IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION: PIETERMARITZBURG

APPEAL CASE NO: AR214/24
CASE NO: D8328/2021

In the matter between:

SHAUN DOUGLAS DIXON	**APPLICANT**
and	
LURISTAX (PTY) LTD	**FIRST RESPONDENT**
SANDILE RADEBE	**SECOND RESPONDENT**
COMMISSIONER OF COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**THIRD RESPONDENT**

ORDER

On appeal from: KwaZulu-Natal Division, Pietermaritzburg (Laing AJ sitting as a court of first instance):

1. The appeal is upheld.
2. The first and second respondents' cross appeal is dismissed.
3. The order made by the court *a quo* is set aside, and it is replaced with the following order:

1. The second respondent is directed to do all things necessary to transfer 20% of his shareholding in the first respondent to the applicant;
2. The first and second respondents are directed to deliver to the applicant the audited financial statements/accounting records of the first respondent from 2015 to date which records shall include the bank account statements of the first respondent for the aforementioned period; and
3. The second respondent is directed to pay the costs of the application.'

4. The first and second respondents are ordered to pay the costs of the appeal, the cross appeal, and the costs of the application for leave to appeal, jointly and severally, the one paying the other to be absolved, such costs to include the costs of consequent upon the employment of two counsel on scale C.

JUDGMENT

Pillay AJ (**Mngadi J and Chithi J** concurring)

Introduction

[1] This is an appeal against a judgment of Laing AJ, in which he dismissed the appellant's application with costs. The appeal by the appellant is with leave of the court *a quo*. The appellant launched the application seeking the transfer of 20% of the shares in the first respondent and that he be provided with access to the first respondent's financial records. The court *a quo* dismissed the application on the basis that the appellant's claim had prescribed.

[2] The first and second respondents cross appealed against the conduct of the proceedings in the court *a quo* as well as against certain findings made by the court *a quo*.

The application for transfer of shares

[3] The appellant, Mr Shaun Dixon, a logistic executive, launched an application claiming a transfer of a 20% shareholding arising from an alleged oral agreement between himself and the second respondent, Mr Sandile Radebe. The second respondent was at all material times the sole director of the first respondent, Luristax (Pty) Ltd.

[4] The appellant alleged that an oral agreement was concluded on 25 January 2016, when the second respondent met with the appellant and made the offer to transfer a 20% of his shareholding to the appellant. The only term of the oral agreement was that the second respondent would transfer 20% of his shareholding in the first respondent to the appellant subject to the condition that the appellant would work for the first respondent for six months without remuneration. The appellant accepted the offer and it was common cause that he was employed for more than six months without having received remuneration from the respondents.

[5] It follows that ownership of the shares in question remained vested in the second respondent and could only pass upon fulfilment of the suspensive condition being the appellant's completion of the six months employment without remuneration. The respondents have not disputed the appellant's claim that he would only received his first salary in September 2016, being three months after the date when he was supposed to have been paid his first salary. The appellant alleged that notwithstanding the extension of the period of employment by three months, that upon completion of the first six months, that such period constituted complete payment for the 20% shareholding and that he complied with the terms of the oral agreement. The appellant alleges that up until 2017, the second respondent had still not attended to transfer the appelant's shares in the first respondent, which led the appellant to reminding the second respondent to do what was necessary to transfer the shares to the appellant.[1]

[6] The respondents opposed the appellant's claim contending, firstly, that there was a dispute of fact regarding the oral agreement, and that oral evidence was required to arrive at a decision. The respondents further alleged that the appellant had agreed to be employed for six months without remuneration because he was

[1] The papers, volume 1, founding affidavit, paras 22 and 24, at 13.

embroiled in a dispute with his former employer, Grindrod. The respondents' version was to the effect that the appellant claimed for wrongful dismissal and damages, and that he did not want to be prejudiced in the prosecution of that claim, therefore relinquished any payment for six months. The respondents have not explained how the payment of remuneration would have resulted in prejudice to a claim for damages against the appellant's previous employer.[2] There is no indication that any of the agreements, whether that contended for by the appellant, or the consultancy agreement alleged by the respondents was required to be reduced to writing.

[7] The respondents also contend that the discussions between the second respondent and the appellant were only proposals for the transfer of shares and in the event that an agreement is found to exist, that the appellant's claim had prescribed. In response, the appellant alleged that the second respondent remained silent regarding the content of the emails, where second respondent either expressly or tacitly acknowledged his indebtedness to the appellant, which acknowledgment interrupted the running of prescription in terms of s 14 of the Prescription Act 68 of 1969.

