

SOUTH AFRICA / JUDGMENT

One Vision Investments 344 (Pty) Ltd v Smith and Others (76711/2014) [2020] ZAGPPHC 53 (7 February 2020) [2020] ZAGPPHC 53

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

76711/2014

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Source record

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
(1)

REPORTABLE:

YES/NO
(2)
OF
INTEREST TO OTHER JUDGES; YES/NO
(3)
REVISED
Case
number: 76711/2014
7/2/2020
In

the matter between:

ONE
VISION INVESTMENTS 344 (PTY) LTD
PLAINTIFF
Vs
RALSTON
EMMANUEL
SMITH
1ST DEFENDANT
MONEY BOX
INVESTMENTS 225 (PTY) LTD
2ND DEFENDANT
CARL JACOBUS
POTGIETER
3RD DEFENDANT

MARIUS
NIEUWOUDT
4TH
DEFENDANT
LAURENCE
STEPHEN BIRD
5TH
DEFENDANT
THEODORUS
BLEEKER
6TH
DEFENDANT
SAREL
JOHANNES VAN HEERDEN
7TH
DEFENDANT
FINISHING TOUCH
304 (PTY) LTD
8TH
DEFENDANT
MURAIBALL
INVESTMENTS (PTY) LTD
9TH DEFENDANT
DAVID GLEASON
DEVELOPMENTS (PTY) LTD
10TH
DEFENDANT
GLOBAL SECURITY
INTERNET INFRASTRUCTURE
(PTY)
LTD
11TH
DEFENDANT
RAMESH SINGH
12TH DEFENDANT

JUDGMENT

TOLMAY, J:

INTRODUCTION

- [1] The Plaintiff (One Vision), whose sole director is the Twelfth Defendant (Mr Singh) sought an order declaring the Memorandum of Understanding (MOU) as incorporated in the Sale of Equity, the Sale of Equity itself and the Cession to be valid and binding on the parties. One Vision also sought an order for specific performance in terms of the Sale of Equity, incorporating the MOU.

[2] The First Defendant (Mr Smith) and the Second Defendant (Money Box) sought an order that the claims be dismissed. It was the case of Mr Smith and Money Box that he never resigned as a director of Lahleni, nor did he sell his shares, nor did he sign the forms for transfer of the shares in Lahleni. He alleged that his signatures were forged on the documents and that a WhatsApp image and emails relating to this were forgeries. Mr Smith also filed a conditional counterclaim in reconvention that if the MOU and Sale of Equity be found to be valid and enforceable, he claimed for rectification of the MOU and payment of R24 million in terms of the rectified MOU. One Vision countered that with a special plea of prescription of the claim. Despite the fact that Mr Smith, who

appeared in person's attention was drawn to the fact, no evidence was led regarding rectification and as a result this Court need not deal with that claim.

[3] On 23 July 2017 the parties agreed, as recorded in the pre-trial minute that, written communications be deemed to have been dispatched and received according to their tenure, and unless the parties agree otherwise, only those documents in the trial bundle referred to during evidence would form part of the record.

[4] The parties attended a pre-trial in front me at their request on 25 April 2019. At that stage Mr Smith was still represented by senior counsel and an attorney. During that meeting it was inter alia recorded that:

- a) a joint chronology of agreed and disputed facts was prepared;
- b) the documents in regard to the facts which are common cause are contained in three lever arch files; and
- c) the documents in respect of the disputed facts will be contained in a trial bundle to be settled between the parties.

[5] It was agreed that the Court read the consolidated chronology before the commencement of the trial which was scheduled to start on 6 May 2019. Importantly it was agreed that the chronology, which contained the common cause facts would be handed in at the trial as an exhibit and would constitute evidence of such facts. Evidence would be led in respect of the issues in dispute referred to in the chronology (or as otherwise agreed to between the parties) with reference to the trial bundle, insofar as such reference might be necessary.

[6] The parties also agreed that the experts would meet and prepare a joint minute, this however did not occur, due to the fact that Mr Smith terminated his experts' mandate.

[7] On 29 April 2019 Mr Smith's attorneys withdrew. On 30 April 2019 a directive was issued by me who, inter alia required the presence of Mr Smith and his previous legal representatives at a further pre-trial meeting, to enquire from them why they did not sign the pre-trial minute of 25 April 2019, as they did represent Mr Smith at the time, and as a result the agreements reached would be binding on Mr Smith. The further pre-trial was held and the minutes were signed by them in the presence of Mr Malulzane, Mr Smith's new attorney of

record, who was appointed in the meantime.

[8] On 6 May 2019, the day that the trial was supposed to commence an application for postponement was brought by Mr Smith's new legal

representative. The application for postponement was refused and the matters stood down until 16 May 2019, to give the new legal

representative an opportunity to prepare for trial. A further pre-trial was held on 14 May 2019. At the pre-trial that was held in open Court, Mr Smith's legal representatives failed to appear, despite earlier indicating that he would be available. During this pre-trial the Court was informed that Mr Pryor, Mr Smith's expert apparently informed One Vision's experts that his mandate had been terminated.

[9] The trial finally commenced on 16 May 2019. Mr Smith was informed that he, was not legally entitled to represent Money Box,[1] but he indicated that he would represent only himself.

[10] Mr Smith was requested to familiarise himself with the chronology of facts, in order to ensure that he would be able to represent his case in accordance with the content thereof. During the trial it transpired that he did not do so and the Court again impressed on him the importance of properly preparing himself. The Court gave him assistance and was at pains to explain the procedure to him and to assist him as far as was possible in the conduct of his case. He was also advised to obtain legal representation, as he was represented by senior counsel initially and also in an appeal based on the same

facts

before the Supreme Court of Appeal (SCA).[2] He however preferred to represent himself, despite the fact that financial considerations were never raised by him as his motivation

for doing so. As the matter was a complicated commercial case he was clearly at a disadvantage, but the court had to respect his decision. He is clearly an intelligent and astute businessman.

[11] One Vision called the following witnesses, Mr G B Stockdale, Mr A S Van Dyk, Mr P Erasmus, as witnesses on the facts. The following experts were called, Mr B S Eicker, a chartered accountant in the employ of Price Waterhouse Cooper, Brigadier J H Hatting, a handwriting expert, Mr B L Buckton who is an expert on forensic imaging of computers and data recovery.

[12] Mr Smith testified and called Mr Henry Kwami Dua-Ayegemang, Mr J Van Dyk and Mr J P Van Der Walt. After calling these witnesses Mr Smith stated that he did not have a fair trial and would for that reason close his case. He led no evidence relating to his counterclaim for rectification, despite the fact that the Court pointed this aspect out to him.

- [13] After Mr Smith closed his case Mr Van Loggerenberg called Mr Erasmus again as well as Mr Botha as an expert digital forensic specialist. These witnesses were called at this point as Mr Smith alleged that his signature, WhatsApp images and e-mails were forgeries and consequently he carried the onus to prove the fraudulent actions he alleged were committed.

