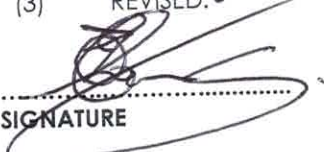


REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: NO YES
(2)	OF INTEREST TO OTHER JUDGES: NO YES
(3)	REVISED. ✓
	
SIGNATURE	DATE 25/5/2023

CASE NO: 20/27162

In the matter between:

TOOTHROCK INVESTMENTS CC

Applicant

and

DZOTHE PROPERTY INVESTMENTS (PTY) LTD

First Respondent

SILVER ANGEL INVESTMENTS (PTY) LTD

Second Respondent

Neutral Citation: *Toothrock Investments CC V Dzothe Property Investments PTY LTD and another* (Case Number: 2020/27162) [2023] ZAGPJHC 562 (25 March 2023)

JUDGMENT

THOMPSON AJ

Introduction

- [1] The applicant's case is squarely based on an out-and-out cession whereby the first respondent, as cedent, ceded all of its rights, title, interest and claims in and to all of the issued shares held by it in respect of the second respondent. A brief background is necessary.
- [2] The applicant, duly represented by Mr Jasper Smit ("Smit"), entered into a loan agreement ("the loan") with Dzothe Investments (Pty) Ltd ("DI"), duly represented by Mr Paul Marais ("Marais"), whereby the applicant agreed to lend and advance to DI the sum of R500 000,00. The loan was entered into on or about 2 June 2016 and was repayable, with a short turnaround time, by 2 August 2016. It was thus a severely short-term loan or, as *Mr H B Marais SC*¹ appearing for the applicant termed it, a loan amounting to bridging finance.
- [3] Simultaneously with the loan, the applicant entered into a Memorandum of an Agreement of Cession and Assignment of Shares ("the cession"), being the outright cession with the first respondent as indicated in paragraph [1] hereof. In terms of the cession, the shares would by way of a reversionary cession, be ceded back to the first respondent if the total debt is repaid by DI to the applicant by the payment date. If the total debt is not repaid by the payment date, the right of the first respondent to the reversionary cession falls away. The payment date is 2 August 2016.

¹ There is no relationship between Marais and counsel appearing for the applicant.

[4] Relevant to the respondent's opposition of this matter:

3.1 In the founding affidavit the following allegations were made in respect of the entering into of the cession:

"7.2 In concluding the cession:

7.2.1 I [Smit] once more represented [the applicant];

7.2.2 both

(a) [the first respondent];

(b) [the second respondent];

were duly represented by:

7.2.2.1 Mr Marais; and

7.2.2.2 Mr Paul Langa;

7.3 Mr Marais again represented [DI]."

3.2 Whereas the cession annexed to the founding affidavit as annexure "JS4" indicates on the front page of the agreement where the parties'

identities are set out that the first respondent is represented (only) by Marais. The description employed on the front page is:

“DZOTHE PROPERTY INVESTMENTS (PTY) LTD

Registration Number: . . .

(“the Cedent”)

herein represented by Paul Marais

duly authorised as a director”

- [5] The loan was advanced by the applicant to DI on 2 June 2016. The loan was, however, not repaid by 2 August 2016. Despite attempts by the applicant to have the first respondent complete the necessary share transfer forms as contemplated by Section 51(6)(a) of the Companies Act² (“the Act”), the first respondent has not attended to same. Hence this application.

- [6] The first respondent opposed the application on the following grounds:

6.1 The transfer of the shares constitutes a debt as contemplated by Section 10(1) of the Prescription Act³ (“the Prescription Act”) to which the prescriptive period is 3 years as contemplated by Section 11(d) of the Prescription Act. As the debt became due on 2 August 2016 and the application was only launched on 22 September 2020, more than 3 years have lapsed and accordingly the claim by the applicant became

² 71 of 2008

³ 68 of 1969

unenforceable by way of prescription. I will refer to this as “the prescription defence”.

6.2 The non-joinder of DI. I will refer to this as “the non-joinder defence”.

6.3 The lack of authority on the part of Marais to have entered into the loan and the cession. I will refer to this as “the authority defence”.

[7] The second of the three defences, namely the joinder defence, can swiftly be dealt with. No relief is sought against DI. DI is also, in no way, affected by the relief sought in this application. It is not its shares which was ceded nor it was not the holder of the shares being ceded. As no relief was sought, by way of a counterapplication by the first respondent in respect of the loan, DI’s involvement is simply not necessary. Accordingly, there is no necessity⁴ to have DI joined to the proceedings.

