REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED

18 January 2021 .....

DATE **SIGNATURE**

CASE NUMBER: 6183/2020

In the matter between:

VERIFIKA INCORPORATED (PTY) LTD	First Applicant
BERNARD JOHN LAFERLA	Second Applicant
And	
ENFORCED INVESTMENTS (PTY) LTD	First Respondent
FATIMA PEREIRA TORRES	Second Respondent
THE INDEPENDENT REGULATORY BOARD FOR AUDITORS	Third Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent

and

CASE NUMBER: 14799/2020

In the matter between:

VERIFIKA INCORPORATED (PTY) LTD	First Applicant
BERNARD JOHN LAFERLA	Second Applicant
And	
FATIMA PEREIRA TORRES	First Respondent
JOHN ROBERT WOODNUT	Second Respondent
THE INDEPENDENT REGULATORY BOARD FOR AUDITORS	Third Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent
THE SOUTH AFRICAN REVENUE SERVICES	Fifth Respondent

JUDGMENT

DIPPENAAR J:

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 18th January 2021.

[1] The present proceedings concern the return date of orders granted in the urgent court on 11 March 2020 and 10 July 2020 respectively, a final order restoring the entire shareholding in Verifika to the second applicant, ("Mr Laferla"), the setting aside of a cession enforced by the first respondent, ("Enforced") and all steps taken pursuant to that cession, with ancillary relief, a counterapplication for certain mandatory and interdictory relief and a further conditional application for the winding up of Verifika.

[2] The background to the application is not contentious. It is necessary to set out the facts in some detail to contextualise the present application. The dramatis personae are Mr Laferla, the second respondent ("Ms Torres"), Mr Woodnutt, a director of Enforced and Enforced. Ms Torres is also a shareholder of Enforced. Mr Laferla and Ms Torres are both registered auditors.

[3] The remaining respondents played no role in these proceedings. The first and second respondents will collectively be referred to as "the respondents", where appropriate.

[4] Ms Torres was formerly the sole shareholder of Verifika. On 18 March 2016 she sold 50% of her shareholding in it to Mr Laferla, who was appointed as director of Verifika. Ms Torres resigned as director but remained a signatory on the company's bank account. On 6 June 2019 Ms Torres sold her remaining 50% shareholding in the company to Mr Laferla for R2 million. He paid a R100 000 deposit. On the same date Mr Laferla, Verifika and Enforced concluded a loan and repayment agreement ("the loan agreement") in terms of which Mr Woodnutt on behalf of Enforced lent and advanced an amount of R1.9 million to Verifika. Mr Laferla ceded his shareholding in Verifika to Enforced as security for the loan. This cession lies at the heart of the disputes between the parties.

[5] The cession provision of the loan agreement provided:

> *"5.1 Laferla hereby cedes and assigns all right title and interest in the Security to Enforced Investments (Pty) Ltd as security for the loans.*
>
> *5.2 Upon signature hereof Laferla will deliver to the company secretary of Enforced Investments Pty Ltd the following: 5.2.1 Signed and undated share transfer forms for the Security; 5.2.2. The share certificates in respect of the security; 5.2.3. His written and undated resignation as a director of Verifika Inc.*
>
> *5.3 Laferla upon signature hereof agrees to the company secretary giving transfer of the security from his name into the name of Enforced Investments Pty Ltd or its nominee in the event of a default as set out in paragraph 11 below*

[6] The relevant repayment provisions of the loan agreement provided:

> *"7 Loan: Interest and principal repayments.*
>
> *7.1 For each Interest Period[1] the Loan Principal shall accrue interest at the Loan Interest Rate. The aforesaid interest shall:-7.1.1 accrue on a day to day basis; and be calculated on the actual number of days elapsed and on the basis of s 365 day year…*
>
> *7.2 The borrower shall repay the loan principal and interest to the lender in accordance with the payment schedule set out in appendix 2"*

[7] The payment schedule in appendix 2 provided that the loan was repayable as follows*:*

> *"Years one and two R500 000 per annum Year 3 R1 000 000 payable at each year end 2. Interest payable monthly on the outstanding balance. The loan interest rate was defined in the agreement as the prime overdraft interest rate plus 1% as determined by Nedbank or their successors".*

[8] The loan agreement did not provide an exact date on which the interest instalments were due, nor did it provide the exact amount of interest payable monthly as it was subject to fluctuations in the interest rate.