AMENDMENT OF PRAYERS AND THE MATTER BEFORE THE SCA

- [14] During argument One Vision sought an amendment of sub-paragraphs 5.1.2. and 5.2.2 of the prayers this was opposed by Mr Smith.
- [15] Subparagraphs 5.1.2 and 5.2.2 of the prayers in the amended declaration contain a typing error in that the word "payment" in these prayers should have been "cession". This was a mere typographical error and One Vision accordingly sought an order that the word "cession" be substituted for the word "payment" in those subparagraphs. There can be no prejudice for Mr Smith in this regard if the amendments are granted as the amendment is in accordance with the contents of the particulars of claim and the evidence. The amendment is merely formalistic.
- [16] During the period that the matter stood down for argument Mr Smith delivered a copy of the matter of *R Singh & Others v The Companies and Intellectual Property Commission & Others*[3] to chambers.
- [17] If regard is had to the minutes of the pre-trial conference that was held before this Court on 25 April 2019, it is clear that the legal representatives then appearing on behalf of Mr Smith co-operated in bringing the matter to trial readiness. No mention was made by Mr Smith's legal representatives that the outcome of the appeal in the Supreme Court of Appeal could possibly impact on the trial proceedings and that these proceedings should therefore be postponed until the judgment of the Supreme Court of Appeal was delivered.
- [18] The Court requested the parties to address the Court on the relevance and impact that this judgment may have on the proceedings before it. The Court heard argument and considered the judgment of the SCA. The matter before the SCA concerned the question whether the Companies Intellectual Commission (the Commission) had jurisdiction to investigate a complaint in terms of sec 185 of the Companies Act of 2008 and if it had jurisdiction to investigate a complaint lodged by Mr Smith to the effect that his removal as a director of Lahleni had been effected fraudulently.[4] The Commission recommended that the complaint be investigated. Mr Singh was requested to appear before the Commission which he did not do. In the end Mr Singh launched an application to review and set aside the decision to accept and investigate the complaint against him. The Court a quo dismissed the application and Mr Singh appealed this decision with the leave of the Court a quo.[5]
- [19] A perusal of the factual matrix of *Singh v CIPC* revealed that the same factual allegations were made as those that this Court had to decide,[6] The legal context however differed substantially.

- [20] The judgment also revealed that it was inter alia argued by Mr Singh's representatives that an action was pending in the High Court which dealt with the same matter and that it ought to have been referred to trial and consolidated with the case before the SCA.[7] The SCA found that this argument had no merit.[8]
- [21] The SCA in its judgment emphasised the fact that the accuracy of company records falls within the jurisdiction of the CIPC regardless of what the situation may be with regard to a private action launched in the High Court concerning contractual disputes.[9]
- [22] Having regard to the case law referred to by the SCA it is clear that the investigation by the CIPC could run concurrently with the trial proceedings in the High Court (i.e. the present trial proceedings).[10]
- [23] It would seem then that it was found that the judgment in *Singh v CIPC* that this Court could independently proceed with the proceedings before it. It is important to note that at no stage whatsoever did Mr Smith bring an application to this court for a stay or suspension of the trial proceedings pending the finalisation of the statutory investigation by the CIPC.

GENERAL

BACKGROUND

- [24] During 2006, Lahleni Lakes (Pty) Ltd then known as Morning Tide Investments (89) (Pty) Ltd (Lahleni) purchased the farm Doornpoort situated between Emalaheni and Middelburg, Mpumalanga. The intention was to develop the land and establish a township. The directors at the time were Mr Bird, Mr Bleeker, Mr Van Heerden and Mr Potgieter.
- [25] On 21 April 2008 Absa issued a letter of Grant of Development Loan to Lahleni and on 28 May 2008 the local municipality of Emalahleni signed a final service agreement with Lahleni.
- [26] On 12 August 2008 a directors' meeting was held. The points discussed were reflected in a copy of the minutes and it was recorded that on 8 September 2008 Lahleni, represented by Mr Fourie, entered into a Development Property Loan Agreement with Absa. The loan provided for a revolving credit facility in the amount of R240 million, for the financing of phase 1 of the development. As security for the facility a covering mortgage bond was to be registered over the property. On the same date a deed of security for the loan was signed by Mr Bird, Mr Bleeker, Mr Van Heerden, Mr Fourie, Mr Nieuwoudt and Mr Potgieter.
- [27] On 14 November 2008 Absa advanced an amount of R40 700 000-00 to Lahleni in terms of the agreement. On 14 November 2008 a mortgage bond was registered over Lahleni's immovable property to secure the loan.
- [28] Mr Singh was appointed as director of Lahleni on 20 January 2009. During 2008 and 2009 the economic down turn had a negative effect on the development. This resulted in Lahleni not utilising the full credit facility.

- [29] Lahleni could not comply with the terms of the agreement with Absa, and was unable to serve the interest on the outstanding capital. Lahleni's financial situation worsened and a series of negotiations followed. On 21 April 2010, Mr Nieuwoudt, the managing director, addressed a notice to all debenture holders that Lahleni decided to put the entire development on auction. Mr Stockdale of All Core Property Auctioneers testified that the auction took place, at about 20 May 2010 and that no offers were received. Mr Smith did not lead any evidence to contradict this.
- [30] A meeting of directors took place on 3 June 2010 and Mr Peet Ersamus was appointed as the general manager of Lahleni. At that point Absa wanted to launch liquidation proceedings against Lahleni. Further negotiations between the board and Absa ensued. During the period negotiations with Mr Smith started, he was a shareholder in Lahleni. He and Mr Potgieter on behalf of Lahleni came to an agreement that Money Box, a company of Mr Smith would pay the accumulated interest owing to Absa in the amount of approximately R5.7 million. As quid pro quo Mr Smith's or his nominees' shareholding in Lahleni would increase to forty shares. The transfer of the additional shares was done pursuant to an oral agreement.
- [31] Further negotiations between Absa and Lahleni followed as well as between Lahleni and Mr Smith. On 5 December 2010 Mr Erasmus on behalf of Lahleni confirmed payment of R5.7 million in interest and confirmed an interest roll agreement with Absa for a period of 12 months commencing on 10 January 2011.
- [32] During April 2011 two debenture holders brought a liquidation application against Lahleni and a provisional liquidation order was granted. A settlement agreement was reached, with the assistance of Mr Smith and Money Box. In terms of this agreement Money Box bought the claim for R1.5 million and as a result the order was discharged and became settled in due course and Money Box paid the amount of R1.5 million to these creditors.
- [33] After this further negotiations followed, on 23 June 2011 the debt of Absa amounted to R49 282 592-00. In due course 68.5% of the shares in Lahleni were transferred to Mr Smith and his nominees. Absa agreed to hold over further steps, but the interest on the outstanding balance had still to be paid.
- [34] There existed a dispute whether Money Box advanced an amount of R10 156 311-00 to Lahleni to pay various creditors. One Vision admitted that certain creditors were however paid.
- [35] Mr Smith was appointed as a director of Lahleni on 19 September 2011. After this further negotiations took place between Mr Smith, his nominees and other shareholders and it was agreed that Money Box would pay R1 570 000-00 to a Mr Cromhout and Mr WS St Ledger Denny (Mr Denny) to settle all their claims against Lahleni in terms of an agreement dated 18 May 2010.

