IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
HELD AT JOHANNESBURG

Signed electronically
Reviewed 23 August 2023
Not reportable

CASE NO.: 33936/2016

In the matter between: -

MAPULA SOLUTIONS (PTY) LTD	Plaintiff
and	
AFRICAN BANKING CORPORATION OF ZAMBIA LIMITED	First Defendant
AFRICAN BANKING CORPORATION OF BOTSWANA LIMITED	Second Defendant
STANDARD CHARTERED BANK LIMITED, JOHANNESBURG BRANCH	Third Defendant
STANDARD CHARTERED BANK LIMITED, BOTSWANA LIMITED	Fourth Defendant

---

JUDGMENT

Victor J

Introduction

[1] The claim in this trial is one of contractual damages based on the loss by the Mayibuye Group (Pty) Ltd (Mayibuye) of its investment in Blue Financial Services Limited, (Blue) which was in the business of microlending and at the relevant time was a company listed on Johannesburg Stock Exchange.

[2] The plaintiff in this matter is Mapula Solutions (Pty) Ltd hereinafter referred to as Mapula, and it sues in its capacity as a cessionary of a damages claim ceded to it by Mayibuye.

[3] There are four defendants in this matter, the African Banking Corporate of Zambia Ltd is the first defendant, the African Banking Corporation of Botswana Limited is the second defendant. Standard Chartered Bank Limited, Johannesburg branch is the third defendant, and Standard Bank Botswana Limited is the fourth defendant.

[4] The four defendants comprise two main banking groups, the African Banking Corporation of which the first and second defendants are members, and the Standard Bank of which the fourth defendant is a subsidiary of the third defendant.

[5] An opportunity arose for Mayibuye to make an investment of R163 million in Blue, which at that stage had a significant Pan African footprint in the microlending industry. The business of Blue during the period 2008 to 2009, enjoyed a market capitalisation value in excess of R3.7 billion.

[6] In the period 2010 there was a significant financial collapse in Blue and this is when Mayibuye saw the opportunity to invest in what it perceived to be a valuable business.

[7] The financial collapse of Blue was due to management failures and a fraud perpetrated by its then CEO. The effect of the financial collapse resulted in Blue's market capitalisation being reduced from R3.7 billion to R56 million.

[8] Mayibuye's had extensive experience in dealing with the types of assets that Blue had and wished to take the opportunity as it had the skills to correct Blue's inappropriate operating model and it could benefit from restoring Blue's market capitalisation to its former high water mark. Thus the commercial objective of Mayibuye was to bring Blue back to its former market capitalisation of R3.7 billion.

Issues

[9] The issues for determination in this trial include:

9.1 the plaintiff's *locus standi* and whether the judgment of Swanepoel AJ is *res judicata;*

9.2 the legal nature of the plaintiff's claim and whether it is based on the loss of its investment and the value of that lost investment;

9.3 whether the breach of the debt rescheduling agreement (the DRA) concluded between the parties gave rise to the non-contagion principle;

9.4 Whether on and around 1 November 2013 the defendants acted in unison in breaching the DRA, thus amounting to

conduct which is consistent with a common purpose and a breach of the non-contagion principle.

9.5 If costs are awarded against the defendants whether the costs should be joint and several the one paying the other to be absolved.

Background

[10] The background to this matter is set out in great detail in the particulars of claim. There were various amendments to the particulars of claim, and in particular the final amendments took place in March 2022 after a portion of the plaintiff's claim was struck out by Swanepoel AJ.

[11] The Blue Group's business was premised on conducting microlending businesses and an important aspect of that business were the payroll deductions directly from employees' salaries and paid over by the employer directly to Blue. This was the case in a number of countries on the African continent. In the microlending business this is a great advantage when the employer pays over directly to the microlender. This is a valuable licence condition which was applicable in most of the countries where Blue operated. This comprised a significant intangible asset of the Blue Group and was part of its recorded goodwill in its annual financial statements.

[12] The business model was well regarded, because of this payroll deduction advantage. It ultimately became apparent that Blue's financial collapse was due to the fact that it implemented and conducted its business using an inappropriate operating model. There were allegations of fraud.

The collections from debtors became unsatisfactory and the cost of operations was relatively high, and this led to its financial collapse in 2010.

[13] Once Blue's financial collapse occurred, Blue then became factually and commercial insolvent and it was in dire need of re-capitalisation. The Mayibuye Group at that stage, invested in distressed companies such as what occurred in the Blue Group. It was this scenario which led to Mayibuye taking the business opportunity to invest in Blue to turn it around.

[14] The design of the Mayibuye Investment is important. The commercial objective of the Mayibuye Investment was to enable the Blue Group to regain its previous market value of over R3 billion. Mayibuye would thereby financially benefit from scenario.

[15] In order to achieve that commercial objective, the Mayibuye Investment was designed as follows: It separated the insolvent and under-performing historical business of the Blue Group, from what was planned to become a new structured and re-capitalised business of the Blue Group, and referred to as the Good Bank.

Good Bank and Bad Bank concept

[16] The under-performing section of Blue was referred to as the Bad Bank. The idea was to ensure that the Bad Bank would be immunised from the Good Bank and this would result in limitations on the rights of creditors of the Bad Bank, in particular those who were to participate in the re-capitalisation agreements and to receive payments in terms of thereof as payment would be contingent upon assets remaining in the Bad Bank.

[17] The further design was that the Bad Bank would be wound down over the rescheduling period, all of which is defined in the DRA, and this was anticipated to be a 3-year period. It also meant that Blue would be capitalised on the basis that it would, after the end date, have a zero impact on its shareholder funds.

[18] The Good Bank would have access to sufficient initial capital for the rescheduling period. A lot turned on the concept of the Good and Bad Bank. The defendants to the end denied that such a distinction could be made. The genesis of this concept of the Good Bank and Bad Bank was a concept introduced at the very outset and an objective manifestation of this is found in the SENS announcement of the 7th October 2010. Although not termed the Good Bank and Bad Bank in the Sens announcement it was referred to as the post transaction business, clearly distinguishing between pre and post transaction business.

