IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable
CASE NO: 2091/19P

In the matter between:

ROBERT ANTHONY LE SUEUR	Plaintiff
and	
RODERICK ROBERT STAINTON	First Defendant
ROKWIL CIVILS PROPRIETARY LIMITED	Second Defendant

ORDER

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1. The defendants' application in terms of Uniform Rule 6(5)*(g)* for the referral of certain issues for the hearing of oral evidence is dismissed with costs.
2. Judgment is granted in favour of the plaintiff against first and second defendants jointly and severally, the one paying the other to be absolved, in accordance with the confessions to judgment dated 3 April 2019, as follows:
    2.1 Payment of the amount of R103 128 603.15.
    2.2 Payment of interest on the amount of R103 128 603.15 at the rate of 10.25% per annum from 29 February 2020 to date of final payment, both days inclusive.

2.3 Payment of the plaintiff's costs of suit on the scale as between attorney and own client.

JUDGMENT

delivered on: 28 July 2021

BEZUIDENHOUT AJ

Introduction

[1] The plaintiff, Robert Anthony Le Sueur, instituted action against the first defendant, Roderick Robert Stainton and the second defendant, Rokwil Civils (Pty) Ltd (Rokwil) on 25 March 2019, claiming payment of the amount of R 100 million together with interest and costs of suit, on the attorney and own client scale.

[2] The defendants did not defend the action but instead signed confessions and consents to judgment in terms of Uniform Rule 31(1) for R 100 million together with interest and costs in favour of the plaintiff on 3 April 2019.

[3] On 28 February 2020, plaintiff filed a notice of application in terms of Uniform Rule 31(1)*(c)* in accordance with the confessions to judgment (attached to the notice) and applied for judgment in the following terms:

(a) That the defendants are directed jointly and severally, the one paying the other to be absolved, to pay the sum of R103 128 603-15 to the plaintiff;

(b) The defendants are directed jointly and severally, the one paying the other to be absolved, to pay interest on the sum of R103 128 603-15 at the rate of 10,25% per annum from 29 February 2020 to date of final payment, both dates inclusive;

(c) That the defendants are directed jointly and severally, the one paying other to be absolved, to pay the plaintiffs' costs of suit on the scale as between attorney and own client.

[4] The application is accompanied by a supporting affidavit, attested to by the plaintiff, wherein he set out a brief history of the matter with reference to an agreement and settlement agreement entered into between the parties, as well as an acknowledgement of debt signed by both defendants prior to the issuing of summons. He also attached a certificate of balance which indicated that the balance owing was the amount of R103 128 603-15, which included interest at an agreed rate.

[5] The defendants' current attorney of record filed correspondence dated 27 February 2020, in the court file. The apparent intention was to alert whichever judge was to consider the application in chambers, to the fact that it was instructed to 'bring an urgent interdict disputing the validity of the confession to judgment, acknowledgement of debt and the underlying causa, both individually and collectively'. It also stated that the defendants signed the confession to judgment without them obtaining legal advice.

[6] The first defendant attested to an affidavit (also duly authorised to act on behalf of second defendant), which was filed on 3 March 2020. On 4 March 2020, Poyo Dlwati J made an order, referring the application to open court. The first defendant's supplementary affidavit followed, filed on 15 May 2020.

[7] The plaintiff filed a comprehensive replying affidavit on 1 December 2020.

[8] The matter was set down for argument on the opposed roll on 16 April 2021. On 6 April 2021, the defendants' filed an application in terms of Uniform Rule 6(5)*(g)* for the referral for oral evidence of certain issues set out in Annexure "A" to the notice of motion. The issues to be resolved at such hearing were:

'i) whether Stainton disclosed to Le Sueur that Rokwil was doing the civil engineering work at the Mr Price site or mislead him into believing that the work was being done by an independent contractor;

ii) the question of who drafted the value share agreement and whether Paul Hay introduced changes into the draft agreement after 26 September 2017 designed to harm Stainton and Rokwil economically;

iii) whether the conduct of Le Sueur in concluding the value share agreement, the acknowledgment of debt, and requiring Stainton and Rokwil to sign a confession to judgment amounts to duress in law such as to render the value share agreement, the acknowledgement of debt and the confession to judgement void and unenforceable;

iv) whether Le Sueur was at all material times a registered credit provider in terms of section 40(1)(b) of the National Credit Act 34 of 2005;

v) what was the value of Rokwil and its profitability was for the purpose of the value share agreement.'

[9] The plaintiff opposed the application and filed an answering affidavit after which the defendants filed their reply shortly before the hearing of the matter.

[10] The defendants did not at any stage apply in terms of Uniform Rule 6(5)*(e)* to be allowed to file a further affidavit in order to respond to the plaintiff's replying affidavit in the main application. Defendants instead chose to address certain disputes in the application for referral for oral evidence.

[11] Due to the complex facts and numerous issues to be considered and decided upon, as will become apparent below, the time allocated for the hearing of the matter was insufficient and I permitted both counsels acting for the parties to file further heads of argument to address me on two remaining issues not fully canvassed at the hearing. I received further comprehensive heads of argument on 23 April 2021 and on 5 May 2021 respectively, for which I am indebted.

Background

[12] It is common cause that the plaintiff and the first defendant had known each other for close to 20 years and had become business associates and friends. The plaintiff had various business interests and was involved in, inter alia commercial and residential developments, a private equity business investing in emerging businesses and a farming business in Zambia. First defendant was a charted accountant, but had become an experienced businessman, involved in residential developments and mini-factory developments.

[13] During the beginning of 2012, the plaintiff approached the first defendant with a view to possibly develop land in the Hammersdale area. The first defendant was willing to become involved in the development of the land as a light industrial park providing warehousing facilities and logistic premises. As the first defendant did not have the money available, it was agreed that the plaintiff would provide finance to purchase the land and fund the initial development whilst the first defendant would manage the development, referred to as the so–called 'sweat equity'.

[14] The plaintiff and the first defendant had previously conducted business together and achieved great success without much formality. The plaintiff trusted in the first defendant's ability to deliver a complex property development. The plaintiff (on his version) informed the first defendant that after repayment of the funds provided by him, they would share equally in the net profit generated by the development. The Keystone Park development came into being.

[15] The land was purchased and registered in the name of Keystone Park CC. The Crowned Eagle Trust, plaintiffs' family trust and the Keystone Trust, first defendants' family trust, each held a 50% member's interest in Keystone Park CC. Keystone Park CC would develop the land and generate an income by selling or leasing serviced light industrial plots in the development. The Crowned Eagle Trust and the Keystone Trust would share in the profits created in Keystone Park CC.

[16] The plaintiff's case is that during the discussions relating to the development of Keystone Park, he and the first defendant realised that substantial work and business opportunities, such as earthmoving and installation of infrastructure would arise, that would not fall within the ambit and purpose of Keystone Park CC. It was agreed that the first defendant would set up a special purpose vehicle ("SPV") which would compete for the performance of such work or business opportunities and that the plaintiff and the first defendant would be equal shareholders or members of the SPV. It was also agreed that they would share in the value created in the SPV.

[17] Subsequently the plaintiff left the procurement of tenders for the civil works in the hands of the first defendant. On 18 June 2016, the plaintiff had a conversation at a social event with Mr James Te Riele, who remarked that they (referring to the

plaintiff and the first defendant) had made the right decision to do all the civil works themselves, as they would own all the equipment afterwards. The plaintiff informed Mr Te Riele that the first defendant told him that outside contractors attended to the civil works. Mr Te Riele suggested that the plaintiff go check for himself.

[18] A confrontation between the plaintiff and the first defendant followed on 20 and 21 June 2016 during which the plaintiff accused the first defendant of lying to him and the first defendant allegedly apologised and acknowledged that he should have told him about it. The civil works were apparently being done by through Rokwil, in which the plaintiff held no interest.

[19] The plaintiff, after the confrontations between himself and the first defendant, addressed an email to first defendant on 28 July 2016. The email is important for reasons which will become clear below. The relevant portions read as follows:

'I am still not 100% happy that we have cleared up the Keystone issues.

I have been giving a lot of thought to how to make sure that going forward we are fully aligned and we don't have any future misunderstandings. I don't believe we have resolved clearly enough the way forward, and it must be sorted out now before we continue with the project. We need to do this for our friendship and for good business.

I think we need to dedicate a day together to agree exactly how we are going to move forward together. I want us to understand clearly how the project will run before we draw down on the R346 million from Nedbank. I need a clearer understanding and I want to be more involved in the detail and associated costs, and we need clarity on structures, reporting and the detailed numbers.

