REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 20/39151

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED

12/10/2021

SIGNATURE DATE

In the matter between:

MAPONYA MOTOR CITY PROPERTIES (PTY) LTD	First Applicant
MAPONYA MOTORS PROPERTY HOLDINGS (PTY) LTD	Second Applicant
MAPONYA MOTORS PROPERTY HOLDINGS (PTY) LTD N.O.	Third Applicant

and

HAMILTON, JOHN GARRY N.O.	First Respondent
HAMILTON, CHERYL N.O.	Second Respondent
LUTZ, NILS JOHN N.O.	Third Respondent
LECUONA, MASON EBEN N.O.	Fourth Respondent
LECUONA, HELEN N.O.	Fifth Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 12 October 2021

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This application concerns the shareholding in the first applicant, Maponya Motor City Properties (Pty) Ltd ('*Maponya Properties*'). The entirety of the shareholding in Maponya Properties is registered in the name of the R J P Maponya Property Investment Trust ('*the RJP Maponya Trust*'). That holding is affirmed by the Maponya Properties shareholder register and in prayer 2 of the notice of motion, the applicants seek confirmation that the securities register correctly reflects its shareholders.

[2] The two respondent trusts, the Garry Hamilton Trust ('*the Hamilton Trust*') and the John Galt Trust ('*the Galt Trust*')(collectively *'the Trusts'*), each previously held 10% of the shareholding in Maponya Properties. The first to fifth respondents in their capacities as trustees represent the Trusts in these proceedings.

[3] The Hamilton and Galt Trusts acquired their shareholding pursuant to a court order dated 27 August 2018 in terms of which Justice Keightley directed that a draft order be made an order of court by agreement between the parties ('*the order*'). The order followed on a trial before Justice Keightley which commenced on 22 August 2018 ('*the action*').

[4] The order directed the RJP Maponya Trust, the first defendant[1] in the action, to take all steps necessary to transfer 10% of the issued share capital in Maponya Properties to each of the Hamilton and Galt Trusts.[2]

[5] On 12 September 2018 and 8 October 2018, and in compliance with the order, ten shares in Maponya Properties were registered in the names of each of the Hamilton and Galt Trusts.

[6] The action had been instituted in June 2016 with the Hamilton and Galt Trusts as the first and second plaintiffs. The defendants were the RJP Maponya Trust and Maponya Properties. The Hamilton and Galt Trusts relied in their cause of action on a partly oral / partly written agreement one component of which entitled each Trust to ten percent of the shareholding in Maponya Properties ('*the shares agreement*') – a proposition originally denied by the defendants. The shares agreement was concluded over the period 14 May 2010 to 19 April 2011. It was concluded on behalf of the Trusts by Mr Borthwick and the Maponya entities and the RPJ Maponya Trust were represented by Dr Richard Maponya who is now deceased.

[7] It is the applicants' subsequent cancellation of the shares agreement which forms the subject matter of this application. In this application, the applicants ask this Court to confirm the cancellation of the shares agreement.

[8] The applicants' case is that one of the terms of the shares agreement was that the Hamilton and Galt Trusts undertook to pledge in favour of the second applicant ('*Maponya Holdings*') their respective shareholdings in Maponya Properties (once acquired). The purpose of that pledge was to secure the claim of R35 million that Maponya Holdings held (on loan account) against Maponya Properties. That debt was made up of the purchase price for a property Maponya Holdings sold to

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1 Represented by its trustee Dr Richard Maponya, now deceased

2 The remaining ancillary relief in the draft order is not relevant to this application

Maponya Properties for R35 million which sale was recorded in the Sale of Immovable Property agreement concluded between Maponya Properties and Maponya Holdings on 29 November 2010 (*'the sale agreement'*). The purchase price was paid by Maponya Properties creating in its financial records a R35 million credit loan account in favour of Maponya Holdings. There remains a balance of R9 262 367 owing to Maponya Holdings.

[9] The shares agreement governed the terms of engagement between the parties as they embarked on the project to develop the property in Orlando, Johannesburg. The project was housed in Maponya Properties.

[10] Once the project was completed, Dr Maponya - as the controlling mind of Maponya Holdings and Maponya Properties, refused to accept the existence of the shares agreement and any entitlement of the Trusts to shares in Maponya Properties. The Trusts instituted proceedings against Dr Maponya to take the necessary steps to formally transfer 10% of the issued share capital to each of the Trusts. The order was granted after the evidence of Mr Borthwick had been led. It directed, *inter alia*, Dr Maponya to take the steps necessary to transfer the 10% shareholding in Maponya Properties to each of the Trusts. The Order was granted by Keightley J as mentioned above by agreement between the parties, some 8 years after the conclusion of the shares agreement.

