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

(Coram: Holderness J)

Case Number: 19818/23

In the matter between:

LEON DAWID LöTTER	First Applicant
LEORAH TRADING (PTY) LTD	Second Applicant
and	
LONA FRUIT CAPE (PTY) LTD	First Respondent
ZALO BELEGGINGS (PTY) LTD	Second Respondent

Date of hearing: 27 January 2025
Date of judgment: 12 May 2025

JUDGMENT

HOLDERNESS J

Introduction

[1] The applicants seek an order against the respondents for payment of R10 million in terms of an alleged share buyback agreement (the primary relief), *alternatively* and in the event that the Court finds that there is no share buyback agreement, an order for specific performance of a sale of shares agreement concluded in 2014, in terms of which the second respondent, Zalo Beleggings (Pty) Ltd (Zalo) is directed to issue 1 285 of its shares to the second applicant, Leorah Trading (Pty) Ltd (Leorah Trading) (the 2014 agreement).

[2] The respondents raised a number of defences to the primary and alternative relief sought by the applicants. Regarding the primary relief, they contend that there is a factual dispute regarding the existence of the alleged share buyback agreement (the 2023 share buyback) and that the applicants have *inter alia* failed to prove the *essentialia* of such agreement, and that such agreement in any event falls foul of several mandatory provisions in the Companies Act 71 of 2008 (the 2008 Companies Act).

[3] With regard to the claim for specific performance in terms of the 2014 agreement (the alternative relief claimed by the applicants), the respondents contend that as the first applicant, Mr. Leon Dawid Lötter (Mr. Lötter) was an unrehabilitated insolvent at the time of the conclusion of such agreement, and thereby purported to dispose of property in his estate, such agreement is voidable and, in any event, any claims in terms thereof have since prescribed.

Relevant factual background

[4] On 26 September 2014, Mr DC Lötter, the father of Mr Lötter (Mr DC Lötter), Mr Lötter, Riverside Holdings (Riverside)[1], the first respondent, Lona Fruit Cape (Pty) Ltd (Lona Fruit) and Zalo entered into the 2014 agreement, the salient terms of which are the following:

[1] Riverside is now known as 'Lona Agri'.

4.1 Riverside purchased 712 shares in Zalo from Mr DC Lötter for the purchase price of R1 422 373.

4.2 The effective date of the agreement was the date on which payment of the purchase price was due to be made, which was no later than two business days after the date of signature, that is 28 September 2014.

4.3 Zalo would issue 1 285 authorised new shares (30% of the shares that were yet to have been issued in Zalo) to Mr Lötter or his nominated entity on the date that Mr Lötter was rehabilitated, or two years from the effective date, whichever occurred first.

4.4 Mr Lötter would pay R1 per share to Zalo for each share issued to him.

4.5 The issue of 1 285 shares in Zalo could not take place until Zalo had passed the necessary resolutions to amend its then current or future MOI to authorise the issue of 10 000 non-par value shares as a separate class of shares that were to rank *pari-passu* in all respects with the rights attached to the existing ordinary shares of Zalo as a special class.

4.6 Mr Lötter would be issued with 1 000 par value shares and 285 non-par value shares.

4.7 The required resolutions would be passed within 120 days from the effective date.

[5] Mr Lötter was an unrehabilitated insolvent at the time of conclusion of the 2014 agreement,

[6] Lona Agri (formerly Riverside) purchased Mr DC Lötter's shares as per the sale of shares agreement. It is common cause that no shares in Zalo were transferred to Mr Lötter or his nominee as required by the 2014 agreement. This is the alternative relief sought in the notice of motion.

[7] Lona Fruit formerly held 2 228 shares in Zalo. These shares were transferred to Riverside. The effect of this is that Lona Agri is now the sole shareholder in Zalo, and Lona Fruit is no longer a shareholder in Zalo.[2]

[8] On 20 January 2017, Mr Rikus Groenewald (Mr Groenewald), a director of Zalo, sent an email to Mr Lötter, to canvas certain aspects of the 2014 agreement with him.

[9] It appears that Mr Lötter did not take any steps to enforce the 2014 agreement until 30 October 2017, when his attorneys directed a letter to Zalo demanding that it issue 30% of its shares to the LSS Lötter Familie Trust (the Trust), as his nominee.

