

REPUBLIC OF SOUTH AFRICA



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

Case No: 20/28515

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

..... SIGNATURE DATE
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In the matter between:

THE ROCK FOUNDATION PROPERTIES CC

First Applicant

ESTHER NYARWAI NDEGWA

Second Applicant

and

DOSVELT PROPERTIES (PTY) LIMITED

First Respondent

ELI NATHAN CHAITOWITZ

Second 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 14h00 on 21 December 2022

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The second applicant is Esther Nyarwai Ndegwa (*'Ms Ndegwa'*), who holds the entire member's interest in the first applicant, the Rock Foundation Properties CC (*'the Rock Foundation'*). The second respondent, Eli Nathan Chaitowitz (*'Mr Chaitowitz'*) is an attorney and the sole shareholder of the first respondent, Dosvelt Properties (Pty) Ltd (*'Dosvelt'*).

[2] There is a main application and a counter application. In the main application, the applicants seek an order to declare that a suite of agreements are credit agreements as contemplated in terms of section 8(4)(f) of the National Credit Act 2005 (*'the NCA'*). Having declared the NCA applicable to these agreements, the applicants seek to have such agreements declared unlawful and void *ab initio* as contemplated in terms of section 40 of the NCA or reckless as contemplated in terms of section 80(1)(aa) and/or 80(1)(b)(i) of the NCA and in consequence to have their force and effect suspended. In the further alternative, an order is sought setting the agreements aside as being against public policy.

[3] If the applicants succeed in obtaining this relief, they require an order to direct the transfer of Erf 298 Sandown Extension 24 Township (*'the property'*) to be reversed and to be transferred back to Ms Ndegwa.

[4] In the alternative and should the court refuse to declare the agreements void, the applicants pray for an order that the respondents determine the purchase price to be paid to enable them to acquire the property from Dosvelt.

[5] There is then a counter-application in which the respondents seek declarators that the lease agreement, being one of the suite of agreements, has been properly

cancelled by Dosvelt on 23 December 2020 that the option agreement (being another of the suite of agreements) between the Rock Foundation and Dosvelt not to have been exercised and to have lapsed on 23 December 2020, for the Rock Foundation to vacate the property or the Sheriff to be authorised to give effect to such order and for the Rock Foundation to pay an amount in respect of arrear rentals.

[6] Finally, this court is called upon to make a determination in respect of costs which were reserved in relation to an application for security for costs and a counter-application therein in which interdictory relief was sought.

Common cause facts or facts not seriously contested

[7] Ms Ndegwa purchased the property on 8 September 1999. The property was derelict at the time and improvements were required to add value to it. In 2005, Ms Ndegwa obtained a loan from ABSA in the amount of R1,2 million effect the improvements and such debt was secured by a bond. The property was leased to tenants who did not pay their rent timeously and in some instances at all, and the non-payment created a substantial cashflow issue leading to Ms Ndegwa being in default of her obligations to ABSA. ABSA instituted action against her for the full amount outstanding of R1,2 million and default judgment was granted against her.

[8] Ms Ndegwa was able to delay the sale in execution by satisfying the arrears on a month to month basis. She began searching for investors and builders to realise the best value of the property and ultimately to stay the sale in execution. She began the process of subdividing the property into six portions, borrowing funds from friends and family to pay the architects and town planners to give effect to the subdivision. She could not afford to pay for the amount required for the property to be subdivided to the City of Johannesburg nor could she afford to pay for the sums

required by the town planners to draw up and submit the application for the proposed subdivision.

[9] She was introduced to Mr Chaitowitz and they conducted negotiations which resulted in the conclusion of the suite of agreements.

[10] Ms Ndegwa involved the Rock Foundation and Mr Chaitowitz involved Dosvelt. This they did for reasons of tax efficiency and the structures had investment flexibility to accommodate investors.

[11] On 28 June 2018, Ms Ndegwa and Dosvelt concluded a written agreement in terms of which Ms Ndegwa sold the property to Dosvelt (*'the sale agreement'*).

[12] Dosvelt then entered into a lease agreement with the Rock Foundation in terms of which it leased the property from Dosvelt (*'the lease agreement'*).

[13] On 28 June 2018, Dosvelt and the Rock Foundation entered into an option agreement (*'the option'*) in terms of which Dosvelt granted the Rock Foundation an option to purchase the property on the terms and conditions set out therein. They also entered into a written agreement which would govern such sale in the event of the option being exercised (*'the option sale agreement'*).

[14] Ms Ndegwa was unable to pay the City of Johannesburg to obtain a rates clearance certificate to enable the transfer of the property to take place pursuant to the sale agreement. Dosvelt authorised the payment to be made to the City of Johannesburg out of the deposit paid in terms of the sale agreement.

[15] Ms Ndegwa authorised the release of an amount of R200,000 from the funds held in trust in terms of the sale agreement to pay the builder Mark Damon who was to refund that amount to Ms Ndegwa in accordance with arrangements in place between them.

