("the MOA") is either void *ab initio* or has been validly terminated. SVM opposes the application

[2] TFM Industries was wound up by order of this Court on 7 September 2022 and the third to fifth respondents in this application are insolvency practitioners who have been appointed as the joint provisional liquidators of TFM Industries. I refer to them collectively as "the provisional liquidators". They took no part in these proceedings.

[3] In order to understand the grounds on which the applicants claim an entitlement to the relief they seek, it is helpful first to set out the relevant factual background to the application.

The Facts

[4] Many of the facts are common cause. Insofar as some of the relevant facts are contested, because the applicants seek final relief I must of course accept SVM's version unless that version is "*'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.*"[1]

[5] The second to seventh applicants, and TFM Industries prior to its winding up, were all wholly owned subsidiaries of the first applicant ("TFM Holdings") and operated collectively as "the TFM Group". The TFM Group manufactures various industrial vehicles, for example waste compactors, cash-in-transit vehicles, mining trucks, fire engines and ambulances as well as components for industrial vehicles, fuel tanks and trailers. It also performs modifications on truck chassis and installs hydraulic kits. The third applicant ("TFM Customising") operates premises in Durban, while the fifth and sixth applicants ("TFM Manufacturing" and "TFM Conversions" respectively) operate premises in East London.

[6] The deponent to the applicants' founding affidavit, Mr Mcebisi Mlonzi, is the chairman of TFM Holdings. He purchased the TFM Group in 2016. The deponent to SVM's answering affidavit, Mr Madodowa Mhlwana, is a director of SVM. He

[1] **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at [56]

was also previously the CEO of TFM Industries, having been appointed to this position in March 2021. Both parties referred to him throughout as "Odwa" and I shall do the same.

[7] Mlonzi explains in the founding affidavit that in 2020, two of the key employees of TFM Industries resigned, requiring him to take over management of the TFM Group's businesses. This placed him under tremendous stress and prompted him to explore the sale of the businesses to someone who would be able to keep them running.

[8] Odwa in turn, together with other members of management, also wanted to keep the businesses running and were of the view that they could take them over successfully. They created a new company, SVM, and in April 2022 Odwa made an initial written offer on behalf of management for SVM to buy the businesses of the TFM Group. While this offer was rejected by Mlonzi, after a further deterioration in the position of the businesses, Odwa made a new offer to Mlonzi on or about 18 August 2022.

[9] On 29 August 2022, Mlonzi and Odwa met and Mlonzi indicated that he was prepared to sell the businesses to SVM but required that the agreement be concluded by 30 August 2022 so that a payment of R1 million in respect of the purchase price could be made on or before 2 September 2022. A new written agreement, the MOA, was therefore finalised in some haste, incorporating some of the provisions of the April 2022 offer but also a number of new provisions. The MOA was signed by the parties the next day, 30 August 2022.

[10] I discuss the specific terms of the MOA in some detail below. For now, I simply record that under the MOA, the TFM Group sold to SVM "*the Businesses*", defined

in the MOA to mean "*the businesses of [the TFM Group]*", for the amount of R5 million. The businesses were sold in a single indivisible transaction.

[11] Both parties were aware at the time the MOA was concluded that TFM Industries had significant potential liabilities, in the form of debts owed by Mlonzi as shareholder and potential liability arising from a contract with the City of Johannesburg. It was at least in part for this reason that SVM did not wish to purchase the shares of the firms making up the TFM Group, only their businesses, and the parties agreed that these debts would expressly be excluded from the sale.

[12] SVM alleges that it took possession of the businesses on 1 September 2022, including the various premises as well as the businesses' bank accounts, from which it subsequently transferred funds. SVM also paid for rentals, employees' salaries and certain creditors of the TFM Group after this date.

[13] While the applicants have disputed SVM's claim that it took possession of the businesses, they have not disputed that, as a matter of fact, SVM paid for rentals, employees' salaries and certain creditors of the TFM Group after 1 September 2022, and have themselves confirmed in the founding affidavit that after 1 September 2022 SVM was in sufficient control of TFM Industries' bank account that it was able to transfer the sum of R1 million out of that account.

[14] As for possession of the premises, it is common cause that on 15 November 2022 Marion AJ in the KwaZulu-Natal High Court (Durban) found that the applicants had spoliated SVM of possession of the premises of TFM Customising in Durban on 26 October 2022 and ordered the applicants to restore possession of the premises to SVM. While a similar application by SVM in the Eastern Cape High Court (East London Circuit Court) in respect of the premises of TFM Manufacturing

and TFM Conversions in East London was dismissed by Stretch J on 28 December 2022, this was on the basis that SVM had not established that a spoliation had occurred.

[15] In the circumstances, SVM's version that it took possession of the businesses on 1 September 2022 is not clearly untenable and I accept it for purposes of this application.