[8] This was in essence the crux of the versions placed before the court *a quo*. The court *a quo* considered the respective versions and found that there was an agreement that the appellant would work for six months for which he would be compensated by the transfer of shares from the second respondent. It was clear that the appellant's acquisition of shares was subject to the fulfilment of one suspensive condition, being completion of six months employment without remuneration, which condition was fulfilled and which rendered the sale complete.[3]

[9] In *Southern Era Resources Ltd v Frandell*, Mpati P stated: -

'In terms of the agreement the appellant undertook to furnish the guarantee for the purchase price of the mineral rights within 14 days from the date of fulfilment of the second condition. Upon its fulfilment, the appellant thus became bound to perform its side of the bargain - to furnish the guarantee within the time stipulated in the agreement, ie within 14 days of the

[2] The papers, volume 2, answering affidavit, paras 23 and 24, at 93.
[3] *Southern Era Resources Ltd v Farndell NO* [2009] ZASCA 150; 2010 (4) SA 200 (SCA) (*Southern Era Resources Ltd*).

fulfilment of the condition (within 14 days after 22 April 2004). The stipulation is an enforceable contractual obligation; a term of the contract.'[4]

[10] In arriving at the finding that an agreement was concluded, Laing AJ found that there was no material dispute of fact regarding the oral agreement, and relied on the following admitted facts:

(a) That the respondent discussed the transfer of 20% of his shares in the first respondent to the appellant.

(b) That the correspondence strongly suggested there was an agreement to transfer 20% of the second respondent's shares to the appellant.

(c) That the second respondent instructed his attorney in 2019 to prepare the documentation to give effect to the transfer of shares.

(d) There was a request for more shares by the appellant suggesting that the appellant already had 20% in the bag.

(e) That the respondents conceded that the appellant fulfilled what was expected of him in his duties.

[11] The court *a quo* considered the *Plascon Evans* rule,[5] by enquiring whether the facts stated by the respondents together with the admitted facts in the applicant's affidavit would justify an order in favour of the appellant. The court *a quo* rejected the respondents denial of the agreement on the basis that it was untenable for the respondents to claim that the appellant would not claim compensation for his services because of his claim against his previous employer.

[12] The court took into account the respondents' version, which was to the effect that the appellant would work for no remuneration, not only for just six months, but for three years. The respondents' version was starkly in contrast to the common cause facts and the email exchanges, which pointed out an unequivocal intention by the second respondent on 20 April 2018 to always give the appellant 20% shareholding in the first respondent.[6]

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[4] *Southern Era Resources Ltd* para 14.

[5] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[6] The papers, volume 1, founding affidavit, at 16, para 33, and Annexure "E2", at 72.

[13] On 4 June 2018, the second respondent confirmed that he made an offer of shares to the appellant, which is evinced from the following statement, 'Hi Shaun, Please explain why you require a higher share than originally offered, for record purposes.'[7]

[14] It was thus apparent from the agreement that there was an intention on the part of the second respondent to transfer ownership of 20% of his shareholding and a consequent intention on the part of the appellant to acquire such ownership.[8] The appellant's acceptance of the offer was clearly established from the moment when he commenced employment without remuneration. From the exchange of emails, it is also common cause that the appellant laid no claim for any remuneration for the six months, but only persisted with his claim for the 20% shareholding.

[15] On 12 July 2019, pursuant to a meeting between the first respondent's auditor, Mr Blaise Walker, an email was communicated to the second respondent recommending that a shareholder's agreement be drawn up to govern the relationship between the second respondent and the appellant as shareholders.[9]

[16] It is apparent from this communication that the respondents had already regarded the appellant as a shareholder. The shareholding agreement was meant to formalise the agreement already reached and facilitate transfer of the appellant's shareholding of 20%. The appellant contended in the court *a quo* that the signing of the written agreement was no more than an administrative formality to record the appellant's shareholding and to facilitate transfer of the shares from the second respondent to the appellant. There is no dispute that Mr Walker was mandated by the second respondent to act on behalf of the respondents and to ascertain the appellant's complaints regarding additional shares he claimed and the appellant's employment related issues.

[17] The appellant contended that the transfer of shares was not required to be in writing, and that the agreement for the transfer of shares may be a tacit one or maybe

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[7] The papers, volume 1, founding affidavit, para 35 at 17, Annexure "E2", at 72.
[8] *Legator Mckenna Inc and another v Shea and others* 2010 (1) SA 35 (SCA) at 44G – J.
[9] The papers, volume 1, founding affidavit, Annexures "E4" and "E5", at 74 and 75.

inferred from the conduct of the parties.[10] This is so especially in light of the second respondent not disputing that he stated that it was always his intention to transfer 20% of his shares to the appellant. It is clear that the parties had dispensed with the need to have the agreement reduced to writing and there was no request prior to fulfilment of the suspensive condition that the agreement be reduced to writing. In accepting that the agreement was in accordance with the intention of the parties, the court decided the application on the affidavits placed before it.

[18] I am of the view that the court *a quo* did not commit a misdirection in finding that an agreement was concluded (when the suspensive condition was fulfilled), and that the common cause facts at all material times established that ownership to the 20% shareholding was then vested with the appellant.

[19] In *Fakie NO v CCII Systems (Pty) Ltd,*[11] Cameron JA (as he then was) summarised the position as follows:

'[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise "fictitious" disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be "a bona fide dispute of fact on a material matter". This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable

[10] *Botha v Fick* 1995 (2) SA 750 (A) (*Botha v Fick*) at 762.
[11] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.' (Footnotes omitted.)