As I re-iterated yesterday and we both agreed the project was to run on the basis we agreed upfront and I don't think it is at the moment. We agreed that everything to do with Keystone and any business or opportunities that developed out of the Keystone development would be done on a 50/50 basis as partners. I think we both want this and agree that was what our intentions are, but we need to understand the detail as to exactly how this is implemented before things get more complicated down the line.

I will give you a call later so we can find a day that suits to meet without any interruptions so we can clear things up and agree the way forward for both of our benefit.'

[20] The first defendant did not respond to the email. Between August 2016 and August 2017, the plaintiff kept on requesting the first defendant to indicate what

progress he was making to rectify the situation. The plaintiff and the first defendant subsequently had a meeting on 29 August 2017 at the offices of Rokwil where the plaintiff apparently placed the first defendant on terms regarding the resolution of the issue between them. The plaintiff requested the first defendant to draft an agreement setting forth the manner in which 'the wrong committed against him would be rectified.'

[21] On the 31 August 2017 the plaintiff received a draft agreement from Ms Sue Bartlett, who was employed as second defendants' legal manager. She is a qualified and experienced attorney. As mentioned above, the first defendant himself is a chartered accountant and previously practised as such. The draft agreement, known as the value share agreement, was the first of eleven drafts, which culminated in the signing of the final value share agreement by all the parties on 2 November 2017. The first draft referred only to the plaintiff and the first defendant as the parties to the agreement.

[22] The first draft of the value share agreement commenced with an introduction which reads as follows:

'1.1 Stainton and Le Sueur, as representatives of various entities and in their personal capacities, have participated in and contributed to development projects and have shared business interests on an informal business.

1.2 The purpose of this Agreement is to clarify and record each party's rights and obligations regarding their respective interests, contributions and shares in various projects from mid 2012 until date of signature of this Agreement ("Date of Signature"), and to record their future roles, rights, obligations and interests in shared business ventures.

1.3 It is recorded that Rokwil Pty Ltd is and has always been wholly owned by Stainton and is used and will continue to be used as his personal trading vehicle. Shared value has been created in Rokwil and the purpose of this Agreement is inter alia to identify and distribute such shared value as originally agreed between the Parties.'

[23] In terms of clause 2.3 of the first draft of the value share agreement

'The parties agree that on principle they will share equally in the net value or loss created directly in DELIVERING the Keystone project irrespective of howsoever created, such value

or loss to be allocated and distributed in terms of Clause 8.2. It is specifically agreed that such value is not payable in cash by either party'.

[24] The first draft of the value share agreement made provision for the parties to share in certain projects and interests but also specifically excluded various projects, properties and interests of the first defendant and Rokwil.

[25] Clause 8, with the heading 'Context and manner of settlement' reads as follows:

'8.1 From inception of the Keystone project, Stainton has managed and facilitated the day-to-day operations, implementation and delivery of all aspects of Keystone, has signed suretyships and personal guarantees and has utilised personal cash flow and funds of Rokwil for the benefit of Keystone. It is recorded that for this service Stainton (and Rokwil) has not levied interest or charges for the purpose of the value share agreement ,and will not levy such interest and charges, As consideration for these services, it is agreed that in calculating the values allocated to each party in terms of this Agreement (being shared value created in delivering Keystone), Stainton is entitled to an additional R250 000,00 (Two hundred and fifty thousand rand) per month (on average) calculated from 01/01/2013 until Date of Signature. This shall not be paid in cash but used in the calculation of the value share.

8.2 It is agreed that the allocated and agreed values due to or by each Party shall not be payable or claimable by either Party in cash, but will be calculated as and when the included projects referred to in Clauses 2, 3, 4 and 5 are concluded . . . Such values will be settled by means of asset transfers and adjustments between the Parties. The Parties will endeavour to finalise this process within 24 months of Date of Signature, or sooner if possible. . .'

[26] In the period following the receipt by the plaintiff and his attorney of record, Mr Paul Hay, of the first draft of the value share agreement, the first defendant, Ms Bartlett, the plaintiff and Mr Hay continued to amend and refine the first draft. It ultimately resulted in the final draft, which the parties signed on 2 November 2017.

[27] In the process of producing the final draft, the parties exchanged various emails and the first defendant offered on several occasions to meet with the plaintiff and Mr Hay to discuss the various drafts. From the correspondence attached to the

affidavits it appears that on occasion Mr Hay would forward a draft to the first defendant, with an indication in the accompanying email that 'the amendments have been marked in red'. On occasion the first defendant emailed an amended draft to Mr Hay wherein he amended various clauses in manuscript.

[28] From the final value share agreement, it is clear that Rokwil is now also a party to the agreement, having been added as a party from around the fourth draft, which emanated from Ms. Bartlett. The joint and several liability of the defendants were introduced by Mr Hay in the seventh draft. The introduction reads inter alia as follows:

'2.1 The Parties confirm that since 2012 they have been involved in various commercial opportunities which include:

2.1.1 The delivery of the Keystone Park Development ("the Development"); and

2.1.2 Transactions that arise from, or are connected to, the delivery of the Development ("Connected Transaction/s") in which Stainton and Le Sueur agreed to share value gained ("the Value Share") on an equal basis (50:50) ("the Initial Agreement").

2.2 Le Sueur initially identified the development land, secured and funded its acquisition.

2.3 Stainton was appointed to administer the Development and all Connected Transactions, which administration including him recording all income and expenses derived therefrom and accounting to Le Sueur therefor.

2.4 At the commencement of the Development and as the Development progressed Keystone obtained a number of quotations from independent third parties for the delivery of the Development. Rokwil undertook to deliver the Development to Keystone on the basis that the cost of such delivery would be equal to or less than the lowest of the quotations received by Keystone, as aforesaid. Keystone accordingly awarded the contract to deliver the Development to it on this basis. In accordance with this arrangement, Rokwil has acted as development agent of the Development, has funded many costs of the Development on an ongoing basis, and has received income arising from the Development to off-set such costs resulting in the realisation of possible profit . . .

2.3 The purpose of this Agreement is to inter alia identify and distribute the Value Share created in Rokwil between Stainton and Le Sueur, and to clarify and regulate the Initial Agreement….

2.7 Stainton warrants that all of the Value Share has been created and retained within Rokwil and further that no part of the Value Share has been created or transferred (in cash or otherwise) to any other entity.

2.8 The Value Share has since inception to date not been recorded by Stainton, as contemplated in accordance with the Initial Agreement, and the Parties now wish to record and regulate inter alia the manner in which such Value Share is to be dealt with.'

[29] Clause 4 of the value share agreement dealt with the calculation of the current value share created in Rokwil and was to be determined as at 31 October 2017. In terms of clause 4.3, the calculation of the current value share within Rokwil would, inter alia take into consideration the income received by Rokwil from Keystone for the delivery of the development and from any clients within the development, less the direct costs of providing the services, and less an agreed average amount of R250 000-00 per month, calculated from 1 January 2013 until the date of signature of the value share agreement.

[30] Clause 4.4 contained further provisions to calculate the residual net asset value derived from the development.

[31] In terms of clause 4.4.2 the first defendant would prepare the calculation of the current value share in Rokwil, which would be provided to the plaintiff by no later than 31 January 2018. The plaintiff would have until 31 March 2018 to consider, interrogate and agree the calculation of the current value share as presented to him by the first defendant. The plaintiff would be entitled to engage with the first defendant regarding the calculation and could request copies of any documents and information he required to validate, interrogate and agree the amount to be determined to be the current value share amount.

[32] Clause 4.4.3 reads as follows:

'Upon finalisation of the calculation of the Current Value Share in Rokwil, Stainton shall issue to Le Sueur a warranty of accuracy of such amount to within R3 million above or below the agreed Current Value share amount. This agreed Current Value share will be settled between the Parties in terms of clause 9.3, taking inter alia taxes and efficient structuring into account.'

[33] Clause 8 of the value share agreement deals with various properties and interests of the first defendant, excluded from the calculation of the value share.

[34] Clause 9 of the value share agreement contained various clauses aimed at determining the manner of the settlement of the value share. Clauses 9.3 and 9.4 are of particular importance and the relevant portions read as follows:

'9.3 The various component parts of the Value Share owed by Stainton and Rokwil (on a joint and several basis) to Le Sueur shall be settled, paid and discharged as follows:

9.3.1 The Current Value Share that accrues to Le Sueur as calculated in accordance with the provisions of clause 4 above shall be settled and paid, on the basis as contemplated in clause 9.4 below, once Le Sueur confirms in writing that he agrees with Stainton's calculation of the Current Value Shares, as contemplated in clause 4.4.2 or, if not agreed, as otherwise determined in terms of the provisions of the agreement.

. . .

