

REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO 2018/16703

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

15/5/18.
DATE

M.S.
SIGNATURE

In the matter between:

PROSPERITY MANAGEMENT AFRICA (PTY) LTD

APPLICANT

and

THE SOUTH AFRICAN LOCAL AUTHORITY PENSION FUND

RESPONDENT

JUDGMENT

Sutherland J:

Introduction

[1] The respondent is a pension fund registered under the Pension Fund Act 24 of 1956. Since about 2004 it has had a contractual relationship with the applicant. The applicant describes itself as a Financial Services Provider and is registered as such. The applicant has, in terms of this relationship, secured reinsurance for the products provided by the respondent to its members, the employees of municipalities in South Africa.

[2] The applicant has applied on an urgent basis for interim relief pending an arbitration to be convened to procure specific performance of a contract it alleges exists between the parties. The crux of the controversy is the allegation by the applicant that it has a valid contract concluded on 9 June 2017 binding the respondent to use its services until 30 June 2022. The respondent denies the existence of such a valid contract.

[3] There are two questions which require examination to decide the matter:

3.1. Was there a valid resolution passed by the trustees of the respondent on 9 June 2017 in terms whereof the applicant was appointed to render services for a five-year period ending on 30 June 2022. The very existence of such a resolution is in dispute.

3.12. Are the documents which purport to be contracts pursuant to such appointment, signed on 9 June 2017, valid and binding on the respondent. The question falls to be decided by reference to the provisions of rule 2.9 of

the respondent's rules which deems valid and binding a contract bearing the signature of both the principal officer and the chair of the trustees and a proper interpretation thereof. Prima facie, only the principal officer's signature appears.

Is the contract valid and binding without the chair's signature?

[4] Two inter-related documents evidence that a purported signed 'contract' indeed exists, dated 9 June 2017.¹

[5] One of the documents is styled "Risk Benefit Contract". The preamble states:

'SALA appoints PMA (ie the applicant) to arrange on behalf of SALA and as its mandatory, the benefits set out in this contract to members of SALA in accordance with this contract.....The benefits which are insurance benefits, are reinsured by PMA as SALA mandatory under one or more reinsurance treaties'.

The document goes on to identify a 'Certificate of Participation' and to stipulate that the effective date of the contract is the date upon which the certificate is signed. A document styled 'Certificate of Participation' is signed on the same day, 9 June 2017. Its preamble states:

'Pursuant to a SALA Board meeting held in Cape Town on the 7th of June 2017, the Interim board of Trustees resolved that the new risk benefit Proposal presented by Prosperity as per this certificate of participation and supporting the Risk Benefit Contract be approved

¹ RecordFA9.1 p46ff; FA9.2, p80ff

and that the aforesaid New Risk Benefit Proposal to be implemented by Prosperity with effect 1 July 2017.'

In paragraph 4 of the Certificate, the term of the 'schedule of reinsurance' is stipulated to be:

'Continuous, irrevocable renewal of the agreement between SALA and Prosperity for a further term of five years from 1 July 2017 until 30 June 2022.'

[6] On behalf of the respondent these documents are signed by the then principal officer, Kgakane and one other person, whose capacity is not stated and whose signature is illegible. Van Zyl signed for the applicant. These signatures were witnessed by Avontuur, an employee of the respondent and one other person whose signature is illegible. The text stipulates that the two signatories on behalf of the respondent have been 'Duly authorised to sign this contract and certificate of participation on behalf of [the respondent] at Cape Town on this 9th day of June 2017'.

[7] The respondent's deponent, Sidu, the present principal officer, who it may be said was not the principal officer at the relevant time having taken office on 1 August 2017, has no personal knowledge of any material fact, a circumstance he freely admits. Kgakane's term of office ended on 31 July 2017. Sidu's affidavit is supported by the sole affidavit of the chair, Mahlangu, who does have personal knowledge. Notably, Avontuur, an employee of the respondent, who witnessed the controversial signing, has given no affidavit to explain how an 'unauthorised' contract was witnessed by him observing the principal officer supposedly breach the governance rules.

[8] The respondent is an institution whose governance is regulated by the Pension Funds Act, regulations promulgated thereunder, and rules created by itself. It is not seriously contested that the respondent is obliged to strictly conform to the regulatory regime in order to transact business of any kind.

[9] The respondent's rule 2.9 provides:²

'All documents shall be deemed to be validly executed by the fund if signed by the chairperson of the trustees or his duly appointed deputy in the capacity of acting chairman and the principal officer and deputy principal officer where applicable in the manner described in the [Pension Funds Act]

(emphasis supplied)

[10] *Prima facie*, the documents do not satisfy the requirements of rule 2.9 as the chair's signature does not, ostensibly, appear on it. The critical question is therefore the significance of the absence of the signature of the chair of the Board of Trustees. The respondent alleges that the Chair did not sign these documents. A confirmatory affidavit by the Chair is attached. This allegation cannot be rebutted by the applicant. On the approach of *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 620 (AD)* the denial of the respondent must prevail; ie the chair did not sign this purported agreement.