[20] It is apparent from the affidavits before the court *a quo*, that the second respondent did not dispute that the appellant continued to receive a monthly income of R40 000.00. Whilst the second respondent baldly denies that the appellant's first payment was received in September 2016, such a denial, in my view is one that is contradictory and uncreditworthy. The denial contradicts the second respondent's communication to the appellant on 4 June 2018 where he states that the appellant received R40 000.00 per month, plus bonuses, since the appellant joined the first respondent.[12]

[21] The second respondent's version are therefore replete with contradictions and the version presented in the answering affidavit are inconsistent with the unchallenged email communications. Whilst the appellant disputes that he received any income for the first nine months, the second respondent's communications make reference to an employment relationship and not an independent contractor agreement.

[22] I am of the view that the appellant's employment is consistent with an employment relationship in circumstances where the email exchanges between the parties from February 2018 to July 2019 make reference to the appellant receiving a salary and bonuses, that the appellant was employed as the Chief Operating Officer and was represented as an appointee in terms of s 16(2) of the Occupational Health and Safety Act 85 of 1993, for the purposes of Health and Safety legislation.[13] It is evident that during the aforesaid period the respondents fail to place in dispute the relationship at play between the appellant and the respondents.

[23] During this period, ie between February 2018 to July 2019, when the appellant sought to negotiate a further shareholding and formalise issues relating to his employment, there was no express claim by the second respondent that the appellant

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[12] The papers, volume 1, founding affidavit, para 37 at 17, Annexure "E2", at 72.

[13] Section 16(2) of the Occupational Health and Safety Act 85 of 1993 provides that:
'Without derogating from his responsibility or liability in terms of subsection (1), a chief executive officer may assign any duty contemplated in the said subsection, to any person under his control, which person shall act subject to the control and directions of the chief executive officer.'

was not an employee but a consultant, or that the appellant was not entitled to a salary. The circumstances that prevailed during this intervening period was material as it established an offer and acceptance, the fulfilment of a material condition and the passing of ownership in the 20% shareholding. The respondents belated disputes to the shareholding only arose on 25 January 2021 when the appellant and first respondent had a meeting and later when the respondents engaged their attorneys on 26 March 2021. I am of the view that the belated disputes raised by the respondents in the answering affidavits are accordingly uncreditworthy, palpably implausible, not genuine and do not serve to assist the respondents.

[24] The respondents' version that the appellant was employed as a consultant is also contradictory and untenable in circumstances where the respondents admit that the appellant continued to receive a monthly income of R40 000.00 per month. The receipt of an income is not consistent with services rendered as a consultant. The second respondent failed to substantiate its bald claim that the appellant was employed as a consultant for the first part of 2016, which could have been easily demonstrated by a consultancy agreement or invoices from the appellant for consultancy services rendered, even after the six month period.

[25] I am of the view that the respondents' version is patently far-fetched and clearly untenable, and was correctly rejected by the court a *quo*, especially in light of the fact that it was in direct contrast with the objective evidence such as the various emails, which communicated the express and unequivocal intention of the second respondent to pass ownership of a 20% shareholding.

The appeal

[26] The court *a quo*, having accepted that an agreement was concluded, was then constrained to determine whether the appellant's claim had prescribed. The respondents' plea of prescription was pleaded on the basis that the appellant's claim would have only arisen six months later from January 2016, that being July 2016 (when the suspensive condition was fulfilled). The respondents consequently pleaded that prescription would have begun to run as of 1 August 2016, and that the appellant's claim prescribed on 31 July 2019, well before the application was launched on 14 September 2021.The court *a quo* upheld the plea of prescription on the basis that the

appellant had acquired rights to the shares, on 31 July 2016, being the date when the obligation to deliver became due.[14] It reasoned that it was at this point that the appellant had a personal right to the shares or to their value.[15] The court *a quo* further found that the appellant had not acquired ownership over the shares and that the delay in requesting delivery of the shares was detrimental to the appellant's right to exercise control over the shares.[16]

[27] The court *a quo* held that the obligation to deliver the shares constituted a debt in terms of the agreement between the parties[17] and placed reliance on *Barnett and others v Minister of Land Affairs*,[18] where the court stated that:

'Though the Act does not define the term "debt", it has been held that, for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something ... Thus understood, I can see no reason why it would not include a claim for the enforcement of an owner's rights to property'. (References omitted.)