[10] On 1 November 2017 Zalo indicated that it was prepared to issue the shares to Mr Lötter as requested, subject to confirmation that any legal action brought against him and Lona Citrus (Pty) Ltd in connection with his sequestration had been finalised, and that there was no possibility that any issue of shares could impact the legal proceedings.

[11] On the same date, Zalo presented a settlement offer to Mr Lötter in terms of which Riverside, as Zalo's holding company, offered to pay R4 million to Mr Lötter or his nominee in lieu of issuing the shares. This offer was rejected on 22 November 2017.

[12] It appears that nothing further transpired until 18 February 2020, when Mr Johnson, a director of Zalo, sent an email to Mr Lötter, stating that based, *inter alia*, on a third-party valuation of Zalo, the shareholding of Zalo had been valued at R8 million and that consequently 30% of the shareholding in Zalo (the shareholding or the shares) was valued at R2.453 million.

[13] Zalo indicated that if it issued the shareholding to Mr Lötter, it was likely to attract a tax liability. It proposed instead purchasing Mr Lötter's right to acquire the

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[2] The applicants incorrectly contend in the replying affidavit that Lona Fruit is the sole shareholder of Zalo.

shares for R6.75 million, in instalments of R2.25 million per year for three years. Mr Lötter rejected this offer and repeated his demand that the shares be transferred to him.

[14] Almost a year later, on 26 February 2021, Zalo increased its offer for the purchase of the shareholding to R10 million, of which R4 million would be paid at the end of 2021, and three payments of R2 million each would be made at the end of 2022, 2023 and 2024 respectively.

[15] It is clear from subsequent correspondence exchanged between the parties that this offer too was not accepted by Mr Lötter.

[16] It appears that nothing further transpired with regard to the transfer or buyback of the shareholding until February 2023, when further negotiations commenced between Zalo and Mr Lötter regarding a proposed share buyback agreement.

[17] On 6 February 2023 Mr Johnson sent an email to Mr Lötter in which he set out proposed payment amounts and dates for the proposed share buyback.

[18] On 13 February 2023 a series of emails were exchanged between Mr Anton Meinesz (Mr Meinesz), a financial director of the Lona Group of companies, and Mr Peter Wiese (Mr Wiese) of Moore Cape Town regarding Mr Johnson's payment proposals and different options by means of which the 2023 share buyback transaction could be structured.

[19] On 14 February 2023 Mr Meinesz sent an email to Mr Johnson dealing with the tax implications of the proposed share buyback transaction. He proposed that Zalo issue a 30% shareholding to Mr Lötter or his nominee (presumably a trust) and that a separate agreement be concluded for the repurchase of those shares with a clearly defined payment period. This email was forwarded to Mr Lötter, enquiring whether the written agreements that would need to be prepared to give effect to the proposed transaction could be prepared on that basis, as no draft agreements had been prepared at that stage.

[20] On 15 February 2023 Mr Lötter indicated that he would accept payment in the sum of R10 million, in tranches, as proposed in Mr Johnson's email of 6 February 2023, on condition that the shareholding be transferred up front.

[21] On 22 February 2023, the applicants' attorney confirmed in an email to Lona Agri that Mr Lötter was willing to accept the proposals made by Messrs. Wiese and Meinesz in the email exchange of 14 February 2023. He requested that Lona Agri *'prepare the necessary agreements, which we assume will constitute a Subscription Agreement for the issue of 30% shares to our client's nominated entity, together with the relevant Share Buy Cack (sic) Agreement/s for each of the share buy backs to be undertaken by the Company.*'

[22] Mr Lötter's attorney indicated that he would assist Mr Lötter with the registration of a new private company and would provide Lona Agri (previously Riverside) with the details of the new company *"upon receipt of the amended agreements".* He further proposed a different payment structure to the one proposed in Mr Johnson's email of 6 February 2023, and asked Lona Agri to advise when they could expect to receive the first drafts of the *'amended agreements'* and requested that same be provided without unreasonable delay.

[23] On 8 March 2023 Mr Johnson sent an email to Mr Lötter's attorneys in which he stated that payment could only take place in accordance with the proposal sent on 6 February 2023, with the first payment of R2 million in December 2023, but that the remaining payment dates could be moved forward to mid-December in respect of the remaining tranches. He advised that if Mr Lötter agreed with this proposal, they would then move to obtain the required internal authorities and thereafter prepare the draft agreements.