[9] During August 2019 Enforced contended that Mr Laferla was in breach of the loan agreement. Over the next five months, correspondence and verbal communications were exchanged between the parties regarding the alleged breach which raised not only the loan agreement, but also various other business transactions between the various parties. Written demands were sent by Enforced on 8 August 2019, 18 October 2019 and 24 January 2020 respectively. I return to these demands ("the breach notices") later as they are at the heart of the present dispute.

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[1] Defined as "each period which commences on one instalment payment date and which terminates on the date before the next instalment payment date. Instalment payment date is defined as each anniversary of the payment date. Advance date is defined as the signature date of the agreement being 6 June 2019.

[10] On 28 January 2020, Enforced transferred Verifika's entire shareholding to Ms Torres as nominee in terms of the signed transfer form given by Mr Laferla to Enforced as security for its loan. On the same date, a shareholders meeting was held at which Ms Torres was appointed a director of Verifika.

[11] On 31 January 2020 Enforced sent a letter of demand to Verifika demanding payment of R2 059 666, being the accelerated outstanding capital and interest in terms of the loan agreement. The letter was received by Ms Torres.

[12] On 24 February 2020, Laferla paid the arrear interest to Enforced. It was not disputed that interest on the loan was in arrears at the time of the breach notices. The main application was launched as an urgent application by the applicants on 25 February 2020 which culminated in an interim consent order being granted by Fisher J on 11 March 2020. Whilst the urgent application was pending in court, a shareholders meeting of Verifika was held on 9 March 2020 in terms of which Mr Laferla was removed as director of the company. Mr Woodnutt was appointed as director of Verifika on 10 March 2020. On 11 March 2020, Ms Torres signed a special resolution for the voluntary winding up of Verifika on the basis that Verifika was insolvent.

[13] Pursuant to a further urgent application launched by the applicants during July 2020 to set these steps aside, an order was granted by Yacoob J on 10 July 2020 granting certain interim relief. The conditional counter application for the winding up of Verifika in those proceedings was consolidated with the main application. This is the determination of the main application on all those issues.

[14] It is not necessary to particularise all the disputes between the parties. The central issue for determination pertains to the validity of the breach notices sent by Enforced, pursuant to which it called up the security provided for in the loan agreement.

[15] The applicants contended that there were presently no arrears due under the loan agreement and that all subsequent amounts have been paid, which was not disputed. The respondents contended that an event of default occurred pursuant to Verifika's historical breaches of the loan agreement and its failure to comply with the demands, thus entitling Enforced to call up its security and effect a cession of Mr Laferla's shareholding in Verifika, which is currently held by Ms Torres as Enforced's nominee.

[16] I turn to the issues. It was common cause between the parties that the validity of the breach notices lay at the core of the application. They were in agreement that if the breach notices and the enforcement of the cession contained in the loan agreement was invalid, all steps taken subsequent to the enforcement of the cession fell to be set aside. The parties were also in agreement that a determination of this issue would seal the fate of the counter application and the conditional counter application for the winding up of Verifika. The winding up application was conditional upon the applicants obtaining the relief sought.

[17] The central issue was whether the breach notices sent by Enforced to Verifika complied with the relevant lex commissoria in the loan agreement and were delivered in accordance with the agreement. If not, Enforced's activation of the cession and the forfeiture of Mr Laferla's shares in Verifika was invalid and all steps taken pursuant thereto fell to be set aside.

[18] The applicants' case was that the breach notices were defective as they were not delivered in terms of the agreement and did not comply with the lex commissoria agreed upon in the loan agreement as the notices did not contain the relevant period within payment had to be made and did not advise of the consequences if the breach was not rectified.

[19] The respondents' case was that the letters were compliant and thus that the orders granted by Fisher J and Yacoob J should not be confirmed. They argued that the breaches were material and the lex commissoria could be invoked. It was contended that

Mr Laferla was given proper notice and his breach became an event of default as envisaged by clause 11.1 of the loan agreement. The clause did not require a time period to be given in the breach notice and once the period expired Verifika was in default, thus triggering clause 11.2 and the acceleration of the debt. It was further argued that the service of the letters was compliant.

