REPUBLIC OF SOUTH AFRICA

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

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

_____ _____
DATE SIGNATURE

Case number: **16892/2012**

In the matter between:-

KUMARAN PADAYACHEE Plaintiff

And

ADHU INVESTMENTS CC 1st Defendant

HUGO HEINRICH KNOETZE 2nd Defendant

LIVISPEX (PTY) LIMITED 3rd Defendant

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] The plaintiff, ("Mr. Padayachee") instituted action against the first and second defendants ("Mr Knoetze" and "Adhu"), for damages caused by them to him by

diverting and preventing payment to Mr Padayachee of a fee of R2.5 million ("the fee"). The fee was originally payable to him personally in terms of an agreement ("the exit agreement") concluded on 28 July 2010 by Mr Padayachee, a company which he controlled, Spartan Finance Holdings (Pty) Limited ("Spartan"), another individual, Mr Knoetze, a company controlled by Mr Knoetze, Adhu and a company which was to serve as a vehicle for Messrs Padayachee and Knoetze via their respective companies (Spartan and Adhu) to enable a company called Teleosis Capital (Pty) Limited ("Teleosis") to acquire a valuable shareholding in another company. Had things gone according to plan, as they seldom do in human affairs, Teleosis would have paid Mr Padayachee a fee of R2.5m for assisting in the raising of the funds from a funder to facilitate this entire transaction and Mr Padayachee would have exited stage left. This was not to be. Many a twist was hidden behind the scenes, only to be revealed much later when the machinery of the courts, subpoena, discovery and cross-examination entered onto the stage in the hands of skilful and determined lawyers.

[2] The exit agreement flowed from a fall out between Mr Knoetze and Mr Padayachee. They had, before they fell out, planned a BEE transaction in terms of which their joint venture company, Teleosis, was to acquire 51% of the shares in a valuable company known as Advanced Fire Suppression Technologies (Pty) Limited ("AFST"). The shareholding in Teleosis was, if all had gone according to plan, to be held by Mr Knoetze's company Adhu and Mr Padayachee's company, Spartan, in the proportions 49% to 51% respectively. Spartan was to fulfil the role of BEE partner. It was because they fell out that Mr Padayachee and Spartan decided to exit. Although it sounds peculiar (and it is not the only peculiar feature of this matter) they entered into the exit agreement.

[3] Mr Padayachee's claim for damages was based on two grounds: Mr Knoetze and Adhu failed to take steps to progress the AFST transaction to its final end when able to do so and failed to perform such acts as might be necessary to give effect to the terms of the exit agreement. As mentioned, the exit agreement recorded an obligation on Teleosis to pay Mr Padayachee R2.5million if he successfully raised the funds needed for Teleosis to acquire the targeted shareholding in AFST. In the alternative, Mr Padayachee pleaded that Mr Knoetze had in effect achieved the

completion of the AFST transaction, but had replaced Teleosis for this purpose with the third defendant, Livispex (Pty) Ltd ("Livispex"), and in so doing failed to procure that the obligations owed by Teleosis to Mr Padayachee were fulfilled by Livispex, when Mr Knoetze could and should have caused it to do so.

[4] Mr Padayachee further pleaded that Mr Knoetze or Mr Knoetze and Adhu, unlawfully prevented Livispex from paying him the fee.

[5] Mr Padayachee does not persist with the ground that Mr Knoetze and Adhu failed to take steps to progress the AFST transaction to its final end when able to do so.

[6] On or about 17 December 2014 and by means of an application for joinder and a substantial amendment to the particulars of claim, Mr Padayachee levelled his claim against Livispex, claiming payment of the fee of R2.5m on the basis of a stipulatio alteri, contending that in an agreement between Standard Bank of South Africa ("SBSA") and Livispex they had included that fee in the capital amount of the loan being made by SBSA to Livispex to pay for target shares in AFST.

[7] In support of his claim based on the stipulatio alteri, Mr Padayachee relied on documents that had been provided by SBSA in January 2014, pursuant to the subpoenas issued against it, in particular a written motivation by SBSA's "Equity and Leveraged Finance Department" to its Credit Department which provided that a portion of the loan funding to Livispex would comprise the fee due to Mr Padayachee, and the medium term loan agreement concluded between SBSA and Livispex, ("the loan agreement") in terms of which SBSA loaned Livispex an amount of R63.4 million.

[8] In their amended plea Mr Knoetze and Adhu admitted the conclusion of the exit agreement, but denied that the conditions necessary for payment of the fee were met. They denied that Mr Padayachee had done what was required of him (i.e. the rendering of certain consulting services) for payment of the fee. They pleaded that after the conclusion of the exit agreement, Livispex purchased the assets and business of AFST "which acquisition was funded partly by a loan granted to Livispex by SBSA." In its plea, Livispex identified its direct and indirect shareholders, admitted the conclusion of the loan agreement and its terms but denied the remaining allegations and also raised a special plea of prescription. Livispex's prescription

defence was to turn into a central pillar of the defence presented in the trial. The allegation that Livispex owed the obligation to pay the R2.5m fee was at the end of the day resisted on two broad grounds, prescription and that Mr Padayachee had not performed in terms of the exit agreement.

[9] To the prescription point Mr Padayachee replicated, relying on section 12(3) of the Prescription Act 68 of 1969 ("the Prescription Act"). During argument, an amendment to the replication was sought, relying on section 12(2) of the Prescription Act. The amendment was unopposed and was granted.

[10] Two bundles of documents were prepared for the trial, and introduced as volumes 1 and 2. The defendants introduced certain other documents which were admitted by agreement as volume 3. During the trial it was agreed between the parties that the full contents of various written agreements concluded on 14 and/or 20 July 2010 (bundle 2 pages 396 – 596 "the transaction agreements"), could be relied on in argument by any of the parties, irrespective as to whether any agreement or provision thereof had been introduced into evidence through the mouth of a witness or not.

[11] The parties agreed that the documents were what they purported to be, that copies could be used in place of originals and that documents would not be regarded as having been adduced in evidence unless referred to in evidence or agreed to form part of the record.

[12] The plaintiff called five witnesses; Mr Padayachee, three witnesses employed by SBSA during 2010: Mr Gaarekwe Penyenye, ("Mr Penyenye"), Mr Mohammed Sabi ("Mr Sabi") and Mr Kreneshin Naidoo ("Mr Naidoo"), and Mr Padayachees' attorney, Mrs Jonet Crone ("Mrs Crone").

[13] The defendants called two witnesses, Mr Knoetze and a certain Mr Willem Frederick (Barries) Barnard ("Mr Barnard").

SUMMARY OF THE EVIDENCE

Mr Padayachee

[14] Mr Padayachee explained that he was a businessman involved in financing small and medium businesses and had been doing this for approximately 20 years. During 2010 he was, amongst other things, a director of Spartan. He was interested in acquiring shares in AFST. AFST's business involved the servicing of the mining

industry through fire suppression. AFST had a distributorship agreement with an international company called Tyco. Teleosis was a shelf company. It was decided that Teleosis, the shelf company of which Mr Padayachee was a director, would be used to house his and Mr Knoetze's business interests. Mr Knoetze became the chief executive officer ("CEO") as well as a director of Teleosis.

[15] On the 8th of February 2010, Mr Knoetze, on behalf of Teleosis, and Mr Barnard on behalf of AFST, signed a memorandum which contained a proposal for the acquisition of a 51% stake in AFST. The document recorded that the purchase consideration would be R 82.9 million for the 51% stake and that payment would be made in three stages. An initial 50% of the consideration would be paid on conclusion of the transaction. The remainder of the purchase price would be paid in two equal instalments at the end of each financial year starting with the financial year ending 2011. Should the warranties not be met, this payment would be adjusted downward on a rand for rand basis. The remaining 50% would be held by the financial institution funding the transaction on a secure money market instrument. Teleosis would hold 51% of the shareholding in AFST and the existing shareholders of AFST would hold the remaining 49%.

[16] The distributor sales agreement between AFST and Tyco provided in article XIII part B as follows:

"In the event Distributor transfers, sells or assigns ownership of fifty percent (50%) or more of its interest therein to any third party, whether by consolidation, merger, or otherwise, TYCO SAFETY PRODUCTS reserves the right to continue or terminate this Agreement."

[17] Mr Padayachee testified that he had been approached by Mr Knoetze as he had an existing business enterprise or group, and accordingly had some form of capital and could thus pay for salaries, the rent and provide a form of drawing for Mr Knoetze during the initial phase, in short to provide capital. Another important reason why he, Mr Padayachee had been approached was that he had existing, and well established, relationships with the funders. Lastly, he was approached as he, Mr Padayachee, would fulfil the Black Economic Empowerment ("BEE") component of this transaction.

[18] Mr Padayachee testified that he had in fact in respect of this matter, engaged three banks, being First National Bank ("FNB"), Investec and SBSA.

[19] Mr Padayachee explained that he had arranged for business premises at one of the properties that he owned, that he and Mr Knoetze had hired an assistant and that he, Mr Padayachee, had created a facility to pay for a monthly drawing for Mr Knoetze (Mr Padayachee was the one who funded this). He also introduced Mr Knoetze to some of his network of contacts to develop the new business venture. He explained that at that stage, Mr Knoetze did not have any relationship with SBSA.

[20] Mr Padayachee called for a meeting with SBSA where Mr Knoetze and he were present and Mr Knoetze explained the AFST transaction to SBSA. This introduction ultimately lead to the SBSA providing funding for the transaction.

[21] On the 19th April 2010 and at the time that Mr Knoetze and Mr Padayachee were both directors of Teleosis, Teleosis received a letter from SBSA referred to by Mr Padayachee as an initial term sheet ("initial term sheet"). Mr Padayachee had received this initial term sheet due to the fact that he had approached Mr Zair Cassim and Mr Naidoo. Mr Zair Cassim was the previous head of leverage finance of SBSA and Mr Naidoo was the subsequent head. The initial term sheet proposed that the security which was to be provided by Teleosis was to include:

- Unrestricted Cession of Book Debts.
- Notarial General Bond over all moveable Plant and Equipment held in the name of the Borrower wherever situated.
- Reducing Limited Suretyships (linked to the capital amount outstanding, including accrued interest and recovery costs) issued by Teleosis Capital. The bank to take relevant consideration of the security held in the event of exercising such suretyship.
- Unrestricted Cession and Pledge of a cash investment in the amount of at least R 42, 250 million for the first 12 months of the Term Loan, thereafter reducing to R 21,125 million for an additional 12 months."

[22] Mr Padayachee testified that what the last bullet point in fact meant was that SBSA required that half the facility be pledged back to them. SBSA's fee for the transaction would amount to R 750 000. The initial term sheet further provided that any legal costs incurred from date of acceptance would be borne by Teleosis and that the document should not be construed as an offer for finance from SBSA, nor should it be considered as a commitment from SBSA. Mr Padayachee testified that it was never anticipated that the borrower would get the full approximately R 85 million up front. In support of this he referred to a document prepared by Webber Wentzel

Attorneys dated the 6th of April 2010, which document had become available to Mr Padayachee after the discovery process had been completed, which at page 26 thereof, confirmed that only R 41. 45 million would be paid up front by SBSA. He referred to an SBSA document dated the 9th of April 2010 (this was also a document, the content of which became known to Mr Padayachee after it had been procured under subpoena) in which it was recorded that 50% of the transaction value, ie R 41, 450 000 would be paid over to the sellers on day 1 of the transaction. The balance would be paid to the sellers but be ceded back to SBSA assuming certain profit and cash flow warranties were met.