[19] The SENS announcement, was a circular to the Blue shareholders and the stock market in general, describing the entire Mayibuye plan to save Blue. It was distributed on the 7th of October 2010 and the closing date for the acceptance of this business plan was the 31st of October.

[20] Of importance is paragraph 4.3 in the SENS announcement. It defines the debt rescheduling agreement (DRA):

> "4.3.1 It is a condition precedent to the subscription agreement that Blue concludes the debt rescheduling agreement with the existing lenders, who have made the existing facilities available to the borrowers."

> "4.3.2: The Debt Rescheduling Agreement applies to amounts currently owing by the borrowers to the Existing Lenders. Although the large majority of the group's current lenders have agreed to participate in the debt rescheduling, certain of the current lenders to whom approximately R130 million is owed, have elected not do so."

[21] Central to the concept of the Good and Bad Bank, is that found in 4.3.3 of the same SENS announcement.

> "4.3.3 The over-arching principle underlying the Transaction and the Debt Rescheduling Agreement (amongst others) is that the business of the current Group must effectively be separated from *the post Transaction business* such that there can be no *contagion* effect. Accordingly the Debt Rescheduling Agreement commits the Existing Lenders to (i) a stay on principle payments, it ringfences the existing lenders' claims against the Group in terms of the Existing Facilities(iii) relinquishing their right to liquidate or institute a related action against the Group (iv) settlement of operating expenses (v) payment of the "Lag Creditors" and the Group's tax obligations due at the effective date and (vi) the repayment of Existing Lenders claims from the proceeds received from the Existing Claims or in equity should there be any shortfall (and ability for Existing Lenders to accelerate this event).

[22] The SENS announcement describes Mayibuye's project to save Blue. In particular clause 1.3 describes the rationale for undertaking the re-capitalisation of Blue because of the losses, for the year ended 28 February 2010, the details of which were released on SENS on the 21st of June 2010.

[23] It was clear therefore that the losses would continue unless there was some meaningful intervention. The SENS announcement largely sets out what is found in the DRA and the transaction's structure.

[24] All the technical terms and framework are defined both in the DRA and in the SENS announcement. The Mayibuye Investment design entailed the structuring and conclusion of five Recapitalisation Agreements that were designed to implement the creation of the Good Bank and the separation of the Bad Bank, together with the required initial capitalisations.

[25] The first recapitalisation agreement was the subscription agreement, which was concluded between Mayibuye and Blue. It provided that Mayibuye could subscribe and receive certain shares in the share capital of Blue at specified prices and would have as its core objective to capitalise the Good Bank. Mayibuye acquired 1 253 846 154 subscription shares of which 100 000 million subscription shares were transferred to the Pinebridge transaction.

[26] The second recapitalisation agreement was the DRA which was concluded between Mayibuye and Blue, also the participating entities referred to as the lenders, and entities referred to as the borrowers. Its purpose was to split the Blue Group into the Good Bank and Bad Bank.

[27] In terms of the DRA the debts of certain entities in the Blue Group referred to as the DRA borrowers and the creditors referred to as the DRA lenders, had to agree to rescheduled payments by restricting payments of the lenders' claims to what is defined in the DRA as included claims.

[28] It created a re-capitalisation methodology that was designed to ensure that the Bad Bank would have a zero impact on Blue Group's shareholder funds. The purpose and conclusion therefore would be to achieve commercial

solvency for the Blue Group and the capital required by the Blue Group was planned to be generated in two phases.

[29] Firstly the capital to be injected in terms of the subscription agreement, would create excluded claims, and secondly there was a final capital requirement at the end date, so as to make all Blue Group companies sustainably capitalised.

[30] Of importance, the breach by any of the parties to the re-capitalisation agreements, and any conduct of any of them in conflict with the terms of such agreements, specifically action taken in conflict with the separation between the Good and Bad Bank, would likely result in a dramatic adverse financial consequence for Mayibuye, and would preclude the completion of the final re-capitalisation of Blue. This would subvert and undermine the commercial objective. The plaintiff contends that the re-capitalisation agreements were concluded on the basis of such knowledge and understanding by all and this design and the implementation of the re-capitalisation agreements, created a significant financial benefit to Mayibuye.

[31] Any breach would affect Mayibuye's investment. The essential purpose of the DRA is recorded in clause 12.2 and in summary what could have happened, is that instead of concluding the DRA, the defendants could have sought and obtained the liquidation of each of the relevant Blue borrowing entities, in order to obtain payment of the amounts owing to them, through a liquidation process.

[32] However, a liquidation scenario would not have brought any benefit to them because of Blue's financial position. The defendants then concluded the

DRA in the expectation of recovering more out of existing claims than they would have succeeded in doing had they procured the liquidation of Blue.

[33] The other three re-capitalisation agreements include the Blue Claims Purchase Agreement, the Renaissance Africa Master Fund Agreement and the two Pinebridge agreements. This fifth recapitalisation agreement was an agreement between Mayibuye and Pinebridge in terms of which Mayibuye acquired sale rights from Pinebridge.

[34] Material breaches were described as follows: No lender would be entitled to be paid any amounts outstanding from the effective date and which are owed to it by any borrowers, other than in accordance with the distribution principles, as set out in clause 12.9 of the DRA.

[35] Each shortfall lender had to convert its shortfall amounts into shortfall shares, also as defined in the DRA. If any shortfall lender, that is a non-capitalising lender, failed to comply with the formalities prescribed in clause 7.22, for the conversion of its shortfall amount into shortfall shares, the borrower was obliged to use all commercially reasonable endeavours to collect the amounts owing to it, under any included claims which are non-performing.