[20] The relevant provisions of the loan agreement provide:

> *"11 Events of default.*
>
> *11.1 An Event of default shall occur if any of the following events, each of which shall be several and distinct from the others, occurs (whether or not caused by any reason whatsoever outside the control of the Borrower)-*
>
> *11.1.1 The Borrower fails to pay to the Lender any amount which becomes payable by it pursuant to this Agreement strictly on due date, and the Borrower fails to remedy such default within 3 (three) Business days of written demand…*
>
> *11.2 If an Event of Default occurs the Lender shall be entitled, without notice to the Borrower accelerate or place on demand all amounts owing by the Borrower to the Lender under this Agreement, whether in respect of principal, interest or otherwise so that all such amounts shall immediately become due and payable, and call up the Security.*
>
> *22 Notices and Domicilia*
>
> *Verifika chose as domicilium citandi et executandi the following:*
>
> *22.2.1 10 Redwood Road, Bedfordview, Johannesburg (marked for attention of Bernard Laferla) facsimile number-*(left blank) *or email address* (left blank)*.*
>
> *22.2 any notice given in terms of this agreement shall be in writing and shall-*
>
> *22.3.1 if delivered by hand be deemed to have been duly received by the addressee on the date of delivery; …..unless the contrary is proved.*

22.4 Notwithstanding anything to the contrary contained or implied in this Agreement, a written notice or communication actually received by one of the parties from another including by way of facsimile transmission shall be adequate notice or communication to such party".

[21] It was not disputed that clause 11 of the agreement created a lex commissoria which created an event of default as defined in the section. Before an event of default came into existence it required a breach notice as envisaged by the agreement in strict compliance with the lex commissoria coupled with a failure to pay. The agreement did not provide the exact date on which interest was payable. It simply provided for monthly payments. The monthly interest amount was also not expressed in the agreement, although it was not disputed that the amount could be calculated with reference to the outstanding amount and Nedbank's prime interest rate from time to time.

[22] Prior to considering the breach notices it is necessary to consider the relevant legal landscape. It was undisputed that as the applicants sought final relief, the so-called Plascon Evans[2] test applies. Before considering the breach notices it is necessary to state the relevant general principles and to consider the parties' different contentions in relation thereto.

[23] A central part of the dispute was whether the failure to provide 3 days' written notice in the breach notices rendered them fatally defective as such notice was required in terms of the lex commissoria. The applicants contended that on a proper interpretation, it was necessary to provide such notice in the breach notices.

[24] The respondents on the other hand argued that the terms of the lex commissoria were complied with and that it was not necessary to furnish the applicants with three days' written notice in the letter. As long as that period expired and the breach was not remedied, Enforced became entitled to execute upon the cession.

[2] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

[25] The interpretation given to similar worded clauses by the relevant authorities, favour the interpretation contended for by the respondents. In *SA Wimpy (Pty) Ltd v Tsouras*[3], Nestadt J interpreted a similarly worded provision. He held that the clause did not require that the notice had to specify the time within which the breach complained of was to be remedied. It simply required the tenant not to remain in breach for more than four days after giving of the notice. It was thus unnecessary to refer in the letter to any period. He held that the fact that an inadequate period was specified in a letter of demand did not invalidate the notice[4], relying on the principle that where a party who has to give notice is under no obligation to mention any period in such notice within which the breach has to be remedied, a mistaken signification of the period does not invalidate the act of placing the defaulter in mora.

[26] In *Tangney and others v Zive's Trustee*[5], the relevant clause provided that the applicants would be entitled to claim forfeiture if the insolvent failed to remedy a breach within 14 days after notice given in writing to remedy the breach. It was common cause that if the terms of the letter required 14 days' notice to be given, the time given in the letter was incorrect and ineffectual. Kuper J found:

> *"In my view, the clause only required a notice required a notice in writing to be given to remedy the breach and there was no necessity to specify in the notice the period within which the breach was to be remedied. Nor does the fact that an inadequate period was specified invalidate the notice[6]*

[27] In C*hesterfield Investments (Pty) Ltd v Venter*[7] the relevant clause provided:

> *".. and should purchaser fail to make any other payments provided for herein or otherwise commit a breach of any of the conditions hereof, and remain in default for seven days after dispatch of written notice by registered post requiring such payment or the remedying of any other breach, the seller…."*

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[3] 1977 (4) SA 244 (W)
[4] At 249A-D
[5] 1961 (1) 449 (W)
[6] 453G-H
[7] 1972 (3) SA 777 (T) at 780

[28] The full court interpreted the clause as follows:

> *"The only obligation required by clause 12 to be performed by the seller as a condition precedent to cancellation was the giving of written notice requiring the breach to be remedied. That obligation was performed. Upon the expiration of the period provided for, the seller had the right to elect any one of the alternatives provided for in clause 12. He elected to cancel the agreement*"

[29] The aforesaid authorities were also referred to and their reasoning adopted by the full bench in *Lench and Another v Cohen and Another*[8]. Although the judgment was overturned by the SCA on appeal[9], it was on the basis of the full court's findings regarding service of the notice and it was unnecessary to address the adequacy of the notice.

