

SOUTH AFRICA / JUDGMENT

Seima N.O and Others v Saharan Trade and Finance (Pty) Ltd (2022/027175) [2024] ZAGPJHC 826 (22 August 2024) [2024] ZAGPJHC 826

COURT

South Gauteng High Court, Johannesburg

BEFORE

I Opperman

CASE / FILE NUMBER

2022/027175

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

Case No: 2022/027175

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED YES

DATE: 22/08/2024

SIGNATURE

In

the matter between:

SIMON
MATLESHE SEIMA
N.O.
First Applicant
TARYN
JANE NEIZEL N.O.
Second
Applicant
NURJEHAN
ABDOOL GAFAAR OMAR N.O. Third
Applicant
SIBUSISO
NDUNA
N.O.
Fourth Applicant
(in
their capacities as the duly appointed joint trustees of
the
insolvent estate of Martin Ashley Levick)
and
SAHARAN
TRADE AND FINANCE (PTY) LTD
Respondent
(Registration Number:
1996/012499/07)
This
judgment was handed down electronically by circulation to the
parties' legal representatives by email. The date for hand-down
is deemed to be 22 August 2024

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application for the provisional liquidation of Saharan Trade and Finance (Pty) Ltd (Saharan), the respondent, which has been brought by the trustees of the sequestrated estate of Mr Martin Ashley Levick (the insolvent). The trustees (the applicants) apply for the provisional liquidation of Saharan on the basis that Saharan owed the insolvent some R45 million[1] (the loan) as at the date of the sequestration of the insolvent's estate and that Saharan is unable to pay its debts.

- [2] The applicants' case is that the loan is due to the insolvent and that, having stepped into the shoes of the insolvent's estate, they have called up the loan which has not been paid. Saharan disputes this. Its case is that if the loan exists and it is due, it is owing to Jamrae Capital Corporation (Jamrae), an off-shore trust registered in Lichtenstein. To address this dispute, it is necessary to go back to the genesis of the loan.

The property and its acquisition by Saharan

- [3] Saharan owns a property in Cape Town described as Unit 903 Eventide, 24 Victoria Road, Clifton (the property). The controlling mind behind Saharan's purchase of the property in the Cape was Mr Glynn David Cohen, a resident of Zimbabwe and a citizen of the principality of Monaco. The property was registered into Saharan's name in the Deeds Registry in 2007. The property is situated in an apartment block called Eventide. That Saharan owned the property is one of the few fixed points of reference in this matter.
- [4] The Vulcam Trust (T 7931/02) (the Vulcam Trust) is the owner of 100% of the issued share capital of Saharan. Saharan raised both mortgage bond finance (the Bond Finance) and loan finance (the Loan Finance).
- [5] Mr Cohen explained the Loan Finance as follows:

'[Saharan] raised what I defined as 'the Loan Finance'. This was a loan from Mondo Investments & Finance Ltd ('Mondo') a company registered in the British Virgin Islands, to Saharan. Despite a diligent search, I am unable to locate a copy of this loan agreement. Mondo advanced the loan to [Saharan] and the money was duly transferred from Mondo's bank, Hypo Swiss Private Bank.'

- [6] Mondo then allegedly ceded the right to receive payment of the loan to Chancery Consultants Inc (Chancery), a company also registered in the British Virgin Isles. An unsigned copy of the loan and cession agreement between Mondo,

Saharan and Chancery dated January 2009 recording (a) the loan between Mondo and Saharan and, (b) the cession of such loan to Chancery, is attached to Mr Cohen's affidavit the content of which he confirms (the Chancery cession agreement).

- [7] The purpose of the Loan Finance recorded in the Chancery cession agreement was for the loan of R75 900 000 'to be utilised to assist Saharan in their cash flow requirements relating to the investment side of their business.' [2]

The purchase of the property by the insolvent/Jamrae

- [8] According to the insolvent's wife, Leigh-Anne Gresham Levick, who deposed to Saharan's answering affidavit, she and her husband holidayed frequently at Eventide and became friendly with Mr Cohen who although living in Monaco was a frequent visitor to Cape Town with his wife Nadia.