[16] It is not in dispute that SVM made payment of the first tranche of the purchase price, R1 million, on 2 September 2022 as required under the MOA.

[17] On 7 September 2022, however, this Court granted an order finally winding up TFM Industries. The order was granted consequent on an application that had been filed by a creditor on 20 April 2022, which application was not opposed at the time of the hearing. The grant of this order appears to have led to a falling out between Mlonzi and Odwa.

[18] On 4 October 2022, Mlonzi sent a WhatsApp message to Odwa requesting a meeting and stating, "*I need us to talk regarding you guys stopping using TFM in trading name immediately*". The two met on that date. At the meeting, they discussed the position of TFM Industries and whether an approach should be made to creditors or the provisional liquidators to make an offer to settle the claims of the liquidation creditors. Odwa told Mlonzi that he was trying to persuade a potential investor to buy out the creditors.

[19] By 11 October 2022 Odwa had not reverted to Mlonzi on whether he had been successful in his efforts and Mlonzi then sent him a WhatsApp indicating that he was handing the matter over to his attorneys to deal with. Odwa responded that this was "*probably the only option*" and Mlonzi then indicated that "*okay, therefore,*

we will take over and assume agreements are null and void". Odwa did not respond to this message. He says in the answering affidavit that he decided at this stage not to engage with Mlonzi any further.

[20] Mlonzi made a further attempt to contact Odwa by WhatsApp on 12 October 2022, to which Odwa also did not respond. On 18 October 2022 Mlonzi then sent a WhatsApp message to Odwa stating, "*I have tried to reach you now I will take action*", to which Odwa again did not reply.

[21] On 20 October 2022, the applicants, through their attorneys of record, then addressed a notice of breach, in terms of clause 20 of the MOA, to SVM. SVM's attorneys of record responded by letter on 24 October 2022 denying that SVM was in breach as alleged. In reply, on 26 October 2022, the applicants sent a letter to SVM in which they purported to cancel the MOA.

[22] SVM alleges that on the same date Mlonzi and the applicants forcibly took possession of both the Durban and East London premises. In consequence, on 1 November 2022 SVM launched an urgent application in the KwaZulu-Natal High Court (Durban) alleging that it had been spoliated from the Durban premises by the applicants on 26 October 2022. As I have mentioned above, the High Court granted SVM relief on 15 November 2022 ordering Mlonzi and the applicants to restore possession to SVM. The Court's decision is the subject of an application for leave to appeal.

[23] On 17 November 2022, TFM Customising launched an urgent application in this Court on an *ex parte* basis to interdict SVM and FirstRand Bank Ltd from withdrawing funds from a bank account held by SVM at the bank. This Court granted an order as sought on 18 November 2022, but after SVM approached the

Court on an urgent basis the Court reconsidered its decision and on 15 December 2022 made an order setting aside the *ex parte* order and directing the bank not to refuse to pay out funds from the account.

[24] Also on 17 November 2022, TFM Holdings, TFM Customising, TFM Manufacturing and Ritam Holdings (Pty) Ltd (TFM Holdings' shareholder) launched an urgent application in this Court for an interdict to prevent the provisional liquidators from proceeding with a sale of TFM Industries' assets that had been scheduled to take place on 24 November 2022. This Court granted an interdict on 23 November 2022, by consent between the applicants and the provisional liquidators.

[25] On 22 November 2022, SVM launched another urgent application in the Eastern Cape High Court (East London Circuit Court) alleging that it had been spoliated from the East London premises by Mlonzi and the applicants on 26 October 2022. As I have already said, the High Court dismissed that application on 28 December 2022, on the basis that SVM had not established that it had been denied access to the premises and had not therefore proved an act of spoliation.

[26] On 24 November 2022, the applicants then launched this application as an urgent application, intending to have the matter heard on 13 December 2022. As appears from the notice of motion, the applicants required that any respondent wishing to oppose the application deliver an answering affidavit on or before 12h00 on 2 December 2022, less than six clear days later. SVM ultimately delivered its answering affidavit on 7 December 2022, three court days later than provided for. The applicants delivered their replying affidavit the next day, 8 December 2022.

[27] The matter did not proceed on 13 December 2022, for reasons that were not explained to me and instead, as I have said, now comes before me as an opposed motion, on the same papers.

[28] The applicants seek the following substantive relief:

[28.1] declaring the MOA void *ab initio*;

[28.2] in the alternative, declaring that the MOA has been duly cancelled;

[28.3] restoring, as far as possible, the status *quo ante*.

[29] In support of the first prayer, the applicants allege that the MOA is void either because it is impermissibly vague or because performance under the MOA is impossible, or became impossible once a winding up order was granted against TFM Industries on 7 September 2022.

[30] In support of the second prayer, the applicants allege that SVM by its conduct repudiated the MOA, which repudiation the applicants accepted and relied on to cancel the MOA.

[31] I deal with each of these claims in turn.