- [36] In the meantime negotiations with Absa continued, as well as further negotiations regarding transfer of shares to Mr Smith. On 2 March 2012 Absa confirmed that Lahleni had 21 days to settle its debt to Absa and threatened with a liquidation application, if the debt was not paid. On 7 March 2012 Mr Smith forwarded an offer by Tiger Africa (Pty) Ltd to Absa, this was followed by a written offer on 15 March 2012. This offer entailed an acquisition of Absa's claim against Lahleni for an amount of R35 million plus an additional R5 million. One Vision contended that Tiger Africa concluded a settlement agreement with Absa, but never paid any amount. Mr Smith denied that a settlement was reached. It was however common cause that the R35 million was not paid by Tiger Africa to Absa.
- [37] On 31 May 2012 attorneys acting on behalf of Absa informed Lahleni that it was indebted to Absa in the amount of R53 962 065-18 with interest at 19.5% per annum from 31 May 2012 and demanded payment within seven business days, failing which it would institute legal action.
- [38] On 10 June 2012 the board of directors requested from Mr Smith if Tiger Africa had any intention to pay Absa, as they were sureties for Lahleni's debt to Absa. Mr Smith did not respond to this letter and as a result the need for alternative funding arose, which ultimately led to the involvement of Mr Singh and this litigation.
- [39] On 27 September 2012 Absa issued an application for the liquidation of Lahleni in this Court under case number 56167/2012. Mr Singh then extended a financial lifeline to Lahleni in an amount of R60 million.
- [40] Against the aforementioned background the following agreements were concluded the MOU, the Absa settlement agreement, the shareholders loan agreement. the Sale of Equity and the Cession.
- [41] The purpose of the MOU was recorded in clause 3 thereof and was threefold:
- a) to enable Mr Singh to procure 100% shareholding in Lahleni as well as all loan accounts held in Lahleni;
 - b) compensate Mr Smith in the amount that Mr Smith and Mr Singh agreed upon as the loan account acknowledged in Lahleni; and
 - c) enable Mr Singh to settle the Absa indebtedness and other creditors of Lahleni (under security of the MOU).
- [42] The purpose of the Sale of Equity, which incorporated the MOU, was to give Mr Singh exclusive control of, and ownership of all the shares (albeit by means of One Vision) in Lahleni.
- [43] The purpose of the Cession was to affect the cession of all exiting shareholders' rights, title and interest in and to the sold shares and claims in Lahleni in favour of One Vision.
- [44] The following were inter alia terms of the MOU:

44.1 Mr Singh bought all the shares held by Mr Smith and his nominees as well as Messrs Potgieter, Nieuwoudt and Bird for R1.00, which amount was payable upon fulfilment of the suspensive conditions (clause 4.1);

44.2 Messrs Potgieter, Nieuwoudt, Bird, Bleeker and Van Heerden undertook, without consideration therefor, to cede all their rights, title and interest in and to any loan accounts held by any of them, or any of their companies, in Lahleni, as from date of signature of the MOU (clause 4.2);

44.3 Messrs Smith, Potgieter, Nieuwoudt, Bird, Bleeker and Van Heerden would, upon signature of the sale of shares agreement referred to in clause 2.1.4 of the MOU, forthwith resign as directors of Lahleni (clause 6.1);

44.4 Mr Smith would be appointed as a non-executive, non-remunerated director of Lahleni until the amount determined by the auditor had been paid in full to him;

44.5 Mr Singh would cause the release of Messrs Smith, Potgieter, Nieuwoudt and Bird from liability towards the debenture holders in Lahleni as well as Absa within 30 days of signature of the sale of shares agreement referred to in clause 2.1.4 of the MOU (clause 7).

[45] The MOU was subject to the fulfilment of the following conditions precedent:

45.1 That all the parties to the MOU sign it (clause 2.1.1);

45.2 That Mr Singh, successfully and to his satisfaction, settle the Absa facility with Absa within 30 days of signature of the MOU (clause 2.1.2);

45.3 That Mr Singh secure the release of all parties to the MOU, other than Mr Singh, from any and/or all liabilities to the creditors of Lahleni within 30 days of signature of the MOU (clause 2.1.3);

45.4 That a purchase of share agreement be signed by all parties within 45 days of date of signature of the MOU (clause 2.1.4);

45.5 That the outgoing shareholders, when signing the aforesaid purchase of share agreement, sign share transfer deeds (forms CM49) (clause 2.1.4.1).

[46] The relevant terms of the Absa settlement agreement were the following:

46.1 One Vision offered an amount of R40 million to Absa in full and final settlement of the indebtedness of Lahleni;

46.2 One Vision and Mr Singh, jointly and severally, undertook to pay the amount of R40 million to Absa by way of an initial deposit, followed by eight monthly payments commencing on 3 December 2012 and terminating on 3 July 2013;

46.3 One Vision and Mr Singh would secure their liability in terms of the agreement by furnishing a suretyship and guarantee in favour of the bank;

46.4 Absa would on receipt of the deposit and One Vision's guarantee, withdraw the liquidation application against Lahleni;

46.5 upon payment of the final instalment, Absa would release the existing sureties from the existing suretyship and Tiger Africa from all its obligations to Absa in terms of the Tiger Africa agreement.

[47] The following were the relevant terms of the Sale of Equity:

47.1 the exiting shareholders sold to Mr Singh, who purchased from the exiting shareholders, as one indivisible transaction, the shares and claims (i.e. the "sold equity") in Lahleni with effect from 17 October 2012, from which date all risk in and benefits attaching to the sold equity would pass to Mr Singh or his nominee;

47.2 the purchase price payable by Mr Singh to the exiting shareholders was R1.00 payable on or before the implementation date;

47.3 on the implementation date, the exiting shareholders would deliver to Mr Singh:

47.3.1 the share certificates in respect of the sold shares together with declarations for the transfer thereof;

47.3.2 a written cession of the sold claims including due delivery of any security held for or in respect of those claims;

47.3.3 a certified copy of a resolution passed by the directors of the company approving the transfer of the sold shares to Mr Singh or his nominee;

47.3.4 such other documents as were necessary in order to enable Mr Singh to procure the registration of the sold shares into his name or the name of his nominee.

47.8 The Sale of Equity had the following conditions precedent:

47.8.1 that the transaction set out therein and the entering into that agreement are approved by the board of Lahleni;

47.8.2 the acceptance and approval by Absa, of a settlement offer tendered by Mr Singh or nominee, in full and final settlement of the exposure of Lahleni under loan agreement No: 701 005 8953, within 30 days from 3 October 2012;

47.8.3 the resignation by all exiting shareholders as directors, other than Mr Singh, of Lahleni within 30 days from 3 October 2012.

[48] The Cession provided inter alia as follows:

48.1 it is recorded that in terms of a Sale of Equity agreement concluded between the Plaintiff and the exiting shareholders, the exiting shareholders sold their shares and the claims in Lahleni to the Plaintiff;

48.2 the exiting shareholders, in order to comply with their obligations under clause 6.1.2 of the agreement, were required to deliver a written cession of the sold claims to the Plaintiff;

48.3 the exiting shareholders ceded all of their rights, title and interest in and to the sold claims to the Plaintiff, which cession the Plaintiff duly accepted.

