



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

Case No: 21535/2022

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

.....
DATE

.....
SIGNATURE

In the matter between

**ITHEMBA SKY MARK SECURITY
ALL SERVICES (PTY) LTD**

Applicant

And

**ITHEMBA SKY MARK SECURITY
SERVICES CAPE TOWN CC**

First Respondent

THOMAS MERRICK PERKINS

Second Respondent

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. This application concerns a disputed deed of cession entered into in December 2020 between the applicant (Ithemba Sky Mark Security All Services (Pty) Ltd), represented by the late John Jackson, and the first respondent (Ithemba Sky Mark Security Services Cape Town CC), represented by the second respondent (Thomas Perkins). Contracts between the applicant and security services clients were the subject matter of the deed. The validity of the deed is attacked by the applicant on various grounds, including an alleged absence of authority on the part of Mr Jackson.
2. For the reasons set out in paragraphs to below, I conclude that the deed of cession is null and void *ab initio*, on two grounds of invalidity, being the absence of authority on the part of Mr Jackson and of consent on the part of the clients, and grant an order in the terms set out in paragraph below.

THE FACTS

3. It is not in dispute on the papers that, for many years, Messrs Perkins and Jackson were involved in a security services business that operated nationally under the name Ithemba Security Services. At a regional level, the business was conducted by various companies and close corporations, including the applicant and the second respondent. Initially, whereas Mr Perkins was a director or member of all such entities, Mr Jackson was primarily involved in the group's operations in the Gauteng and KwaZulu-Natal regions.

4. In 2016 the applicant was converted from a close corporation to a company, Mr Perkins resigned as its member/director and Mr Jackson and Hendrik van der Walt became its only shareholders (51:49) and directors. As at 2018 Messrs Perkins and Jackson were the only members of an associated entity, Ithemba Sky Mark Security Services CC. In 2018 Mr Perkins resigned and was replaced as member by Mr van der Walt such that Messrs Jackson and Van der Walt became the only members (51:49) of the corporation. Mr Perkins continued to conduct the Cape Town and Port Elizabeth businesses of the first respondent, of which he was and remains the sole member.

5. Mr van der Walt died of a heart attack on 02 September 2019. On the evidence of Mr Perkins:

5.1. shortly before that date Mr van der Walt entrusted to Mr Perkins the applicant's office keys and bank account passwords to enable him to assist with the financial affairs of the applicant should that become necessary;

5.2. on that date Mr Perkins attended at the offices of the applicant and asked Mr Jackson whether he could assist the applicant by paying staff salaries and immediate creditors. Mr Jackson asked Mr Perkins, who agreed, to continue assisting the applicant by attending to its day-to-day financial affairs;

5.3. in the ensuing months Mr Perkins investigated those affairs and informed Mr Jackson that they were in a state of disarray, including that the company was in default of a number of employee-related and other statutory obligations and indebted to the first respondent in a sum of approximately R900,000;

5.4. on 07 February 2020 it was agreed between them that Mr Perkins would assume financial control and management of the applicant, whose employees and clients would be moved over to the first respondent,

which would repay the applicant's outstanding indebtedness to Mercantile Bank;

- 5.5. although it was agreed that Mr Jackson would initiate liquidation proceedings in respect of the applicant, it later transpired that he did not do so; and
 - 5.6. during September 2020 Messrs Perkins and Jackson discussed and agreed to cede the applicant's client contracts to the first respondent with effect from 01 March 2021 (the start of the applicant's financial year), in return for which Mr Jackson would retain the "*remuneration and benefits that he received from the applicant*" and be "*released of all past debt in his personal name*".
6. On 03 December 2020 the applicant (as cedent) and the first respondent (as cessionary) entered into a written deed of cession, which appears to have been signed by Mr Jackson for the applicant and Mr Perkins for the first respondent.
- 6.1. The preamble records, in relevant part, that:

***“AND WHEREAS** the cedent has secured numerous contracts with various clients to furnish security services consisting out of the placing of day shift and night shift security guards, armed response, radio and patrol system equipment throughout Gauteng and KwaZulu-Natal;*

AND WHEREAS the cedent, due to financial constraints, is no longer able to furnish the aforesaid security services to its clients and pay all the salaries and wage related costs of its security guards and management;

AND WHEREAS the cedent may expose itself to damages claims by its clients for failing to deliver security services in terms of the existing contracts with its clients;

AND WHEREAS the cedent wish to cede its rights and obligations in terms of the existing contracts with its clients to the cessionary who is prepared to accept such cession.”