- [9] At some point in mid-2013 Mr Cohen and the insolvent discussed the purchase of the property. The insolvent was informed by Mr Cohen that Mr Cohen's wife Nadia had fallen pregnant with twins and that Mr Cohen was therefore going to sell the property as it was not suitable for infants. According to the insolvent's wife, Mrs Levick, the insolvent told Mr Cohen that if the property were to be purchased, the purchaser would be Jamrae, the off-shore trust registered in Lichtenstein, of which the insolvent and his wife were trustees, and their three children were beneficiaries.
- [10] Mrs Levick recalls that Mr Cohen informed her husband that Saharan owned the property and that the shares in Saharan were owned by the Vulcam Trust of which Mr Cohen was a trustee and his family and children were the beneficiaries. Mr Cohen apparently then suggested to the insolvent that rather than purchasing the property from Saharan, the insolvent should just "purchase" or "take over" his and his children's beneficial interest in the Vulcam Trust.
- [11] Mr Cohen also informed the insolvent that he had obtained exchange control approval from the South African Reserve Bank for a loan that had been made to Saharan. The entity to which the loan was allegedly owed at this time was Chancery, which had taken cession of Mondo's right to receive repayment of the loan in terms of the Chancery cession agreement. The insolvent apparently had no idea of the nature or extent of the loan facility, but he wished to ensure that Chancery should have no further claims against Saharan.
- [12] If Chancery called up the loan owed by Saharan, then Saharan would have to pay it back. The rights of Chancery to call up the loan were to be transferred from Chancery by a cession to a recipient nominated by the insolvent. The insolvent's version is that the recipient of the right of Chancery to call up the loan was supposed to be Jamrae, the off-shore trust registered in Lichtenstein, of which the insolvent and his wife were trustees, and their children the beneficiaries.
- [13] The terms of the purchase agreement, according to Mrs Levick, were that the purchase price of R65 000 000 for the property would be discharged by Saharan remaining liable to ABSA in the amount of R18 840 657, which was the amount outstanding and owing by Saharan to ABSA under and in terms of an existing mortgage bond. This amount would be deducted from the purchase price. Jamrae would pay, or cause to be paid, the balance of the purchase price which was agreed to be the US dollar amount equivalent of R46 159 343, to Mondo's account with Chancery. Jamrae would take cession of Mondo/Chancery's claim against Saharan.
- [14] In respect of Vulcam: Mr Cohen and one Frank Davidson would resign as trustees of Vulcam. The insolvent and Mrs Levick would be appointed as trustees of Vulcam and their children would replace Mr Cohen's daughter as the capital and income beneficiaries. The Vulcam's trust deed would be amended to record this. In respect of Saharan: the existing directors would resign as directors; The insolvent and Mrs Levick and/or their nominees would be appointed as directors; All other assets owned by Saharan would be transferred out

of Saharan so that Unit 903 would remain as the sole asset owned by Saharan, which when all of this manoeuvring was completed, would in effect be under the control of the insolvent and his family.

[15] This did not all come to fruition as envisaged. For reasons unexplained, Mr

Cohen remained on as a trustee of Vulcam and the insolvent, Mr Levick, was never appointed a director of Saharan. Mrs Levick claims

that the purchase price was duly paid in full but acknowledges that Mr Cohen has denied that the full purchase price was paid and that Mr Cohen has instituted action against her daughter and herself as Vulcam's trustees for the balance that Mr Cohen alleges remains owing.

[16] Despite the alleged failure to pay the purchase price in full, the Levicks were given occupation of the property by the Cohens on 31 March 2014 and immediately began making renovations to the property.

The Badenhorst Principle

[17] The Badenhorst principle, a concept used in liquidation proceedings, which has been described as less of a principle and more of a sensible rule of practice[3], states that if an applicant wants to claim a debt they know is disputed, they should not bring liquidation proceedings to do it, but should claim the debt by way of action to get the dispute resolved and only once the claim has been established by judgment in the trial action may the applicant seek to liquidate.