The claim that the MOA is void for vagueness

[32] The applicants do not dispute that the parties to the MOA all intended to conclude a valid agreement of sale.[2] They contend, however, that the parties did not manage to achieve this, because the agreement they concluded is, as a matter of law, void because it is impermissibly vague. The applicants put up three

[2] This is expressly stated in paragraphs 3 and 41 of the supplementary heads of argument delivered on behalf of the applicants and was confirmed by counsel in oral argument

arguments in support of this contention:

[32.1] First, they allege that the *merx* is described in an incomplete and imprecise manner;

[32.2] Second, they submit that the MOA includes a promise to conclude an agreement in the future, which they say is an unenforceable *pactum de contrahendo*;

[32.3] Third, they contend that it is impossible to determine from the MOA when the applicants had to perform the obligation to deliver the *merx* and when ownership and risk in the *merx* would pass.

[33] I consider each argument in turn. In interpreting the MOA, I am guided by the following now well-established principles.

[34] The purpose of interpretation of an agreement is to discern the common intention of the parties to the agreement. That intention is to be determined by considering, as a unitary exercise, the language used by the parties in the agreement, understood in the context in which it is used, and having regard to the purpose of the provisions of the agreement. While the starting point of the exercise must inevitably be the words used in the agreement, it is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.[3] Relevant extrinsic evidence as to context and purpose should

[3] **University of Johannesburg v Auckland Park Theological Seminary and Another** 2021 (6) SA 1 (CC) at [64] – [66]; **Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty)**

therefore always be used to interpret the agreement, even where the words of the agreement appear clear.[4] That evidence may relate to conduct by the parties before or after the conclusion of the agreement, but only insofar as it is relevant to an objective determination of the meaning of the words used in the agreement.[5] Evidence of the parties' subjective intentions or understanding of the agreement is therefore inadmissible.[6] Evidence of the parties' prior negotiations is also inadmissible.[7]

[35] Insofar as the applicants claim that the MOA must be interpreted so that it is void for vagueness, even though they intended it to be effective and binding, I am also guided by the following specific principles established in respect of such claims.

[36] The general principles were summarised by the SCA in **Namibian Minerals Corporation Ltd v Benguela Concessions Ltd** 1997 (2) SA 548 (A) at 561G - J as follows:

"Once a Court is called upon to determine whether an agreement is fatally vague or not, it must have regard to a number of factual and policy considerations. These include the parties' initial desire to have entered into

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Ltd and Others 2022 (1) SA 100 (SCA) ("**Capitec**") at [25], both referring to **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) ("**Endumeni**") at [18]

[4] **University of Johannesburg v Auckland Park Theological Seminary** *supra* at [63] – [69] and [81]; **Capitec** *supra* at [38]

[5] **Capitec** *supra* at [48] and [52] and [54]

[6] **Capitec** *supra* at [48]

[7] **Capitec** *supra* at [48], although this evidence is excluded not because it is not objective, but rather because permitting evidence of prior negotiations undermines the very certainty that capturing a final agreement in writing is intended to achieve – see **Tshwane City v Blair Atholl Homeowners Association** 2019 (3) SA 398 (SCA) at [76] – [77]

a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding (cf ***Pezzutto v Dreyer and Others*** *1992 (3) SA 379 (A)); that many agreements contain tacit terms (such as those relating to reasonableness); that language is inherently flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation; and that the Court should strive to uphold - and not destroy - bargains."*

[37] In that context, while it is not for a court to attempt to create an agreement for the parties that they have not themselves made,[8] a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. A court should therefore not be astute to destroy an agreement that the parties have seriously entered into in the belief that it was capable of implementation.[9] A court should be even more reluctant to hold that a clause in an agreement is void for uncertainty where the agreement is no longer executory but has been partly performed.[10]

[38] A court should bear in mind two further considerations. Firstly, businessmen often record their agreements "*in crude and summary fashion*" and it is the duty of a court construing such a document to do so "*fairly and broadly, without being too astute or subtle in finding defects*".[11] Secondly, a court should be alert to the reality that the confusion experienced, or the host of possible alternatives foreseen, by a

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[8] **Endumeni** *supra* at [18]

[9] **De Beer v Keyser and Others** 2002 (1) SA 827 (SCA) at [13]

[10] **De Beer v Keyser** *supra* at [14]

[11] **Novartis SA (Pty) Ltd and Another v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA) at [31], quoting from **Hillas & Co Ltd v Arcos Ltd** 147 LTR 503 at 514

party seeking to resile from an agreement can at times be exaggerated and unreal.[12]

[39] Finally, a court must distinguish between vagueness and ambiguity. If a contract can be interpreted to have two or more reasonable meanings, this would not by itself render the contract void for vagueness. The correct meaning can be determined by the use of extrinsic evidence or the process of legal interpretation. It is only where the contract is not capable of any effective meaning in the circumstances that it would be too vague to be enforced.[13]

The identification of the merx

[40] The applicants submit that the MOA does not identify the *merx* with sufficient certainty for the MOA to be a valid agreement of sale. The thing to be sold is one of the material terms of an agreement of sale and if the *merx* is not identifiable then the agreement is void for vagueness.[14]

[41] The applicants' contention is based on the express wording of the MOA, to which I now turn.