[16] The property was transferred to Dosvelt on 30 October 2018. In May 2019, the Rock Foundation fell into arrears in relation to the payment due in terms of the lease agreement, but were able to negotiate a payment plan with Dosvelt to bring the arrears up to date, which resulted in an addendum to the lease agreement being concluded on 24 May 2019 (*‘the addendum’*). The purpose of the addendum was to extend payment terms to the Rock Foundation to assist it with the payment of rental.

[17] During the period December 2019 to March 2020, the Rock Foundation was again unable to pay the invoices in respect of the rental and the charges to the City of Johannesburg.

[18] On 12 November 2020, Dosvelt issued a breach notice to the Rock Foundation in terms of the addendum to the lease affording it 20 days to remedy the breach.

[19] On 7 December 2020, the Rock Foundation’s attorneys of record addressed an email to Dosvelt’s attorneys disputing that any amount was payable by the Rock Foundation. On 20 December 2020, Dosvelt cancelled the lease agreement in terms of a further notice to the Rock Foundation. The parties remain in dispute as to whether the cancellation is valid.

[20] The applicants remain in occupation of the property.

A closer look at the agreements

The sale agreement

[21] The property was sold by Ms Ndegwa to Dosvelt for a purchase price of R3,000,000 payable against registration of transfer of the property into the name of Dosvelt. The purchase price would be paid by deposit in the sum of R500,000 into the conveyancer’s trust account within 15 days and the balance of R2.5 million was to be secured by guarantee to be delivered to the conveyancer on request. Ms Ndegwa would remain in occupation of the property upon registration of transfer by

virtue of and subject to the terms of the lease agreement entered into between the Rock Foundation and Dosvelt simultaneously with signature of the sale agreement. Ms Ndegwa acknowledged her liability for the judgment debt to ABSA and the cost of uplifting the attachment noted against the property and agreed to set off the judgment debt and upliftment costs against the purchase price. The agreement contained the standard '*sole and entire agreement*' and '*non-variation*' clauses.

The lease agreement

[22] The lease agreement concluded between the Rock Foundation and Dosvelt provided that the lease would commence on the day of transfer of the property to Dosvelt and would continue for an uninterrupted period of three years from such date.

[23] The rental was R10,000 per month but could be increased to R15,000 per month on the first occurrence of a breach after the notice to remedy an existent breach, and to R20,000 in the event of a second such breach. On the third occurrence of such breach, Dosvelt would have the right to cancel the lease without further notice as well as the option to evict the Rock Foundation.

[24] In addition to the rental, the Rock Foundation was responsible for payment of all amounts billed by the local authority and prevailing municipal tariff of charges in respect of the property's municipal rates, taxes and charges and insurance and which amounts had to be paid to Dosvelt monthly in arrears within seven days of Dosvelt furnishing the Rock Foundation with an invoice setting out the charges. It was recorded that the Rock Foundation was aware that this clause was material to the lease and that Dosvelt could cancel the lease if there was no money available to pay these accounts.

[25] Crucially, the lease agreement provided that during the lease period the Rock Foundation would be entitled, at its sole risk and expense, to take any and all steps necessary to procure subdivision of the property and to direct such new residential dwelling that may be permitted by the local authority in terms of an approved site development plan and market such dwellings for sale. The purpose of such subdivision and development was to enable the Rock Foundation to secure sufficient funds through the sale of the residential dwellings to enable it to successfully exercise the option and to pay the full purchase price.

[26] The sale of the residential units to third parties would at all times be subject to the Rock Foundation's successfully exercising the option and paying the full purchase price on or before the due date. Offers by third parties to purchase residential dwelling units would be submitted by the Rock Foundation to Dosvelt for approval, which approval would not be unreasonably withheld. The lease agreement too contained '*non-variation*' and '*entire agreement*' clauses. The Rock Foundation confirmed that it had read the lease agreement, that it had been explained to it and that it understood and accepted the terms.

The option

[27] The option was concluded on 28 June 2018, would commence on the date of the transfer of the property to Dosvelt and would endure for a continued period of three years unless cancelled as set out therein. If the option were exercised, it would be deemed to have been entered into upon the terms and conditions set out in the option sale agreement. The option would automatically terminate in the event of the cancellation of the lease agreement. The option contained '*entire agreement*' and '*non-variation*' clauses. It was expressly recorded that there existed no collateral and/or other agreements and that apart from the lease agreement referred to in the

option, this was the sole agreement entered into by and between the parties in respect of such subject matter.

[28] The option sale agreement provided that the purchase price of the property would comprise R3,300,000 and interest at the rate of 22% per annum on such amount from the date of signature of the sale agreement to date of payment of the purchase price in full plus costs and expenses incurred by Dosvelt in relation to the purchase and transfer of the property by virtue of the sale agreement and all costs and expenses incurred by Dosvelt in relation to the property from date of transfer until date of transfer to the Rock Foundation and interest thereon at the rate of 22%. This agreement too contained '*no variation*' and '*entire agreement*' clauses.