[49] Although Mr Smith raised various defences, he limited his evidence during the trial to a denial that he ever resigned as a director of Lahleni and that he signed his shares and the shares of the Ninth, Tenth and Eleventh Defendants over to Mr Singh.

[50] The common cause chronology which by agreement constituted evidence indicated that:

50.1 On 25 September 2012 Mr Erasmus sent an e-mail to Mr Smith, Mr Singh and Mr Hein Brauckmann ("Mr Brauckmann"). This e-mail dealt with the fact that Mr Singh and his group were desirous of taking over the Lahleni project in totality as well as the basis upon which they were prepared to do so.

50.2 On 26 September 2012 Mr Erasmus sent an e-mail to Mr Bleeker, copied to Messrs Van Heerden, Bird, Nieuwoudt, Potgieter and Smith confirming that everyone was on board as regards the proposal from Mr Singh and placing on record that he was awaiting confirmation from Mr Smith. On the same day, i.e. 26 September 2012, Mr Bleeker addressed an e-mail to Mr Erasmus, copied to Messrs Van Heerden, Bird, Nieuwoudt, Potgieter and Smith. In this e-mail Mr Bleeker confirmed that Mr Smith had also accepted via SMS the terms of the transaction proposed by Mr Singh. On 26 September 2012 Mr Erasmus sent an e-mail to Mr Smith and copied Mr Singh. Attached to

this e-mail was the draft agreement providing for Mr Singh's proposal.

50.3 On 27 September 2012 Mr Erasmus sent an e-mail to Mr Potgieter, Mr Smith, Mr Nieuwoudt, Mr Bird, Mr Singh, Mr Van Heerden and Mr Bleeker, to which was attached an email received from Estelle van Heerden of Absa and the final draft of the MOU for the parties to sign. Mr Erasmus confirmed that he would be meeting Mr Smith at 15:00 in order for Mr Smith to sign the MOU. During the afternoon of 27 September 2012 Mr Erasmus sent a further e-mail with the amended MOU to Mr Bleeker, Mr Nieuwoudt, Mr Bird, Mr Potgieter, Mr Van Heerden, Mr Singh and Mr Smith.

[51] Against this background the MOU was signed by all parties, including Mr Smith who signed in Swaziland on 27 September 2012.

[52] On 1 October 2012 Mr Singh and Mr Erasmus met with Absa and its attorneys to discuss the proposed transaction contained in the MOU. Following the meeting, and on the same day, Mr Erasmus wrote an e-mail to all directors and shareholders of Lahleni advising them that Absa's consideration of the proposed transaction was subject to certain conditions, one of which was that the offer of Mr Singh to Absa had to be unconditional. Mr Erasmus called upon the directors and shareholders to agree to their immediate resignation and transfer of shareholding held in Lahleni. All necessary forms had to be signed to enable Mr Singh to

submit a written offer to Absa the following day. Time was of the essence as Absa advised that an application for the

liquidation of the company was issued.

[53] On 1 October 2012 a meeting was held at the offices of De Vries Inc, the attorneys for Absa, where a settlement proposal was discussed. On 2 October 2012 Ms Wickins of De Vries Inc sent an e-mail to Mr Erasmus wherein she referred to the meeting and confirmed that their instructions were to proceed with the liquidation, until a settlement was concluded and that the liquidation application would be served in due course.

[54] Mr Erasmus forwarded this e-mail to Messrs Smith, Nieuwoudt, Bird, Potgieter, Singh, Bleeker and Van Heerden by e-mail.

[55] It was clear from all the facts that at 1 October 2012, time was of the essence. At that point there was the threat of liquidation proceedings instituted by Absa. All the directors and shareholders had to sign the necessary forms for their resignation and transfer of shares in order to enable Mr Singh to submit a written offer to Absa on 2 October 2012. Mr Smith resigned as a director of Lahleni and sold his shares and that of the ninth, tenth and eleventh defendants in Lahleni in terms of the MOU, as confirmed in the Sale of Equity and by the resignation of all the exiting directors of Lahleni, including Mr Smith, on 2 October 2012. This much is clear from clauses 3.1, 4 and 6.1 of the MOU as well as clauses 4, 5 and 6 of the Sale of Equity.

[56] On 2 October 2012 Mr Erasmus requested Mr Jan van Dyk to prepare mandates for the resignation of the directors and securities transfer forms to be signed by all existing shareholders.

[57] Insofar as Mr Smith was concerned, he requested Mr Jan Van Dyk to e-mail him. Mr Smith's mandate for resignation as director as well as the securities transfer forms (CM42) applicable to him and his nominee companies, as he was aware of the fact that Mr Smith was in Swaziland at the time and that he would have to e-mail him the documents for signature.

[58] All the directors and shareholders signed the necessary resignation and share transfer forms on 2 October 2012. Except for Mr Smith, all the others signed in the presence of Mr Andre Van Dyk.

[59] As regards Mr Smith's resignation as a director of Lahleni and the transfer of the relevant shares, the following transpired:

59.1 On 2 October 2012 at 1:52PM Mr Jan Van Dyk (e-mail address: janvandyk@mweb.co.za) sent an e-mail to Mr Erasmus (e-mail address: peetwater@gmail.com) which reads:

"Hi Peet

Sien aangeheg die dokumente soos aangevra.

Groete

"Jan"

59.2 The documents which were sent to Mr Erasmus were the following:

59.2.1 A MANDATE FOR RESIGNATION OF DIRECTOR (CoR39) of "Ralston Emmanuel Smith" dated 2 October 2012 but unsigned.

59.2.2 A SECURITIES TRANSFER FORM (Form CM 42) in respect of Lahleni dated 2 October 2012 but unsigned. The form indicates Mr Smith as the transferor.

59.2.3 A SECURITIES TRANSFER FORM (Form CM 42) in respect of Lahleni dated 2 October 2012 but unsigned. The form indicated Global Security as the transferor.

59.2.4 A SECURITIES TRANSFER FORM (Form CM

42) in respect of Lahleni dated 2 October 2012 but unsigned. The form indicates Muraiball Investments as the transferor.

59.2.5 A SECURITIES TRANSFER FORM (Form CM 42) in respect of Lahleni dated 2 October 2012, but unsigned. The form indicated David Gleason Developments as the transferor.

[60] On receipt by Mr Erasmus of Mr Jan Van Dyk's e-mail and documents, he, on 2 October 2012 at 2:21pm, sent an e-mail to the following persons:

Mr Smith ("oxfordleasing@yahoo .com");

Mr Smith ("Ralston Smith");

Mr Singh ("joesingh@justcoal.co.za").

[61] It was directed at Mr Smith and read as follows:

"Hi Ralston Please print the attached documents, sign, scan and send back ASAP. I need (sic) returned before submitting (sic) offer to ABSA Bank in the morning.