[11] Can the agreements be valid in the absence of a signature by the chair? The respondent directs my attention to the decision in *ABSA Bank Ltd v South African*

² Record SMS 1, p145 at esp p175.

Commercial Catering and allied Workers Union National Provident Fund (Under Curatorship) 2012 (3) SA 585 (SCA), [2012] 1 All SA 121 (SCA) In that case the controversy was whether non-compliance with rule 4.3 of that Fund resulted in an invalid and non-binding contract. The Rule provided:

'Signatures to documents

All documents or contracts effected by the FUND shall be binding upon the FUND provided that they have been signed by the Chairperson and another two TRUSTEES

- (a) at a duly constituted meeting, or
- (b) after such a meeting, provided that authorisation for the signing of these documents or contracts was granted at such meeting.

Where, however, the [the Pension Fund Act] prescribes specific formalities for the signature of documents, such documents shall only be binding upon the Fund subject to compliance with these requirements.'

Only the principal officer signed the agreements at issue, a circumstance which afflicts the contracts in the present case too. The SCA in *ABSA* held that non-compliance with rule 4.3 was fatal. The Court went on to make two further significant remarks.

First at:

[31] 'Rule 4.13 is the only effective overriding control over the legal capacity of the Fund to enter into written contracts. It is common cause that it has not been complied with. That one would have thought would be the end of the matter. For, as Trollip J stated in *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 79B-E:

'As the defendant is a corporate body its legal capacity to enter into a particular contract must be sought for exclusively within the expressed and implied provisions of its constitution and if it is not found there then the defendant has exceeded its powers in entering into the contract and it is null and void. That is because according to the Act, the constitution not only defines defendant's legal capacity but also confines it to what is expressly or impliedly contained therein. That is the effect of the

sections of the Act quoted above. In other words, the doctrine of *ultra vires* applies to defendant like any other corporation (see Street, *Doctrine of Ultra Vires*, pp 4, 22, 23; *Cape United Sick Fund Society & others v Forrest & others* 1956 (4) SA 519 (AD); *The Mineworker's Union v Prinsloo* 1948 (3) SA 831 (AD) at 843-4, 847). Street's summary of the position at p 4 is so lucid and apposite that it is worth quoting in full: "A corporation is commonly styled a 'legal person', but the appellation 'person' is applicable to it only by analogy; and the analogy fails when it is thus clearly stated that this legal person is wanting in much that belongs to a natural person - that its course of existence is marked out from its birth; that it has been called into being for certain special purposes; that it has all the powers and capacities, and only those, which are expressly given it, or are absolutely requisite for the due carrying out of those purposes; and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes, are null and void." '

Secondly, at:

[36] 'In my view questions of equity cannot, when the rule is clear and unambiguous, affect the interpretation to be placed on it. The question that naturally arises is, what was the purpose of the Fund in adopting rule 4.13, if it can simply be ignored as the Bank postulates. And, the further rhetorical question that then remains unanswered is: if rule 4.13 does not apply to these contracts then when precisely would it apply? Here we are dealing with an elaborately framed constitution from which it is clear, as I hope I have shown, the control of expenditure is entrusted to the trustees. Indeed, that is precisely what the Act envisages, given the public interest at stake. In those circumstances it is not difficult to appreciate why such an elaborate and cumbersome procedure was chosen in rule 4.13. It was to ensure the greatest measure of protection for the funds entrusted to the Fund which was to be administered by the board of trustees. The chosen procedure thus has a legitimate and rational purpose. One looks in vain for similar protection were the principal officer to act as postulated by the Bank. There is nothing to suggest that although somewhat cumbersome the chosen procedure is unworkable or that the Fund cannot regulate its affairs in such a way as to ensure compliance with the requirements of the rule. Moreover, the Fund is free, if so advised, to effect such amendments, as it may desire to its rules. For, even if we were to hold that the constitution of the Fund may be a foolish contract, this Court has no power to make a new contract for its members.