[23] On the 9th June 2010, Mr Padayachee received a letter of resignation from Mr Knoetze. He and Mr Knoetze discussed some terms and the amount which Mr Padayachee would receive for exiting the AFST transaction. They agreed on R 2.5 million.

[24] On the 28th day of July 2010 Mr Padayachee, Spartan, Mr Knoetze, Adhu and Teleosis concluded an agreement dealing with how the parties would dissolve their relationship (the exit agreement). In order to fully understand the exit agreement, it is necessary to quote extensively therefrom. I accordingly quote the salient features:

" 2. **BACKGROUND**

2.1 SFH [Spartan Financial Holdings (Pty) Ltd, Mr Padayachee's company] currently holds 60% (sixty percent) of the shares in Teleosis.

2.2 Adhu [Mr Knoetze's company] currently holds 40% (forty percent) of the shares in Teleosis.

2.3 Padayachee is a director of SFH and Teleosis.

2.4 Knoetze was the Chief Executive Officer of Teleosis. Knoetze resigned as the Chief Executive Officer and director of Teleosis on 11 June 2010.

……

2.7 SFH and Adhu together with Padayachee and Knoetze have invested time, effort and resources to arrange and facilitate that Teleosis purchase 51% (fifty one percent) of the shares of the existing shareholders of AFST.

2.8 The 51% (fifty one percent) acquisition contemplated in clause 2.7 would meet the black economic empowerment requirements of AFST.

….

3. **RECORDAL**

3.1 The Parties acknowledge and agree that the successful conclusion of the AFST transaction is founded on Knoetze and Padayachee in their respective individual capacities, irrespective of the roles played by SFH, Adhu and Teleosis.

3.2 Padayachee and Knoetze agreed to work together in good faith, with complete trust and by exercising sound and honest commercial dealings with each other and third parties and by sharing common business goals and objectives.

3.3 The Parties have progressed the AFST transaction to an advanced stage.

….

3.5 The Parties hereby agree that they shall state that the relationship was dissolved as a result of the Parties sharing differing business philosophies should any enquiries be made or queries raised by third parties of whatsoever nature regarding the dissolution of the relationship and when Padayachee and Knoetze fulfil the terms of this agreement as contemplated in clauses 5 and 6.

….

4. **TELEOSIS**

4.1 SFH will transfer its shares in Teleosis for R 1.00 (one rand) to Adhu.

4.2 In order to give effect to the transfer of shares contemplated in clause 4.1, an appropriate agreement shall be drafted by SFH, if necessary.

….

4.5 Teleosis hereby appoints Padayachee as a consultant. Padayachee will render consulting services to Teleosis on the AFST transaction.

4.6 The consulting services to be rendered by Padayachee are recorded in clause 5.

4.7 Teleosis undertakes to pay Padayachee R 2.5 million for rendering consulting services to Teleosis on the basis that the AFST transaction is finally concluded and subject to clause 4.8.

4.8 Teleosis shall pay Padayachee the R 2.5 million as contemplated in clause 4.7, without deduction of set-off as follows:

4.8.1 The consulting service fee will be due and payable if said service is capitalized as part of the funding arrangement from the financial institution. The funders will be approached on the specific basis to also fund this R 2.5 million fee.

….

4.8.2 If the AFST transaction is not concluded and the Parties referred to in clause 4.11 have settled the expenses and liabilities contemplated in clause 4.9 in the agreed upon percentages, the Parties shall take the necessary steps to

place Teleosis into voluntary liquidation. The Parties shall cooperate in good faith and sign all documents that are necessary to place Teleosis into voluntary liquidation.

5. **PADAYACHEE'S DUTIES**

5.1 Padayachee shall facilitate the Funders continue to participate in the AFST transaction.

5.2 Padayachee shall do all that is reasonably necessary and within the power of Padayachee to progress the AFST transaction to its final end.

6. **KNOETZE AND ADHU'S OBLIGATIONS**

6.1 Knoetze and Adhu undertake to source and secure a Replacement BEE shareholder.

6.2 Knoetze and Adhu shall do all that is required to progress the AFST transaction to its final end.

….

8. **BREACH**

8.1 Save where express provision is made therefore, if any Party commits a material breach of any material provision or term of this Agreement and:

8.1.1 If the breach is incapable of being remedied by the payment of compensation of otherwise or if the defaulting Party fails to cause such state of affairs to cease to exist; or

8.1.2 If it Is capable of being remedied by the payment of compensation or otherwise, the defaulting Party fails to pay such compensation or to remedy any such breach.

within 14 (fourteen) days (or such longer period as may be reasonable in the circumstances) of the receipt of written notice calling upon it to do so, then the aggrieved Party shall be entitled, in addition to any other remedy available to it at law, to cancel this Agreement or to claim specific performance, in either event without prejudice to the aggrieved Party's rights to claim damages.

10. **IMPLEMENTATION AND GOOD FAITH**

10.1 The Parties undertake to do all such things, perform all such acts and take all steps to procure the doing of all such things and the performance of all such acts, as may be necessary or incidental to give or conducive to the giving of effect to the terms, conditions and import of this Agreement.

10.2 The Parties shall at all times during the continuance of this Agreement observe the principles of good faith towards one another in the performance of their obligations in terms of this Agreement. This implies, without limiting the generality of the aforegoing, that they:

10.2.1 will at all times during the term of this Agreement act reasonably, honestly and in good faith;

10.2.2 will perform their obligations arising from this Agreement diligently and with reasonable care; and

10.2.3 make full disclosure to each other of any matter that may affect the execution of this Agreement."

[25] Although clause 4.1 of the exit agreement provides that Spartan would transfer its shares in Teleosis for R1.00 to Adhu, Mr Padayachee said that he had never received a demand or request by Mr Knoetze at any stage to do this nor had he ever received any requests to assist with the voluntary liquidation of Teleosis as envisaged in clause 4.13 of the exit agreement.

[26] Mr Padayachee explained that the consulting services which he was required to render, as envisaged in clause 4.5 of the exit agreement, were that he was to engage with SBSA and make them comfortable with the AFST transaction so that it could continue despite Mr Padayachee withdrawing.

[27] The replacement BEE shareholder, as envisaged in terms of clause 6.1 of the exit agreement, was Ms Sindi Mobasa Koyana ("Ms Koyana"), although Mr Padayachee would only get confirmation of this fact much later.

[28] Mr Padayachee testified that after the conclusion of the exit agreement he arranged a meeting with SBSA. Messrs Naidoo, Penyenye and Knoetze were present. He urged Mr Naidoo to continue with the AFST transaction and assured him that he, Mr Padayachee, would continue to support the AFST transaction. He also advised him that they had concluded a formal exit agreement and that his fee of R2.5 million was to be capitalised into the funding which would be made available to the borrower. Mr Knoetze also requested that it be capitalised into the funding which was to be made available. SBSA was advised that a new BEE partner would be introduced.

[29] Mr Padayachee made reference to a letter which was addressed by Mr Knoetze to Mr Naidoo of SBSA on the 9th of August 2010. This too was a document which only became available to Mr Padayachee in preparation of the trial and after SBSA had been subpoenaed to produce documents. In this letter Mr Knoetze records:

"The Transaction Structure Memorandum done by Webber Wentzel is also finalized and you can contact WW for the final copy for your legal department. **As discussed with Kumaran, the only change to the Term Sheet is the R 2.5m fee payable to Kumaran. This amount needs to be capitalized to the overall funding**. (emphasis provided)

[30] Mr Padayachee, whose first name is Kumaran, referred to a shareholders' agreement concluded between Varsiworx Investments (Pty) Limited ("Varsiworx"), Livisize (Pty) Limited ("Livisize"), Livisys (Pty) Limited ("Livisys"), Livispex and Livisize's Shareholders, which agreement was concluded on 14 July 2010 ("the shareholders agreement"). Varsiworx is described as the BEE company. Mr Padayachee then made reference to a revised term sheet which was attached to an email from Mr Penyenye dated the 2nd of September 2011. The borrower is described as Livispex. In clause 2.1.20 of the revised term sheet, Teleosis has been deleted and replaced with Varsiworx and 51% has been deleted and replaced with 49.5%.

[31] At pages 396 to 596 of volume 2 appear 9 agreements consisting of the shareholders agreement, sale of shares agreements, marketing and agency agreements, sale of business agreements, reorganisation agreements all concluded during July 2010 but no later than the 20th of July 2010 and all relating to the sale of shares by AFST to Livispex (these suite of agreements have previously been defined herein as "the transaction agreements"). Mr Padayachee testified that neither the content, nor the existence of the transaction agreements had been drawn to his attention by Mr Knoetze at the time of the conclusion of the exit agreement. He explained that he was completely oblivious to the fact that the transaction agreements had already been concluded by the time the exit agreement was signed.

[32] Mr Padayachee explained that he had subsequently discovered that on the 29th October 2010, the loan agreement had been concluded between SBSA and Livispex. He only became aware of this when the SBSA provided this document to his attorneys under subpoena.

[33] Mr Padayachee testified that he had contacted SBSA from time to time to establish whether the AFST transaction had been concluded. On the 6th October 2010 he forwarded an sms which he had received from Mr Naidoo, representing SBSA, to his attorney. The sms reads:

"Things are moving along. We have the final sanction. Draft agreements are being reviewed by our credit and compliance and should be distributed shortly. Kreneshin"

[34] Mr Padayachee referred to a credit application of the SBSA dated the 2nd of September 2010 (the content of this document was confirmed by Mr Penyenye). The customer is identified as AFST and as a "new client". Non-executive directors are identified as Ms Koyana and Mr Knoetze. The BEE percentage is stated as 49.5% and the entity identified as Varsiworx. The facility is categorised as a medium term loan of R 63.4 million. The parties are then mentioned and the following is recorded about Teleosis:

"Teleosis Capital was initially earmarked to participate in the transaction. It is a specialised Black Investment and Turnaround house operating in Southern Africa. The company is 60% black owned through Spartan Finance Holdings. However the latter is being unwound with Hugo Knoetze buying out Spartan from Teleosis Capital. This has arisen due to the shareholders diverging in strategic direction. K Padayachee will focus on his core business – Spartan Technologies."

[35] Mr Padayachee testified that it is evident that at some point the shareholding percentage changed from 51% to 49.5%. He does not know when that occurred and he was certainly not told about this change at the time.

[36] Mr Padayachee referred to an email from Mr Penyenye dated 6 September 2010 in which he recorded the following:

"3. Under 8.1.9 please read the Tyco agreement, we don't need their consent, that was the whole reason we moved from 51% to 49.5%, so please delete this clause, as I indicated we would have waited 6 months if this was over 50% and it would have been a "deal breaker" [I am comfortable with Hugo's suggestion, please confirm you are]"

[37] Mr Padayachee referred to a further "AFST Structure Motivation to Credit" draft agreement prepared by SBSA dated the 28th October 2010 which document reflected that Varsiworx had approached SBSA to fund R 63.4 million of the R 83. 4 million purchase consideration of a 49.5% stake in AFST. The document also records the following:

"

- Newco would acquire the assets of AFST for R 80.9 m. Further Transaction Costs of R 2.5 m would be capitalised under the transaction bringing the Enterprise Value to R 83.4 m for a 49.5% stake in Newco.
- In funding the transaction SBSA would provide an MTL for R 63.4 m. The vendors would inject a shareholder loan of R 20 m for the total purchase consideration of R 83.4 m.
- In addition R 20.225 m of the loan, extended by SBSA, in funding the transaction would be pledged back to the bank and released in tranches upon certain warranties being met…….
- The shareholders would thus retain R 40.9 m of the cash upfront, with a further R 20.2 m being released upon meeting of warranties and a further R 20m in shareholder loans being repaid only once all of SBSA's debt has been expunged."