[8] The prescription defence, at first blush, seems to be a good defence which is destructive of the applicant’s entire application. Applying the Constitutional Court’s reasoning that the transfer of (immovable) property constitutes a debt,⁵ the transfer of shares accordingly also constitutes a debt. There is a fundamentally important aspect that must not be overlooked, namely what is being sought by the applicant is not a transfer of the shares. The applicant seeks the respondent to take such actions necessary as contemplated by

⁴ *Judicial Services Commission & Another v Cape Bar Council & Another* 2013 (1) SA 170 (SCA) at para [12]

⁵ *eThekweni Municipality v Mounthaven (Pty) Ltd* (CCT05/18) [2018] ZACC 43; 2019 (2) BCLR 236 (CC); 2019 (4) SA 394 (CC) (31 October 2018) at para [8]

Section 51(5) and (6)(a) of the Companies Act to *register* the transfer of the shares.

[9] The applicant seeks no more than the preceding relief due to the effect of the outright cession. The effect of an outright cession is trite. The ownership of that which is ceded is transferred to the cessionary upon the cession being effected.⁶ As such, the applicant became the owner of the shares upon the cession being effected.

[10] Although not dealt with during argument, I have had regard to the definition of “*shareholder*” in the Companies Act, which requires entry into the share register as a shareholder prior to being considered a shareholder. In my view, this is not indicative of any intention on the part of the Legislature to add an additional requirement for the ownership of shares to be passed. It does no more than denote a certain step that is required, namely the entering into of the required details into the share register, in order to exercise the statutory rights accorded to a holder of shares.

[11] As the ownership of the shares have been transferred, in my view, to the applicant when the cession was affected, there is no debt that can prescribe. What the applicant seeks to enforce is no more than the administrative requirement of the second respondent to enter the transfer of the shares in its share transfer register. Accordingly, the prescription defence must fail.

⁶ *Weiner v The Master (1)* 1976 2 SA 830 (T) 842D

[12] This leaves the authority defence. In this regard it must be remembered that it is alleged in the founding affidavit that the first respondent was duly represented by Marais and one Mr Paul Langa ("Langa"). It must further be remembered that the cession, contra to what is stated in the founding affidavit, refers to the first respondent being represented by (only) Marais. The first respondent, fixated on that which is contained on the front page of the cession and disregarding the allegations in the founding affidavit, only dealt with the alleged lack of authority of Marais to have entered into the loan and the cession in its answering affidavit. It is within this context that the controversy relating to the alleged lack of authority must be decided in terms of the *Plascon-Evans*-rule, as interpreted over the years.⁷

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C

"The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G - 924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhotso v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A).

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para [26]

[13] In my view, the most convenient starting point is the alleged lack of authority in respect of the loan. It is common cause that at the time of entering into the loan, DI's sole director was Marais. On what basis it can therefore be alleged that Marais did not have the authority to enter into the loan on behalf of DI escapes me.

[14] The authority aspect relating to the cession must then be dealt with. The argument by the first respondent is that Marais was not a director of the first respondent and could therefore not have represented the first respondent. *Ms Slabbert*, appearing for the first respondent did accept during argument that any person may be authorised to act on behalf of the first respondent and that

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (A) at para [13]

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

a director may delegate certain responsibilities. Nothing therefore turns on the point that Marais was not a director of the first respondent.

[15] Of importance relating to the authority issue in respect of the cession, the first respondent at no stage alleges in its answering affidavit that for authority to have been properly exercised, there must have been two signatories to the cession, both of whom must be authorised to act on behalf of the first respondent. The import hereof lies therein that, in terms of the founding affidavit, the first respondent was duly represented by Marais and Langa. In the absence of an allegation that there must have been two authorised signatories to the cession, even if the authority of Marais fails, the authority of Langa remains unaffected as it is unanswered to, save for a bald denial of the allegation that “*both*” Marais and Langa duly represented the first respondent.

