

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

CASE NO: 010253/2023

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

15 /08/23

Date

ML TWALA

In the matter between:

ZOVIFLO (PTY) LTD

APPLICANT

And

HARALAMBOS PROKAS

JOALETTE PROKAS

FIRST RESPONDENT

SECOND RESPONDENT

FOTINI PROKAS

THIRD RESPONDENT

(Cited in their capacities as trustees of the
Prinia Heritage Trust (IT 952/12))

**PRINIA INVESTMENT CAPITAL (PTY)
LIMITED**

FOURTH RESPONDENT

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

FIFTH RESPONDENT

JUDGMENT

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 15th of August 2023.

Summary: *Interpretation - whether two agreements are interlinked - whether the failure to successfully conclude and implement the one or cancellation thereof impacts negatively on the other – Rules of interpretation of contracts restated – Enforcement of contract – the pacta sunt servanda principle restated – Applicant succeeds.*

TWALA J

[1] In this application which served before the opposed motion Court, the applicant sought the declaratory relief and other ancillary orders in the following terms:

- 1.1 It be declared that the applicant is the owner of 80% of the issued shares in the fourth respondent.
- 1.2 The fourth respondent be directed to issue a share certificate to the applicant, and to take all steps necessary to effect the registration of the applicant as the 80% shareholder in the fourth respondent's securities register.
- 1.3 Should the parties refuse to take all steps necessary to issue a share certificate to the applicant and to effect the registration of the applicant as the 80% shareholder in the fourth respondent's securities register and sign all documentation required, then:
 - 1.3.1 The other party may sign on his/her behalf; and/or
 - 1.3.2 The Sheriff of the Court is hereby authorized and directed to sign all documentation and to do all things necessary on behalf of either of the parties in order to effect the registration of the applicant as the 80% shareholder in the fourth respondent's securities register.
- 1.4 The first to third respondents be ordered to pay the costs of this application, such costs to include the costs of two counsel.

[2] The application is opposed by the first to fourth respondents who have filed a comprehensive and substantial answering affidavit. The first to fourth respondents raised a point in limine that the citing of the second respondent in these proceedings is a misjoinder since she is not a trustee in the Prinia

Heritage Trust, Number: IT952/2017. Furthermore, at the hearing of this matter, the first to fourth respondents sought to strike out certain paragraphs of the applicant's replying affidavit as constituting new matter in reply which were known to the applicant and should have been put in the founding affidavit. I propose to deal with this aspect later in this judgment.

- [3] It is worth noting that the fifth respondent is not participating in these proceedings. For the sake of convenience, I propose to refer to the first to fourth respondents as the respondents in this judgment. Where necessary, I will refer to the applicant, Zoviflo (Pty) Ltd as Zoviflo, to the fourth respondent, Prinia Investment Capital (Pty) Limited, as PIC and the Prinia Heritage Trust as the Trust.
- [4] The respondents contended that the second respondent is not a trustee in the Trust - therefore the applicant should not have joined her in these proceedings. Although all the necessary documentation was signed by the first respondent to make second respondent a trustee in the Trust, she is not a trustee since the process of appointing her was not finalised. The applicant was made aware of this in the anton pillar application but persists with the misjoinder of the second respondent in these proceedings.
- [5] The applicant contended that the respondents are precluded from relying on any defence that the second respondent is not a trustee of the Trust. In his answering affidavit in the Anton Pillar application, the first respondent stated that he has signed all documents to register the second respondent as a trustee. It was contended further that both the first and second respondents co-signed the nominee agreement on behalf of the trust. The first respondent has treated the second respondent as a trustee all of this with the blessings of the other trustee, the third respondent in this case.

- [6] It is appropriate at this stage to restate the provisions of the Trust Property Act, 57 of 1988 (*"the Act"*) which are relevant to this discussion. The act provides the following:

"Definitions

"trustee" means any person (including the founder of a trust) who acts as trustee by virtue of an authorization under section 6 and includes any person whose appointment as trustee is already of force and effect at the commencement of this Act;

Section 6

(1) Any person whose appointment as trustee in terms of a trust instrument, section or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master."

