



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, THEMBALETHU)**

JUDGMENT

Reportable / Not Reportable

Case no: 839/2023

In the matter between:

EUGENE MARTIN EDWARD NEL

First Plaintiff

ANTHONETTA NEL

Second Plaintiff

and

JOCHEN ECKHOFF N.O. and

First Defendant

MOHAMED MAHIER TAYOB N.O

(In their capacity as provisional trustees of the insolvent
estate of J[...]V[...] D[...] M[...])

J[...] P[...] V[...] D[...] M[...]

Second Defendant

NUMIWELL INVESTMENTS (PTY) LTD

Third Defendant

CS HENTIQ 1044 (PTY) LTD

Fourth Defendant

JOANIES PROPERTIES CC

Fifth Defendant

J[...] V[...] D[...] M[...] BELEGGINGS CC

Sixth Defendant

GOUSSARD & ASSOCIATES INCORPORATED

Seventh Defendant

Coram: Honourable Justice HM Slingers

Heard: 24 November 2025

Delivered: 29 January 2026

This judgement is delivered electronically by circulation to the parties' legal representatives' email addresses and will be deemed to have been delivered on 29 January 2026.

ORDER

- (a) the plaintiffs are entitled to the payment of the amount of R2 million, together with any accrued interest, which amount was deposited into the trust account of Raubenheimers Attorneys by the third defendant in terms of the court orders dated 9 September 2022 and 1 June 2023;
- (b) the costs of suit, save for the costs of the two applications in procuring the orders of 9 September 2022 and 1 June 2023, shall be borne by the second defendant on scale C, which costs shall include the costs of two counsel where so employed; and
- (c) the cost of the two applications in procuring the orders of 9 September 2022 and 1 June 2023 shall be borne by the first and second defendants jointly and severally, the one paying to absolve the other, on scale C, which costs shall include the costs of two counsel where so employed.

JUDGMENT

INTRODUCTION

- [1] In this action the plaintiffs seek a declaratory order that they are entitled to payment of the amount of R2 million, together with any accrued interest thereon.

- [2] These trial proceedings are only opposed by the second defendant as the plaintiffs seek no substantive relief against the third to fifth defendants and the first defendant filed a notice to abide.

TIMELINE

- [3] During 2016, the plaintiffs concluded an agreement of sale of shares in terms whereof they purchased 33.3% of the first defendant's company, Century Western Cape (Pty) Ltd at a purchase price of R2 million rand. This sale agreement made provision for the purchase price to be paid into the account of the fifth defendant, Joanies Properties CC.
- [4] On 23 January 2017, the first defendant and the plaintiffs concluded an addendum to the agreement of sale of shares. However, payment would still be paid into the bank account of Joanies Properties CC, the fifth defendant.
- [5] The first payment installment was paid into the account of the fifth defendant but the subsequent payments were made into a different bank account. However, it is not disputed that the full purchase price of R2 million was paid. Notwithstanding payment of the agreed purchase prices, the plaintiffs were not given the 33.3 percent shares in the first defendant's company.
- [6] On 23 May 2017, the second defendant emailed the first plaintiff wherein she proposed that the plaintiffs be refunded the amount of R2 million. She stated *inter alia* that:
- '... My eerlike opinie is dat ons 'n transaksie moet uitwerk wat jul tot geen nadeel sal strek vir die geld wat jy reeds belê het en as vriende uitmekaar elkeen ons eie padjie gaan.'*

[7] On 22 January 2018, the plaintiffs wrote to the first and second defendants wherein they expressed understanding that they (the first and second defendants) did not, at that stage, have the funds to repay them the amount of R2 million. In an effort to accommodate the first and second defendants the plaintiffs requested that a sale agreement in respect of certain erven held by the fourth defendant, CS Hentiq 1044 (Pty) Ltd be drafted as soon as possible in lieu of the repayment of R2 million. This proposal did not materialise.