[18] As will be apparent, the facts of this matter are reminiscent of a game of cups, where an object is hidden below an upside-down cup moved around by a trickster with other empty upside-down cups to baffle the audience as to the whereabouts of the object. In this case the object is the loan. If it is found in the cup which the applicants say it is in, the estate of the insolvent, then they receive the proceeds of the sale of the property up to the value of the loan. If the loan is found in the cup which the insolvent's wife (Mrs Levick as the deponent to Saharan's answering affidavit) says it should be in, then the proceeds of the sale of the property to repay the loan go to the Levick family trust, Jamrae. An option introduced by the confusing trail of transactions

is that the loan vanished completely. A further option is that the loan was not used in the game at all, and that all the receptacles

presently under consideration are empty.

[19] Of significance to whether there is a bona fide dispute over the loan is the fact that action proceedings have been instituted by the applicants against Saharan in which they seek judgment for payment of the loan, the very indebtedness upon which the applicants claim to have standing to apply to wind up Saharan. The summons in which the applicants are the plaintiffs was served on Saharan on 11 August 2022 and on 26 August 2022, Mrs Levick on behalf of Saharan, concluded a sale agreement with a company called Blue Cloud

Investments 37 (Pty) Ltd (Blue Cloud) for the sale of the property. On 2 September 2022, the trustees were approached by Blue Cloud who sought information as to any potential risks that it may encounter as a result of the insolvent's association with Saharan. It became apparent that the property had not been marketed publicly, that the representatives of Blue Cloud were approached directly and that the existence of the ceded loan or the dispute in respect thereof, had not been disclosed to Blue Cloud. Mr Rothbart, Saharan's attorney of record, on 14 September 2022 advised that the summons was served on Saharan's registered office and neither Saharan nor the offices of Mr Rothbart were alerted to it. He attached a notice of intention to oppose the action and drew attention to the fact that the applicants were aware of Saharan's defences which had been tabled to Fluxmans Attorneys, the applicants' former attorneys.

- [20] Because Mrs Levick had disposed of Saharan's primary asset, the property, the applicants contended that there was a high probability that she would attempt to dispose of other assets of Saharan and accordingly sought an urgent liquidation order. This resulted in an agreement being concluded (made an order of court) in terms of which some R65 million would be held in trust by Mr Rothbart pending finalisation of this application.
- [21] I do not know what the status is of the action which was instituted. From submissions made in the heads of argument it would seem that the action is still pending. It is now 3 years later and might have been finalised if actively advanced. What is clear is that the applicants from the outset appreciated that there are disputes of fact which will probably be best decided in trial proceedings. They appreciated at that time that the Badenhorst route had to be followed.
- [22] The only aspect which changed between the action being instituted and this application being launched, was the sudden sale of the property. If dissipation of assets were the only concern, then there were presumably other remedies available, such as an interdict prohibiting the dissipation of the funds pending the outcome of the action. Liquidation proceedings are inappropriate under circumstances where action was instituted because inherent in the choice of action proceedings is a tacit acknowledgement that the claim is the subject of a dispute of fact. Nonetheless I will assume, in favour of the applicants, that their view that action proceedings were appropriate changed after action was instituted.
- [23] If I nonetheless find that the claim is bona fide disputed on reasonable grounds[4], I should, by virtue of the Badenhorst rule/principle/practice, dismiss the application and let the action, already instituted,

resolve the disputes of fact (and law[5]).

The Loan Reconsidered

- [24] The applicants contend that it is to be inferred from documents presented that Saharan borrowed money from Mondo. Mr Cohen's affidavit reflects that the written loan agreement between Mondo and Saharan cannot be found. Saharan denies that there ever was such a

loan, and points to the fact that there is no loan agreement document evidencing a loan between Mondo and Saharan. Saharan therefore says that the Court cannot find as a fact that there was a loan between Mondo and Saharan, and hence puts in issue that there was in fact such a loan.

[25] Mondo's right to be repaid the loan was, according to the applicants, accomplished by means of a loan agreement between Mondo, Saharan and Chancery. A document was provided by Mr Cohen ostensibly in support of this allegation, but it is not signed.