[36] The payment period would end on the date on which all capital account instruments and all the included claims, which are the performing claims on the end date, have either been collected in full or written off as irrecoverable.

The Defendants breaches of the DRA

[37] The first defendant's breach occurred on 1 November 2013, when it addressed a letter of demand to the Blue Group in which it contended that the whole loan that had been advanced by it, had become due for payment on the 31st of July 2013.

[38] A demand for payment by no later than 8 November 2013 was made for an amount of US$3 975 414.32. These claims were made in terms of the existing facility agreement and the plaintiff contends that this disregarded the amendment in the DRA, which had brought about the existing facilities.

[39] The DRA had been amended in December of 2010 and this demand was contrary to the provisions thereof. The plaintiff contends that on 5 November 2013, the Blue Group addressed Mr Paul Westraadt, the first and second defendant's chief credit officer and queried the demand which had been made and that it had not been made in accordance with the terms of the DRA as amended and that t he provisions of the DRA were ignored.

[40] The plaintiff contends that the first and second defendants took the view that the DRA was no longer valid and informed the Blue Group that the first and second defendants would act accordingly.

[41] On the 22nd of November 2013, a further letter of demand was received by the Blue Group from the first defendant's legal representative in which an amount of US$4 377 355.40 was demanded.

[42] In February 2014, the first defendant issued legal proceedings in the High Court of Zambia against certain borrowers of the Blue Financial entities in

Zambia, and did not recognise that their claims were limited to included claims.

[43] The dates of these alleged breaches become important in assessing the loss of the plaintiff's investment. The second defendant, so the plaintiff alleges, committed the second breach and this second breach was during November 2013.

[44] The second defendant addressed a letter of demand to the Blue Group in which it contended that the whole loan that it had advanced to the Blue Group had become due and payable, and did not recognise that the claim was limited to included claims.

[45] The claim was made in terms of the existing facility agreement, and thus disregarded the changes to the DRA, which had brought about the existing facilities concept and of course was a material term. On 19 March 2014, the second defendant issued an application in the High Court of Botswana, and in terms of that application payment was demanded in the amount of P42 888 931.33.

[46] The plaintiff contends that the second defendant in issuing the application in Botswana and having regard to the content of that application constituted a material breach of the provisions of the DRA and in particular it failed to acknowledge that the claim was limited to included claims, as determined by the provisions relating to the distribution plan which was to determine distributable cash and how that would be allocated to the DRA lenders.

[47] The third defendant's breach were described in the particulars of claim as follows: On 11 November 2013 Mr Rex Madamombe, a representative of the

third defendant sent an email to the Blue Group, in which he recorded the following question: "If we choose not to convert and get repaid from the MPL as outlined in the DRA, do we.."

[48] The plaintiff contends that the third defendant changed its stance as this demand was in stark contrast to its email of 11 November 2013 because on 29 November 2013, the third defendant addressed a letter of demand to Blue and demanded the sum of R151 363 450.50 and required payment within 5 days. It then issued an application in this Division for payment.

[49] The plaintiff concludes that the nature of that breach demonstrated that the third defendant would not abide by the first or second distribution plan. It also failed to abide by the dispute resolution process for which provision was made in the DRA.

[50] It failed to hold itself bound to the decision of the Lender committee after the acceleration date to engage on behalf of the lenders in the distribution and conversion process. [1]

[51] The fourth defendant's breach occurred on the 8th of January 2014, when it delivered a letter of demand to the Blue Employee Benefits Pty Ltd, a borrower in terms of the DRA. It contended that the whole loan that it advanced, had become due on the 31st of December 2013, and made a demand for payment in the amount of P1 660 774.52.

[52] The plaintiff alleges again that these claims were made in terms of the existing facility agreement and that the fourth defendant had disregarded the changes that had been brought about by the amendment to the DRA.

[1] The DRA provided for a Lender's committee to be set up to monitor the situation.

[53] In short then, the plaintiff claims that as of 1 November 2013, Mayibuye's financial benefit would have flowed from its investment, which the plaintiff claims was an amount of R704 968 234 as opined by the plaintiff's expert Mr Lange.

[54] There were a number of amendments to the particulars of claim including on the 9th of February 2022 and again on the 14th of March 2022 and the plaintiff sets out its claim as follows: It repeated the breaches referred to and pleaded that to the knowledge of the defendants, their claims for payment of capital against the Bad Bank, prior to the end date had to be deferred in favour of creditors who did not participate in the DRA.

[55] Payment of those claims in cash would, after the end date, be contingent upon the availability of distributable cash. The business of the Bad Bank would have been wound down since there was no distributable cash capable of being distributed in terms of the DRA.

[56] The defendants would have been compelled to either convert their claims into equity in Blue or to write off their claims against Blue in terms of the DRA. The business of the Bad Bank would have been wound down.

[57] Mayibuye would have completed its re-capitalisation of the Blue Bank and this would have then have consisted of the Good Bank business. The business of the Good Bank would have included the payroll deduction agreements, the capital introduced by Mayibuye, and which would have become excluded claims after the effective date of the DRA.

Locus Standi and res judicata

[58] The defendants submitted that the plaintiff did not have locus standi to bring the action. The basis of this submission was that the cession agreement between Mapula and Mayibuye was not good in law.

[59] On the 14th of September 2016 and at Bryanston, the plaintiff concluded a written agreement of sale and cession with Mayibuye in terms of which Mayibuye sold and ceded in favour of the plaintiff all of Mayibuye's right, title and interest in and to its claims of whatsoever nature against the defendants jointly or individually, arising from the breaches of the DRA.

[60] The cession is only limited to any breaches arising out of a repudiation of the DRA. The terms of this cession must be distinguished from the cession by Mayibuye to Investec Bank which was a cession in securitatem debiti. On the 22nd of July 2020, the plaintiff and Mayibuye concluded an addendum to the cession agreement which entitled it to pursue the damages claim.