[28] The court *a quo* then concluded that the appellant failed to enforce his rights to acquire ownership of the shares from the second respondent and therefore the appellant was not the owner of the shares, and consequently that the appellant's claim prescribed in terms of s 12(1) of the Prescription Act.[19]

[29] The challenge on appeal is premised on the court *a quo's* finding that ownership requires delivery, and consequently that the court *a quo* failed to take into account that delivery of a right of action should not be considered in the same way as delivery of a movable thing. The appellant contended that the court *a quo* failed to apply the approach followed in *Botha v Fick.*

[30] The further challenge on appeal is founded on the learned acting judge having erred in finding that the second respondent's email to Mr Walker, dated 15 July 2019,

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[14] The papers, volume 2, judgment, para 24, at 144.
[15] The papers, volume 2, judgment, para 24, at 144.
[16] The papers, volume 2, judgment, para 24, at 144.
[17] The papers, volume 2, judgment, para 26, at 145.
[18] *Barnett and Others v Minister of Land Affairs and Others* [2007] ZASCA 95; 2007 (6) SA 313 (SCA) para 19.
[19] Section 12(1) of the Prescription Act 68 of 1969 states that: 'Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.'

as well as his email to the appellant, dated 20 April 2018, were insufficient to interrupt the running of prescription and that such emails interrupted the running of prescription. It is therefore important to first deal with whether the appellant's claim in actual fact constitutes a personal right or real right of action, and whether prescription is applicable in the circumstances upon which the relief is sought.

Does the appellant's claim prescribe?

[31] The appellant contends that the court *a quo* failed to apply settled law, specifically the decision by the Supreme Court of Appeal in *Botha v Fick* which confirmed that a share is a *jus in personam*, the ownership which passes by cession, and which is established by consensus between the parties.

[32] In *Botha v Fick* the court confirmed that the legal duty resting on a registered shareholder of a company who has sold his shares to deliver a share certificate and a completed share transfer form to the purchaser arises from the obligatory agreement of sale (between the parties) and is not a requirement for the validity of the cession whereby the right and title to the shares are transferred.[20]

[33] In *Brayton Carlswald (Pty) Ltd and another v Brews*,[21] Theron JA, considered the distinction between the obligatory agreement and the date when the cession takes effect, and stated as follows:

'The court a quo failed to distinguish between the agreement to cede (the obligatory agreement whereby an obligation is created), also referred to as the *pactum de cedendo*, and the cession itself (the real agreement whereby rights are bilaterally transferred), also known as the pactum cessionis. In *Grobbelaar v Shoprite Checkers Ltd* Brand JA explained that "(a) cession is an abstract legal act that is independent of the underlying, obligationary, agreement". Justice PM Nienaber puts it well in his contribution to *The Law of South Africa*, aptly distinguishing between these two types of agreements:

> "The undertaking to cede and the actual cession will often coincide and be consolidated in a single document, yet they remain discrete juristic acts. However, because they are frequently merged into one transaction the clear distinction between the obligatory agreement to cede and the actual cession sometimes tend to be

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[20] *Botha v Fick* at 778C-D. See also *FH v YAH and Others* [2019] ZAKZDHC 31 (*FH v YAH*).

[21] *Brayton Carlswald (Pty) Ltd and Another v Brews* [2017] ZASCA 68; 2017 (5) SA 498 (SCA) para 15.

smudged. They are nevertheless distinct in function and can be so in time: by the former a duty to cede is created, by the latter it is discharged."' (Footnotes omitted.)

[34] It follows that in the present case, the appellant and second respondent had contemplated that the appellant would acquire right and title to a 20% shareholding when such shares were to be earned through the appellant being employed for six months without remuneration. There is no dispute that the second respondent, as sole director was the duly authorised representative of the first respondent when he entered into the oral agreement and offered the 20% shareholding.

[35] In *FH v YAH and Others*, Olsen J followed the approach in *Botha v Fick,* and stated that:[22]

'I think that the proposition may be put this way: that in the case of cession properly so called, as a mode of transfer employed in respect of shares, it takes place when the parties agree it should take place. Nothing more is required, unless of course their agreement or mutual intention is that something more is required. I can see no obstacle at all to an agreement designed to pass shares from the ownership of A to the ownership of B, which provides that that the actual transfer will only take place upon the amendment of the company's register of shareholders and delivery of the share certificate generated by that. It is a question of fact as to when the parties anticipated the transfer of the shares to have been effected.'

[36] In the present matter, there was an offer of shares, which was subject to a suspensive condition. Upon the appellant's acceptance of the offer, (in commencing employment without remuneration), and the fulfilment of the suspensive condition, (completion of the six month period of employment without remuneration), it was clear that the parties anticipated that such transfer and ownership of the 20% shareholding would be complete.

[37] The learned acting judge had accordingly erred in finding that the appellant had not acquired ownership of the shares. In my view, once the cession had taken effect, ownership of the shares then vested in the appellant, who then had a real right to the shares. There was accordingly no legal requirement that the appellant was then

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[22] *FH v YAH* para 21

obliged to enforce such a real right as though it was a debt covered by extinctive prescription under s 10 of the Prescription Act.

