

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-055987

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED: NO	
DATE 05/05/2025	SIGNATURE

In the matter between:

INHLANHLA VENTURES PROPRIETARY LIMITED
(Registration Number 2015/298141/07)

First Applicant

REGELTRO INVESTMENTS PROPRIETARY LIMITED
(Registration Number 2015/295667/07)

Second Applicant

DAVID SOLOMON BROUZE

Third Applicant

and

PERESEC PRIME BROKERS PROPRIETARY LIMITED
(Registration Number 1999/010976/07)

First Respondent

AFRICAN PHOENIX INVESTMENTS LIMITED
(Registration Number 1946/021193/06)

Second Respondent

HAMPDEN CAPITAL PROPRIETARY LIMITED
(Registration Number 2000/003703/07)

Third Respondent

ANDREW JAMES HANNINGTON N.O. in the capacity of a trustee for the time being of the Hannington Family Trust	Fourth Respondent
GWYNETH HANNINGTON N.O. in the capacity of a trustee for the time being of the Hannington Family Trust	Fifth Respondent
DARRYL HANNINGTON N.O. in the capacity of a trustee for the time being of the Hannington Family Trust	Sixth Respondent
CLARKE CAPITAL PROPRIETARY LIMITED (Registration Number 2019/035474/07)	Seventh Respondent
OYAMA ANDREW MABANDLA	Eighth Respondent
AMANDA MUNRO SMITH	Ninth Respondent
KYLE DE ALMEIDA	Tenth Respondent
EXTRACT GROUP PROPRIETARY LIMITED (Registration Number 1998/011672/07)	Eleventh Respondent
MCC CONTRACTS PROPRIETARY LIMITED (Registration Number 1983/008084/07)	Twelfth Respondent
WARREN HAMPDEN CHAPMAN	Thirteenth Respondent
ANDREW JAMES HANNINGTON	Fourteenth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fifteenth Respondent

JUDGMENT

FISHER J

Introduction

- [1] The facts which have given rise to this application arise in the arena of investment banking and share brokerage. This may, to some, seem a rarified commercial environment. But this context does not detract from the fact that ordinary legal principles operate to determine the disputes at issue.

- [2] This case is about the meaning and validity of a settlement agreement entered into for the purposes of compromising a claim for monies owing under a loan agreement.
- [3] The settlement in question is referred to by the parties as the “second MoU”. There was a previous settlement concluded approximately two weeks before the second MoU was concluded. This, the parties have called this the “first MoU”. Thus, there was a progression from the first to the second MoU.
- [4] Essentially, the aim of the applicants is to have the second MoU declared void so that the position as at the date of the first MoU is reinstated.
- [5] The securities which are the subject of the settlement are shares which have values running to the hundreds of millions of rands.
- [6] The nature of such instruments is that they are designed for instant disposal and acquisition. The commercial environment in which the investment decisions are made is dynamic and the transactions often occur in real time and with a measure of informality. This position does not, however, detract from the need for ordinary legal principles to be observed for legality to ensue. It does however create a context for the determination of the meaning of the settlement in issue.
- [7] The settlement contained in the second MoU provides for a share transfer in settlement of loans owing to the first respondent, Peresec which shares were pledged under the first MoU.
- [8] The shares in issue were previously under the control of the third applicant, Mr David Brouze. The shares are now registered to the second to tenth respondents.
- [9] The story of how and why control over the shares was lost by Brouze and gained by those who now have registration thereof is what founds this dispute.
- [10] Essentially, Brouze, on his own behalf and on behalf of the applicant companies controlled by him, seeks that he be placed back in control of these shares. To do

this Brouze must establish, on his own behalf and that of the other applicants, that the settlement agreement in issue is void *ab initio*. This voidness is contended for on the basis of an impossibility of performance of the settlement.

[11] At the heart of the dispute is the meaning of the terms of the second MoU in relation to the performance that was required thereunder in full and final settlement of the applicants' indebtedness to Peresec under a loan facility

[12] Because the validity of share transfers is at the crux of this dispute it is helpful to start with an understanding of the general principles relating to the transfer of securities.

The nature of share transfer

[13] A person in whom a personal right vests is not the "owner" of the personal right. Although we commonly say that a person "owns" shares, one should be cautious of attaching legal significance to this expression.

[14] A share in a company is a bundle of incorporeal personal rights against the company¹ and cannot strictly be "owned". This bundle of personal rights is transferred by cession.² They are claimed as rights – not property.

[15] In *Standard Bank of SA v Ocean Commodities Inc*³, Corbett JA expressed doubt as to whether a claim for delivery of the shares could properly be characterised as a vindicatory one. This notwithstanding it was held in *Oakland Nominees*⁴ per Holmes JA, that there was no reason not to apply the principles relating to ownership to a case where a declaration was sought as to the 'ownership' of shares.⁵

¹ *De Leef Family Trust v Commission for Inland Revenue* [1993] ZASCA 46; Clicks at 233

² *Botha v Fick* 1995 (2) SA 750 (A) at 762A-H.