[26] The insolvent's wife makes the following observations about this unsigned document on behalf of Saharan in an endeavour to debunk the existence of the loan and the cession from Mondo to Chancery:

'31. The only document sent by Cohen to [the insolvent] allegedly evidencing the "loan" was an unsigned copy of a document

titled "Loan Agreement" recording the cession of the loan from Mondo to [Chancery]. This document is annexed ... to Cohen's "further affidavit". As can be observed from this document:

31.1 the facility that was made available by Mondo to [Saharan] was R75,900,000 and not R107,601,703;

31.2 the facility is recorded as being made available to [Saharan] to "assist Saharan in their cash flow requirements relating to the investment side of their business";

31.3 the term is recorded as: -

'The period of the Loan is defined as being from date of drawdown of the capital by Saharan Trade & Finance, until date of repayment of such loan inclusive of all interest.

In the absence of a demand or cancellation by Saharan Trade & finance, an amount of up to the capital of the Facility is available for utilisation until this Agreement is terminated by the parties hereto.

31.4 It is recorded that the loan plus all interest thereon was ceded to [Chancery] 'according to the Letter of Understanding attached hereto and marked Annexure A.'

.....

'33. If however, one has regard to annexure A..., it is clear that this cession from Mondo to [Chancery] was not a legitimate

cession. In this regard annexure A records that:

33.1 the loan was ceded by Mondo to [Chancery] "for structure purposes";

33.2 Mondo remained "the true owner of the loan (the Option)";

33.3 Mondo would have “the option to have the loan ceded back to Mondo as the true owner of the loan”;

33.4 Mondo was provided with an undated document that it could exercise at any time in order to cause the loan to be ceded back to it.”

[27] Thus, concludes Mrs Levick on behalf of Saharan:

“34. Accordingly, from the above, it is apparent that [Chancery] simply held the loan for ‘structure purposes’ and not a true cession. [Chancery] could not cede the loan to [the insolvent] because it had no right to cede the loan to [the insolvent].”

[28] Given the unsigned nature of these documents being commented on by Mrs

Levick and the sketchiness of Mr Cohen’s description of the transactions (which are, to say the least, guarded), the document

would appear to provide a very flimsy foundation for a liquidation claim indeed and I would have little hesitation in finding that the trustees do not have locus standi or at least that their locus standi is bona fide and reasonably disputed, if this was where the evidence stopped.

[29] But there is a document signed by the insolvent, Saharan and Chancery which rather changes the otherwise flimsy foundation of the

application, at least insofar as locus standi is concerned. This document is entitled a “Cession of Loan Agreement” and is concluded between Chancery as the cedent, the insolvent as the cessionary, and Saharan as the company (previously herein defined as the Chancery cession agreement[6]).

[30] In terms of the Chancery cession agreement which the insolvent signed, as did the other parties just named, the following is recorded:

‘2.1 On or about 1 December 2005 and in terms of South African Reserve Bank loan reference number ... [Chancery] lent and advanced monies to [Saharan] in the amount of R107,601,704 (hundred and seven million six hundred and one thousand, seven hundred and four Rand) ...

2.2 The total drawdowns and repayments made in respect of same loan as at date of 30 January 2014 is as per the loan recon annexed hereto.

3. Cession of rights and obligations

3.1 [Chancery] hereby irrevocably and unconditionally cedes, transfers, makes over and assigns to [the insolvent] all of Chancery’s rights, title and interest in and to the loan with effect from the Effective date.

