REPUBLIC OF SOUTH AFRICA

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

CASE NO: 13166/2017

(1) REPORTABLE (YES) / NO
(2) OF INTEREST TO OTHER JUDGES: (YES) / NO
(3) REVISED. ✓

22/1/19 .....
DATE SIGNATURE

In the matter between:

ANDRIES FREDERICK COETZEE N.O. Applicant

and

TOTAL AUCTIONEERING SERVICES AND SALES CC First Respondent
t/a CONSOLIDATED AUCTIONEERS

EGIDIO FILIPE GONCALVES DA SILVA Second Respondent

JUDGMENT

WEINER, J

Introduction

[1] The applicant applied for an order that the first respondent (Total) pay R2,9 million to him, in his capacity as executor of the estate of the late André Botha (Botha).

[2] The applicant also applied for an order that, in the event that Total was unable to pay the amount of R2,9 million with interest within 20 days of the date of the order, that the second respondent (Da Silva) be ordered to sign all documentation and do all things necessary to transfer the property known as Sections No. 3, 4, 5 and 6 of a development known as Villa Vilonia, Erf 49 Wychwood Township, Ekurhuleni Metropolitan Municipality, Gauteng, corresponding to No. 89 Senator Road, Wychwood (the property) into the name of the applicant in his capacity as executor.

[3] Botha passed away in April 2015. The applicant was appointed executor of the estate of Botha in May 2015 (the estate).

The loan agreement

[4] During May 2014, and at Johannesburg, Botha, Total and Da Silva entered into a written loan agreement (the loan agreement). Da Silva represented Total.

[5] The loan agreement was not signed by Botha, but it was signed by Da Silva on behalf of Total and in his personal capacity. The terms of the loan agreement were complied with by both parties, Botha by way of his conduct in paying the loan amount to Total by accepting such loan.

[6] In terms of the loan agreement:

6.1. Botha lent and advanced R2,5 million to Total.

6.2. Total was obliged to repay the amount, together with interest in the amount of R400 000,00, on or before 31 December 2016.

6.3. As security for the repayment of the loan, Da Silva ceded in favour of Botha his right, title and interest in the property.

6.4. In the event of Total defaulting and not timeously effecting payment, then Total would also be liable for interest, legal costs and other disbursements.

6.5. Da Silva warranted that he was the sole owner of the property and that he had not previously alienated or encumbered it. He further warranted that the property was freely owned by him and capable of transfer. He undertook not to sign any documentation alienating or encumbering the property from the date of signature of the loan agreement.

6.6. Clause 7 provides that—

'*This agreement constitutes the entire contract between the parties, and no representations or warranties which are not specifically included in this agreement shall be deemed to have not been given by any party to another other and shall be of no force and effect.*' (sic)

6.7. Clause 8, headed 'Non-variation' reads as follows:

'*No alteration, variation or cancellation of this agreement, addition, amendment to, or deletion from this agreement, including this clause, shall be of any force or effect unless reduced to writing and signed by ALL THE PARTIES hereto.*'

6.8. Clause 9 states that—

'*No indulgence, leniency or extension of time which either party (the grantor) may grant or show to the others shall in any way prejudice the grantor or preclude the grantor from exercising any of his rights in future.*'

[7] Although Da Silva appears to dispute this, he acknowledges that Botha lent this amount to Total, and during May 2014, Botha complied with his obligations in terms of the loan agreement and paid the amount of R2,5 million to Total.

Correspondence re loan agreement

[8] On 4 August 2015, the applicant addressed a letter to Total and Da Silva referring to the monies which had been loaned and advanced by Botha to Total and the cession of the property by Da Silva. The applicant requested a consultation in regard to the repayment of the loan.

[9] In the latter part of 2015, he met Da Silva for a consultation. Da Silva, representing Total, acknowledged the indebtedness of Total to Botha/his estate. The applicant further contends that Da Silva, on behalf of Total, confirmed the contents and enforceability of the loan agreement. He admitted that Total was indebted to the estate in the sum of R2,9 million and that Botha had made payment of the R2,5 million loan. He further confirmed the cession of his right, title and interest to the property.

[10] According to the applicant, he and Da Silva agreed that the matter would stand over until early 2016, as Da Silva was actively marketing two properties in order to repay the loan.

[11] On 30 March 2016, the applicant addressed a letter to the respondents confirming the consultation and Da Silva's admission that the amount of R2,9 million was owed to the estate. On 20 April 2016, the applicant sent a follow-up email to the respondents as no reply to the letter of 30 March 2016 had been received.