Retain originals I need them when you are back in SA please. Regards

Peet'

[62] On 2 October 2012 at 17:18pm and subsequent to his aforesaid e-mail, Mr Henry Kwami Dua-Ayegemang, (an employee and business associate of Mr Smith), sent five attachments via WhatsApp to Mr Erasmus followed by a WhatsApp text message, which authenticity was disputed by Mr Smith, and which read as follows:

"Peet got Ralston to sign and have sent signed copies to u"

[63] During evidence Mr Smith and Mr Dua-Ayegemang denied that Mr Smith signed the attachments and that they were sent as alleged.

[64] The attachments to the WhatsApp text were colour copies of the documents referred to above, but which then contained the signature, on each of them, of Mr Smith. Mr Smith denied that it was his signature and stated that a fraud was committed.

[65] On receipt of the aforesaid WhatsApp from Mr Dua-Ayegemang, Mr Erasmus replied at 11:20pm:

"Great and thank you"

[66] On 3 October 2012 Mr Erasmus forwarded Mr Dua-Ayegemang's WhatsApp, including the attachments thereto, per e-mail to Mr Erasmus' own e-mail address as well as to Mr Singh and the latter's son, Christopher Singh (at chris@justcoal.co.za).

[67] On 3 October 2012, Mr Singh then made a written offer to Absa. On 9 October 2012 Mr Erasmus sent Mr Dua-Ayegemang's WhatsApp referred to above as a text file via e-mail to Mr Jan van Dyk. It reads as follows:

"Chat history is attached as 'WhatsApp Chat with Kwamie.txt' file to this email"

[68] The evidence of Mr Andre Van Dyk was that on 8 October 2012 he visited Investec where Mr Denny and Mr Cromhout were present and on which occasion they called Mr Smith and enquired whether all three of them, as the only directors on the board of directors of Finishing Touch, could resign. The evidence was that he confirmed that they could. On 9 October 2012

Mr Andre Van Dyk confirmed the resignation in an e-mail addressed to Mr Smith and copied it to Mr Denny, Mr P Erasmus and Mr J Van Dyk. One would have expected immediate response from Mr Smith, if his evidence was to be accepted that he did not resign.

[69] Mr Andre Van Dyk's evidence was also that Mr Smith confirmed that he resigned and that Mr J Singh would take office as director of Finishing Touch and that Mr Jan Van Dyk could arrange for the CM 42's to be signed. Mr Andre Van Dyk's evidence was supported by the objective facts in this matter. A director may by oral notice to the board of directors resign as a director of a company. Such a resignation takes effect when it is tendered.[11]

[70] In the minutes of the pre-trial conference held on 23 January 2017 the parties agreed that written communications be deemed to have been dispatched and received according to their tenure. Mr Smith did not prove that he did not receive Mr Van Dyk's e-mail, the contents of which he confirmed in reply. Accordingly, the e-mails referred to above must be deemed to have been dispatched and received according to their tenure.

[71] The uncontested, evidence of Mr Erasmus corroborates the fact that Mr Smith resigned as director of Finishing Touch. On 18 October 2012 Mr Jan Van Dyk sent an e-mail to Mr Erasmus. It read as follows:

"Goeie Dag Peet

Sien aangehegte dokument.

Jan"

[72] The document which was attached to the aforesaid e-mail was a MANDATE FOR RESIGNATION OF DIRECTOR (CoR39) of "Ralston Emmanuel Smith" which was undated and unsigned. On receipt of Mr Jan Van Dyk's e-mail, Mr Erasmus testified that on 18 October 2012, he sent an e-mail to the following persons:

- i. Mr Smith ("Ralston E. Smith");
- ii. Mr Singh ("joesingh@justcoal.co.za");
- iii. Mr Singh's son, Christopher ("Christopher Singh").
- iv. The e-mail read as follows:

"Hi Ralston .. see enclosed .. please print, sign, scan and return to me.

Kind regards

[73] Mr Erasmus's evidence was accordingly supported and corroborated by documentary prove.

[74] On the same day Mr Smith sent an e-mail from ralstonl@tigerafrica.com to Mr Erasmus at peetwater@gmail.com, and copied Mr Singh at joesingh@justcoal.co.za and to Mr Singh's son Christopher Singh. It read as follows :

"Dear Peet,

Have you received signed Finishing Touch Resignation from me? Kindest and warmest regards,
Ralston E. Smith".

[75] The aforesaid email supported the inference supportive of and well aware of the process which ultimately led to the transfer of shares and resignation as director, including the payment to Absa by Mr Singh.

[76] On 19 October 2012 Mr Erasmus responded to Mr Smith by e-mail.

The response read as follows:

"I have Ralston Thanx a stack. Did you receive my query on payment date, to allow me the dignity to make arrangements in the event payment will be late again this month?"

[77] As reflected in the mandate for appointment of director (CoR39), Mr Singh was appointed the sole director of Finishing Touch. Mr Singh became the sole director of Finishing Touch under circumstances where Mr Denny, Mr Cromhout and Mr Smith confirmed their resignations as directors of the company to Mr Andre van Dyk and that Mr Singh should be appointed as sole director.

- [78] As reflected in the issued share certificate, One Vision became the sole shareholder in Finishing Touch. The shares were transferred pursuant to Mr Denny, Mr Cromhout and Mr Smith confirming to Mr Andre Van Dyk that Mr Jan Van Dyk could arrange for the CM42's to be signed.
- [79] The evidence of Mr Andre Van Dyk was that all directors, save for Mr Smith, resigned as directors on 2 October 2012 in his presence and signed mandates for resignation as directors (CoR39's) from Lahleni in his presence. The uncontested evidence of Mr Andre Van Dyk was further that Messrs Nieuwoudt, Bird and Potgieter respectively signed security transfer forms, transferring their respective shares in Lahleni to One Vision. In the light of the legal position the shares had in any event been transferred on conclusion of the MOU, read with the Sale of Equity. Mr Jan Van Dyk amended the share register of Lahleni accordingly. On 2 October 2012 Mr Jan van Dyk issued a share certificate in One Vision's name holding 100 shares in Lahleni.
- [80] The uncontested evidence of Mr Erasmus was that the purchase price of R1.00 was paid to each exiting shareholder as provided for in the MOU.
- [81] On 12 October 2012, and in anticipation of the conclusion of the settlement agreement, One Vision paid the required deposit of R5 million to Absa. Following the conclusion of the agreement and during the period 3 December 2012 to 3 July 2013, One Vision paid eight equal instalments of R4,375 million to Absa in full and final settlement of the amount of R40 million. Subsequent thereto, and on 16 July 2013, Absa released all sureties and Tiger Africa from all liability towards Absa.
- [82] Subsequently, Mr Jan Van Dyk, via Mrs R Pienaar, submitted the director's resignation of Mr Smith to the CIPC. He also updated Lahleni's share register.
- [83] In terms of the provisions of the MOU, as incorporated in the Sale of Equity, and the Cession, Messrs Singh, Potgieter, Nieuwoudt, Bird, Bleeker and Van Heerden ceded all their rights, title and interest in and to any loan accounts held by them or any of their companies in Lahleni to One Vision. On 22 October 2012, Mr Singh concluded a settlement agreement with Absa.
- [84] In terms of clauses 8.2 and 8.4 of the agreement with Absa, Mr Singh secured the release of Mr Smith and Tiger Africa from their liability towards Absa. Mr Smith never took issue with this release, as one would have expected, if he did indeed not resign as a director nor signed for the transfer of his shares. In the light of his evidence that his signature was forged one would have expected a prompt reaction from him to alert all concerned that he did not resign or sell his shares.
- [85] On 16 July 2013, Absa confirmed in writing that it had received full payment in terms of the settlement agreement and that the sureties had been released from liability as provided for in clause 8.3 of the agreement.

