



OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 5841/2023

In the matter between:

PETER JOHN DACHS

Applicant

and

ZANTISI STUDENT SERVICES (PTY) LTD

Respondent

REASONS FOR JUDGMENT DELIVERED ON THIS 17th DAY OF MAY 2023

PATRICK, AJ:

Events leading to the application

1. The applicant, (“**Dachs**”) and the sole director of the first respondent (“**Muller**” and “**ZSS**” respectively) are brothers-in-law. Muller is the husband of Dachs’ sister, though Muller and Dachs’ sister now are divorcing.

2. In 2013 Dachs advanced R1 908 005,51 to ZSS. ZSS purchased two properties, to conduct business providing accommodation. Dachs also stood surety for ZSS's obligations to repay bond-secured loans of R2 500 00 from Nedbank. The contract between Dachs and ZSS was oral. A term was that ZSS was to repay Dachs upon sale of the properties. Dachs and Muller, at that stage, envisaged building a substantial business.
3. During the pandemic, ZSS suffered financial difficulties. In October 2022 and November 2022 it failed to pay its Nedbank loan instalments. Dachs liaised with Nedbank to try to prevent a sale in execution and facilitate a sale on the open market.
4. On 6 December 2022 Dachs and Muller met. Muller confirmed that the properties were on the market. By January 2023 the loan instalments were four months in arrears. Dachs asked Muller for an update on the sale progress. None was forthcoming.
5. Dachs subsequently found out that the properties had been sold. Commencing in mid-March, Dachs sent several emails and WhatsApp messages to Muller. Muller did not answer. On 25 March 2023 Dachs wrote to the conveyancers. Dachs stated that ZSS was indebted to him and asked the conveyancers to tell him when they expected to transfer the sold properties, because, he explained, he was liaising with Muller to ensure that ZSS repaid him on transfer.
6. On 27 March 2023 the conveyancers answered Dachs. They wrote that they held no instructions from ZSS to repay Dachs from the sale proceeds. They also wrote

that by 30 March 2023 the purchasers were to furnish a guarantee, which was what was required for them finally to lodge in the Deeds Office and transfer.

7. On 28 March 2023 Muller emailed Dachs. Muller wrote

“I feel harassed and bullied by your emails and WhatsApp messages during the past two weeks. I speculated what the emails are about, and I have not read them apart from the initial text. ...

I was informed that you, in your personal capacity, contacted the transferring attorneys with a claim and threat of an interdict.

I was under the impression that this matter was comprehensively concluded seven years ago.

I would ask and recommend that we enter urgent binding arbitration to resolve this matter and avoid the delay or cancelling of the ... property sale, which has been very difficult. This arbitration should include all entities involved and all matters relating to the [ZSS] matters.

I hope everyone finds this acceptable.

I reserve my rights.”

8. On 4 April 2023 Dachs’ attorneys wrote to Muller. They requested an undertaking that the loan would be repaid by the conveyancers from the sale proceeds. They threatened to apply to liquidate ZSS if the undertaking were not provided. On

11 April 2023 Muller answered that would need to take legal advice to answer. By that stage the threatened application was all but finalised.

The application

9. Indeed, on the same day, 11 April 2023, Dachs launched the threatened application as a matter of urgency. The notice of motion instructed ZSS to answer if it opposed by 18 April 2023, and set the application down on 25 April 2023, which is how it came before me in the urgent court.
10. In the event, ZSS took until 20 April 2023 to deliver its answer, deposed to by Muller. ZSS delivered an eighteen-page affidavit. The first nine pages made comprehensive and exhaustive complaints that Dachs had prepared his papers at a leisurely pace, that Dachs had imposed unreasonably short time periods on ZSS, that Dachs had unreasonably procrastinated, that there had been “*an obvious and egregious violation of the rights of [ZSS]*” in that Dachs had deliberately violated the rights of ZSS to consult with witnesses and prepare a meaningful answer, obtain documentary evidence and “*fully present it’s (sic) case adequately*”, that Dachs had failed to use the long-form notice of motion, that Dachs had obtained an undue tactical advantage, that Dachs had not explained why he would not be afforded substantial redress at a hearing in in due course. They concluded that the matter should be appropriately dismissed or struck with an immediate costs order.
11. The second nine pages of the answering affidavit addressed the merits. What I have I have set out in paragraphs 2 - 8 above was not controversial. ZSS characterised the advance as the provision of investment capital, Dachs as a loan.