3.2 The [insolvent] hereby accepts the cession as referred to in 3.1 hereinabove.’

- [31] As quoted, clause 3.1 provides that Chancery ceded, transferred, made over and assigned to the insolvent all of Chancery's rights, title and interest in and to the loan owed by Saharan to Chancery. Thus, after the cession, instead of Chancery being owed the loan due by Saharan, the insolvent was owed the loan due by Saharan. In this way the insolvent acquired the right to receive payment of the loan from Saharan.
- [32] The amount that Saharan owed to Chancery then, appears to have been R44,815,658.64 and accordingly, once this transfer of rights via the cession just described had taken place, Saharan appears to have owed the insolvent this amount. In other words, the right to claim payment in this amount fell as an asset into the insolvent's estate. The applicants in this application seek to exercise the rights that the insolvent acquired by way of this document to receive payment of this amount from Saharan.
- [33] The objective in taking the cession was, as the insolvent's wife records in her affidavit on behalf of Saharan :
- '50. Martin [the insolvent] wanted to regularise the situation. He and Cohen had been involved in other business dealings with a certain David Shane Cornelius. ... Martin [the insolvent] did not want Cohen using the [Chancery] loan facility as leverage in the David Shane Cornelius transaction, particularly as it should have been ceded and no longer held by [Chancery].
51. Accordingly, Martin [the insolvent] engaged with Cohen again regarding the cession of the [Chancery] loan facility.
52. Jamrae [the Levicks' Family Trust] should have been the cessionary of the [Chancery] loan facility. Jamrae had paid the lion's share of the purchase price [for the property] to Mondo. Jamrae, of all the parties involved in the transaction, was the only creditor of [Saharan]
53. However, for reasons that Martin [the insolvent] cannot recall, the cession (attached as FA9 to the founding affidavit) was concluded in Martin's [the insolvent's] name. This was patently wrong. Martin [the insolvent] had never advanced funds directly to Cohen for the purchase price of Unit 903.'
- [34] This version assumes that he who paid for the property ought to have been he who took cession of the right to be paid by Saharan. However, there are many reasons why individuals use companies and trusts to regulate their tax and other affairs and it does not automatically follow that just because Jamrae would, viewed from one perspective have been the obvious recipient of the right to receive payment from Saharan that this was what the insolvent actually intended. The insolvent is described by his wife as 'an extremely wealthy man with an estate in excess of R500 million'. The insolvent has a B.Com degree with several law subjects and he was the Chief Executive Officer of Genesis Capital, an investment holding company. It is difficult to accept that such an individual with such a high-powered job in a financial services company should have his own name inserted in a document, ceding a loan of this magnitude to him, have it signed by the company that owns such a valuable property and then say, through his wife, that he "cannot recall" why it was concluded in his

name instead of the family trust's and that this was "patently wrong".

[35] I also find it difficult to accept that a businessman of the insolvent's education and training pedigree can have a document like this "cession and loan agreement" (which acknowledges the existence and quantum, if not the terms, of the loan) signed in his own name and then turn around and say many years later when it suits him that actually, it should have been signed in the name of the family trust, Jamrae. That is an indication of a lack of genuineness.

[36] Then there is the point made by the applicants that the insolvent's auditor had included the loan in the insolvent's estate, this recordal appearing in a document prepared by the auditor six months before the insolvent's sequestration. It reflects as an asset in the insolvent's (not Jamrae's) estate the very loan that he now says was not part of his estate but ought to have been Jamrae's. This anomaly bears on the issue of the existence of the loan and whether it was owed to the insolvent or to Jamrae. The auditor-produced document is annexed to the founding affidavit and is entitled "Martin Levick as at 30 September 2018 Assets Direct and Indirect". It contains the following entry: "Saharan Trade and Finance (Pty) Ltd Cape Town property R220,484,852" and "Note No 2" is referenced next to this entry. "Note No. 2" reads in relevant part:

'Loan to Vulcram /Saharan Trade and Finance (Pty) Ltd (ceded to M Levick)

Loan from Chancery Consultants Inc registered in BVI Ceded to M Levick

Reserve Bank approval no. [...]

Capital plus interest

136,234,851

Storeroom

250 000

Alterations appliances and furniture

4 000 000

Settlement of bond in 2016

19 000 000

Payment to G Cohen Total R80 million less bond

61,000,000

220,484,851

[37] The document thus reflects under the hand of an auditor that the loan is owed to the insolvent. The affidavit of the applicants regarding this document contains the following averments:

‘The statement of his assets and liabilities which was drawn up by Hewitt [the insolvent’s auditor] on his instructions relatively close to his sequestration (FA28) demonstrates that Levick considered the Ceded Loan as a major asset of his [estate]...’

[38] The insolvent’s wife has the following to say about this:

‘I admit that Hewitt [he auditor] prepared the list of assets attached as FA28. Martin asked Hewitt to prepare a list of assets and

liabilities to send to Anthony Ball with whom Martin did a lot of business.

Ball needed the list of assets to procure financing for a deal in which Martin and Ball were involved.

Hewitt prepared and sent the list to Ball without obtaining Martin’s input or approval.