- [7] I do not understand the first respondent to be saying that the second respondent has no authority from the trustees to act on behalf of the trust. Instead, the issue that she is not a trustee is raised only in so far as the second respondent is cited in these proceedings. It seems to me that the signing of the nominee agreement by the second respondent has been ratified by the other trustees who have not raised an issue about her conduct.
- [8] However, I do not agree with the applicant. Although the second respondent has acted on behalf of the trust with the blessings of the trustees, she is not a trustee since she did not act by virtue of an authorization of the Master of the High Court (*"the Master"*) in terms of the provisions of the Act. I accept that the record shows that the second respondent is, in certain instances, treated by

the other trustees of the Trust as a trustee. She may have signed documents on behalf of the Trust as she did with the nominee agreement which purports to transfer ordinary par shares representing 80% of the entire share capital in the PIC. However, it is my respectful view that she is not a trustee of the Trust until she is authorized by the Master.

- [9] I agree with the respondents that there was no reason for the applicant to join the second respondent in these proceeding and to cause her to incur unnecessary costs of the litigation. It follows ineluctably therefore that the application against the second respondent falls to be dismissed with costs.
- [10] The facts foundational to this case are common cause and are as follows: Zoviflo and the Prinia Heritage Trust (IT 952/2017) referred herein as the (*"the Trust"*) concluded a Nominee Shareholders Agreement (*"the nominee agreement"*) whereby Zoviflo, as the beneficial owner of the ordinary par shares representing 80% of the entire issued share capital in the PIC, nominated the Trust to hold the shares on its behalf. As the nominee, the Trust warranted that it was the actual owner of shares, which represent 15% of the issued share capital in the PIC.
- [11] Furthermore, it is common cause that on the 26th day of March 2020 the Trust, Zoviflo and ZJ Purchase Assist Proprietary Limited (*"ZJ"*) concluded a joint venture agreement. The purpose of the joint venture was to jointly acquire the identified companies and subsequently, such other entities and properties, as the joint venture may elect to, for the purposes of building the property portfolio.
- [12] The essential issue for determination in this case is whether the nominee agreement is a standalone and independent agreement and is not interlinked

with the joint venture agreement. Put in another way, the question is whether the existence of the nominee agreement is impacted by the failure of the successful conclusion and implementation of the joint venture agreement. It is therefore plain that the answer lies in the interpretation of both agreements.

- [13] The respondents submitted that the nominee agreement was interlinked and dependent on the successful conclusion and implementation of a valid and binding joint venture agreement. Therefore, so the argument went, the nominee agreement cannot be considered and or implemented in isolation from the purpose for which it was executed. The nominee agreement was inextricably linked to the conclusion and implementation of a valid joint venture agreement and since the joint venture agreement did not come into existence, it cannot be implemented and given effect to as an agreement and on its own terms alone.
- [14] Furthermore, the respondents submitted that the deponent to the founding affidavit is deposing to the facts of which he does not have personal knowledge for he was not part of the negotiations when the parties concluded the nominee agreement. It was contended further that the signature of the deponent to the founding affidavit differs from the signature of the person who signed the nominee agreement. At the time the nominee agreement and the joint venture agreement were concluded, the deponent who now describes himself as a director of the applicant was not registered with the Companies and Intellectual Property Commission as the director of the applicant. He was only registered as director of the applicant on the 22nd of January 2022 whereas the agreements were signed on the 26th of March 2020.
- [15] The respondents contended further that a valid joint venture agreement did not come into existence since the negotiations were still on going. Although the

joint venture agreement was signed on the 26th of March 2020, it was not a final document since the first respondent was dissatisfied with some of its terms – hence the parties continued to negotiate a second joint venture agreement which in the end did not come into effect.

[16] In *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* [2002] (3) SA 435 (A) where the Court was faced with the issue of two agreements that were linked to each other said that the answer to the question whether the cancellation of one of two linked agreements resulted in the termination of the other with attendant consequences lies in the interpretation of the agreements in question.