[24] On 13 March 2023, the applicants' attorneys, sent a further email addressed to Lona Agri in which the applicants' attorneys stated:

> 24.1 '*As per clause 3 of our letter dated the 21st of February 2023, please proceed to prepare the necessary Agreements and move to get the necessary*

internal authorisations on your end in order for the parties to finalise the Agreements."

24.2 *We look forward to receiving the proposed draft Agreements from your end in due course and would appreciate confirmation of timelines of when we can expect same in order for the parties to finalise the matter without any undue delay.*' [3]

[25] On 23 May 2023, Mr Paul Searson, legal advisor and the company secretary for the Lona Group of companies (Mr Searson), sent an email to Mr Lötter and his attorneys, to which he attached a draft cession agreement for their review and comment. Mr Searson explained that it was now proposed the shares in Zalo be repurchased in tranches to draw out the dates on which tax would become payable in respect of each of the tranches.

[26] No response was received from Mr Lötter until 16 August 2023, when his attorneys sent an email addressed to the Board of Directors of Lona Agri and the Board of Directors of Zalo (the email was not addressed to Lona Fruit – the first respondent) stating that:

26.1 Mr Lötter had instructed them that Lona Agri and Zalo were in breach of an '*express written agreement … reached between the parties.*'\

26.2 The alleged '*express written agreement*' arose from '*several email correspondence (sic) exchanged between the parties.*'

26.3 On 22 February 2023 they had addressed a letter to *"Lona"* for and on behalf of Mr Lötter and that the letter of 22 February 2023 constituted, *'… sufficient documentary proof of [Mr Lötter's] express written acceptance of the final proposed terms of the Agreement reached by between (sic) the parties …'*

[3] Underlining added.

26.4 What they contended the *"essential and express written terms"* of the alleged agreement supposedly reached between the parties as contained in their letter of 22 February 2023 were.

26.5 Mr Searsommn's email of 23 May 2023 (to which he had attached the draft cession agreement) constituted a *'repudiation"* of *'the Agreement reached by and between the Parties.'*

[27] Mr Lötter's attorney failed to identify the parties to the alleged agreement. Mr Lötter was referred to as a party to the alleged agreement, and the only other contracting party to whom reference is made in the letter is *'Lona.'* The Lona Group is a group of fifty companies. Moreover, the applicants' attorneys also referred to a single agreement, whereas it had been clear to Mr Lötter, his attorneys and Mr Johnson, as evidenced by the correspondence, that a number of written agreements would need to be concluded to give effect to the proposed share buyback transaction.

[28] On 7 September 2023, Mr Searson addressed a response to Mr Lötter's attorneys, in which he expressly denied that the selection of email correspondence referred to in the letter of 16 August 2023 constituted an express written agreement between the parties and consequently denied that there had been any breach or repudiation of the alleged agreement.

[29] Mr Searson reiterated that it was still the intention of Zalo and Lona Agri that the proposed share buyback transaction be implemented on the terms set out in the draft cession agreement sent on 23 May 2023. He further requested that Mr Lötter clarify whether he wished to have the shares issued and then repurchased by Zalo, or whether he just wished to have the shares issued and stated that to avoid any misunderstandings any agreement reached would need to be formally captured in a signed agreement.

The striking out application

[30] Before turning to the merits of the primary and alternative relief sought by the applicants, I propose to deal briefly with the striking out application brought by the respondents at the commencement of the hearing, and the reasons given for the order striking out Annexure 'RA' to the applicants' replying affidavit, and the paragraphs in the reply in which reference to annexure 'RA' is made.

[31] The applicants, placing reliance on an email from Mr Johnson dated 13 November 2023 (RA), contended that the respondents admitted and consented to the relief sought in this application based on common cause facts. The email includes the following:

> 'I have spoken with our Zalo team and there is no need for Zalo to defend the matter as they have no issues with proceeding on the basis put forward in the application.'
> This would be the share allotment and issue to Leorah Trading, followed by the buyback over 3 years as stated.
> …….
> We are happy that you draft an agreement to record the above and the shares can be allotted and issued asap and the matter withdrawn.'

[31] After hearing argument on the striking out application I granted the application and struck out the offending paragraphs and annexures.

[32] The basis for the striking out was that the proposed agreement referred to in RA is markedly different to the relief sought in the notice of motion, and does not accord with what the applicants contend are the terms of the alleged share buyback agreement.

