IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 45154/2020

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

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E.M. KUBUSHI **DATE: 07 FEBRUARY 2023**

In the matter between:

PETRUS JACOBUS CORNE VAN STADEN N.O. **1ST APPLICANT**

NOMVUYU YVONNE SERITI N.O **2ND APPLICANT**

[In their capacities as joint liquidators of the

Insolvent estate of VHD Construction (Pty) Ltd (in liquidation)]

And

HRVATSKA PROPERTY DEVELOPERS (PTY) LTD **1ST RESPONDENT**

(Registration Number: 2015/323551/07)

ERIGH STEWART **2ND RESPONDENT**

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 07 February 2023.

INTRODUCTION

[1] In this opposed application, the Applicants, Petrus Jacobus Corne Van Staden N.O., the First Applicant, and Nomvuyo Yvonne Seriti N.O., the Second Applicant, in their respective capacities as joint liquidators of the insolvent estate of VDH Construction (Pty) Ltd (in liquidation) ("VDH Construction"), seek an order for payment against the Respondents, HRVATSKA Property Developers (Pty) Ltd, the First Respondent, and Erigh Stewart, the Second Respondent, jointly and severally, in the sum of R1,212,855.22 (One Million Two Hundred and Twelve Thousand Eight Hundred and Fifty-Five Rand and Twenty-Two Cents), together with interest and costs.

[2] The Second Respondent is cited in these papers as the representative of the First Respondent since he is the sole director, thereof. In this judgment, the First and Second Applicants are referred to collectively as the Applicants, whilst the First and Second Respondents are collectively referred to as the Respondents.

[3] The Respondents are opposing the application on the merits and have, in addition, raised a point *in limine*. The *in limine* point raised deals with the issue of prescription, whereas the merits deal with the interpretation of the Settlement Agreement ("the Agreement"), which is the subject matter of these proceedings.

[4] It is trite that a point *in limine* is normally decided before the merits, since it may be dispositive of the proceedings. However, the parties agreed

during argument in Court that in these proceedings, since the issues raised *in limine* and in the merits part are intertwined, it would be prudent to deal with them at the same time. More specifically, it is the view of this Court that the *in limine* issue cannot be decided without first interpreting the relevant terms of the Agreement.

CONDONATION

[5] The Respondents' answering affidavit was not served and filed within the time prescribed in the Notice of Motion and/or the Rules of Court in general, and the Respondents sought condonation for such late filing in their answering affidavit. The Applicants, also, filed their replying affidavit out of time and sought condonation thereof in their replying affidavit. Both parties did not launch formal condonation applications and are not opposing the granting of each other's respective application for condonation. Condonation for the late filing of the answering affidavit and the replying affidavit, is consequently, granted.

BACKGROUND

[6] The factual background to these proceedings are mostly not in dispute. The facts originate from the instruction and commission by the First Respondent, represented by the Second Respondent, to VDH Construction (before its liquidation) to perform and effect certain construction works on various immovable properties. A dispute arose between VDH Construction and the Respondents which resulted in no less than two different legal proceedings instituted in this Court under case numbers 43376/2017 and 47913/2017, and three separate Court Orders being granted in those proceedings.

[7] Pursuant to those legal proceedings, VDH Construction and the Respondents negotiated an agreement aimed to settle any and all disputes between them. In such an endeavour to settle all disputes, on or about 29

September 2017, a Settlement Agreement (“the Agreement”) was concluded between the following parties:

7.1. VDH Construction (Pty) Ltd, [referred to as Construction in the Settlement Agreement] a company with limited liability and with registration number 2014/16374/07;

7.2. Hrvatska Property Developers (Pty) Ltd, [the First Respondent herein] a company with limited liability and with registration number 2015/323551/07;

7.3. Erigh Stewart, [the Second Respondent herein] an individual with identity number 680215 5032 082;

7.4. VDH Building Consortium (Pty) Ltd, [referred to as Consortium in the Settlement Agreement] a company with limited liability and with registration number 2016/323888/07

7.5. Gilbert Laurence Stewart N.O with identity number 750717 5070 062 in his capacity as co-trustee of the Sofiya Stewart Trust with Master's reference IT2445/2016;

7.6. Elena Shishkova N.O with passport number 6940436 in her capacity as co-trustee of the Sofiya Stewart Trust with Master's reference IT2445/2016, and;

7.7. Debbie Straus N.O with identity number 650530 0031 067 in her capacity as co-trustee of the Sofiya Stewart Trust with Master's reference IT2445/2016.