[86] The evidence of Brigadier J F Hattingh, a handwriting and photographic expert called by One Vision, confirmed that the signature which appeared on the WhatsApp images that Mr Erasmus received from Mr Dua-Ayegemang is in all probability that of Mr Smith. He found 16 points of correspondence between those signatures and specimen signatures of Mr Smith with regard to individual characteristics and no fundamental differences.

[87] Brigadier Hattingh confirmed the contents of his expert report in which he found, after an examination of the documents for indications of the signatures of Mr Smith having possibly been transferred from other documents by means of "cut and paste", that:

"The documents were examined for indications of the signatures being transferred from other documents by means of 'cut and paste'. No indication of such manipulation occurred."

[88] In conclusion Brigadier Hattingh recorded the following finding in his expert report, which he confirmed during evidence, that no indications of forgery could be found and that the disputed signature fell within the range of variation and no fundamental differences occurred. Mr Smith led no expert evidence to counter Brigadier Hattingh's evidence, nor did he succeed to successfully cast doubt on the evidence during cross-examination.

[89] The expert evidence of Mr B L Buckton, called by One Vision, confirmed the authenticity of the e-mails that were exchanged in regard to the resignation and transfer of shares relating to Mr Smith. His conclusion appears in his expert report which he confirmed in evidence, and which reads as follows:

"8.5 The emails extracted from the Gmail account (peetwater@gmail.com) as per Annexure "A" to "I", have no irregularities within the email header information.

8.6 From the email header information accordingly, the emails have originated from the identified email accounts."

[90] The expert evidence of Mr M G Botha, called by One Vision, with reference to his expert report regarding the WhatsApp chat of Mr Dua-Ayegemang that Mr Erasmus received from him and then e-mailed to himself, concluded that "based on the characteristics of the text file 'Whatsapp chat with Kwamie.txt', this message could be a WhatsApp chat that had been emailed from a WhatsApp account to the user."

[91] Mr Bot a's expert evidence was also that the e-mail by means of which Mr Erasmus forwarded Mr Dua-Ayegemang's WhatsApp to Mr Singh appeared in the Gmail account of Mr Erasmus as well as in the e-mail inbox of Mr Singh.

[92] Mr Smith did not call any expert witnesses. The evidence of the plaintiffs experts was therefore uncontested.

[93] Mr Smith's witnesses, Mr J A Van Dyk and Mr J van der Walt, gave evidence which were supportive of the evidence of Mr Erasmus, Brigadier Hattingh, Mr Buckton and Mr Botha.

- [94] The evidence of Mr Van der Walt corroborated the evidence that Mr J A Van Dyk gave with regard to the e-mail containing Mr Dua- Ayegemang's WhatsApp, which he received from Mr Erasmus, containing the signatures of Mr Smith with regard to his resignation as a director and the transfer of the shares in Lahleni. In particular, Mr Van der Walt confirmed that he received a photograph of the mandate for resignation as a director (CoR39) depicting the signature of Mr Smith from Mr Van Dyk and that he confirmed with the CIPC that they had a similar document.
- [95] Mr Smith led the evidence of Mr Jan Van Dyk, the son of Mr Andre Van Dyk, who admitted that he did forge the signatures of Mr Smith in the CM42 documents, which were submitted to CIPC. This witness also made contradictory affidavits regarding to what led to the forgeries that he committed. He testified that he had a copy of Mr Smith's signature when he was appointed as a director of Finishing Touch. On the one hand he said that he acted on request of Mr Erasmus and on the other hand he explained that he was told to sign this affidavit to avoid prosecution. In Court he testified that neither his father, Mr Van Dyk nor Mr Erasmus told him to commit the fraud and he did it because pressure was put on him by the shareholders to finalise the procedure for change of directors. He said he never met Mr Singh nor has he ever spoken to him. There is thus no question that Mr Jan Van Dyk forged Mr Smith's signature on the documents presented to CIPC. This is a matter that is presently before CIPC and this Court need say nothing about that. The issue before this Court is whether One Vision proved on a balance of probabilities that Mr Smith resigned as a director and transferred his shares accordingly and whether Mr Smith succeeded in proving that his signature was forged on the documents attached to the WhatsApp. Mr Jan Van Dyk played no role in relation to those documents and the forgery committed by him is not relevant to these proceedings.
- [96] Mr Smith, in his evidence, denied that the WhatsApp of Mr Dua- Ayegemang existed and Mr Dua-Ayegemang also disassociated himself from that WhatsApp during his evidence. However the uncontested expert evidence indicated otherwise.
- [97] Mr Smith was not a satisfactory witness. He for example changed his version regarding the WhatsApp message from Mr Dua-Ayegemang. He also evaded questions. He for example initially denied that he received the e-mail with the Absa settlement agreement, when he was about to sign the equity agreement, only to admit later on, when proof was provided that it was indeed sent to him. Neither did Mr Dua- Ayegemang impress as a witness as he for example initially denied having ever been involved with Lahleni, while e-mails put to him during cross-examination indicated otherwise.
- [98] If the evidence of all the witnesses, including and especially those of the experts are considered, seen with the unsatisfactory evidence of Mr Smith and Mr Dua-Ayegemang, this Court had to find on a balance of probabilities that Mr Dua-Ayegemang received the resignation and transfer forms, that Mr Smith signed it and it was transmitted to Mr Erasmus

via WhatsApp. There is no other explanation for the images. Mr Smith's evidence was that they were forgeries, but he provided no

proof nor led any evidence to prove this fact and the experts evidence indicated otherwise. Mr Dua-Ayegemang conceded that he could

have received the e-mail from Mr Erasmus containing the unsigned resignation as a director and transfer of shares forms in regard to Lahleni. On the probabilities this Court finds that he would have presented it to Mr Smith. In the light of all the evidence the only logical inference is that Mr Smith did sign those forms. Significantly Mr Smith did previously admit in an affidavit that he did resign as a director.

[99] The uncontested evidence of Mr Eicker was that the amount of the loan account was, in accordance with the provisions of clause 5 of the MOU, determined by him in the amount of R14,809,625.11. According to him Mr Smith at all relevant times co-operated with him in determining the amount of the loan account and never disputed the correctness of the amount determined. Mr Smith led no evidence contradicting this evidence nor did he lead evidence to prove that the amount is not correct, as a result this Court must accept Mr Eicker's calculation.

[100] This Court finds that the MOU, as incorporated in the Sale of Equity, the Sale of Equity and the Cession are valid and binding on the parties and One Vision is entitled to an order in terms of prayer 2 of the amended declaration.