³ *Standard Bank of SA v Ocean Commodities Inc* 1983 (1) SA 276 (A)

⁴ *Oakland Nominees (Pty) Ltd v Gelria Mining & Investments Co (Pty) Ltd* 1976 (1) Sa 441.

⁵ *Id* at 452 C to D.

- [16] The respondents contend that the claim for return of the shares has prescribed.
- [17] Whether the Prescription Act⁶ applies on the basis that shares constitute ‘property’ is not a travail upon which I need enter in that the respondents concede for the purposes of the prescription argument the Act does apply. I will come later to the prescription point.
- [18] In South Africa, registration of shares, does not determine “ownership”. If as between the registered holder of shares and a party, that party “owns” the shares this means that the personal rights which comprise the shares vest in that party but the enforcement of those rights may have to take place through the registered shareholder given that, strictly speaking, the company in which the shares are held is not legally bound to recognise anyone other the registered owner.
- [19] A particular set of circumstances could, notionally, have the effect that the legal rights comprising the shares vest in the registered holder, with the third party merely having personal rights against the registered holder.⁷
- [20] The terms ‘beneficial ownership’ or “beneficial interest” and “ownership” and “nominal ownership” are often loosely applied to share transactions with little real appreciation for what they, in fact, denote.
- [21] It was made clear in the second and majority judgment in *Independent Community Pharmacy Association v Clicks Group Ltd and Others*⁸ written by Rogers J at para 234 that there is only one “owner” of the shares, or – more accurately – only one person in whom the rights comprising the shares vest. There is not one “nominal owner” and another “beneficial owner”. Rogers J writing for the majority said the following:

⁶ Prescription Act 68 of 1969

⁷ *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 666C-667A; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) at 453A-B; and *Ocean Commodities* above n X at 289A-B.

⁸ *Independent Community Pharmacy Association v Clicks Group Ltd and Others* (CCT 11/22) [2023] ZACC 10.

“The legal significance of share registration depends on the details of company legislation. This case is not the occasion to delve into the details. The legislation may have the effect that the company need not concern itself with anyone other than the registered holder of the shares. However, in this country registration of shares, unlike the registration of land, does not determine “ownership”. If, as between the registered holder and a third party, the latter “owns” the shares, the personal rights comprising the shares vest in the third party, but the enforcement of those rights may have to take place through the registered holder, given that the company is not legally bound to recognise anyone other than the registered holder. A legal regime could notionally have the effect that the legal rights comprising the shares vest in the registered holder, with the third party merely having personal rights against the registered holder. In either of these situations, there is only one “owner” of the shares, or – more accurately – only one person in whom the rights comprising the shares vest. There is not one “nominal owner” and another “beneficial owner”. The nomenclature of “nominee” and “beneficial owner” in this field is, for purposes of South African law, imprecise, and is a relic of the English law of constructive trusts which does not form part of our law.”⁹

[22] In the context of this case, the application of these principles mean that it is the intention of the parties as to the ownership of the shares in issue that must be discerned from the facts and specifically the terms of the settlement agreement in issue.

[23] With this in mind, I turn to the facts which lend context to the settlement agreement. Most are not seriously disputed.

[24] I must add that, where there are disputes, they fall to be dealt with by way of the test in *Plascon Evans*¹⁰ – which means that the respondents’ version must prevail unless rejected for being false.

⁹ *Id* at para 234

¹⁰ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)

- [25] This becomes important in that differing versions of the meaning of the second MoU have been committed to on behalf of the applicants in related proceedings involving the second MoU which were abandoned prior to the launching of these proceedings.

Material facts

- [26] The first and second applicants, Ventures and Regeltro invest in tradeable shares and securities and in commercial and industrial property. Brouze is the controller of these applicants.
- [27] Until 2020, Ventures and Regeltro, through Brouze had conducted all their securities investment transactions through the first respondent, Peresec
- [28] Peresec offers stock broking services and is also in the business of lending cash and/or securities to investors, such as Ventures and Regeltro.
- [29] As part of its service offering, Peresec allows its clients to gear their positions by borrowing against the value of their investments to make further investments. Peresec does this by providing loans to its clients that are secured against the client's existing investments.
- [30] Brouze is experienced in the gearing mechanisms involved in Peresec's loan structure, having been subject thereto and engaged therewith for a number of years.
- [31] The shares at the centre of this case are those of the eleventh respondent, eXtract . The business of eXtract is the providing of opencast mining services to the mining industry. eXtract was a public company until June 2023 when it consolidated its share capital and was converted to a private company.
- [32] The twelfth respondent, MCC, is a wholly owned subsidiary of eXtract. This ownership is a pivot in the dispute and I will deal further with its significance later.