As pointed out earlier, the document reflects that the R 2.5 million agreed to in the exit agreement had been capitalised as part of the proposed medium term loan.

[38] Mr Padayachee testified that towards the end of 2010 SBSA had advised him that the transaction had been finalised but would not disclose the details or the identity of the parties concerned. Mr Padayachee's attorneys of record accordingly addressed a letter to Prinsloo, Tindel and Andropolis Incorporated ('PTA'), the attorneys initially engaged on behalf of both SBSA and Teleosis, in which it was recorded that it had come to Mr Padayachee's attention that Mr Knoetze had diverted the AFST transaction from Teleosis elsewhere. It recorded on Mr Padayachee's behalf that he was not aware as to a) how the diversion took place, and b) who the ultimate beneficiary of the AFST transaction was. His attorneys accordingly asked who the beneficiary of the AFST transaction was and whether SBSA had advanced the sum of R 2.5 million. He testified that no written response had been received. On the 17th February 2011 Mr Padayachee had instructed his attorneys to address a letter to Mr Knoetze and Adhu and to copy Ms Koyana in on such communication. In such letter Mr Padayachee demanded payment of the sum of R 2.5 million and tendered Spartan's reciprocal performance in terms of the exit agreement against payment of the sum of R 2.5 million. It also recorded that should payment not be made, he would like to know how and in what circumstances the AFST transaction

was not dealt with in terms of the exit agreement. This letter afforded Mr Knoetze and Adhu six days in which to perform their obligations ("the letter of demand").

[39] The letter of demand was responded to by alleging that Mr Padayachee had not complied with his obligations in terms of paragraphs 4.7 and 4.8 of the exit agreement. No reference to Livispex is made in this response.

[40] Mr Padayachee then dealt with certain features contained in Mr Knoetze's affidavit resisting summary judgement. In paragraph 10.2 of the affidavit resisting summary judgement Mr Knoetze stated under oath that the transaction ultimately concluded was very different from the AFST transaction envisaged in the exit agreement. The funding needed to complete the AFST transaction as envisaged in the exit agreement was, so Mr Knoetze stated, R 85.4 million which amount would have included Mr Padayachee's consultancy fee of R 2.5 million. He advised that the only capital that AFST was able to raise was R 63 million. Mr Padayachee drew attention to annexure "A" of the exit agreement which provided in clause 3.1 thereof that the terms and conditions of the loan were still to be agreed upon. That being so, there could not be any "difference".

[41] In paragraph 12 of the affidavit resisting summary judgement, Mr Knoetze stated the following:

"I further submit that a further condition precedent, namely the capitalization of his consultancy fee in Teleosis did not eventuate as a result of the fact that the plaintiff did not execute the consultancy duties imposed upon him by the contract."

[42] Mr Padayachee was cross-examined extensively. It was put to him that he did not comply with his obligations in terms of the exit agreement. It was suggested that he was obliged to procure funding of R 84.5 million for a 51% shareholding. Mr Padayachee's response was twofold, firstly he contended that the exit agreement did not provide that he was to obtain such funding indeed, the exit agreement expressly provided that the funding to be procured was still to be agreed upon and secondly that he was never given notice nor advised that he was in breach of the exit agreement.

[43] Mr Padayachee was also cross examined on the issue of prescription. He explained that he became concerned about the fact that he had not been paid when, during December of 2010, he contacted SBSA and was advised that the AFST

transaction had been finalised. Mr Naidoo had expressed his surprise about the non-payment of the R 2.5 million to Mr Padayachee. Mr Padayachee was criticized in this trial for not phoning Mr Knoetze or Mr Barnard to establish the particulars of the transaction. He responded that he had requested his attorneys to do so. He conceded that he had not called Mr Barnard nor Mr Jacobs. He said that he did not think it was proper. The dispute was between him and Mr Knoetze. He was also criticized for not having contacted Ms Koyana. He again said that he had requested his attorneys to engage her. He was criticized for not doing company searches at the registrar of companies to establish who the directors of the various companies were. He explained that he had done a Google search and had found that Mr Knoetze and Ms Koyana were involved in a company called New Advanced Capital. Mr Padayachee testified that it was clear to him that the transaction had been diverted and that these individuals were part of Mr Knoetzes' grouping. Mr Knoetze was not cooperating with him and he had no reason to believe that they would cooperate. Besides, his attorney had sent a letter to Mr Knoetze who hadn't provided the detail of the AFST transaction. Such letter had been copied to Ms Koyana who similarly hadn't responded.

Mr Garikwe Penyenye

[44] Mr Penyenye testified that he was a manager in commercial banking at SBSA. He was introduced to the AFST transaction during 2010 when he met with Mr Knoetze, Mr Padayachee and Mr Naidoo at Spartan's premises in Craighall Park. He was told that Mr Padayachee would walk away from the AFST transaction, that Mr Knoetze would continue with it and that at a later stage, an alternative BEE partner was to be introduced.

[45] He identified an email which he had received on the 11th August 2010 from Mr Knoetze referred to paragraph [29] above.

[46] Mr Penyenye confirmed that on the 16th August 2010 he had received the final version of the proposed AFST BEE transaction and that the memorandum had recorded amongst other things:

"3.5.2 R40.2 million of the R80.4 million will remain outstanding on loan account ("the AFST Shareholders Loan") with effect from the closing date. The remaining R40.2 million of the purchase consideration payable to the AFST Shareholders in respect of their 49.5% equity stake in AFST will only become unconditionally payable in two tranches subject to pre-

determined earnings hurdles being achieved in the first and second year, post the transaction, in respect of the business going forward."

He confirmed that the change in the BEE partner and the change in the shareholding from 51% to 49.5% did not concern the bank overly and that SBSA had been willing to proceed with the AFST transaction.

[47] On the 23rd August 2010 Mr Penyenye received an email from Mr Knoetze in which he advised:

"As the transaction stands STD Bank was willing to fund the deal (obviously with a change in partnership from Kumaran to Sindi it slightly changed as you needed to get comfort from Sindi being the partner). We discussed the option of a vendor loan of R 20m at a recent board meeting with AFST and believed that it will speed up the process of 4 weeks to pay-out …."

[48] On the 2nd of September 2010 Mr Penyenye forwarded a first draft of a Term Sheet in which Livispex was identified as the borrower in respect of the AFST transaction. The transaction agreements were mentioned in paragraph 9.1.5 of such Term Sheet by name. On the very same day, ie the 2nd of September 2010, Mr Penyenye had also circulated a credit application internally which reflected Teleosis as the party initially earmarked to participate in the AFST transaction.

[49] He testified further that it was himself, Mr Saul and Mr Naidoo who were the three role players in the leverage finance department who had put this deal together. He stated that the borrower would only ever receive the sum of R 40.9 million in cash up front. This was the same from the outset. It was never anticipated that the borrower would receive the entire amount up front. He also confirmed that he was the author of the email dated the 6th September 2010 in which he recorded that the reason the transaction was changed from a 51% to a 49.5% shareholding was because Tyco's co-operation and consent was not required in the event of the acquisition of a shareholding less than 50%. He also confirmed that he was the author of a mail dated the 27th September 2010 in which he was asked for the confirmation of the identity of the borrower and that he had responded that it was Levispex.

[50] Much time during cross examination was spent in trying to extract a concession from Mr Penyenye that the transaction, in the terms it was ultimately couched, was more onerous to the borrower than the transaction as contemplated in

the initial term sheet. With reference to the sale of business agreement in respect of the ASFT transaction, Mr Penyenye testified that it was less onerous if the borrower had to pay R63 million up front as opposed to R84 million, but that in any event, Livispex was only obliged to pay R40 million up front as this was what the agreement obliged it to do.

Mr Mohamed Sabi

[51] Mr Sabi testified that he was at the time of testifying, employed by a company called Sphere Holdings which company is not directly connected to SBSA. During 2010 he was employed by SBSA in its leverage finance department. He confirmed that he was the author of the email dated the 19th April 2010 and referred to hereinbefore as the initial term sheet (see par. [21] above). He confirmed that it was not a legally binding document but contained the framework of a possible financing structuring arrangement. He identified the transaction structuring memorandum dated the 6th April 2010 which document was prepared by Webber Wentzel on instructions of Teleosis, AFST and their advisors. He also confirmed that on the 6th of May 2010 he had received a further version, version 2 of the transaction structuring memorandum which document was dated the 21st of April 2010. During cross examination Mr Sabi explained that in terms of the initial term sheet, the entire amount of R 84.5 million would have been paid to the borrower. However, half of that, in other words R 42. 25 million would have been pledged back, after 12 months R 21. 25 million would have been released and after a further 12 months the balance.

Mr Krinesha Naidoo

[52] Mr Naidoo testified that he was, at the time of testifying, working for Internet Solutions which is not directly related to SBSA. During 2010 he became involved in the AFST transaction. He didn't know Mr Knoetze but did know Mr Padayachee and had worked with him before. He testified that he had had sight of both version 1 and version 2 of the proposed AFST BEE transactions dated 6 April 2001 (version 1) and 21 April 2002 (version 2). He confirmed Mr Sabi's understanding of the amount of monies that would be paid over initially. He amplified this by explaining that the release of the funds were dependant on the achievement of profit and cash flow targets and that this was clearly recorded in the credit application for facilities form

which had been sent to him by Mr Sabi on 22 May 2010, this was recorded in paragraph 4 under item 16.

[53] He further testified that he was aware of a fall-out between Mr Padayachee and Mr Knoetze. He was called to a meeting at Mr Padaychee's offices and he was told that Mr Padayachee was to receive R 2.5 million. Mr Knoetze would introduce a new BEE partner. On 9 August 2010 he received a mail from Mr Knoetze, the content of which has been quoted above (para [29]). In this letter the identity of the replacement BEE partner is disclosed, he was requested to reinitiate the process to finalise the funding and to capitalise the amount of R 2.5 million payable to Mr Padayachee. This document further confirmed that R40.2 million would be paid up front and the balance would only become unconditionally payable in two tranches subject to predetermined earning hurdles being achieved in the first and second year post the transaction.

[54] Mr Naidoo also confirmed that he received an email from Mr Knoetze on the 23rd of August 2010 in which Mr Knoetze advised that a vendor loan of R 20 million had been discussed at a recent board meeting. Mr Naidoo explained that he understood this to be a shareholder's loan. He was referred to the AFST structure motivation to credit dated the 28th October 2010 in which the following appears:

"The balance of R20m (R80.9m less R60.9m) (defined in the Business Sale Agreement ("BSA") as a "Third Tranche") of the Purchase Consideration will be differed and only become due upon achievement of pre-agreed warranties ("herein defined as "agterskot"")

- The seller will be entitled to a further amount of up to R20m in 2013 ("agterskot") in the event certain profit warranties are met. This obligation does not arise from the onset (day 1) but only arises in the event that the seller meets set warranties."