The list is replete with errors. For instance, the list –

- Includes the ‘Houghton property’ as an asset of Martin whereas the Houghton property is and always has been owned by me. ...;
- Includes the ‘Cape Town property’ as Martin’s asset when in truth Unit 903 is owned by Saharan which in turn is owned by the Vulcam;
- Includes Jamrae [the Levick Family Trust] as Martin’s asset, when Jamrae is not his asset but a trust in which our children are the beneficiaries;
- includes Jamrae’s payment to Mondo as a payment by Martin to Cohen. Not only are the parties wrong but so is the amount;
- includes the alleged Ceded Loan as Martin’s asset when, in truth and in fact, not only was there never a loan but even if there was, which I do not concede, it was not for R136,234,851.’

[39] What these criticisms of the auditor’s schedule do not consider is its heading “Martin Levick asset 30 September 2018 assets direct and indirect”. The phrase underlined is plainly intended to reflect assets over which the insolvent has control and can be taken into account as part of his estate, in other words, assets of which he is the direct or indirect / beneficial owner. The answer to the question of what is form and what is substance is subsumed in what is hard not to read as a deliberately confusing account.

[40] What did the insolvent do about his auditor’s apparent errors? This is what his wife proffers in answer to that question:

‘Martin immediately contacted Ball after he read the list of assets and informed him of the fundamental errors in it.

Ball was so eager to consummate the deal that he told Martin not to create complications for the deal and to leave things as they were. Martin took his advice.

The list of assets is manifestly wrong....'

[41] That he could have been convinced by a fellow businessman (Mr Ball) to allow a document containing so many "errors" about his estate to be used in a business transaction is shocking because this version (if it is true) amounts to an admission that he, the insolvent, allowed a highly misleading document to be presented to a third party to induce them to go into a deal with the insolvent and Mr Ball, both of them knowing that it was replete with falsehoods. The more plausible inference to draw from

this sketch is that the document prepared by the auditor is not misleading but is a correct reflection of what assets the insolvent

directly and indirectly controlled (had at his disposal), but now it no longer suits the insolvent to reflect his assets in this way.

[42] There is no affidavit submitted by Saharan from the auditor who drew the document saying that "I got it all wrong". One would have expected an auditor to fall on her sword for her client if indeed it was the auditor's error, but even if it was, how does one accept the explanation that the insolvent allowed the document (with knowledge of its "errors")

to be used in a business transaction to mislead another or others? The obvious question must be posed, as would inevitably be asked in a trial, when was the insolvent being economical with the truth, then or now?

[43] Can a dispute raised on this basis where the sums involved are so enormous and the improbability of the version so high be said to be a "genuine" dispute?

[44] The loan recorded in the cession from Mondo to Chancery is for the amount of R75 900 000 plus interest. In terms of Annexure 'A' thereto the sole purpose of the loan by Mondo to Chancery was for structure purposes and Mondo remained the true owner of the loan as it had the option to have the loan ceded back to Mondo at any future date beyond 15 January 2009. This break in the chain i.e. the lack of entitlement by Chancery to cede good title to the loan to the insolvent, or to Jamrae for that matter, is not explained. If the loan was not Chancery's to cede, (which it could not have been if Mondo could have it ceded back to itself at Mondo's option) then the loan could not have passed, the debt on which the liquidation application is based does not exist, and that is the end of the matter.

[45] Perhaps that is why the loan facility of R107 801 704 (or was it R75 000 000?) was not used after its cession to the insolvent in 2014. The following is said by Mrs Levick and unanswered by the applicants:

'The "loan facility" was never used after its cession to Martin. The respondent [Saharan] never drew down on the "loan facility" and never paid any monies to CCI or Martin in respect thereof.'

- [46] On 25 April 2019 Chancery demanded payment from Saharan in the sum of R110 567 999. The applicants do not explain this letter of demand. Why is Chancery claiming money? Is it because Chancery knows that in terms of its contractual obligations to Mondo, it could not and did not cede such rights (insofar as they existed or were capable of being transferred) to the insolvent?
- [47] The loan facility available was allegedly R107 601 703 (on some documents) of which R44 815 658.64 was available for drawdown into South Africa but such loan facility was not, according to Mrs Levick, a legitimate loan. It was, she contends, part of a structure that Mr Cohen had designed and implemented to enable Mr Cohen to remit funds from South Africa without falling foul of exchange control regulations. Mrs Levick explained that exchange control approval for the "loan facility" was renewed on a yearly basis from 2015 onward. Mrs Levick also gave instructions in 2018 for the "loan facility" to be renewed. She explained that Lisa Pienaar, who worked for Mr Cohen pressured them year in and year out to renew exchange control approval for the "loan facility". If the loan had been ceded to the insolvent, one asks why would approval be necessary at all, and what would Mr Cohen's interest be in having it? It is no longer a foreign loan. In addition, the content of the reserve bank application itself reflects Chancery as the beneficiary i.e. that the loan is from Saharan to Chancery and not from Saharan to the insolvent.