6.2. Clause 1.4 defines “clients” as:

“the existing clients of the cedent as on the 1st of March 2021 with whom the cedent has entered into written agreements to furnish security services consisting out of the placing of day shift and night shift security guards, armed response, radio and patrol system equipment throughout Gauteng and KwaZulu-Natal specified in Annexure ‘CES1’ hereto”.

6.3. Clause 3 provides that:

“The cedent hereby cedes and the cessionary hereby accepts the cession of all the cedent’s rights and obligations towards its clients specified in Annexure ‘CES1’ hereto with effect from the effective date [01 March 2021] and in particular the right to recover the remuneration payable by the clients to the cedent for rendering security services to the clients consisting out of the placing of day shift and night shift security guards, armed response, radio and patrol system equipment to the cedent’s clients throughout Gauteng

and KwaZulu-Natal in terms of written agreements entered into between the cedent and its clients.”

6.4. Clause 4 provides that *“[n]o consideration will be payable by the cessionary to the cedent for the cession herein recorded.”*

6.5. Clause 5 provides that:

“With effect from the effective date the cedent will place the cessionary in control of all its guards posted throughout Gauteng and KwaZulu-Natal from which date the cessionary will be liable to pay the salaries and other benefits to the cedent’s existing guards in terms of the existing employment agreements;

With effect from the effective date the cedent shall deliver and, where applicable, cede, assign and transfer all of its licences, PSiRA documents, certificates, registration papers and other documents necessary to pass benefit of the cession herein recorded to the cessionary.”

6.6. Clause 6 provides, in relevant part, that:

“The cessionary hereby undertakes unto and in favour of the cedent that he will offer contracts of employment to all security guards who were employed by the cedent as at the effective date, which contracts will be on terms and conditions no less or more favourable than those which exist as at the effective date.

In the event of any security guards failing to accept the offer of employment within thirty (30) days of the effective date, the cedent

shall at its own cost and expense deal with such security guards in accordance with the general principles of Labour Law ...”.

7. Mr Jackson died of Covid-related complications on 05 February 2021. The last will and testament of Mr Jackson nominated his surviving spouse, Banita Jackson, as sole beneficiary of his estate and a representative of Appleton Fiduciary Services (Pty) Ltd (**AFS**) as executor of the estate.
8. On 12 February 2021 the applicant (per Mr Perkins) informed clients of “*Ithemba Sky Mark Group*” of a decision to consolidate “*our banking accounts*” into a single account with effect from 01 March 2021. Mr Perkins confirms that this account is held by the first respondent. From about that time Mr Perkins amended the invoices of the applicant to reflect bank account details of two Mercantile Bank accounts, including the account referred to in paragraph above.
9. A copy of the deed of cession was emailed by Mr Perkins to Ms Jackson on 17 February 2021. According to Ms Jackson, she had been unaware of the deed until that time.
10. It appears from letters of executorship approved and issued by the master of the high court on 24 March 2021 that Lauren Hean of AFS was appointed executrix and authorised as such to liquidate and distribute the estate of Mr and Ms Jackson.

11. Ms Jackson became the applicant's sole shareholder and director in January 2022. According to Mr Perkins, her appointment as director occurred without the knowledge of the executor of Mr van der Walt's estate.
12. It appears from letters of executorship approved and issued by the master of the high court on 28 January 2022 that, following the resignation of AFS, Ms Jackson was appointed executrix and authorised as such to liquidate and distribute the Jackson estate.
13. According to Mr Perkins, "[t]he KwaZulu-Natal contract" transferred by the applicant to the first respondent pursuant to the deed of cession terminated and was not extended in July 2022.
14. It is his evidence that revenues derived from the transferred contracts were used to cover expenses and generated only modest profits for the first respondent.

THE PROCEEDINGS

15. The applicant launched this application on 17 June 2022. The relief sought in the application – that the deed of cession be declared null and void *ab initio* and its implementation reversed with effect from 01 March 2021 – is supported by a founding affidavit deposed to by the applicant's sole director, Ms Jackson, on 15 June 2022. The case sought to be made out in the founding affidavit is that:

- 15.1. at no time did Mr Jackson mention the deed of cession to his wife or sons (who were both actively involved in the business) and Ms Jackson suspects that his signature may have been forged on the deed;
- 15.2. none of the security guard employees of the applicant was informed of any cession of rights or offered employment contracts with the first respondent and none of the private security business licences of the applicant was transferred to the first respondent;
- 15.3. after Mr Jackson's death Mr Perkins denied Ms Jackson access to the businesses (including the books and records) of the applicant;
- 15.4. the purported cession of rights was and is invalid because the deed:
 - 15.4.1. was executed and implemented for no valid *causa* or consideration and constitutes a voidable disposition without value as contemplated in section 26(1) of the Insolvency Act 24 of 1936;
 - 15.4.2. was executed and implemented without Ms Jackson's written consent and constitutes a voidable donation or alienation without value as contemplated in section 15(3)(c) of the Matrimonial Property Act 88 of 1984;

15.4.3. is void for vagueness in that the list of clients referred to in clause 3 was not attached as annexure CES1 to the deed and it is unclear which contracts were purportedly transferred by the applicant to the first respondent; and

15.4.4. purported to transfer “*all the security contracts of the business, being the sole source of income for the business*” but was not authorised by any resolution of the applicant’s directors (Mr Jackson and the late Mr van der Walt) or shareholders (Mr Jackson and the estate of the late Mr van der Walt).

16. The founding papers were served on the respondents on 27 June 2022.

17. On 25 July 2022 the respondents delivered an answering affidavit deposed to by Mr Perkins. According to the respondents:

17.1. there are foreseeable, fundamental and far-reaching disputes of fact that cannot be resolved on the papers such that this application should be dismissed with punitive costs or referred to trial;

17.2. the founding affidavit contains irrelevant, vexatious and objectionable evidence that should be struck out of the papers;

17.3. Ms Jackson lacks personal knowledge of the circumstances that led to the conclusion of the deed of cession. The applicant had been unable to discharge its debts or service its obligations (to employees and others) and its contracts with clients were ceded to enable the ongoing rendering of security services;

17.4. the cession of rights was and is not invalid because:

17.4.1. the attempted reliance on section 26(1) of the Insolvency Act is "*patently wrong*" since the applicant has not been liquidated;

17.4.2. section 15(3)(c) of the Matrimonial Property Act is inapplicable since Mr Jackson did not dispose of his shareholding in the applicant or any other asset of the joint estate and, in any event, his last will and testament states that the Jacksons were married *out of* community of property;

17.4.3. the contention that the deed of cession is void for vagueness is not understood by the respondents and is, in any event, irrelevant and without merit; and

17.4.4. as regards authority to conclude the deed, "*[i]t is bizarre to allege that the late Mr van der Walt who passed away on 2 September 2019 was still a director who could act on 3*

December 2020” and, in any event, Mr Perkins “*was not a director of the Applicant and [is] therefore fully entitled to rely on the provisions of Section 20(7)*” of the Companies Act 71 of 2008.

18. The applicant’s replying affidavit – deposed to by Ms Jackson – was delivered on 12 August 2022. The affidavit asserts that a declaration of invalidity may be made on what is not disputed on the papers. (This court is no longer asked to decide whether Mr Jackson signed the deed of cession.) In particular, it is:
 - 18.1. confirmed (with reference to the title deed of their immovable property and the letters of executorship referred to in paragraphs and above) that the Jacksons were married *in* community of property; and
 - 18.2. submitted that the void-for-vagueness and absence-of-authority grounds of invalidity are not pertinently or persuasively addressed by the respondents.
19. The attorneys for the applicant delivered a practice note, heads of argument and list of authorities on 21 December 2022. An updated practice note was delivered on 22 May 2023. The heads of argument address the facts outlined in paragraphs to above and elaborate on the submissions set out in paragraphs and above, including by invoking sections 112 and 115 of the Companies Act in support of the absence-of-authority ground of invalidity.

20. Counsel for the respondents delivered heads of argument and a list of authorities on 06 March 2023. A practice note was delivered on 28 March 2023. The heads of argument address the facts outlined in paragraphs to above and elaborate on the submissions set out in paragraph above. As regards the absence-of-authority ground of invalidity, it is submitted that the founding papers do not allege “*that the security contracts constituted a disposition of a major asset*” and that the applicant places only belated reliance on sections 112 and 115 of the Companies Act.