[All three are trustees of the Sofiya Stewart Trust and referred to as the Trust in the Settlement Agreement]

[8] It is common cause that emanating from the terms of the Agreement a property of the Trust was transferred to VDH Building Consortium (Pty) Ltd (“VDH Consortium”) as provided for in the agreement. It, however, appears

that some of the terms of the Agreement, as will more fully appear hereunder, were not fulfilled. And, in an attempt to recover the moneys which, it seems were not paid pursuant to the Agreement, Dawie de Beer Attorneys, sent a letter of demand to the Respondents requesting payment of various amounts stated in paragraph 2.2 of that letter. In response to this letter, the Respondents paid an amount of R174 347.64 to Dawie de Beer Attorneys. Danie de Beer Attorneys acknowledged receipt of this amount in a letter to the Respondents dated 7 December 2017. In the said letter it is indicated how the said amount was allocated. An amount of R21 180.22 was used to pay for the clearance certificate, and the amount of R3 167.42 was used for the cancellation of the bond. However, there is no indication how the remaining amount of R150 000 was allocated. This amount is the subject of a dispute between the parties, which shall be dealt with later in this judgment.

[9] In due course VDH Construction was liquidated and the Applicants were appointed on 27 March 2019 as liquidators thereof. The Applicants have now approached this Court in an attempt to enforce the terms of the Agreement that it is alleged were not fulfilled, claiming monies from the Respondents, which they allege are due and owing to VDH Construction.

ARGUMENTS

[10] In regard to the *in limine* point, the Respondents' contention is that since the Applicants rely in their case on an Agreement signed on 29 September 2017, for the Applicants to succeed in their case, VDH Construction and/or the Applicants in their joint capacities as joint liquidators of the insolvent estate of VDH Construction, had to institute any proceedings to claim any amounts due in terms of that Agreement within a period of three years from the date of the signing thereof. The contention, is further that since, VDH Construction and/or the Applicants failed to institute the proceedings within that time period, the claim, if any, has prescribed, and the application should as a result be dismissed.

[11] The Applicants deny that the claim in these proceedings has prescribed. In the first place, they rely on the provisions of section 14(1) and (2) of the Prescription Act,[1] to the effect that the running of prescription in these proceedings was interrupted firstly, on 4 December 2017 when, pursuant to a letter of demand from Dawie de Beer Attorneys, an amount of R150 000 (One Hundred and Fifty Thousand Rand), being part payment of the debt the Respondents owed to VDH Construction, was made by the First Respondent to Dawie de Beer Attorneys; and, secondly, when the Second Respondent, during the liquidation enquiry of VDH Construction, made an express or tacit acknowledgement that the Respondents were indebted in the amount claimed, to VDH Construction.

[12] The Respondents concede the payment made on 4 December 2017 to Dawie de Beer Attorneys, but deny that such payment interrupted the running of prescription. They deny, further, that there was any acknowledgement of indebtedness to VDH Construction made by the First Respondent during the liquidation enquiry of VDH Construction.

[13] Their contention is that the payment made was not for any debt owing to VDH Construction, but was made in consequence of the agreement entered into by the parties, as part reimbursement to VDH Consortium for the liabilities VDH Consortium incurred when the property was transferred, and which the Respondents assumed and undertook to pay to VDH Consortium, in terms of the Agreement. The Respondents deny, also, that they owe the amount claimed in these proceedings and that what they owe VDH Construction are only the taxed costs in case number 47913/2017 ("the taxed costs"), as *per* the Agreement. They argue, further, that insofar as there is any money they might be owing to VDH Construction, that debt prescribed on 28 September 2020.