Prescription

- [48] Assuming that none of the questions raised in respect of the existence of the loan, the parties thereto and the amount of such loan can be labelled as defences which are bona fide and based on reasonable grounds and one were to assume that a loan from Mondo to Saharan has been established and the cession thereof to the insolvent, the next question arises whether such debt has not prescribed?
- [49] The following appears from SARB Foreign Debt Reporting Form B14: The loan agreement was concluded on 1 May 2001 and the first draw down was on 18 May 2001. Saharan relies on Trinity for purposes of the proposition that a loan is repayable on demand and thus argues that the loan became immediately repayable in 2001 or whenever a draw-down took place. The SARB record reveals that the last draw down was on 22 March 2005 and the last payment was on 20 August 2007. Mr Miltz SC, representing Saharan, argues that even if one treats a repayment as an acknowledgment of debt interrupting prescription, prescription would have started to run on 21 August 2007, being the date on which the creditor (at that time Mondo or Chancery) could have demanded repayment of the full loan balance. That being the case, so the argument continues, any claim for repayment of the loan amount would have prescribed and the debt extinguished at the latest by 20 August 2010, being a date long before the insolvent's alleged acquisition of the loan. On this analysis of the facts the insolvent did not acquire any claim against Saharan at all.

- [50] In an attempt to distinguish Trinity's case, the applicants argue that Trinity only applies where the 'Loan was a featureless, standard commercial loan agreement' and the loan in the present matter is not such an agreement but rather a 'never-never' loan – one without a specified date for repayment or demand pursuant to a breach or potentially mutual termination pursuant to repayment. Mr Smit, representing the applicants, thus argued that prescription only began to run when demand was first made by the applicants on 4 November 2019.
- [51] Trinity is not authority for the proposition that prescription begins to run immediately only in respect of 'standard, featureless agreements' for loans payable on demand. Justice Cameron explains in that decision:
- [104] Here, of course, the loan was not 'payable on demand' but rather repayable 30 days after demand. Does the additional 30-day period afforded to the debtor to repay change anything? Does it take this agreement outside the law applying to loans 'payable on demand'? No. The 30-day period makes no difference. The point of the jurisprudence is that the creditor has the unilateral power to demand performance from the debtor at any time from advance — not that, following demand, the debtor must pay immediately ('on demand') or 30 days later. In both instances the creditor has the sole power to demand performance at any time.
- [105] It is this fact — that the creditor has the exclusive power to demand that performance be made when the creditor so chooses — that has given rise to the general rule applying to loans 'payable on demand', namely that prescription begins to run when the debt arises, unless there is a clear indication to the contrary.'
- [52] The Court thereafter considered whether the loan in question “gives us enough signs to justify dumping this general principle that in loans 'payable on demand' prescription begins to run as soon as the money is paid.”[7]
- [53] The Court found that whether or not the general principle applies is a “question of fact whether the parties intended demand to be a condition precedent for the debt to be due.” The Court held that one of the factors relevant to the termination was whether there were "distinguishing features of the agreement" or "circumstances surrounding its conclusion" that would justify a departure from the general principle. Another factor was whether there was evidence that the creditor could not make demand straight after advance, or that it could only demand after circumstances had changed to allow the creditor to demand payment. Ultimately, the Court held that there must be a clear indication that the agreement deviates from the general principle, as to allow a creditor to unilaterally delay prescription would be against public policy.
- [54] In the context of the facts before it, the Court found that the “standard, featureless agreement” presented to it gave no indication that the parties intended the general principle not to apply.