[61] The defendants continue to dispute the plaintiff's *locus standi* on two grounds. They contend that Mayibuye could not have lawfully ceded its claim for damages to the plaintiff, in circumstances where it had previously ceded and pledged its right, title and interest in and to the shares it owned in Blue to Investec in securitatem debiti. It had done so as security for a debt owed to Investec by Hlano Financial Services.

[62] Secondly the debt owed to Investec was in place in September 2016 and the indebtedness was settled in 2019. Therefore the defendants contend that there was nothing that Mayibuye could cede.

[63] The defendants contend that the damages claim which was ceded to the plaintiff is inextricably tied up in the value of the shares held by Mayibuye and therefore having ceded in *security debiti*, Mayibuye could not have ceded a right to damages to Mapula, notwithstanding the judgment by Swanepoel AJ allowing the plaintiff to continue its damages claim

[64] The defendants contend that in terms of the cession and pledge, the security interests created in terms thereof, remained in full force and effect, and continued even after any discharge or settlement or any temporary fluctuation in its secured obligations.

[65] The secured obligations, meant collectively the shares, the pledged rights under the acquisition documents, and the shares were defined as private shares and all other securities in the capital of Target and any securities issued in substitution of the exchange of securities. The submission is that the damages claim ceded to the plaintiff was inextricably tied up to the value of the shares held by Mayibuye.

[66] The Target shares meant 1 153 846 154 of the subscription shares which Mayibuye would continue to hold after the acquisition and transfer of subscription shares from Pinebridge.

[67] It meant therefore that the claim which was struck from the particulars of claim by Swanepoel AJ resulted in the cession being unenforceable. The defendants contend that the amended claim is really the same as the claim that was struck out and therefore the same claim could not be ceded by the amendment to the cession. In is therefore their contention that the plaintiff does not have any *locus standi* to bring this action.

[68] In response the plaintiff contends that the defendants have missed the point completely because Swanepoel AJ had in fact allowed the claim for the loss of its investment to continue. It was not a claim pursued by Mayibuye through Mapula as qua shareholder of Blue.

[69] The law in relation of a cession in *security debiti*, is distinguishable from a cession of a claim for damages. In the matter of *Grobler vs Oosthuizen*, Brand JA explained that the true character of a cession therefore depends on the intention of the parties.[2]

[70] In this case the cession by Mapula was in security for a debt to Investec. Reliance on the case of *National Bank of South Africa Limited vs Cohens Trustees* does not assist the defendants and whilst seeking support for the point overlooked the following words:

> "Form should not override substance if on a proper analyses of the transaction as a whole, the cession was made with the purpose of securing a debt owed by the cedant to the cessionary."[3]

[71] The defendants also relied on the case of the *Development Bank of Southern Africa* [4]. The facts in that case are distinguishable from the facts in this case. It is important that one construes the terms and conditions of a cession agreement before applying the legal principle to a different set of

[2] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA)

[3] Brand JA in *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) in referring the judgment by Lord De Villiers CJ in National Bank of South Africa Ltd v Cohen's Trustee 1911 AD 235 at 246, in response to a similar reliance on the wording of a cession document, form should not override substance if on a proper analysis of the transaction as a whole the cession was made with the purpose of securing a debt owed by the cedent to the cessionary (see also Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A) at 294D - E). F I respectfully subscribe to this practical approach. As the evidence in this matter shows, the reference to an 'out-and-out cession' did not even appear in the documents when they were signed by Grobler. Brand JA ")

[4] *Development Bank of Southern Africa Ltd. v Van Rensburg NO and Others* (490/2000) [2002] ZASCA 39; [2002] 3 All SA 669 (SCA) (14 May 2002)

facts. In this case it is important to note that the cession should be analysed very carefully and cognisance must be taken of exactly what the design of the cession is. In this regard the terms of the cession are central. There was no out and out cession and the ownership of the shares were retained by Mayibuye.

[72] Unterhalter AJA, explained in his reasoning in *Capitec Bank Holdings vs Coral Lagoon Investments 194 (Pty) Ltd*.[5]

> "Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

[73] For this reason interpretation begins with the text and its structure. They have the gravitational pull that is important. In my view context and purpose must be considered to ascertain exactly what was ceded. It is clear from the plain meaning of the words used in the cession, that it is one in securitatem debiti, and does not preclude a right to sue for a damages.

[74] In the matter *Coopers and Lybrand & Others* 1995(2) AD where justices of appeal, Joubert, Grosskopf, Steyn, Nienaber and Howie concurred and found the following in relation to a cession of book debts:

> "The defendants raised a special plea to Mr Bryant's particulars of claim, namely that his claim against the appellants was subject to the terms of the deed of cession. There is nothing in the deed of cession to indicate that the parties intended to provide security to the bank for Mr Bryant's personal affairs and from the nature and purpose of the said cession, including its context as a whole, the intention of the

[5] Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) at para 51

parties was that it was intended to relate to business date, including claims other than book debts."

[75] Joubert JA found that the cession on a proper construction was not wide enough to include the private claims of Mr Bryant and therefore found that he had *locus standi* to sue for his personal damages.[6]

[75] Therefore on the facts in this case I find that the plaintiff has *locus standi* in these proceedings.

[76] On the question of *res judicata*, the defendants submit that the judgment of Swanepoel AJ amounted to *res judicata* of the issues in this trial; they are the same parties, the same issues and therefore the plaintiff cannot claim for the same thing more than once. The defendants submit therefore that this trial cannot proceed, because judgment has already been given on the issues when the claim was dismissed.