The addendum

[29] On 24 May 2019, a written addendum to the lease agreement was concluded and it was recorded that the Rock Foundation had breached the terms of the lease agreement in failing to timeously pay the rent and municipal rates, taxes and charges by the due dates, that the Rock Foundation was experiencing what was hoped to be temporary financial difficulties, that the breach of the terms of the lease agreement and cancellation of the lease would result in the option to cancel and that the Rock Foundation had requested Dosvelt to grant it certain indulgences to allow it an opportunity to resolve its financial difficulties and honour the terms of the lease agreement to which Dosvelt had agreed that the Rock Foundation was to be afforded an opportunity to settle all arrear rental and municipal rates, taxes and charges for the period 1 May 2019 to 30 September 2019 by no later than 30 September 2019. The Rock Foundation warranted that it would be able to honour the terms of the addendum by 30 September 2019 and the terms of the lease agreement.

[30] It was also recorded that the local authority's billing records contained certain inaccuracies and errors but that the estimated monthly municipal rates, taxes and charges amounted to approximately R10,500 per month. It was further recorded that until such time as the local authority had rectified its records, the amount of R10,500, an estimate, would be accepted by the parties as the monthly amount payable by the Rock Foundation to Dosvelt in respect of the municipal rates, taxes and charges and that upon the local authority rectifying its records and issuing corrected amounts, the corrected information would be used to make the necessary adjustments and the corrected account be provided and be subject to adjustments.

[31] If the Rock Foundation failed to make payment under the lease, Dosvelt would have the right to place it in breach by means of a notice allowing it 20 business days to remedy such breach. Should the Rock Foundation fail to remedy such breach, Dosvelt would be entitled to cancel the lease agreement, evict the Rock Foundation from the property in which event the option would be cancelled automatically. The addendum read with the lease agreement constituted the entire agreement between the parties concerning that subject matter. It too contained a '*non-variation*' clause.

Crux of the complaint

[32] The applicants contend that the actual agreement/s between the parties is a credit agreement where Dosvelt is not registered as a credit provider and where such registration was a pre-requisite the failure of which renders the agreement/s unlawful and void. The applicants contend that the transactions underpinning the transfer of Ms Ndegwa's home to Dosvelt share similarities with the contracts signed by victims of the Brusson scheme and other schemes involving simulated loan

agreements which have been assessed in various judgments.¹ They thus contend that there was never an intention to transfer the property as same was only ever intended to serve as security for the loan.

[33] In a nutshell: The Applicants contend that the transaction was a loan and the respondents contend it was an investment opportunity.

Analysis of the agreements

[34] The agreements are clear as to their form, content and intent. They are quite commonplace in that the sale of immovable property coupled with a lease and an option to buy back, are frequent occurrences and are well recognised as instruments of commerce.

[35] The terms of the agreements provide exactly what they are. The sale agreement identifies a property and specifies a price payable against transfer. The lease agreement provides the use and occupation of the property against the monthly rental and for a pre-determined period. The option provides for a right to purchase the property and at a price to be derived from a formula. What is more, each of the agreements provide that they are the sole memorial of the parties in regard to their arrangement and they admit of no variation without it being in writing and signed by the parties.

[36] The sale was an out and out purchase which required and provided that the property could only be transferred upon payment and could only be repurchased by the exercise of the option and at the predetermined formula for the price. Occupation

¹ *Absa Bank Ltd v Moore and another*, 2017 (1) SA 255 (CC); *Absa Ltd v Moore and another*, 2016 (3) SA 97 (SCA); *Quartermark Investments (Pty) Ltd v Mkhwanazi and another*, 2014 (3) SA 96 (SCA); *Ditshego and others v Brusson Finance (Pty) Ltd and others* [2010] ZAFSHC; *Slabbert v Du Plessis* (A5052/2018) [2019] ZAGPJHC 190 (3 June 2019); *Maine v Dube* ZAGPJHC/2015/164.

of the property would be lost and there was nothing to oblige Rock Foundation to exercise the option.

[37] Two contemporaneous valuations produced by Ms Ndegwa at the date of the sale show that the property was valued between R2.9m and R3.265m. It will be recalled that the property was purchased by Dosvelt for R3million and that the option provided for the repurchase of the property for the amount of R3.3million (with certain adjustments required by the formula).

[38] The Rock Foundation was entitled, in terms of the lease agreement, to effect alterations. There was no obligation on the Rock Foundation to develop the property. Whether it elected to do so or not during the currency of the lease was entirely up to the Rock Foundation. If the property was developed, the Rock Foundation could use the proceeds of any sale to repurchase the property but it was not obliged to do so.

[39] The option did not obligate the Rock Foundation to do anything. For a period of three years, it could decide whether or not it wished to purchase the property. The right to be the exclusive purchaser of the property for three years at a predetermined price if the Rock Foundation so elected would be expected to cost money and hence the formula was not surprising.