[12] Again, no response was received. Accordingly, on 30 May 2016, applicant addressed a further email to the respondents stating that it was clear that the emails addressed had been read and he requested an urgent response to his letters.

[13] On 10 June 2016, the applicant received a response from the respondents in which they acknowledged receipt of the letters referred to above. They stated: '*We to date had not forgotten our obligations and still continue to offer our building for sale.*'

[14] In February 2017, the applicant sent a registered letter to the respondents requesting that the breach be remedied within 10 days of receipt of the letter. The track and trace reports indicate that the notice was collected on behalf of the respondents on 20 March 2017 by one Lucas Nkoko.

[15] Notwithstanding the lapse of 10 days, the respondents failed to remedy the breach. The applicant accordingly launched the present application.

The respondents' defences

[16] The respondents state that the original agreement was superseded by a subsequent agreement and they therefore deny any liability to the estate. Da Silva contends that, in January 2015, he entered into a sale of member's interest agreement (the sale agreement) with Botha in terms of which Botha acquired 50% of Da Silva's member's interest in a close corporation, Consolidated Auctioneers Pretoria CC (Consolidated Pretoria) for the purchase consideration of R2,5 million. Da Silva however, later stated that the purchase consideration was R2,5 million in return for 50% member's interest in Consolidated Pretoria.

[17] The applicant in reply stated that there is no such entity as Consolidated Auctioneers Pretoria CC in which Botha could have purchased any member's interest. The applicant attaches a WinDeed search which shows that an entity titled 'Consolidated Auctioneers (Pta) CC' does exist (the CC). That CC is currently in the process of deregistration and the two members reflected are Da Silva and one Theodorus Lubbe (Lubbe), who have been the only two members since its registration on 5 May 2010. It is accordingly contended by the applicant that Botha did not purchase any member's interest in any close corporation as alleged by the respondents

[18] Thus, applicant submits that, not only did Da Silva misdescribe the close corporation in which Botha allegedly took a member's interest, he does not explain the contradictions or the fact that a 50% interest was held by Lubbe. It was not possible for Da Silva to sell a 50% member's interest and retain 50% for himself as he claims. Despite these contentions of the applicant, Da Silva has failed to deal with this or file an affidavit from Lubbe.

[19] Da Silva admits receiving the letters relied upon by the applicant. He denies that he confirmed to the applicant that the amount of R2,9 million was owed to the estate. He did state that he was looking for a suitable buyer for some of his company's properties to pay the profit share in relation to Botha's 50% member's interest in the

CC. Da Silva denies that, because he read the two letters, and failed to respond thereto, that he agreed with the contents thereof.

[20] Da Silva alleges that the comment, '*We to date had not forgotten our obligations and still continue to offer our building for sale*' meant that once the property was sold, he would have paid Botha his profit share in the CC. He further denies that he has ever verbally acknowledged the enforceability of the loan agreement, that the amount was owing, or that he ceded his rights to the property to Botha. He however, does not deny the terms of the loan agreement.

[21] In reply, the applicant set out why the opposition is fanciful. Firstly, the applicant states that the loan agreement contained a non-variation clause stipulating that '*No alteration, variation or cancellation of this agreement, addition, amendment to, or deletion from this agreement, including this clause, shall be of any force or effect unless reduced to writing and signed by ALL THE PARTIES hereto.*' It is accordingly submitted that the oral agreement that the respondents rely upon is a variation of the loan agreement – which is impermissible.

[22] The applicant further contends that it is evident from the correspondence sent to the respondents that they never, at any time, disputed the loan agreement and/or referred to an oral agreement that had superseded it. Further correspondence dated November 2015 between Da Silva and the applicant was attached wherein the applicant refers to the loan agreement and Da Silva replies:

'*To date we are trying to sell off properties and we have not been successful as yet. Copies of the adverts attached for your information. We are hoping to sell them at our next auction in order to settle <u>our indebtedness to you</u>.*' [Emphasis added]

It is pertinent from this response that it refers to an indebtedness and not to a profit share. The indebtedness is also acknowledged to be due to the applicant, not to some company, to which Da Silva later states, the member's interest was to be transferred. In any event, even on respondents' version, no profits were due to Botha at that stage.

[23] The applicant contends that the first time that the respondents mentioned this sale agreement was in the opposing affidavit. It was not mentioned in any consultations or in response to any of the correspondence. The applicant repeats that

Da Silva admitted the indebtedness and also did so to Luke Botha (Luke), the son of Botha.