[38] In *Cooper v Boyes* the court emphasised that a share has a complex set of characteristics which are peculiar to it, with the court stating:

'The gist thereof is that a share represents a share in the company, which interest consists of a complex of personal rights which may, as an incorporeal movable entity, be negotiated or otherwise disposed of. It is certainly not a consumable article, such as money, even though a money value can be placed on it. Nor can it, by any analogy, be likened to a debt which may give rise to a claim of some kind or another, even though the debt and related claim may eventuate in an award of money being made to the claimant in respect of such debt.'[23]

[39] In *Standard Bank of SA Ltd v Ocean Commodities Inc.* ,[24] the court held that:

'There is an important legal difference between immovable property and movable property whether corporeal or incorporeal. In regard to immovable property, a court cannot go behind the register. In respect of registered shares, a court can go behind the register to ascertain the identity of the true owner. The fact, therefore, that the shares are registered in the name of Standard Bank Nominees does not mean that it is the actual owner or that one cannot look behind the register to ascertain the identity of the true owner. *Vide, Randfontein Estates Ltd v The Master* 1909 TS 978 at 981, 982. Further, an agreement for the sale of shares does not mean that the seller must procure registration of the transfer into the name of the purchaser. The seller's duty is completed when he has done all in his power to put the transferee in a position to demand transfer from the company. *Vide, McGregor's Trustees v Silberbauer* 9 SC 36 at 38; *Jeffery v Pollak & Freemantle* 1938 AD 1 at 24. Until registration of transfer, however, the transferor or his nominee is a trustee of the shares for the transferee. The trustee must act according to the A instructions of the transferee who becomes the beneficial owner of the proprietary rights in respect of the shares by means of the conclusion of the contract of cession. The true owner of the proprietary rights can, therefore, demand of the person in whose name the share is registered that he does all things necessary to enable the owner to approach the company for registration of the shares into his name.'

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[23] *Cooper v Boyes* 1994 (4) SA 521 (C) at 535B-D.

[24] *Standard Bank of SA Ltd v Ocean Commodities Inc* 1980 (2) SA 175 (T) (*Ocean Commodities* (T).

[40] The Court of Appeal in *Standard Bank of South Africa Ltd and another v Ocean Commodities*[25] ruled in favour of the Harris brothers. The court found that they had the right to sell the shares even though they were not the registered shareholders. The sale was affected via a cession of rights to Ocean Commodities. The court further found that the fact that the beneficial owners were not able to deliver the share certificates did not invalidate the transfer of ownership. The new beneficial owner, Ocean Commodities, demanded the share certificates. The court ruled that the certificates were to be registered in the name of Ocean Commodities via a partial *rei vindicatio* in opposition to a 'true' *rei vindicatio,* since the Harris brothers did not have full and unfettered ownership of the shares.

[41] Similarly, in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investments Co (Pty) Ltd*[26] the beneficial owner launched an action against the person in possession of the shares for delivery of the share certificates. The court granted the relief and confirmed that the beneficial owner, not being the shareholder, is entitled to an action to assert its right of possession of the share certificates.

[42] The appeal court upheld the court *a quo*'s declaration that the first defendant is obliged to deliver to the plaintiff certificate No. 25794 in respect of 2 000 shares in Gledhow Sugar Co. Ltd., together with transfer form duly completed by the first defendant.[27]

[43] The Companies Act 71 of 2008 makes provision for a situation where a person, other than the registered shareholder, could hold a 'beneficial interest' in a share. A 'beneficial interest' is defined in s 1 of the Companies Act and includes a person who has a right to receive a distribution. In the present appeal, whilst the court a quo was correct regarding a cession constituting a personal right, it misdirected itself regarding the nature of the appellants claim, being a right to assert ownership of shares. The court *a quo* failed to distinguish a personal right and the right to ownership which has passed to the appellant as cessionary, which right would constitute a real right.

[25] *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 290A.
[26] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investments Co (Pty) Ltd* 1976 (1) SA 441 (A) (*Oakland Nominees*) at 461H and 462H.
[27] *Oakland Nominees.*

[44] The court *a quo* therefore erred in finding that the obligation to deliver the shares constituted a debt, and placing reliance on *Barnett.* The decision in *Barnett* and the confusion as to whether the *rei vindicatio* is a debt for purposes of the Prescription Act has now been settled. In *Absa v Keet,*[28] the Supreme Court of Appeal held as follows:

'[23] The obligation which the law imposes on a debtor does not create a real right (*jus in rem*), but gives rise to a personal right (*jus in personam*). In other words, an obligation does not consist in causing something to become the creditor's property, but in the fact that the debtor may be compelled to give the creditor something or to do something for the creditor or to make good something in favour of the creditor.