[17] It is therefore opportune at this stage to restate the terms of both agreements which are relevant in this discussion which are the following:

“Nominee Shareholders Agreement between Prinia Heritage Trust (“the nominee”) and Zoviflo Proprietary Limited (“the beneficial owner”)

1. *The De Facto Owner is the beneficial owner of the ordinary par shares in Prinia Investment Capital Proprietary Limited (Registration Number: 2011/007246/07) (“the Company”) representing 80% of the entire issued ordinary share capital of the Company (“the Subject Shares”). The Nominee warrants that it is the actual owner of the shares, which represent 15% of the issued share capital in Company.*

2. *The De facto Owner does not wish to be reflected in the share register of the Company as the De Facto Owner of the Subject*

Shares. To this end, the Nominee has agreed to hold the Subject Shares as nominee for and on behalf of the De Facto Owner.

3. *The Nominee hereby acknowledges and agrees that notwithstanding the registration of the Subject Shares into its name, that it has no beneficial interest in and to such shares and is not entitled to receipt of any dividends and or any other distributions of whatsoever nature accruing from time to time in respect of the Subject Shares and hereby confirms that the De Facto Owner is the true and beneficial owner thereof.*

4. *In order to give effect to the provisions hereof, the Nominee hereby:*
 - 4.1 *agrees to deliver to the De Facto Owner the share certificates in respect of the Subject Shares together with a share transfer form duly signed but blank as to the date and name of the transferee;*
 - 4.2 *irrevocably and in rem suam authorises Marios Kyriacou of Kyriacou Incorporated attorneys or any of its authorised representatives, on its behalf and in its name:*
 - 4.2.1 *.....*
 - 4.2.2 *.....*
 - 4.2.3 *Undertakes to vote the Subject Shares in such manner as directed by the De Facto Owner, in writing, from time to time. The Nominee agrees and binds itself to timeously advise the De Facto Owner of any meeting (whether- by the directors or shareholders in the Company) as well as provide the De Facto Owner with full particularity regarding the items proposed in the agenda for such meetings. The Nominee irrevocably undertake to vote on*

all matters, questions or resolutions arising in such meetings as per the directions of the De Facto Owner.

7. This agreement constitutes the entire agreement between the Parties with regard to the matters dealt with herein and no representations, terms conditions or warranties express or implied not contained in this Agreement shall be binding on the Parties.

[18] The relevant terms of the joint venture agreement between the parties being PIC, ZOVIFLO and ZJ are the following:

“2. Definitions

In this agreement, the following definitions apply unless the context otherwise requires:

- 2.1 this/the Agreement means this Agreement together with any Annexures hereto;*
- 2.2 “Annexures” means all or any documents attached to or referred to in this Agreement, the contents of which will be deemed to be incorporated herein;*
- 2.3 “Commencement Date” means the date on which the last of the parties signs this Agreement;*

5. Holding Structure

5.1

5.2 The parties undertake to, simultaneously with the conclusion this Agreement, to:

5.2.1 conclude a Nominee Shareholders Agreement; and

5.2.2 constitute the Management Committee envisaged in clause 6 below;

7. *Participating Interest*

Upon formation of the Joint Venture the participating Interest of the Parties will be;

7.1 *Prinia – 15% (Fifteen Percent);*

7.2 *Zoviflo – 80% (Eighty Percent);*

7.3 *ZJ - 5% (Five Percent)*

13. *Profit Sharing*

The Parties agree that Prinia will be responsible for providing the financing for all and any acquisitions undertaken and that once Zoviflo has been reimbursed for the actual reasonable costs associated with the properties provided to enable Prinia to procure funding and once all expenses have been paid relating to such acquisition that all and any profits will be distributed amongst the Parties in accordance with their respective shareholding.

20. *Entire agreement*

This agreement constitutes the entire agreement between the Parties with regard to the matters dealt with herein and no representations, terms conditions or warranties express or implied not contained in this Agreement shall be binding on the Parties. The parties specifically record that no warranties or representations have been made by either Party, save as contained in this Agreement, including the other to enter into this Agreement.

21. *Variation and Cancellation*

No agreement varying, adding to, deleting from or cancelling the Agreement, and no waiver whether specifically or implicitly or by conduct on any right to enforce any term of this Agreement, shall be effect unless reduced to writing and signed by or on behalf of all the Parties. It is recorded that there exist no collateral and or other agreements between the parties and that this Agreement is the sole Agreement entered into by and between the Parties. ”

[19] It is now settled that, in interpreting a document, the Courts must first have regard to the plain, ordinary, grammatical meaning of the words used in the document. While maintaining that words should generally be given their grammatical meaning, it has long been established that a contextual and purposive approach must be adopted in the interpretative process.