9.4 The Current Value Share (calculated in accordance with the provisions of clause 4) will be settled by means of:

9.4.1 In specie asset transfers and adjustments taking into account any amounts due by Keystone referred to in 4.4.1 (ii) (to be agreed between Le Sueur and Stainton), or

9.4.2 In cash; or

9.4.3 Partly by in specie asset transfers and adjustments (to be agreed between Le Sueur and Stainton) and partly in cash.

Stainton and Le Sueur will use their best respective commercial endeavours to attempt to agree the settlement of the Value Share, in whole or in part, by way of in specie asset transfers and adjustments. In the event of Le Sueur and Stainton failing to agree upon the in specie asset transfers and adjustments to settle the Value Share, as contemplated above, Stainton will make payment of the Value Share amount to Le Sueur in cash. The following terms and conditions will apply to the settlement of the Value Share in cash, namely:

9.4.3.1 When Le Sueur, at his discretion, determines that the endeavours to attempt to agree on the settlement of Value Share in specie as contemplated above have failed, he shall be entitled to give Stainton 10 (ten) days written notice of his determination in this regard;

9.4.3.2 Stainton will then, from the end of the 10 (ten) day period referred to in clause 9.4.3.1 above, have a period of 120 (one hundred and twenty) days within which to pay the Value Share, together with the accrued interest thereon as provided for in clause 9.4.3.3 below, to Le Sueur in cash.

9.4.3.3 Interest at the prime rate charged by the Standard Bank of South Africa, from time to time, will accrue on the full outstanding amount of the Value Share, calculated from the end of the 10 (ten) day period referred to in clause 9.4.3.1 above, until the date final payment, both days inclusive.'

[35] Subsequent to the signing of the value share agreement, and after missing the deadline of 31 January 2018 as set out in clause 4.4.2, the first defendant advised the plaintiff on 17 March 2018 that the current value share was around R69 million. On 19 March 2018, the first defendant provided the plaintiff with the financial statements pertaining to Rokwil and Keystone Park CC and various other documents. He did not provide a calculation of how he arrived at the current value share as provided for in clause 4.4.2.

[36] During a meeting held on 23 April 2018, the first defendant presented his calculation of the current value share in the amount of R69 427 122 and also provided the signed calculation and the supporting documents referred to in the calculation.

[37] The plaintiff commenced with the process of reviewing the calculation as provided for in the value share agreement, and for such purpose engaged the chartered accountants Mr Keith Pitout and Mr Guy McEwen, as well as an accountant and tax practitioner, Ms Theresa Alder. The first defendant agreed to Mr McEwen conducting a lifestyle audit on him. He also ensured that his chief financial officer, Mr Oliver Humphries (also a chartered accountant) was available to assist the plaintiff's team and consented to them having access to any documents, bank statements and accounting records required by them.

[38] On 14 May 2018, the first defendant sent through another schedule containing a calculation for an adjustment of R15.113 million by which the current value share had to be increased. On the first defendant's calculation the current value share was now R84 540 122. On 25 June 2018, Mr Humphries provided a spreadsheet to the plaintiff in terms of which Rokwil's profit during the period February 2016 and 31 October 2017 was calculated by him and the first defendant to be R220 571 038.

[39] Mr Pitout produced a schedule based on the documents, bank account statements and accounting records investigated and concluded that the original amount of R69 427 122 calculated by the first defendant, had to be increased by R176 770 234.

[40] Mr Pitout calculated the first defendant's income in Rokwil to which he was legitimately entitled to be R5 628 686. The calculations however reflected that the first defendant actually appropriated income in Rokwil in the amount of R182 398 919.

[41] During October 2018, Mr Pitout prepared a revised calculation of the current value share and arrived at an amount of R281 579 508. The schedule provided referred inter alia to an amount of R63 874 799, which reflected cash drawn out of Rokwil by or on the instructions of the first defendant to fund his lifestyle and came about as a result of the lifestyle audit conducted by Mr McEwen.

[42] Mr Pitout's calculations were provided to the first defendant to enable him and Mr Humphries to review his calculation of the current value share. During a meeting held on 25 October 2018 the findings of the review process were discussed and Mr Humphries confirmed that he was satisfied with the calculations.

[43] On the plaintiff's version, he and the first defendant continued with settlement discussions in private during which it was agreed that the current value share would be R200 million. The plaintiff would accept R100 million as his share, to which the first defendant agreed. Mr Hay was instructed to prepare a settlement agreement and an acknowledgment of debt for the amount of R100 million.

[44] On 26 October 2018 a meeting was held at the offices of Rokwil. The plaintiff, Mr Hay and Mr Jeremy Capon, a partner at Hay & Scott Attorneys, were present, as was the first defendant, Ms. Bartlett and Mr Humphries. Mr Hay tabled a draft settlement agreement and a draft acknowledgment of debt to which certain amendments were made at the request of the first defendant. It is the plaintiff's version that the amendments were done on Ms. Bartlett's laptop.

[45] The first defendant considered the amended draft settlement agreement, and draft acknowledgment of debt and requested further amendments. The plaintiff agreed to the amendments, made in manuscript by the first defendant , where after both the plaintiff and the first defendant signed the settlement agreement and the acknowledgment of debt, and witnessed by Mr Capon and Mr Humphries. The first defendant also signed the two documents on behalf of Rokwil.

[46] The settlement agreement that the plaintiff, the first defendant and Rokwil entered into defines the value share agreement in clause 1 as the agreement concluded between the parties on 2 November 2017. According to the preamble:

'The Value Share Agreement provided inter alia for the Parties to agree on the amount owing by Stainton and Rokwil to Le Sueur in respect of the Current Value Share (as dealt with in clause 4 of the Agreement) and the future Value Share that may arise from Connected Transactions (as dealt with inter alia in clause 5 of the Agreement)'.

It also recorded that the parties had reached agreement on the amount owing by 'Stainton and Rokwil to Le Sueur'.

[47] In terms of clause 3.1 the parties had agreed that the amount owing by the first defendant and Rokwil to the plaintiff in respect of the current value and the future value share was R100 million. Clause 3.3, which was amended in manuscript, reads as follows:

'The amount recorded in clause 3.1 …, above is the total agreed amount payable by Stainton and Rokwil to Le Sueur in all respects of the Current Value and the future Value Share which is agreed on a full and final basis.'

[48] It was agreed in clause 4 that the first defendant and Rokwil will 'simultaneously with the conclusion of this agreement conclude the Acknowledgment of Debt (as attached hereto marked "A") in favour of Le Sueur.'

[49] Clause 5.2 is of particular importance and reads as follows:

'Each party acknowledges that it has been free to secure independent legal and other advice as to the nature and effect of all the provisions of this Agreement and that it has either taken such independent legal or other advice or dispensed with the necessity of doing so.'

[50] Clause 7.2 reiterated what was contained in clause 5.2 but went slightly further. It reads as follows:

'. . . the Parties acknowledge, declare and agree that they have had sufficient time and opportunity to seek independent legal and other professional advice with respect to the terms of this Agreement, that they understand the terms of this Agreement and voluntarily enter into this Agreement for the purpose of making full and final settlement of the Current Value Share and future Value Share, as provide for in the Value Share Agreement, without any threats or coercion.'

[51] The acknowledgment of debt was annexed as annexure "A" to the settlement agreement. In terms of clause 2, under the heading 'Undertaking to settle debt' the payment of the capital sum of R 100 million together with interest by means of a 'payment plan' is set out. In terms of clause 2.1, the debtor (the first defendant and Rokwil, jointly and severally *in soldium*) 'shall make a written proposal to the Creditor (plaintiff) within 120 calendar days of the date of signature of this agreement setting out in detail the manner in which the capital sum shall be secured and settled …'. The time period of 120 calendar days was written in manuscript to replace the original typed time period of 5 days in accordance with what the first defendant requested at the time of the negotiation and signature of the two documents. It is the plaintiff's version that the first defendant remarked that the acknowledgement of debt was a liquid document and he wanted sufficient time to comply. He was clearly aware of the legal consequences of the documents he was signing.

[52] The remainder of clause 2.1 dealt with the details of what was to be contained in the written proposal, referred to as 'the Settlement Plan', such as the dates on

which the proposed payments would be made and details of any proposed means of settling the capital sum.

[53] Clause 2.2 made provision for the signing of a settlement plan in the event of the creditor being satisfied with the terms thereof. Clause 2.3 dealt with the eventuality that should the creditor not be satisfied with the settlement plan or if the settlement plan was not provided within the period of 120 calendar days. In that event, the creditor 'may institute any legal proceedings for the recovery of the Capital Sum which the creditor is his sole and absolute discretion may determine appropriate.' (sic)

[54] Clause 4 dealt with failure to comply with clause 2 and provided as follows:
'….. we hereby jointly and severally irrevocably undertake to sign all the necessary documents, including without limitation all required affidavits and resolutions required in order to consent to judgment being granted in favour of the creditor for the full Capital Sum (or if any payments have been made with the reduction of such amount, the balance thereof) plus legal costs on the attorney and own client scale, to be taxed or agreed.'