[24] The manner in which the Prescription Act is structured reflects this distinction — acquisitive prescription of real rights is dealt with in chs 1 to 2 and the extinctive prescription of obligations is dealt with in ch 3. The reason for arranging the Prescription Act in this manner was explained by Prof JC de Wet, the author and draftsman of the present Prescription Act, in a full memorandum he submitted to the legislature. The memorandum was published in February 1979 in a work called *Opuscula Miscellanea.* Professor De Wet had this to say at 77 para 5:

> "Whether prescription is concerned with a single legal concept with two branches, viz. acquisitive and extinctive prescription, or whether there are in fact two distinct legal concepts is an old controversy. It appears to me that one is actually concerned with two distinct legal concepts and even the expressions acquisitive and extinctive prescription are somewhat unfortunate and misleading. It is true that the passage of time plays a role in both legal concepts and that certain circumstances, connected to the person against whom prescription runs, apply to both legal concepts, but nonetheless the two legal concepts rest on different foundations. In the case of acquisitive prescription one is concerned with real rights, which do not concern simply the acquisition of a right by the one and the loss of a right by the other, but also outward appearances that may affect third parties in their relationships with the one or the other. The rationale for the acquisition of real rights by prescription is the perpetuation of a factual situation that has existed for a long time, and upon which third parties may rely in their relationships with the ostensible rightful owner. In the case of extinctive prescription one is more specifically concerned with the relationship between creditor and debtor and prescription serves in the first instance to protect the debtor against

[28] *Absa Bank Ltd v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA) (*Keet*).

claims that perhaps never came into existence or had already been extinguished. The obligation is by its nature and substance a temporary relationship that is destined to terminate through performance and moreover a relationship between creditor and debtor in which third parties are only indirectly involved. A real right, by contrast, is a relationship of a durable nature, that can be maintained against anyone and everyone, and which can impede commerce if outsiders cannot with confidence rely on the appearance thereof." [My own translation.]

[25] In the circumstances the view that the vindicatory action is a "debt" as contemplated by the Prescription Act, which prescribes after three years is in my opinion contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a "debt", becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a "debt" has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act.' (Footnotes omitted.)

[45] The approach and distinction between extinctive prescription and acquisitive prescription in *Keet* was adopted by the Constitutional Court in *Makate v Vodacom Ltd*.[29] Wallis AJ in a minority judgment which concurred with the decision of the majority regarding whether the debt in question prescribed held as follows:

'[189] Not all rights of action give rise to debts. That is well illustrated by the recent decision in *Keet*. Based on an ambiguous and obiter statement in the first-instance court in *Evins* it had been said in a series of cases in the Supreme Court of Appeal that a vindicatory claim, that is, a claim to assert a right of ownership in an asset, gave rise to a debt capable of being extinguished by extinctive prescription under s 10 of the Prescription Act. This occasioned confusion because the owner would remain the owner of the asset, but would not be entitled to exercise its rights of ownership against the possessor thereof. In effect it would be deprived of its rights of ownership by way of extinctive prescription, whereas the loss of the right of

[29] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) (*Makate*).

ownership by way of prescription is a matter of acquisitive prescription, which is dealt with in ch I and ss 1 – 5 of the Prescription Act, not ch III and ss 10 – 12 of that Act.

[190] The court in *Keet* overruled these earlier cases [including *Barnett*] and held that acquisitive prescription dealt with the acquisition (and corresponding loss) of real rights such as ownership, while extinctive prescription dealt with the extinguishment of debts and their correlative rights of action, in other words, with personal rights. The relevance of the case to the present one is that it illustrates that not every right to approach a court for relief will amount to a debt for the purposes of extinctive prescription. So the right to claim delivery of the motor vehicle in that case did not give rise to a "debt" for the purposes of extinctive prescription in terms of s 10 of the Prescription Act.' (Footnotes omitted.)

[46] The authors Parker and Zaal, in commenting on the appeal court's decision in *Keet*, pointed out: [30]

'The overruling of the decision of the *Absa* [ie *Keet*] court *a quo* by the SCA is to be welcomed. Since the appeal court holding that vindicatory claims do not prescribe after three years was essential for purposes of its conclusion and thus is clearly not *obiter*, it may safely be accepted that the uncertainty concerning this point of law has at last been resolved. It is the submission of the authors that the SCA judgment is clearly correct for two main reasons. First, it accords with the nuanced approach in our law to real and personal rights. It recognises the primary distinction between these, and their corresponding actions. Real rights arise out of a relationship with a thing and personal rights out of an obligationcreating event, such as a contract or delict. It is trite to say that real rights are enforceable against the world at large and personal rights only as against the other person. The creation of a personal right with its correlative obligation results in a creditor-debtor relationship, but no such relationship flows from the creation of a real right. Because of the fundamental difference in nature between real and personal rights, they require different remedies for their enforcement. In relation to personal rights, for example, delictual remedies are available to enforce rights arising out of delicts, and contractual remedies are available to enforce rights that arise out of contractual relationships. The protection of a real right is quite different – the main remedy is, of course, the *rei vindicatio* which is available to an owner for the return of the possession of his or her property, but there are other remedies such as the *actio negatoria* available to protect limited real rights. The *Absa* [ie *Keet*] appeal decision, in recognising that vindicatory claims need to be treated differently from debts relating to personal rights, supports the durable and *sui generis* nature of the *rei vindication*.'

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[30] J Parker and FN Zaal *'Absa Bank Limited v Keet* 2015 JDR 0996 (SCA)' (2016) 49(1) *De Jure* 181at 189.