[55] What needs to occur is that the facts need to be interrogated and there is no need, in the context of a liquidation application in which a provisional order is sought, for me to find any more than that Saharan has set out sufficient evidence to show that it would be able to raise a *prima facie* defence based on prescription at a trial in due course, which is all that is required of them at this stage. If the debt is prescribed then even if one makes all other assumptions in favour of the applicants regarding the existence of the loan and to whom it is due, the defence of prescription has been raised *bona fide* and on reasonable grounds which grounds include that the loan agreement relied upon by the applicants in the founding affidavit

gives no indication that the general principle would not apply. There are no distinguishing features *ex facie* the document to suggest that the parties did not intend for the creditor to make immediate demand as and when it desired. On the

contrary, the onerous terms contained in the unsigned loan agreement, including undertakings, representations, and warranties given by the borrower, give every indication that it was an ordinary commercial loan. The counter argument advanced by the applicants being that the “context of the loan” evidences that specific demand would have been needed in order to render the loans repayable, is an argument which might well have prospects of success in the fullness of time, but cannot displace my finding that the defence of prescription in these proceedings has been raised *bona fide* and on reasonable grounds.

[56] So too, the argument advanced that completion of prescription was delayed in terms of Section 13 of the Prescription Act 68 of 1969 because the person in control of Mondo/Chancery – the creditor (i.e. Mr Cohen and thereafter Mr Levick) was the same person in control of Saharan/Vulcam – the debtor. In these circumstances they contend, the period of prescription would not be completed before a year elapsed after the “impediment” was removed (i.e Mr Levick stopped being in control of his affairs).

[57] Mr Levick's estate was provisionally sequestrated on 23 April 2019, and finally sequestrated on 4 June

2019. Mr Levick's provisional trustees' powers were extended on 16 August 2019 in terms of Section 73(1) of the Insolvency Act of 1936, meaning that they could have instituted proceedings against Saharan from that date. At worst for Saharan, Mr Levick's final trustees were appointed on 21 June 2021.

[58] Therefore, any impediment to Mr Levick's estate claiming payment of the amounts allegedly owing by Saharan were removed either on 16 August 2019, alternatively 21 June 2021. The trustees therefore had one year from the date the impediment was removed (i.e. one year from either 16 August 2019 or 21 June 2021) in which to institute proceedings against Saharan for the recovery of the amounts allegedly owing. Summons was only served in August 2022, more than two years after the completion of the running of prescription and more than a year after the removal of the impediment whether it was removed on 16 August 2019 or 21 June 2021.

[59] To make it clear: I do not find that the debt has prescribed. But just as I find that there is a dispute incapable of resolution on the papers regarding the existence, terms, quantum and present parties to the loan, so too, do I find that in relation to prescription, sufficient has been placed before me to apply the Badenhorst principle and to dismiss the application.

Conclusion

[60] Applying the Badenhorst principle to the disputes described herein, I conclude that the uncertainty relating to the existence of the loan, the cession and consequently the identity of the present parties to the loan, the positioning of the loan under “the cups” and the prescription concerns, have been raised bona fide and on reasonable grounds and that these disputes should be resolved by way of action proceedings.

Order

[61] I accordingly grant the following order:

The application is dismissed with costs on scale C including the costs of two counsel where so employed.

I Opperman

Judge of the High Court

Gauteng Division, Johannesburg

Counsel for the applicants: Adv J.E. Smit and Adv C. Morgan Instructed by: ENS Africa Counsel for the respondent: Adv I. Miltz SC and Adv J.M. Hoffman Instructed by: Rothbart Inc Date of hearing: 18 March 2024 Date of judgment: 22 August 2024

[1] R44 815 658.64 according to the loan reconciliation annexed to the cession ‘FA9’ and R48 491 000 as at 31 March 2019 according to the South African Reserve Bank foreign debt report ‘FA11’.

[2] Clause 1 of the Chancery cession agreement

[3] Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd, 2018 (1) SA 94 (CC) at para [86]

[4][4] Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another, 2015 (4) SA 449 (WCC) at para [13]

[5] Trinity (supra) at para [93] and Froneman J in his minority judgment in Trinity at para [148]

[6] Paragraph

[6] hereof

[7] Trinity supra at paragraph [106]

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