[14] As regards the acknowledgement of indebtedness, the Respondents' submission is that what was acknowledged during the liquidation enquiry, is

[1] Act No. 68 of 1969.

the indebtedness contained in the Agreement. It is on the basis of all the aforesaid reasons that the Respondents pray for the dismissal of the Applicants' claim, with costs.

ISSUES FOR DETERMINATION

[15] There are, actually, three issues that come out from the above arguments. In the first place, the Respondents deny owing VDH Construction the monies claimed in these proceedings, except for the taxed costs. Secondly, the Respondents deny that the amount of money paid on 4 December 2017 to Dawie de Beer Attorneys was paid in part payment of a debt owed by them to VDH Construction. Thirdly, the Respondents deny that the First Respondent made any acknowledgement of indebtedness in the amount claimed to VDH Construction, during the liquidation enquiry.

[16] It is this Court's view that the interpretation of the relevant terms of the Agreement is vital in resolving the issues, in order to determine whether the Applicants' claim has prescribed. The Agreement must first be interpreted to determine whether, except for the taxed costs which the Respondents have admitted, the Respondents owe any other money to VDH Construction and, if not, whether the payment they made to Dawie de Beer Attorneys on 4 December 2017 was in part payment of a debt owed by them to VDH Construction.

[17] If it is found that in terms of the Agreement the monies claimed in these proceedings are owed by the Respondents to VDH Construction, it will follow that the money paid by the Respondents on 4 December 2017 to Dawie de Beer Attorneys, was part payment of the debt they owed to VDH Construction, and in that sense, the running of prescription would have been interrupted. To the contrary, if it is to be found that in terms of the Agreement, the monies claimed by the Applicants in these proceedings, excluding the taxed costs, are not owed to VDH Construction but to VDH Consortium, then it will, actually, be the end of the matter because the claim will have to be

dismissed, except that an order for the payment by the Respondents of the taxed costs would have to be made.

[18] Nevertheless, this Court will still have to determine whether the money paid by the Respondents to Dawie de Beer Attorneys on 4 December 2017, was in part payment of the taxed costs owed to VDH Construction or it was in part reimbursement of the money owed by the Respondents to VDH Consortium. Furthermore, if it is found that that amount was in part payment to VDH Construction's taxed costs, then the running of prescription shall have been interrupted, and the Applicants will be entitled to an order for the taxed costs less the amount of R150 000. Conversely, if it is to be found that the money was in part reimbursement of VDH Consortium's liabilities, then the running of prescription against VDH Construction's claim (the taxed costs), shall not have been interrupted. The Respondents shall, in that event, not be liable to pay any amount to the Applicants, as VDH Construction's claim shall have prescribed.

[19] These issues are dealt hereunder, in turn.

Has the Applicants' Claim Prescribed?

[20] The Applicants are in these proceedings claiming an amount of R1,212,855.22, against the Respondents.

[21] Although it is admitted in the Respondents' answering affidavit that the dispute that led to the granting by the Court of the three Court Orders referred to above, related to monies supposedly owed to VDH Construction by the Respondents, it is common cause that none of the Court Orders pronounce anything about the payment of monies.

[22] In addition, it is not in dispute that the monies which the Applicants are claiming in these proceedings flow from the Agreement, and that in the Agreement, itself, no specific amounts of money are set out. The monies that the Applicants allege are owed to VDH Construction by the Respondents, are set out in the letter of demand dated 29 November 2017, sent to the

Respondents by Dawie de Beer Attorneys ("the letter of demand"). The said monies are stated in paragraph 2.2 of the letter of demand as follows:

"2.2.1	Transport kostes, Oordrag kostes, en Hereregte	R224 381.00
	Uitklaringssyfer	R 21 180.22
	(Par 1.4 en 1.5 g/m par 3.4 van die Skikkingsooreenkoms)	
2.2.2	Eventfin: Kansellasie van Dekkingsverband	
	(rente bereken tot 30 November 2017)	R721 568.75
	(Par 2.4 en 2.5 g/m par 3,4 van die Skikkingsooreenkoms)	
2.2.3	Roestoff Prokureurs: Opstel van kontrak	R 29 981.54
	Kansellasie van verband	R 3 167.42
	(Par 2.4 en 2.5 g/m par 3.4 van die Skikkingsooreenkoms)	
2.2.4	Ons klient se getakseerde kostes in terme van die Hofbevel	
	gedateer 21 Julie 2017	R 286 488.43
	Plus, rente @ 10.25% vanaf 11 Oktober 2017	
	(Datum van taksasie) tot 30 November 2017	R 4 022.50
	(Par 4.3 van die Skikkingsooreenkoms)	
2.2.5	Boumateriaal: VDH Construction (Edms) Bpk	R 96 350.00
	TOTAAL	**R1 367 202.86**

[23] In order for this Court to give meaning to these monies, in its determination of whether the Applicants are entitled to claim such monies from the Respondents, and/or whether these monies were due and payable to VDH Construction, and, in its further determination of whether the amount of R150 000 paid to Dawie de Beer Attorneys was in part payment of the Respondents' indebtedness to VDH Construction, the letter of demand must be read together with the salient terms of the Agreement, namely, paragraphs 1.1, 1.2, 1.3, 1.4, 1.5, 2.4, 2.5, 3.4, 4.1, 4.2 and 4.3, thereof.

[24] The salient terms of the Agreement are stated as follows:

NOW THEREFORE THE PARTIES HAVE AGREED TO SETTLE ALL THE DISPUTES BETWEEN THEM AS FOLLOWS: -

ALIENATION AND TRANSFER OF THE PROPERTY

1,1 The Trust is desirous and has decided to sell (alienate) the property valued at R 3 190 000.00 (Three Million One Hundred and Ninety Thousand Rand) to Consortium, which amount constitutes full and final settlement of all Hrvatska's indebtedness and responsibilities towards Construction *in toto*, except for the liabilities referred to and contained in paragraphs 1.5, 2.5 and 4.3 *infra*.

1.2 The Trust confirms and acknowledges that it assumes the entire liability and indebtedness which ensued between Construction and Hrvatska, which liability and responsibility is extinguished *in toto* as a result of the alienation and transfer of the property to Consortium.

1.3 Upon the transfer of the property to Consortium all and any of Hrvatska liabilities and obligations towards Construction are extinguished *in toto* and neither Construction, nor Consortium will have any further or additional claims against Hrvatska in any manner whatsoever.

1.4 Consortium assumes the responsibility and liability of all costs in relation to the transfer of the property into its name, which costs shall be due and payable on demand to Dawie de Beer Attorneys who are instructed by the parties to attend to the transfer of the property to Consortium, which costs shall include, but not necessarily be limited to, transfer duties, municipal clearance certificates, transfer costs, etc.

1.5 Hrvatska assumes the full liability and responsibility to reimburse Consortium in relation to all the costs referred to and contained in paragraph 1.4 *supra*, in accordance with the provisions contained in paragraph 3.4 *infra*. . .

2.4 Consortium furthermore assumes the liability and responsibility to effect payment of all costs in relation to the cancellation of the surety

bond. which costs will be due and payable on demand by Dawie de Beer Attorneys.

2.5 Hrvatska assumes the full liability and responsibility to reimburse Consortium in relation to all the costs referred to and contained in paragraph 2.4 *supra*, in accordance with the provisions contained in paragraph 3.4 *infra*. . .

3.4 Hrvatska is liable and responsible to reimburse Consortium in relation to all the costs incurred on its behalf, as provided for in paragraphs 1.5, 2.4 and 2.5 supra, which costs shall be settled and paid to Dawie de Beer Attorneys within a period of 30 days after this agreement has been entered into and concluded (signed by all the parties hereto) . . .

THE LEGAL COSTS: CASE NO. 47913/2017

4.1 Hrvatska and Stewart [the Respondents], jointly and severally, assumes the liability for the costs incurred by Construction pertaining to the application under case no 47913/2017.

4.2 Construction, Hrvatska and Stewart [the Respondents] have agreed to submit the settled bill of costs in respect of the order granted by Mali J on 21 July 2017 (Annexure “C") to the Taxing Master for taxation purposes of stamping and signing same in the amount agreed upon between the parties.