[101] The value of the loan account in Lahleni had been determined by Mr Eicker in the amount of R14,809,625.-11 pursuant to the provisions of clauses 5.1 and 5.3 of the MOU, and such determination of the value of the loan account is final and binding on One Vision and Mr Smith.

[102] One Vision is entitled to an order in terms of prayer 4 of the amended declaration that the plaintiff be ordered to pay the amount of R14,809 ,625-11 to Mr Smith.

THE LEGAL POSITION REGARDING THE TRANSFER OF SHARES

[103] For as far as it may be relevant the legal position regarding the transfer of shares is set out. Section 35(1) of the Companies Act 71 of 2008 ("the Companies Act") provides that a share issued by a company is movable property, transferrable in any manner provided for, or recognised by the Act, or other legislation.

[104] Section 51(5) of the Companies Act provides regarding transfer that: "A company must enter in its securities register every transfer of any certified securities."

[105] This must be done if the transfer (a) is evidenced by a proper instrument of transfer that has been delivered to the company; or (b) was effected by operation of law. The transfer of shares is not a single act, but includes an agreement to transfer, the execution of the transfer and finally, the registration of the transfer.[12]

[106] In terms of the MOU, as confirmed by the signed transfer of share forms, including those signed by Mr Smith, and the Sale of Equity, One Vision was entitled to demand that Lahleni registers, amongst others, the transfer of the shares purchased by it from Mr Smith and the ninth, tenth and eleventh defendants into its name. Mr J A Van Dyk testified that he amended and updated the register of Lahleni to reflect the plaintiff as the only shareholder. The evidence is clear that Mr Smith signed transfer of share forms in respect of the transfer of his shares and those of the ninth, tenth and eleventh defendants on 2 October 2012.

THE SUSPENSIVE CONDITIONS AND THEIR FULFILMENT OR NOT

[107] Although Mr Smith under oath stated that the resignation as shareholder and director was the only dispute, I deal with the fulfilment of the conditions of the MOU, as he did refer to this aspect during evidence.

[108] It is common cause that the suspensive condition contained in clause 2.1.1 of the MOU, ie that all parties sign the MOU, had been fulfilled in that all parties signed the MOU on 27 and 28 September 2012 respectively. The aforesaid was clear from the chronology of common cause facts and was as a result not in dispute.

[109] The suspensive condition contained in clause 2.1.2 of the MOU, ie that Mr Singh successfully, to his satisfaction, settles the Absa facility within 30 days from 28 September 2012, was duly fulfilled upon the conclusion of the Absa settlement agreement on 22 October 2012, ie within the 30 day period.

[110] The suspensive condition contained in clause 3.3 of the Sale of Equity, ie the acceptance and approval by Absa, of a settlement offer tendered by Mr Singh within 30 days from 3 October 2012, should be read together with clause 2.1.2 of the MOU. In the light of these provisions Mr Smith's contention that Absa had to be paid within 30 days from 28 September 2012 was incorrect and should be rejected. Clause 2.1.2 was therefore fulfilled, even if this is not correct, with the incorporation of the MOU in the Sale of

Equity, clause 2.1.2 of the MOU became superfluous and pro non scripto as by that time Mr Singh had finally concluded the Absa settlement agreement.

[111] Mr Smith was aware prior to and after the conclusion of the Absa settlement that payment would be done over a period of time and specifically until July 2013. No evidence was led that he ever objected at any relevant time to Absa being paid over a period of time. In his evidence under cross-examination he, in any event, conceded that this condition was fulfilled.

[112] The suspensive condition contained in clause 2.1.3, ie that Mr Singh secure the release of all parties to the MOU from any and/or all liabilities to the creditors of Lahleni within 30 days from 28 September 2012, was fulfilled upon the conclusion of the Absa settlement agreement on 22 October 2012.

[113] Clauses 8.3 and 8.4 of the Absa settlement agreement provide for the release of the sureties and Tiger Africa upon payment of the settlement amount in full.

[114] The suspensive condition contained in clause 2.1.4 of the MOU, i.e the purchase of share agreement by all parties within 45 days of date of signature of the MOU had been fulfilled.

114.1 All the parties, except Mr M Nieuwoudt, had signed the Sale of Equity within 45 days of date of signature of the MOU;

114.2 Mr Nieuwoudt was abroad and could not sign within the period of 45 days. On his return he signed the Sale of Equity on 20 November

2012. However, Mr L Ferreira, for and on behalf of Mr Nieuwoudt, confirmed, in an e-mail to Mr Erasmus on 11 October 2012, the following:

"I have considered all the matters listed below.

On behalf of Marius Nieuwoudt and as discussed with you on the phone I confirm that we are in agreement and that we have familiarised

ourselves with all matters listed below.

We have also taken note of the fact that a position of default by SING/CAMM will lead to the situation where parties such as Nieuwoudt will revert to a position as it was the case prior to the date of the conclusion of the relevant MOU.

Please proceed with this matter as contemplated."

[115] The matters referred to in the e-mail of Mr Ferreira are common cause. They were set out chronology of common cause facts. As such the paragraph in the chronology of common cause facts referred to an e- mail sent by Mr Erasmus to Mr Smith and the other directors and shareholders of Lahleni (including Mr Nieuwoudt) on 11 October 2012 and in which he required a response from each of them to the effect that:

115.1 they had taken notice of the settlement agreement received from Ms Wiggins of Absa for comment;

115.2 the settlement agreement took cognisance of the MOU that was signed;

115.3 they had no objections to the transaction;

115.4 they took notice of the fact that the Sale of Equity would be drafted and signed;

115.5 they agreed to the transfer of shares on signature of the Absa settlement agreement and the appointment of Mr Singh as sole director of Lahleni (albeit that the transfer of shares and the resignation of directors had by then already in fact taken place).

- [116] Thus, although Mr Nieuwoudt was, due to him being overseas at the time, not able to sign within the 45 day period, he confirmed that the Sale of Equity could be proceeded with. In effect, the suspensive condition has therefore been materially complied with.
- [117] In the alternative it was submitted, and correctly so, that when the MOU was incorporated into the Sale of Equity and the latter was signed, this condition precedent became superfluous and pro non scripto in the light of the fact that by that point in time all the shares in Lahleni had already been transferred to One Vision (and all the exiting directors had already resigned).
- [118] The suspensive condition contained in clause 2.1.4.1, ie that the outgoing shareholders would sign, with the share sales agreement, transfer deeds (CM49's) to allow the transfer of shares, was duly fulfilled on 2 October 2012, when all exiting shareholders, including Mr Smith, signed securities transfer forms (CM49's). In any event in the light of the legal position referred to above, this suspensive condition is in law irrelevant.
- [119] The suspensive condition contained in clause 3.2 of the Sale of Equity, ie that the board of directors of Lahleni approve the transaction, was duly fulfilled by Mr Singh, being the sole director of Lahleni at the time, signing the Sale of Equity agreement on 13 November 2012.
- [120] Mr Smith, in an affidavit filed in this Court, admitted that the suspensive condition contained in clause 3.2 of the Sale of Equity was fulfilled.
- [121] The suspensive condition contained in clause 3.3 of the Sale of Equity, ie the acceptance and approval by Absa of a settlement offer tendered by Mr Singh within 30 days from 3 October 2012, was duly fulfilled upon the conclusion of the Absa settlement agreement on 22 October 2012.
- [122] The suspensive condition contained in clause 3.4 of the Sale of Equity, ie that all exiting shareholders resign as directors of the company within 30 days from 3 October 2012, was duly fulfilled on 2 October 2012 when all exiting shareholders, including Mr Smith, signed mandates for resignation of director of Lahleni. In any event, and in the light of the legal position the directors agreed on signature of the MOU, and in the light of clause 6.1 of the MOU, to resign as directors, which resignation, by agreement, took effect on the conclusion of the Sale of Equity.