[24] In regard to the respondents' failure to respond to the letters, in *McWilliams v First Consolidated Holdings (Pty) Ltd*[1] Miller JA dealt as follows with a failure to respond to a letter:

'I accept that "quiescence is not necessarily acquiescence" (see Collen v Rietfontein Engineering Works *1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute.'*[2]

[25] That is the precise situation in the present case. The correspondence called for a firm denial that the loan agreement was valid. This was not done, nor was there any reference to the alleged sale agreement which allegedly superseded the loan agreement. The relevant inference can accordingly be drawn that the lack of such response amounts to an admission of the facts stated in the letters.

Non-variation clause

[26] Da Silva has alleged that the loan agreement was not signed by Botha and therefore the non-variation clause does not apply. He refers in to an unreported High Court judgment in the Free State of *Karpah Construction CC v Potgieter*[3] in which the court stated:

'*Where the parties do not clearly indicate their acceptance and incorporation of the non-variation clause into their agreement by appending their signatures to the*

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[1] *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A).
[2] Ibid at 10E-F.
[3] *Karpah Construction CC v Potgieter and* Others (530/2014) [2014] ZAFSHC 230 (12 December 2014).

contract, the non-variation clause in the strict terms of clause 1.5 of the standard contract prepared...cannot be deemed to be part of the agreement between the parties.'[4]

[27] The *Karpah Construction* judgment goes further than as quoted by the respondents, stating as follows:

'*...except in cases where legislation prescribes formalities, such as for instance that the contract for the sale of land must be in writing, the parties are free to decide on the form of their contract. A written contract signed by the parties is one such form. Another form could be that the signatures must be witnessed. Another form could be that the terms be in writing, but need not be signed by the parties, or by both parties. The latter is the type of contract that the parties agreed to here. They acted in terms of this agreement. The plaintiff alleges in the particulars of claim that the defendants have paid close to R6 million. A written document, although signed by only one party, constitutes a written agreement nonetheless, as it was received by one of the contracting parties without demur by the other and acted upon by both parties...*[5]
[emphasis added]

[28] The court in *Karpah* relied on the earlier case of *Mervis Brothers v Interior Acoustics*,[6] where a full bench of the Witwatersrand Local Division (as it then was) held that:

'*Generally* [a written agreement] *postulates signature by both parties. However, a document may constitute an agreement in writing even though it is signed by only one party .... The test is whether the parties have deliberately intended to record their agreement in writing and have shown that the document so produced constitutes the agreement between them.*[7]

[29] In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren*[8] it was held that a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding. This was confirmed in *HNR Properties CC v Standard Bank*[9] by the SCA where it was held—

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[4] Ibid para 5.
[5] Ibid para 3.
[6] *Mervis Brothers v Interior Acoustics and Another* 1999 (3) SA 607 (W).
[7] Ibid at 610 D-F.
[8] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).
[9] *HNR Properties CC vs Standard Bank of SA Ltd* 2004 (4) 471 (SCA).

'.... *In* .... Shifren *...this Court held that a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding. ....Courts have in the past, often on dubious grounds, attempted to avoid the* Shifren *principle where its application would result in what has been perceived to be a harsh result....*'[10]

[30] It is quite clear from the facts of this case that the respondents cannot dispute the conclusion of the loan agreement and that all parties acted upon it, Botha by paying out the loan amount and the respondents by accepting same.

[31] Thus, the non-variation clause is enforceable and the oral agreement relied upon by the respondents can be of no force and effect.

Waiver

[32] The respondents also contend that, if the non-variation clause is applicable, Botha waived the provisions thereof by accepting the 50% interest in the CC as repayment for the loan amount in full, and that the enforcement of the non-variation clause would be contrary to public policy.

[33] It is trite that there is a factual presumption that a party is not likely to be deemed to have waived his or her rights, and that clear and unequivocal evidence of a waiver is required. In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty)*,[11] waiver of existing rights was claimed. It was held that such must be as clearly and unambiguously proved as any other waiver or novation. In addition, it must be clearly proved by the defendant that the plaintiff who has waived his rights was fully aware of both the facts and the legal consequences which surrounded such waiver

[34] This the respondents have not done. In any event, such waiver would be contrary to the non-variation clause.

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[10] Ibid para 19.

[11] *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011(1) SA 8 (SCA); see also *Feinstein v Niggli* 1981 (2) SA 684 (A).

[35] The present case is covered by the principles set out in the authorities referred to above. Therefore, the defence that Botha waived reliance on the loan agreement must fail.