[8] The second defendant instituted divorce proceedings against the first defendant and on 3 February 2020 they concluded a settlement agreement. In terms of the divorce settlement agreement:

- (i) the first defendant ceded sixty percent of the future proceeds of his remaining fifty one percent shares he held on date of signature of the agreement in CS Hentiq 1044 (Pty) Ltd to the second defendant and will sign the necessary cession document within 7 days after signature of the divorce settlement agreement. The divorce settlement agreement further provided that '*Defendant* (the first defendant) *shall immediately after signature hand the cession document over to Plaintiff.*¹' (own emphasis);
- (ii) the first defendant ceded to the second defendant the right to claim fifty percent of any capital amounts due, costs due and/or loan accounts due to him by CS Hentiq 1044 (Pty) Ltd on date of signature of the divorce settlement agreement and agreed to sign the necessary cession document within 7 days after signature of the divorce settlement agreement. The first defendant also agreed to immediately, after signature, hand the cession document over to the second defendant; and

¹ The second defendant was the plaintiff in the divorce action.

- (iii) the first defendant ceded to the second defendant the right to claim fifty percent of the outstanding amount of R13 128 000.00 due to him as a result of the sale of his forty nine percent share to the third defendant. The first defendant undertook to sign the necessary cession document within 7 days after signature of the divorce settlement agreement and to immediately thereafter, hand over the cession document to the plaintiff.

[9] On 2 August 2021 the plaintiffs and the first and fifth defendants reached a settlement agreement, which was made an order of court on 3 September 2021. This settlement agreement provided that:

- '1. The first defendant [J[...] V[...] D[...] M[...]] will pay the Plaintiffs the amount of R2, 000, 000.00.*
- 2. Each party to pay their own legal costs.*
- 3. Interest is payable on the amount of R2, 000,000.00 from 1 February 2022 at the rate of 6% per annum.*
- 4. Payment will be made upon final settlement of the disputes between the first defendant and Numiwell Investments (Pty) Limited in their capacities as shareholders of CS Hentiq 1044 (PTY) Ltd.*
- 5. The first and second defendants herewith cedes a portion of their claim against Numiwell Investment / CS Hentiq 1044 (Pty) Limited in the amount of R2, 000.000.00 plus interest, if payable in terms of clause 3 above, in favour of the plaintiffs.²*

[10] The settlement agreement was signed by V[...] D[...] M[...] and J[...] P[...] V[...] D[...] M[...], the second defendant.

² The second defendant referenced is Joanies Properties CC.

[11] On or about 25 July 2022, V[...] D[...] M[...] and Numiwell Investments (Pty) Limited (**'Numiwell'**) settled their disputes. Thus, in terms of the settlement agreement of 2 September 2021, V[...] D[...] M[...] had to pay the plaintiffs the amount of R2 million. This was not done. The plaintiffs aver that V[...] D[...] M[...] intentionally failed to inform them that he and Numiwell had settled their dispute. In response to this averment, the second defendant pleaded that she had no knowledge, could not admit or deny same and therefore put the plaintiffs to the proof thereof.³

[12] In terms of the settlement agreement reached between V[...] D[...] M[...] and Numiwell:

- (i) V[...] D[...] M[...] would transfer all his shares in CS Hentiq 1044 (PTY) Ltd (**'CS Hentiq'**) to Numiwell;
- (ii) V[...] D[...] M[...] would cede all his loan accounts in CS Hentiq to Numiwell;
- (iii) the reciprocal payment by Numiwell to V[...] D[...] M[...] for the transfer of his shares and loan accounts to Numiwell was R5 million;
- (iv) this payment was to be made to the second defendant.

[13] The plaintiffs aver that in accordance with the settlement agreement made an order of court on 3 September 2021, the first defendant was divested of any right to deal with the R2 million of the R5 million reciprocal payment. However, the second defendant challenges the validity and enforceability of the cession relied upon by the plaintiffs for payment of the R2 million on the basis that it constitutes a splitting of the one debt.

³ Paragraph 5.6 of the particulars of claim on page 10 of the record read with paragraph 7 of the second defendant's plea on page 42 of the record.

- [14] In the alternative, the plaintiffs assert that V[...] D[...] M[...] acted *mala fide* to defraud them of the R2 million resulting in them suffering damages in the amount of R2 million.
- [15] On 9 September 2022, the plaintiffs obtained a *rule nisi* in terms whereof, the third defendant was restrained and interdicted from paying the amount of R2 million from the amount of R5 million to the second defendant and was directed to pay it into an interest-bearing trust account of Raubenheimers Inc Attorneys, 6[...] C[...] Street, George. On 1 June 2023 the *rule nisi* was confirmed pending the outcome of the action or application for a declaratory order to be instituted by the plaintiffs pertaining to their entitlement to payment of R2 million.
- [16] These proceedings pertain to the dispute between the parties as to whether the plaintiffs or the second defendant is entitled to the amount of R2 million which has been deposited into the trust account of Raubenheimers Attorneys, George.⁴