- [33] It is important that MCC is the registered holder of 61 305 360 ordinary issued shares in enX Group Limited (enX), an integrated fleet management solutions provider and distributor of industrial, petrochemical and fuel products. Most of the value of MCC is derived from these enX shares. It is the very substantial value that flows from control of the enX shares that drives the dispute.
- [34] The second to tenth respondents, as I have said, now hold the shares in eXtract in various percentages as registered owners. It is not in dispute that these shares were transferred to them by Peresec. **These respondents have been collectively called the "the Concert Parties" in the papers and I will follow suit for convenience.**
- [35] Mr Warren Chapman, the thirteenth respondent and a director of Peresec has represented Peresec at all material times and specifically in relation to the conclusion on the MoUs in issue.
- [36] The respective authority of Chapman and Brouze in relation to the determination of how the shares which were the subject of the share trades and the gearing and subsequent loan agreements and cessions in security of these loans is not in dispute. Nowhere, is it alleged that the trades, transfers and transactions contemplated in and recorded the settlements were beyond the power of Brouze.
- [37] Ventures concluded various written agreements with Peresec that governed their relationship, including a mandate agreement in terms of which Peresec was appointed as agent to purchase and sell shares on a non-discretionary basis and a facility agreement which governed the loan facilities.
- [38] **It is important that the amounts owing under the facility agreement, whether in respect of capital, interest or fees, were not subject to a fixed repayment period. The amounts owing were payable on demand or on termination of the facility agreement or, in any event, on 30 days' calendar notice by Peresec.**
- [39] By 1 November 2019, Ventures had become indebted to Peresec in the amount of approximately R420 million under the facility agreement. This debt was

secured in Peresec's favour by three securities that, at a stage in the relationship are alleged by Brouze to have had a net asset value of approximately R855 million. These included the shares in enX and the Nu World Holdings (Nu World) shares which are mentioned in the agreements in dispute.

[40] By late 2019, Peresec had become nervous about the adequacy of the collateral it held as security for the applicants' indebtedness to it. Chapman and Mr Evan Macris, an employee of Peresec, notified Brouze, on behalf of Peresec that it was required that Brouze should refinance part of the debt owed to Peresec with funds from a bank or other financial institution.

[41] It was discussed that there could possibly be a refinance on security of the enX shares and the Nu-World Holdings shares which were part of the portfolio of shares controlled by Brouze. It was anticipated that this refinancing would enable Ventures to repay its debt or an acceptable portion thereof to Peresec whereupon Peresec would relinquish its hold on the shares to the bank or other financial institution providing the financing as security for the debt.

[42] In discussions with Chapman, Brouze indicated that he would endeavour to have the facility refinanced by RMB by the end of February 2020. This did not happen.

[43] On 19 March 2020, Macris requested that R150 million cash be injected into the facility, failing which it would be foreclosed. This would have entailed Peresec taking ownership of the shares held as security under the facility agreement.

[44] There were negotiations between Brouze and Chapman during the period 25 April 2020 to 19 May 2020. These negotiations were aimed at finding a solution to restructuring the loan as an alternative to blanket foreclosure under the facility.

[45] The negotiations resulted in the conclusion of the first MoU on 4 May 2020 which was superseded, approximately two weeks later, by the second MOU which was concluded on 20 May 2020.

[46] Essentially, the applicants seek to have the second MoU declared void. They

argue that this declaration of voidness will have the result that the first MoU is revived which, according to them, will mean that the eXtract shares must revert to them qua “owner”, albeit under pledge to Peresec.

- [47] On the basis of this revival argument, the terms of the first MoU have relevance. Essentially, in terms thereof, Ventures and Regeltro consolidated their debt and respective portfolios held as security by Peresec for the loans under the facility into the twelfth respondent, MCC. As I have said, MCC is a wholly owned subsidiary of eXtract . This ownership of MCC by eXtract is crucial to the dispute.
- [48] This consolidation under the first MoU entailed MCC becoming the registered holder of 61 305 360 ordinary issued shares in enX, which represents 33,63% of enX’s issued share capital. It is not in dispute that the MCC shares remain registered to MCC on paper. Furthermore, in terms of the first MoU, Ventures pledged its eXtract shares to Peresec.
- [49] It is common cause that the intention of Brouze as at the date the first MoU was concluded was to continue seeking to refinance the debt to Peresec using the eXtract shares as security for this financing. On achieving this proposed bank financing, Peresec would be settled, thus releasing the pledge over the eXtract shares; this would allow the value in MCC to be released as security for the bank loan. The consolidation of these valuable shares into MCC was, it seems, for the purposes of streamlining the obtaining of a bank loan through the security of the MCC shares once the Peresec loan was paid. This was the context in which the first MoU came about.
- [50] After signature of the first MoU, the price of the enX shares, which made up the bulk of the value of MCC and therefore the bulk of the value of the security held by Peresec on the basis of the pledge over Extract for the loan obligations, dropped sharply.
- [51] This drop in share price meant that the value of the security relative to the size of the loan went into negative territory. In terms of the facility agreement, the value of the security was to be maintained at 130% of the indebtedness – i.e.

there had to be a 30% margin between debt and value of security.