[40] There is no reason to suspect that Mr Chaitowitz would not be justified in requiring a return three years later on investing in a derelict property but which, according to Ms Ndegwa, had potential to become far more valuable. In the period of the lease (coinciding with the duration of the option), the Rock Foundation could either develop the property according to original plans, create a different plan to make use of the property or purchase the property outright if it thought it was worth the purchase price. But all these options lay in the Rock Foundation's hands and they came at a price. If the property had a value of R15m as asserted by the

applicants (which is heavily disputed by the respondents), one would have expected the Rock Foundation to have exercised the option. It should easily have found finance and have been able to realise the profit it contends was there to be had.

Loan vs Investment

[41] The nail in the coffin of the applicants' application, is the consequence of the evaluation of the evidence applying the *Plascon-Evans* rule: Mr Chaitowitz, on behalf of Dosvelt and in his own capacity, states that the sale agreement (independently or read together with the other agreements), was not a loan, that the agreements are exactly what they purport to be and that he was not willing to loan money to Ms Ndegwa or the Rock Foundation, nor did he want to become a partner in her development.

[42] This assertion is supported by the fact that the purchase price is supported by two valuations and the rental in terms of the lease agreement is related to the use of such property. When was the capital amount to be repaid, one asks if this were a loan? There is no provision for an obligatory capital repayment. The notion that it is simulated is accordingly inherently improbable. In addition, a lease is specifically exempted from the provisions of the Act in terms of section 8.

[43] On the respondents' version, the value of the property is R3m. On the applicants' version, the property is between R12.5m and R15m. If that is true, Ms Ndegwa has benefitted enormously from this transaction and as pointed out previously, ought to have unlocked the profit that was available by exercising the option.

[44] But the best indicator that the agreements are exactly what they purport to be emerges under the hand of Ms Ndegwa herself. On 22 June 2018, and shortly before the suite of agreements were signed, she addressed an email to Mr

Chaitowitz, copying the builder and Charmaine Dison (who was the conveyancer responsible for drafting the agreements), complementing Ms Dison on the agreements. Ms Ndegwa said:

‘I have perused and found that all the documents are very professional and in perfect order. Charmaine has captured our discussions and verbal agreements very well. Well done Charmaine!’

[45] The applicants now contend that everything about the agreements was wrong because it was a loan. That despite the fact that the agreements cumulatively provide for the exact opposite of a loan. They provide for a sale, a lease and an option. They are completely incompatible with any suggestion of a loan. To read a loan into them is fanciful.

[46] How then do the applicants make a case for a loan in the face of the agreements which they signed and which directly contradict their assertion? Ms Ndegwa contends that she was introduced to Mr Chaitowitz by the builder, Mark Damon. He advised her that Mr Chaitowitz would provide her with the necessary finance to enable her to pay off the judgment debt to ABSA and allow her to proceed with finance in the development of the property. Thus, Ms Ndegwa’s version is that she was introduced to Mr Chaitowitz who would provide her with a loan. His version is that it was an investment opportunity.

[47] In support of Ms Ndegwa’s version, she refers to certain correspondence which she contends is corroborative of the loan arrangement. The first is an email dated 22 May 2018 which is a mail sent by her to Mr Chaitowitz in which she says –

‘Firstly, I am pleased to confirm my confidence in entering an investment agreement with you against my property ...’

[48] The interest rate referred to in that email is in respect of the rental and there is no mention of a loan at all. The only mention in respect of security is for the

investment. The fact that she noted therein that the objective was to settle the ABSA home loan and facilitate the speedy installation of services to market individual plots for the property development which was at subdivision stage, does not establish a loan. It supports the construction that there was a buy-back, if she was able to and chose to develop the property.

[49] She then refers to an email dated 23 May 2018, being an email from Mr Chaitowitz to Ms Ndegwa. This email contains some of Mr Chaitowitz's responses to the email of 22 May 2018. There is a debate about the value of the property but nothing in its suggests that the risk that Mr Chaitowitz was assuming was that of a loan. Everything in the correspondence suggests that the risk he was assuming was that of an investment. The percentages that were mentioned in the email are relative to rental as a return on income and not as interest on a loan as Mr Ndegwa implies.

[50] Mr Chaitowitz emphatically stated that under no circumstances was he prepared to become involved in the success or otherwise of the development. He insisted that as the owner of the property all the proceeds of the sale were to accrue to him until the option purchase price had been paid. This is inconsistent with an agreement of loan.

[51] Ms Ndegwa further relies on an email in which she agrees to a rental based on the interest rate that Mr Chaitowitz suggested and also agrees that the proceeds of the sale would have to go into his account until the option price was paid. This is also consistent with an investment not a loan as she suggests.

[52] Mr Chaitowitz denies the version of a loan outright. He explains that he met with Ms Ndegwa approximately three to five times before they concluded the suite of agreements. On the first time they met, Ms Ndegwa explained that she was looking for someone to loan her the amounts required to proceed with the development or an

investor that would inject the requisite funds so that she, together with the investor, could proceed with the development. Her predicament was that if she did nothing, the property would be sold in execution and not only would she not realise fair value for the property, but her aspirations for developing it would be lost.