THE EVIDENCE

- [17] The plaintiffs called two witnesses to testify on their behalf. The first witness called was Mr Jaques Gouws (**'Gouws'**). He testified that he knows the first and second defendants and that he is a director of the third defendant, Numiwell which is currently the sole shareholder of CS Hentiq. Gouws identified the sale of shares and shareholder agreement entered into between J[...] V[...] D[...] M[...] as the seller, Numiwell as the purchaser and CS Hentiq as the company on 19 March 2018. In terms of this agreement, Mr J[...] V[...] D[...] M[...] sold 49 percent of his shares to Numiwell. The second defendant was not involved in this transaction at all.

⁴ Paragraph 4.3 of the particulars of claim on page 9 of the record read with paragraph 2 of the second defendant's plea on page 40 of the record.

[18] Gouws was taken to paragraph 19 of the said of sale of shares and shareholder agreement which provides that:

'19 ASSIGNMENT CESSION AND DELEGATION

The Parties shall not be entitled to assign, cede, pledge, sub-lease, make over, delegate or transfer any rights, obligations, title or interest acquired in terms of this Agreement, in whole or in part, to any other party or person, without the prior written consent of the other Parties.'

[19] Gouws testified that at no time was any written permission given to the first defendant in terms of clause 19 of the sale of shares and shareholder agreement. This evidence was not disputed nor challenged during cross-examination conducted on behalf of the second defendant.

[20] In the absence of any cross-examination on this aspect, it can be accepted that the second defendant did not dispute this evidence.⁵

[21] Gouws further testified that he was present at court when the settlement agreement resolving the disputes between V[...] D[...] M[...] and Numiwell was reached. He testified that the payment of R5 million in terms of this agreement was initially to be made to J[...] V[...] D[...] M[...]. However, after the draft agreement was discussed between the attorneys, the request was made that payment should rather be made to the second defendant. The recipient of the payment was of no concern to Gouws who was only concerned with the culmination of the settlement agreement.

⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC)

[22] Gouws went on to testify that the third defendant, Numiwell had no interest in paragraph 4.1 of the settlement agreement which is the so-called gagging provision.

[23] Gouws' evidence that the first and second defendants continue to share the same residential address post their divorce was left unchallenged. Gouws was also taken the divorce settlement agreement between the first and second defendants. Clauses 3.3 and 3.4 of the divorce settlement agreement provides that:

'3.3 CS Hentiq 1044 (Pty) Ltd

3.3.1 Defendant hereby cedes 50% of the future proceeds of it's remaining 51% shares that he hold on date of signature of this agreement in CS Hentiq 1044 (Pty) Ltd to Plaintiff and will sign the necessary cession document within 7 days after signature of this ... agreement. Defendant shall immediately after signature hand the cession document over to Plaintiff.

3.3.2 Defendant will furthermore cede to Plaintiff the right to claim 50% of any capital amounts due, costs due and/or loan accounts due to him by CS Hentiq 1044 (Pty) Ltd on date of signature of this agreement and sign the necessary cession document within 7 days after signature of this Settlement Agreement. Defendant shall immediately after signature hand the cession document over to Plaintiff.

3.4 Numiwell Investments (Pty) Ltd

Defendant hereby cedes to Plaintiff the right to claim 50% of the outstanding amount of R13 128 000.00 due to him as a result of the sale of his 49% share to Numiwell Investments (Pty) Ltd, Defendant shall sign the necessary cession document within 7 days after signature of this Settlement Agreement and immediately thereafter hand the cession document over to Plaintiff.'

- [24] The divorce settlement agreement also contained an amendment clause which provides that no waiver, addition, amendment of any nature would be of any force and effect unless it was ordered by a competent court or reduced to writing and signed by both parties. The divorce settlement agreement furthermore provided that that it constituted the full settlement between the first and second defendants.
- [25] It is clear from the wording of clauses 3.3 and 3.4 of the divorce settlement agreement that parties intended to reduce the cessions referred to therein to writing and that the cessionary documents were to be signed within 7 days after signature of the divorce settlement agreement and thereafter handed to the second defendant. The divorce settlement agreement was signed on 3 February 2020. Consequently, the cession of J[...] V[...] D[...] M[...]’s interests in CS Hentiq had to be effected within 7 days thereafter.
- [26] Gouws testified that the second defendant was not a shareholder of CS Hentiq nor did she have a loan account in her favour. Thus, there was no reason for the R5 million to be paid into her account. He confirmed that when the settlement agreement dated 25 July 2022 was reached at court and which was entered into between J[...] V[...] D[...] M [...], J[...] V[...] D[...] M[...] Beleggings CC and CS Hentiq, Numiwell, Joanies Properties CC and J[...] P[...] V[...] D[...] M [...], he was represented by attorney Magda Van Biljon.