[11] Once the shares had been transferred to the Trusts - under order of court – Dr Maponya sought to rely on and enforce one of the pleaded terms of the shares agreement – the very shares agreement that he had denied for years. He now contended for an obligation purportedly resting upon the Trusts to execute a cession and pledge document provided by his attorneys of record. The Trusts contend that the demand was simply part of a design stratagem to preclude the Trusts from

participating in Maponya Properties by extinguishing their *locus standi*. Dr Maponya thereafter purported to cancel the shares agreement.

[12] Dr Maponya's basis for contending for the existence of an obligation to execute a cession and pledge document was that it had been pleaded by the Trusts in the action. During argument Mr Mundell SC representing the applicants (the Maponya entities) submitted that this was not the only basis for contending that such an obligation existed but that the applicants also relied on the evidence of Dr Maponya in the liquidation application (as he did not depose to an affidavit in this application having passed away) and ancillary documents being the sale agreement and the signed pledge of shares and cession of loan accounts document dated 6 July 2011.

[13] The Trusts contend that the applicants have provided no factual foundation for their cause of action, and no basis for this Court to grant the relief sought in the notice of motion; that the matter is, at best for the applicants, replete with disputes of fact and that it cannot be determined in motion proceedings; that the shares agreement proved at the trial did not, on the evidence, disclose a term that required the Trusts to pledge and cede their shares to Maponya Holdings; that even if the applicants have established the existence of such a term and its continued applicability, there was no repudiation; and, even if there was, it would be inherently inequitable to permit the cancellation of the shares agreement in light of Dr Maponya's fundamental breach of his and the applicants' obligations, namely the extraordinary delay in transferring the shares, and the failure to pay down the Maponya Holdings loan account.

[14] Before dealing with the merits of this application I ought to mention that 3 months after compliance with the order i.e. after the 20% shares in Maponya

Properties had been transferred to the Trusts (10% each) and after the cancellation of the shares agreement, Dr Maponya had unilaterally amended the share register of Maponya Properties and had returned such shares to the RJP Maponya Trust. This gave rise to a spoliation application under case number 2019/35766 for the restoration of the Trusts' names to the share register of Maponya Properties. There was some debate in the heads of argument filed herein as to which application should be heard first or whether they should be heard simultaneously. As matters turned out the spoliation application was heard two weeks prior to this application and judgment was delivered on 20 August 2021 in which the Trusts were successful with the relief restoring the Trusts' names to the share register of Maponya Properties. The two applications appear to be separate and distinct and in this judgment, I need not pronounce on the possessory features fully and comprehensively dealt with in the spoliation application and judgment.

The existence of a pledge and cession term

[15] The applicants' case is that one of the terms of the shares agreement was that the Hamilton and Galt Trusts undertook to pledge in favour of Maponya Holdings their respective shareholdings in Maponya Properties (once acquired).

[16] The crux of the applicants' (the Maponya entities') case, as reflected in the affidavits deposed to on their behalf, is that the Trusts repudiated the shares agreement by their refusal to execute the cession and pledge document provided to them by the applicants' attorney of record. The demand emanating from the applicants' attorney of record provides that:

> 'We attach hereto marked **"X1"** and **"X2"** respectively, the required cession and pledge documents to be signed in order to remedy the breach.'

[17] In order to successfully advance the cause of action justifying an order that there was a valid cancellation of the shares agreement, the applicants must allege and prove at the very least, the existence of the shares agreement; and the existence of a material term to that agreement requiring that the Trusts execute a pledge and cession document as demanded by their attorney of record.

[18] The applicants have not provided any factual foundation for their purported cause of action. There are no positive allegations from Mr Solly Maponya (son of the now deceased Dr Maponya) in any affidavits before this Court regarding these key components of the cause of action. Mr Solly Maponya also never advanced any positive allegations concerning the conclusion of the shares agreement, less still did he adduce any evidence concerning a material term of the shares agreement of the nature now contended for. In heads of argument, the applicants contend that Dr Maponya has set out the "*terms and cancellation of the shares agreement*" in his affidavit filed in the liquidation proceedings. That is not so. Dr Maponya provided no direct evidence on the terms of the shares agreement. He simply described the pleaded terms in the particulars of claim in the action.

[19] He set out the terms with the proviso:

> 'I highlight the following aspects in the pleadings filed in the action.'

[20] In respect of the particular term in issue, he stated:

> 'the particulars of claim confirmed the material term of the agreement that .. the JG and GH Trust would provide a pledge and cession of their respective shares and loan accounts…'

[21] Later, he said:

> "On their pleaded version in the action the applicants were obliged to pledge their shares and cede their loan accounts in the first respondent to Maponya Holdings as security for the obligations I have previously described."