[36] The rejection of the respondents' submissions on the above two issues, puts paid to the defences raised by the respondents. However, several other factors arose at the hearing and in supplementary submissions and affidavits filed. I will deal only briefly with these in view of the decision to which I have come in regard to the Non-variation clause and the defence of waiver.

Business rescue

[37] This matter was initially heard on 29 August 2018, and at the time the respondents alluded to the fact that Total had been placed under business rescue and accordingly that the litigation against Total could not proceed.

[38] The parties then delivered further submissions at my request in regard to the effect of the business rescue proceedings.

[39] After such submissions were received, I was informed by the applicant's attorney that Total had been placed into liquidation. It accordingly seeks an order only against Da Silva in terms of the notice of motion, alleging that it is clear that Total is unable to pay the amount owing.

[40] The parties filed supplementary affidavits and heads of argument which were received at the end of November 2018.

[41] Da Silva persists in his original submissions that there is a dispute of fact in regard to whether or not the sale agreement was concluded. He submits that the application should be dismissed with costs.

[42] Da Silva also submits that the applicant cannot now rely on the liquidation as the prerequisite for Da Silva becoming liable due to the fact that Total cannot make payment. The respondents contend that this Court is unable to make any order in respect of Total, in view of the fact that no relief can be granted against it in the present

proceedings, having regard to its winding-up. This appears to be correct and no order will be granted against it.

Supplementary affidavits and submissions

[43] In November 2018 the respondents sought to file a supplementary affidavit dealing with further issues which they submit have arisen in this matter. The respondents contend that Da Silva discovered a document which he did not know he had when he filed the answering affidavit. He submits that this document evidenced Botha's intention to register a new company. Da Silva contends that Botha was in the process of registering the new company to hold his 50% interest in the CC. He further states that Botha instructed a book-keeper, Geldenhuys, to register the new company and to attend to register his 50% interest. This instruction was given to the book-keeper on 19 March 2015. However, before the registration could take place and the interest could be transferred, Botha passed away.

[44] As stated above, n the original opposing affidavit Da Silva had initially stated that Botha had acquired 50% of Da Silva's member's interest in Consolidated Pretoria. He then changed this version contending that Botha acquired a 50% stake in Consolidated Pretoria. In the supplementary affidavit, he now submits that '*I completely forgot ... that Mr Botha insisted on holding the interest in a company and not in his personal capacity.*' Da Silva also contacted one Cohen who rendered accounting functions for '*the Consolidated Auction Group during 2015 and 2016*' which included Total and Consolidated Pretoria. Cohen confirmed that Botha was paid by taking up 50% of the stake in Consolidated Auctioneers Pretoria.

[45] Cohen's affidavit poses more questions than answers. He states that Botha loaned a sum of R2,5 million to the Group. Thus, this is admitted. The intention, according to Cohen, was to '*repay this loan by transferring a 50% stake in the Pretoria operations to Mr Botha.*' He does not say whose intention this was and does not mention the original loan agreement and its terms of repayment. On Cohen's version, the original agreement was that the loan was to be repaid through the transfer of a 50% stake in the 'Pretoria Operations'. Cohen also refers to Botha holding the interest, not a company

[46] The only document produced is that in which Botha allegedly authorised Geldenhuys to effect the registration of the company to be formed. There is no indication that this was for the purpose of holding the member's interest in the CC.

[47] The applicant was granted an opportunity to respond to the supplementary affidavit. The response was filed on 25 January 2019. The affidavit is deposed to by Luke Botha.

[48] Luke states that the agreement referred to by Da Silva, in terms of which Botha purportedly purchased 50% of Da Silva's member's interest in Consolidated Auctioneers Pretoria CC (as referred to in the initial answering affidavit), must be seen against the second and third versions that Botha would acquire a 50% member's interest in the CC (not 50% of Da Silva's interest), and then that the interest was to be held by a company, not Botha.

[49] Luke refers to and attaches a copy of a consultation note made by and confirmed by the applicant dated 22 September 2015. Such note contains the following:

'*Consultation with Chico Da Silva on 22/9/2015 at AF Coetzee Attorney at 15h00:*

1. *Chico said he loaned an amount of R2,5 million from André about two years ago. He paid André back.*

2. *Then in May 2014 Chico loaned another R2,5 million from André.*

3. *Chico says he knows he owes André R2,5 million plus interest.*

4. *Chico says as soon as he sells Villa Vittoria or another Pretoria property he will pay back the R2,9 million.*

5. *Rietfontein Road property – broke force?'*

[50] The consultation was followed by a confirmatory email from Coetzee dated 6 November 2015, to Da Silva stating as follows:

'*We refer to the meeting with André from our offices and Chico from your offices on 22 September 2015. Kindly indicate to us what progress was made with the sale of*

the proposed properties to settle the loan of R2,5 million plus interest due to the estate of AN Botha. We await your reply.'