[77] It is clear from the facts and the ruling by Swanepoel AJ that he did not preclude the plaintiff's claim for the loss of its investment going forward. He found that the plaintiff's claim could proceed in respect of its damages for the loss of its investment. He stated;

> "It is a claim separate and distinct from the claim of diminution of Blue's share value. In my view this claim falls within the third category of claims in Johnson, [7] it is not a reflective claim, and should be allowed to go forward…"

---

6 Coopers & Lybrand and Others v Bryant (459/93) [1995] ZASCA 64; 1995 (3) SA 761 (AD); [1995] 2 All SA 635 (A) (30 May 1995)

7 Johnson v Gore Wood & Co [2001] 1 All ER 354 cited with approval by the SCA in Hlumisa Investment Holdings RF Ltd v Kirkinis and Others 2020 (5) SA 419 (SCA) at paras 27 and 28.

[78] In the result the issue before this court is not res judicata.

Contractual damages

[79] The question to be determined is what damages, if any is the plaintiff entitled to. There were two experts on this issue, Mr Lange on behalf of the plaintiff and Mr Brian Abrahams on behalf of the defendant.

[80] On the question of contractual damages, the correct computation of contractual damages can never, in principle be merely arithmetical. [8] There is a value judgment involved in the computation of quantum. However, that value judgment must be based on objective and acceptable facts.[9] This is particularly relevant to the four month non-trading period from 26 June 2013 to 1 November 2013.

[81] The fundamental principle in the quantification of contractual damages, is that the object must as far as possible not result in undue hardship to the party in breach. Its purpose is to make an award in money in order to place the innocent party in the position that the party would have had been, had the contract not been breached or repudiated.

[82] Smalberger JA in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* reiterated the principles of the computation of damages in

> "Rens v Coltman 1996 (1) SA 452 (A) where it was said, in relation to this rule (at 458E - H):
> 'The application of this rule will ordinarily require in many cases, and typically the case of a breach of a contract of sale by the purchaser, that the date for the assessment of damages be the date of performance, or as it has often been expressed, the date of the breach. But even in contracts of this nature, there is no hard and fast rule (cf Culverwell and Another v Brown 1990 (1) SA 7 (A) at D 30G - 31H) and in each case the appropriate date may vary depending upon the circumstances and

[8] *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd 2015 (2) SA 89 (GJ) para 25*

[9] *Victoria Falls & Transvaal Power Co. Ltd. v Consolidated Langlaagte Mines Ltd.*, 1915 AD 1 at p. 22; *Novick v Benjamin,* 1972 (2) SA 842 (AD) at p. 860).

> the proper application of the fundamental rule that the injured party is to be placed in the position he would have occupied had the agreement been fulfilled. The position is the same in England. In Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801 (HL) Lord Wilberforce (at 813) recognised that "as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach" but in the same passage emphasised that the general rule did not preclude the Courts in particular cases from determining damages as at some later date." [10]

[83] The defendants contend that there was no breach and that they were entitled to act in the way that they did. The defendants raised a number of issues and contend that there could not have been a breach, because the DRA became inoperable.

[84] The question was traversed extensively in the cross-examination of Mr Meiring, and this aspect was also traversed in the request for particulars for purposes of trial.

[85] The plaintiff argues that the DRA did not become inoperable and it was the breach by the defendants which caused the loss of its investment. The breach events as contended for by the plaintiff, have already referred to in detail as well as the importance of the non contagion principle.

[86] In argument the plaintiff referred to the fact that the letter of demand by the first defendant was on the 1st of November 2013, claiming payment, and this constituted a breach. It is common cause that such a letter was sent, and whether that amounted to a breach is to be determined in terms of a proper interpretation of the DRA and the facts on which the plaintiff relies.

[87] I have referred to the breaches extensively as alleged by the plaintiff in respect of the first defendant and clearly I find that the first defendant acted

[10] 2001 (4) SA 159 (SCA)

outside of the DRA and its amendment. The same relates to the breaches by the second and third defendant, as well as the fourth defendant for the reasons that the plaintiff has pleaded. The subsequent court cases embarked upon by the defendants all point to the intention to act outside of the DRA and its December 2010 amendment.

[88] The question then that I have to consider is whether there were other factors as contended for by the defendants which caused the loss of the plaintiff's investment. These include that the whole situation was untenable, because of the failure of the re-capitalisation, the failure of the project Antelope, the failure to produce audited financial statement for Blue and the failure of the separate listing for Blue.

[89] Mr Mering in lengthy cross examination was able to illustrate why the issues raised by the defendants as being untenable were not so. He was able to illustrate that the issues raised by the defendants were either incorrect or would not have led to the failure of the investment.

[90] His credibility was attacked on this, in particular that he was not being frank with the court, that his evidence was contradictory on the question of the breaches and other factors that would affect the damages claim.

[91] The plaintiff contended that Mr Meiring's evidence was clear, logical and convincing and that his witness statements and his pictorial presentations explained in detail the reasons for the investment failing and the role of the breaches by the defendants.

[92] I found that Mr Meiring's evidence was very detailed. It is clear that he had analysed the situation very carefully when he designed the commercial investment for Mayibuye. He oversaw the drafting of all the agreements. He is a qualified attorney, but did not give evidence in that capacity. He dealt with the purpose of the various agreements in meticulous detail.

[93] His lengthy evidence albeit it repetitive on some aspects in essence amounted to establishing that the point of the deterioration was a result and the effect of the breaches by the defendants of the DRA. His evidence was frequently interrupted by counsel on behalf of the defendants, while he was trying to give complete answers and he was stopped on many occasions when he tried to explain the correct facts, nevertheless he persisted in dealing with all the issues put to him.

[94] Albeit that he was accused of contradicting himself, it is clear from an analysis of the evidence that there were no contradictions, it was simply that he explained himself in great detail and this resulted in some dissonance between the cross-examiner on behalf of the defendants and Mr Meiring.

[95] On balance I find that Mr Meiring's evidence was credible. It was clear to me that he was telling the truth, that his knowledge of the industry was very detailed and that he had tried his best to save Blue for the benefit, not only of Mayibuye, but also for the benefit of the defendants who would have benefited from the repayment of the entire indebtedness owed by Blue to them, if they had stuck with the DRA agreement.