[22] At no point has Dr Maponya ever provided this Court, or the Trusts, with a statement on oath regarding the terms of the shares agreement. He merely recounts the terms the Trusts pleaded. He does this in the context of a dispute in which he took the position that there was no such agreement.

[23] Affidavits constitute both the pleadings and the evidence in support thereof.[3] In any action or application to establish the existence of a material term agreed to between parties to a transaction, the party bearing the onus would be required to tender evidence concerning what passed between the parties, demonstrating that the term relied upon was in fact agreed to between them, was material and the nature of how that term was agreed to.

[24] *In casu*, however, the applicants rely solely upon an allegation that appeared in historical pleadings – allegations that they chose historically to deny. Mr Solly Maponya's allegations concerning the terms of the shares agreement aside are also carefully worded. He says:

> 'The conclusion of and the terms of the agreement were particularised in the respondents' particulars of claim'
>
> .....
>
> 'The respondents' pleaded that it was a material term of the agreement that they would furnish a pledge and cession of their respective shares and loan accounts in Maponya Properties to Maponya Holdings.'

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[3] *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E.

[25] A pleaded cause of action or version advanced by another party with which issue has been taken, does not constitute a factual foundation for the applicants' cause of action. It was neither admitted nor accepted by the applicants. On the contrary, it was denied. Keightley J. did not find that there was an agreement as alleged by the Trusts (and denied by Dr Maponya). The matter was settled by agreement and a Court order produced in the terms of an agreed draft. That draft as prepared by the parties representatives and presented to the Court of Keightley J to settle the matter before the learned Judge makes no mention of the obligation to cede and pledge shares.

[26] In *SP&C Catering Investments (Pty) Ltd v Da Cruz and Others*[4] the Court considered an application for ejectment of the two respondents from certain premises. The parties had been involved in prior litigation which had been referred to oral evidence to determine the nature of the agreement between them. The applicants sought to rely on the version set out by the respondents in their pleas in the trial action in order to demand rental payments, and when the payments were refused, to cancel the lease agreements. Lamont J, in articulating the nature of the issues that arose before him, said that:

> 'the question to be answered is whether the applicant while disavowing the existence of a contract is entitled to rely upon it, demand payment in its terms, deliver an interpellation, thereafter cancel it and then seek relief based on the cancellation.'

[27] The Court noted that the applicant's conduct gave rise to an absurdity. Lamont J continued:

> 'There are further issues which arise namely: What were the terms of the contract pursuant to which the interpellation was issued? Was it a term that

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[4] (Case No. 40746/2010) South Gauteng High Court, 10 November 2010 (unreported)

> breaches required notice of a reasonable period? Was it a term that breaches to be dealt with in terms of particular clauses with particular time-limits and methods of cancellation? There is simply no answer to these questions and apparent absurdities which arise if the applicant is entitled to rely on a contract it claims does not exist.'

[28] The court dismissed the application, finding that the applicant was not entitled to demand payment in terms of a lease agreement that it had denied. That is not the same as a situation where the parties have an agreement which is common cause but they dispute the cancellation, the absurdity as in the present case lies in the denial of the existence of an agreement and then, having settled the matter (without the disputed term forming part of the settlement), relying on the other parties' version of the agreement in the settled litigation as if that version was now somehow common cause. More importantly, the court found that in relying on a pleaded version, the applicant had failed to prove the necessary terms of the purported agreement in order to establish how the cancellation would be effected.

[29] In *Moving Violations Systems Phumelelo (Pty) Ltd v The City of Johannesburg Metropolitan Municipality*[5] a full court of this Division, held as follows:

> '[29] A party relying on a contract is obliged to allege and prove the contract which includes the essentials of alleging when the contract was entered into, where it was entered into, by whom it was concluded, and whether it was oral or in writing. In addition, the claimant is also required to attach true copies of the contract (if in writing) to the pleadings and allege its terms - which have to be proven to succeed with the claim. The terms may of course be express, tacit or implied, but they must be pleaded and proven. One searches the founding affidavit in vain for compliance with these fundamental requirements.
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> [30] An analysis of the facts also disprove that there could have been a contract at all because there simply was no consensus established by the twin elements of a contract in respect of the Misgund intersection offences, namely offer and acceptance. To find an agreement, there is normally an offer and an acceptance

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[5] (A5028/2018) [2019] ZAGPJHC 143 (16 April 2019)

> thereof and these must appear from the evidence. In our law a contract is based upon mutual agreement. As a matter of law, if an offer is not accepted in its precise terms, such an offer may be withdrawn. (footnotes omitted)

[30] And at paragraph [60]:

> 'Accepting, without finding, that the February 2009 invoice can be excised from the remainder of the claim and was not adjudicated upon, then, the appellant faces the difficulties relating to the formulation of its cause/causes of action as **our law does not recognise as a cause of action the free-floating admissions** construction sought to be advanced in these proceedings.' (emphasis provided)

[31] Similarly, in the present matter the Maponya entities seek to rely on a contract that they have persistently disavowed for over a decade, settled without mentioning the term now contended for, and in relation to which they have steadfastly avoided adducing direct evidence.