[52] The dropping of the value of the shares below this margin triggered the default provisions in the facility agreements under which the loan indebtedness was owed to Peresec.

[53] Peresec gave notice of default under the facility agreement as it was entitled to do. Under the terms of the facility agreement Ventures had 30 days within which to ensure that the value of the investments in MCC were returned to positive territory – i.e. 30% more than the indebtedness.

[54] Under the first MoU, If MCC's net asset value did not return to positive within the 30 days, Peresec, (then known as Legae) would take outright transfer of the eXtract Shares for R1.

[55] There is no dispute that Chapman and Brouze on behalf of the transacting parties understood that the value of the security for the debt to Peresec was derived from MCC which was, in turn, owned by eXtract and thus that the security for the debt was held by Peresec through eXtract.

[56] Clearly, on any version, Brouze was in financial peril. It seemed likely that the eXtract shares would be lost to Peresec under the first MoU if something were not done about paying the Peresec debt.

[57] At this stage, further settlement negotiations ensued with a view to avoiding this foreclosure on the eXtract shares contemplated by the first MoU.

[58] These negotiations led to the second MoU being concluded on 20 May 2020. The second MoU is stated to be in full and final settlement of the indebtedness to Peresec and it superseded the first MoU.

[59] The terms of the second MoU are best quoted verbatim in that it is the meaning of this agreement that forms the basis of the claim for a declaration of invalidity. They read as follows:

"MOU between Regeltro Investments (Pty) Ltd ("Regeltro"), and Inhlanhla Ventures (Pty) Ltd ("Inhlanhla"), and Legae Peresec (Pty) Ltd ("Legae") and David Brouze.

A. Regeltro has transferred free of value to Legae [Peresec] the following shares:

1. 1,793,502 ENX Group Limited ordinary shares
2. 157,507 NU-World Holdings ordinary shares

B. Inhlanhla [Ventures] has transferred free of value to Legae [Peresec] the following shares:

1. 10,538,897 ENX Group Limited ordinary shares
2. 3349,59 units in the Conservative Yield fund with instrument code CYF BH
3. 11,254,509 Core Potash PLC shares listed on the JSE
4. 11,189,850 Core Potash PLC shares listed on the LSE

C. Legae 12[Peresec] has cancelled the CFD contract obligations entered into between Inhlanhla [Ventures] and Legae [Peresec].

D. Inhlanhla [Ventures] and David Brouze will procure and deliver outright and free of value and encumbrance its shares in Extract Group Limited, being approximately 83% of the shares in issue, to Legae [Peresec]

E. Legae [Peresec] has lent R150 million ("Loan") to Inhlanhla [Ventures] from Monday 18 May 2020. The loan is secured by 7 065 895 Nu World Holdings shares. The salient terms of the Loan are:

Term of 6 (six) months

Interest at SA prime overdraft rate.

Interest capitalised to the loan and repaid on the repayment date

Sole security on the capital and interest being the 7 065 895 Nu World shares with no further recourse to Inhlanhla [Ventures]

Effective date 18 May 2020

Repayment date on or before 18 November 2020

F. The draft Loan agreement is included as annexure "A" which agreement must be settled and signed within 7 (seven) days from 18 May 2020. Any dispute as to the final terms of the loan agreement will be referred to Kevin Joselowitz to act as arbitrator.

Legae will confirm the same to RMB in writing.

G. Inhlanhla [Ventures] will seek to refinance the Loan with a third party within 6 months. If Inhlanhla [Ventures] does not repay the loan in 6 months then the Loan (including interest) needs to be collateralised at 130%. If not sufficiently collateralised after 6 months then Legae [Peresec] will take transfer of the shares in settlement of the loan obligations and make the appropriate market announcements. It been (sic) recorded that taking transfer of the shares and collateral will be in full and final settlement of the loan obligation and Legae [Peresec] will have no claim beyond that.

H. This agreement is in full and final settlement of Legae's [Persec's] prior claims. Legae [Peresec] will have no further claims of whatsoever nature against David Brouze or any of the entities and accounts which are related to David Brouze, which are:

MCC Contracts Pty Ltd

Inhlanhla Ventures Pty Ltd

Regeltro Investments Pty Ltd

Inhlanhla Trust

eXtract Group Limited" (Emphasis added)

[60] In early 2024, Brouze and Ventures began litigating about the ownership of the eXtract shares. Initially, they launched an urgent interdictory application in this court alleging that the second MoU had been procured under duress and seeking to have it declared void for this reason (the duress application).