[33] Firstly, Lona Fruit is no longer a shareholder in Zalo. Lona Agri holds 712 shares in Zalo, which were previously held by Mr DC Lötter. The proposal in November 2023 email is that 30% of those 712 shares, being 305 shares, would be issued to Leorah Trading; and that Zalo would reacquire the 305 shares as follows:

> 33.1 61 shares on 15 December 2023 for an amount of R2 million.

33.2 92 shares on 15 December 2024 for an amount of R3 million.

33.3. 152 shares on 15 December 2025 for an amount of R5 million.

[34] The applicants therefore cannot rely on RA as a basis for the relief sought in the notice of motion. Insofar as the applicants seek to rely thereon as a basis for the primary relief sought, the proposal set forth in RA constitutes an entirely new cause of action. This is impermissible in reply.[4]

[35] As contended by Ms Adhikari, who appeared on behalf of the respondents, whilst it is not an absolute rule that new matter may not be introduced in reply, and an applicant may be permitted to do so in exceptional circumstances, an applicant is not permitted to introduce a new cause of action in its replying affidavit. The introduction of a new cause of action in reply is not the same as introducing new matter – it is impermissible for an applicant to seek to base its claim on a different agreement to that relied on in its founding affidavit.[5]

[35] On this basis alone RA and the references thereto in the replying affidavit fell to be struck out.

[36] Moreover RA conveyed a 'without prejudice' settlement proposal. The content of the email is accordingly privileged and inadmissible. It is well settled that the only question in a striking-out application is whether the evidence is admissible.[6]

[37] It is trite that correspondence conducted in a *bona fide* effort to settle a claim is, once a party objects to its being adduced in evidence, wholly inadmissible. There is no evidence to suggest that the respondents have waived the settlement privilege. Accordingly, the November 2023 email and the offending paragraphs referring thereto were struck out.

Issues for determination

[38] The issues which fall to be determined are the following:

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[4] *National Council of the Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paras [29]-[30].

[5] *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T) at 91C-E.

[6] *Helen Suzman Foundation v President RSA* 2015 (2) SA 1 (CC) at para [127].

38.1 In respect of the primary relief, have the applicants proven the conclusion and alleged terms of the 2023 share buyback agreement, particularly in light of the factual disputes raised by the respondents regarding both the conclusion and their alleged breach of such agreement?

38.2 If there was such a binding 2023 agreement, is the relief sought in terms thereof contrary to the relevant provisions of the 2008 Companies Act?

38.3 In the event that the claim for the primary relief fails, is Mr Lötter entitled to claim specific performance in terms of the 2014 agreement, and if so, has such claim prescribed?

Did Mr Lötter have the requisite contractual capacity to enter into the agreement?

[39] Section 23(2) of the Insolvency Act 24 0f 1936 (the Insolvency Act) is as follows:

> **'23. Rights and obligations of insolvent during sequestration**
> (1) Subject to the provisions of this section and of section 24, all property acquired by an insolvent shall belong to his estate.
> (2) The fact that a person entering into any contract is an insolvent, shall not affect the validity of that contract: Provided that the insolvent does not thereby purport to dispose of any property of his insolvent estate; and provided further that an insolvent shall not, without the consent in writing of the trustee of his estate, enter into any contract whereby his estate or any contribution towards his estate which he is obliged to make, is or is likely to be adversely affected, but in either case subject to the provisions of subsection (1) of section 24.

[40] An insolvent accordingly has no authority to dispose of any property of the insolvent estate and a contract whereby the insolvent purports to do so cannot be enforced against either the trustee or against the insolvent.[7]

[41] As observed by the Supreme Court of Appeal in *MacKay v Fey and Another,* although not expressly stated in the section, it is well established that a contract entered into by an insolvent falling under either the first or second proviso to s 23(2) is voidable only and not void.[8]

[43] Section 24(1) of the Insolvency Act provides that if an insolvent purports to alienate, for valuable consideration, without the consent of the trustee of his estate any property which he acquired after the sequestration of his estate (and which by virtue of such acquisition became part of his sequestrated estate) or any right to any such property to a person who proves that he was not aware and had no reason to suspect that the estate of the insolvent was under sequestration the alienation shall nevertheless be valid.

[44] The applicants assert that the buyback provision in the sale of shares agreement was a valid *stipulatio alteri* to the benefit of Mr Lötter.