[37] In *Gründling v Beyers & others* 1967 (2) SA 131 (WLD) at 139 Trollip J drew the following important distinction:

'Now, the constitution does specify certain acts which the Union is required or permitted to do; it often specifies too the manner in which those acts are to be done. The former are the Union's powers, the latter, its internal management (cf. *Mine Workers' Union v. Prinsloo*, 1948 (3) S.A. 831 (A.D.)). If it exceeds the former powers, that is, does an act that the constitution does not require or permit it to do, that act is *ultra vires*, and null and void. Such an act cannot be validated by ratification or estoppel, and the Union, any outsider affected by it, or a member may, if necessary, have it set aside or declared null and void. On the other hand, if the act is within its powers, but the manner of doing it deviates from or is contrary to the constitution, it is not null and void; at most, it is voidable, but it can be validated by ratification or estoppel.'

[12] The force of these *dicta* is not contested on behalf of the applicant, rather reliance is placed on the implications of the different texts. The critical issue is the work done by the word 'deemed' in the respondent's rule. Generally, the concept of 'deemed' is marshalled to the perform the work of extinguishing a controversy about whether a true state of affairs exists; ie, in circumstances where X occurs a result follows regardless of *indicuae* to the contrary.³ However, where X is absent, it does not follow that the result contended for is established. In my view, the texts of the two rules are materially distinct. In *ABSA* the text sets up a condition precedent to validity and requires positive steps to be evidenced. That is not the case in the respondent's rules. In that example, evidence that the two office-bearers have signed creates proof of validity immune from challenge. Accordingly, rule 2.9 is shield against challenges to validity, not a notional sword to

³ See: *Chotabhai v Union Government & Another* 1911 AD 13; *Fromberg v Ward* 1929 CPR 390 ; *S v Voigt* 1965 (2) SA 749 (N) at 752F-H

establish incontestable invalidity. A failure to have both the principal officer and the chair sign the contract in my view does not *ipso facto* invalidate the agreement.

Was there a resolution authorising the conclusion of the contracts?

[13] The question arises whether there is evidence that, notwithstanding the principal officer acting alone, the contract is valid because he was authorised by the Board to sign it? Various self-standing *indiciae* are argued to exist. The central pillar, however, of any such thesis, must be the reference in the contracts themselves to a resolution expressly referred to in the Certificate of Participation.

[14] In due course, the extract of the minute of the Board meeting of 7-9 June 2017 was sent by the respondent to the applicant.⁴ Paragraph 20 addressed the Risk Benefits Review Proposal. The resolution, as recorded, reads thus:

‘Resolved:

- (a) That the new risk benefit structure stated hereunder be approved at no additional costs to the members.
- (b) That the fund should consider a re-broking exercise after the expiry of the PMA contract.
- (c) That the principal officer be mandated to give effect to the board resolution (a) above.’

[15] The risk benefit structure in (a) said to be ‘stated hereunder’ is that of the applicant. The applicant states that it did a presentation at the meeting and attaches an extract of

⁴ Record, SMS 2, p278.

its presentation which includes an allusion to a term of a further five years'⁵ The extract of what 'is stated hereunder' in the draft minute for the 9 June meeting shows a table of benefits but no reference to a term.⁶

[16] Curiously, the respondent goes on to baldly allege that it decided to terminate the applicants contract and appoint Momentum. This decision was communicated to applicant on 18 April 2018, some ten months later. Extracts of minutes of the Board evidencing that decision are not disclosed.

[17] As regards (b) of the resolution, the respondent says that must be understood in the context of a month-to-month appointment of the applicant since 2015. This statement is, in my view, astonishing. How a contractual relationship of this nature could be conceived on such a footing is bizarre. Again, no minute of the board concluding this arrangement is disclosed. That such an unorthodox and commercially suspect decision could be taken without a record is unfathomable. Moreover, the notion is scotched by the existence of a 2013 contract, due to terminate on 1 July 2018. Its validity is merely challenged for want of the chair's signature, despite the chair having signed as a witness and confirmed that he had the original documents. The 2013 contract seemingly was implemented and would have been current in June 2018. In the context of that consideration, the minute of 9 June could be understood to mean the end of that agreement; ie on 30 June 2018. Given the practice followed by the respondent it is in my view probable that the 1 July 2018 termination date was that envisaged which might

⁵ Record; p317, RA13.

⁶ Annexure SAA1 to Respondents supplementary affidavit.

explain why the relationship continued as it did on the New risk Benefit for the next 10 months and, moreover, the timing of the decision to appoint another service provider.

[18] Part (c) of the resolution is non-specific and what exactly was intended remains obscure. The applicant contends that it implies the signing of the contracts upon which it relies. That is not implausible, but by no means the only reasonable interpretation.

[19] Significantly, the resolution cited above does not expressly appoint the applicant for a term until 2022. The applicant alluded to a draft resolution in exactly those terms that was being circulated by the respondent's Wandile Oliphant on 13 June 2017.⁷ This occurred *after* the contracts had been signed. In past relocations of the contract there were always express appointments.