[27] The original agreement made provision that payment would be to V[...] D[...] M[...] but subsequently their attorneys requested that payment be made to the second defendant. Numiwell did not have an issue with it. During cross-examination, Gouws confirmed that the change in the recipient of the money was a last minute development which required a handwritten correction. This evidence was not challenged nor was a contrary version put to Gouws.

[28] During cross- examination, Gouws testified that he only became aware of the cession agreement in favour of the plaintiffs upon receipt of the application in the urgent application. However, he had no objections to paying the amount due in two amounts and he was not prejudiced thereby.

[29] Gouws was also taken to the answering affidavit filed in response to the urgent interdict application issued under case number 348/2022 where Mr V[...] D[...] M[...] stated under oath that:

'108. It seems that the Applicants are trying to portray me as a man of straw. With respect, it seems that the Applicants are trying to launch a whole range of applications and actions in one single application, to prove that I cannot pay the R2, 000, 000.00, I humbly submit that this is not proper.'

V[...] D[...] M[...] deposed to his answering affidavit on 10 October 2022. Gouws was also taken to the *nulla bona* return issued under case number 18282/2019 in respect of the writ of execution which was served on J[...] V[...] D[...] M[...] on 8 May 2023. The *nulla bona* return recorded that J[...] V[...] D[...] M[...] owned no valuable assets that could satisfy the judgment debt of R2 million.

[30] In his answering affidavit, V[...] D[...] M[...] explicitly stated that there was no connection between himself and the second defendant.

- [31] Gouws testified that Numiwell had no objections to splitting the payment of R5 million and confirmed that it had filed a notice to abide in those legal proceedings.
- [32] During cross examination, Gouws testified that the R2 million was paid into the trust account as a result of being directed to do so by a court order. During re-examination, Gouws confirmed that at all relevant times Numiwell was represented by Ms. Van Biljon of the law firm Savage and Jooste Attorneys. He was also referred to correspondence dated 23 August 2022 addressed to Ms. Van Biljon which noted that she would recall that the separate action between the first plaintiff (Mr Nel) and V[...] D[...] M[...] were settled in terms of a settlement agreement dated 2 September 2021. It furthermore referenced the knowledge of Mr Gouws of the action instituted by the first plaintiff against V[...] D[...] M[...] and that their respective clients had various discussions in pertaining hereto.
- [33] Mr Eugene Martin Edward Nel, the first plaintiff was the second witness to testify in support of the plaintiffs' case.
- [34] Nel testified that he knows the first and second defendants who were married but who are now divorced. It was clear from the documents to which Nel was taken in the trial bundle that although they have divorced, the first and second defendants still reside on the same premises.
- [35] Nel testified that V[...] D[...] M[...] was sequestrated at his instance.
- [36] Nel testified that the plaintiffs agreed to purchase 33.3 percent of the first defendant's company for an amount of R2 million rand and went on to identify this sale agreement concluded on 5 August 2016 at George. This agreement recorded that the plaintiffs were the purchasers and that V[...] D[...] M[...] was the seller.

- [37] In terms of the agreement, payment would be made into the bank account of Joanies Properties CC. Nel furthermore identified the addendum to the sale agreement and testified that the original agreement was amended to reflect a change in the purchase price and method of payment. It was not disputed that the purchase price was paid in installments, with the first payment being made into the account of Joanies Properties CC and the subsequent payments being made into a different bank account.
- [38] Nel further testified that they had not received the shares for which they paid. On the contrary, he testified that things became sour and they had regard to the exit clause as they wanted to get their money back.
- [39] He testified that the second defendant is also known as 'Kotie'. Kotie sent email correspondence to him on 23 May 2017 to which he responded on the same day. In her correspondence Kotie proposed that the Nels be refunded their money and that each party then go their own way. Nel accepted this proposal.
- [40] On 22 January 2018, the second plaintiff sent email correspondence to the first and second defendants. Wherein she noted that they had to refund them their R2 million but that they understood that the first and second defendants did not have that sum available at that specific stage. In an attempt to accommodate them, the plaintiffs proposed a sale agreement for the purchase of certain erven held by CS Hentiq.
- [41] It was not disputed that the contract was cancelled and that the plaintiffs were not refunded their money they paid as the purchase price.
- [42] The matter resulted in litigation and on the day of the trial, Nel's attorney asked him if he was prepared to settle out of court, to which he agreed. This resulted in a settlement agreement being drafted. While it appeared on paper as if the