[16] Prior to dealing with the authority point further, I must first interject to consider the effect of the allegation in the founding affidavit that the first respondent was duly represented by Marais and Langa whilst the cession stipulates only representation by Marais. It is trite that extraneous evidence may not be used to alter the meaning of terms of an agreement.⁸ The question thus arises what the status of the indication of Marais’ representation of the first respondent in the agreement is. Is it indication of Marais’ representation a term of the agreement or is it no more than a recording of representation. In my view, the recordal of Marais as the first respondent’s representative is not a term of the

⁸ *Capitec Bank Holdings Limited & Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* [2021] ZASCA 99; [2021] (3) All SA 647 (SCA) at para [38]

agreement. In my view, it is nothing more than a recital and was never intended to create any contractual obligation that the first respondent must and can only be represented by Marais.⁹ The question comes to mind what would have occurred if, upon signature of the agreement, Marais was not available to sign the agreement (for example due to the fact that he was stuck in traffic occasioned by loadshedding), but another person who may validly represent the first respondent signed the agreement and no one bothered to change the recordal of representation. Would this then invalidate the agreement? Or would it preclude a party seeking to rely on the agreement for adducing evidence as to who signed the agreement on behalf of a particular party. I think not. Nothing therefore turns on the fact that the cession does not indicate that Langa would also, or in the absence of Marais, represent the first respondent.

- [17] The more substantive question to be posed is whether Langa had authority to sign the cession on behalf of the first respondent, as alleged by the applicant. The first respondent simply did not deal with Langa's authority save for a bald denial that Marais and Langa both duly represented the first respondent. This denial can be construed in at least two ways, namely that Marais and Langa acting jointly, did not duly represent the first respondent, or that neither Langa nor Marais individually, duly represented the first respondent. Having regard to the attack on Marais' authority only, the second construction is the more probable construction.

⁹ *ABSA Bank Limited v Swanepoel* (246/03) [2004] ZASCA 60 (31 May 2004) at para [6] and [7]

[18] During argument, *Ms Slabbert* sought to rely thereon that the first respondent's deponent, Mr Mmethi ("Mmethi") who is also the director of the first respondent, alleges that neither the first nor the second respondent was aware of the existence of the cession, or for that matter, the loan. The problem for the first respondent in this regard is that the second respondent has two directors, namely Mmethi and Langa and no confirmatory affidavit from Langa is provided to confirm that he was unaware of the existence of the cession. There is also no disputing of the allegation by the applicant that Langa was duly authorised to act on behalf of the first respondent.

[19] As Langa's authority is not even dealt with by the first respondent, there is nothing to gainsay the applicant's version and no factual dispute arises in respect of his authority to act on behalf of the first respondent. Even if one is to rely on the general denial of the relevant allegations in the founding affidavit, the denial is bald and unsubstantiated.

[20] It then gets demonstrably worse for the first respondent. The first respondent alleges that there is no resolution authorising the entering into of the cession. To this end the applicant put up, in reply, a resolution by the first respondent signed by Mmethi and Langa. The resolution also contains, as witness, the signature of Marais. A resolution clearly exists, which leaves the version of the first respondent uncreditworthy.

[21] *Ms Slabbert* sought to argue that the applicant should have proved the authority of Marais and Langa in its founding papers and should have attached

the resolution to the founding papers. The applicant alleged in the founding affidavit that Marais and Langa were duly representing the first respondent. The use of the word denotes due, proper and lawful authorisation to act on behalf of the first respondent. It was up to the first respondent to clearly and unambiguously dispute such authority, in which event the applicant would be entitled to adduce evidence to refute that which the respondent has said.

- [22] The applicant has not, in my view, attempted to make out a new case in reply. It alleged Marais and Langa were duly authorised, which is the fact the respondent was called upon to admit or deny,¹⁰ and upon denying same to deal clearly and unambiguously with the dispute. The applicant did not need to prove authority (actual or ostensible) until such time that authority was formally placed in dispute by the respondent. To do so would be to expect an applicant to pre-empt any possible defence a respondent may raise and deal therewith in its founding affidavit, instead of making out the case upon which it relies. To allege authority in the context of a juristic entity, without proffering evidence to prove same, does not in my view amount to a “*mere skeleton*” of a founding affidavit.¹¹ Parties entering into agreements with juristic persons often assume authority without same being proved to such person and such authority is accepted as due. It is only once the authority becomes disputed that it would be necessary to demonstrate why actual or ostensible authority is relied upon, depending on the nature of the challenge.