[20] In *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) the Supreme Court of Appeal stated the following:

*“[61] It is fair to say that this Court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] All SA 262; [2012] ZSCA 13), stated that the purpose of the provision being interpreted is also*

encompassed in the enquiry. The words have to be interpreted sensibly and not have an unbusinesslike result. These factors have to be considered holistically, akin to the unitary approach.

- [21] The words used in both these agreements are plain and unambiguous. The nominee agreement is a contract between the two parties whereas the joint venture agreement involves three parties. There is nothing in the nominee agreement which links it to the joint venture agreement nor state that it is dependent on the successful conclusion and implementation of a valid joint venture agreement. Clause 7 of the nominee agreement makes it plain that the agreement constitutes the entire agreement between the parties with regard to the matters dealt with therein and that no representations, terms, conditions or warranties express or implied not contained in the agreement shall be binding on the parties.
- [22] Clause 2 of the nominee agreement sets out the purpose of the agreement being that the De Facto Owner's wish is not to be reflected in the share register of the company (PIC) as the owner of the subject shares. The nominee agreed to hold the shares in the company on behalf of the De Facto Owner and has made undertakings to act only on the directions of the De Facto Owner with regard to the subject shares. Nothing turns on whether the share certificates in respect of the subject shares and a blank but duly signed transfer form, was not delivered to the applicant in compliance with the provisions of clause 4 of the nominee agreement. In my respectful view, clause 4 of the nominee agreement is there to protect the De Facto Owner should the nominee not honour the agreement and transfer the shares. It is not a condition precedent which must be complied with before the agreement could take effect.

- [23] Nonetheless, the applicant testified that it has in its possession the share certificate of the subject shares and a blank but duly signed transfer form. It therefore does lie with the respondents that the applicant did not have to institute legal proceedings to enforce his rights instead of completing the forms and submitting them for registration as a holder of 80% shares in the PIC. The applicant has a right to choose how it wishes to enforce its rights and, in this instance, it chose the legal route.
- [24] Reliance on clause 2.2 of the joint venture agreement by the respondents is misplaced. The only reference to the nominee agreement in the joint venture agreement is in clause 5.2 which provides for the simultaneous conclusion of the nominee agreement with the joint venture agreement. Clause 2.2. provides that the contents of the documents referred to in the joint venture agreement will be deemed to be incorporated therein. That is the only clause that links the two agreements. But nowhere in both these agreements is it provided that the two agreements are inter – dependent and the failure to successfully conclude and implement a valid joint venture agreement or cancellation thereof would negatively impact on the nominee agreement.
- [25] The respondents contended that they never knew Mr Mepha, the deponent to the applicant's affidavit and that he was not a director of the applicant at the time the nominee agreement was signed. It is the unchallenged testimony of Mr Mepha that he has ratified all the actions he had taken before his name appeared in the company's register as the director. Moreover, it is undisputed that the late Mr Georgiou was the one who was the king pin and go-between in putting together the deal – hence there was no physical contact between Mr Mepha and the respondents. Furthermore, the uncontroverted testimony of Mr Mepha is that his signature has changed due to his ill health since he has suffered a stroke.

- [26] I do not agree with the contention of the respondents that when they signed the nominee agreement, they were making an offer which was presented to the applicant who, if he accepted the offer, did not communicate his acceptance thereof – thus the agreement did not come into existence. It is trite that when an offer is made it only becomes an agreement once it is accepted and the acceptance is communicated to the offeror. However, in this case, the parties had already concluded the agreement and it was then reduced in writing. Although the nominee agreement does not provide for a date on which it is to commence, it is presumed that it came into effect when the last party signed it, which Mr Mepha testified that it was signed on the 26th of March 2020.
- [27] There is no merit in the argument that the joint venture agreement was merely a working - document and that the first respondent informed the parties that he was dissatisfied with its contents – hence negotiations further continued after the signing thereof. The essence of the matter is that the parties agreed, and the joint venture agreement was reduced to writing and signed by the parties concerned. The first respondent was the first to sign the agreement followed by the other two parties. The negotiations or suggested changes to the agreement were negotiated in the form of an addendum to the joint venture agreement which addendum was not successfully concluded and implemented. The failure to successfully conclude and implement the addendum has no bearing to the nominee agreement which was concluded for a different and separate purpose.
- [28] It is apparent that both the nominee agreement and the joint venture agreement were concluded on the same day. However, each agreement records that the document embodying it is the entire agreement between the parties and may not be varied except in writing. Nowhere in the nominee agreement or the