[30] Applicants placed reliance on *Hodgkinson v K2011104122 (Pty) Ltd*[10] ("Hodgkinson") in support of the proposition that in order to invoke a lex commissoria, an innocent party must comply with the procedures applicable to it. Where a specified time is a requirement under the agreement and a shorter period is provided, the notice is defective and any cancellation predicated on such notice is invalid. A party is entitled to ignore a defective breach notice and is entitled to await a further proper breach notice affording it the correct time period within which to rectify its alleged breaches. The innocent party cannot expect the other to read the breach notice as if it contained the correct time periods and to rectify accordingly. If the notice is defective the party can expect the innocent party to reboot the procedures invoking the lex commissoria from scratch and can ignore the defective notice.

[31] It seems to me that the weight of the authorities in this division, including the full court authorities which bind me, favour an interpretation of a clause in similar terms to the

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[8] 2006 (1) SA 99 (W) para [18]
[9] 2007 (6) SA 132 (SCA)
[10] (10019/2013) ZAWCHC22; [2019]2 All SA 754 (W) (5 March 2019) para 41-44

present as not requiring a time period to be stated and that an incorrect or insufficient period reflected in a letter of demand does not invalidate the notice.

[32] The next issue which arose is what the lex commissoria required. It is trite that when such a lex commissoria appears in an agreement, its provisions must be strictly complied with[11]. Delivery of a breach notice must also be effected strictly in accordance with the domicilium provisions of the agreement[12].

[33] The applicant further relied on *Klingbiel v Olawagen*[13] for the proposition that our common law requires that in order to place a debtor in mora, the creditor must give him or her an unequivocal and unconditional demand for performance within the specified time. The intention to cancel in the event of non-performance must also be made clear. While a debtor is assumed to know the origin of the debt in respect of which performance is demanded, the creditor may be under an obligation to make this clear in the letter of demand[14]. A termination notice must be clear unequivocal and unconditional.[15]

[34] The contents of the breach notices must also be clear an unequivocal[16]. The party who receives the notice must be made aware of the consequences if the breach is not rectified. If cancellation is intended this must be specified in the notice. By parity of reasoning, if the innocent party wishes to exercise another right/s, such as to enforce the agreement and the calling up of security, this must be made clear.

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[11] De Wet NO v Uys NO 1998 (4) SA 694 (T) 706 C-D; North Vaal Mineral CO Ltd v Lovasz 1961 (3) SA 604 (T) at 606; Rautenbach v Venner 1928 TPD 26 at 30.
[12] Cohen and Another v Lensch and Another fn 9 supra
[13] (23891/2015 [2016] ZAGPJHC 145 (16 March 2016), para 31
[14] Relying on Maltz v Mererthal 1920 TPD 338; Christie Law of Contract (6th ed) at p525 and p527; Kerr Principles of the Law of contract (6th ed) at p621
[15] Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC) par 120; Ponisammy& Another v Versailles Estates (Pty) Ltd [1973] 1 All SA 540 (A)
[16] Klingbiel, Ponisamy Sebola supra

[35] In discussing the relevant principles, Gamble J, writing for the full court in *GPC Developments CC and Others v Uys*[17] explained:

> *"[27] The following passage in the 7th edition[18] [of Christie Law of Contract] is to the same effect:*
> *"If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective."*
> *In the later edition the author refers to Bekker [19], Hand [20]and Hano Trading [21] in support of the approach.*
>
> *[28] In Bekker Yekiso J, relying on the decision in Godbold [22], held as follows:*
> *The purpose of a notice requiring a purchaser to remedy a default is to inform the recipient of that notice of what is required of him or her in order to avoid the consequences of default. It should be couched in such terms as to leave him or her in no doubt as to what is required, or otherwise the notice will not be such as is contemplated in the contract*
> *.*
> *[29] In Godbold [23] the learned judge cautioned as follows:*
> *"The question for decision is always whether the conditions on which the right to cancel was dependent have been fulfilled (Rautenbach v Venner 1928 TPD 26 at 31). The purpose of such a notice is to inform the recipient of what is required to do in order to avoid the consequences of default, and if it is in such terms as to leave him in doubt as to the details of what he is required to do, then it may be that it will be held that the notice is not one such as is contemplated by the contract (Rautenbach's case, supra at p 31)"*
>
> *…*
>
> *[33] A contractual term styled a lex commissoria was the subject of the discussion in North Vaal Mineral [24]:*
>
> > *"Clause 9 is a lex commissoria (in the widest sense of a stipulation conferring a right to cancel upon a breach of the contract to which it is appended, whether it is a contract of sale or any other contract). It confers a right (viz to cancel) upon the fulfillment of a condition. The investigation whether the right to cancel came into existence is purely an investigation whether the condition, as emerging from the language of the contract (a question of interpretation), has in fact been fulfilled (Rautenbach v Venner, 1928 TPD 26)."*
>
> *[34] The term "lex commissoria" has acquired a somewhat flexible meaning in our law of contract. Van der Merwe et al[25], with reference to inter alia Nel v Cloete[26], observed that the*