[55] In terms of clause 6, a certificate signed by the creditor (plaintiff) setting forth the amount of indebtedness, that the debt is due and payable, the interest payable on the debt and the date from which such interest is recorded, 'shall constitute prima facie proof of the facts herein stated and shall be binding on us for all purposes.'

[56] The debtor also renounced the benefits of, inter alia,
'*errore calculi* – by renouncing this benefit we are precluded from raising the defence that there have been errors in calculation upon which the claim is based',
and
'revision of accounts – by renouncing this benefit we are precluded from raising the defence that the accounting documents upon which the Creditor's claim is based should be revised.'

[57] On the plaintiff's version, Ms Bartlett was present at the meeting of 26 October 2018 although she left the meeting at times, re-joining after a short while.

[58] On 28 January 2019, Mr Hay addressed an e-mail to the first defendant to remind him that in terms of clause 2.1 of the acknowledgment of debt, he had until 23 February 2019 to make a written proposal, setting out the manner in which the sum of R100 million was to be settled.

[59] On 22 February 2019 the first defendant sent his proposed payment plan to the plaintiff. The plaintiff rejected the proposals and demanded payment of R100 million by 8 March 2019. Payment was not made and subsequently summons was issued on 25 March 2019 and served on the first defendant and Rokwil on the same day.

[60] The first defendant requested a meeting with the plaintiff and Mr Hay in order to discuss 'possible asset transfers so we can bring the matter to a close as soon as possible.' The first defendant was however requested to make proposals in writing and was reminded that settlement of the amount owing must be made in cash or by way of agreed asset transfers.

[61] In an email dated 1 April 2019, the first defendant set out certain proposals and concluded by saying that the settling of the matter 'is of paramount importance to me'. He again requested a meeting to resolve the matter. The plaintiff was willing to meet to discuss settlement on a without prejudice basis. In an e-mail dated 2 April 2019 sent to the first defendant, Mr Hay said the following:

'Rob is prepared to meet with you tomorrow morning to discuss the proposals advanced by you on a without prejudice basis. However, a precondition to confirm such meeting is that you confirm your willingness to sign the Confessions to Judgment (in both your personal capacity and in your capacity as director of Rokwil Civils (Pty) Limited).'

The first defendant confirmed the content and conditions via email in response to Mr Hay.

[62] The first defendant was also informed by Mr Hay in another email on the same day that such confessions to judgment would be held by him and will only be lodged at court should the without prejudice negotiations fail.

[63] A meeting was held on 3 April 2019, which the first defendant attended together with the plaintiff, Mr Pitout, Mr Hay and Mr Capon. The first defendant signed a confession to judgment in his personal capacity as well as in in his representative capacity on behalf of Rokwil. He also deposed to two affidavits, verifying his signature, in his personal capacity and on behalf of Rokwil, at the offices of Grant & Swanepoel Attorneys. A resolution by the directors of Rokwil accompanied the confession to judgment on behalf of Rokwil.

[64] Between 3 April 2019 and February 2020, negotiations took place between the parties. The first defendant instructed his current attorney of record, Mr Mike Pedersen, to act on his behalf. In an email dated 21 February 2020, Mr Hay wrote to Mr Pedersen, as well as to the first defendant and Ms. Bartlett, with a suggestion that the original agreement be adjusted to provide that the date of payment be moved to 2 March 2020 and that the debt will be owed instead to the Crown Eagle Trust. This was apparently as a result of tax advice received by the plaintiff and also as a result of the fact that '*Rod has not discharged his obligation to pay the amount due in terms of the AOD*'.

[65] In an email dated 27 February 2020, Mr Pedersen informed Mr Hay that the first defendant could not agree to extend the payment date until 2 March 2020, as it 'may constitute reckless trading bearing in mind transactions and commits.' A suggestion was made that a reasonable extension would be to the end of October 2020. Attached to the letter was an addendum to the settlement agreement, already signed by the first defendant and Rokwil, in terms of which Stainton and Rokwil Civils would settle the outstanding balance owing to the plaintiff in terms of the agreement by no later than 31 October 2020. It was also indicated that in all other respects the agreements would remain the same.

[66] The plaintiff did not sign the addendum and the next day the application in terms of Uniform Rule 31(1)*(c)* was filed.

[67] As mentioned above the first defendant filed two affidavits and raised various defences to the plaintiff's claim. At the hearing of the matter, counsel for the defendants, Mr Broster SC, indicated that the defendants would only be pursuing the

defences addressed in his heads of argument namely, economic duress, non-compliance with section 112 of the Companies Act 71 of 2008 (the Companies Act) and non-compliance with section 40(1) of the National Credit Act 34 of 2005 (the NCA). These issues need to be considered in conjunction with the issues listed in the draft order accompanying the application filed by the defendants for a referral to oral evidence.

[68] Much was made by the plaintiff of the apparent contrast between what was contained in the first affidavit and the second supplementary affidavit. In the first affidavit, the first defendant sets out in more detail what occurred between the signature of the settlement agreement and the acknowledgment of debt on the one hand and the signing of the confession to judgment on the other hand and inter alia refers to on-going efforts to pay the amount due to the plaintiff.

[69] In the supplementary affidavit the tone changes somewhat and the first defendant alleges that the plaintiff became more and more insistent that he wanted money from Rokwil 'in a form which he and attorney Paul Hay defined as a "value share"'. He also alleged that the final construction and its description in the value share agreement were entirely the work of Mr Hay and the plaintiff and that Mr Hay 'is the draftsman of all the agreements annexed to these papers and many others'. The first defendant also alleges that he did not seek legal advice as he did not want to 'exacerbate an already deteriorating and volatile relationship' with the plaintiff, and that he signed the value share agreement without seeking legal advice and did not share its existence with anyone. The first defendant also alleges that the plaintiff hired a team of accountants who spent many months pouring over the financial affairs of Rokwil as well as his own, for the purpose of computing the net asset value of Rokwil as he did not have time to conduct the exercise. He also claims that he attended a meeting on 6 April 2019 where he signed the confessions to judgement as the plaintiff was in a position to apply for default judgement against him.

[70] Bearing in mind what is set out above, it is clear that there are various contradictions between what the first defendant alleges in his supplementary affidavit and what is stated by the plaintiff and more importantly, what is borne out by the volumes of documents attached to these application papers. The first defendant has

furthermore chosen not to attach any confirmatory affidavits by his legal manager, Ms Bennett, or his chief financial officer, Mr Humphries.

[71] I will now turn to the legal principles and the defences raised by the first defendant in his affidavit.

The setting aside of a confession to judgment

[72] In terms of Uniform Rule 30(1)*(b)* the confession to judgment should be signed by the defendant personally and the defendant's signature shall be witnessed by an attorney acting for the defendant or shall be verified by affidavit. The first defendant initially raised an issue regarding the validity of the confessions but his counsel, quite rightly, did not pursue the matter in argument before me. The confessions by the first defendant and Rokwil are clearly properly executed.

[73] It was held in *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co*.[1] that a defendant is not entitled to withdraw a confession but it can be avoided on the ground of a mistake. Such a case would be approached on the same lines and judged according to the same principles as cases where a party may resile from an agreement based on the ground of *justus error*.[2]

[74] A judgment can also be set aside in terms of the common law on the grounds of fraud, *justus error,* in certain exceptional circumstances where new documents are discovered, where judgments had been granted by default, and in the absence between the parties of a valid agreement to support the judgment, on the grounds of *iusta causa*. It may also be set aside in terms of Uniform Rule 42, if applicable.[3]

Economic duress

[75] As mentioned above, the defendants raise a defence of economic duress. The basis of their defence is that the value share agreement was induced by economic duress and consequently falls to be set aside and declared to be

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[1] *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co*. 1977 (1) SA 64 (N) at 68 to 69.
[2] AC Cilliers, C Loots and HC Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at ch27-702 – ch-27-703.
[3] DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Courts Practice* (2020 – Revision Service 15) at D1-363.

unenforceable. Counsel for the defendants quite rightly submitted that there was a lack of authority justifying the setting aside of a confession to judgment based on a defence of economic duress.

[76] In *Amler's* the author states as follows:[4]

'The party relying on duress must allege and prove

(a) a threat of considerable evil;

(b) that the fear was reasonable;

(c) that the threat was of an imminent or inevitable evil and induced fear;

(d) that the threat was unlawful or *contra bonos mores*;

(e) that the contract was concluded because of the duress.'