4.3 Hrvatska and Stewart [the Respondents] undertake to pay the settled taxed bill of costs of the aforementioned application within a period of 30 days after taxation, the date of taxation. . .

[25] Of importance is that, the issue that this Court must resolve is the interpretative understanding of the relevant terms of the Agreement in relation to the question, firstly, of whether the Applicants are entitled to claim these monies from the Respondents, and/or whether these monies were due and payable to VDH Construction; and secondly, whether the amount of R150 000 paid to Dawie de Beer Attorneys was in part payment of the money owed to VDH Construction by the Respondents.

The Law Applicable

[26] It is trite that judicial precedent now establishes that a so-called unitary approach to the interpretation of documents, whether they be contracts, statutes or other written instruments, must be followed. Account must, at all times when interpreting the said instruments, be taken of the text, context and purpose. This is the state of law as was made clear in the *Endumeni* judgment[2] by the Supreme Court of Appeal, and restated by the Constitutional Court in cases like *Bato Star*.[3] In its recent judgment in *Chisuse*,[4] the Constitutional Court explained that the purposive or contextual interpretation of legislation must still remain faithful to the literal wording of the statute. That Court, in particular, stated that Courts must not lose sight of the fact that the construction given to legislation must still be reasonable. And, cautioned that strained reading of texts, no matter how well-intentioned, can lead to dissonance.[5]

> Whether the Applicants are entitled to claim from the Respondents, and/or whether the monies claimed by the Applicants were due and payable to VDH Construction;

[27] The following matters are common cause between the parties, namely that: the Applicants' claim against the Respondents is based on the Agreement signed on 29 September 2017; the said Agreement was not signed by VDH Construction and the Respondents only, but was concluded by VDH Construction, the Respondents, VDH Consortium and the trustees of Sofiya Trust; the intention of the signatories to the Agreement was to settle 'any and all disputes' between VDH Construction and the Respondents.

[28] On the plain reading of the Agreement, it is clear that VDH Consortium assumed the responsibility and liability of all the costs in relation to the

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA); [2012] ZASCA 13.
[3] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687; [2004] ZACC 15.
[4] *Chisuse and Others v Director General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC); [2020] ZACC 20, para [52].
[5] *Idem* n 24, para [54].

transfer of the property into its name, which costs included, but not necessarily limited to, transfer duties, municipal clearance certificate, transfer costs, etc.; together with the liability and responsibility to effect payment of all the costs in relation to the cancellation of the surety bond. These are the costs that are stated in paragraphs 2.2.1 and 2.2.2 of the letter of demand. The First Respondent, in paragraph 3.4 of the Agreement, assumed the full liability and responsibility to reimburse and/or undertook to pay VDH Consortium all these costs.

[29] Furthermore, in terms of the Agreement, it is clear that the Respondents, jointly and severally, assumed the liability for the costs incurred by VDH Construction pertaining to the application under case number 47913/2017 [the taxed costs]. These are the taxed costs that are referred to in paragraph 2.2.4 of the letter of demand.

[30] It is patently clear from the above summation that in terms of the Agreement, the First Respondent was liable to reimburse VDH Consortium for the costs VDH Consortium incurred when the property was transferred into its name by the Trust. The reimbursement as *per* the letter of demand amounts to R1 000 278.93. Furthermore, in terms of the Agreement, the Respondents were liable to pay to VDH Construction taxed costs which according to the letter of demand amounts to R286 488.43. Accordingly, these are the only monies that the First Respondent and/or the Respondents are liable to pay as *per* the Agreement.

[31] What is not clear from the Agreement, is the money stated in paragraph 2.2.5 of the letter of demand pertaining to building material. There is nothing mentioned in the Agreement about building material. Moreover, except to say that the Respondents acknowledged this amount and undertook to pay it, there is no evidence on the Applicants' papers in support of this item indicating as to how it is alleged that the Respondents are liable to pay it.