Quantification of damages

[96] The question then is, what damages is the plaintiff entitled to? The basis of the plaintiff's claim is that it made investment in Blue in the amount R163 million comprised of R150 million in cash and R13 million for the purchase of the Pinebridge shares. Mr Lange, [11] an expert on behalf of the plaintiff, extrapolated what the investment of R163 million would have been on the 26th of June 2013.

[97] This date is important, since this is the date when Blue suspended its trading on the JSE. Mr Meiring explained at length that Blue did so because of the alleged fraud by Lennox on Blue and that it was important to advise the market and the JSE and the World Bank of that fact. This then resulted in the voluntary suspension of the shares trading on the JSE.

[98] Mr Lange did a computation of the value of the shares on the day before the cessation of trading and this was 13 cents a share, and he multiplied that by the number of shares and stated that on the date of suspension the shares were valued at R577 000 730.6. He opined that this was the value of the Mayibuye investment on that day.

[99] The next step that Mr Lange undertook was to evaluate Mayibuye's investment on the 1st of November 2013. This is the date on which the plaintiff contends the breaches commenced and I have found that to be the date of the first breach of the DRA. The question is whether the defendants from that day acted in unison and with a common purpose.

[100] It is clear from the litigation which was initiated by the defendants and also the letters of demand and calling up their indebtedness were objective

[11] Mr Lange's curriculum demonstrated that he was suitably qualified as an expert.

facts which could not be ignored. There was a clear pattern of them acting in unison and from that one can infer that there was a common purpose.

[101] Mr Lange was criticised for choosing the date of 1 November 2013 to assess the plaintiff's damages. He was provided with that date for good reason since it was the date of the breach. He looked at the date when trading ceased, that is the 26th of June 2013 and analysed the value of Mayibuye's investment on the date of the breach being 1 November 2013.

[102] The date of 1st of November 2013 is not a random date, I have already referred to it as the date of breach which I accepted. On the other hand, I have to consider the input of Mr Abrahams.[12] He contended that the Mayibuye's investment was worth nil.

[103] His view was that effectively Mayibuye did not invest anything, because this amount was really theoretical. Under cross examination it could not be refuted that Mayibuye invested R150 million in cash and that it was paid into Blue for the utilisation of excluded claims.

[104] Mr Abrahams opined that it was worth nil because of Mayibuye's warranty claims. It is noteworthy that Mayibuye purchased the PineBridge claims for an amount of R13 million but Mr Abrahams contended that this had no fair value at all. He was unable to provided convincing evidence or facts for this opinion.

[105] It is clear from the evidence that the breaches had a devastating effect on the plaintiff's investment of R163 million. The plaintiff had available a further amount of R50 million.

[12] curriculum demonstrated that he was suitably qualified as an expert

[106] So there was R200 million which Mayibuye had available to recapitalise the Good Bank. Despite what could not be dispute on the facts, Mr Abrahams continued to contend that his opinion would not be changed at all by the concessions he made and the undisputed facts put to him. Mr Lange on the other hand expressed the view that the initial investment was a success, because Blue's market capitalisation increased quite dramatically from virtually zero to in excess of R3.5 billion. This could not be disputed.

[107] An unfortunate aspect is that the two experts could not agree on virtually every issue and the minute produced by Mr Lange of their joint meeting could not be regarded as a joint minute at all. It was clear that Mr Abrahams would not make any concessions that any good came out of the plaintiff's investment.

[108] Mr Lange based his computation as follows and it was fairly straightforward. The day prior to the investment, the shares traded at 13 cents, and he then multiplied that by the number of shares.

[109] Mr Lange stated that as at date of cessation of trading there was a market capitalisation for Blue of just over a billion rand and he says that 54% was Mayibuye's investment and this resulted in the figure of R577 000 730.65 million referred to.

[110] Mr Abrahams, in commenting on that computation, said that Mr Lange's approach was incorrect despite the fact that International Valuation Standards (IVS) provide that a market approach should be applied (IVS) and it is acceptable when valuing an asset like the Mayibuye Investment. Mr Lange

was clear that awareness of the relevant economic developments and specific industry trends be considered for all valuations. He opined that it was also necessary to look at comparable assets in the market.

[111] Mr Abrahams, on the other hand, insisted that a discounted cash flow method (DCF) be used (DCF) Mr Abrahams continued to rely on the evidence of Mr Klaassen, and in this regard it was quite clear that Mr Klaassen was incorrect when he said the audited financial statements for Blue for 2012 and the interim financial statement for 2013 were withdrawn. They never were.

[112] The evidence indicates that Deloitte eventually did approve the 2012 financial statement, as well as the interim statement for 2013. Despite this evidence and the wrong facts by Mr Klassen, Mr Abrahams would make no concession at all, as any such concession would then mean that he would not support the defendants' case.

[113] On a proper analysis it is quite clear that Mr Abrahams was not prepared to place any value on the plaintiff's investment, although a number of important undisputed facts were put to him. But despite that, and despite some concessions by him, he would not accept Mr Lange's valuation and would not suggest his own valuation based on his methodolgy.

[114] In assessing the breach by the defendants, one only has to look at what happened when the NHFC demanded payment and the effect that had on the market. It resulted in a R2 billion drop in the value of Blue shares. The breach of the DRA also had the effect of a total loss of the plaintiff's investment.

[115] The defendants supported Mr Abraham's position in a separate note and stated that there were aspects of his evidence that the plaintiff did not deal with, and this again goes to the other issues upon which they rely, such as the reputational issues arising from the actions of the Blue's directors and Blue's inability to raise funds, whilst the Lennox fraud was pending resolution. Ultimately there was no fraud in Blue and I have already referred to Mr Meiring's evidence on how capital could have been raised.

[116] The defendants also contend that the plaintiff did not address Mr Abrahams' supplementary report of 4 May 2022, and the credible information aspect. The defendants contend that the plaintiff did not address its opinion on the process of valuing shares or equity, where there is no active market. Mr Lange's evidence clearly addressed this aspect in detail.