[51] On 26 November 2015, in response to this email and referring to the meeting of 22 September 2015 Da Silva states:

'*To date we are trying to sell off properties and we have not been successful as yet. Copies of the adverts attached for your information. We are hoping to sell them at our next auction in order to settle our indebtedness to you.'*

[52] This flies in the face of the respondents' contention that there was no indebtedness and that a company obtained a 50% member's interest in the close corporation in lieu of payment. No mention is made of this agreement. More importantly, the applicant's letter states specifically that the amount is owed to the estate. Da Silva does not deny this, but in fact confirms same in this response.

[53] It is therefore contended by the applicant that Da Silva has always admitted liability on behalf of Total for the repayment of the loan to Botha and/or his estate. This consultation took place on 22 September 2015, which is many months after Da Silva alleges that the subsequent sale agreement was concluded. There was no mention of this sale agreement in this or any of the previous correspondence, or at this meeting,

[54] Luke also states, and this is confirmed by the applicant, that Botha always used his own accountants or his attorney Mr Coetzee to register close corporations or companies for any purposes. The applicant also confirms that Botha never discussed any dealings in respect of the registration of a new company and the interest in the CC with the applicant.

[55] The inconsistencies, probabilities and legal anomalies lead inevitably to the conclusion that that no sale agreement with Botha or a company was concluded.

[56] As set out above, Da Silva claims that there is an irresoluble dispute of fact and that the matter should be dismissed. In *Stellenbosch Farmers Winery Limited* the court held that in certain cases the denial by the respondent of a fact alleged by the applicant

may not be such as to raise a real genuine or bona fide dispute of fact.[12] In such a case if the court is satisfied as to the inherent credibility of the applicant's factual averments, it may proceed on the basis of the correctness thereof to determine whether the applicant is entitled to final relief. Further, as was held in *Plascon-Evans Paints (Pty) Limited v Van Riebeeck Paints (Pty) Limited*:

'*There may be exceptions to this genuine rule for example where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.*'[13]

[57] This is such a case; no genuine disputes of fact have been shown by the respondents. This Court therefore rejects such version as being untenable.

[58] Total is clearly unable to pay the amount owing, having gone from business rescue to liquidation. Thus it would be a *brutem fulmen* to require the applicant to wait the period set out within which Total is to pay in order to make an order against Da Silva. Da Silva provided security for the repayment. It was to be made by Total by 31 December 2016. There is no requirement that, before realising its security the applicant must first excuss Total. Total failed to pay on due date; thus Da Silva's liability arose and the security falls to be realised.

Accordingly, the following order is made:

1. The second respondent is ordered to sign documentation and do all things necessary to transfer the properties known as Section No. 3, 4, 5, and 6 of the development Villa Vilonia, Erf 49 Wychwood Township, Ekurhuleni Metropolitan Municipality, Gauteng, corresponding to 89 Senator Road, Wychwood (the property) into the name of the applicant in his capacity as executor of the estate of the late Mr Andre Marius Botha.

2. Should the second respondent fail to comply with this order within 14 days hereof, the Registrar of this Court is authorised to sign all documentation and

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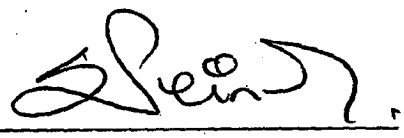
[12] *Stellenbosch Farmers Winery Limited v Stellenvale Winery (Pty) Limited* 1957 (4) SA 234 (C) at 235E-G.

[13] *Plascon-Evans Paints (Pty) Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E-635C.

do all things necessary in order to effect the transfer of the property into the applicant's name, in his capacity as executor of the estate.

3. The second respondent is ordered to pay the costs of the application, including any costs reserved on previous occasions.



S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	29 August 2018 (Further submissions and affidavits received in November 2018 and January 2019)
Date of judgment:	25 February 2019
Appearances:	
Counsel for the Applicant:	Adv. G V R Fouché
Instructing Attorneys:	AF Coetzee Attorneys
Counsel for the Respondents:	Morné Coetzee
Instructing Attorneys:	Morné Coetzee Attorneys