[32] Besides that, it is this Court's view that the nature of the parties' obligations can be readily ascertained on the ordinary grammatical meaning of the words of the Agreement. On that interpretation, it is clear that the only money that, in terms of the Agreement the Respondents are to pay to VDH Construction, is for the taxed costs and nothing else.

[33] However, the contention by the Applicants is that the Agreement must be read with an understanding that the money was owed to VDH Construction and that VDH Consortium was a vehicle through which payment was to be effected. VDH Consortium and the Trust, according to the Applicants' argument, were only used as vehicles to facilitate the various rights and obligations of VDH Construction and the Respondents, who were actually the parties involved in the litigation that gave rise to the Agreement. The submission is that such understanding could be arrived at if the Court were to consider the surrounding circumstances and what happened prior to the agreement being entered into, when interpreting the Agreement. In support of this submission the Applicants refers this Court to the decision in *University of Johannesburg*,[6] a Constitutional Court judgment wherein that Court in explaining how the contextual and purposive interpretation of a document is to be approached, held that context and purpose must be taken into account as a matter of course.

[34] In particular, the Applicants relied on the following passages of that judgment:

> "[65] This approach to interpretation requires that "from the outset one considers the context and the language together, with neither predominating over the other". In *Chisuse,* although speaking in the context of statutory interpretation, this Court held that this "now settled" approach to interpretation, is a "unitary" exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

[6] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC).

> [66] The approach in *Endumeni* "updated" the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.
>
> [67] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. . . ." (footnotes removed).

[35] It is this Court's view that the Applicants' reliance on *University of Johannesburg* for their submission that this Court should consider surrounding circumstances in its interpretation of the Agreement, misconstrues the decision in that judgment. That judgment is not authority for the proposition that the Court must consider contextual evidence as a matter of course even though such evidence is not before the Court.

[36] The Applicants seek this Court to consider what they say is contextual evidence, but that evidence, in this Court's view, cannot be tendered by Mr Stander, the deponent to this application, because he is not a party to the Agreement and could not, therefore, have been privy to the deliberation leading to the Agreement. Mr Erasmus, on the other hand, who is a party to the Agreement and is best placed to provide such evidence, says nothing about it in the evidence he tendered in the liquidation application of VDH Construction.

[37] In addition, the Respondents' argument that the Agreement does not state that VDH Consortium will be used as a vehicle through which payments will be made on behalf of VDH Construction, is correct. Nor is there anything in the Agreement that indicates that that is what the parties intended when

they concluded the agreement. Thus, it is this Court's view that the evidence proffered by the Applicants that VDH Consortium was a vehicle through which payment was to be effected and that VDH Consortium and the Trust were only used as vehicles to facilitate the various rights and obligations of VDH Construction and the Respondents, is inadmissible in that it seeks to add, vary, modify or contradict the terms of the agreement.[7]

[38] Consequently, there is no extrinsic evidence before this Court, that this Court can consider when interpreting the Agreement. Nor is there evidence before this Court that says that the Agreement must be interpreted in a way different from what is written in the document, that is before this Court.

[39] The purpose or intention for entering into the agreement was, in terms of the Agreement, nothing else but to settle all the disputes between them (all the parties), and not between VDH Construction and the Respondents. VDH Consortium, in signing the Agreement, agreed to assume the liability and responsibility of all the costs relating to the transfer of the property and the cancellation of the security bond. Conversely, the Trust agreed to assume the entire liability and indebtedness which ensued between VDH Construction and the First Respondent, which liability was extinguished *in toto* as a result of the alienation and transfer of the property to VDH Consortium. Nothing else can, therefore, be read into the terms of the Agreement.