¹⁰ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A), at 635H – 636B

¹¹ *Bowman N.O. v De Souza Raldao* 1988 (4) SA 326 (TPD) at 327H

- [23] It must also be borne in mind that Langa's authority was not raised in the replying affidavit for the first time. It emanates from the founding affidavit already. The first respondent did not deal therewith, whether by oversight or by design. *Ms Slabbert* contended the failure to deal with the authority of Langa arises from the wording of the founding affidavit as read with the cession. It was contended that the manner in which the relevant paragraphs in the founding affidavit was structured (as repeated in paragraph [4]), as read with the cession, paragraph 7.2.2(a) [the first respondent] was read to refer to paragraph 7.2.2.1 [Marais] and paragraph 7.2.2(b) (the second respondent] was read to refer to paragraph 7.2.2.2 [Langa].
- [24] The error in this argument lies therein that the first part of paragraph 7.2.2 refers to "*both*", denoting that both the first and second respondents were represented by both Marais and Langa.
- [25] The allegation in the founding affidavit relating to the representation of the first respondent is confirmed by the cession, which bears two signatures at the signature spaces for the cedent. In the absence of a challenge that the second signature is that of Langa, I can do no more than, on the papers, accept that the second signature is that of Langa.
- [26] *Ms Slabbert* indicated that it is possible for the first respondent to file an affidavit to deal with the authority of Langa. When her attention was directed thereto that a substantive application would be necessary, she also indicated that it would be possible to bring such substantive application. For reasons

unknown, no application was made to have the matter postponed in order to seek such leave to file a further affidavit, nor was any application made to have the matter stand down to bring such substantive application to file a further affidavit. In the absence of such application, the issue of Langa's authority is undisputed on the papers before me.

[27] As there is no contention by the first respondent that the cession would have had to be signed by two authorised representatives, the issue of Marais' alleged lack of authority becomes moot as Langa's authority is not disputed and, in so far it is denied, it is denied in bald, vague and unsubstantiated terms. It also bears mentioning that Langa remains a director of the second respondent, together with Mmethi, who is also the director of the first respondent. There can be no suggestion that Mmethi did not have access to Langa or that the relationship between Mmethi and Langa had soured to such an extent that Mmethi could not confront Langa and/or obtain a version from Langa as to the allegations by the applicant pertaining to Langa.

[28] In summary, the version of the applicant that Langa represented the first respondent is not seriously disputed other than a vague and bald denial of the allegation relating to representation of the first respondent in general. As a result of the fact that the representation by Langa is only disputed in vague and bald terms, the first respondent has failed to clearly and unambiguously deal with the alleged lack of authority on the part of Langa.

[29] In closing I wish to make a remark that is not often found in judgments, other than a terse remark by the judge thanking counsel for their submissions and argument. Both counsel in this matter argued well, however it is the conduct of *Ms Slabbert* that stands out for me in this matter. Her argument was well prepared and well presented. Even with questions being fired at her in rapid succession to her by me, she stood her ground firmly, respectfully and competently. As a matter of fact, it was during the firing off of questions to her that the manner of her preparedness for the case came to the fore. She knew the papers like the back of her hand and was able to easily and without delay, page to the relevant page and refer me thereto during argument when she needed to substantiate a point she was attempting to carry across upon a question asked by me. This is an advocacy attribute all counsel should aspire to.

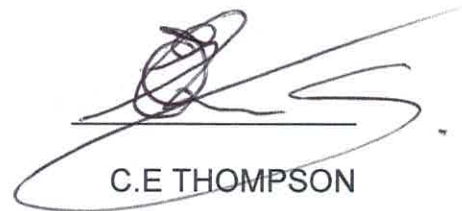
[30] Both counsel were *ad idem* that the costs should follow the result.

[31] In the premises I make the following order:

1. The Respondents are ordered and directed, within 7 (SEVEN) days of the granting of this order, to
 - 1.1 take whatever steps; and
 - 1.2 sign all documents,as may be necessary to enter the transfer of all the issued shares in the Second Respondent from the First Respondent into the name of the Applicant, in accordance with the provisions of Section 51(6) of

the Companies Act 71 of 2008.

2. The First Respondent is to pay the costs of this application.



C.E THOMPSON

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT: ADV H.B MARAIS SC
APPLICANT'S ATTORNEYS: ADRIAN ENGELBRECHT
COUNSEL FOR THE RESPONDENTS: ADV K.A SLABBERT
DATE OF HEARING: 18 MAY 2023
DATE OF JUDGMENT: 25 MAY 2023