[32] The Maponya entities argue now that Dr Maponya's concession in the trial action and consent to judgment directing him to transfer the shares to the Trusts constituted some form of 'consensus', not on the unchallenged evidence given at the trial, but rather on the pleaded terms of the shares agreement. The proposition appears to be that these entities are entitled to rely on pleadings that had been denied,[6] whilst ignoring the evidence given, the cross-examination to which it was subjected and the subsequent settlement which did not incorporate the term. It would have been a simple matter to have incorporated it in the draft order had it been intended that the pledge and cession should still be performed, but the parties settled that matter without including it. It is so that Maponya Holdings was not a party to the action but Dr Maponya was the controlling mind of all the Maponya entities

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[6] The only positive allegation is that the relief was conceded and "*the terms of the agreement became common cause between the parties to the action*"

and one would, under such circumstances, have expected the term to be part of the order if indeed it were a term and was still an obligation to be performed.

[33] It was not the case that the parties came to consensus over the terms of the shares agreement after Dr Maponya's defeat in the trial action. The applicants' statements in the founding affidavit are directly contradicted by their position prior to the institution of these proceedings. In April 2019 – six months after the order was granted – Dr Maponya stated quite clearly that the parties remained in dispute about the existence of the shares agreement, its terms, and any rights flowing from it. In the answering affidavit in the liquidation application he said:

> 'On any construction there is a clear factual dispute concerning the agreement, its cancellation and whether the applicants have any right at all to a shareholding in the first respondent.'

[34] Later he stated:

> 'there are now patently disputes of fact about the cancellation and the applicants' entitlement to any shareholding.'

[35] Nor is it the case – as the applicants argue - that the existence of the signed pledge of shares and cession of loan accounts document dated 6 July 2011 ('*the cession document*') proves that this was a material term of the shares agreement. There is no evidence that the cession document was signed pursuant to a term of the shares agreement. The evidence suggests that the cession document was not signed pursuant to a term in the shares agreement as the cession document was signed by 4 Trusts whereas the pleaded version suggests that The Nompinti Trust and The Nalesa Family Trust would each be issued with 15% of the issued share capital but these two Trusts were not party to the cession document yet ought to

have been if the cession document had indeed been signed pursuant to a term in the shares agreement.

[36] The cession document was not signed by Maponya Properties, Maponya Holdings or the RJP Maponya Trust despite them ostensibly being parties thereto. It would appear that signature of the cession document was mandatory. The failure by the Maponya entities to have signed resulted in their being no conclusion of the security agreement required for purposes of a valid pledge. Although no express clause to that effect is to be found, the most plausible inference to be drawn from the following provisions of the cession document is that signature was a prerequisite:

> '20.1 This is the whole agreement between the parties containing all of the express provisions agreed on by the parties with regard to the subject matter hereof.
>
> 20.3 No agreement varying.....shall be effective unless in writing and signed by or on behalf of the parties.
>
> 20.7 This agreement may be signed by the parties in any number of counterparts, each of which shall be deemed to be an original, but all of which shall together constitute one and the same agreement.'

[37] During argument Mr Mundell submitted that the cession document was concluded (i.e. the security agreement underpinning the pledge) on 7 December 2018 when the demand was made to sign the pledge documents attached to the letter of demand, thus 7 and a half years after the signature by the Trusts of the cession document. Mr Sawma SC, representing the Trusts argued that the cession document was not an offer open for acceptance 7 and a half years later to which Mr Mundell countered that clause 15 expressly provides that the pledge and cession would only terminate on receipt by the Trusts of a notice from the Maponya entities to that effect. That does not answer the legal conundrum the Maponya entities find themselves in i.e. that they did not sign the cession document ever (up to this day)

and that signature was a requirement for purposes of the conclusion of creating binding obligations, that the alleged oral acceptance did not occur expressly (insofar as oral acceptance was permissible which I have already found it was not) and that if it were accepted tacitly (and if this were legally competent) it did not occur within a reasonable period of time. This 'acceptance' on 7 December 2018 is also not born out by the facts nor is that case made out in the founding affidavit.