[61] The duress application was withdrawn after the respondents had filed their answering affidavit therein. The applicants then stated that they would proceed with an action for the relief sought in the duress application. But, instead of doing so and inexplicably they launched this application, some two months after the withdrawal of the duress application.

[62] The explanation proffered for this withdrawal of the duress application was that the applied for certification as a commercial matter was refused. This makes no sense. The refusal to certify the matter as a commercial matter would not have prevented it from proceeding urgently in the normal course.

[63] The abandoned urgent duress application is relevant in that, in the papers founding that application, Brouze gave a different account of his understanding of the second MoU and relied on an entirely different cause of action for the contention that it was void – i.e. duress. I shall return to this aspect later.

[64] Subsequent to the launching of this application a preservation application was launched apparently on the basis that it run in tandem with this application. This preservation application had as its purpose the obtaining of interim relief protecting the eXtract shares from being dealt with by the respondents pending the determination of this, the main application. The preservation application reached a stage where it had been answered by the respondents. The respondents provided undertakings in relation to the dealing with the shares.

[65] The applicants then decided to “pause” the determination of the preservation application on the basis that the main application was allocated a preferential date by me in the Commercial Court, being 26 March 2025. The applicants thus took the decision not to file a replying affidavit in the preservation application.

[66] During February 2025 and allegedly pursuant to the alleged discovery of new facts relating to dealings with the shares in issue, the applicants sought to amend the notice of motion in the preservatory application by including in it the following prayer for relief:

“Pending the final outcome of the main application, each of the Second to Ninth respondents shall transfer the proceeds of the distribution received from the Eleventh Respondent on or after 13 June 2024 to the trust account of its legal representative to be held by the legal representative in an interest-bearing account, for the benefit of the party entitled to receipt of the proceeds of the distribution in question as determined by this Honourable Court;”

[67] The indication from the applicants was that they would, with this amended relief, seek that the preservatory application be heard at the hearing of 26 March 2025 together with this main application.

[68] On 13 March 2025, it was sought that a supplementary affidavit be received in relation to the proposed amendment.

[69] Ms Hofmeyr SC, on behalf of the respondents, objected to the hearing of the revived preservatory application as well the amendment of the relief sought thereunder.

[70] The objection was upheld and only the main application was heard. This judgment is in respect of the main application only.

The opposing arguments

[71] The applicants allege that, properly construed, clauses A and B of the second MoU were intended to impose obligations to transfer the shares mentioned therein rather than to record transactions which had already occurred.

[72] They argue that, because as at the date of the conclusion of the second MoU, the shares which were the subject of clauses A and B were registered to MCC in accordance with the pledges and consolidation under the first MoU, the shares could not have been the subject of an obligation to transfer them under the second MoU, hence the impossibility of performance which renders the second MoU a nullity.

[73] This begs the question as to whether an item subject to a pledge cannot be the subject of an agreement to sell such item. I do not propose to deal with this question in light of the facts ultimately found by me to be determinative of the matter. I must say, however, that it seems to me that there is no reason why there should be an objection to the sale of a pledged item on the basis that such sale would be regarded as subject to the pledge.

[74] The respondents admit that the enX shares have remained formally registered to MCC pursuant to the consolidation of security precipitated by the first MoU.

[75] Chapman alleges that the registration of the shares in the name of MCC, be it for

pledge or otherwise, was fluid in the context of the trading arrangement in place. This trading arrangement of necessity involved instant trade subject to agreement but characterised by a lack of formality as to registration.

[76] The respondents point out that the notional distinction between a transfer of the shares to Peresec or MCC is one without an effectual difference. The effect of the second MoU is to place Peresec in control of the shares in MCC by virtue of the fact that the clear and overweening term of the second MoU is the transfer to Peresec of the shares in eXtract (which owns MCC) in full and final settlement of Peresec's claims against the Brouze entities, which included MCC.

[77] Recall, under the first Mou the eXtract shares were to be transferred to Peresec for R1 on failure to cure the default. With the second MoU, the eXtract shares were transferred outright and a further loan was extended on pledge of the Nu World shares.

[78] This loan was, says Chapman, meant to afford Brouze some liquidity so he was not subject to total foreclosure under the facility agreements and could continue trading.

[79] As I have said, the respondents contend further that the applicants' case for the return of the shares has prescribed. It argues that, on the applicants' version, they were aware of the impossibility on which they now rely for more than four years - i.e. from as far back as May 2020 - and the application was instituted more than four years later.

[80] The questions for determination can thus be distilled into the following:

- a. Is the second MoU capable of the construction proposed by the applicant, being that clauses A and B were intended to be obligation clauses and not recordal clauses?
- b. Has the claim for return of the shares, in any event, prescribed?

[81] In that prescription is potentially a dispositive point it is best to deal with it first.