[20] Why then did the principal officer sign the purported contracts? The respondent showed a draft of the 9 June minute that was tabled at the August 2017 meeting that provided expressly for an appointment. That record was rejected at the August meeting as being an error. The minute recording the correction was disclosed.

[21] The inference to be drawn from these facts is that the principal officer's conduct in signing the contracts on 9 June is explicable in terms of the draft minute, presumably drawn up or approved by him for tabling at the next meeting. The fact that an express resolution in respect of the appointment was still in circulation on 13 June is, however,

⁷ Record RA12, pp323 – 325.

corroboration that even the principal officer must have thought an express appointment was still required despite what he had recorded in the draft minute and his signature on 9 June of the contract. Why he thought an additional resolution was needed if the draft resolution had captured the Board's decision is obscure. In his absence, in August, the notion of an appointment of the applicant was repudiated. Therefore, there has not been a resolution appointing the applicant for a further 5-year term.

[22] What remains to explore, from these odd events, is whether some skulduggery has been perpetrated and by whom. Was there indeed a decision to appoint that was later reversed? Was there never a decision to appoint but the minute taker sought to slip it in? Perhaps the minute taker was under a bona fide impression that the re-appointment was implied. Does the change in principal officer have something to do with the shift? Are these facts the peripheral *induciae* of some internal power struggle to allot a very lucrative contract?

The test for establishment of a *prima facie* case

[23] The formulation in Webster v Mitchell of the test for the grant of an interim interdict is thus:

'From the Appellate Division cases to which I have referred I consider that the law which I must apply is that the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "*prima facie* established though open to some doubt" that is enough. In the grant of temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether, if interim protection is given,

the applicant could ever obtain the rights he seeks to protect. *Prima facie* that has to be shown. The use of the phrase "*prima facie* established though open to some doubt" indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set out in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief'.

[24] In that decision, the Court examined the several terminological forays to try to capture exactly what it is that a Court is asking and assessing. I refrain from adding to these efforts. In my view the exercise is assessing whether a *prima facie* right exists, 'open to some doubt,' demands a common sense fact-specific evaluation.

[25] In this case it is common cause that the principal officer signed the contracts. That is certainly evidence of a *prima facie* right. I have concluded that rule 2.9 is not dispositive of a validity challenge. Whether an estoppel is open to assert depends on evidence yet to be adduced. The official minutes do throw some doubt on the applicant's claim but the signed contract and the respondents past conduct tend to hold this in equilibrium. Moreover, the murk of suspicion engulfs the respondent's conduct. My conclusion is that the applicant has satisfied the test.

[26] Accordingly, as all other elements necessary for an interim interdict were undisputed, having concluded a prima facie case though open to some doubt has been established, the applicant has justified the relief it seeks.

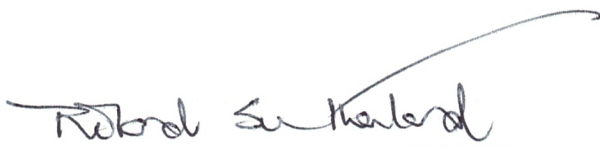
The Order

It is ordered that:

1. Pending the outcome of an arbitration to be instituted within 15 days of the date of this order by the applicant as claimant against the respondent as defendant, in which arbitration the applicant shall seek *inter alia*, specific performance of the Risk Benefit Contract and Certificate of Participation (collectively, "the agreement") signed by the parties on 9 June 2017, until 30 June 2022,
 - a. The respondent is directed to pay to the applicant all premiums that are payable by the respondent to the applicant under the Risk Benefit Contract and Certificate of Participation (collectively, "the agreement"), concluded between the applicant and the respondent on 09 June 2017 and to do so in one amount, monthly in advance and by way of electronic funds transfer to the bank account stipulated in Clause 8 of the Certificate of Participation on or before the last day of the month preceding the month for which cover is intended.
 - b. The respondent is directed to comply with all of its obligations to the applicant under the agreement.

- c. The respondent is interdicted and restrained from giving effect to and/or implementing the resolution purportedly taken by the interim board of the respondent on 12 April 2018 to appoint Momentum as the respondent's re-insurer with effect from 01 June 2018 and to approve Fairsure Fund Administrator as intermediary in respect of the aforesaid appointment of Momentum and to pay it a commission and binder fee.

2. The costs of this application shall be costs in the cause in the arbitration.



Roland Sutherland
Judge of the High Court
Gauteng Local division, Johannesburg

Heard: 10 May 2018

Judgment delivered: 16 May 2018

For the Applicant:

Adv D Vetten,

Instructed by Edward S Classen & Associates

For the Respondent:

Adv A Franklin SC, with him Adv M Seape

Instructed by Norton Fulbright South Africa Inc