disagreement had been settled, in reality it had not been as the plaintiffs had not yet received their money.

[43] Although he was not informed that V[...] D[...] M[...] and Numiwell had settled their dispute, he had learnt thereof which caused him to contact his attorney to find out what was happening. It was at this stage that he was advised to take immediate action as they only had a few days to object. This resulted in the interdict proceedings resulting in the granting of the *rule nisi* which was later confirmed.

[44] During cross examination, Nel testified that to him Joanies Properties CC and V[...] D[...] M[...] were part of one entity. Payment was made into Joanies Properties CC's account because V[...] D[...] M[...] did not have a bank account and requested that the money be paid into that bank account. He saw no harm in that request.

[45] Mr Nel was admittedly a nervous witness but impressed as an honest witness who gave his evidence in a clear and consistent manner.

[46] The plaintiffs closed their case after Nel's testimony.

[47] The second defendant closed her case without taking the witness stand and without calling any witnesses.

THE LAW

[48] As the plaintiffs' main claim is for declaratory relief the court must undertake a two-stage inquiry. Firstly, it must ascertain whether the plaintiffs have satisfied the court that they have an interest in an existing or contingent right or obligation.

Should this inquiry be answered positively, then the court has to consider whether this is a case where the court should exercise its discretion favourably under section 21(1)(c) of Act 10 of 2013.⁶

[49] As stated in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*⁷ the grant of declaratory orders is discretionary and flexible. When determining whether or not to grant a declaratory order, a court is required to consider all the relevant circumstances. This consideration must be done in a manner which promotes the protection and enforcement of our Constitution and its values.

[50] Therefore, the right a party seeks to be declared in his favour must be acknowledged and enforceable in law.

[51] The second defendant admits that there is a dispute between the plaintiffs and the second defendants in respect of the R2 million deposited by Numiwell into the trust account of Raubenheimers Attorneys. However, she argues that the cession relied upon by the plaintiffs is unenforceable as it constitutes an impermissible splitting of the debt without the consent of the debtor. Secondly, the second defendant pleaded that the payment of R5 million by Numiwell to her in terms of settlement agreement is not subject to the settlement agreement relied upon by the plaintiffs.

[52] As the second defendant's defence is that the cession relied upon by the plaintiffs is invalid and unenforceable because it amounts to splitting of a debt, she would have to establish such splitting.

[53] Gouws' evidence that no consent was requested in accordance with clause 19 of the sale of share agreement was not disputed.

⁶*Pasiya and Others v Lithemba Gold Mining (Pty) Ltd and Others* 2024 (4) SA 118 (SCA)

⁷ 2005 (2) SA 359 (CC)

[54] In *Paiges vs Van Rhyn Gold Mines Estates Ltd*⁸ the court held that:

‘the stipulation against cession is part and parcel of the agreement creating the right, and the right is limited by the stipulation. The observation that the debt is pars patrimonii and can therefore be ceded in spite of the agreement likewise loses sight of this consideration.’

[55] Thus, any cession contrary to a contractual stipulation against cession is without any legal effect.

[56] Further, clothing the cession with legal validity when it was executed contrary to a contractual stipulation against it would offend against the sanctity of contract as recognised in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*⁹

[57] Thus, any cession in contravention of clause 19 would be without any legal effect.

[58] It is clear from the wording of the divorce settlement agreement that the first and second defendant intended the cessions referred therein to be in writing and that they were conditional. These cessionary documents were not discovered. Nor was it put to either Gouws or Nel that the cessions referenced in the divorce settlement agreement were recorded in writing and that the formalities pertaining thereto, as set out in the divorce settlement agreement were complied with.