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[17] (A71/2017) [2017] ZAWCHC 80; [2017] 4 All SA 14 (WCC) (15 August 2017)
[18] GB Bradfield Christie's Law of Contract in South Africa (7th ed) at 637
[19] Bekker v Schmidt Bou-Ontwikkelings CC 2007(1) SA 600 (C)
[20] Standard Bank of SA Ltd v Hand 2012(3) SA 319 (GSJ)
[21] Hano Trading CC v JR 209 Investments (Pty) Ltd 2013(1) SA 161 (SCA)
[22] Godbold v Tomson 1970(1) SA 61 (D)
[23] At 65C
[24] North Vaal Mineral Co.Ltd v Lovasz 1961(3) SA 604 (T) at 606C
[25] Contract, General Principles (4th ed) at 299 fn126
[26] 1972(2) SA 150 (A) at 160

phrase denotes, primarily, a term which permits a contracting party to resile from an agreement on the ground of delay, but that it has also acquired a wider and more general meaning, viz, a stipulation conferring the right to cancel an agreement on the basis of any recognised form of breach. Such a term may include a right on the part of the creditor to claim forfeiture of amounts already received, but it is not limited to that right.[27]

[35]Christie [28] *provides the following useful synopsis in regard to a lex commissoria:*

> *"The contract may explicitly state that if one party fails to perform a particular obligation by a specified time the other party is entitled to cancel the contract. In a lease where the landlord is given the right to cancel for non-payment of rent, such a provision it is usually called a forfeiture clause, and in a contract of sale where the seller is given the right to cancel for non-payment of the purchase price, a lex commissoria, but either description may be used in respect of any type of contract. Such clauses are valid and enforceable strictly according to their terms, and the court has no equitable jurisdiction to relieve a debtor from the automatic forfeiture resulting from such a clause.*
> *A clause fixing a time for performance and stating that time is of the essence is a forfeiture clause, and so is a clause prescribing a time for performance and giving the creditor the right to cancel after the debtor has been given notice to rectify its default within a further prescribed time and has failed to do so, but not a clause which does not place an unconditional unilateral obligation on the debtor to perform." (Footnotes omitted)*

[36] Applying the mandated approach to contractual interpretation, the court is required to consider the language chosen by the parties in their agreement contextually against the background facts and circumstances known to them and considered at the time of conclusion of the contract and give it its ordinary grammatical meaning. A sensible and businesslike interpretation should be sought provided it does not violate the actual wording of the agreement.[29]*"*

[36] Considering the provisions of clause 11 of the loan agreement and applying the above approach to contractual interpretation, I conclude that a failure to state the consequences if the breach is not rectified, would render the breach notice defective.

[37] Turning to the delivery of a breach notice, it is trite that unless the contrary is agreed a notice of cancellation must be brought to the mind of the debtor[30]. The agreement contains a domicilium clause which alleviates the burden on Enforced to prove

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[27] Baines Motors v Piek 1955 (1) SA 534 (A) at 542 - 7
[28] *Op cit* 599
[29] Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd [2014] 1 All SA 375 (SCA) at [10]-[17]; Betterbridge (Pty) Ltd v Masilo and Others NNO 2015 (2) SA 396 (GNP) at [8].
[30] Muller v Mulbarton Gardens (Pty) Ltd 1972 (1) SA 328 (W) at 331

actual receipt. All that is required of a party relying on a domicilium is to effect service in the manner required by the agreement[31].

[38] It is apposite to refer to *Cohen and Another v Lench and Another*[32] , wherein Nugent JA, [33] stated:

> "D*elivery to a chosen domicilium presupposes…hand delivery in any appropriate manner by which in the ordinary course the notice would come to the attention of and be received by [the addressee]. Acceptable methods would include handing the notice to a responsible employee, pushing it under the door, or by placing it in a mailbox".*

[39] In the present context, one is not dealing with a cancellation but with Enforced's alleged entitlement to effect the cession being the security envisaged in clause 11.2 of the loan agreement. The respondents relied on the failure to pay the monthly interest payments due pursuant to the breach notices sent under clause 11.1.1 as constituting events of default, triggering Enforced's entitlement to call up the security and effect the cession referred to in clause 11.2 of the loan agreement.