12. In 2016, continued the answer, Muller had approached Dachs to discuss “*the issue of the business going nowhere due to [Dachs’] failure to provide*” further capital Dachs had promised. Dachs at that time suggested that Dachs should become 75% shareholder. Muller was not amenable. They “*then decided to part company*”. Muller still then “*intended repaying [Dachs] funds which [Dachs] had initially invested in the business*”; he had another entity sell a property to that end.
13. Continued the answer “*(f)urther negotiations were held with [Dachs] because I was deeply unhappy that I had spent so much time on the business, but [Dachs] had failed to meet these commitments or make any contribution whatsoever. It was at this time that we entered into an oral agreement with each other – while I represented [ZSS] – that we would both walk away, and that neither [ZSS] nor I would have to repay [Dachs].*”

Urgency

14. Liquidation applications are inherently urgent, and usually brought on the short form notice of motion. This particular liquidation application was urgent because transfer was imminent. ZSS had refused the undertaking Dachs requested. Nor had it offered at least to retain the sale proceeds in trust until resolution of Dachs’ now-disputed claim. Though ZSS alleged that the urgency precluded it consulting with witnesses, it identified none. It did not request leave to supplement. Though ZSS alleged that it had been unable to procure documents, it contended for an oral agreement in its defence, and identified no documents which might reflect the oral

agreement. ZSS's answer was comprehensive. Its counsel prepared good heads, was ready and to argue, and well did so. In the circumstances I heard the matter as a matter of urgency.

Approach

15. Dachs was required to show his entitlement to an order, including his claim, *prima facie*.¹ That meant showing that the balance of probabilities on the affidavits favoured him.² If however ZSS *bona fide* disputed Dachs' claim on reasonable grounds, then the application fell to be dismissed – the *Badenhorst* rule.³ The onus was on ZSS to show it *bona fide* disputed Dachs' claim on reasonable grounds.⁴

Entitlement to order

16. Muller alleged that in 2016, and before the conclusion of oral agreement for which ZSS contended, he intended to procure Dachs' repayment and took steps to that end. Dachs' claim to repayment – whether of a loan or investment – therefore is common cause. Dachs established his claim on the affidavits. The next enquiry was therefore whether ZSS discharged the onus to show that it *bona fide* disputed Dachs' claims on reasonable grounds.

¹ *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 932 (A) at 975J – 979F, *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC) paragraph 7 at 453H – J.

² *Ibid.*

³ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348C, *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd supra* paragraph 8 at A – E.

⁴ *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 218D – 219C; *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd supra* paragraph 8 at 454E – F.

Badenhorst rule

17. Muller did not allege that Dachs was a very rich man for whom the sum would have been trifling, and nothing on the papers so indicates. It is inherently improbable that Dachs would have agreed to forgive repayment of a sum so large. Muller was vague in answer about precisely when he and Dachs concluded the oral agreement. He could only point to a particular year, 2016. That is perhaps understandable. The agreement would have been concluded a long time ago and when relations between Dachs and Muller had a different complexion - though I would have expected Muller at least to have remembered where he and Dachs were when they concluded the oral agreement.
18. Muller was also vague in answer about the terms of the oral agreement. He alleged that the agreement had two components: [1] “*we would both walk away, and [2] that neither [ZSS] nor I would have to repay [Dachs]*”. The vagueness is perhaps understandable, as I have explained. But the difficulty for ZSS is that if Dachs and Muller [1] spoke and discussed that they would both walk away, that bespeaks dissensus as to [2] what that meant. Muller: that it meant that Dachs forgave repayment, as Muller alleged. Dachs: that it merely meant that they would not seek to build a business as they had envisaged in 2013, but not that he forgave the debt. In reply Dachs denied any agreement at all.
19. On ZSS’s version, the next enquiry is whether, even in absence of consensus, there was apparent consensus upon which ZSS reasonably could rely – the doctrine of quasi-mutual assent.⁵ ZSS could not so reasonably rely, on account of

⁵ *ABSA Bank Ltd v Moore* 2017(1) SA 255 (CC), footnote 24:

- the inherent improbability. So, accepting ZSS's *bona fides*, there was no oral contract.
20. What was telling was that before he deposed to his affidavit, Muller at no stage wrote that ZSS and Dachs agreed that Dachs would forgive the debt. I would have expected Muller naturally to have done so in answer to Dachs' emails and WhatsApp messages he received in the two weeks prior to 28 March 2023, which he experienced as harassing and bullying.⁶
21. When finally Muller answered Dachs, what he wrote was "*I was under the impression that this matter was comprehensively concluded seven years ago*". An impression does not a contract make.⁷ On the contrary, Muller acknowledged that

"Even if there had been no 'meeting of the minds' between Brusson and the Moores, it does not follow that no valid loan came into existence. Our law of contract has long recognised quasi-mutual assent as a source of contractual obligation: since it would be unrealistic for contractual liability to be based solely on the parties' subjective, and possibly hidden, intentions. So where dissensus is not readily apparent, the party who acts contrary to the apparent consensus may well be held bound. This protects a contracting party unable to dispute the other's denial of their 'true' intention. See Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadoglianis 1992 (3) SA 234 (AD) ["Sonap"] at 239I – J:

'... The decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lean the other party, as a reasonable man, to believe that his declared intention represented his actual intention?'"