He was referred to the first draft term sheet dated the 2nd of September 2010 in which the R 84 million was crossed out and replaced with R 63 million. He confirmed that this change was consistent with the introduction of the shareholder's loan. He confirmed that he had received a mail on the 6th of September 2010 from Mr Penyenye in which he was advised that the whole reason the shareholding was changed from 51% to 49.5% was because Tyco's consent in respect of the replacement of the BEE partner would not be required in the event of a sale of shareholding less than 50%. He testified that the credit application for facilities dated 11 October 2011 reflected that AFST was a new client. The transaction was

supported by Mr Penyenye, Mr Saul and himself and the loan amount included a fee of R 1 million for SBSA and R 2.5 million for Mr Padayachee. In considering this transaction, Mr Naidoo testified that he had to have regard to a number of transactions which included the shareholders agreement in which the BEE company was identified as Varsiworx. The Sale of Business Agreement was one of the agreements that he had regard to which reflected, in clause 8.3.1.4, that the purchaser (Livispex) was to pay an amount of R 40 218 750 up front. He also had regard to the reorganisation agreement which recorded in paragraph 2.1.3 "BEE company is a BEE investor wishing to acquire 49.5% of the shares in AFST …." He recalls that he sent Mr Padayachee an sms on the 6th October 2010 confirming that the transaction had almost been finalised. He acknowledged receipt of the letter dated the 29th June 2011 addressed by Mr Padayachee's attorneys of record to SBSA and that he had responded thereto on the 13th July 2011.

Ms J Crone

[55] Ms Crone testified that she is an attorney employed by Brian Kahn Incorporated, Mr Padayachee's attorneys, as an associate. She testified that on the 9th of February 2011 she had addressed a letter to Mr D Andropoulos of PTA attorneys, in which she sought to ascertain who the beneficiary of the AFST transaction was, whether the R 2.5 million had been paid, and if so, to whom. She testified that there were telephonic discussions with Mr Andropoulos pursuant to the letter but that no answers to the questions posed had been received. She explained that Mr Andropoulos had expressed the view that the information sought was privileged. On the 17th of February 2011 she had caused a letter to be written to Mr Knoetze and Adhu. Ms Koyana was copied in on this letter. In this letter she sought the same information as was requested from Mr Andropoulos. She sent a similar letter to Ms Koyana, on 4 March 2011 but did not receive responses from Ms Koyana although Mr Knoetze's attorneys had responded without disclosing the identity of the beneficiary.

[56] She testified that she had conducted a number of CPI searches and had found a number of companies in which Ms Koyana and Mr Knoetze were directors. The search did not, however, shed any light on the identity of the beneficiary of the AFST transaction. The search results were contained in the court bundle and it appeared

that the search in respect of AFST, had been done on the 28th January 2011. The search for Mr Knoetze yielded 30 company names in which of those 30, Mr Knoetze was still active in 12 of them. This search was conducted on the 22nd February 2012. Particulars of claim were drafted in May of 2012 and a trial date was procured for 29 January 2014. This trial date was obtained from the Registrar on 4 March 2013. Subpoenas were then served on SBSA on 12 November 2013. On 17 January 2014 she received documents from SBSA. She had received the various term sheets, the drafts, the applications for credit and such documents. She also received three versions of the transactions as embodied in the Webber Wentzel documents. She had also asked Webber Wentzel for the documents who had similarly claimed privilege on behalf of their clients. The actual transaction agreements that comprised the vast majority of volume 2, were obtained from the defendant's attorneys which she received approximately a week after the SBSAs documents had been received. Those documents were procured pursuant to the discovery process. The loan agreement ultimately concluded with Livispex, was received from SBSA on or about the 17th January 2014. She explained that during September 2011 the firm had written to Tyco in order to establish which entity the business opportunity had been diverted to. This had yielded no response. The letter written to Mr Naidoo on the 29th June 2011 and his response thereto she also confirmed.

[57] It was put to her that the most obvious route to have followed was to explore New Wave Advanced Capital (Pty) Limited as Mr Padayachee had already identified that Mr Knoetze and Ms Koyana were involved with this company. Ms Crone disputed this. She testified that the most obvious route was to ask Mr Knoetze and Ms Koyana directly. Ms Crone was criticised for not doing the company search in respect of Mr Knoetze prior to 22 February 2012. During re-examination it was pointed out that Livispex is not one of the 30 companies that came up when the search of Mr Knoetze was done. It was further pointed out from documents in the bundles that the directors of Livispex were Mr Jacobs and Ms Koyana. Thus, even if the search had been done in February 2011, it would not have assisted Ms Crone in establishing that Livispex was the ultimate borrower.

Mr Padayachee

[58] By agreement between the parties Mr Padayachee was recalled to be cross examined on certain documents which only became available during the trial. On 24 April 2010 Mr Knoetze and Mr Jacobs were sent the re-organisation agreement, the AFSM sale agreement and the AFST sale agreement. The point which was made was that the identity of Livispex appear from these documents and Mr Padayachee had knowledge of Livispex or ought to have had knowledge. Mr Padayachee responded saying that they had not been sent to him and he had not seen them.

[59] This concluded the evidence for the Plaintiff.

[60] The defendants called two witnesses, Mr Knoetze and Mr Barnard.

Mr Hugo Heinrich Knoetze

[61] Mr Knoetze testified that he had a B.Comm in banking finance, a B.Comm honours in financial management, a certificate in corporate finance and a Masters in Business Administration. Mr Knoetze testified in much detail about the background to the AFST transaction and how he and Mr Padayachee came to be involved in this enterprise. In short though, he confirmed that Teleosis had been a shelf company, that Spartan owned 60% of the shares in Teleosis and Adhu 40%. He explained how important the BEE situation was for AFST and how Mr Barnard, who was really the man behind AFST, had built the company up from nothing over a period of 10 years since 2000, to a significant organisation. There was urgency in getting the company BEE compliant.

[62] He testified that he was the person who liaised with PTA Attorneys and that agreements had, prior to the break-up between him and Mr Padayachee, been prepared by this firm of attorneys.

[63] He also explained and confirmed that it was part of the distribution agreement between AFST and Tyco, that as soon as there was a shareholder change of more than 50%, Tyco had to consent, ie a vetting of the shareholders had to occur and that this procedure could take a long time.

[64] He confirmed that he had had a fall out with Mr Padayachee and that they had had no communications with one another save for one email in which he had pleaded with him to reconsider his position. He testified that he continued with the AFST transaction on behalf of another party and not Teleosis. He explained that Mr Padayachee had not complied with his obligations in terms of the exit agreement. He testified that Mr Padayachee had been obliged to provide funding in the amount of R 84 million and to render a service, ie to bring the AFST transaction to its conclusion which meant that he should assist with the transaction structure as well as giving comfort to Mr Barnard, all of which he had not done. He testified that he had complied with his obligations in terms of the exit agreement by progressing the AFST transaction to its final end. He explained that a decision was taken not to acquire 51% of the shareholding of AFST but rather 49.5% because if they had to go through the vetting procedure again, the transaction would be delayed.

[65] He confirmed that on 9 August 2010 he had sent an email to, amongst other recipients, Mr Naidoo in which he requested that the R 2.5 million fee payable to Mr Padayachee be capitalised. He testified that the borrower would have to pay the R 2.5 million and that that amount was ultimately capitalised. He felt that Mr Padaychee had not fulfilled his obligations in terms of the exit agreement. He had taken legal advice and during December 2010/ January 2011 had decided not to pay Mr Padayachee. Mr Knoetze conceded that the transaction agreements had all been signed between the period 14 to 20 July 2010 and prior to the conclusion of the exit agreement. He conceded that in terms of clause 1.3.62 of the sale of business agreement of AFST, the funding envisaged was R 60 million.

[66] The transaction agreements had, by the end of July 2010, already been concluded and it had already been agreed that Varsiworx (and not Teleosis) would acquire 49.5%. Mr Knoetze was asked why this was not drawn to Mr Padayachee's attention when the exit agreement was concluded. Mr Knoetze said that it was done as a back up. He testified that he and Mr Padayachee had agreed that Mr Padayachee would phone Mr Barnard and that Mr Barnard had indicated to Mr Knoetze that he, Mr Padayachee, had left a message with Mr Barnard that he would drive the process to 51%. It was pointed out to Mr Knoetze that this version had

never been put to Mr Padayachee during his cross examination. He could not explain why his counsel had failed to do so.

[67] Mr Knoetze testified that when Spartan was brought in as the 60% partner of Teleosis, it had paid Mr Knoetze's drawings in the sum of R 50 000 per month for a period of time. All this money came from Teleosis which ultimately came from Mr Padayachee.

[68] He further testified that Mr Penyenye had indicated that the R 84.5 million might be difficult if Varsiworx replaced Teleosis. It was then put to him that this was never traversed with Mr Penyenye during his cross examination. He could not explain why this had not been done. Moreover, it was pointed out to Mr Knoetze that Mr Penyenye had testified that he only became involved when the amount was R 63 million, he hadn't been involved with the transaction when it was going to be R 84 million.

[69] Mr Knoetze was cross examined on his affidavit resisting summary judgement in which he had stated that the fee of R 2.5 million had to have been capitalised in Teleosis in order for Mr Padayachee to receive it, whereas his evidence during the trial was that it did not matter whether the fee was capitalised in Teleosis or another company. Mr Knoetze could not explain this discrepancy.

[70] Mr Knoetze testified that he had complied with his obligations in terms of the exit agreement by bringing about a transaction in which a 49.5% shareholding in AFST had been acquired whereas Mr Padayachee had breached the very same agreement by not bringing about a transaction in which 51% shareholding of AFST had been acquired. He was requested to explain the anomaly. He was unable to.

[71] It was suggested to Mr Knoetze that at the time of the conclusion of the exit agreement, the only concern he, Mr Knoetze, had was that the funders who had previously shown a willingness to negotiate and take the transaction to the next level, might withdraw because of Mr Padayachee's exit. It was suggested to him that that was the reason why he signed the exit agreement. It was suggested to him that what Mr Padayachee was required to do was to secure the funders' continued involvement in the transaction and nothing else. He disagreed with this, contending that the transaction agreements dealt with a completely different transaction and that Mr Padayachee was obliged to secure funding for R 84 million for a 51% shareholding.

[72] It was suggested to Mr Knoetze that the exit agreement provided that he and Adhu would source and secure a replacement BEE shareholder but that at the time of the conclusion of the exit agreement, a replacement BEE shareholder had already been sourced and secured, ie Ms Koyana. He was criticized for not having told Mr Padayachee of this development. He said that he had done so. He was asked to explain why, if he knew the identity of the BEE partner, Mr Padayachee would go and see his attorneys at the end of January 2011 and instruct them to find the information and why he would look at websites to try find the identity of the replacement BEE partner. Mr Knoetze could not explain this.

[73] Mr Knoetze conceded that he hadn't written a letter of demand calling upon Mr Padayachee to remedy his breaches in terms of the exit agreement. It was suggested to him that this hadn't been done because Mr Knoetze did not hold the view that Mr Padayachee had breached the exit agreement. Mr Padayachee had made sure that SBSA was still fully behind the AFST transaction and therefore there was no need to write a letter giving notice to remedy a breach of contract. Mr Knoetze denied this proposition.

[74] During cross examination Mr Knoetze added another obligation for Mr Padayachee to comply with in terms of the exit agreement. He testified that he was required to contact Tyco and to advise them that he had fallen out of the picture but that they should not be concerned about it as Mr Knoetze was going to get a replacement BEE partner. It was put to Mr Knoetze that this was never put to Mr Padayachee during his cross examination nor did Mr Knoetze ever send him an sms or some communication that he had failed to comply with this obligation. Mr Knoetze could not explain this.