[40] Against this backdrop it is necessary to return to the facts and consider each of the breach notices relied upon by Enforced. In each instance, the notices were authored by Mr Woodnutt on its behalf.

[41] The first breach notice is a letter dated 8 August 2019 which Mr Woodnutt states he hand delivered to Verifika's domicilium address by hand delivering it to the receptionist at 10 Redwood Road Bedfordview. Documentary proof was provided that Mr Woodnutt signed an attendance register on 8 August 2019. Mr Laferla denies having received the letter. The relevant portion of the letter provides:

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[31] Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd 1884 (3) SA 834(W) at 849B ("Loryan")
[32] 2007 (6) SA 132 (SCA) para 35-36
[33] Quoting Loryan with approval

"Arrears Interest Payment: R32 343.19. The foregoing amount remains unpaid and needs to be settled immediately in respect of your loan to Enforced Investments (Pty) Ltd. Please note that in terms of the loan agreement any failure to pay is an act of default. For ease of reference the following amounts, based upon current interest rates are due and payable at each month end: …Please ensure that the arrears are settled immediately and that all future payments are made on due date"

[42] The applicants contended that there was no compliance with the lex commissoria as the letter did not provide Mr Laferla 3 days to comply with the notice as required by clause 11.1 of the agreement and did not notify of the consequences of a failure to pay. They further disputed proper service in terms of the agreement.

[43] On the papers there is a dispute regarding the delivery of the first breach notice in compliance with clause 22. It was common cause that the letter was left with the receptionist of Verifika at a time when, to the knowledge of Ms Torres and Mr Woodnutt, Mr Laferla was overseas. The applicants contended this was improper compliance whereas the respondents contented it was sufficient compliance in terms of the domicilium clause and that it was not necessary that Mr Laferla received the notice. No evidence was presented to controvert the direct evidence from Mr Woodnutt that he gave the letter to the receptionist. The respondent's version is to be accepted. I conclude that service of the demand was effected in accordance with the provisions of the domicilium clause. It matters not that Mr Laferla did not receive the letter.

[44] Even if it was not necessary to specify a time period in the notice, as I have concluded, the applicants were not notified of the consequences if the breach was not remedied. The letter further did not unequivocally and unconditionally state Enforced's intention if the breach was not remedied. In those circumstances, I conclude that the first demand was not in compliance with the lex commissoria and was defective.

[45] The second breach notice is a letter dated 18 October 2019, the relevant portions of which provided:

"*Arrear payments: R86 416.01 and R850 000 The foregoing amounts are the amounts that will be outstanding in respect of the Enforced Investments loan etc as at the end of October 2019. Our discussion with regard to finalizing the TG Print transaction refers. As indicated in our discussion I am off to the New York Marathon and we need to resolve these matters before the month end.*

1. *Please ensure that current and arrears amounts on the Verifika loan are settled.*

2. *Your obligations to Enforced with regard to TG Print purchase of the P&M and*

3. *Villa Via with regard to the TG Print rent.*

Please note that in terms of the Verifika loan agreement any failure to pay is an act of default. This serves as a second written notice that we currently hold you to be in default and reserve our rights to foreclose upon Verifika's agreement of loan so please ensure that the account is brought up to date. Please settle the outstanding Verifika interest and TG print obligations (including rent etc)"

[46] The applicants contended that this letter was similarly non-compliant with the provisions of the agreement as no 3 day period was afforded and the letter did not comply with the lex commissoria in the agreement. It was also contended that service of the letter was not compliant with clause 22 of the agreement. The respondents on the other hand contended that the letter was compliant as it stated what the debt was being the arrear interest under the agreement and warned of the consequences.

[47] Applying the principles enunciated above, I conclude that the letter was compliant with the lex commissoria in the agreement as it did forewarn of the consequences if the breach was not rectified.

[48] There is a dispute on the papers as to whether the letter was delivered in accordance with the lex commissoria. The applicants contended that the letter was not received. A Mr Brown deposed to an affidavit stating that on or about 25 October 2019 he requested Mr Aidan Gainsford to receive and process a number of documents. Included amongst such documents was a notice for delivery to Mr Laferla. He confirmed that the document was signed for by Mr Gainsford. The demand was in an envelope

addressed to Mr Laferla. Mr Gainsford on the other hand contended that he did not receive the document. Mr Laferla similarly contended that he did not receive the document. The respondents contended that Mr Gainsford's affidavit did not expressly state that he did not sign the envelope.