GENERAL PRINCIPLES

21. Generally, contractual rights may be freely ceded unless a contract precludes the cession.¹ So, if A is a creditor of B, A may typically cede its rights to obligations owed to it by B, to C, without B’s consent.
22. The general principle is subject to the exception of *delectus personae*, which, if applicable, requires B to consent to the cession by A to C.
23. The exception applies where a contract, properly interpreted, is so personal in nature that it would make a reasonable or substantial difference to B whether A or C enforces the obligation.²

¹ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (8) BCLR 807 (CC) [55]; *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* 2019 (2) SA 221 (SCA) [17]-[20]

² *Eastern Rand Exploration Co Ltd v AJT Nel, JL Nel, SM Nel, MME Nel's Guardian and DJ Sim* 1903 TS 42 53; *University of Johannesburg supra* [58]-[61]

24. The court in *Propell*³ provided an illustration, originally articulated in *Densam*,⁴ that, in a contract between ‘master’ and ‘servant’ for the rendering of personal services, the master may not cede his right to receive services from the servant without the servant’s consent (given the special nature of the services) whereas the servant may cede his right to receive payment (given the general nature of the payment obligations).
25. The distinction between a *right* and an *obligation* is important. A contractual right may ordinarily be freely ceded; but a contractual obligation may not.⁵
26. A transfer of obligations may only be achieved by delegation, which requires the consent of the parties. A transfer of a right in terms of a contract, by way of a cession, does not automatically entail a transfer of the corresponding obligation, which remains intact unless validly delegated.⁶

³ *Propell supra* [19]

⁴ *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A) 112A-E

⁵ *Dettmann v Goldfain and Another* 1975 (3) SA 385 (A) 395A-F

⁶ *Milner v Union Dominions Corp (SA) Ltd and Another* 1959 3 SA 674 (C) 676E-H

THE ISSUES

Was there non-compliance with the Insolvency Act?

27. It was debated at the hearing whether the transfer of the contracts required prior publication in terms of section 34(1)⁷ of the Insolvency Act.
28. The parties' representatives were agreed that, if the deed of cession brought about a disposal of all or a substantial part of the applicant's business, then publication in terms of section 34(1) was required; and *vice versa*. But that debate – whether a transfer of the contracts constitutes such a disposal – played itself out more fully in the context of the absence-of-authority ground of invalidity; so any alleged non-compliance with section 34(1) does not require determination in this judgment.
29. It was also debated whether the transfer of the contracts is voidable under section 26(1)⁸ of the Insolvency Act.

⁷ Section 34(1) of the Insolvency Act provides, in relevant part, that “[i]f a trader transfers in terms of a contract any business belonging to him, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt, and such trader has not published a notice of such intended transfer in the Gazette, ..., within a period of not less than thirty days and not more than sixty days before the date of such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer ...”.

⁸ Section 26(1) of the Insolvency Act provides that “[e]very disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent – (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the

30. I understood Ms Naydenova, who appeared for the applicant, ultimately to accept that, since the applicant is not in liquidation, a section 26(1) disposition without value does not require consideration in this case.
31. It was similarly accepted by Ms Naydenova that allegations of an ulterior purpose in the form of a scheme to side-step creditors are disputed and thus unsustainable on the papers. She did not press for relief under this ground of invalidity.
32. In the circumstances, given what is discussed and decided in paragraphs to below, it is unnecessary to make a finding in relation to any alleged non-compliance with the Insolvency Act.

Was there non-compliance with the Matrimonial Property Act?

33. Although there was debate at the hearing whether the Jacksons' matrimonial property regime is determinable on the papers, a marriage in community of property may, for present purposes, be assumed in favour of the applicant.

disposition was made, the liabilities of the insolvent exceeded his assets; (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities."

34. Mr Kloek, who appeared for the respondents, submitted that section 15(3)(c)⁹ of the Matrimonial Property Act applies only to assets falling within a joint estate – such as shares in a company – but not to assets held, for example, by a company whose shares fall within the estate. So, even if a transfer of contracts constitutes a disposal of the applicant’s business, it would not be voidable under the Matrimonial Property Act since the contracts were not assets of the Jacksons’ estate.
35. In response, Ms Naydenova argued that such a narrow interpretation of section 15(3)(c) would ignore the purpose of the provision. On the basis that a transfer of the contracts would impact the value of a 51% shareholding in the applicant, she urged on this court a substance-over-form approach to this ground of invalidity.
36. In my assessment, neither side focussed attention on its submissions on this score and I was not referred to what other courts may have considered or decided in similar cases. Be that as it may, given what is discussed and decided in paragraphs to below, it is unnecessary for me to make a finding on this ground of invalidity.

⁹ Section 15(3)(c) of the Matrimonial Property Act provides, in relevant part, that “[a] spouse shall not without the consent of the other spouse – ... donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate ...”.