[75] Mr Knoetze was cross examined on the fact that according to him Mr Padayachee was obliged to deal with SBSA, deal with Tyco and appease Mr Barnard but from 28 July 2010 until 29 October 2010 when the loan agreement was concluded, he did nothing, and that such a proposition was highly improbable. Mr Knoetze could not explain or refute this.

[76] Mr Knoetze testified that the AFST transaction envisaged in paragraph 5.2 of the exit agreement was the same AFST transaction envisaged in paragraph 6.2 of the exit agreement.

Mr Willem Fredrick (Barries) Barnard

[77] Mr Barnard, the chief executive officer of AFST, testified that during the first part of 2010 they were trying to secure a BEE partner. During April 2010 he met Mr Padayachee at a meeting where the future structure of the transaction was discussed. The Tyco vetting procedure was concluded on 25 May 2010. During May he was told that Mr Knoetze had fallen out with Mr Padayachee and that he, Mr Knoetze, would secure an alternative BEE partner. In order to sell a 51% shareholding, the vetting procedure with Tyco would have had to have recommenced. AFST would have had to spend another $ 20 000 (twenty thousand dollars) and another four months waiting for that approval. They decided not to go this route but to rather sell 49,5% of the shareholding only.

[78] After the 25th May 2010, Mr Barnard had no further contact with Mr Padayachee. He expected contact and expected Mr Padayachee to apologise to him. He wanted him to clear the air.

[79] That concluded the evidence for the defendants.

[80] The parties agreed that Ms Koyana would not be required to testify and that references to her in evidence, which would otherwise amount to hearsay, would be permitted as if they were not hearsay.

COMMON CAUSE FACTS

[81] The undisputed version which unfolds from all this evidence is the following: Using Teleosis as their vehicle, Mr. Padayachee and Mr. Knoetze, intended acquiring 51% of the shares in AFST. AFST needed to acquire a BEE shareholder to satisfy its customers and the imperatives of the mining industry in which it operated. In terms of AFST's agreement with Tyco a change of a majority share in AFST would allow Tyco to terminate the agreement. Accordingly Tyco's permission was required for the sale by AFST of 51% of its shares.

[82] Prior to Mr. Padayachee introducing Mr. Knoetze to SBSA, the latter had no business relationship with SBSA. SBSA and other funders were approached to fund the AFST transaction. The funding document indicated that funding would be sought based on a purchase consideration of R82.9 million for a 51% stake in the AFST business. At this initial stage, it was intended that only 50% of the consideration would be paid as an upfront payment on conclusion of the transaction. Whilst the

balance of the purchase price would be paid in two equal instalments, if certain warranties were not met this payment would be adjusted downward. It was also anticipated that the balance would be held by the funder on a secure money market instrument.

[83] At the outset, Mr. Padayachee and Mr. Knoetze, through Teleosis appointed PTA attorneys to attend to the legal aspects of the transaction. Attorneys Webber Wentzel were appointed in turn to attend to structure the transaction from a taxation perspective.

[84] On 6 April 2010, attorneys Webber Wentzel prepared the first version of a transaction structuring memorandum which anticipated that Teleosis would, indirectly acquire 51% of the shares in AFST, thus giving effect to the BEE transaction. Importantly, this memorandum also envisaged that the borrower, Teleosis, would only initially obtain half of the capital amount sought. The transaction envisaged a step by step restructuring and reorganisation in terms of which Teleosis would hold 51% of the shares in a "Newco" which in turn would hold 100% of the shares in AFST.

[85] Pursuant to Teleosis' approach to SBSA and on 19 April 2010, Mr Sabi on behalf of SBSA's Leveraged Finance department addressed a letter to the directors of Teleosis, to finance a term loan facility of R84.5 million in order to fund the proposed buy-out of 51% of the shares in AFST by Teleosis. This document, the initial term sheet, was not a legally binding document and at best, if accepted by the borrower, would constitute an agreement by it to allow SBSA to proceed to the next phases of the financing transaction.

[86] The initial term sheet envisaged a transaction where the borrower would only receive 50% of the capital upfront with the balance to be paid over two years.

[87] A second version of the transaction structuring memorandum was prepared on 21 April 2010. During the period April and May 2010, much was done to progress the AFST transaction to its final conclusion, although it is clear that this process was driven by Mr Knoetze and Mr Jacobs. Whilst Mr Padayachee was involved in the process, Teleosis conducted its business from Spartan's premises in Craighall and it paid the expenses of Teleosis.

[88] Around the end of May 2010 a fall out occurred between Mr. Padayachee and Mr. Knoetze. Mr. Padayachee indicated that he wished to cease his involvement in the partnership housed in Teleosis. Mr. Knoetze resigned as a director of Teleosis on 9 June 2010.

[89] Mr Padayachee's exit required the identification and introduction of a replacement BEE shareholder for the AFST transaction to progress to its conclusion. It is clear from the evidence that Mr. Padayachee was not involved in any significant manner in the furtherance of the AFST transaction during June and July 2010. The evidence of Mr. Knoetze is that as early as end June or early July 2010, he and Mr. Barnard of AFST had discussed deferring a portion of the funding (R20 million) as a vendor loan.

[90] Unbeknown to Mr Padayachee, Mr Knoetze, Mr Barnard and Ms Koyana (in various capacities) concluded a series of agreements on 14/20 July 2010, (the transaction agreements). The transaction agreements are in line with the reorganised structure envisaged by the various transaction structuring memoranda prepared by Webber Wentzel in April 2010, save for he following differences a) Mr. Knoetze (at the behest of Ms Koyana) had decided to remove Teleosis from the reorganised structure (Teleosis had been substituted by Varsiworx b) Livispex had been introduced as the proposed borrower and operating company to acquire AFST's business c) the BEE shareholding to be acquired in AFST was no longer 51% but 49.5%; and d) the loan funding required was now approximately R60 million.

[91] The exit agreement, , was concluded on 27 and 28 July 2010. It appears that Mr. Padayachee, Spartan and Teleosis (represented by Mr. Padayachee) signed the exit agreement on 27 July 2010 whilst Mr. Knoetze and Adhu signed it on 28 July 2010. The evidence has also shown that whilst the exit agreement was negotiated between Mr Padayachee and Mr Knoetze, Mr. Padayachee took the lead and instructed attorneys Kramer & Viljoen to prepare it.

[92] From the evidence of both Mr. Padayachee and Mr. Knoetze, the latter did not, whether before the conclusion of the exit agreement, at the time of its conclusion or at any time thereafter, advise Mr. Padayachee a)- of the conclusion of the transaction agreements on 14 and 20 July 2010; b) that the transaction agreements were based on the acquisition of a 49.5% share in AFST (not a 51% share); c) that

Teleosis was no longer part of the reorganised structure; and d) that Ms Koyana had already been identified and introduced into the transaction agreements as the effective BEE shareholder.

[93] Nothing more needed to be done regarding Tyco, because the transaction agreements had already been concluded on the basis that a 49.5% share would be acquired, something which would not require Tyco's approval.

[94] Shortly after the conclusion of the exit agreement, Mr. Padayachee hosted a meeting at Spartan's offices, attended by himself, Mr. Knoetze, Mr. Naidoo and Mr. Penyenye. At this meeting SBSA was advised of the withdrawal of Mr. Padayachee from the AFST transaction and also of the fact that Mr. Padayachee would be paid a fee.

[95] On 9 August 2010, Mr. Knoetze wrote a letter to Mr. Naidoo which was also to be brought to the attention of Mr. Penyenye, asking SBSA to reinitiate the process in order to finalize the payout (funding to shareholders). In this email Mr. Knoetze recorded that the only change to the term sheet was the R2.5 million fee payable to Mr Padayachee.

[96] The finalised transaction structure memorandum prepared by Webber Wentzel envisaged an initial payment of only R40.2 million (with the balance to be deferred) and that the new BEE Co (Varsiworx in substitution for Teleosis) was acquiring 49.5% of the shares in AFST (through a new structure).

[97] On 23 August 2010, Mr. Knoetze addressed an email to Mr. Penyenye, referring to the fact that at a recent meeting with AFST, discussions had arisen concerning the option of a vendor loan of R20 million. According to Mr Knoetze this had been discussed with Mr Barnard as early as late June/early July 2010.

[98] On 2 September 2010, SBSA prepared an undated term sheet in which Livispex was identified as the borrower, the reference to Teleosis was deleted and replaced with Varsiworx and the loan amount of R84.5 million was deleted and replaced with an amount of R63.4 million.

[99] On 28 October 2010, SBSA's "Equity and Leveraged Finance" department addressed a motivation letter to its credit department. Mr. Penyenye and Mr. Naidoo testified as to their involvement in this process and confirmed that included in the loan finance to be provided was an amount of R2.5 million specifically earmarked as

Mr. Padayachee's payment. The motivation letter refers to the amended structure and the deferred shareholders loan of R20 million.

[100] On 29 October 2010 SBSA, represented by Mrs Khoulla Michael and Livispex, represented by Messrs Knoetze and Barnard concluded the loan agreement . The loan agreement specifically refers to the final Transaction Structuring Memorandum, which was prepared by Webber Wentzel dated 16 August 2010. The loan agreement provides for funding of R63.4 million and the evidence of the SBSA was that an initial "nett" payment or R40.9 million would be available to the borrower (Livispex).

[101] An amount of R43.4 million was paid to Livispex on 1 December 2010 by SBSA.

[102] Mr. Padayachee became concerned during late December 2010 and early January 2011 when he had not been paid and his evidence was that he attempted to contact Mr. Knoetze. During January 2011, Mr. Padayachee contacted his attorneys and advised them of his concerns.

[103] On 9 February 2011, BKI addressed a letter to PTA attorneys. In this letter enquiries were made as to the identity of the beneficiary of the AFST transaction and whether SBSA had paid the sum of R2.5 million in the circumstances envisaged in clause 4.8.1 of the exit agreement. Mrs Crone, an attorney at BKI, testified that there was no response of any substance to this letter.

[104] After conducting a google search and ascertaining that Mr. Knoetze and Ms Koyana were directors of a company known as Advanced Capital Mr. Padayachee instructed BKI to address a letter to Mr. Knoetze, Adhu and Ms Koyana. From the contents of this letter which Mrs Crone settled, it is clear that Mr. Padayachee and BKI were unaware of the identity of the beneficiary of the AFST transaction.

[105] When given an opportunity to set out their version of events in response to BKI's letter of 17 February 2010, Mr. Knoetze and Adhu instructed their attorney, Mr Nixon, to respond in terse and non-committal terms. All Mr Nixon effectively stated was that Mr. Padayachee had not complied with his obligations in terms of paragraphs 4.7 and 4.8 of the exit agreement. This letter (written on the instructions of Mr Knoetze) when read in conjunction with clause 4.8 of the exit agreement appears intended to convey that the fee was not capitalised as part of the funding and accordingly not payable.

[106] From the conclusion of the exit agreement until February 2011 (when there was correspondence between Mr Padayachee's attorneys ("BKI") and Mr Knoetze's attorney ("Mr Nixon"), Mr. Knoetze made no demand on Mr Padayachee to do anything in connection with the finalisation of the AFST transaction. Mr Knoetze never called on Mr Padayachee to do anything more regarding the participation of SBSA in the transaction. In particular Mr Knoetze at no time sought to invoke the breach clause provided for in clause 8 of the exit agreement.