[45] In *Crookes NO & another v Watson & others*[9] Schreiner JA stated: '[I]n the legal sense, which alone is here relevant, what is not very appropriately styled a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two..' [10]

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[7] *MacKay v Fey and Another* (463/2004) [2005] ZASCA 83; [2005] 4 All SA 615 (SCA); 2006 (3) SA 182 (SCA) (22 September 2005) at para 7 (*MacKay)*.

[8] See *MacKay* at para 10 and *W L Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) 728 (T) at 731A-732C; *Ex Parte Olivier* 1948 (2) 545 (C) at 548-549; *Fairlie v Raubenheimer* 1935 AD 135. In the event of such a contract being avoided the appropriate remedy is *restitutio in integrum*.

[9] 1956 (1) SA 277 (A).

[10] At 291B-F. Although contained in a minority judgment, the passage quoted is not inconsistent with the majority judgment; it has been generally accepted as a correct statement of the law; and it has twice been approved by the Supreme Court of Appeal, in the *Joel Melamed & Hurwitz Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed & Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 172D-F and *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 625E-F.

[46] Contrary to the impression sought to be created in the founding affidavit, Mr Lötter (and not just Mr DC Mr Lötter) was a party to the sale of shares agreement. This is evident from the agreement itself, and from the fact that he signed the sale of shares agreement in his capacity as such.

[47] It is not in dispute that Mr Lötter was an unrehabilitated insolvent at the time that he entered into the sale of shares agreement. Section 24 of the Insolvency Act therefore comes into play.

[48] As Mr Lötter was a party to the agreement, the contention by the applicants that the buyback provision was a *stipulation alteri* in his favour (as a third party) is unsustainable.

[49] An insolvent has no authority to dispose of any property of the insolvent estate and a contract whereby the insolvent purports to do so cannot be enforced against either the trustee or against the insolvent.[11]

[50] In terms of relevant provisions of the sale of shares agreement, Mr Lötter was obliged to pay R1 per share to Zalo for each share issued to him. It was clearly contemplated that by making payment for the shares to be issued to him, Mr Lötter would dispose of property of his insolvent estate, in the form of the payment of monies for the purchase of the shares.

[51] It is common cause that Mr Lötter at no point sought or obtained the consent of his erstwhile trustee to the sale of shares agreement.

[52] On this basis alone it is clear that the sale of shares agreement is not capable of being enforced by Mr Lötter, and the relief sought in respect of specific performance of that agreement falls to be dismissed.

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[11] *Mackay v Fey NO and Another* 2006 (3) SA 182 (SCA) at 188A-C.

[53] In view of the finding below, namely Mr Lötter's claim for specific performance in terms of the 2014 agreement has prescribed, it is not necessary to determine whether his estate was adversely affected thereby.

Have the applicants' claims under the Sale of Shares Agreement prescribed?

[50] In terms of s 14 of the Prescription Act, 68 of 1969 (the Prescription Act), prescription is interrupted by an express or tacit acknowledgment of liability of the debtor.

[51] Placing reliance on s 14 of the Prescription Act, the applicants assert that their claims have not prescribed due to the numerous alleged admissions of the respondents' liability to issue and buyback the shares.

[52] The applicants contend that the most recent such admission was in the November 2023 email, which has been struck from the record and therefore cannot be relied upon.

[53] The effective date of the sale of shares agreement was 28 September 2014. In terms of clause 2.5.5 of the sale of shares agreement, Zalo was required to issue 1 285 authorised new shares to Mr Lötter or his nominated entity on the date that Mr Lötter was rehabilitated or two years from the effective date (that is 28 September 2016), <u>whichever occurred first</u>.[12]

[54] As the effective date preceded Mr Lötter's rehabilitation in 2021, Zalo's obligation to issue the shares to him in terms of the sale of shares agreement arose on 28 September 2016.

[55] As a further consequence, Mr Lötter's entitlement to demand performance in terms of the sale of shares agreement arose on 28 September 2016, and prescribed three years thereafter, being 28 September 2019.

[12]Underlining added.

Have the applicants' claims under the Sale of Shares Agreement prescribed?

[56] The contention advanced by the applicants in the replying affidavit, namely that the *'allotment and issuing of shares'* does not fall within the definition of a debt as contemplated by the Prescription Act, is unsustainable as a matter of law.

[57] Section 16(1) of the Prescription Act prescribes that its provisions apply to *'any debt arising after the commencement of this Act*'. The preliminary enquiry must accordingly be whether what is being claimed in these proceedings is in fact a debt.