[53] Mr Chaitowitz says that he was not prepared to loan her any money because, on her track record as represented to him, she was a bad payer. He was also not interested in developing the property with her because he did not know her and did not wish to speculate on the success or not of a building project or property development.

[54] Applying the *Plascon Evans* rule, I find the suite of agreements are what they purport to be – a sale, a lease and an option to purchase – and they are not a loan as alleged by the applicants. The respondents' version is not bald and it does not contain uncreditworthy denials, fictitious disputes of facts, which are palpably implausible, far-fetched or untenable. To the contrary, the probabilities (and the written agreements) overwhelmingly favour the respondents' version – this is particularly so since Ms Ndegwa herself admitted that the agreements as drawn correctly reflect their understanding.

Brusson type case or not

[55] It was common cause at the hearing that were this court to accept that the agreements are what they purport to be, the NCA has no application. I have so found and that should be the end of the enquiry.

[56] However, whether the three agreements are simulated or disguised transactions, and in actual fact credit agreements under the NCA, perhaps requires further analysis:

A simulated transaction is a dishonest transaction² in terms of which the parties intend a legal effect which is different to the terms that the agreement expresses ('*Consideration 1*'), which the parties dress up in a guise ('*Consideration 2*') and which is created for the purpose of deceiving (by concealing) the real transaction ('*Consideration 3*'). A party claiming simulation must satisfy the court that there is a real intention, definitely ascertainable, which differs from the simulated intention.³ The court must be satisfied ('*Consideration 4*') that there is some unexpressed agreement or tacit understanding between the parties that is not borne out by the terms of the agreement or some secret understanding between them⁴. If this were not so, it could not find that the ostensible agreement is a pretense.

[57] As part of the inquiry, the Court must determine whether the real nature and implementation of the contracts are consistent with their ostensible form⁵.

[58] In respect of all three agreements: Ms Ndegwa was at all times a self-professed businesswoman whose work included the international promoting of trade and investment. Ms Ndegwa sought out Mr Chaitowitz not the other way around. Even though the content of the negotiations is in dispute, it is common cause that the parties took their time in concluding the three agreements which were only concluded after a series of negotiations between the parties. Ms Ndegwa herself was instrumental and responsible for the ultimate form and structure of the three agreements, for example she wanted the Rock Foundation introduced to suit her ends, to achieve tax benefits and attract future investors. The applicants read and understood the terms of the three agreements before signing them and in Ms Ndegwa's own words to the conveyancer and Mr Chaitowitz, referring to the three

² *Commissioner of Customs and Excise v Hudson Ltd* 1941 AD 369, at 395 – 396

³ *Zandberg v Van Zyl*, 1910 AD 302 at 309

⁴ *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others*, 2014 (4) SA 319 (SCA) at para [15].

⁵ *Maize Board v Jackson*, 2005(6) SA 592 (SCA) at para [8]

agreements, *“the documents are very professional and in perfect order. Charmaine [the conveyancer] has captured our discussions and verbal agreements very well. Well done Charmaine!”*.

[59] In respect of the sale agreement: the purchase price of R3 million matched the value of the property as determined by two estate agents at the time, who valued the property between R2.9 and R3.265 million. Dosvelt paid the full purchase price of R3 million, Ms Ndegwa received the full purchase price, which she used amongst other things to extinguish her debts and pay third parties, and she received the balance of the purchase price in cash. Ms Ndegwa transferred the property to Dosvelt and the sale agreement was fully executed in all respects by both parties.

[60] In respect of the lease agreement: the Rock Foundation was entitled to use and develop the property in terms of Ms Ndegwa’s aspirations and the Rock Foundation took steps in this direction although the applicants do not say how far they actually developed the property. The Rock Foundation had to pay a monthly rental and municipal charges which it did on and off. They say that the Rock Foundation paid some of the rental due in terms of the lease agreement. They also acknowledge that the Rock Foundation fell into arrears under the lease agreement and they knew that if the Rock Foundation breached the terms of the lease agreement the Rock Foundation would lose its option. During 2019 Dosvelt negotiated a payment plan relating to the Rock Foundation’s arrears under the lease and agreed an addendum to the lease agreement (the Rock Foundation was at the time represented by attorneys), specifically so that the Rock Foundation would not lose its option, all of which demonstrates that the applicants recognized the validity and enforceability of the lease agreement and option agreement. Even after concluding the addendum to the lease agreement, the applicants concede that the Rock Foundation again fell into

arrears and that during or about December 2019 to March 2020 it was unable to pay Dosvelt's invoices as they fell due. Dosvelt eventually cancelled the lease agreement (as amended) due to the Rock Foundation's repeated breaches – the latter made no payments toward rental or municipal charges after May 2020.

[61] In respect of the option: the Rock Foundation had the right, but not an obligation, to purchase the property and it, via its erstwhile attorneys, made inquiries about the price of the option but never exercised it.