[49] Although the respondent's version cannot be rejected as false and untenable on the papers, their version did not establish delivery at the domicilium address as contemplated in the agreement. I conclude that the letter of demand was not properly delivered in accordance with the provisions of clause 22 of the agreement. The second breach notice was thus defective.

[50] The third breach notice forms part of an email directed by Mr Woodnutt to Mr Laferla at 08:39 on 24 January 2020. The email is addressed to Mr Laferla and Ms Torres. The email pertains to various issues regarding RGB Digital Printshop (Pty) Ltd and Verifika. Regarding Verifika, the email stated:

> *"I note with concern that you have, notwithstanding the terms of your agreement, failed to pay any of the monthly instalments that have been due and payable. Please be advised that these amounts need to be settled by the end of this month (January 2020). As is evident from the above we have been generous to the point of excess. We need to urgently resolve these issues (particularly in the light of your imminent departure from the building) and accordingly we should plan to meet 08h00 non Monday."*

[51] The applicants contended that similarly, the notice was defective in its terms and was not served in terms of the loan agreement. It was argued that the notice was defective as it was sent via email.

[52] Enforced relied on the provisions of clause 22.4 of the agreement, which provided that a written notice actually received by one of the parties would be adequate written notice or communication to such party. Although no email or faxcimile address was stipulated in clause 22.2.2 of the agreement, it was not disputed that Mr Laferla actually received the email as he responded thereto later on 24 January 2019, confirming receipt of the correspondence.

[53] The breach notice however suffers from the same defects as previously referred to. In its terms, the notice did not comply with the lex commissoria and did not unequivocally and unconditionally advise the applicants of the consequences if the breach was not rectified. For the same reasons as previously stated, the third breach notice is defective.

[54] The respondents argued that by the latest an event of default occurred pursuant to the demand of 24 January 2020 when Mr Laferla failed to rectify the breach by 27 January 2019 and that the right to effect the cession accrued, which was exercised on 28 January 2020, when Mr Laferla's shareholding was forfeited and transferred to Ms Torres. It was argued that the full outstanding amount became immediately payable as conveyed to Verifika on 31 January 2020, after the cession had been executed. It was argued all the breach notices complied with the requirements as they reminded the debtor it was in default and that he must comply. Thus it was argued that an event of default occurred and Enforced was entitled to execute on its security and effect the cession. For the reasons provided this argument must fail.

[55] A further issue which arose is whether Enforced was bound by its election to enforce the agreement rather than cancel it. The applicants argued that Enforced was bound by its election and could not rely on the alleged repudiation of the agreement by Mr Laferla as contended by the respondents in reply. There is merit in the applicants' argument.

[56] When faced with a repudiation or other circumstances entitling a party to cancel, the innocent party must elect whether to cancel or not. He cannot blow hot or cold and approbate and reprobate regarding such election. In electing to enforce a contract, albeit through a defective notice he is held to his election in certain circumstances[34]. The cases which afford an innocent party a later election is based on the principles that if a party has exhibited a clear repudiation of the agreement it would be non-sensical to hold him to

[34] Hodgkinson paras 55-56

such election. These are however not the factual circumstances here, considering the conduct of Enforced in taking steps to effect the cession and have Mr Laferla's shareholding forfeited. It would be untenable to allow the respondents in these circumstances to rely on a so-called repudiation as a fall- back position[35]

[57] Throughout, Enforced gave no notification that it intended to cancel the agreement. Its conduct in calling up the security under the loan agreement and effecting the cession, speaks to a contrary unequivocal election to enforce the agreement and to pursue a particular remedy. Having done so it was bound by the contractual terms implicit in that choice[36]. In relying on an alleged repudiation, there is merit in the applicants' contention that Enforced cannot blow hot and cold[37] in relying on two inconsistent remedies.

It is apposite to refer to the dictum of Van Den Heever JA in *Baines Motors v Piek*[38]:

> *"When the purchaser has made default, the seller can elect whether or not he is going to put the lex commissoria into operation (D.18.3.3). Once he has exercised his option he cannot resile from that election (D.18.3.6.7; Voet [18.3.3])."*

[58] It follows that the respondent's reliance on an alleged repudiation of the loan agreement must fail.