[47] In this matter the second respondent had expressly ceded all his right, title and interest in the 20% of his shareholding in the first respondent to the appellant. I accordingly find that delivery and transfer of ownership of the 20% shareholding took place when the second respondent ceded his right, title and limited interest to the appellant on 31 July 2016. The approach to the appellant's claim falling within a vindicatory claim and therefore not hit by prescription is consistent with the Constitutional Court's finding in *Makate* which held that not every right of action would amount to a debt.

[48] In the present matter the appellant remained the owner of a 20% shareholding upon the cession taking effect, and was prevented from exercising his rights of ownership against the possessor of the shares, that being the second respondent. In effect, the appellant was not deprived of his rights of ownership by way of acquisitive prescription.[31] The loss of the right of ownership by way of prescription is a matter of acquisitive prescription.The appellant's claim for delivery and/transfer of the 20% shareholding therefore must succeed.

The cross appeal

[49] The respondents contend that it was never the appellant's case that he was vindicating his shares and that the affidavits did not support the allegation that the appellant was already the owner. The argument proceeded on the basis that the appellant, in asserting a vindicatory claim, was obliged to have alleged that at some stage he would have taken possession of the shares because it is only upon possession being acquired that ownership passes. The respondents counsel, Mr *Collingwood*, whilst accepting that that transfer of possession can take place '*brevi manu*' or '*longa manu*' argued that delivery was still a prerequisite to ownership, regardless of the method of delivery. The contentions which make possession a pre-requisite loses sight of the fact that the sale of shares was effected via a cession of rights to the appellant, and accordingly that the passing of ownership was not

[31] *Makate* para 189 and 190.

dependant on actual physical control, but that ownership had passed automatically upon the fulfilment of the suspensive condition.[32]

[50] The approach to the manner in which a real right of ownership can be transferred by means of cession was considered by the court in *Page Automation (Pty) Ltd v Profusa Properties CC t/a Homenet or Tambo and Others*,[33] where the court stated:

'[18] In the strict sense ownership in corporeals cannot be transferred by cession. Ownership must be transferred by either physical delivery or various forms of constructive delivery such as *clavium traditio*; *traditio longa manu*; *traditio brevi manu*; and *constitutum possessorium*.
[19] It is generally accepted that in respect of hire-purchase agreements, whilst delivery takes place when the article is handed over, ownership is suspended until the purchase price is paid in full. The passing of ownership is not dependent on the actual physical control but happens automatically when the condition is fulfilled. This can be categorised as a new form of constructive delivery or a type of *traditio brevi manu*.' (Footnotes omitted.)

[51] The appellant's claim was always premised on a right of ownership of his shares. This right of action did not constitute a debt and was never hamstrung by the manner in which he pleaded his case in seeking transfer of his 20% shareholding. The second respondent's intention to pass ownership remained extant at all material times from fulfilment of the six month period without remuneration. This constituted a cession of ownership or cession of the right of vindication in favour of the appellant.[34] I am accordingly of the view that the plea of prescription is not applicable and not consistent with the definition of 'debt' as contemplated in the Prescription Act. The obligation, on the part of the second respondent effectively entails facilitating the signing of necessary transfer documents and delivery of share certificates to enable registration of the share certificates as directed by the appellant.[35] The relief claimed is not a debt that was due prior to the commencement of the present litigation and the plea of prescription should have been dismissed by the court *a quo*.[36]

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[32] *Page Automation (Pty) Ltd v Profusa Properties CC t/a Homenet or Tambo and Others* 2013 (4) SA 37 (GSJ) (*Page Automation*) paras 16-19.
[33] *Page Automation*.
[34] *Page Automation (Pty) Ltd* para 29.
[35] See also *Oakland Nominees*.
[36] *Makate* para 186 and (*Ocean Commodities* (T) at 16 C-G.

[52] The respondents' cross appeal was also premised on the ground that there was a profound dispute of fact and that the court *a quo* should have dismissed the application on that ground alone. The respondents' appeal ground in this regard is based on its version that there was no agreement between the parties and that it was impermissible for the appellant to argue the matter on the basis of probabilities. I accept that motion proceedings are utilized to resolve legal issues based on common cause facts, and that motion proceedings are not designed to determine probabilities.[37]

[53] Whilst counsel for the respondents placed reliance on the test to be applied in *National Director of Public Prosecutions v Zuma*, the following *proviso* from that decision regarding the proper approach to motion proceedings must also not be ignored:[38]

'It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.' (Footnotes omitted.)

[54] It is also clear that the findings of the court *a quo* was not reached on the basis of probabilities or on arguments based on probabilities. The findings of an oral agreement was based on the admitted facts on the part of the respondents. I have already set out the common cause facts upon which the court *a quo* concluded that there was an agreement and that the respondents version to the contrary was untenable. It is clear from my reasons outlined above that the respondents' version, apart from being uncreditworthy was also contradictory and untenable, and accordingly there was no misdirection by the court *a quo*.

[55] The further ground contended for in the cross appeal was that there was an ambush during argument, which amounted to a trial by ambush. Mr *Collingwood* for the respondents referred to *Minister of Land Affairs and Agriculture and others v D &*

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[37] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) (*Zuma*) para 26.
[38] *Zuma* para 26.