The wording in the MOA

[42] Clause 2 of the MOA records that the sellers wish to sell, and the purchaser wishes to purchase, "*the Businesses*", and that the parties "*are accordingly entering into this agreement to set out the terms and conditions applicable to the*

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[12] **De Beer v Keyser** *supra* at [13]

[13] **Namibian Minerals Corporation Ltd v Benguela Concessions Ltd** 1997 (2) SA 548 (A) at 557E

[14] **Genac Properties JHB (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)** 1992 (1) SA 566 (A) at 576I–J; see also Glover Kerr's Law of Sale and Lease 4ed (2014, Lexisnexis) at [3.2]

sale and purchase of the Businesses". "*Businesses*" is defined in clause 1.2.3 to mean the "*the businesses of*" the firms making up the TFM Group.

[43] Clause 4 confirms that the sellers sell, and the purchasers purchase, "*the Businesses*" in a single indivisible transaction.

[44] Clause 8 records that for the purposes of the Value-Added Tax Act 89 of 1991, the Businesses are sold "*as a going concern*" (clause 8.1.1), that the assets which are sold "*constitute ... the assets which are necessary for the carrying on of the Businesses*" (clause 8.1.2) and that the Businesses are "*an independent income-earning activity and capable of separate operation*" (clause 8.1.3).

[45] Clause 12 similarly records that for the purposes of the Labour Relations Act 66 of 1995 "*the Businesses will be transferred as a going concern*".

[46] The applicants accept that if this was all the MOA said, then there would be no difficulty in identifying the *merx*. It would be all the assets and rights necessary to keep the businesses in operation,[15] so that the business remained the same but in different hands.[16] The fact that evidence might have to be led to identify these assets and rights would not render the MOA impermissibly vague, because evidence of an identificatory nature, to apply the contract to the facts, is always permissible.[17]

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[15] **General Motors SA (Pty) Ltd v Besta Auto Component Manufacturing (Pty) Ltd and Another** 1982 (2) SA 653 (SE) at 657C–H. This accords with the requirement in s11(1)(e)(i)(bb) of the Value-Added Tax Act 89 of 1991 that a business shall not be considered disposed of as a going concern unless *inter alia* all the assets which are necessary for carrying out the business are disposed of.

[16] **National Education Health and Allied Workers Union v University of Cape Town and Others** 2003 (3) SA 1 (CC) at [56]

[17] **Standard Bank of South Africa Ltd v Swanepoel NO** 2015 (5) SA 77 (SCA) at [19]; **Delmas Milling Co Ltd v Du Plessis** 1955 (3) SA 447 (AD) at p 454G–H

[47] The applicants contend though that the following further clauses in the MOA demonstrate that despite this wording the parties did not actually intend to sell all of the assets that comprise the business of the TFM Group as a going concern, but rather only those assets that they would reach agreement on at some point in the future.

[48] Clause 5.1 of the MOA provides that "*for the sake of clarity, the Businesses excludes the Excluded Assets and Excluded Liabilities*". These are both defined terms.

[49] "*Excluded Assets*" is defined in clause 1.2.7 to mean "*the assets of the Sellers that are <u>not listed</u> in the Assets (sic) Disclosure Schedule which will include the names and branding of the Sellers*" (my underlining). The Asset Disclosure Schedule is defined in clause 1.2.2 to mean "*a list of assets of the Sellers that will be contained as an annexure of the Sale of Business Agreement <u>which list will contain all the assets of the Sellers that will be sold</u> to the Purchaser in terms of the Sale of Business Agreement*" (my underlining).

[50] "*Sale of Business Agreement*" is defined in clause 1.2.18 to mean "*the sale of business agreement to be entered into between the Sellers, [the first applicant] and the Purchaser in terms of which the Purchaser agrees to purchase the Businesses (as a going concern), on all the terms and conditions contained therein*".

[51] These provisions form the basis for the applicants' contention that the MOA is void for vagueness. The applicants content that these provisions make clear that the assets to be sold will only be determined once the asset disclosure schedule has been created, which will only take place at some time in the future, when the sale of business agreement is concluded.

[52] The applicants contend that the definition of "*Excluded Liabilities*" reflects the same intention. The term is defined in clause 1.2.8 to mean two specifically defined liabilities but also "*all Liabilities of the Sellers that are not listed in the Liability Disclosure Schedule*". The Liability Disclosure Schedule is defined in clause 1.2.12 to mean "*a list of Liabilities of the Sellers that will be contained in the Sale of Business Agreement which list will contain all the Liabilities that will be transferred to the Purchaser in terms of the Sale of Business Agreement*".