[59] Paragraph 6.6 of the particulars of claim expressly states that the cessions contained in the divorce settlement agreement were conditional and that these

⁸ 1920 AD 600 at 617

⁹ 2020 (5) SA 247 (CC) at paragraph 84

conditions were never complied with. In responding hereto, the second defendant merely pleaded a bare denial.¹⁰

[60] Cession is the bilateral juristic act in terms of which a right is transferred by agreement between the transferor and the transferee. While no formalities are generally required for the act of cession, the parties may agree on formalities required to render the cession valid.¹¹ In the divorce settlement agreement the parties agreed to record the cession in writing and for the cessionary document to be handed to the second respondent. On the evidence presented, these formalities were not complied with. Therefore, the divorce settlement agreement contained an undertaking to cede rather than actual cessions.¹²

[61] In the circumstances it cannot be found that the second defendant established the impermissible splitting of a debt.

[62] Notwithstanding my finding that the second defendant has failed to show an impermissible splitting of a debt, I deal with the case law on this aspect.

[63] In *Lief, N.O. v Dottmann*¹³ the Appellate Division (as it was then known) settled the longstanding uncertainty as to whether a single debt could, without the consent of the debtor, validly be split among two or more cessionaries, or among the cedent and one or more cessionaries. The rationale for this was set out in *Kotsopoulos v Bilardi*¹⁴ as follows:

‘... “the splitting” of the debt would impose upon the debtor a greater burden than that to which he would otherwise be subject in then he would be obliged to make separate payments to different creditors and, if unable to pay, could be subjected

¹⁰ Paragraph 13 of the second defendant’s plea on page 44 of the pleadings bundle read with paragraph 6.6 of the particulars of claim on page 12 of the pleadings bundle

¹¹ *Carlswald & Another v Brews* 2017 (5) SA 498 (SCA)

¹² *ibid*

¹³ 1964 (2) 252 (AD) at 275

¹⁴ 1970 (2) SA 391 (C)

to separate actions, and the costs thereof, at the suit of different creditors. This cannot be allowed without the consent of the debtor.’

[64] The test for validity of a split cession is prejudice to the debtor.¹⁵ This was emphasised in *The Liquidators of Tirzah (Private) Limited and Other Companies v Merchant Bank of Central Africa Limited and Others*¹⁶ the Supreme Court of Zimbabwe held that a cession which results in a splitting of debts could, at the instance of the debtor who proves that he is prejudiced by the cession, be declared invalid and unenforceable. Thus, the test is not the potential prejudice apparent at the time of the grant of the cession but whether the cession results in prejudice to the debtor.

[65] The respondents in that case, without conceding that there was a splitting of debts, argued that a splitting of debts would render the cession unenforceable as opposed to invalid in that the debtor could consent to it at a later date. Furthermore, the debtors having paid the debts, waived their right to question the validity of the cessions and that it could not be raised by the appellants as representatives of the cedents.

[66] Support for this view can be found in *Anglo African Shipping Co (Rhodesia) (Pvt) Ltd v Badderey and Another*¹⁷ where the splitting of the cession occurred without the debtor’s consent. In such circumstances, the debtor is entitled to raise the question of prejudice of such cession and may thereby render the cession invalid and unenforceable.

¹⁵ *Spies v Hansford and Hansford Ltd* 1940 TPD 1 at 8 and 9; *Segal and Another v Segal and Others* 1977 (3) SA 247 (C) at 252F

¹⁶ *Liquidators of Tirzah (Pvt) Ltd., Belmont Leather (Pvt) Ltd., G & D Shoes (Pvt) Ltd., P B Shoes (Pvt) Ltd. (all in liquidation) v Merchant Bank of Central Africa Ltd. and Others* (Civil Appeal 293 of 2000; SC 123 of 2002) [2003] ZWSC 123 (9 March 2003)

¹⁷ 1977 (3) 236 (R)

[67] Evins v Shield Insurance Co Ltd¹⁸ the court held that:

‘Ordinarily, a creditor cannot divide and separate or split such a rights of action or debt without the consent of the debtor. The reason is the possibility that it may render the debtor’s position more burdensome by causing him prejudice, hardship or inconvenience.’ (own emphasis)

[68] At the end of the hearing the parties were invited to provide supplementary notes on *inter alia* whether it was the cedent’s or the cessionaries’ obligation to obtain the debtor’s consent when a single debt is ceded to more than one cessionary, resulting in splitting of the debt. The plaintiffs’ legal representative accepted the invitation while the second defendant’s legal representatives elected not to.