[117] It must be borne in mind that Mr Lange in comparing other entities in the microlending field, during that period, showed that Capitec had in fact increased its value by some 22% in the time that Blue was not trading.

[118] Mr Abrahams also criticised the comparator of Capitec, stating that it was not a comparator at all, since the facts were so different and Capitec was a company which did not have the hurdles Blue had. Mr Abrahams also emphasised that the because of the unaudited annual financial statements, the performance of Capitec was not comparable. Of course at the time of testifying Mr Abrahams was aware of the position pertaining to the correct position of audited financial statements, but would not adjust his opinion and contended that the investment had no value.

[119] Mr Abrahams opined that the final re-capitalisation did not fail as a result of the defendants' actions and that Mr Lange's use of the efficient market theory was inappropriate and that his price to book ratio (PBR) as he used the market sentiment without a critical evaluation of it.

[120] Therefore Mr Abrahams opined that the evidence of Mr Lange should be rejected in its entirety. I have considered the evidence given by both Mr Lange and Mr Abrahams. I find the evidence of Mr Lange reliable and persuasive. It is quite clear that Mr Abrahams was bent on his theory of the case and despite making vital concessions on the facts, he continued to say that the investment by Blue did not bring any value.

[121] This stance flew in the face of what he finally had to accept that indeed the sum of R163 million was invested by the plaintiff, yet he did not change his conclusion. Despite the clarification of the PineBridge transaction, he also would not change his opinion.

[122] The defendants continue, and this was continued by Mr Abrahams, that there was no concept such as the Good Bank and Bad Bank, and there was no basis for this concept and the non-contagion principle all of which are found on a proper analysis of the SENS announcement of 7 October 2010 and the DRA and its amendment.

Conclusion

[123] In summary the plaintiff has proved that the DRA and its amendment was in place, that the defendants breached the DRA and that the Mayibuye investment was lost. Further there are questions that need to be addressed and that is, would it have been possible to lift the suspension, under circumstances

where Deloitte did not take the appropriate steps to complete the audits, which was a requirement for the JSE. The evidence of Mr Mering showed that it could have lifted the suspension since but for the conduct of the defendants it would have resolved those issues.

[124] In addition the plaintiff contends that the separate listing would have succeeded, but for the actions of the defendants. The Good Bank would have traded and complied with the JSE listing requirements, and therefore the question of these audited financial statements, would not have been a factor. There was capital available from the Antelope project once the question of the fraud in Blue was resolved and Mayibuye had further capital available.

[125] But in any event, it turns out that those statements, the AFS of 2012 and the interim statement of 2013 were never withdrawn by Deloitte so it would not have been an impediment to a new listing of the good bank.

[126] The plaintiff further explains that Blue would have succeeded with a separate listing as the only non-compliance was the outstanding audit financials, and if regard be had to the fact that there would have been a controlled wind down of the Bad Bank, Blue would then have been able to continue with the listing of the Good Bank as a new separate entity.

[127] The further submission made by the plaintiff is that it is common cause that Blue had a high market value, a high market capitalisation, and when it was destroyed by the NHFC demand which caused a drop in Blue's market capitalisation from R2.8 billion to R800 million, the market capitalisation was built back.

[128] This must be balanced against the announcement of the project Antelope, [13] which caused an uptick in the market capitalisation to increase to R1.8 billion an aspect demonstrated by Mr Lange in his graphs. Cognisance must also be taken of the negative sentiment, prior to July 2013. This negative sentiment was reversed from July 2013 to November 2013 and Capitec traded higher in that period by 22%.

[129] Mr Abrahams could not dispute the 22% increase in Capitec's trading on the JSE. But he argued that Capitec was not a good comparator yet in his early expert report he used Capitec as a comparator. The plaintiff contends that the defendants conduct destroyed Blue's market capitalisation by breaching the non-contagion principle and creating the perception that they intended to evade the restrictions of the DRA.

[130] It is clear that Mayibuye's investment was destroyed and was valueless, certainly at the time of the breach by the 1st of November 2013. It is also clear that there was an orchestrated disregard by the defendants of the non-contagion principle, and this led to the investment becoming valueless.

[131] I have accepted the computation as set out by Mr Lange of what the investment of R163 million by the plaintiff, would have been on the 1st of November 2013, and of importance is that Mr Abrahams simply would not come up with a suggested figure for the loss of that investment.

[132] He simply refused to do so, and therefore the figure given by Mr Lange of R704 958 234 million is a figure which this court is left with. Therefore I find that the computation principles used by Mr Lange are a good tool in the

[13] The World Bank approved a R500 million credit guarantee as part of Project Antelope which was paused at the request of Meiring until there was more certainty regarding the Lenox fraud

circumstances where the breach by the defendants occurred in November 2013 and there being the period of non-trading from 26 June 2013 to 1 November 2013. I find his methodology to be an acceptable method of computing the plaintiff's loss.

Costs

[134] On the question of costs, the defendants submit that the plaintiff filed no fewer than 15 amendments to its particulars of claim. There were also witness statements by Mr H Hatzkilson and ultimately he was not called. The defendants contend that such delays as there were, were really caused by the fact that the plaintiff had amended its pleadings so many times.

[135] The plaintiff on the other hand, submits that the defendants had conducted themselves in a way which they term as Stalingrad tactics, with virtually every key allegation in the plaintiff's particulars of claim either denied or the plaintiff was put to proof thereof.

[136] For that reason the plaintiff submits that 50% of the costs of the pleadings should paid for by the defendants on a punitive scale. I do not accept that submission, parties to litigation are entitled to contest issues in the interests of their client and on the instructions of their clients.

[137] There was also the question of reserved costs. There were two previous postponements of the trial, which was caused by the defendants and the plaintiff contends that all the reserved costs should be borne by the defendants on the attorney client scale.