[77] *Christie's*[5] references the fact that English Law, in recent years, has come to recognise 'economic duress' and that '[it] would be beneficial to our law . . . to go beyond duress of goods and follow English law in recognising "economic duress"' as it could be 'equally unconscionable'.

[78] The defendants' counsel referred me to *Medscheme Holdings (Pty) Ltd and another v Bhamjee* where the following was held:[6]

'*English and American law* both recognise that economic pressure may, in appropriate cases, constitute duress that allows for the avoidance of a contract. As pointed out by Van den Heever AJ in *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 BK* 1999 (1) SA 780 (T), that principle has yet to be authoritatively accepted in our law. While there would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, such cases are likely to be rare. (The point is underlined by the dearth of English cases in which economic duress was found to have existed.) For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in *Van den Berg & Kie Rekenkundige Beamptes* at 795E - 796A) that hard bargaining is not the equivalent of duress, and that is so even where

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[4] LTC Harms *Amler's Precedents of Pleadings* 9 ed (2018) at 181.
[5] GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 354.
[6] *Medscheme Holdings (Pty) Ltd and another v Bhamjee* 2005 (5) SA 339 (SCA) para 18. See also *Experian South Africa (Pty) Ltd v Haynes and another* 2013 (1) SA 135 (GSJ) paras 32, 33 and 37.

the bargain is the product of an imbalance in bargaining power. Something more - which is absent in this case - would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress.' (my emphasis, footnote omitted)

Section 112 of the Companies Act

[79] The first defendant alleged in his supplementary affidavit that he had been unaware of the provisions of section 112 of the Companies Act, and that he had failed to obtain legal advice, prior to signing the value share agreement. He only became aware of section 112 of the Companies Act whilst the supplementary affidavit was being drafted. This was the only reference to section 112 of the Companies Act by the first defendant.

[80] The relevant provisions of the Companies Act read as follows:

'**112 Proposals to dispose of all or greater part of assets or undertaking.** — (1) …

(2) A company may not dispose of all or the greater part of its assets or undertaking unless—

(a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115; and

(b) . . .

(3) ….

(4) Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section,

must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be

determined in the prescribed manner.

(5) ….'

The definitions section sets out the following, which is relevant to section 112:

'**1. Definitions**. — In this Act, unless the context indicates otherwise—

"all or the greater part of the assets or undertaking", when used in respect of a company, means —

(a) in the case of the company's assets, more than 50% of its gross assets fairly valued, irrespective of its liabilities; or

(b) in the case of the company's undertaking, more than 50% of the value of its entire undertaking, fairly valued'.

[81] The plaintiff accepted that Rokwil's shareholders did not approve the conclusion of the value share agreement.

[82] Both counsel for the plaintiff, Mr Lotz SC, and for the defendants, Mr Broster SC, made extensive submissions in their supplementary heads of argument on the various issues to be considered regarding section 112 of the Companies Act. Particularly both counsel dealt with the meaning of the words 'dispose of' and 'disposal', the question being whether the value share agreement,properly interpreted, amounts to a disposal of more than 50% of Rokwil's gross assets, fairly valued, and accordingly falls within the ambit of section 112.

[83] The *Oxford English Dictionary*[7] defines 'dispose' as 'get rid of' and 'disposal' as 'the action or process of disposing. The sale of assets.'

[84] The *Cambridge Dictionary*[8] defines 'disposal' as 'the act or process of getting rid of something'.

[85] The Afrikaans text of section 112(2) of the Companies Act uses the words 'vervreem' and 'vervreemding'. Counsel for the plaintiff referred to *Crous N.O. v Utilitas Belville*,[9] the court said the following regarding the meaning of 'vervreem':

'"Vervreem" beteken volgens Bosman Tweetalige Woordeboek, "dispose of", wat weer volgens die Concise Oxford Dictionary "get rid of, sell" beteken.
Volgens *HAT* beteken dit "verkoop, in ander hande bring, oordra".
Sande *Treatise on Restraints* 1.3.16 *(Webber* se vertaling) definieer "alienation" byvoorbeeld as "any course of dealing by which *dominum* is transferred".
Met inagneming van bostaande uitsprakereg en woordeboek-definisies, sou dit na my mening korrek wees om te sê dat die algemeen-aanvaarde of gewone betekenis van "vervreem" ("alienate" op Engels) 'n vrywillige en "willekeurige" oordrag van eiendomsreg van 'n saak deur die eienaar daarvan na 'n nuwe eienaar impliseer.'

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[7] *Concise Oxford English Dictionary* 12 ed (2011).
[8] *Cambridge Dictionary* https://dictionary.cambridge.org/dictionary/english/disposal (accessed 21 July 2021).
[9] *Crous N.O. v Utilitas Belville* 1994 (3) SA 720 (C) at 725E–G.

[86] Both counsel referred me to S*tandard Bank of South Africa Limited v Hunkydory Investments 188 (Pty) Ltd and others (No 2)*[10] where the court dealt with section 112's predecessor in the 1973 Companies Act, namely section 228, which also used the words 'dispose' and 'disposal', and in particular the range of transactions encompassed by the phrase 'dispose of'. The question the court had to consider was whether the registration of a mortgage bond over a company's main asset constituted an act whereby the company 'disposes of' the whole or greater part of its assets.[11]

[87] Rodgers AJ, with reference to *Kinloch NO and another v Kinloch*,[12] further held that the ordinary meaning of 'dispose of' is 'to make over or part with by way of sale or bargain, sell', 'to transfer into new hands or to the control of someone else (as by selling or bargaining away)'.

[88] *Henochsberg*[13] refers to the meaning of 'dispose' and concludes that 'the only disposal to which it is intended to refer is one which would have the effect of permanently depriving the company of its right to ownership of the assets involved.'

[89] When it comes to the process of attributing meaning to words used in legislation it is important to ensure that a sensible meaning is given to a word or phrase instead of a meaning that could lead to 'insensible or unbusinesslike results or undermines the apparent purpose of the document'.[14]

Section 40(1) of the National Credit Act

[90] The heads of argument filed on behalf of the defendants raise for the first time that the plaintiff, at the time of conclusion of the acknowledgment of debt, was not registered as a credit provider in terms of section 40(1) of the NCA.

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[10] S*tandard Bank of South Africa Limited v Hunkydory Investments 188 (Pty) Ltd and others (No 2)* 2010 (1) SA 634 (WCC)
[11] S*tandard Bank v Hunkydory Investments (No 2)* para 11.
[12] *Kinloch NO and another v Kinloch* 1982 (1) SA 679 (A) at 697H – 698C, see S*tandard Bank v Hunkydory Investments (No 2)* para 12.
[13] P Delport *et al Henochsberg on the Companies Act 71 of 2008* (2021 – Service Edition 25) at 407.
[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) para 18.

[91] The definition of credit provider in section 1 of the NCA lists a number of descriptions but the only one applicable is found in sub-para *(h)* namely 'the party who advances money or credit to another under any other credit agreement'. Counsel on behalf the defendants also referred me to section 8 of the NCA which dealt with the different categories of credit agreements and submitted that section 8(4)*(f)* was relevant to the present matter. It reads as follows:

'(4) an agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is —

….

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of—

(i) the agreement; or

(ii) the amount that has been deferred.'

[92] On behalf of the defendants, it was submitted that the value share agreement, the settlement agreement and the acknowledgment of debt signed by the defendants, provided for the granting of credit by the plaintiff to the first defendant in the amount of R100 million. It was submitted that the reach of the NCA was very wide and covered the transactions under consideration, especially with regards to part *(a)* of the definition of credit in section 1, which reads as follows: 'a deferral of payment of money owed to a person, or a promise to defer such a payment.'

[93] Counsel for the defendants placed reliance on *Du Bruyn NO and others v Karsten*[15] where the following was held:

'The legislature has set thresholds that trigger the obligation to register where a single transaction is in excess of the prescribed amount. To conclude that this does not apply to once-off transactions, or to those who are not regular participants in the credit market, is, however attractive and sensible it may sound, not being true to the text and the context of the statute. As stated in *Potgieter*, to find otherwise would be to substitute what is justifiably seen as regulatory overreach with judicial overreach. Lamenting the dismal drafting of the NCA, the Constitutional Court suggested that we accept the words of the provision of the

[15] *Du Bruyn NO and others v Karsten* [2018] ZASCA 143; 2019 (1) SA 403 (SCA).

statute, acknowledge the drafting error and leave it to Parliament to correct.'[16] (footnotes omitted)

It was submitted that the value share agreement, the settlement agreement and the acknowledgment of debt exceeded the current threshold in terms of section 40(1) of the NCA (set at nil) by R100 million and are therefore null and void. The facts in De Bruyn however differ substantially from those in the present matter.