[62] The applicants have not shown: (Consideration 1) that the intended legal effect of the three agreements is different to the terms expressed in such agreements – the manner in which the parties conducted themselves demonstrates that they understood the three agreements in their ostensible form, gave effect to them in their ostensible form and respectively benefitted from them in their ostensible form. (Consideration 2) that the three agreements were in any way dressed up – each spell out precisely what they provide for. (Consideration 3) that the purpose of the three agreements was to deceive anyone – the applicants do not even go so far as to suggest who was purportedly deceived and/or supposed to be deceived by the documents; nor (Consideration 4) any unexpressed or tacit understanding that differs to what the three agreements provide; any secret understanding that applied between the various parties; nor any reason why the parties would have a different understanding to what is expressed in the three agreements.

[63] The applicants' reliance on the *Brusson* type of cases is misplaced.⁶ They are not factually analogous. In these cases, the applicants were misled as to the suite of agreements that they signed. They were induced to believe that the documents they

⁶ See: *ABSA Bank Ltd v Moore and Another* 2017 1 SA 255 (CC) at para [5], 258G and para [14], 260F; *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) at paras [14] – [17], 101B – 102C; *Slabbert v Du Plessis* 2019 JDR 1211 (GJ) at para [3], p2 and para [6], p4 and *Maine v Mosebo and Others* (46283-13) [2015] ZAGPJHC 287 (13 August 2015) at paras [9] and [10], p4. In so far as the court in *Ditshego v Brusson Finance (Pty) Ltd* 2013 JDR 2440 (FB) went beyond an enquiry into fraud, it adopted the approach adopted in *Maize Board v Jackson* already referred to in footnote 5.

were signing were not the sale agreements involving the transfer of their immovable property. They did not understand that by signing the agreements they would lose title to their properties and would have to repurchase them if they were to re-acquire title.

[64] On the facts in this case, the applicants were perfectly aware, even on their own version, that by signing the agreements that the property would be transferred to Dosvelt and were content that this occurred. The fact that the applicants say that this is a simulation does not change the fact that they intended transfer to be passed, That Dosvelt intended to take transfer and that registration of transfer of title has occurred.

[65] These are the only elements necessary to properly transfer ownership under the abstract theory, and because the causal theory of transferring ownership no longer applies, the underlying agreement – simulated or otherwise – no longer matters, and cannot affect the validity of the transfer of ownership⁷.

[66] I thus find that the applicants have not made out a case that the three agreements are simulated, disguised or anything other than what they purport to be. I find that in their ostensible form, the three agreements are not governed by the NCA, and there is no simulation. The agreements are to be enforced in their terms.

[67] Although this was not argued at the hearing but was raised in the papers obliquely, I should add that I do not find anything in the agreements as concluded or as executed, contrary to public policy.

The alternative relief

[68] The applicants pray in the alternative for an order requiring the respondents to set out a calculation to enable them to calculate the sum due in terms of the option

⁷ *Legator McKenna Inc and Another v Shea and Others* 2008 ZASCA 144.

and this is to include the calculation of interest payable as contemplated in clause 4.2 of the option; the calculation and description of all costs and expenses and interest charged described in clause 4.3, 4.4 and 4.5 of the option; the calculation is to be provided to the applicants within 7 days of the date of the order; the respondents must calculate the exact amount payable by the applicants in respect of the water and electricity due on the property based on actual readings within 30 days of the order supported by vouchers and job cards setting out the applicants' actual consumption of the property and the tariff applied thereto by the City of Johannesburg; once the respondents have calculated that sum, they must revise the account payable in terms of the lease agreement by deleting the incorrect utility debits and debiting the actual charges relating to the applicants' consumption of the premises; once the account has been provided the applicant must pay the account within 14 days; should the respondents fail to ascertain the exact consumption they must install a water and electricity meter at the property for a period of 3 months which consumption will be used to calculate the actual consumption of the applicants for the duration of the lease as a reasonable estimated consumption of utilities on the property.

[69] In terms of clauses 4.2, 4.3, 4.4 and 4.5 of the option what is required to compute the purchase price is R3 300 000 plus interest at the rate of 22% thereon from the date of signature of the sale agreement to date of payment of the purchase price, all costs and expenses incurred by Dosvelt in relation to the purchase and transfer of the property from Ms Ndegwa to Dosvelt by virtue of the sale agreement and all costs and expenses incurred by Dosvelt in relation to the property as from the date of transfer thereof, and interest at the rate of 22% on all amounts disbursed by

Dosvelt from the date of disbursements until the date of payment of the purchase price in full.

[70] The calculation of the option price was specifically addressed in the answering affidavit. According to the formula provided for in clause 4 to 4.5 of annexure A to the option agreement the price was: R3.3 million plus 22% per annum on the R3.3 million from 28 June 2018 to date of final payment; costs and expenses incurred by Dosvelt in relation to the purchase and transfer of the property which was nil; all costs and expenses incurred by Dosvelt in relation to the property which was nil; interest on amounts disbursed by the Dosvelt on the amounts in the previous two items which was nil.

[71] There is accordingly no need for this relief.