[53] The applicants contend that these clauses indicate that the liabilities to be transferred will also only be determined when the liability disclosure schedule is created in the future for purposes of concluding the sale of business agreement.

[54] Before I consider this contention further, I set out one further clause in the MOA that is of relevance. The parties' intention in relation to the sale of business agreement, and its relationship to the MOA, is explained as follows in clause 3 of the MOA:

[54.1] clause 3.1 provides that the provisions of the MOA will constitute binding obligations among the parties with effect from the signature date until the implementation of the sale of business agreement, after which the agreement "*shall cease to be of force and effect*";

[54.2] clause 3.2 provides that the parties "*hereby undertake to enter into a comprehensive sale of business agreement, failing which this Agreement shall be implemented by the Parties*".

[55] There is an obvious tension then within the MOA. On the one hand, the MOA is stated to be a binding agreement in terms of which the sellers sell their businesses as going concerns to the purchaser for an agreed amount. On the

other, the MOA states that the assets and liabilities to be sold will be identified in lists to be drawn up at the time of the conclusion of another agreement, the sale of business agreement, which the parties undertake to conclude in the future.

[56] The fact that the parties made provision for a future comprehensive agreement does not, on its own, render the MOA void. As long as parties each have *animus contrahendi*, it is perfectly permissible for them to enter into a binding agreement while at the same time leaving some outstanding issues for later negotiation. If they should fail to reach agreement on the outstanding issues, then the original contract stands.[18] The applicants' point though is that the parties have stated in the MOA that all the assets and liabilities to be sold will be identified in lists to be drawn up as part of that future agreement and have therefore concluded an agreement that is missing a material term and that cannot be enforced and so cannot bind them.

[57] On the applicants' interpretation, at the time the parties concluded the MOA they did not have any agreement on what *merx* was to be transferred by the sellers to the purchaser and their common intention was that this would only be determined at a later date. On this interpretation, the MOA would be void, because no *merx* is identified in it.[19]

[58] SVM advances another interpretation of the MOA. While the answering affidavit does not articulate SVM's interpretation comprehensively, I do not think that SVM

[18] **Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd** 2013 (2) SA 133 (SCA) at [12] and [13], referring to **CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd** 1987 (1) SA 81 (A) at 92A–E

[19] For the same reason, the MOA would not even be capable of interpretation as a *pactum de contrahendo*, the requirements for which I discuss below.

should be criticised for this, given that its answering affidavit had to be drafted on an urgent basis, in a very short time, and that SVM was required to deal in that affidavit with multiple different challenges to the MOA. In my view, SVM's version is articulated clearly enough that I am able to assess it.

[59] SVM contends that provision was made in the MOA for a future agreement only to afford the parties an opportunity to negotiate on outstanding matters including whether some of the assets of the business should not be included in the transaction. In this context, the lists of assets and liabilities to be drawn up as part of any future agreement were intended only to be identificatory of what had already been sold under the MOA, or that were subsequently excluded in the new agreement. In the absence of such future agreement though, what is referred to in the answering affidavit as the "*default position*" would remain – that "*all tools of the trade would form part of the sale*", save for the names and branding of the sellers, which are expressly identified as excluded assets in the MOA (provision being made in clause 14 of the MOA for the continued use by SVM of the names and branding in return for an annual fee).

[60] The same would hold true in respect of the liabilities of the businesses. If the sale of business agreement was not concluded, then whatever liabilities would ordinarily be transferred as part of the transfer of a business as a going concern would also be transferred to SVM, save for the two liabilities expressly excluded in the MOA.

[61] In my view, this is also a plausible interpretation of the MOA, and one that gives effect to the provision in clause 3.1 that if the sale of business agreement was not concluded then "*this agreement shall be implemented by the parties*", which the applicants' interpretation does not. It also finds textual support in clause 15.4 of the

MOA, which provides that the business "*includes*" all the assets listed in the Asset and Liability Disclosure Schedules and excludes the excluded assets and excluded liabilities. The use of the word "*includes*" with reference to the lists can be regarded as an indication that the lists were intended to be identificatory and not determinative.

[62] In my view then, the language of the MOA is capable of being read to support either interpretation. I should, of course, lean towards adopting an interpretation of the MOA that gives effect to it rather than destroying it, but before reaching any firm conclusions I must first consider the context in which the MOA was concluded and its purpose to see whether these provide any better clarity on how the MOA should be interpreted.

The context in which the MOA was concluded and its purpose

[63] The applicants did not address the context in which the MOA was concluded or the purpose of the parties in concluding it in either their written or oral arguments, arguing that the express wording of the MOA was plain. As I have set out above though, a court cannot consider the interpretive exercise complete by simply looking at the words in the agreement, even where the words seem clear.