Was the deed of cession inchoate?

37. It was submitted by Ms Naydenova that, having regard to the deed of cession's definition of "*contracts*" and the absence of the annexure to which it refers, the subject matter of any consensus between the applicant and the first respondent is unascertainable and no assignment of rights and obligations is enforceable; hence this application should succeed. Accepting that the answering affidavit mounts no substantive defence to this attack on the deed of cession, Mr Kloek submitted only that the preamble and clause 1.4 guide the proper interpretation of clause 3 such that the absence of annexure CES is not destructive of the deed.
38. It is not clear to me that, in the absence of annexure CES1, the deed of cession is inchoate. It is trite that a court will endeavour to give effect to a contract apparently genuinely entered into by parties and there is no evidence on the papers that it would be impossible to identify the contracts concluded in writing between the applicant and clients in the Gauteng and Kwazulu-Natal regions. So, I am not persuaded that inchoateness follows necessarily from the absence of annexure CES1. Again, however, given what is discussed and decided in paragraphs to below, it is unnecessary for me to make a finding on this ground of invalidity.

Was the deed of cession unauthorised?

39. Ms Naydenova submitted that:

39.1. the contracts were the applicant's sole source of income such that their transfer amounted to a disposal of its entire business; and

39.2. Jackson lacked authority necessary to sign the deed of cession on behalf of the applicant.

40. In answer, Mr Kloek argued – somewhat faintly – that an assignment of rights and obligations is not an act of disposal as contemplated in section 112(2)¹⁰ of the Companies Act. He referred to a case decided under the statute's 1926 predecessor but it involved a security cession as opposed to an outright cession or assignment and is not on point. I did not understand Mr Kloek to press the argument, which I do not consider to have merit.

41. More forceful was Mr Kloek's argument that section 1 of the Companies Act defines "*all or the greater part of the assets or undertaking*" of a company to mean "*more than 50% of its gross assets fairly valued, irrespective of its liabilities*" or "*more than 50% of the value of its entire undertaking, fairly valued*". In his submission, the test for the application of sections 112 and 115 is whether

¹⁰ Section 112(2)(a) of the Companies Act provides that "[a] company may not dispose of all or the greater part of its assets or undertaking unless ... the disposal has been approved by special resolution of the shareholders, in accordance with section 115".

the contracts are shown on the papers to represent at least 50% of the fair value of the applicant's business, a test that is failed since there is no valuation of the business or its contracts on the papers. What is said of the applicant's other assets in paragraphs 11.8.1 to 11.8.5 of the founding affidavit – that they have an aggregate value of about R1.1 million – does not assist because the fair value of the contracts remains unknown. Hence the application should be dismissed *alternatively* referred to evidence on the issue of the fair value of the business and its contracts.

42. In reply, Ms Neydenova pointed to an averment in the founding affidavit – not disputed in the answering affidavit – that Ms Jackson was denied access to the books and records of the applicant and prevented from gaining and being able to convey a clearer indication of the nature and extent of the business.

43. In my assessment, there *is* evidence on the papers of the value of the business and its contracts. That Mr Jackson valued his shareholding in the applicant at R2.4 million is not denied by Mr Perkins. Annexures BJ14 and BJ15 to the founding affidavit, which are not disputed in the answering affidavit, reflect contract-related revenues of approximately R1.9 million in each of February and May 2021. The papers make no reference to any contracts other than those defined in the deed of cession; or to any residual business not sought to be transferred by the applicant to the first respondent. Ms Jackson's averment that the letter referred to in paragraph above was sent to "*all clients of the Applicant*" is confirmed by Mr Perkins as being "*quite correct.*" Her averment that "*the*

Applicant had ceded all its contracts” is not disputed by him. Ms Jackson’s further averment that the contracts were the sole source of income for the business is not pertinently disputed by Mr Perkins. In any event, it is confirmed categorically in the answering affidavit that *“the business of the Applicant was transferred to the First Respondent in the sense that the contracts of the clients were so ceded.”*

44. In the result, I find that the purported transfer of the contracts constitutes a disposal of *“all or the greater part of [the] assets or undertaking”* of the applicant as contemplated in section 112(2) in the absence of a special resolution of the shareholders of the applicant as required by section 115(1)¹¹ and (2)¹².
45. I understood Mr Kloek to accept that, if I were to find sections 112(2) and 115(1) and (2) to be of application, as I do, then the common-cause absence of such a resolution would invalidate the deed of cession.
46. It follows, on this basis alone, that the primary relief sought in this application should be granted.