joint venture agreement is recorded that in the event that the joint venture agreement is not successfully concluded and implemented or is cancelled for whatever reason, the nominee agreement would not be implemented. I hold the view therefore that the nominee agreement is a standalone agreement and should be implemented on its own terms.

- [29] I am unable to disagree with the respondents' counsel that where there is a dispute of fact which cannot be resolved on the papers, the Court should either dismiss the application or refer the matter to trial. However, that is not the case in this matter. The alleged dispute of fact is easily determinable and resolved in that it does not relate to the issues to be determined in this case. It is a dispute that relate to the conclusion of the joint venture agreement and its addendum which the respondents prefer to call it "the second joint venture agreement". As indicated above, the issue in this case is whether the nominee agreement is a stand-alone agreement which must be determined on its own terms. The question has been answered positively.
- [30] Counsel for the respondents urged the Court to strike out certain paragraphs in the applicant's replying affidavit which it is alleged introduce a new matter in reply. I do not intend to detain myself much on the impugned paragraphs of the applicant's replying affidavit for they relate to issues raised by the respondents in their answering affidavit which are in essence of no relevance to the matter at hand. As suggested in the alternative by the respondents, I am constrained to not consider the matters raised in those paragraphs especially since they are irrelevant to the issues in this case.
- [31] It has been decided in several cases that the privity and sanctity of the contracts must prevail. Courts have been urged that, unless the agreement is unlawful,

or it is demonstrated that it is contra bonos mores, parties must be held to their agreement.

[32] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176 (1 December 2017) the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of contracts and stated the following:

"[23] The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract."

[33] The Court continued and quoted with approval a paragraph in *Wells v South African Alumenite Company* 1927 AD 69 at 73 wherein the Court stated as follows:

"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."

[34] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others* CCT 109/19 [2020] ZACC 13 also had an opportunity to emphasized the principle of pacta sunt servanda and stated the following:

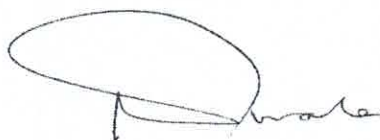
“[84] Moreover, contractual relations are the bedrock of economic activity, and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

[85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda.”

[35] I do not understand the respondents to be challenging the contents of the nominee agreement and its terms. The nominee agreement was concluded freely and voluntarily by the parties and the respondents have not demonstrated that there was fraud or that the agreement was contrary to public policy. It is my considered view therefore that the applicant has established a case against the respondents and is entitled to the relief that he seeks in terms of the notice of motion.

[36] In the circumstances, I make the following order:

1. It is declared that the applicant is the owner of 80% of the issued shares in the fourth respondent.
2. The fourth respondent is directed to issue a share certificate to the applicant, and to take all steps necessary to effect the registration of the applicant as the 80% shareholder in the fourth respondent's securities register.
3. Should the respondents refuse to take all steps necessary to issue a share certificate to the applicant and to effect the registration of the applicant as the 80% shareholder in the fourth respondent's securities register and sign all documentation required, then:
 - 3.1 The other party may sign on his/her behalf; and/or
 - 3.2 The Sheriff of the Court is hereby authorized and directed to sign all documentation and to do all things necessary on behalf of either of the parties in order to effect the registration of the applicant as the 80% shareholder in the fourth respondent's securities register.
4. The first and third respondents are ordered to pay the costs of this application, such costs to include the costs of two counsel.
5. The application is dismissed against the second respondent with the applicant to pay the costs.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 24th of July 2023

Date of Judgment: 15th of August 2023

For the Applicants: Advocate P F Louw SC
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