[94] Counsel for the plaintiff relied on *Hattingh v Hattingh*[17] where the court had to consider whether a settlement agreement was subject to the provisions of the NCA. The following was said:

'[25] Na my mening blyk die aard en substansie van die kontrak gesluit tussen die partye te wees 'n ooreenkoms wat die verhouding tussen die partye reguleer, voortspruitend uit die besluit van die partye om die besigheid en sake wat hulle vir 'die afgelope paar dekades' in samewerking met mekaar gedoen het, te beëindig op die basis soos uiteengesit in die kontrak. Hier is nie sprake van 'n kredietverskaffer-/verbruiker- verhouding soos waarmee die Nasionale Kredietwet duidelik mee handel nie. Wanneer dit en dus die bedoeling van die partye tot die kontrak in ag geneem word teen die agtergrond van die doelstellings van die Nasionale Kredietwet en die Nasionale Kredietwet ooreenkomstig sodanige doelstellings geïnterpreteer word soos vereis in art 2 van die Wet, meen ek dat dit nie die bedoeling van die wetgewer kon wees dat 'n kontrak soos die onderhawige geag moet word 'n kredietooreenkoms te wees nie. Hoewel eiser, op sigwaarde van die Nasionale Kredietwet, voldoen aan die definisie van 'n 'credit provider' soos vervat in art 1 daarvan, is ek van mening dat wanneer die doel van die Wet in ag geneem word, saamgelees met die totale konteks van die Wet, dit sekerlik nie die bedoeling kon wees dat die eiser in 'n geval soos die onderhawige geag moet word 'n kredietverskaffer te wees met die gepaardgaande verpligtinge soos bedoel in die Wet nie. Soos deur mnr De Bruin betoog, sal dit die absurditeit tot gevolg hê dat wanneer 'n getroude paar getroud in gemeenskap van goedere skei en 'n akte van dading sluit met betrekking tot die verdeling van die gemeenskaplike boedel, en die een eggenoot aan die ander uitstel verleen vir die betaling van wat hy voortspruitend daaruit skuld by wyse van paaiemente en onderworpe aan die betaling van rente en regskoste, geag sal moet word 'n kredietooreenkoms te wees in terme waarvan die eiser daarin as 'n kredietverskaffer sal moet registreer indien dit 'n sekere bedrag te bowe gaan.

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[16] *Du Bruyn v Karsten* para 27.
[17] *Hattingh v Hattingh* 2014 (3) SA 162 (FB).

[26] By 'n behoorlike uitleg van die Nasionale Kredietwet is ek oortuig dat die verhouding wat tussen die partye in die onderhawige geval by wyse van die kontrak gereël word, nie geag kan word 'n verhouding te wees wat deur die doelstellings van die Wet getref word nie.

. . .

[30] Gevolglik is ek van mening dat die kontrak wat in die onderhawige geval die skuldoorsaak daarstel, nie 'n kredietooreenkoms is soos bedoel in die Nasionale Kredietwet nie . . .'

The facts of this particular matter will be mentioned below and are very similar to the present matter.

[95] I was also referred to *Grainco (Pty) Limited v Broodryk NO en andere*[18] where the plaintiff inter alia relied on a written acknowledgment of debt which provided for the payment of a capital sum in instalments and subject to interest. The defendants averred that the acknowledgment of debt was a credit agreement as contemplated in s 8(4)*(f)* of the NCA. The court held that the acknowledgment of debt was not subject to the NCA as the underlying cause of the acknowledgment was not a money lending transaction, but a damages claim in respect of which the plaintiff agreed to defer payment of such damages by the defendants. The defence was dismissed.[19]

[96] I was lastly referred to *Ratlou v MAN Financial Services SA (Pty) Ltd*[20] where the court also dealt with a settlement agreement concluded between parties and where the defence was raised that the settlement agreement was subject to the provisions of the NCA. The court found that if the underlying *causa* did not fall within the parameters of the NCA, then its compromise in terms of the settlement agreement cannot result in the agreement being converted in one that does.[21] The following was said:[22]

'[21] A purposive interpretation and not a literal interpretation of s 8(4)*(f)* of the NCA is required because it is quite clear that the NCA was not aimed at settlement agreements. Its application to them will have a devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation.

. . .

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[18] *Grainco (Pty) Limited v Broodryk NO en andere* 2012 (4) SA 517 (FB).
[19] *Grainco v Broodryk* 2012 (4) SA 517 (FB) paras 7.2 – 7.4.
[20] *Ratlou v MAN Financial Services SA (Pty) Ltd* 2019 (5) SA 117 (SCA).
[21] *Ratlou v MAN Financial Services* para 19.
[22] *Ratlou v MAN Financial Services* paras 22 and 23.

[23] The purposes of the NCA are set out in s 3 of that Act. Section 2 thereof provides that the NCA must be interpreted in a manner that gives effect to such purposes. Under s 3 the purposes of the Act are 'to promote and advance the social and economic welfare of South Africans, to promote fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers'. Therefore the NCA is concerned with the advancement of money or granting of credit, in the main, to individual consumers.'

[97] *Ratlou* discussed *Hattingh*, and *Grainco*, supra:[23]

'[24] MAN's reliance on three cases, in which our courts have used the purposive approach in determining whether the NCA was applicable to settlement agreements, is well placed. In *Grainco (Pty) Ltd v Broodryk NO and Others* the court found that, although the settlement agreement referred to deferral of payment and interest, the agreement did not constitute a credit transaction because the underlying transaction was a damages claim in respect of which the plaintiff, by agreement, afforded the first, second and third defendants deferment of payment. It was held that the transaction did not fall within the business of moneylending and the furnishing of credit, in the ordinary sense of the word. The NCA was not intended to encompass an underlying causa of the postponement of payment of damages.

[25] In *Hattingh v Hattingh* a settlement agreement in which two brothers terminated their business relationship and provided for payment of R6,6 million in annual instalments of R734 000,00, together with interest on the capital, was found not to fall within the ambit of the NCA. The court found specifically that there had been no credit provider-consumer relationship. This and the parties' intention viewed against the background of the objects of the NCA showed that it could not have been the intention of the legislature that an agreement such as the impugned agreement should be regarded as a credit agreement. Although the one brother, prima facie, fell within the definition of a credit provider as intended in the NCA, it could not — given the purpose and the context of the NCA — have been the intention of the legislature that the brother would be regarded as a credit provider subject to the obligations imposed by the NCA.' (footnotes omitted)

[98] It is also important to take note of the provisions of section 4(1)*(a)*(i) of the NCA which state that the NCA does not apply to credit agreements of which the consumer is a juristic person, whose asset value or annual turnover at the time the agreement is made, exceeds R1 million. This would apply to Rokwil, in the event of it

[23] *Ratlou v MAN Financial Services* paras 24 and 25.

being found that the NCA applied to the agreements between the plaintiff and defendants.

Referral to oral evidence

[99] As mentioned above, the defendants filed an application for referral to oral evidence and it is perhaps appropriate to, at this stage, briefly deal with the relevant applicable principles.

[100] In terms of Uniform Rule 6(5)*(g)*:

'Where an application cannot properly be decided on affidavit the court may. . .direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact. . .'

[101] Counsel for the defendants referred me to *Manuel v Sahara Computers (Pty) Ltd and another*[24] where Weiner J held:

'This subrule does not only apply where there is a true dispute of fact on the papers. It also applies in circumstances where one party casts doubt on the relevant allegations of another. Although not contradicted by direct evidence, those averments are thus in dispute, and 'cannot properly be decided on affidavit' in terms of the subrule.' (footnotes omitted)

[102] It was submitted by the defendants' counsel that apart from the material disputes of fact there is also reason to doubt the allegations 'made by Le Sueur and Stainton', which ought to be referred for oral evidence.

[103] Counsel for the plaintiff referred me to *Minister of Land Affairs and Agriculture v D & F Wevell Trust*[25] where, as succinctly set out in *Erasmus*, the court made it clear that '[a] party will, however, not be allowed to lead oral evidence to make out a case which is not already made out in his affidavits'.[26]

[104] It was submitted on behalf of the plaintiff that the defendants have, under the guise of a substantive application for referral to oral evidence, attempted to amplify

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[24] *Manuel v Sahara Computers (Pty) Ltd and another* 2020 (2) SA 269 (GP) para 89.
[25] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) paras 57 – 58, at 205D – 206B.
[26] DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Courts Practice* (2020 – Revision Service 15) at D1-71 and the authorities referred therein.

their answering affidavit, introduce new issues and create disputes of fact – which they should have done in their answering affidavit, but did not do.

[105] In *D & F Wevell Trust*, supra, Cloete JA cautioned that

'a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent.'[27]

[106] In *Fakie NO v CCII Systems (Pty) Ltd*[28] the court said the following:

'More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.' (footnotes omitted)

[107] I will deal with the particular issues listed for referral by the defendants in the discussion below.