[38] The original case pleaded by the applicants was that the Trusts were required under the shares agreement to conclude the pledge and cession agreements i.e. to provide the cession and pledge documents attached to the 7 December 2018 letter. In the founding affidavit, Mr Solly Maponya described the events as follows: "*On 7 December 2018, Maponya Holdings demanded compliance with the terms of the agreement.*" In the context of the founding affidavit, the "agreement" referred to by Mr Solly Maponya is the shares agreement. He continues: "*the specific demand was for the Garry Hamilton and John Galt Trusts to provide the required cessions and pledges of their shares and loan accounts in Maponya Properties to Maponya Holdings*". This is supported by the letter of demand of 7 December 2018 which attached a draft pledge and cession agreement for signature by the Trusts and stated that the document should be "*signed in order to remedy the breach.*"

[39] In the heads of argument, the applicants advanced a different case. The applicants submitted to this Court that what was required of the Trusts was the *perfection of the pledge obligations arising from the pledge and cession agreements already signed by the Trusts ten years before*. The applicants submitted that the Maponya entities "*demanded delivery*" in terms of the cession document and that this Court was called upon to determine whether the Trusts are "*compelled to perfect*

their pledge obligations by delivery of the requisite share certificates to Maponya Holdings". It is asserted, on the applicants' behalf, that the "*delivery obligation imposed ... by the pledge agreement has not been met*" and that the respondents' refusal to comply with the demand for delivery "*led to the cancellation of the shares agreement by the Maponya companies.*"[7]

[40] This is not the case made out in the founding affidavit. The founding affidavit makes no mention at all of the cession document signed by the Trusts in 2011. The founding affidavit makes it quite clear that what was demanded was compliance with the shares agreement in the form of the conclusion of the draft pledge and cession agreement provisioned by the applicants through their attorney of record, and attached to the letter. Delivery was not the issue.

[41] The applicants cannot seek to change their case by way of legal argument[8]. This new version is at odds with the version advanced in the founding affidavit being that their cancellation was based upon a repudiation of a very specific demand made upon the Trusts, and that demand was not one for perfection of an already concluded pledge and cession.

[42] The ancillary documents relied upon by Mr Mundell in support of the argument that a term as alleged existed included the sale agreement in which it was recorded in clause 4.2 thereof that Maponya Properties would, and if consented to by Nedbank, procure that the shareholders of Maponya Properties provide a pledge and cession of the shares in Maponya Properties to Maponya Holdings. But of course at that stage, the Trusts were not shareholders of Maponya Properties.

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[7] Para 17 of the Applicants' Heads of Argument.

[8] *Swissborough Diamond Mines (Pty)Ltd v Government of the Republic of South Africa*, 1999(2) SA 279 (T) at 335 and *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd,* 1974 (4) SA 362 (T)

[43] An analysis of the founding affidavit evidences that the Maponya entities have simply not pleaded and proved the necessary components of their cause of action. There is no allegation at all by Mr Solly Maponya, or his late father, regarding the particular terms agreed between the parties. Nor is there any reference to the terms upon which a party would be entitled to cancel the shares agreement. It is simply not possible for this Court to make a determination on the cancellation of the shares agreement without this evidence.

[44] In contrast to the applicants' strategy, the Trusts have stated quite clearly that there was no such oral term of the shares agreement; that there was no term in the written portion of the shares agreement; that the term did not arise tacitly as a consequence of the conduct of the parties – because, amongst other reasons, the cession document was signed some time after the conclusion of the shares agreement; that the term was pleaded in the particulars of claim, but for the reasons already mentioned ie that such term did not exist, no evidence was adduced on its existence at the trial and the Trusts did not rely on the term at the trial; even if such a term existed, it was not a term for unlimited duration; the Trusts fully complied with all their obligations under the shares agreement; and the transfer of the 10% shareholding to each of the Trusts was the final outstanding obligation in the shares agreement.

No obligation on the pleaded and proved version

[45] The applicants contend that they are entitled to rely on a pleaded version in the action. Assuming the concession to the relief in the action in some unexplained manner gave rise to consensus on the pleaded terms of the shares agreement, then those terms did not include a term requiring the pledge and cession of the Trusts'

shares. This is so as the applicants stress that the relief was conceded on the basis of the pleadings and the evidence led by Mr Borthwick as to the terms of the shares agreement.

[46] The following appears at paragraph 26 of the founding affidavit:

> 'During the course of the trial the respondents led the evidence of Mr Borthwick in support of their claims. It was on the basis of Mr Borthwick's evidence, coupled with the pleaded case, that the relief in the action was conceded by the defendants in the action. In that manner the terms of the agreement became common cause between the parties to the action, including the trusts represented by the respondents. That commonality of cause in the action resulted in a court order in terms of which the defendants in the action conceded the relief sought in prayers 1, 2 and 3 of the respondents' particulars of claim. A copy of the court order is attached marked 'FA6'.