Prescription

- [82] The applicants rely in response to the plea of prescription by the respondents that the word "debt" in the Prescription Act does not include a vindicatory action for the recovery of property. Such a claim they argue on authority of *Absa Bank Ltd v Keet*¹¹ does not prescribe as it is a real and not a personal right.
- [83] The argument goes that, because of the impossibility contended for, the agreement is void ab initio and that the enX shares remained owned by Ventures and Regeltro.
- [84] Simply put, the applicants say that, as at the date of conclusion of the second MoU, the position was that there had been a pledge of the shares in enX by Ventures and Regeltro who were the owners of those shares to MCC. It is not disputed that this was for the purposes of consolidation of Peresec's security for the debt which was part of the intention behind the first MoU.
- [85] On this assertion, the applicants contend that, once the second MoU is declared to be void and of no effect, then the position reverts to that which maintained absent the second MoU.
- [86] If, indeed, the transaction was void and thus without effect, the transfer of the shares (accepting the respondents concession that the shares are capable of being the subject of vindication) would not change the ownership position as it existed before the transfer.
- [87] The central problem for the applicants is not the mechanism relied on for the alleged reversion of ownership, it is that impossibility contended for is not borne out by the facts. This is a central and overwhelming difficulty faced by the applicants.

¹¹ *Absa Bank Ltd v Keet* 2015 (4) SA 474 (SCA)

[88] Thus, to concluded on the prescription point, whilst I accept for the purposes of the argument that, on an understanding of the shares as property, and on the basis that an impossibility may render a transaction void *ex tunc*, it must be said that such an argument is contrived when one has reference to the facts of the matter. Ignoring these facts sends one on a goose chase around prescription principles and shareholding which, although this may be interesting, is not merited in the determination of the case.

[89] It is relevant that the case in the abandoned application - being one of duress - was also calculated to contrive a case of invalidity *ex tunc* in a bid to attempt to avoid the legal consequences of the transfers under the second MoU.

[90] The matter is to be dealt with on the facts which, do not in my view allow for a rational finding of impossibility in relation to the intention behind the second MoU.

[91] I now turn to the meaning of the second MoU with specific reference to whether clauses A and B thereof are capable of the meaning attributed to them by the applicants.

The second MoU

[92] We know perfectly well by now that interpretation is a unitary exercise which takes account of the language used, the context in which it is used and the purpose of the clauses which are to be interpreted.¹²

[93] We are cautious also to see that text, context and purpose not be used in a mechanical fashion. Unterhalter AJA in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*¹³ put the position thus:

“It is the relationship between the words used, the concepts expressed by those words

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

¹³ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA)

and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'.¹⁴

[94] In *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited*¹⁵, the SCA explained that, even in the absence of ambiguity, the conduct of the parties in implementing the agreement might provide clear evidence as to how the disputed provision is understood by reasonable businesspeople.¹⁶

[95] The following passage in *Capitec* is compelling in relation to textual structure:

"Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."¹⁷

[96] The point of departure in the case is whether the second MoU is, in light of the application of these principles capable of the meaning sought to be attributed to it. If it is not, that is the end of the matter.

[97] I shall start, as I am bid by the authorities, with the structure of the language.

[98] The starkest feature of the form of the clauses that require interpretation is that the present perfect tense of the verb is employed- '...has transferred' to Peresec'.

[99] In normal parlance the use of the present perfect tense would indicate an acknowledgment and recordal of the completion of the transaction mentioned.

¹⁴ Id at para 25.

¹⁵ *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited* (759/2011) [2012] ZASCA 126.

¹⁶ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC).

¹⁷ *Capitec* at par 51.

[100] It would be most unusual for an English speaker to use the perfect tense to convey the imposition of a future obligation.

[101] It would be even more unusual for a businessman to sign a document which recorded that there had been the perfection of a transaction which entailed the transfer of rights and obligations when this was not the case. It is important that the case on the facts is that both Chapman and Brouze were aware of this impossibility.

[102] This brings me to the business context in which the parties were operating.

[103] The subject matter transferred under the second MoU are incorporeal rights designed for instant disposal and acquisition. Registration of shareholding does not create ownership. It is evidential only and must be weighed with the totality of the evidence.

[104] The trading environment in which the second MoU was concluded is the context for the determination of the meaning of its terms.

[105] It is not disputed that the position before the conclusion of the second MoU was that the eXtract shares were held under pledge in favour of Peresec.

[106] There is also no dispute that Brouze had the unfettered authority to encumber the eXtract shares as security and effect the consolidation of the security into MCC.

[107] The picture in relation to the value of the pledged security under the first MoU was completed by the back-to-back pledging of the eXtract shares to Peresec on the basis that, if the default was not purged within the 30 days ownership the shares would pass to Peresec for R1. This was done as it was understood by both men that the enX shares were encumbered to MCC and that he who controlled eXtract controlled MCC and through this control of MCC the enX shares – which is where the value of the security lay.

[108] That Peresec take in control of all the shares as security for the debt was the clear aim of the first MoU.