[59] I conclude for these reasons that none of the three breach notices by Enforced were valid and were all defective in the respects already mentioned. The provisions of clause 11.2 of the loan agreement were thus not triggered by an "event of default" as

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[35] Hodkinson para 68
[36] Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd 1996(2) SA 537 (C) at 542E-G
[37] Hodkinson supra
[38] 1955 (1) SA 534 (A) at 542-547. See Total South Africa (Pty) Ltd v Bekker NO1992(1) SA 617 (A) at 626G – 627C and Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another 1965(4) SA 373 (A) at 380

envisaged by clause 11.1 and Enforced was not entitled to effect the cession as it did on 28 January 2020.

[60] It follows that all steps taken pursuant thereto fall to be set aside and that the order granted by Yacoob J on 10 July 2020 must be confirmed. The parties were in agreement that such finding would dispose of the counter application which cannot succeed.

[61] The winding up application under case number 14799/20 (the conditional counterapplication) can be disposed of succinctly. It was conditional upon the applicants' application succeeding. The winding up application is fatally defective [39]as no certificate of security was ever filed, contrary to the peremptory requirements of s346(3) of the Companies Act 61 of 1973. It falls to be dismissed on this basis alone and it is not necessary to consider the application on its merits.

[62] I turn to the issue of costs. The normal principle is that costs follow the result. There is no reason to deviate from this principle. The parties were in agreement that the costs of two counsel was justified.

[63] At the hearing, the respondents abandoned the relief sought against the applicants' attorney, Mr Messina. They persisted with the contention that his fees were not to be borne by Verifika. I am not persuaded that a proper case has been made out for such relief. The respondents further abandoned the contempt application as it had in the interim been purged by Mr Laferla.

[64] The respondents sought the costs of 4 May 2020 and 18 May 2020, being dates when they had briefed counsel to argue the matter. They complained that the applicants failed to properly set down the matter for hearing on those dates in accordance with the relevant directives. On 11 March 2020 the application was postponed to 4 May 2020 and applicants should have done a notice of set down. However, the matter was not ripe for

[39] EB Steam (Pty) Ltd v Eskom Holdings SOC Ltd 2015 (2) SA 526 SCA para [24]

hearing on that date. Instead on 22 April 2020 the applicants served a notice of set down for 18 May 2020, but no computerized notice of set down was filed. Paragraph 9.8.2 of the applicable practice directives made the procedure to be followed clear. The applicants contended that the issues and delays were due to the lockdown regulations promulgated under the Disaster Management Act consequent upon the Covid 19 pandemic.

[65] From the facts it is clear that the necessary procedures under the relevant practice directives were not followed by the applicants. For this reason, there is merit in the respondents' criticism of the applicants. It should however have been clear to the respondents that the matter would not proceed on either 4 or 18 May 2020 due to the matter not being ripe for hearing on 4 May and absent a proper enrollment of the application on the latter date. It is also unclear whether the taxing master would allow fees being charged for those dates. In the circumstances I decline to make any costs order in relation thereto.

[66] I grant the following order:

Case number 14799/2020

[1] The first and second respondents' taking possession of the second applicant's shareholding in the first applicant is set aside;

[2] The second applicant's entire shareholding in the first applicant is restored.

[3] The first and second respondents' counter application is dismissed with costs, including the costs of two counsel

[4] the first and second respondents are directed to pay the costs of the application jointly and severally, the one paying, the other to be absolved, including the costs of two counsel where employed.

Case number 6183/2020

[1] The first and second respondents' taking possession of the second applicant's shareholding in the first applicant is set aside;

[2] The voluntary winding up of the first applicant is set aside;

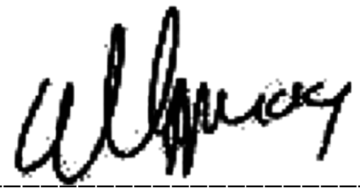
[3] The fourth respondent is directed to reinstate the first applicant to an enterprise status of *"in business";*

[4] The second respondent's appointment as a director of the first applicant is set aside;

[5] The first and second respondents are interdicted and restrained from interfering with or altering the status of the first applicant;

[6] The first and second respondent's counterapplication is dismissed with costs;

[7] The first and second respondents are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved, including the costs of two counsel where employed.



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EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATES OF HEARING	:	15 October 2020
DATE OF JUDGMENT	:	18 January 2020
APPLICANT'S COUNSEL	:	Adv. C. Georgiades SC Adv. R. Bosman
APPLICANT'S ATTORNEYS	:	Messina Inc Mr Messina
FIRST AND SECOND RESPONDENT'S COUNSEL	:	Adv. HB Marais SC Adv. S. Georgiou Adv. N Rambachan-Naidoo
FIRST AND SECOND RESPONDENT'S ATTORNEYS	:	Duncan Okes Inc. Mr D Okes