[72] To the extent that the applicants seek greater clarity to the consumption on the property and its unresolved queries in relation the City of Johannesburg in terms of the lease, the addendum to the lease agreement obliges them to engage with the City Council to determine whether corrections or adjustments are required. They have failed to do that.

[73] But in any event, the lease agreement has been cancelled, and in its terms the option terminated when the lease terminated. Accordingly, there is no need to calculate the purchase price payable in terms of the option as it has been extinguished. The fate of the alternative relief is directly linked to the counter application.

The counter application

[74] In the counter application, the respondents seek: judgment against the Rock Foundation for arrear rental and municipal charges of R150,514.47 plus interest; confirmation of the cancellation of the lease agreement as amended; confirmation of

cancellation of the option (due to the cancellation of the lease agreement); ejection of the Rock Foundation – specifically the respondents do not seek Ms Ndegwa’s eviction now; and costs.

[75] Dosvelt is the registered owner of the property. Dosvelt concluded a lease agreement with the Rock Foundation on 28 June 2018 which entitled the Rock Foundation to occupation.

[76] On 24 May 2019, Dosvelt and the Rock Foundation negotiated and agreed to an addendum to the lease agreement in order to afford the Rock Foundation an opportunity to catch up its arrears. Notwithstanding the addendum, it again fell into arrears in breach of the lease agreement as amended. As at 6 November 2020, the Rock Foundation was in arrears in the amount of R150,514.47.

[77] The applicants baldly dispute the indebtedness however lay no foundation therefore as the monthly rental is not in dispute; and the applicants know the municipal charges (both estimated and actual), they have had the municipality’s accounts since inception, yet they do not identify which of the municipal charges they dispute; they do not say why they dispute any particular charge; they do not explain why they have never done so in the past. Instead, the applicants suggest that the municipality’s accounts are “clearly incorrect” because one cannot reconcile the municipality’s estimates with its actual charges. This, in the context of all the facts in

this case, does not amount to a *bona fide* denial of liability⁸ and the suggestion is demonstrably without merit.

[78] In terms of (the amended) clause 21.1 of the lease agreement, if the Rock Foundation failed to make any payment due under the lease agreement, Dosvelt had the right to place the Rock Foundation in breach by means of delivering a notice to it and allowing it a period of 20 days in which to remedy the breach. Dosvelt placed the Rock Foundation on terms on 12 November 2020 for not paying rental and municipal charges for some six months, since May 2020.

[79] The applicants suggest that the notice did not comply with clause 21.2 or 21.2.3 of the lease agreement. However, the suggestion is based on the previous clauses 21.1 and 21.2.3 (which provided for a three-breach requirement before cancellation) which clauses were deleted and replaced in terms of the amendment to the lease agreement in 2019.

[80] In terms of (the new and applicable) clause 21.2 of the lease agreement as amended, if the Rock Foundation failed to remedy a breach within 20 days of receiving notice thereof, Dosvelt was entitled to cancel the amended lease agreement and evict the Rock Foundation from the property.

[81] When the Rock Foundation failed to remedy the breaches complained of by 23 December 2020, Dosvelt, on notice, elected to cancel the lease agreement as

⁸ A respondent only raises a real, genuine and *bona fide* dispute of fact if he or she seriously and unambiguously addresses the issue disputed, *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 3 SA 371 (SCA)* at para [13], 375G. If the facts are within the respondent's knowledge and he or she does not lay down a factual basis for disputing the veracity or accuracy of the applicant's version but instead rests on bald and ambiguous denials, the court will generally have no difficulty in finding that no dispute of fact has been raised (*Wightman*, para [13], 375H – I). *Wightman* followed in *Brown v Economic Freedom Fighters and Others 2019 6 SA 23 (GJ)* at para [56], 35G – 36B; *BSB International Link CC v Readam South Africa (Pty) Ltd and Another 2016 4 SA 83 (SCA)* at para [13], 88C – E; *Grancy Property Ltd v Manala and Others 2015 3 SA 313 (SCA)*, at para [20], 321B; *PMG Motors Kyalami (Pty) Ltd and Another v Firstrand bank Ltd, Wesbank Division 2015 2 SA 634 (SCA)* at para [23], 644F – H and *Malan v City of Cape Town 2014 6 SA 315 (CC)* at para [73], 335H – 336A. Furthermore, litigants are required to seriously engage with the factual allegations they seek to challenge and to furnish not only an answer but also countervailing evidence, particularly where the facts are within their personal knowledge: *Wright v Wright and Another 2015 1 SA 262 (SCA)*, para [15], 268H

amended and evict the Rock Foundation. Upon cancellation of the lease agreement (as amended), the option is cancelled too.

[82] Dosvelt was thus entitled to cancel the lease agreement as amended and is entitled to the relief sought.

Security for costs application and the counter application for an interim interdict

[83] The respondents launched an application for security for costs (*‘the security for costs application’*). The applicants opposed the security for costs application with a counter application for an interim interdict (*‘the interim interdict application’*). The parties agreed not to proceed with these respective applications however could not agree on who should pay the costs. Accordingly, the Court is required to determine them.