¹¹ Section 115(1)(a)(i) of the Companies Act provides, in relevant part, that *“[d]espite section 65, ..., a company may not dispose of, or give effect to an agreement or series of agreements to dispose of, all or the greater part of its assets or undertaking, ..., unless – the disposal ... – has been approved in terms of this section”*.

¹² Section 115(2)(a) of the Companies Act provides, in relevant part, that *“[a] proposed transaction contemplated in subsection (1) must be approved – by a special resolution adopted by persons entitled to exercise voting rights of such a matter, at a meeting called for that purpose ...”*.

Was the assignment of rights and obligations permissible?

47. In the course of the hearing I asked the parties' representatives whether the terms of the contracts required the consent of the counterparty clients for their valid transfer by the applicant to the first respondent. Since no such contract is included in the papers, neither Ms Naydenova nor Mr Kloek could provide an answer.
48. Both representatives did however address me on whether, in any event, the provision of security services in the context of high levels of crime was a matter of sufficiently personal choice to require the client's consent to a switch in service provider. Whilst Ms Naydenova supported the proposition that clients would not be indifferent as regards which provider of such services would guard their lives and livelihoods by day and night, Mr Kloek resisted it, suggesting that the services rendered by the Ithemba group of entities are not such as to engage *delectus personae* principles.
49. To my mind, the debate is misdirected.
- 49.1. All other things being equal, what would have been capable of *cession* by the applicant to the first respondent, without the consent of each client, is the right to receive payment by the client. In that regard, *delectus personae* principles would probably not arise since the client would be

unlikely to mind to which entity its payments were to be made (provided it received the services for which it had contracted).

49.2. However, what would not have been capable of *delegation* by the applicant to the first respondent, without the consent of each client, is the obligation to render such services to the client. Although the deed is styled as one of cession, the parties' representatives were *ad idem* – and I hold – that it is really a deed of assignment, embodying a purported transfer of both the rights and the obligations under the contracts. Such a transfer was and is impermissible and ineffective in the absence of the consent of the clients.

50. It follows, on this basis too, that the primary relief sought in this application should be granted.

The outcome and order

51. For the reasons set out in paragraphs to above, I conclude that the deed of cession is null and void *ab initio*.

52. Relief in terms of prayer 1 of the notice of motion renders unnecessary any relief in terms of prayer 2 thereof.

53. An entitlement to relief in terms of prayer 3 of the notice of motion is not demonstrated in these proceedings. Besides the respondents' point that the first respondent incurred expenses in generating revenues, the applicant does not show itself to have been impoverished or the first respondent to have been enriched by such profits as may have been earned since December 2020.
54. As regards prayer 4 of the notice of motion, I am minded to grant modified relief aimed at safeguarding the rights and interests of the employees of the business.
55. Similarly, with reference to prayers 5 to 7 of the notice of motion, I am minded to grant modified relief aimed and ensuring an orderly restoration of the business by the first respondent to the applicant.
56. As regards liability for costs:
- 56.1. Ms Naydenova submitted that costs should follow the event but that, even if I were to dismiss the application, there would be no basis for a punitive costs award against the applicant; and
- 56.2. Mr Kloek did not resist the submission that costs should follow the event.
57. Since the applicant has achieved substantial success, the respondents – both of whom oppose this application – should bear the costs of the application, jointly and severally, the one paying the other to be absolved.

58. In the circumstances, I grant the following order:

58.1. The deed of cession dated 03 December 2020 entered into between the applicant (as cedent) and the first respondent (as cessionary) (the deed) is declared null and void *ab initio*.

58.2. The parties are directed to take all lawful, necessary and reasonable steps to safeguard the employment rights and interests of the employees of the business conducted by the applicant before 28 February 2021 and by the first respondent on and after 01 March 2021 (the business).

58.3. The parties are otherwise directed to take all lawful, necessary and reasonable steps to reverse the implementation of the deed with effect from 01 March 2021, including by restoring to the applicant the books and records of the business.

58.4. The respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

PEARSE AJ

This judgment is handed down electronically by uploading it to the file of this matter on CaseLines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is 20 June 2023.

Counsel for Applicant: Attorney MR Naydenova

Instructed By: Marina Naydenova Attorneys

Counsel for Respondents: Advocate JW Kloek

Instructed By: Blake Bester De Wet Jordaan Inc

Date of Hearing: 31 May 2023

Date of Judgment: 20 June 2023