[69] The plaintiffs’ counsel argued that:

‘... where a debtor’s prior consent is required, the only nexus which exists at the time, is between the creditor/cedent and the debtor; there is no nexus between the potential cessionaries and the debtor.

For that reason, it would ordinarily be the obligation of the cedent to obtain the required consent, because without such consent, it cannot validly cede the right – for which it ordinarily would receive a quid pro quo.’

[70] Therefore, it follows that it was for the first defendant or the second defendant in her capacity as a representative of the fifth defendant to obtain the consent of the third defendant, which they failed to do. Alternatively, the first defendant or the second defendant in her capacity as a representative of the fifth defendant were obliged to notify the plaintiffs of the envisaged settlement on the cedents. Not only did the first defendant or the second defendant in her capacity as a

¹⁸ 1980 (2) SA 814 (A) at 827

representative of the fifth defendant fail to do so, but they also incorporated a gagging provision in the settlement agreement which settled the disputes between the first and third defendants.

[71] The argument that it fell to the first defendant or the second defendant in her capacity as a representative of the fifth defendant to obtain the consent of Numiwell cannot be faulted and must be upheld. Similarly, the argument that it was the first defendant and/or the second defendant in her capacity as a representative of the fifth defendant to, at the very least, inform the plaintiffs of the envisaged settlement with the fifth defendant has merit and must be upheld.

[72] As stated above, the rationale against splitting of debts is to protect the debtor. Gouws' evidence that Numiwell suffered no prejudice was not contested and is therefore accepted.

[73] I agree with the arguments presented in *The Liquidators of Tirzah (Private) Limited and Other Companies v Merchant Bank of Central Africa Limited and Others* and the view expressed in *Anglo African Shipping Co (Rhodesia) (Pvt) Ltd v Badderey and Another* that it is for the debtor to raise the validity and enforceability of cession which resulted in the splitting of a debt without its consent. This view is consistent with the decisions of *Lief, N.O. v Dottmann* and *Evins v Shield Insurance Co Ltd* and is consistent with the rationale against splitting, which exists for the benefit of the debtor, necessitating his or her consent. It is not for the creditor/ cedent, who acts with full knowledge and either intentionally or negligently omits to obtain the necessary permission for splitting, to then rely thereon to his/her advantage. It is the debtor who is entitled to raise the question of prejudice and invalidity, this follows from the fact that the principle against splitting of cessions is to protect the debtor.

[74] In the present case, V[...] D[...] M[...] and the second defendant arranged their affairs as the creditors to result in a splitting of debts, they failed to inform the plaintiffs hereof and failed to obtain permission of the debtor (Numiwell). The second defendant now seek to take advantage of these failures to the prejudice of the plaintiffs. This underhanded conduct offends against the rule of law and cannot be endorsed and/or supported by the court.

FRAUD

[75] I turn now to the plaintiffs' alternative claim that the amount of R5 million, being the reciprocal payment for the sale of the first defendant's shares in the third defendant to the second defendant, was done *mala fide* with the intent to defraud and to deprive the plaintiffs of the payment of the R2 million due to them.

[76] The uncontested evidence is that when the settlement agreement between the first and third defendant was reached, payment would have been made to the first defendant. For reasons which were not disclosed, the settlement agreement was amended to allow for payment to the second defendant. This required a handwritten amendment, as reflected in in paragraph 3.4 of the settlement agreement.¹⁹

[77] The second defendant elected to present no evidence to explain why she was entitled to payment of R5 million. This election must be evaluated against the uncontested evidence that she had no shares in CS Hentiq and that she held no loan account with CS Hentiq in her favour. In correspondence dated 31 August 2022, Gousard attorneys offered an explanation as to why the R5 million had to be paid to the second defendant. This letter does not constitute evidence and has no evidentiary weight.

¹⁹ Page 44 of the trial bundle (settlement agreement made an order of court on 25 July 2022)

[78] The first and second defendants failed to furnish any explanation why they failed to inform the plaintiffs of the settlement agreement reached between the first and third defendants. Paragraph 4 of the settlement agreement reached between the plaintiffs and the first, fourth and fifth defendants necessitated such an explanation. While the second defendant was not *per se* a party to this settlement agreement, she was fully aware of the contents thereof and the obligations arising therefrom and was a signatory to the settlement agreement.