[109] When the value in the enX share dropped the security under the first MoU was reduced below the 30% margin contemplated in the first MoU. This gave Brouze 30 days to bring the security held back in line. The way of doing this was to refinance. Brouze was having difficulty getting the requisite finance.

[110] It seemed that the matter was hopeless for Brouze and it was accepted that foreclosure was inevitable.

[111] This was the context in which the second MoU which confirmed the outright transfer of the pledged eXtract shares to Peresec was concluded. A further loan of R150 million by Peresec was extended under pledge of the Nu World shares.

[112] It is not seriously disputed that the intention behind the second MoU was to avoid a full foreclosure under the facility agreements in place at the time. Chapman says that the further loan of R 150 million was extended to give Brouze a lifeline and allow him to continue trading.

[113] The pivot in this case is what Brouze had the power to agree to in relation to the shares of his various entities and this is now examined.

[114] It is not in dispute that, as at the date of the conclusion of the second MoU, Chapman was empowered to act for Peresec. Neither is it in dispute that Brouze was in total control of eXtract, Ventures, Regeltro and importantly, MCC. There are no third parties involved who needed to give their consent.

[115] The fluidity and transactional autonomy that Brouze had over these related entities is key to the meaning of the second MoU.

[116] Brouze knew, at the time that he concluded the first MoU, that he could decide that Peresec could take transfer of the eXtract shares (i.e. full and unlimited control of all the rights in and to the shares) in the event of default. On this basis,

he agreed to the pledge of the shares to Peresec. In the same vein – Brouze had the power, as at the date of the second MoU, to determine where the shareholding stood in Ventures and Regeltro and in MCC.

[117] He controlled ventures and Regeltro and through them the EnX shares in that he controlled MCC.

[118] This control and the trading environment in which the shares were being traded is the context in which the second MoU must be considered.

[119] The second MoU is a compromise in respect of indebtedness owing to Peresec by the all the entities mentioned in the second MoU. It records that Peresec will have no further claims of whatsoever nature against Brouze or any of the entities and accounts which are related to Brouze, which are specified as being MCC, Ventures, Regeltro and eXtract. The Inhlanhla Trust is also mentioned.

[120] It is not disputed that Brouze together with Chapman for Peresec could agree to release the pledges operative under the first MoU.

[121] It was thus perfectly possible for Chapman on behalf of Peresec to agree to a platform for the second MoU which allowed for the release of Peresec's pledge of the eXtract shares and for Brouze to agree, on that basis, that there would be a mechanism in the second MoU for Peresec to acquire the value in MCC (ie the enX shares) through the transfer of ownership of the eXtract shares.

[122] This, says Chapman is precisely the deal that was done and this position was in place at the time and duly recorded as having taken place.

[123] There can be little doubt that the attempt to undo the transfers recorded in the second MoU is because of remorse felt by Brouze in relation to the settlement in the second MoU.

[124] This remorse is understandable. It arises as a result of the fact that, after the settlement in the second MoU was concluded, the enEx shares increased in value sharply.

- [125] The contention of Brouze is that this rise in share price would have taken the security that Peresec was holding in terms of the first MoU into positive territory. This, he alleges, would have cured the default within the thirty days' notice period given. Thus, it seems that his thinking is that the conclusion of the second MoU was unnecessary in hindsight.
- [126] There is a dispute as to whether the recovery of the share price would have cured the default. The respondents allege that it would not have done so.
- [127] Whether it would or would not have done so is immaterial to the dispute before me, save to the extent that it creates context for this application and the abandoned duress application.
- [128] And this brings me to the premise of the duress application with reference to how the version there impacts on finding in this application.
- [129] The duress application was based on the acceptance, under oath, by Brouze that the second MoU was concluded under duress. This premise entails an acceptance by Brouze of the meaning of the second MoU.
- [130] As I have said, the duress application the first attempt to gain refuge in a legal construct which allowed for the assertion of voidness *ab initio* so as to avoid the spectre of a prescription argument.
- [131] There can be no question that the intention in the relation to what was to happen to the eXtract shares was that ownership therein would be transferred to Peresec. These shares had been pledged under the first MoU.
- [132] As at the date of conclusion of the second MoU, Brouze was in control of the entities mentioned in the second MoU whose obligations to Peresec were secured in terms of the second MoU. He could agree to transfer the eXtract shares on behalf of Ventures and Regeltro. Why could he not, in the same vein agree that the pledges held by these entities in favour of MCC (which was also under his control) be released and substituted with the new central agreement which saw Peresec take the shares in eXtract outright.