[64] SVM has referred to several facts that are contained in the affidavits that it says are relevant to the interpretive exercise, but has not suggested that there are contextual facts outside of what is contained in the affidavits that might be relevant. I therefore proceed on the basis that the only relevant contextual facts are those contained in the affidavits. Most of those facts are not materially in dispute.

[65] As I have set out above, there is no dispute that the common intention of the parties in entering into the MOA was so that the businesses of the TFM Group

could be taken over and run by SVM. Mlonzi wished to sell the businesses because he was not managing them effectively, but wanted them to continue in operation so that he could benefit from the name and brands of the businesses, which would not be sold. SVM, comprised of management of the applicants, conceived that they could turn the businesses around if given the chance to operate them freed from Mlonzi.

[66] Both parties were aware at the time they concluded the MOA that TFM Industries had significant liabilities, in the form of debts owed by Mlonzi as shareholder and potential liability in terms of a contract with the City of Johannesburg, which SVM considered would prevent it from operating the businesses effectively and which the parties agreed should therefore be expressly excluded from the sale.

[67] All the parties also intended for the MOA to be effective as soon as it was signed. Mlonzi wished to receive payment of the first instalment of the purchase price by 2 September 2022 while SVM wanted to take possession of the businesses as soon as possible to begin their anticipated turnaround.

[68] These facts, none of which is in dispute, all suggest that the MOA was not intended simply to be an "*in principle*" agreement to reach agreement in future on a collection of assets and liabilities to be sold, which assets might or might not be sufficient to enable SVM to conduct the businesses of the TFM Group, which is what the applicants now contend. The uncontested contextual facts, in my view, indicate clearly that the parties intended that the TFM Group would sell immediately all the assets SVM as purchaser would need to run the businesses, while leaving open the possibility of future negotiation on this issue should they wish. The fact that certain assets and liabilities were specifically excluded from the MOA is also

inconsistent with the suggestion that at this time the intention of the parties was to leave the identification of these assets and liabilities entirely to the future agreement.[20]

[69] Importantly, both the applicants and SVM were intimately familiar with the assets and liabilities of the businesses, Mlonzi as owner of the businesses and Odwa as CEO of TFM Industries, along with the other members of management who were the shareholders in SVM. The applicants have not suggested that at the time of conclusion of the MOA the issue of the assets and liabilities to be transferred was in any way contentious such that these could not be agreed on in the time available and which were therefore left to further consideration.

[70] Finally, although I am mindful that the fact that a party has an understanding of a contract at one point and then changes its stance may not necessarily be cynical and may be based on its better appreciation of the contract,[21] it is still a relevant contextual fact that after the MOA was concluded, SVM took possession of the businesses and made payment of the first tranche of the purchase price, as well as various other payments. This fact also suggests that the parties understood that the MOA identified the assets and liabilities to be transferred to SVM, and that these were not indeterminable unless and until the sale of business agreement was concluded.

[71] In my view, the relevant contextual facts all support the interpretation of the MOA advanced by SVM.

[20] See, in contrast, the position of the parties in **OK Bazaars v Bloch** 1929 WLD 37

[21] **Capitec** *supra* at [56]

Conclusion

[72] The applicants do not deny that in concluding the MOA they intended to enter into a valid and binding sale agreement with SVM. They contend no more than that they now accept, on legal advice, that the MOA is not effective because it is impermissibly vague.

[73] I accept that the words of the MOA are ambiguous. They are capable of being interpreted in the manner suggested by the applicants, that the MOA is simply an agreement to sell a collection of assets and liabilities that the parties would only agree on later, in a sale of business agreement to be concluded in the future. They are also capable though of being interpreted in the manner suggested by SVM, that the MOA was intended to constitute the sale of the businesses of the TFM Group as going concerns, with provision being made for the parties to enter into a future agreement in relation to the assets and liabilities to be transferred if they wished.

[74] In my view, the context in which the MOA was concluded and the purpose of the parties in concluding it resolve this ambiguity. The relevant contextual facts all favour interpreting the MOA as being an agreement that the applicants would sell all the assets and liabilities comprising the businesses of the TFM Group, save those specifically excluded in the MOA and any that might subsequently be excluded in a future agreement (but which would be included if no such further agreement was reached). There is nothing in the context surrounding the conclusion of the MOA that supports the interpretation that the MOA was simply a preliminary agreement to sell a collection of assets and liabilities to be agreed on in future, and which might be less than SVM required to keep the businesses in operation.

[75] In the circumstances, I find that the MOA is not void for vagueness as alleged by the applicants.