⁶ *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E – H:

"I accept that 'quiescence is not necessarily acquiescence' (see Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion. (See Benefit Cycle Works v Atmore 1927 TPD 524 at 530 - 532; Seodat v Tucker's Shoe Co 1952 (3) SA 513 (T) at 517 - 8; Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd 1960 (1) SA 531 (D) at 541; and of Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A) at 642A - G.)"

⁷ The dictionary definition of impression is "*an idea, feeling, or opinion about something or someone, especially one formed without conscious thought or on the basis of little evidence*".

whatever he thought had transpired in 2016 left him with a sense which differed from that of Dachs. Muller himself acknowledged dissensus. When finally Muller answered Dachs, Muller did not write that in 2016 Dachs agreed to forgive repayment.

Winding-up

22. In the circumstances I concluded that ZSS was unable to discharge the onus to show that it *bona fide* disputed Dachs' claim on reasonable grounds. Dachs applied for liquidation on the ground that ZSS was unable to pay its debts as and when they become due. The debt which Dachs contended ZSS would be unable to pay was that due to him. That debt established, and ZSS unable to call to aid the *Badenhorst* rule, the inability to pay was common cause: ZSS refused to retain the sale proceeds to pay Dachs; ZSS offered no evidence that absent the sale proceeds it would be able to meet Dachs' claim.⁸ All indications were that it would become all but an empty shell. In the circumstances my discretion to refuse an order was "*a very narrow one that is rarely exercised then only in special or unusual circumstances.*"⁹ There were no such circumstances.
23. ZSS argued that as registration had not yet taken place, the debt to Dachs was not yet due. This, argued ZSS, was an insurmountable - though technical - hurdle. The argument overlooked that prospective liabilities must be taken into account in

⁸ *Afrgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) paragraph 4 at 93I/J; *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd supra* paragraph 21 at 458H – I.

⁹ *Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd* 1962 (3) SA 424 (T) at 428B; *Afrgri Operations Ltd v Hamba Fleet (Pty) Ltd supra* paragraph 12 at 96E/F – F, *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd supra* paragraph 18 at 457I – 458A.

considering whether Dachs has proved that ZSS is unable to pay its debts.¹⁰ A prospective liability is one which, by reason of an existing *vinculum iuris* between the creditor and the company, will become enforceable on a date determinable by reference to future events.¹¹

24. Dachs' claim was to become enforceable on transfer and therefore was a prospective liability. The requirement to take into account prospective liabilities "gives the words 'unable to pay its debts' an extended meaning in this context".¹² The result is that a Court will not refuse an order where "it is reasonably certain that the company will not be able to pay its debts when they fall due".¹³ As ZSS will not retain the sale proceeds and pay Dachs, and does not allege it will otherwise be able to pay, it is reasonably certain that ZSS will not be able to pay its debts to when they fall due.¹⁴ When Dachs' debt becomes due and ZSS fails to pay it, as it says it will, and ZSS does not retain the proceeds, as it refuses to do, then ZSS "would simply be making dispositions of its property which would become void, or which could be set aside, if [ZSS] were subsequently wound up. Thus it is sufficient to establish that the company is in fact insolvent."¹⁵

Conclusion

25. At the conclusion of the hearing on 25 April 2023 ZSS kindly undertook that if there were transfer pending the grant or refusal of any order it would retain the

¹⁰ Section 345(2) of the old Companies Act No 61 of 1973.

¹¹ *Du Plessis v Protea Inryteater (Edms) Bpk* 1965 (3) SA 319 (T) at 320G – H.

¹² Blackman *et al* Commentary on the Companies Act page 14 – 134.

¹³ *Ibid.*

¹⁴ The offer to submit to urgent arbitration did not assist ZSS. It was not coupled with an assurance that the arbitration could be completed before transfer, or an offer to retain the sale proceeds until the outcome of the arbitration.

¹⁵ *Ibid.*

sale proceeds. After considering the matter, and on 3 May 2023, I ordered that ZSS be provisionally wound up. On 10 May 2023 ZSS requested my reasons.

What I have set out above are them.

PATRICK, AJ