[47] Mr Borthwick's testimony on the terms of the shares agreement did not include any reference to the requirement for the parties to pledge and cede their shares. Nor was he cross-examined on that issue. The term appeared in the particulars of claim, but no evidence was led as to its existence and the reason for this was fully explained in the answering affidavit being that when the particulars of claim were originally pleaded out, the Trust's junior counsel in the trial action was also provided with a copy of the sale agreement and the cession document that the Trusts had signed but not Dr Maponya. The pleaded case was one that said the terms of the shares agreement were written, oral, implied, tacit or arose by conduct. The writing advanced no such obligation. It is stated that the rationale for the allegation was because junior counsel in preparing the particulars of claim and observing the cession document thought it appropriate to allege that a term requiring the cession and pledge accordingly arose tacitly in consequence of the conduct of

the parties. Senior counsel made no reference to this obligation in the opening address in the action and did not lead Mr Borthwick in regard to such term.

[48] The pleadings and evidence in the action was that the Trusts had performed all their obligations in terms of the shares agreement, and the only outstanding obligation was the transfer of the shares. The particulars of claim expressly alleged that the Trusts "*duly performed their obligations in terms of the agreement.*"

[49] The applicants' denied this allegation in the plea, and importantly made no allegations that there were any obligations outstanding. On their own version, they abandoned this defence in conceding to the relief. They had advanced no cross-examination to Mr Borthwick suggesting that any obligations remained outstanding. In the circumstances, on the applicants' version, it is not open to them to contend that obligations under the shares agreement remained outstanding, after the order.

Consequences of decision to proceed by way of motion

[50] The applicants have elected to seek final relief in motion proceedings. As a result, this Court is required to decide the matter on the *Plascon-Evans* principle. In *National Director of Public Prosecutions v Zuma*, the Supreme Court of Appeal articulated the proper approach to disputes of fact in motion proceedings in the following terms:

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the

> respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'[9]

[51] The Trusts' version is certainly not palpably implausible or far-fetched. To the extent that any disputes arise, this Court must rely on their version. In those circumstances, there is no basis for the relief at all.

[52] An applicant who elects to proceed by way of motion proceedings runs the risk that a dispute of fact may arise. In the Applicants' letter of 17 January 2019, they persist in their allegation that the Maponya entities were entitled to cancel the shares agreement and state:

> 'Even if your clients do not agree, there is clearly a dispute of fact, which can only be resolved in action proceedings.'

[53] With this knowledge, the applicants and their attorneys have elected to proceed by way of motion. At best for the applicants, these disputes of fact cannot be determined without the benefit of full discovery, oral evidence and cross-examination. In such circumstances, the appropriate order would be to dismiss the application with costs.[10] In my view though, there are no genuine disputes of fact on this issue as the applicants have failed to advance any admissible evidence in support for the term relied upon.

The obligation no longer enforceable

[54] Even if the applicants successfully demonstrate that such a term existed within the shares agreement, any obligation on the Trusts to provide a pledge and

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[9] *National Director of Public Prosecutions v Zuma (Mbeki and Another intervening)* 2009 (2) SA 279 (SCA) at para 26.

[10] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; approved in *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350

cession of their shares could only have been on the basis that Dr Maponya complied with his obligations under the shares agreement; and the loan account would be repaid in the manner prescribed in the sale agreement.

[55] The applicants accept that the Trusts became entitled to their shareholding as a result of the conclusion of the shares agreement. They also concede that they refused to give effect to the Trusts' contractual rights under the shares agreement, and that they were forced to litigate in order to secure performance in terms thereof.

[56] The particulars of claim alleged that the shares agreement required that the RJP Maponya Trust would "*within a reasonable time alternatively on demand*" give effect to the agreed percentage shareholding by taking the necessary step to transfer ownership of the shares in Maponya Properties to each party in accordance with the agreed percentage shareholding.

[57] It is common cause that Dr Maponya did not transfer the shares within a reasonable time or upon demand. He only did so when directed by the order. Quite clearly therefore, Dr Maponya and the applicants that he represented were in material breach of their obligations for a significant number of years and concomitantly denuded the Trusts of their rights during the same period. They acted in an unlawful manner. The approach adopted by the applicants completely ignores this aspect of the matter.

[58] The exercise by the Court of the power to inquire into and determine any existing future or contingent right or obligation is discretionary,[11] as is the grant of declaratory orders. The grant or withholding of relief is dependent on the

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[11] Section 21(1)(c) of the Superior Courts Act expressly provides for a discretion enjoyed by a court in this regard.

circumstances.[12] The same principle finds application to a litigant who displays a cynical disregard for the law or has unclean hands.[13] Accordingly an analysis of the unlawful conduct of Dr Maponya is warranted.