[107] BKI, Mr Padayachee's attorneys, sought the assistance of SBSA and addressed a letter to Mr. Naidoo. Mr. Naidoo responded by recording that a meeting had been held at which the SBSA was advised of the termination of Mr. Padayachee's involvement in the transaction, that a consultation fee would be payable to him and that SBSA had been requested to include the amount of the fee in the transaction funding. Mr Naidoo had declined to provide any further information.

THE ISSUES

[108] The issues for determination in this matter are:

a. What were Mr Padayachee's obligations in terms of the exit agreement and did he comply with his obligations?
b. Did Mr Knoetze breach the exit agreement?
c. If so, was Mr Padayachee obliged to comply with the breach clause in the exit agreement and did he?
d. Does the loan agreement create a *stipulatio alteri* in favour of Mr Padayachee which he accepted?
e. Is Mr Padayachee entitled to rely on the provisions of either sections 12(2) or (3) of the Prescription Act in respect of his claim against Livispex?

ASSESSMENT OF EVIDENCE

[109] This Court is to approach the factual disputes which exist between the evidence adduced on behalf of the plaintiff, and the evidence presented on behalf of the defendants, by applying the principles enunciated in the decision of *Stellenbosch*

Farmers Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 at 14I-15D where Nienaber JA held as follows:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

Mr Padayachee's obligations

[110] Mr Padayachee considered his obligations in terms of the exit agreement to be that he was to engage with SBSA, advise them of his intended withdrawal from the AFST transaction and reassure them that his withdrawal from the AFST transaction would not impact adversely on such transaction. Mr Knoetze testified that in terms of the exit agreement Mr Padayachee was obliged to provide funding in the amount of R 84 million, bring the AFST transaction to its conclusion which required Mr Padayachee to procure a 51% shareholding of AFST, provide comfort to Mr Barnard and advise Tyco that he was withdrawing from the AFST transaction but reassure them that the transaction would still be proceeding.

[111] Clauses 5 and 6 containing the duties and obligations of Mr Padayachee and Mr Knoetze, have been quoted above (para [24]). The first question which falls for

determination is whether the evidence of Mr Padayachee and Mr Knoetze, over and above that which is recorded in these clauses in relation to what their obligations are, is admissible in evidence.

[112] Evidence about what the parties thought their obligations are, which is at variance with the express provisions of the exit agreement, would for the reasons set out below be inadmissible as offending the integration rule (a sub-rule of the parole evidence rule). This is so as, amongst other reasons, the parties elected to reduce the exit agreement to writing and agreed in clause 14 thereof that the exit agreement would contain all the express provisions agreed to by the parties.

[113] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) it was confirmed in para [12] (with reference to the summary in paragraph [18] of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) that the approach to interpretation summarised in *Coopers & Lybrand v Bryant,* 1995 (3) SA 761 (A) "is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts *…"*. The "new" approach, which has been followed in a number of subsequent cases,[1] may be summarised as follows.

a. Interpretation is an exercise in ascertaining the "objective*"*[2] "meaning of the language of the provision itself" - it is not aimed at determining the intention of the parties, whether common or otherwise, which is an "unrelated*"* concept,[3] that has "no bearing on the analysis"[4] and is "irrelevant".
b. "Interpretation is a matter of law and not of fact and … is a matter for the court and not for witnesses".[5]

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[1] See for example *Communicare and Others v Khan and Another* 2013 (4) SA 482 (SCA) at para 31; *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC) per Nkabinde J; *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA); *National Credit Regulator v Opperman & Others* 2013 (2) SA 1 (CC) per Cameron JA (dissenting); *Hubbard v Cool Ideas* 1186 CC 2013 (5) SA 112 (SCA) at para 14; CA Focus CC v *Village Freezer t/a Ashmel Spar* 2013 (6) SA 549 (SCA); *Cape Town Municipality v SA Pension Fund 2014* (2) SA 365 (SCA); *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC).

[2] *Endumeni* (above) para 18.

[3] *Endumeni* (above) paras 20 – 24.

[4] *CA Focus* (above) para 18.

[5] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39.

c. The meaning of a provision is determined with reference to its language and in the light of its factual context, which includes what has previously been referred to as "background circumstances" and "surrounding circumstances".[6] Since interpretation is "one unitary exercise",[7] the process requires the court "from the outset" to consider the language and context of the provision together,[8] "whether or not there is any possible ambiguity".

d. The factual context is ascertained by reading the provision having regard to:

   i. the document as a whole; and

   ii. the circumstances attendant upon its coming into existence.[9]

e. Consideration must be given to the following four aspects:[10]

   i. "the language used in the light of the ordinary rules of grammar and syntax", although it must be recognised that words seldom have a single meaning;

   ii. "the context in which the provision appears" (including the provisions of the "document as a whole");

   iii. "the apparent purpose to which [the provision] is directed"; and

   iv. "the material known to those responsible for its production".

f. The "inevitable point of departure"[11] is the language of the provision and where "more than one meaning is possible each possibility [i.e. each possible meaning] must be weighed in the light of all these factors".[12] Where the court "is faced with two or more possible meanings that are to a greater or lesser degree available on the language used … the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation".[13]

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[6] *KPMG* (above) para 39; *Bothma-Batho* (above) para 12.
[7] Bothma-Batho (above) para 12.
[8] *Endumeni* (above) para 24; *KPMG (*above) para 16.
[9] *Endumeni* (above) para 18.
[10] *Endumeni* (above) para 18.
[11] *Kwazulu-Natal Joint Liaison Committee* (above) para 128.
[12] *Endumeni* (above) para 18. See also *National Credit Regulator* (above) paras 93, 100 & 104: "elementary meaning demands that we stop short of the extreme expedient of interpreting a provision against its own language".
[13] *Endumeni* (above) para 26.

g. It is, however, inappropriate to "do violence to the language … by placing upon it a meaning of which it is not reasonably capable"[14] and the language should not be "unduly strained".[15] Thus, while context may no longer be sacrificed at the altar of language, a cautionary note should be sounded against overcorrecting by giving context an exaggerated importance in order to distort and strain the language used in a document. The document should be given a meaning of which it is reasonably capable. The language adopted must be respected and some measure of fidelity must be shown towards it.[16]

h. Although extrinsic evidence of a provision's context, purpose and material known to those responsible for its production is admissible, "one must use it as conservatively as possible".[17] The reason for this admonishment is clearly to avoid unnecessarily taking up court time and parties' costs in pursuit of extrinsic evidence in cases where a clear answer is provided by the intrinsic evidence such as the document as a whole, the provision's immediate context or its apparent purpose.

i. Finally, a sensible meaning should be preferred to one "that leads to insensible or unbusinesslike results", or one that undermines the apparent purpose.[18]

In *Johston v Leal*, 1980 (3) SA 927 (AD) Corbett JA observed at 942 H – 943B as follows : "As has been indicated, the parol evidence rule is not a single rule.

> It in fact branches into two independent rules, or sets of rules: (1) the integration rule, described above, which defines the limits of the contract, and (2) the rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or

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[14] *Hubbard* (above) para 14.
[15] *Mansingh* (above) para 9.
[16] See Article by Michael Bishop and Jason Brickhill, "'In the beginning was the word': the role of text in the interpretation of statutes" SALJ (2012) 129 at pages 681 – 716. The authors endorse a contextual, purposive approach to statutory interpretation but all forms of interpretation in their view owe some degree of fealty to the words of the law with an interpretation required to be 'reasonably capable'. The Courts, in their opinion, often exceed their interpretive mandate by allowing interpretations at odds and incompatible with the text itself. The authors propose to modify Schreiner JA's two approaches expressed in *Jaga v Donges NO,* 1950 (4) SA 653 (A) at 662-664 and their suggestion is something of a combination of the two options. They suggest a two-stage process. First, judges should set out the possible meanings of a provision with full regard for both text and context. The second stage requires the judge to rely on the contextual factors. It would appear that the use of the word "possible" twice by Wallis JA in *Endumeni* (paras 18 and 26) is indicative that the "new" approach to interpretation is consistent with this in substance, if not in form.
[17] *KPMG* (above) para 39.
[18] *Endumeni* (above) para 18.

> affect the meaning of the words contained in a written contract: see, for example, the exposition by SCHREINER JA in Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 453 - 5. (For convenience I shall call this latter rule "the interpretation rule".) Neither rule, in my opinion, affects the matter under consideration."

[114] While the "new" approach to interpretation referred to herein has clearly abolished one of the "branches" of the parol evidence rule i.e. the "interpretation rule", which stated that extrinsic evidence was not admissible in order to determine the meaning of a written instrument,[19] it in no way affects the operation of the other "branch" of the parol evidence rule, being the so-called "integration rule", which determines the content or (in the words of Corbett JA in Johnston v Leal), the "limits"[20] of a written instrument.

[115] It is apparent from *KPMG v Securefin*[21] (which was specifically identified by Wallis JA in *Bothma-Batho* as being representative of the "new" approach to interpretation)[22] that the integration rule remains good law[23]

[116] Mr Padayachee was, in terms of clause 5.1 of the exit agreement, obliged to facilitate that the funders continue to participate in the AFST transaction. Funders is defined in clause 1.2.4 as meaning:

"Investec Limited or Standard Bank of South Africa Limited or any other funder of whatsoever nature."

[117] Mr Padayachee testified that he facilitated the continued participation of SBSA by calling for a meeting with Mr Naidoo and Mr Penyenye which meeting resulted in the continued participation of SBSA in the AFST transaction. Any evidence of Mr Knoetze imposing an obligation on Mr Padayachee to do anything more than to facilitate continued participation in the AFST transaction, would materially change the nature of his obligations. In my view, any evidence adduced by Mr Knoetze tending to suggest that Mr Padayachee was obliged to procure a 51% shareholding in AFST

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[19] *Johnston v Leal* 1980 (3) SA 927 (A) at 943A.

[20] *Johnston v Leal* (above) at 943A.

[21] *KPMG (above)* at para 39. It appears that Harms JA's use of the word "meaning" in this paragraph was erroneous: it is clear from the relevant passage in *Johnston v Leal* (which is the basis of the dictum) that the sentence should more correctly read "[i]f a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its terms". See also *ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC and Another* 2013 (3) SA 426 (SCA) at paras 18 – 23; *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson* 2013 JDR 2722 (SCA) paras 20 – 22.

[22] *Bothma-Batho* (above) at para 11.

[23] *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail*, 2009(1) SA 196 (SCA) at paras 14 and 15

and to obtain funding for the sum of R80.5 million would be inadmissible as contravening the parole evidence rule.

[118] However, even if it were to be considered admissible, I would reject such version on the basis that Mr Knoetze's evidence in this regard was neither credible nor reliable.

[119] The phrase "AFST transaction" is used in clauses 5.1, 5.2 and 6.2 of the exit agreement which (clauses embody the obligations of Mr Padayachee and Mr Knoetze.) Mr Knoetze was asked whether the meaning to be ascribed to "AFST transaction" in clauses 5 and 6 were the same. He said that it was the same. He also said that he had complied with his obligations in terms of the exit agreement. His evidence is however that Mr Padayachee did not comply with his obligations in terms of the exit agreement. Importing Mr Knoetze's evidence into clauses 5 and 6 of the exit agreement, they would read something like this:

"5.1 Padayachee shall facilitate that the Funders continue to participate in the AFST transaction in that he will procure 51% of the shareholding of AFST and obtain R 84.5 million funding in respect thereof.

5.2 Padayachee shall do all that is reasonably necessary and within the power of Padayachee to progress the AFST transaction, ie to procure 51% of the shareholding of AFST and obtain R 84.5 million funding in respect thereof, to its final end.