[40] More, particularly, the terms of the Agreement clearly state that all the parties who are signatories are bound by the Agreement. The parties to the Agreement, which includes VDH Consortium and the Trust, agreed in the Agreement that they have *"reached an agreement in full and final settlement of all the disputes and more particularly the disputes which have risen as a result of the litigation which formed the subject matter of the Court Orders . . ."*

[41] The further arguments by the Applicants, firstly, that since VDH Consortium and VDH Construction have the same directors, it can never be

[7] See *University of Johannesburg v Auckland park Theological Seminary and Another* 2021 (6) SA 1 CC para 92.

argued that the money is due to VDH Consortium, despite the wording of the agreement, as on the directors of VDH Construction's own version in the liquidation application, the money was due and payable to VDH Construction; and, secondly, that due to the fact that VDH Construction and VDH Consortium share the same directors any debt owed to VDH Consortium should be seen as a debt owed to VDH Construction, are not, as the Respondents correctly argue, only ludicrous but are indeed a fallacy in law.

[42] This Court agrees with the argument by the Respondents that the signatories to the Agreement are all distinct and separate entities, and nowhere in the Agreement is it mentioned that either party thereto acts on behalf of another in any capacity whatsoever. This Court, furthermore, aligns itself with the decision of the Supreme Court of Appeal in *Nel*,[8] a judgment referred to by the Respondents in support of the argument that a debt of VDH Construction cannot be seen as a debt to VDH Consortium because they have the same directors, which held that the mere fact that two companies have the same shareholders and the same directors does not constitute a basis for disregarding the separate legal personalities of the two companies.

[43] This Court is satisfied that the Respondents are not liable to pay the monies claimed by the Applicants in these proceedings except for the taxed costs. The wording of the Agreement is very clear and specifically sets out that VDH Consortium would assume and make certain payments in respect of the transfer of the property and that the First Respondent undertook to reimburse VDH Consortium for such payments. Furthermore, the Respondents undertook to pay VDH Construction for the taxed costs. And, that is the basis of the indebtedness.

[44] This Court has to conclude, as such, that the Agreement must be interpreted in the manner that it was written. There is no extrinsic evidence before this Court for the Agreement to be given any other interpretation. The matter must be dealt with as the parties agreed.

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[8] *Nel and Others v Metequity Ltd* [2006] SCA 140 (RSA) para 11.

Whether the amount of R150 000 paid to Dawie de Beer Attorneys was in part payment of the money owed to VDH Construction by the Respondents.

[45] It is, not in dispute that a letter of demand dated 29 November 2017 was sent to the Respondents by Dawie de Beer Attorneys, requesting payment pursuant to the Agreement; and that, on 4 December 2017 the Respondents, in response to the letter of demand, made payment to Dawie de Beer Attorneys. The question that arises at this point is for whom was this payment made? Was it for VDH Consortium or for VDH Construction.

[46] The Applicants argue that the payment was for VDH Construction, whilst the Respondents argue that it was for VDH Consortium. The amount actually paid by the Respondents is shown in the letter dated 7 December 2017 from Dawie de Beer Attorneys. According to that letter the Respondents paid an amount of R174 347.64 which was used to pay what is recorded in paragraph 3 of that letter as:

3.1. Uitklaringssyfer	R 21 180.22
3.2. Kansellasie van verband	R 3 167.42
3.3. 'n betaling van	R 150 000.00
TOTAAL	**174 347.64**

[47] The third amount of R150 000 has no reference. Unlike the other amounts, the amount of R150 000 does not indicate how it was allocated, this is the cause of the dispute. The Respondents submit that all these amounts were made in paying the debt due to VDH Consortium by the Respondents, and the R150 000 was in part payment of the transfer costs as stated in paragraph 2.2.1 of the letter of demand, which is denied by the Applicants.

[48] In their illustration of why they contend that the amount of R150 000 was a payment made to VDH Consortium, the Respondents relies on the figures appearing in the trust account of Dawie de Beer Attorneys, which

shows that on 4 December 2017 the First Respondent made payment of the amount of R150 000. According to the Respondents, the trust account further shows how Dawie de Beer Attorneys dealt with the money when it was in its trust account. The contention is that, firstly, VDH Consortium was debited with the said amount of R150 000, which means that the amount was paid for the benefit of VDH Consortium. That is, the attorneys received the money for the benefit of VDH Consortium. Secondly, the trust account shows that a payment was later made to VDH Consortium in the amount of R150 000.