[59] The Trusts explain in the answering affidavit that the development team contemplated that the loan account of Maponya Holdings would be repaid once the development was complete and earning an income. This understanding is recorded in the sale agreement which provides that the loan account would be "*payable ... as soon as the purchaser is able to raise finance against the security of the property.*"

[60] While it is true that the Trusts were not party to the sale agreement, the particulars of claim alleged that the conclusion of the sale agreement formed part of the terms of the shares agreement between all the parties.

[61] On the approach adopted by the applicants, namely the contention that the pleaded terms form the basis of the concession made by them, the applicants are then obliged to accept this term of the pleaded agreement as well. The applicants' only response to this aspect of the matter, is that paragraph 4.1 of the sale agreement was a recordal of when the loan became payable and not when it had to be repaid. The applicants do not disclose to this Court what they contend are the terms of repayment of the loan.

[62] Unlike the purported term of the shares agreement relied upon by the applicants, this term of the shares agreement found expression in the evidence. Mr Borthwick confirmed these matters in his evidence at the trial and no cross-examination on the issue took place.

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[12] *Baleni v Minister of Mineral Resources* 2019 (2) 453 (GP) at 463 J [30] – 465 B [32] and the cases there referred to.

[13] *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others (No 1)* 2008 (3) SA 91 E at 128 [83]

[63] Clause 4.1 of the sale agreement provides:

> '4.1 The Seller's Loan Account which does not bear interest, is payable to the Seller [Maponya Holdings] by the Purchaser [Maponya Properties] as soon as the Purchaser [Maponya Properties] is able to raise finance against the security of the Property.'

[64] It is common cause that Maponya Properties has been able to raise finance against the property through a further loan from Investec Bank in the amount of R167 300 000. Over and above this, the development continues to earn rental income. Dr Maponya has alleged that Maponya Properties "*has become a very successful enterprise*" and that it is "*commercially sound*". Dr Maponya has also confirmed that Maponya Properties "*meets its obligations to Investec*".

[65] The evidence of Mr Borthwick in the trial displayed that the intent behind the raising of the finance with Investec was to repay the existing loan from Nedbank, repay three small shareholder loans and repay a portion of the loan account in respect of Maponya Holdings. The annual financial statements of Maponya Properties for the year ending February 2018 reflect that Maponya Properties had loaned R18 648 444 to the RJP Maponya Trust, approximately R19 000 000 was loaned to other parties including Dr Maponya's daughter's Trust, Mr Solly Maponya's Trust, a poultry farm under the name Maponya Poultry Farm and Maponya Holdings.

[66] Instead of paying down the loan account as contemplated in paragraph 4.1 of the sale agreement, Maponya Properties, under the control of Dr Maponya, had utilised it's monies in giving loans to members of Dr Maponya's family or entities associated with them.

[67] It would seems that the only reason there remains a loan amount outstanding is because Dr Maponya utilised the money for his own benefit rather than paying down the loan account. There is no enforceable term requiring the Trusts to pledge

and cede their shares for security for a loan account that should have been repaid years ago. What is more, the unlawful exclusion of the Trusts from the affairs of the Maponya Properties precluded them from economically participating or even being party to these decisions in the intervening years as shareholders, to say nothing of receiving dividends that might have been earned on those shares in the years in which they were excluded from their rights as shareholders.

[68] To call upon the Trusts to provide cession and pledges for an obligation that only continued to exist because of the consistent violation by Dr Maponya and the applicants through him of their obligations will not be sanctioned by this court. The conduct of the applicants quite plainly constitutes an ongoing repudiation over many years of the primary obligation relating to the loan account, whilst at the same time calling upon the Trusts to comply with the purported collateral but secondary obligation to secure that primary obligation - at a time when it ought no longer to exist at all and would not exist but for the repudiatory and unlawful conduct of Dr Maponya and the applicants in the first instance.

[69] I cannot find any cognisable basis for the applicants' reliance upon the term in question, but even if I were, I would be loath to grant the applicants their relief as the term only remains capable of enforcement because of unlawful conduct on the part of the applicants.

Trusts' response not a repudiation

[70] The applicants allege that the repudiation occurred on 13 December 2018 when the Trusts' attorney wrote a letter in answer to the applicants' demand on 7 December 2018. A closer analysis of the exchange between the parties on 7 and

13 December 2018 calls into question the applicants' contention that the conduct constituted a repudiation recognised by our law.

[71] In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[14] Nienaber J stated, at paragraph 19:

> "The conduct from which the inference of impending non- or malperformance is to be drawn must be clear cut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is "a serious matter" ... requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed."