6.1 Knoetze and Adhu undertake to source and secure a Replacement BEE shareholder.

6.2 Knoetze and Adhu shall do all that is required to progress the AFST transaction, ie to procure a 49.5% shareholding in AFST and to obtain funding in the amount of R 60 million, to its final end."

[120] From the above exercise the anomaly is abundantly clear; there is simply no scope for importing different meanings to the phrase "AFST transaction" appearing in clauses 5 and 6 of the exit agreement. The phrase "AFST transaction" is used in several places in the exit agreement so for example it is used in clause 3.3, 4.3, 4.5, 4.11, 4.12, 4.13. Then in paragraph 2.9 the following is recorded:

"The Parties have agreed that all further information that the Parties may wish to refer to in so far as the AFST transaction is concerned shall be attached hereto as Annexure "A", same being the Memorandum in Relation to the Proposed Transaction. "

Clause 3 of Annexure "A" provides "Proposed transaction steps – in order to acquire its interest in the AFST business Teleosis [or Newco to be confirmed] will receive funding from a

financial institution on terms and conditions **still to be agreed** in order to ensure that the interest on such funding is deductible, and for certain other reasons, the parties have determined that the proposed transaction should be initiated through AFST disposing of its business … to Newco …" (own emphasis)

[121] It is thus clear that at the time of the conclusion of the exit agreement, neither the funding, nor the terms and conditions of such funding, had been finalised. Clause 5.1 in view of the provisions contained in Annexure "A" to the exit agreement is simply incapable of being read to impose an obligation on Mr Padayachee to procure funding of R 84.5 million for a shareholding of 51%.

[122] Adv Mulligan, on behalf of the defendants, argued that the acceptance of Mr Padayachee's evidence in regard to what his obligations entailed, would render clause 5.2 meaningless. I disagree. Mr Padayachee is to do all that is 'reasonably necessary' to progress the AFST transaction to its final end. This would include, in addition to what he was obliged to do in terms of clause 5.1 ie to facilitate that SBSA continue to participate in the AFST transaction, to intervene should problems be encountered with the funding or some unforeseeable event over which Mr Padayachee might be able to exert some influence, arise. Mr Knoetze's obligations, as contained in clause 6.2, are far more onerous. He is required to do '**all** that is required to progress the AFST transaction to its final end' (own emphasis). Thus he, Mr Knoetze, is required to drive the transaction – which is exactly what occurred. There is further no evidence of any parallel AFST transaction during 2010 or any AFST transaction other than the one actually concluded. The funder (SBSA) initially introduced by Mr Padayachee (and reassured by him at the meeting consequent upon the exit agreement) had already agreed to loan Livispex R 63.4 million and had committed itself in this regard.

[123] From the evidence of both Mr Padayachee and Mr Knoetze, the latter did not, whether before the conclusion of the exit agreement, at the time of its conclusion or at any time thereafter, advise Mr Padayachee of the conclusion of the transaction agreements, that the transaction agreements were based on the acquisition of a 49.5% share in AFST (not a 51% share), that Teleosis was no longer part of the re-organised structure and that Ms Koyana had already been identified and introduced into the transaction agreements as the effective BEE shareholder. Mr Knoetze's evidence that he did not tell Mr Padayachee of the existence of the transaction

agreements gives rise to only one of two probable explanations: 1) Mr Knoetze deliberately intended to mislead Mr Padayachee in the conclusion of the exit agreement to provide himself with an excuse for not paying the fee; or 2) The fact that the AFST transaction was one where a 49.5% shareholding was to be acquired as opposed to 51% shareholding did not have any bearing on the fee payable to Mr Padayachee. The relevance of the transaction agreements and the timing of their conclusion (in that they pre-dated the exit agreement) and that they were kept secret from Mr Padayachee is that they show the AFST transaction had been effectively concluded, where the only outstanding aspect was loan funding (of approximately R60 million).

[124] Mr Knoetze, during cross examination, testified that he and Mr Padayachee had agreed that Mr Padayachee would phone Mr Barnard and that Mr Barnard had indicated to Mr Knoetze that he, Mr Padayachee, had left a message with Mr Barnard saying that he would drive the process to 51%. Of course as the process ultimately did not result in a 51% share transfer this would, if true, tend to show that Mr Padayachee had not attained the agreed performance that would entitle him to the fee. It was pointed out to Mr Knoetze that this version had never been put to Mr Padayachee during his cross examination. Mr Knoetze could not explain why this had not occurred. The inference of this failure is of course that the evidence tendered in this regard during cross examination was a fabrication to create false grounds for not paying the fee. That it was indeed a fabrication is supported by the failure of Mr Barnard, who is called as a witness, to testify and confirm this undertaking allegedly given to him via the alleged message.

[125] Mr Knoetze explained that the reason why the SBSA reduced the proposed funding from R 84.5 million to R 63 million was because Mr Penyenye had indicated that the replacement of Teleosis with Varsiworx would pose a problem. Once again it was put to Mr Knoetze that this was never traversed with Mr Penyenye during his cross examination. Once again the suggestion was that this was a recent fabrication. That it was a fabrication is confirmed by the fact that Mr Penyenye testified that he only became involved in the AFST transaction at the time that the funding contemplated was already R 63 million. In other words he was not involved at all with the decision to reduce the funding from R 84.5 million to R 63 million.

[126] Mr Knoetze in his affidavit resisting summary judgement, had stated that for payment to have been made to Mr Padayachee, the fee of R 2.5 million had to have been capitalised in Teleosis. As this did not occur Mr Padayachee was not entitled to the fee. His evidence during the trial however was whether the fee was capitalised in Teleosis or any other company did not matter. It was put to Mr Knoetze that at the time of the conclusion of the exit agreement the only concern he, Mr Knoetze, had was that the funders who had previously shown a willingness to negotiate and take the transaction to the next level, might withdraw because of Mr Padayachee's exit. It was put to him that that is the reason why he signed the exit agreement. It was also suggested that what Mr Padayachee was required to do was to secure the funders' continued involvement in the transaction and nothing else. This proposition is, on the evidence, overwhelmingly probable. This mind set would explain why no letter had been sent by Mr Knoetze calling upon Mr Padayachee to remedy his alleged breaches of the exit agreement. In Mr Knoetze's mind, Mr Padayachee had secured the funders continued involvement. Mr Knoetze did not genuinely believe that Mr Padayachee had breached the agreement. Mr Padayachee did not obstruct nor scupper the deal in any way, and had done all that he was required to do. The most probable construction of the facts leads one to conclude that Mr Knoetze did not tell Mr Padayachee of the existence of the transaction agreements at the time of the conclusion of the exit agreement because such transactions and their content had no bearing on the fee payable to Mr Padayachee.

[127] Mr Knoetze, during cross-examination added a further obligation with which Mr Padayachee was allegedly to comply. He testified that he was required to contact Tyco and to advise them that he, Mr Padayachee, had fallen out of the picture but that they should not be concerned about it as Mr Knoetze was going to secure a replacement BEE partner. This fact was also never put to Mr Padayachee during his cross examination nor did Mr Knoetze ever send Mr Padaaychee an sms or some other form of communication to call upon him to comply with this obligation.

[128] Mr Padayachee, from the time of the conclusion of the exit agreement ie 28 July 2010 until the conclusion of the loan agreement, ie 29 October 2010, had done nothing other than convene a meeting with the representatives of SBSA. It was highly improbable that Mr Padayachee would have made no contact with Tyco and would

not have sought to appease Mr Barnard during this period if that was indeed what he was obliged to do. It accordingly follows that the parties did not view these acts as forming part of Mr Padayachee's obligations.

[129] Having regard to the contradictions in the evidence of Mr Knoetze referred to herein, the probabilities referred to herein and the calibre and cogency of the evidence adduced by Mr Knoetze, I have little hesitation in rejecting his evidence in so far as it conflicts with that of Mr Padayachee. I accordingly find that Mr Padayachee's obligations in terms of the exit agreement did not include those contended for by Mr Knoetze, that Mr Padayachee complied with his obligations in terms of the exit agreement and that Mr Padayachee was not in breach of his obligations.

Mr Knoetze's obligations

[130] Clause 10 of the exit agreement houses the implementation and good faith provisions. It has been quoted in full above (para [24]). Of particular importance to the current enquiry though is clause 10.2.3 which provides that full disclosure to each other (the parties to the exit agreement) should be made of any matter that may effect the execution of the exit agreement. At the time the exit agreement was concluded, Teleosis was identified as the vehicle through which the AFST transaction was funded. However, 2 weeks prior to the conclusion of the exit agreement, Livispex was named as such vehicle in the duly executed transaction documents. That this fact might influence the execution of the exit agreement goes without saying. Mr Knoetze didn't disclose this fact. He didn't do so in his initial plea to the un-amended particulars of claim either, nor did he disclose it in his affidavit resisting summary judgement. In my view he should have disclosed this fact prior to the conclusion of the exit agreement on 28 July 2010 but at best for him no later than 29 October 2010 when the loan agreement was signed. His explanation for not doing so, ie that there was a parallel but different obligation on Mr Padayachee and that these transactions were put in place as a "back stop" only, has already been rejected.

[131] On Mr Knoetze's version, at some point the funding changed from R 84.5 million to R 63 Million and according to him, Mr Padayachee had the obligation to procure funding for R 84.5 million, thus as soon as this information became known to

him, a situation as envisaged in clause 10.2.3 arose. Clearly, reduced funding might effect the execution of the exit agreement. He did not disclose this information to Mr Padayachee.

[132] Mr Barnard, the primary decision maker of AFST and it's shareholders testified that when Mr Padayachee fell out of the picture so too did the 51% option as they did not want to wait another 4 months nor did they want to spend $20 000 for the vetting procedure to be redone by Tyco. Thus, and at the time of the conclusion of the exit agreement, Mr Knoetze could not have held the view that the acquisition of a 51% shareholding was possible or viable. Assuming, without accepting, that he did hold this view at the time of the conclusion of the exit agreement, it should have become patently clear soon thereafter that the 51% route was completely unattainable. He had this knowledge and in terms of clause 10.2.3 was obliged to communicate such information which he did not do.

[133] The AFST transaction was completed by utilising Levispex. Mr Knoetze failed to procure that the obligations owed by Teleosis to Mr Padayachee in terms of clause 4.8 of the exit agreement were fulfilled by Levispex, when Mr Knoetze could and should have done so. Both Mr Knoetze and Ms Koyana were directors of Livispex. Mr Knoetze decided in about October 2010 that Mr Padayachee had not performed in terms of the exit agreement and that he was not entitled to the consulting services fee. Mr Knoetze's evidence was that it was always his intention that Teleosis or any other party that obtained the funding, pay Mr Padayachee the fee, provided that Mr Padayachee did what was required of him.

[134] This court has found that Mr Padayachee did what was required of him. That being so, Mr Knoetze and Adhu ought to have procured compliance by Levispex of the obligations owed by Teleosis to Mr Padayachee in terms of clause 4.8 of the exit agreement. Mr Knoetze and/or Adhu nonetheless prevented Levispex from paying Mr Padayachee the sum of R 2.5 million contemplated by the exit agreement. Such conduct by them constituted a breach of their obligations under clauses 6 and 10 of the exit agreement and, bar the provisions of the breach clause discussed hereinafter, renders them liable to Mr Padayachee in damages equivalent to the sum that would have been payable to Mr Padayachee by Teleosis ie R 2.5 million, had Mr Knoetze and Adhu not breached their obligations.