[84] The respondents submit that the security for costs application had merit and was, effectively, uncontested. The respondents contend that the interim interdict application was ill-conceived, an abuse of process, and an attempt to bury the security for costs application under threat of protracted further litigation.

[85] The security for costs application was brought against the Rock Foundation only because it is a close corporation, has no assets or income, was acquired in order to proceed with the subdivision and development of the property, does not conduct business, does not trade, other than Ms Ndegwa, has no investors that are prepared to invest monies into it, has no means with which to pay any debts should it incur any, has in the past been in arrears with its lease obligations to the point where the lease agreement was cancelled, could not afford to pay the fees of its previous attorneys and would, in all likelihood, be unable to pay the respondents’ costs. Ms Ndegwa is a Kenyan national with ties to Kenya, intends retiring soon, at the time of

the Rock Foundation's incorporation, was in financial difficulty, her introduction to the respondents was as a result of not being able to pay a default judgment granted in favour of ABSA, was and is unable to secure a bank loan or investment to inject money into the Rock Foundation in order to proceed with the development of the property or to meet its contractual obligations, has no business anymore and would probably be unable to pay the respondents' costs or to help the Rock Foundation to do so. The applicants did not dispute the merits of the case against them for security for costs. Instead they brought a counter-application for interim relief to prevent Dosvelt from alienating or encumbering the property at a time when the respondents never intimated they would do so but it was the applicants themselves that tried to sell the property when they knew that the respondents would object to them doing so and the issue of their entitlement versus the respondents' entitlement was the subject of this litigation.

[86] The respondents highlight a host of inadequacies in the interim interdict application which criticisms, on the face of it, appear to be warranted. The death knell though lies in the applicants' failure to have requested the respondents' view or stance as to what should happen pending the outcome of the main application. The respondents stated that had it been done they would have informed the applicants that they did not intend to alienate, encumber or use the property. They recorded such undertaking in their attorney's letter dated 31 May 2021. They also requested that the applicants catch up on their arrear municipal charges and continue to pay same on a monthly basis. The respondents also made the following without prejudice offer which was rejected ie that both applications be abandoned and that each party bear their own costs. In the end the agreement reached was that both applications

would be withdrawn and that the costs be reserved for determination by the court hearing this, the main application.

[87] Having regard to all the facts and circumstances, some of which have been recorded herein, I exercise my discretion in favour of the respondents and intend ordering the applicants, jointly and severally, to pay the costs of both these applications.

[88] On the issue of costs, I was told from the bar, and this was not contested, that two counsel were from time to time employed. A half-hearted attempt was made to argue that this was unnecessary. In my view, the complexity of the case required both two counsel as well as warranting the employment of senior counsel.

Order

[89] I accordingly grant the following orders:

The Main Application

- (1) The application is dismissed with costs which costs are to be paid by the Rock Foundation Properties CC (*'the Rock Foundation'*) and Esther Nyarwai Ndegwa (*'Ms Ndegwa'*) jointly and severally, the one paying the other to be absolved, which costs are to include the costs of senior counsel where so employed, and the costs of two counsel, where so employed.

The Counter Application

- (2) The lease agreement between Dosvelt Properties (Pty) Ltd (*'Dosvelt'*) and the Rock Foundation, a copy of which is attached as FA7 to the founding affidavit in the main application, as amended, is declared to have been in place and in force between Dosvelt and the Rock Foundation prior to 23 December 2020 and properly cancelled on 23 December 2020.

- (3) The option under the option agreement between Dosvelt and the Rock Foundation, a copy of which is attached as FA5 to the founding affidavit in the main application, is declared not to have been exercised and is declared to have lapsed on 23 December 2020.
- (4) The Rock Foundation is to vacate Erf 298 Sandown, Extension 24 Township, Registration Division IR, the Province of Gauteng, situate at 42 Edward Rubenstein Drive, corner David Street, Sandown (*'the property'*).
- (5) Should the Rock Foundation fail to vacate the property by 20 January 2023 the sheriff of this Court is authorised and directed to eject the Rock Foundation and do all such things as may be required in order to give effect to such order.
- (6) The Rock Foundation is to pay Dosvelt an amount of R150 514.47 plus interest thereon at the rate of 7% from 23 December 2020 to date of final payment.
- (7) The Rock Foundation and Ms Ndegwa are to pay the costs of this counter-application, jointly and severally, the one paying the other to be absolved which costs are to include the costs of senior counsel where so employed, and the costs of two counsel, where so employed.

The reserved costs

- (8) The Rock Foundation and Ms Ndegwa are to pay the costs of the security for costs application and the counter-application for an interim interdict, jointly and severally, the one paying the other to be absolved which costs are to

include the costs of senior counsel where so employed, and the costs of two counsel, where so employed.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the applicants: Adv M Amojee

Heads of argument prepared by Adv C van der Merwe

Instructed by: Kaveer Guinness Inc

Counsel for the respondents: Adv S Symon SC

Instructed by: Paul Friedman & Associates

Date of hearing: 2 November 2022

Date of Judgment: 21 December 2022