The claim that the MOA is an unenforceable pactum de contrahendo

[76] A *pactum de contrahendo* is "*an agreement to make a contract in future*".[22] Common examples of *pacta de contrahendo* include a right of pre-emption,[23] an option[24] and an agreement to supply from time to time.[25]

[77] In my view, the MOA is not a *pactum de contrahendo*. It is not an agreement to conclude a sale agreement in the future, it is a sale agreement. In the circumstances, this point falls to be dismissed. In any event, as counsel for the applicants accepted in argument, the applicants' point turns on whether the *merx* was sufficiently identified in the MOA for the MOA to be valid as a *pactum de contrahendo*.[26] Since I have found that the *merx* is sufficiently identified, for this reason too the point must fail.

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[22] **Hirschowitz v Moolman and Others** 1985 (3) SA 739 (A) ("**Hirschowitz**") at 765I–J; see also **Makate v Vodacom Ltd** 2016 (4) SA 121 (CC) at [95]

[23] See, for example, **Mokone v Tassos Properties CC and Another** 2017 (5) SA 456 (CC)

[24] See, for example, **Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd** 2010 (2) SA 1 (SCA)

[25] See, for example, **Emadyl Industries CC t/a Raydon Industries (Pty) Ltd v Formex Engineering** 2012 (4) SA 29 (ECP)

[26] In order for a *pactum de contrahendo* to be enforceable, all the material terms of the ultimate agreement must normally be determinable from the *pactum de contrahendo* itself. Put differently, a *pactum de contrahendo* is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves – **Hirschowitz v Moolman** *supra* at 766D

The date for delivery and passing of ownership

[78] Clause 9.1 of the MOA provides that the seller shall deliver the businesses on the Implementation Date by making them available at the business premises of each seller. Clause 10 of the MOA provides that ownership of, and risk and benefit in, the sold assets and businesses shall pass to the purchaser on the Implementation Date. The applicants contend that the definition of "*Implementation Date*" in the MOA is so vague that it makes impossible to determine when these events take place.

[79] "*Implementation Date*" is defined in the MOA as follows:

> *"1.2.9 Implementation Date means earlier of –*
>
> *1.2.9.1 the date in which the Sale of Business Agreement is implemented; or*
>
> *1.2.9.2 if the Sale of Business is not implemented, the Signature Date".*

[80] The Signature Date is the date of signing of the MOA.

[81] The applicants' submission is that for as long as the sale of business agreement is not concluded, neither the date for performance of the obligation in clause 9.1 nor whether ownership is transferred as provided for in clause 10 is capable of determination with certainty, because clause 1.2.9 provides that the implementation date might become the date of the sale of business agreement if that agreement is concluded, and will only be the signature date if that agreement is not concluded. The applicants submit that in the circumstances the MOA is void for vagueness.

[82] There are obvious textual complications in the definition of Implementation Date. Since the date of signature will always precede the date of conclusion of the

sale of business agreement, the clause seems to leave open the possibility that the Implementation Date might have to be assumed to be an earlier date (the Signature Date) but then might shift to a later date if the sale of business agreement is concluded. This interpretation though does not give meaning to the phrase "*the earlier of*" in the opening line of the definition. The signature date will always be earlier than the date of implementation of the sale of business agreement.

[83] These difficulties arising from the wording of course did not in fact result in any practical difficulties for the parties. As I have said, the applicants and SVM both understood that delivery of the businesses was to take place on 1 September 2022 and SVM in fact took possession of the businesses on that date. The notional conflict that might arise because of the imprecise wording of the clause is also entirely academic because the parties are agreed that no sale of business agreement will be concluded. In the circumstances, the applicants' objection seems to me to be precisely of the type where the confusion experienced, and the various possible alternatives foreseen, by the applicants now seeking to resile from MOA are "*exaggerated and unreal*".[27]

[84] In any event, in my view it is possible to give sense to the clause. Neither party has suggested that there are any contextual facts or facts specifically relevant to understanding the purpose of the definition of the Implementation Date. In my view though, the definition should be interpreted in the way the parties themselves understood it.

[85] In relation to the businesses sold under the MOA, the definition provides that unless the parties reach some other agreement in the sale of business agreement,

[27] **De Beer v Keyser** *supra* at [13]

the implementation date for purposes of clause 9 and 10 is the date of signature, which is the earlier of the two dates identified in the clause. If the parties had, subsequent to the conclusion of the MOA, reached agreement on further assets to be transferred, then these assets would only be transferred on implementation of the sale of business agreement. While this interpretation may not fully resolve the contradiction in the definition, in my view it gives full effect to the intention of the parties and is an interpretation of which the clause is capable.

[86] The applicants also submit that the clause is impermissibly vague because the MOA does not provide for a date by which the sale of business agreement must be concluded. In my view, since the agreement does not say expressly that it remains open to the parties to conclude such an agreement for an indefinite time the parties must have intended that any such agreement be concluded within a reasonable time. It would not be impossible to determine what amounts to a "*reasonable time*" in the context of the transaction and any difficulty in doing so would not, in itself, be sufficient reason for holding that the MOA is void on the ground of vagueness.[28]

The claim that the MOA is void in consequence of the winding up order granted by this Court on 7 September 2022

[87] The applicants contend that the MOA is void because the sale of TFM Industries was impossible of performance at the time it was concluded, alternatively subsequently rendered impossible to perform, by reason of TFM

[28] **Annamma v Moodley** 1943 AD 531

Industries being placed into liquidation with effect from a date prior to the conclusion of the MOA.