F Wevell Trust and others,[39] the relevant comments of which were relied upon and where the court stated:

'Before doing so, it is necessary to emphasise two aspects. The first is that the only issue for the court a quo to decide on the merits was whether the respondents were entitled to cancel the sale agreements because of fraud. The second is that the case argued before this court was not properly made out in the answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.' (Footnotes omitted.)

[56] The decision in *D & F Wevell Trust* is clearly distinguishable in the present case and circumstances where the conclusions drawn from the various emails and common cause facts were in fact dealt with in the founding affidavit. The appellant clearly evinced an offer and acceptance and the conclusion of an oral agreement for the sale of shares, which shares vested in the appellant upon fulfilment of the suspensive condition agreed to by the parties. In addition the respondents' version was conclusively refuted in the replying affidavit.

[57] The respondents further allege that the appellant's claim to ownership of shares was not raised in the founding papers, in reply and or in the appellant's heads of argument in the court *a quo*. This contention is not correct as the appellant's founding affidavit did disclose that the application was launched on the basis that he was a shareholder, which is established from the allegation that the appellant had in fact communicated to the second respondent that he was already a shareholder at their

[39] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) (*D & F Wevell Trust*) para 43.

meeting on 28 January 2021.[40] The appellant's reference to 'my shares' in 2017 leaves no doubt that the claim was for ownership of shares.

[58] In addition, the appellant's heads of argument did in fact disclose that the claim was based on a cession of ownership and a claim under the *rei vindicatio*. The appellant had also placed reliance in the decision of *Botha v Fick*. The respondents were accordingly not taken by surprise as to the appellant's case and the facts which supported the cession of the shares. There was accordingly no prejudice to the respondents and the claim of a trial by ambush is thus without merit and cannot be sustained.

[59] If I am wrong in holding that the appellant's claim for transfer of his shares does not constitute a debt, and that prescription does not apply, then it also becomes evident that the respondents had tacitly interrupted the running of prescription. It is clear from the court *a quo*'s reasoning that it has correctly delineated the conclusion of the agreement whereby the appellant was vested with a 20% shareholding as at 31 July 2016 and the subsequent negotiations regarding additional shares. It is therefore correct that it was at this stage that the appellant would be able to assert his right of action to ownership.

[60] The court *a quo* regarded the negotiations after this date as constituting a separate claim by the appellant for an additional 10%. The court *a quo*, in dealing with the question as to whether the emails between the parties interrupted the running of prescription, concluded that the further negotiations regarding the request for more shares constituted negotiations in respect of a separate claim.

[61] The court *a quo*, however erroneously reasoned that it cannot be said that these further negotiations had the effect of interrupting prescription. I am of the considered view that this latter finding also constitutes a misdirection of the facts and the law. Whilst it is accepted that the negotiations post July 2016 constituted a separate claim, it was common cause that the email dated 12 July 2019 from Mr Walker, acting as the first respondent's auditor, expressly confirmed a shareholding relationship.

[40] The papers, volume1, founding affidavit, para 59, at 24 and 25.

[62] It is clear that the exchange of emails elicited the true intention of the parties during the relevant period after the appellant fulfilled the suspensive condition. It is therefore clear that the email of 12 July 2019 evidenced a tacit acknowledgment of liability. Section 14 of the Prescription Act provides that:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

[63] It follows that the respondents' acknowledgment on 12 July 2019 of a shareholding relationship had the effect of tacitly interrupting the running of prescription in accordance with s 14 of the Act. The running of prescription would therefore begin to run from 13 July 2019 to 11 July 2022. The appellant instituted the action on 14 September 2021, well within the three year prescriptive period provided for in the Act.

[64] I am satisfied that there is no reason to deviate from the principle that costs should follow the result in the circumstances of this matter.

Order

[65] In light of the above, the following order is made:

1. The appeal is upheld.
2. The first and second respondents' cross appeal is dismissed.
3. The order made by the court *a quo* is set aside, and it is replaced with the following order:

   '1. The second respondent is directed to do all things necessary to transfer 20% of his shareholding in the first respondent to the applicant;

   2. The first and second respondents are directed to deliver to the applicant, the audited financial statements/accounting records of the first respondent from 2015 to date which records shall include the bank

account statements of the first respondent for the aforementioned period; and

3. The second respondent is directed to pay the costs of the application.'

4. The first and second respondents are ordered to pay the costs of the appeal, the cross appeal, and the costs of the application for leave to appeal, jointly and severally, the one paying the other to be absolved, such costs to include the costs of consequent upon the employment of two counsel on scale C.

[redacted]

Pillay AJ

I agree.

[redacted]

Mngadi J

I agree

[redacted]

Chithi J

Heard on: 31 October 2025

Delivered on: 13 March 2026

<u>Appearances</u>

For the appellant: Mr KC Macintosh SC

Mr M Sewpal

Instructed by: Attorney's Murugasens

For the respondents: Mr AD Collingwood

Instructed by: Dhuki Attorneys Incorporated