Discussion

[108] As far as defendants' defence of economic duress is concerned, it is quite clear that it was not specifically pleaded in the first defendant's affidavit nor in his supplementary affidavit. It is listed as one of the issues the first defendant now wants to be referred for the hearing of oral evidence.

[109] In his affidavit filed in support of the application for referral to oral evidence, the first defendant for the first time, under oath, addresses the issue of economic duress. He places great reliance on the email dated 28 July 2016, referred to above

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[27] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* para 57.
[28] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55.

in detail. He claims that it is an example of how the plaintiff controlled him and 'exercised' economic duress in their dealings, and that it was written at a time when plaintiff was pressing for the conclusion of the value share agreement on the one hand, and funds had to come from Nedbank to pay for work done at Keystone Park on the other hand. The first defendant stated the following:

'The duress consisted of this – if I did not agree to what he proposed at that time which, on the second page of the letter appears to be a 50/50 partnership in Rokwil because we were already equal partners in Keystone, he was not going to sign a drawdown from the bank facility with Nedbank in favour of Rokwil.'

[110] The first defendant also states that if the plaintiff had given effect to his 'threat' Rokwil would have been in liquidation. The first defendant later concedes that very little of what he stated regarding the email of 28 July 2016 'can be extracted from the letter itself because it is deliberately worded and written in elliptical fashion. Shorn of its verbiage it contained an extremely serious financial threat that could only be avoided by my capitulation.'

[111] Counsel for the defendants submitted that this type of threat is common in the building and construction industry and would amount to economic duress. It was also submitted that the plaintiff was wealthy and could simply walk away whereas the first defendant's livelihood depended on the success of Keystone Park and Rokwil.

[112] The first defendant however fails to explain, and perhaps lost sight of the fact that the value share agreement and all the negotiations surrounding it, only commenced during a meeting held on 29 August 2017 where after the first defendant's legal manager, Ms Bartlett produced the first draft of the value share agreement. If the plaintiff had in fact threatened the first defendant and subjected him to duress, one would have expected the value share agreement to have seen the light shortly after the perceived threat contained in the letter of 28 July 2016, not some thirteen months later. One would also not have expected the plaintiff, who is portrayed as being in control and demanding and making serious financial threats, to patiently negotiate the value share agreement over some two months and eleven drafts, and the settlement agreement over a further eleven months with the first defendant, his legal manager and chief financial officer.

There was also a hint in the papers that the first defendant was 'forced' to sign the confessions to judgement as the plaintiff was in a position to apply for default judgment. This is however clearly incorrect as at the time of the meeting, the dies had not yet expired. The settlement agreement in clause 4 also clearly makes provision for the signing of such confessions.

[113] The first defendant wants the conduct of the plaintiff in concluding the value share agreement, the acknowledgment of debt and requiring the signature of the confessions to judgment, which he alleges amounts to duress, to be referred for oral evidence. He also wants the proper interpretation of the letter of 28 July 2016, which contains the alleged threat, to be referred for oral evidence.

[114] The first defendant has cited no other examples of this alleged threat of economic duress other than what is contained in the letter of 28 July 2016. The defendants' counsel could point me to no other evidence of such duress and no other correspondence was referred to. The first defendant presented no evidence of the exact circumstances under which he signed the various agreements and consents to judgment which would lead one to conclude that he was subjected to duress. I would have expected at least affidavits from Ms Bartlett and Mr Humphries to confirm the various allegations made by the first defendant, but none were forthcoming.

[115] As mentioned above, the first defendant has not referred to the defence of economic duress in his two affidavits filed in the Uniform Rule 31(1)*(c)* application, and is now trying to make out a case in the application for referral to oral evidence. This is not permitted, as clearly stated in *D & F Wevell Trust***,** supra.

[116] Even if the first defendant had included the relevant allegations in his initial affidavits, it is my view, based on the affidavits, documents and correspondence, that he has not come close to making out a case for a defence of economic duress, especially seen against the particular facts as set out above. Whilst I agree that the threat of economic ruin should be recognised as duress in appropriate cases, this is not one of them. The plaintiff clearly drove a hard bargain and I agree with the authorities referred to above that it is not equivalent to duress.

[117] As mentioned above, the first defendant alleged in his supplementary affidavit that he had been unaware of the provisions of section 112 of the Companies Act and that he has not complied with its provisions before signing the value share agreement. He also alleged that he had failed to seek legal advice before signing the value share agreement. This is clearly incorrect as the correspondence annexed to the papers before me clearly points to the involvement of Ms Bartlett, the first defendant's legal manager, right from the outset.

[118] The question that needs to be answered is simple – is section 112 of the Companies Act applicable to the value share agreement?

[119] It is the plaintiff's case that the value share agreement and in particular the obligations agreed to by Rokwil in the value share agreement, do not constitute a disposal of all or the greater part of the assets of Rokwil as contemplated in section 112 of the Companies Act.

[120] The relevant clauses of the value share agreement were dealt with in detail above. Clause 9 in particular sets out the manner in which the value share, once calculated, would be settled. Clause 9.4 refers specifically to settlement by way of in specie asset transfers and adjustments, cash or partly in specie transfers and adjustments and partly in cash. No reference is made to Rokwil's assets or undertaking or that the value share will be settled by Rokwil. Importantly, it was agreed that in the event of the plaintiff and the first defendant failing to agree upon the asset transfers and adjustments to settle the value share, 'Stainton will make payment of the value share amount to Le Sueur in cash'. Clause 9.4.3.2 of the value share agreement also makes it clear that the first defendant would have a period of 120 days to pay the value share together with interest, in cash to the plaintiff.

[121] Counsel for the plaintiff, in his supplementary heads of argument, submitted that properly interpreted, the value share agreement does no more than to identify the value share created in Rokwil up to 31 October 2017, and provide for the manner in which the current value share was to be calculated or quantified, and to determine the manner in which the current value share would be settled. It was also submitted

that the value share agreement did not contain or specify any quantification, specification or any detail whatsoever of the amount to be paid by the defendants, jointly and severally to the plaintiff, nor did it contain any specification or detail of any of Rokwil's assets to be transferred to the plaintiff.

[122] Counsel for the defendants, in his supplementary heads of argument, concentrated on whether there has been a disposal of Rokwil's net assets and in particular the valuation of Rokwil's net asset value and the determination of the current value share. It was submitted in particular that the net effect of the value share agreement is that from 2012 onwards, the first defendant is obliged to disgorge 50% of the value share of Rokwil while remaining liable for all the liabilities of the company and the losses incurred by it. It is further submitted that the effect of the value share agreement should be characterised as a disposal of more than the greater part of Rokwil's undertaking and there ought to have been compliance with section 112 of the Companies Act.

[123] Bearing in mind the facts set out above, I am of the view, and agree with the plaintiff's submissions that what was agreed upon in the value share agreement does not amount to a disposal of all or the greater part of Rokwil's assets, especially with reference to what was stated in *Henochsberg*, supra, and the other authorities referred to above. I can find nothing in the relevant clauses which could be interpreted as having the effect of a disposal as envisaged by section 112 of the Companies Act. To do so would lead to an insensible or unbusinesslike result, as warned against in *Natal Joint Municipal Pension Fund*, supra.

[124] As far as the submissions regarding the calculation of Rokwil's net asset value is concerned, it was submitted on behalf of the defendants, with reference to section 112(4) of the Companies Act, that the audited financial statements compiled by its auditors, Victor Fernandes and Company, should stand. It was also submitted that the figures were comparatively low in comparison to the figures produced by Mr Pitout, and that the court was faced with a huge disparity which would necessitate evidence from auditors and valuers to assess the fair value of Rokwil's assets at the date of the value share agreement.

[125] In my view it is clear that the defendants have perhaps lost sight of the fact that although Rokwil's auditors valued its net asset value at around R10 million, the first defendant himself, calculated the current value share at around R69 million, which he adjusted to R84 million shortly thereafter. There is however clearly a difference between what is meant by net asset value and current value share. The value share is the value that has accrued over a period of time , not the value of Rokwil at any given time. The first defendant's chief financial officer, Mr Humphries, calculated that the amount of Rokwil's profit to be R220 million, but later accepted Mr Pitout's figure of R281 million. The first defendant also accepted that he withdrew cash of around R63 million from Rokwil to fund his lifestyle. It is clear that the audited financial statements done by Rokwil's auditors cannot be relied upon when it comes to calculating the value share and vice versa, the value share calculations cannot be used to determine Rokwil's net asset value. It is like comparing apples with oranges.

[126] It was submitted by plaintiff's counsel that there is no indication in the value share agreement as to which portion of the value share would eventually be paid by Rokwil. I agree with this submission.