[138] I do not agree with that scale. The question of the wasted court days, is also an aspect that must be addressed. The plaintiff submits that six court days were lost due to early adjournments at the defendants' requests and their witnesses not being ready.

[139] The plaintiff contends that the defendants should have to bear those wasted costs. A further aspect is the plaintiff's contention is that it is entitled to punitive costs for the fact that some 9 witnesses had to be prepared for trial, because the defendants would not admit their evidence until a very late stage.

[140] Ultimately the defendants admitted the evidence which related to very important aspects which the plaintiff had to have in evidence to prove its claim, and because of the denials in the plea, the plaintiff then had to prepare the necessary witnesses to prove its claim.

[141] These issues which had to be proved included when the subscription agreement and the DRA become binding, and a further peripheral issue such as certificates of number of shares. The defendants only agreed to their statements being admitted at a very late stage, this caused a lot of unnecessary preparation. I am of the view that those wasted costs do merit costs on a punitive scale.

[142] The plaintiff also argued that the defendants also did not put any of Mr Klaassens' evidence for Mr Meiring to respond to and when Mr Klaassen was cross-examined on behalf of the defendants, it became unsatisfactory because his evidence was not put to Mr Meiring. According to the plaintiff this added to wasted time and thus costs.

[143] The plaintiff also complains about the lengthy and repetitive cross-examination of Mr Meiring and contends that many of the questions were unintelligible and consisted of statements rather than questions.

[144] I have considered that argument, but find that although there was some dissonance between the cross-examiner and Mr Meiring, the cross examiner was faced with a herculean task of trying to undermine the evidence of Mr Meiring who was consistent, methodical and paid great attention to detail.

[145] A further question for determination is whether the defendants should be ordered to pay the costs jointly and severally the one paying the other to be absolved. Central to this determination is the fact that I have found that the defendants acted in unison. I cannot attribute the conduct of any one of the defendants as being more blameworthy that the other. In other words, their breaches are really such that it was a coordinated breach.

[146] So the harm is not divisible, and the harm caused cannot be sufficiently demarcated. So therefore the liability should be joint and several in this regard. Wallis JA explained in *Gihwala and Others v Grancy Property Ltd and Others*:

> "A helpful explanation of when liability in solidum arises appears in Wessels. Liability as debtors in solidum exists if the debtors have promised the same thing to the creditor in such a way that the creditor can demand from each debtor performance of the entire obligation. Two essentials must be present. The first is that each debtor must be separately liable as completely as if they were the sole debtor. The second is that each debtor should be debtor of the same thing or the same amount of money, not merely a similar thing or a similar amount of money. In my view, that is the case here. Grancy was entitled to demand the same thing from each of Mr Gihwala, the Trust and Mr Manala. They each had to discharge the same duty of good faith in the same way. They are each liable in this case for the same thing,

> namely the same breach of obligation and the same damages. In my view, their liability was joint and several, and Fourie J was correct in holding that.[14]

[147] I find that no distinction can be drawn between the damages caused by either one of the defendants. Their liability clearly is in *solidum*, therefore an order that the costs be paid jointly and severally is justified in these circumstances.[15]

[148] Although the plaintiff in its particulars of claim did not claim costs jointly and severally, having regard to the facts and the nature of the breach and the defendants acting in concert, in my view a costs order of joint and several liability is appropriate.

The following order is made:

It is ordered that:

As against the first, second, third and fourth defendants in the following terms:

1. judgment against the defendants, jointly and severally, the one paying the other to be absolved for:

   1.1 payment of the sum of R704 968 234.00;

[14] 2017 (2) SA 337 (SCA)

[15] *Signature Design Workshop CC v Eskom Pension and Provident Fund and Others* 2002 (2) SA 488 (C) per Davis J at 509

1.2 interest on the amount of R704 968 234.00 at the prescribed rate calculated from the date of service of the plaintiff's summons, being 28 September 2016, to date of payment in full;

2. costs of suit on the party and party scale jointly and severally, the one paying the other to be absolved, in respect of:

2.1.1 the wasted costs occasioned by the postponement on 27 February 2020;

2.1.2 the wasted costs occasioned by the postponement on 18 August 2020;

2.1.3 the wasted costs occasioned by the 6 days of wasted court time;

3. costs of suit on the attorney and client scale jointly and severally, the one paying the other to be absolved, in respect of:

3.1 the wasted costs in respect of:

3.1.1 the evidence of Mr Grant Edwards;

3.1.2 the evidence of Ms Charlene de Jongh;

3.1.3 the evidence of Ms Carol Otto;

3.1.4. the evidence of Ms Pheona Hartel;

3.1.5 the evidence of Mr AG Atkinson;

3.1.6 the evidence of Mr Louis Cockeran;

3.1.7 the evidence of Ms Sulene McKechnie;

3.1.8 the evidence of Mr Alan van Heerden;

3.1.9 the evidence of Ms Vanessa Mans;

4. the balance of the costs of the action are to be paid by the defendants jointly and severally the one paying the other to be absolved on the party and party scale.

____

M VICTOR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Counsel Plaintiff	Adv CM Eloff SC
Counsel Plaintiff	Adv A R G Mundell SC
Instructed by:	Meiring and Partners Attorneys
Counsel for Defendant	Adv J P Daniels SC
Counsel for Defendant	Adv K Premhid
Instructed by:	Norton Rose Fulbright South Africa Inc Attorneys

The trial occurred from: 30 May 2022 to 17 June 2022;

The trial resumed from: 31 October 2022 – 04 November 2022;

The trial resumed from: 21 November 2022 – 01 December 2022

Closing argument occurred from: 10 February 2023 – 11 February 2023

Closing argument resumed on: 27 February 2023

Judgment reserved on 27 February 2023

Judgment was delivered extempore on 21 August 2023

Judgment was edited and signed on 24 August 2023