ESTOPPEL AND WAIVER

- [123] In its amended replication One Vision pleaded that Mr Smith was in any event estopped from denying the validity and enforceability of the MOU and the Sale of Equity, alternatively that Mr Smith had expressly or impliedly waived his right to raise any defence based on the invalidity and enforceability of the MOU and the Sale of Equity under circumstances where he at all relevant times had knowledge of his right to raise such defence, but decided to abandon it. I deem it appropriate to also deal with these two aspects, if it is found that I am . wrong on the conclusions I came to and set out above.

[124] The doctrine of estoppel is an equitable one, developed in the public interest.[13] The essentials for estoppel are the following:[14]

124.1 Representation by words or conduct of a certain factual position;

124.2 The representee acted on the correctness of the facts as represented. There must, therefore, be a causal connection between the representation and the act. This entails proving that reliance was not actuated by an external influence or factors other than misrepresentation;

124.3 The representee acted, or failed to act, to her or his detriment;

124.4 The representation was made negligently. The requirement of negligence is not always an element.

[125] Having regard to the facts pleaded in the amended replication which are common cause and the evidence of Mr Erasmus, it was clear that Mr Smith is estopped from denying the validity and enforceability of the MOU and the Sale of Equity, as he at no point in time indicated any opposition to the conclusion of the agreement with Absa or ultimately payment by Mr Singh to Absa and all the consequences of the payment i.e the release of all the sureties of Lahleni.

[126] One Vision, at all relevant times, acting on the correctness of the facts represented by Mr Smith, i.e. that the MOU and Sale of Equity were valid and binding, paid R40 million to Absa and R3.8 million to other creditors of Lahleni and commissioned the audit of the loan account of Mr Smith, in which Mr Smith gave his co-operation.

[127] It is clear that One Vision would suffer irreparable financial loss should Mr Smith not be estopped from denying the validity and enforceability of both the MOU and Sale of Equity. Not only would One Vision be out of pocket in the amount of R43.8 million, but it would also have, so to speak, given back Lahleni to Mr Smith and the other former directors and shareholders. As a result that would not only be totally unjust but even bizarre. In my view Mr Smith is indeed estopped from denying the validity and enforceability of the MOU and the Sale of Equity.

[128] In the alternative it was argued that Mr Smith waived any rights that he might have had regarding Lahleni. Waiver of a right extinguishes that right and the concomitant obligation. Waiver is a question of fact.[15] The decision to abandon may be either express or tacit. Tacit abandonment is proved by conduct plainly inconsistent with an intention to enforce the right relied on.[16]

[129] The party who abandons the right must have had full knowledge of the right and must have conveyed the decision to abandon to the other party.[17]

[130] Having regard to the facts pleaded in the amended replication which are common cause and the evidence of Mr Erasmus, it clearly points to the fact that Mr Smith tacitly waived his right to raise any defence based on the invalidity and enforceability of the MOU and the Sale of Equity under circumstances where he at all relevant times had knowledge of his right to raise such defence, but which he decided to abandon before the delivery of his plea.

CONCLUSION

[131] Mr Smith did not lead any evidence regarding rectification as pleaded, despite this fact being pointed out to him. As a result this Court need not deal with this aspect.

[132] The evidence supports One Vision's claim, and in any event Mr Smith was also either estopped or waived his right to dispute the validity and enforceability of the agreements.

COSTS

[133] The Plaintiff is entitled to a costs order against Mr Smith and Money Box, jointly and severally, the one paying the other to be absolved. The costs should include the costs of the action and all the costs of the applications and postponements under case number 53735/13, such costs to include the costs attendant upon the employment of two counsel where applicable.

[134] One Vision requested a punitive costs order. I am of the view that the facts of this case did not warrant such an order. Mr Smith might have caused delays due to the fact that he terminated the mandate of his representatives at a late stage and the way in which he represented the matter, but I take into consideration that he as a layperson represented himself.

[135] In the light of the risk that Mr Smith might not pay the costs referred to above it was submitted that the order that One Vision must pay the amount of R14,809,625.11 to him must be qualified, in the sense that the aforesaid amount only be paid to Mr Smith once he has paid all the taxed costs and only 30 days after taxation. This submission seems to be both fair and practical and will not prejudice any of the parties.

[136] The following order is made:

1. The amendment of the prayers is granted.
2. The Memorandum of Understanding, as incorporated in the Sale of Equity, the Sale of Equity and the Cession are declared valid and binding on the parties.
3. The Plaintiff is ordered to pay the amount of R14 809 625.11 to the First Defendant within 30 (thirty) days of payment of all the taxed costs to the Plaintiff.
4. The counterclaims are dismissed.

5. The First and Second Defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the action, and the reserved costs related to case number 53735/2013, such costs to include the costs attendant upon the employment of two counsel where applicable.

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:

3 MAY 2019

DATE OF JUDGMENT: 7 FEBRUARY 2020

ATTORNEYS FOR PLAINTIFF: VDT ATTORNEYS INC

ADVOCATE FOR PLAINITFF: ADV D VAN LOGGERENBERG (SC)

ATTORNEYS FOR DEFENDANTS: IN PERSON

- [1] Manong & Associates (Pty) Ltd v Minister of Public Works and Another 2010(2) SA 167 (SCA) at 167
- [2] Ramesh Singh & others v The Companies and Intellectual Property Commission 9822/2018) [2019] SASCA 68 (30 May 2019)
- [3] (822/2018) [2019] ZASCA 69 (30 May 2019 (Singh v CIPC)
- [4] See Singh V CIPC par 1
- [5] See Singh v CIPC par 2 -
- [6][6] See Sing v ClPC par 6 - 8
- [7] Singh v CIPC par2, par 19 - 20
- [8] Singh v CIPC par 11
- [9] Paragraph 26
- [10] In paragraph 22 and 23
- [11] Harding and Others NNO v Standard Bank of South Africa Ltd 2004(6) SA 464 (C) at 4691- J
- [12] Henochsberg on the Companies Act 71 of 2008 vol 1, p 159
- [13] Trust Bank van Afrika Bpk v Eksteen 1964(3) SA 402 (A) 415-416
- [14] Amler's Precedents of Pleadings, 9th Edition, p 188
- [15] Laws of Rutherford 1924 AD 261 at 263
- [16] Amler's Precedents pf Pleadings, 9th Edition, p 378

[17] Amler's Precedents of Pleadings, 9th 'Edition, p 378

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