[127] I could furthermore find no indication in any of the affidavits by the first defendant that it was ever his intention or his case that he was going to dispose of Rokwil's assets in order to settle the indebtedness to the plaintiff. In an email dated 1 April 2019, he wrote that he was happy to use his share in Desert Star as part settlement, as well as a share he has in a plane, valued at R4 million. He also stated the following in his first affidavit:

'… I have taken considerable steps towards reaching a final agreement with him on how to discharge the judgment by acquiring control of Keystone Park CC in order to enable me to divide up or realise the many undeveloped sites within the development at an equitable valuation or price.'

It appears that the first defendant was intending to use the assets of Keystone Park CC to settle the debt and not the assets of Rokwil.

[128] I am therefore of the view that there is no merit in the submission on behalf of the defendants that it is 'overwhelmingly clear' that the disposal was more than the greater part of Rokwil's assets. There clearly was no disposal to start with. I was

urged in the alternative to refer the disparity between the audited financial statements and the value share determined by Mr Pitout for oral evidence as the amount of R286 million was 'ridiculously high'. In light of what I have already found above, I see no purpose in such an exercise.

[129] I now turn to the defendants' contention that the plaintiff should have been registered as a credit provider in terms of the NCA, as the value share agreement, the settlement agreement and the acknowledgment of debt provide credit to the defendants in the amount of R100 million.

[130] The defendants' counsel referred me to the definition of a credit provider and in particular to s 1*(h)* of the NCA which refers to the party who advances money or credit to another under any credit agreement. It was submitted that the emphasis falls on the words 'other credit agreement' which would bring it within the definition of 'credit provider', in terms of which credit is given to another under any credit agreement. It was also submitted that the value share agreement, the settlement agreement as well as the acknowledgment of debt provide for the granting of credit to the first defendant by the plaintiff. It was also argued that the purpose of the NCA was to ensure that all forms of agreement which involve the advancing of credit which is defined in s 1 as: 'a deferral of payment of money owed to a person or a promise to defer such payment', fall within the ambit of the NCA.

[131] I do not agree with the submission that when it comes to considering the definition of a credit provider referred to above, the emphasis should fall on the words 'other credit agreement'. The purpose of the definition is to describe the credit provider, not the credit agreement, and therefore the emphasis should be on 'the party *who advances money or credit*' (emphasis added). I can find no indication in the value share agreement that the plaintiff at any stage advances money or credit to the defendants. The defendants' counsel has not referred me to a single clause which would support such a contention.

[132] The defendants' counsel also submitted that *De Bruyn N.O.*, supra, was authority for his submission that, provided the extension of credit exceeds the statutory threshold, registration as a credit provider is required even if it is a once off

transaction by a person whose business in no other way qualifies as that of credit provision. It was also submitted that the value share agreement, the settlement agreement and the acknowledgment of debt exceeded the statutory threshold of nil by R100 million. The problem however remains that there is no indication in the value share agreement that money or credit was being advanced. It was merely an agreement which acknowledges and identifies the value share in Rokwil and how such value share should ultimately be settled, once calculated.

[133] As far as the settlement agreement and the acknowledgment of debt is concerned, I fully align myself with the views expressed in *Ratlou*, *Hattingh* and *Grainco*, supra. I agree with the submissions made by plaintiff's counsel with reference to *Ratlou*, supra, that it was not the intention of the legislator that the NCA would be applicable to all settlement agreements whose terms accord with the definition of credit transactions. I was referred to the following in *Ratlou*, where the court held:

'. . .the effect of the sudden unintended conversion of a non-consumer/non-credit provider relationship into one governed by the NCA, and the chilling effect that that would have on the settlement of disputes, would still hold considerable weight. As was submitted on behalf of MAN, parties who were never credit providers, such as a once-off lessor, would suddenly find themselves unable to enforce the terms of their settlement agreement, for want of registration or due assessment or a lessee for creditworthiness.'[29]

[134] In my view it is clear that neither the value share agreement, the settlement agreement nor the acknowledgment of debt is subject to the NCA and the plaintiff was therefore not required to register as a credit provider.

[135] It was also submitted by plaintiff's counsel that even if the provisions of the NCA were applicable, it would not assist Rokwil, as it is a juristic person, whose asset value or annual turnover is in excess of R1 million, as set out in section 4(1)*(a)*(i) of the NCA. On the defendants' own version, the asset value of Rokwil clearly exceeds R1 million. It is however not necessary to consider this issue in light of what I have already found.

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[29] *Ratlou v MAN Financial Services SA (Pty) Ltd* 2019 (5) SA 117 (SCA) para 27.

[136] The issue of whether the plaintiff was at all material times a registered credit provider was listed amongst those the defendants wanted to refer for oral evidence. Why they wanted to do so is a mystery as it would have taken a simple question directed at Mr Hay to establish whether the plaintiff was so registered or not. It unfortunately creates the impression of a litigant intent on delay as this clearly never was a material dispute of fact or an issue where doubt was cast on a particular allegation of the plaintiff.

[137] As far as the application for referral to oral evidence is concerned, I have already touched on some of the issues listed by the defendants in their draft order, in particular the issues listed in paras (iii), (iv) and (v). Despite what I have already found above, it is perhaps necessary to briefly deal with the outstanding issues.

[138] The first issue, whether the first defendant disclosed to the plaintiff that Rokwil was doing the civil engineering work on the Mr Price site or mislead him into believing that the work was being done by an independent contractor, raises a few questions. There is clearly a dispute as the first defendant alleges that the plaintiff knew all along about Rokwil's activities. The plaintiff, in his answering affidavit in the referral application stated that on first defendant's own version, he knew that the plaintiff was lying when he confronted him during June 2016 and that the first defendant therefore could not have been induced by any misrepresentation to conclude the value share agreement. It was also stated that the issue of whether the plaintiff knew about Rokwil's involvement is irrelevant to determine the defendants' liability in terms of the confessions to judgment.

[139] There is furthermore not a single email or letter in these papers, written by the first defendant to the plaintiff subsequent to the confrontation in June 2016 wherein the first defendant protests against the plaintiff's accusations that Rokwil was performing work without his knowledge. The probabilities suggest that the first defendant knew that Rokwil's activities had now been exposed and that he would have to make good to the plaintiff. I am of the view that this issue is in any event irrelevant and does not justify a referral to oral evidence. It has no bearing on the liability of the defendants.

[140] The second issue listed for referral is who drafted the value share agreement and whether Mr Hay introduced changes into the draft agreement after 26 September designed to harm the defendants. I mentioned above that the first defendant initially alleged that Mr Hay drafted all the agreements and that he had no legal representation. Just from the correspondence annexed to the papers it is clear that the first defendant lied. He was at all times assisted by Ms Bartlett, who was the author of the first draft agreement. Mr Hay consistently drew the first defendant's attention to changes proposed by the plaintiff. The first defendant was at all times given an opportunity to either accept or reject any proposed changes and also made counterproposals which were often accepted by the plaintiff. Eleven drafts were exchanged before all the parties were satisfied, whereafter the first defendant signed the agreement. I might just mention that the first defendant made some unsavoury comments about Mr Hay, which were uncalled for and for which there was no justification, as is clearly evident from the papers before me.

[141] The caveat subscriptor rule has been found to be 'a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.'[30] It is clear that no purpose would be served in referring this issue for oral evidence. The first defendant clearly knew at all times what he was signing and there is no evidence that he was ever misled.

[142] In my view the defendants' application in terms of Uniform Rule 6(5)*(g)* is without merit and taken together with the totality of the evidence in the papers before me, would amount to an abuse of process.

[143] As far as the application in terms of Uniform Rule 31(1)*(c)* is concerned, the defendants have in my view failed to make out a case for the setting aside of the consents to judgment signed on 3 April 2019.

[144] I make the following order:

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[30] See *Burger v Central South African Railways* 1903 TS 571 at 578, quoted with approval in *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (AD) at 472B-F and see also the discussion in GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 205-210.

1. The defendants' application in terms of Uniform Rule 6(5)*(g)* for the referral of certain issues for the hearing of oral evidence is dismissed with costs.

2. Judgment is granted in favour of the plaintiff against first and second defendants jointly and severally, the one paying the other to be absolved, in accordance with the confessions to judgment dated 3 April 2019, as follows:

2.1 Payment of the amount of R103 128 603.15.

2.2 Payment of interest on the amount of R103 128 603.15 at the rate of 10.25% per annum from 29 February 2020 to date of final payment, both days inclusive.

2.3 Payment of the plaintiff's costs of suits on the scale as between attorney and own client.

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BEZUIDENHOUT AJ

APPEARANCES

Date of hearing : 16 April 2021

Date of judgment : 28 July 2021

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