[88] The applicants rely for this contention on the provisions of s341(2) of the Companies Act 61 of 1973. That section provides that the disposition of any property "*by any company being wound up and unable to pay its debts made after the commencement of the winding up, shall be void unless the Court otherwise orders*". It is now settled law that the effect of the provision is that any payment made after the date of commencement of a winding up is potentially invalid at the moment it is made and will become invalid *ex tunc* as soon as a winding up order is granted.[29]

[89] I accept for purposes of considering the point that the sale of the business of TFM Industries constitutes the disposition of property as contemplated in the section and that, in the circumstances, that disposition became invalid from 20 April 2022 when the winding up application was filed and therefore presented to Court.[30] I accept too that clause 4.2 of the MOA expressly provides that the sale of the businesses constitutes a single indivisible transaction.

[90] However, in my view the fact that transfer of the business of TFM Industries is impossible does not have the result that the MOA is extinguished entirely. What it means is that the applicants cannot deliver complete performance of their

[29] **Pride Milling Co (Pty) Ltd v Bekker NO and Another** 2022 (2) SA 410 (SCA) at [31]; **Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in Liquidation) and Others** 2023 (1) SA 398 (SCA) at [11]

[30] Section 348 of the Companies Act 61 of 1973 provides: "*A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up*"

obligation under the MOA to transfer the businesses to SVM. The applicants are still, however, able to tender partial performance by transferring all of the remaining businesses to SVM and it is well established that SVM may choose to accept that partial performance.[31]

[91] The applicants have not alleged in this application that SVM has elected not to accept partial performance. SVM has not itself alleged in its answering affidavit that it would not accept partial performance. Although this point is not expressly dealt with in the answering affidavit, SVM has denied the claim that the liquidation renders performance of the MOA impossible and also indicated that its intention was to try and broker a settlement with all creditors of TFM Industries. SVM has also instituted court proceedings to assert its right to remain in possession of the premises in Durban and East London. The inference I draw from all this is that even if the business of TFM Industries cannot be transferred as required under the MOA, SVM still wishes for the MOA to remain in place.

[92] In the circumstances, in my view the applicants have not established that the winding up order granted in respect of TFM Industries on 7 September 2022 has resulted in the MOA becoming void.

The claim that the MOA has been lawfully terminated

[93] The applicants have alleged in the founding affidavit that SVM, by certain conduct in October 2022, repudiated the MOA, which repudiation justified the applicants cancelling the MOA on 26 October 2022 as they did. SVM has denied

[31] **Bedford v Uys** 1971 (1) SA 549 (C) at 553B; see also Bradfield Christie's The Law of Contract in South Africa 8ed (2022, Lexisnexis) at 575

in the answering affidavit that it engaged in the conduct alleged by the applicants and denied further that any of its conduct amounted to a repudiation as alleged by the applicants. SVM has set out its version in support of its contention in its answering affidavit.

[94] No submissions in support of this point were contained in either the main heads of argument or the supplementary heads of argument delivered on the applicants' behalf, and counsel for the applicants properly acknowledged in oral argument that there is a genuine dispute of fact in relation to whether SVM repudiated the MOA as alleged that cannot be resolved on the papers before me, so that the applicants cannot therefore succeed on the point in this application.

[95] It was faintly suggested in argument that I should refer the dispute to oral evidence. There is no application for such referral before me and while a court may order a referral to oral evidence *mero motu*, it is generally undesirable to do so.[32] The applicants could not suggest any reason why I should depart from this general principle, particularly in circumstances where they could have prepared an application but elected not to do so, and I cannot conceive of one. In the circumstances, I decline to refer the dispute to oral evidence *mero motu*.

Conclusion

[96] I have found that the MOA is not void for vagueness and has also not been extinguished as a consequence of the winding up order granted by this Court on 7 September 2022.

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[32] **Bula and Others v Minister of Home Affairs and Others** 2012 (4) SA 560 (SCA) at [53]; **Santino Publishers CC v Waylite Marketing CC** 2010 (2) SA 53 (GSJ) at [5]

[97] The applicants accept that I cannot find on the papers before me that they lawfully terminated the MOA on 26 October 2022.

[98] The application must therefore be dismissed. The parties were agreed that costs of the application should follow the result.

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

1. The application is dismissed;
2. The applicants are to pay the first respondent's costs.

MA WESLEY
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be **28 April 2023**.

Date of hearing: 10 March 2023

Date of judgment (delivered electronically): 28 April 2023

Counsel for applicants: Adv PG Cilliers SC with Adv WR Du Preez

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