- [133] The reality of the situation is that clauses A and B were structured on the basis that both Brouze (who controlled the all the Brouze entities) and Chapmen who represented Peresec were agreed that the eXtract shares would go to Peresec in full and final settlement of the indebtedness of the Brouze entities and that any formal impediments which may have existed in light of previous security structures had been swept aside by agreement.
- [134] It is not disputed that the controlling mind of MCC was Brouze; that the pledging of the A and B shares to MCC was part of a plan agreed to by Brouze to avert a looming foreclosure; that the transfer of the A and B shares in the form of the pledge relied on was on the central understanding that the value in MCC would be transferred to Peresec in settlement of the loan indebtedness of all the Brouze parties including Ventures, Regeltro and MCC.
- [135] Centrally, Brouze had the power on behalf of MCC to release any such pledge so as to enable the terms of the second MoU to take effect. He was answerable to no-one.
- [136] The intention expressed in the second MoU is clear – A and B recorded a situation of shareholding that both Brouze and Chapman understood to be the position. Whether there had been a transfer of the shares mentioned in A and B to Peresec or MCC was immaterial. The fact was that, with the acquisition of the shares in eXtract, Peresec acquired control over MCC – which was the aim of the second MoU regardless of how it was structured. The parties may as well have agreed that all pledges and other impediments existing in relation to security for the debts in issue were released so as to achieve the end being the transfer of the eXtract shares in full and final settlement of the indebtteness of Brouze and his entities.
- [137] Brouze was empowered on behalf of all the Brouze entities to transfer the A and B shares to Peresec. This was recorded as having been done. Likewise, he could

transfer the eXtract shares. Which he duly did on behalf of eXtract.

- [138] The technical approach to the second MoU which Brouze urges be taken ignores the fact that Brouze was in total control of MCC, Ventures and Regeltro and could agree together with Chapman for Peresec to release the pledge and transfer the eXtract share as recorded in A and B of the second MoU and to the transfer of the eXtract shares to Peresec. This could happen in an instant and was recorded as having so happened.
- [139] Chapman says that this was achieved and understood to have been achieved as part and parcel of the settlement – hence the recordal. I have no reason to disbelieve him. In fact, it would be difficult to conceive of a situation where Brouze would find the terms of the second MoU impossible to perform.
- [140] Chapman explains that it was believed at the time of the conclusion of the second MoU, that there was no prospect of Brouze rectifying his position within the 30-day period (i.e. by injecting cash into the portfolio) or refinancing the debt.
- [141] Chapman alleges that Brouze asked that he be left with some assets from which he could potentially recover value. This, says Chapman, was the intention behind the second MoU and specifically the loan of R150 million.
- [142] On *Plascon Evans* this must be accepted. In any event, the terms of the second MoU conform to the version of Chapman. A further loan in the amount of R 150 million was extended on security of the NU-World Holdings shares and the eXtract shares were registered to Peresec.
- [143] The cause of action in the duress application which entails an acknowledgment that the second Mou was concluded on its terms - including the acknowledgment of transfer in clauses A and B – is irreconcilable with the cause of action in this application which entails an acceptance of the fact the clauses were known to be impossible of performance by both Chapman and Brouze.

Conclusion

[144] Not only is the version of Chapman to be accepted on a *Plascon Evans* evaluation, but it is also entirely consistent with the terms of the second MoU.

[145] MCC's default of the first MoU, notice of which was given on 12 May 2020 by Chapman, would according to Brouze have been remedied within the permitted 30 day period. He would thus have it that the second MoU and the transfer of the shares thereunder be wished away. He tried duress; rejected this as implausible after the respondents laid out their defence and now tries impossibility of performance.

[146] Neither version is to my mind plausible.

[147] Once it is accepted that the second MoU evidences the share transfer in the form of the intention to transfer which occurred, there is no basis for the consideration of the severance argument which was one of the alternative arguments raised by the respondents.

Costs

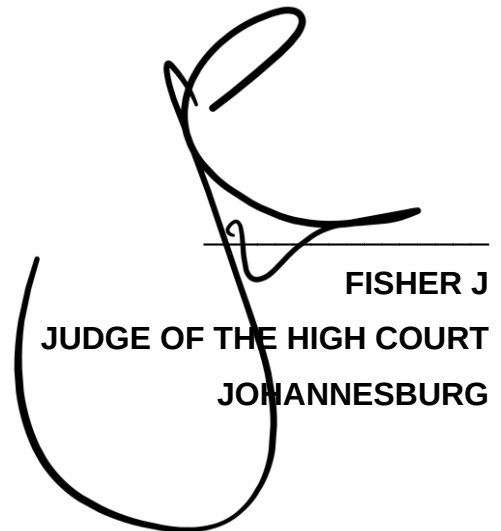
[148] The costs must follow the result. The retrieval of costs must take account of interlocutory applications.

Order

[149] In the circumstances I make an order that reads as follows:

1. The application is dismissed.
2. The applicants, jointly and severally, are to pay the costs of the application, which are to include all costs occasioned by the launching of the

preservatory application to date, such costs to be determined on scale C and to include the costs of two counsel where employed.



FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 05 May 2025.

Heard: 26 March 2025

Delivered: 05 May 2025

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