[79] Furthermore, it was the second defendant who proposed that the plaintiffs be refunded their payment of R2 million.

[80] The urgent interdict application was opposed by the first and second defendants. A possible reason why the amount of R5 million was paid to the second defendant and not the first defendant can be gleaned from paragraphs 24 and 41.3 of the first defendant's answering affidavit where he states that:

'24. Secondly, the Applicants cannot claim R2, 000, 000.00 from the R5, 000,000.00 awarded to the 2nd Respondent, as stated above the Applicants have no claims whatsoever against the 2nd Respondent, accordingly, the Applicants can only claim R2, 000, 000.00 from me in terms of the 2021 Court Order.'

*'41.3 Thirdly, the 2nd Respondent and I divorced in 2020. The Court Order dated 5 August 2022 awarded R5, 000,000.00 only to the 2nd Respondent. I am not going to receive any amount(s) in terms of the 2022 Order.'*²⁰

[81] The first defendant further stated that he and the second defendant are divorced and are not connected in anyway. However, both he and the second defendant

²⁰ See also paragraph 54 on page 102 of the trial bundle

who filed a confirmatory affidavit, failed to explain why or how they continue to reside on the same premises.²¹

[82] The first defendant also stated under oath that he is not a man of straw. This denial appears to have been falsely made when considered within the context of the subsequent *nulla bona* return and his subsequent liquidation.

[83] I am satisfied that the evidence presented shows the payment of the R5 million to the second defendant was without a legitimate reasons, was *mala fide* and done with the fraudulent intent to deprive the plaintiffs of the payment of the R2 million due to them by the first defendant.

[84] The second defendant is not an innocent bystander who was ignorant of the actions of J[...] V[...] D[...] M[...]. On the contrary, the evidence shows that she was at all times aware of the status of the various claims and settlements against J[...] V[...] D[...] M[...]. She is the only member of Joanies Properties CC, which was the second defendant in the action instituted by the plaintiffs for payment of the R2 million as restitution for payment made to V[...] D[...] M[...]. Furthermore, payment of the R2 million was to be made into the bank account of Joanies Properties CC. This request could not have been made without the second defendant's knowledge and/or consent. The evidence established that the second defendant was fully aware of the facts resulting in the litigation between the plaintiffs and Joanies Properties CC and V[...] D[...] M[...] as well as the terms, impacts and reasons for the settlement agreement dated 3 September 2021.

[85] As stated in *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another*²²

²¹ Paragraph 1 of his answering affidavit on page 95 of the trial bundle and paragraphs 2.1 and 2.2 of the particulars of claim on page 6 of the pleading bundle read with paragraph 1 of the second defendant's plea on page 40 of the pleadings bundle.

[29] It is trite law that fraud is conduct which vitiates every transaction known to the law. In affirming this principle, this court, in Esorfranki Pipelines (Pty) Ltd referred with approval to Lord Denning's dicta in Lazarus Estates Ltd v Beasley, when he said:

"No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever"

[86] Therefore, the second defendant is not entitled to the R2 million.

[87] After considering all the evidence and the applicable legal principles, I am satisfied that the plaintiffs have established that they have an interest in an existing right or obligation, i.e the R2 million which is due and payable to them by the first defendant and that this is a case where the court should exercise its discretion favourably as the amount of R5 million was paid to the second defendant to defraud and prevent the plaintiffs from receiving the said payment of R2 million.

[88] Therefore, I make the following orders:

- (i) the plaintiffs are entitled to the payment of the amount of R2 million, together with any accrued interest, which amount was deposited into the trust account of Raubenheimers Attorneys by the third defendant in terms of the court orders dated 9 September 2022 and 1 June 2023;

- (ii) the costs of suit, save for the costs of the two applications in procuring the orders of 9 September 2022 and 1 June 2023, shall be borne by the second defendant on scale C, which costs shall include the costs of two counsel where so employed; and
- (iii) the cost of the two applications in procuring the orders of 9 September 2022 and 1 June 2023 shall be borne by the first and second defendants jointly and severally, the one paying to absolve the other, on scale C, which costs shall include the costs of two counsel where so employed.

HM SLINGERS
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff:	Adv. JY Claasen SC and Adv. GP van Rhyn
As instructed by:	Raubenheimers Attorneys
For the Second Defendant:	Adv. DL van der Merwe
As instructed by:	Goussard & Associates Inc.