Compliance with the notice to remedy breach clause

[135] The breach clause, clause 8 of the exit agreement, provides that a period of 14 days should be afforded to the defaulting party to remedy the breach. The letter of 17 February 2011 only afforded Mr Knoetze and Adhu 6 days within to remedy the alleged breach. The defendants argued that Mr Padayachee had not complied with the provisions of the breach clause which non-compliance is fatal to his claim.

[136] The breach clause, properly construed, only requires notice to be given if a claim for either specific performance or cancellation of the exit agreement is to ensue.

[137] Specific performance lies against Teleosis. No claim is made in these proceedings against it. The exit agreement has also not been cancelled. It follows that clause 8 has no application in this matter and did not oblige Mr Padayachee to invoke it prior to claiming damages from Mr Knoetze and Adhu for their conduct in preventing Levispex from paying Mr Padayachee the fee.

[138] Even if I am wrong in this conclusion , the letter of 17 February 2011 is in its terms a letter of demand, based on the failure by Mr Knoetze and Adhu to perform in terms of the exit agreement. The terms of the breach clause, (if applicable) would only have prevented Mr Padayachee from pursuing his claim prior to the expiry of a period of 14 days from the date of receipt of the letter of demand. The action was only instituted the following year. In *Godbold v Tomson*, 1979 (1) SA 61 (D&CLD), Fannin, J held as follows at 65B-D :

"The right of election to cancel the contract (or to enforce it) arises if the purchaser continues, for more than 14 days after the date of the written notice, in his default - that is to say in the default which he is called upon by the notice to remedy. There is, however, no necessity to specify in the notice the period within which the default must be remedied (see Tangney and Others v Zive's Trustee, 1961 (1) SA 449 (W) at p. 453G and Chatrooghoon v Desai and Others, 1951 (4) SA 122 (N)). The question for decision is always whether the conditions on which the right to cancel was dependent have been fulfilled (Rautenbach v Venner, 1928 T.P.D. 26 at p. 31). The purpose of such a notice is to inform the recipient of what he is required to do in order to avoid the consequences of default, and if it is in such terms as to leave him in doubt as to the details of what is required of him, then it may be that it will be held that the notice is not one such as is contemplated by the contract (Rautenbach's case, supra at p. 31).

In *Tangney and Others v Zive's Trustee*, 1961 (1) SA 449 (WLD) at 453F – H, Kuper J held as follows:

"Clause 16 provided that the applicants would be entitled to claim forfeiture if the insolvent failed to remedy a breach within 14 days after notice in writing given by them to the insolvent to remedy the breach. The notice of the 18th August, 1960 in fact gave the trustee 14 days from the date of the letter and it was common cause that if the terms of the letter required 14 days' notice to be given that the time given in the letter was incorrect and ineffective. In my view, the clause only required a notice in writing to be given to remedy the breach and there was no necessity to specify in the notice the period within which the breach was to be remedied. Nor does the fact that an inadequate period was specified invalidate the notice."

[139] The letter of demand dated 17 February 2011 is clear in its terms. It calls upon Mr Knoetze and Adhu to pay Mr Padayachee R 2.5 million. The fact that it calls upon them in terms more peremptory than clause 8 (the breach clause) actually authorises, does not invalidate the notice. The defendants' reliance on a supposed non-compliance with clause 8 of the exit agreement is accordingly misplaced.

Stipulatio alteri

[140] On 9 August 2010, Mr. Knoetze wrote a letter to Mr. Naidoo which was also to be brought to the attention of Mr. Penyenye, asking SBSA to re-initiate the process in order to finalize the payout (funding to shareholders). I have quoted this email above at par [21].

[141] On 28 October 2010, SBSA's "Equity and Leveraged Finance" department addressed a motivation letter to its credit department. Mr. Penyenye and Mr. Naidoo testified as to their involvement in this process and confirmed that included in the loan finance to be provided was an amount of R2.5 million specifically earmarked as Mr. Padayachee's payment. In terms of the proposed structure the initial loan amount was for R40.9 million and any remaining amounts would be subject to profit warranties. Mr. Knoetze never advised either Mr. Padayachee or SBSA of any change in circumstances and it is clear that the intention of Mr Knoetze and SBSA was that the amount of R2.5 million was an amount included for the benefit of Mr. Padayachee and payable to him. The only prerequisite for payment to Mr. Padayachee of the fee was that it was to be capitalised as part of the funding arrangement.

[142] On 29 October 2010 SBSA, represented by Mrs Khoulla Michael and Livispex, represented by Messrs Knoetze and Barnard, concluded the loan agreement . The loan agreement specifically refers to the final Transaction Structuring Memorandum, which was prepared by Webber Wentzel dated 16 August 2010. The loan agreement provides for funding of R63.4 million and the evidence of the SBSA was that an initial "nett" payment or R40.9 million would be available for the borrower Livispex.

[143] Mr Knoetze testified that an amount of R43.4 million was paid to Livispex on 1 December 2010 by SBSA. The contents of the motivation letter dated 28 October 2010, supported by the evidence of Messrs Penyenye and Naidoo, show that the sum of R43.4 million included the R2.5 million fee.

[144] Mr Padayachee could claim the benefit from Livispex provided that it was capitalised to the overall funding, (which it was). Mr Padayachee became aware of the stipulation and accepted it. This acceptance was communicated to Livispex in terms of the amended particulars of claim. The existence of the stipulation clearly emerges when considering the amount of the loan funding payable in terms of the loan agreement , the basis on which the loan amount was arrived at in the loan agreement and when considered in the context of the motivation letter (which spells out the computation of the loan amount). Both SBSA and Livispex have performed in terms of the loan agreement .

Prescription

[145] Levispex has raised a defence of prescription contending that Mr Padayachee's claim, on his evidence became due either on the conclusion of the loan agreement (28 October 2010) or when SBSA paid Levispex the first transfer of funds which occurred on 1 December 2010. The action against Livispex was instituted during November 2014 which is more than 3 years after the debt became due and the claim against Levispex has thus become prescribed. Without anything further this would have been the end of the claim against Levispex.

[146] Mr Padayachee replicated to this defence relying on facts to support reliance on section 12(3) of the Prescription Act. At the commencement of argument, Adv Strathern, representing Mr Padayachee, moved for an amendment introducing facts

to support reliance on section 12(2) as well. The amendment was not opposed and the amendment was granted.

[147] Section 12 of the Prescription Act provides inter alia as follows:

> (1)Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
>
> (2)If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3)A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[148] Adv Strathern argued that Mr. Padayachee could not reasonably have ascertained the identity of Livispex as his debtor, in terms of his claim against it or of the facts giving rise to that claim. He pointed out that Mrs Crone took all reasonable steps to ascertain the identity of the ultimate beneficiary of the loan. I agree. Mrs Crone wrote to Mr Knoetze and Adhu (the letter dated 17 February 2011) which she copied Ms Koyana in on. She wrote to SBSA. She wrote to TPA attorneys. She again wrote to Ms Koyana during September 2011. She also wrote to Tyco. In every instance she was blocked by the wall of privilege or other obstruction. She conducted CPI searches. The list of directors setting out Mr Knoetze's directorships identifies 30 companies but does not identify Livispex. In addition there was no evidence to suggest that Livispex was ever identified as the recipient of the SBSA loan on any website.

[149] The various term sheets, Mr. Knoetze's emails to SBSA, the motivation to SBSA's credit department and the loan agreement, were only produced under subpoena in anticipation of the trial proceeding in January 2014. Mrs. Crone also testified that the transaction agreements, some of which identify Livispex as the borrower (Opco), were only made available by Mr. Nixon pursuant to the discovery process a few days after the documents from SBSA had been received.

[150] Mr Padayachee was criticized for not contacting Mr Barnard or Mr Jacobs. It is extraordinary that the defendants should suggest that “reasonable care”, as used in section 12(3) of the Prescription Act, and as to be applied in this matter should mean that even though Mr Padayachee through his attorneys asked the defendants directly for the identity of Levispex and they had refused to disclose the information, he was obliged to explore other avenues. This proposition is particularly astonishing under circumstances where the defendants didn’t even disclose the identity of Levispex in their affidavit resisting summary judgment.

[151] Mr Padayachee’s undisputed evidence is that he only got knowledge of the identity of Levispex when SBSA disclosed the loan agreement under subpoena in preparation for the January 2014 hearing. Irrespective as to any suspicion or opinion, prescription only starts to run when knowledge of the identity of the debtor is acquired - see *Minister of Finance and Others v Gore NO*, 2007 (1) SA 111 (SCA). During cross examination of Mr Padayachee it was suggested that he could have had access to the information prior to the break up. That may be so, but he testified that he did in fact not have access as Mr Knoetze was the person who had liaised with Webber Wentzel and PTA attorneys and when he realised he needed the documents to ascertain the identity of the beneficiary, access to such documents and information was denied.

[152] Mr Knoetze was asked for the required information, he failed to provide it. In his affidavit resisting summary judgment, he failed to disclose the identity of Livispex. In his initial plea, he failed to disclose the identity of Livispex. In my view, Mr Knoetze wilfully prevented Mr Padayachee from coming to know of the identity of Levispex, which is the party which owes the debt.

[153] I accordingly find that Mr Padayachee’s claim against Levispex has, by virtue of both the provisions of sections 12(2) and (3) of the Prescription Act, not prescribed.

COSTS

[154] Costs are sought as between attorney and client. The facts of this case in my view warrant a punitive costs order. Mr Knoetze has defended the matter by being untruthful particularly in his affidavit resisting summary judgment. The ineluctable

inference to be drawn from the contents of that affidavit is that Mr Knoetze deliberately lied under oath. The allegations in paragraph 10 of the affidavit resisting summary judgment are simply false. No mention is made of the fact that Livispex raised the capital loan. Instead, reference is made to a loan raised by Advanced Capital (Pty) Limited which is neither a party to any of the transaction agreements nor the borrower in terms of the loan agreement . The only inference to be drawn is that Mr Knoetze set out to hide the truth in a dishonest and deceitful way.

[155] Although Mr Jacobs representing Levispex was present during the hearing, he did not testify. I must assume that he knew that the R2.5 million Levispex received was owing to Mr Padayachee and was content with denying him what was rightfully owing to him. I accordingly draw no distinction between the different defendants in respect of the costs order to be granted.

ORDER

[156] The exit agreement incorrectly refers to the first defendant as 'ADHU Investments 243 CC' whereas it should be 'ADHU Investments CC'. The order for rectification hereof was not opposed.

[157] I accordingly grant the following order:

> Judgement is granted against the first, second and third defendants, jointly and severally, the one paying the other to be absolved in the following terms:
>
> a. The exit agreement dated the 28th of July 2010 is rectified by the deletion on page 1, in clause 1.2.2 and on page 14 thereof of the words 'ADHU Investments 243 CC' and the substitution thereof by the words 'Adhu Investments CC';
> b. Payment of the sum of R 2 500 000 to the plaintiff;
> c. Interest on the sum of R 2 500 000 at 15.5% per annum from 1 December 2010 to 1 August 2014 and thereafter at 9% per annum to date of payment;
> d. Costs of the action as between attorney and client.

_____

I OPPERMAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 12 November 2015
Judgment delivered: 28 January 2016
Appearances:
For Plaintiff: Adv Paul Strathern S.C.
Instructed by: Brian Kahn Inc
For Respondent: Adv SLP Mulligan
Instructed by: Mark Nixon Attorney