[72] The test is objective and the matter is to be approached from the vantage point of the innocent party. Accordingly, a court, faced with the enquiry of whether a party's conduct amounted to a repudiation, must superimpose its own assessment of what the innocent party's reaction to the guilty party's action should reasonably have been.The reasonableness of a party's reaction or perception to the other party's conduct must be considered in context.

[73] The Trusts' letter of 13 December 2018 does not constitute a clear and unequivocal expression that the Trusts did not intend to be bound by the terms of the shares agreement.

[74] The letter of 13 December 2018 noted that the Maponya entities sought to rely on the shares agreement that they had previously disavowed, and which had been the subject of the litigation. It explained that "*the writer can find no mention of any of the documentation between 14 May 2010 and 19 April 2011 constituting the agreement regarding the alleged obligation*"; pointed out that the Maponya entities had expressly denied the existence of the pledge and cession obligation as an oral

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[14] [2001] 1 All SA 581 (A)

or tacit term in the pleadings of the action; requested that the Maponya entities identify "*on what provision of the agreement [they] places reliance.*" Explained that this detail was required in order "*to allow [them - the Trusts' attorney] to properly give consideration to your demand and advise our client accordingly*".

[75] A reasonable response to this letter must occur within the history and context of the matter, including the facts that the applicants had denied the existence of the shares agreement from 2011 until 2016; the Trusts had insisted on the existence of the shares agreement during this period; the Trusts had been forced to institute an action to compel Dr Maponya to transfer the shareholding due to the Trusts under the shares agreement; that in the trial action, the Trusts did not lead any evidence on the pledge and cession obligation; that Dr Maponya did not plead or lead evidence on any outstanding obligations under the shares agreement; that the development had been completed and the property re-financed; that the other parties to the shares agreement had been paid out and the order taken by agreement makes no mention of it.

[76] In these circumstances, a reasonable party in the applicants' position would have understood that the Trusts' letter recorded the fact that they did not understand how or on what legal basis the applicants now sought to advance or enforce the implicated term of the shares agreement and simply required a more detailed explanation of the source of the obligation, and its continued existence.

[77] A reasonable party would not have considered the response to be a clear and unequivocal repudiation of the shares agreement. A reasonable and *bona fide* litigant would have explained the basis for contending that the implicated term in fact existed and remained of application.

Conclusion

[78] For the reasons advanced herein and in summary, I therefore find:

78.1. The applicant's have not proven the existence of a term of the shares agreement that the Trusts undertook to pledge in favour of Maponya Holdings their respective shareholdings in Maponya Properties.

78.2. The applicants are precluded from advancing a case different from the one made out in the founding affidavit ie they are precluded from making out a case in their founding affidavit for the provision of a pledge and cession agreement and in argument asking for the perfection of the pledge as embodied in the cession document.

78.3. The law does not recognise a cause of action based on 'free floating admissions'.

78.4. The applicants ought not to have proceeded by way of motion as the dispute of fact (insofar as it exists as a bona fide one, which I have expressed my views on) was foreseeable and articulated as such prior to the application being launched.

78.5. The conduct of Dr Maponya in breaching the term of the shares agreement which obliged him to transfer the shares within a reasonable time alternatively on demand, for a continuous period of 10 years, entitles this court to exercise its discretion against the Maponya entities in determining the enforcement of the term contended for, assuming it exists.

78.6. The facts of this case militate against the enforcement of such a term, for amongst other, the following reasons: the Maponya entities

initially and for years denied the existence of the shares agreement, now they seek to rely on it; they initially and in their founding affidavit said that a pledge and cession was required but in their argument, that it is simply the perfection (delivery) of an already concluded pledge and cession.

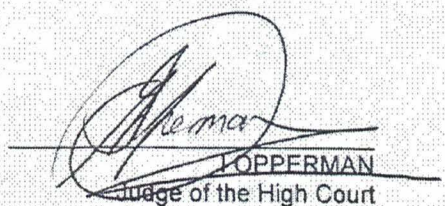
78.7. Objectively the Trusts did not repudiate the shares agreement assuming the existence of the cession and pledge term to be part of such agreement.

[79] I conclude that the securities register of Maponya Properties as at the date of the launching of this application did not correctly reflect the shareholders as it should have included each of the Trusts 10% shareholding. I also conclude that the applicant/s were not entitled to cancel the shares agreement.

Order

[80] I accordingly make the following order:

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



TOPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the Applicants: Adv ARG Mundell SC
Instructed by: Webber Wentzel
Counsel for the Respondents: Adv A Sawma SC and Adv F Hobden
Instructed by: Ramsden Small Fernandes Inc
Date of hearing: 5 May 2021
Date of Judgment: 12 October 2021