[49] The Respondents argue, consequently, that VDH Construction can never, raise the issue that this payment stopped prescription for two reasons. First of all, the payment was not due, or any of the payments as reflected in the letter of 7 December 2017, were not due to VDH Construction, and secondly, payments were made to a completely separate entity.

[50] It is the view of this Court, as the Respondents submit, that the transaction reflected in Dawie de Beer Attorneys' trust account is in line with the Agreement, and that all the moneys reflected in the letter of 7 December 2017, were not made to VDH Construction but to VDH Consortium. Clearly, as the Respondents argue, the first two amounts were paid in respect of the liability incurred by VDH Consortium. On a proper inspection, the amount of R21 180.22 reflected in the said letter is the same amount stated in paragraph 2.2.1 of the letter of demand read with paragraphs 1.4, 1.5 and 3.4 of the Agreement. The amount of R3 167.42 reflected in the said letter is, also, the same amount stated in paragraph 2.2.3 of the letter of demand read with paragraphs 2.4, 2.5 and 3.4 of the Agreement. As already stated, this are the amounts that were incurred by VDH Consortium which the First Respondent assumed and undertook to reimburse VDH Consortium for. Based on these facts, an inference can safely be made that the amount of R150 000, was also meant as reimbursement for the debt due to VDH Consortium by the First Respondent, in terms of the Agreement.

[51] The Applicants can, therefore, not rely on a payment made to a third party, a complete separate entity from VDH Construction, to stop prescription. It is patently clear that the amounts stated in the letter of 7 December 2017, are not amounts due to VDH Construction, and any such payment can never stop prescription to run against the debt of the taxed costs owed by the Respondents to VDH Construction.

[52] The trust account of Dawie de Beer Attorneys confirms that the amount was not received and/or paid as a debt due to VDH Construction, but was received and paid as a debt to VDH Consortium. In terms of the Agreement which is confirmed in the letter of demand, the only amounts the Respondents are due to pay to VDH Construction is the payment of the taxed costs and that claim has, in essence, prescribed.

Whether the Respondents acknowledged indebtedness to VDH Construction

[53] As earlier stated, it is the Applicants submission that prescription was interrupted against the money owed by the Respondent to VDH Construction when at the liquidation enquiry, the Second Respondent acknowledged the Respondents indebtedness, of the money claimed, to VDH Construction.

[54] This Court seems to be in agreement with the submission of the Respondents that the Second Respondent did not acknowledge any indebtedness towards VDH Construction, during his testimony at the liquidation enquiry.

[55] It is common cause that the liquidation enquiry was held after the signing of the Agreement. The evidence of the Second Respondent, as alluded to by the Respondents, is very clear that he did not acknowledge any indebtedness towards VDH Construction. His evidence was that even though they (the Respondents) did not know that they owed VDH Construction money, they agreed to settle. On more than one occasion during his evidence, the Second Respondent expressly denied that the debt was due to

VDH Construction. He, in fact, acknowledged at the enquiry that there was still an amount of R1,212,855.22, that was still outstanding in terms of the Agreement, but clarified this in the answering affidavit when he stated that any amount that was due in terms of the Agreement was not specifically an amount due to VDH Construction.

[56] This denial is fortified by the terms of the Agreement itself (in the Preamble), where the First Respondent agrees without acknowledging any liability towards VDH Construction to settle any and all disputes with VDH Construction.

[57] It is, therefore, this Court's view that, in this regard, the Second Respondent did not acknowledge indebtedness towards VDH Construction and prescription was never interrupted.

CONCLUSION

[58] It is, therefore, this Court's conclusion that in terms of the Agreement, the Respondents do not owe VDH Construction any money except the taxed costs, and that the amount of R150 000 paid by the Respondents on 4 December 2017, was in reduction of its debt with VDH Consortium. This payment did not interrupt the running of prescription against the debt the Respondents owed to VDH Construction.

[59] Consequently, the Applicants' claim falls to be dismissed with costs.

[60] In the circumstances, the following order is made:

1. Condonation for the late filing of the answering affidavit is granted.

2. Condonation for the late filing of the replying affidavit is granted.

3. The application is dismissed with costs.

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E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

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