[58] Whilst the term *'debt'* is not defined in the Prescription Act, the Constitutional Court has now settled the question for once and for all.

[59] In *Food and Allied Workers Union obo v Pieman's Pantry (Pty) Limited*[13] the apex court supported that court's approach taken in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* (*Escom),*[14] that the word 'debt' should be given the meaning ascribed to it in the Shorter Oxford Dictionary, namely:

> '1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
>
> 2. A liability or obligation to pay or render something; the condition of being so obligated'. [15]

[60] Put differently, a debt for purposes of the Prescription Act means either an obligation to pay or render something.[16]

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[13] (CCT236/16) [2018] ZACC 7; 2018 (5) BCLR 527 (CC); [2018] 6 BLLR 531 (CC); (2018) 39 ILJ 1213 (CC) (20 March 2018).

[14] 1981 (3) SA 340 (A).

[15] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) (*Makate)*; 2016 (6) BCLR 709 (CC) above at para 85. See also *The New Shorter English Dictionary* 3ed (Clarendon Press, Oxford 1993) vol 1 at 604.

[16] Escom at 344F at para [188]. See also *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* supra (majority judgment) at para [152] – [156].

[61] I agree with Ms Adhikari, who appeared on behalf of the respondents and who prepared comprehensive heads of argument which were of great assistance in this matter, that as the applicants seek specific performance of the sale of shares agreement, directing Zalo to issue shares to Mr Lötter or his nominee, there can be no doubt that such claim for specific performance is a debt within the meaning of the Prescription Act.

[62] The applicants further contend in reply that the claim has not prescribed as the respondents have *'at all relevant stages accepted liability and thereby interrupted prescription'.'*[17] In particular, the applicants argued that the running of prescription was interrupted, as contemplated by s 14 of the Prescription Act, by an acknowledgement of the alleged debt.

[63] In terms of s 14(1) of the Prescription Act, '*the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.'* It is however, trite that the acknowledgment must refer to an existing liability. Once the debt has prescribed, the creditor cannot apply to court for it to be revived. Thus, if the acknowledgment is made after the prescription period has elapsed, the acknowledgment has no effect and cannot interrupt the running of prescription in terms of s 14(1).[18] The effluxion of time over the specified period extinguishes the debt. Not even an acknowledgment of a debt will revive a prescribed debt.[19]

[64] In argument Mr Welgemoed, who appeared for the applicants, appeared to rely on an alleged admission made on 13 November 2023. Given that the debt had already prescribed on 28 September 2019, an alleged acknowledgement made some four years after that date cannot assist the applicants.

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[17] RA para 29, rec. 180.

[18] *Lipschitz v Dechamps Textiles GmbH and Another* 1978 (4) SA 427 (C) at 430D. *Miracle Mile Investments 67 (Pty) Ltd and Another v Standard Bank of SA Ltd* 2016 (2) SA 153 (GJ) at para [34].

[19] See *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7 at para [52] (minority judgment but not on this point) and para [135] (concurring judgment).

[65] Insofar as the applicants may seek to rely on other dates referred to, somewhat obliquely in the replying affidavit, none of these dates appear to assist the applicants either, as appears more fully below.

[61] On 20 January 2017 Mr Groenewald sent an email to Mr Lötter in which he indicated that Zalo did not dispute the sale of shares agreement but wished to meet with him to canvass certain aspects.

[62] If this email is construed to be an acknowledgment of liability, at best for the applicants it has the effect of extending the date on which the debt prescribed to three years later, that is 20 January 2020. The present application seeking enforcement of the debt was, however, only issued almost four years later on 7 November 2023, by which stage the debt had prescribed. Consequently, the email of 20 January 2017 does not assist the applicants.

[63] On 18 February 2020, in an email Mr Johnson advised Mr Lötter per email that Zalo could either issue the 30% shareholding (as contemplated by the sale of shares agreement), or it could purchase Mr Lötter's right to acquire the shares for an amount of R6.75 million. Put differently, he proposed a share buyback which is not contemplated in the sale of shares agreement.

[64] Mr Lötter rejected this proposed share buyback and requested that he be issued with the shares as contemplated by the sale of shares agreement. Therefore, even if the email of 18 February 2020 could be interpreted as an acknowledgement of debt, which was not conceded by the respondents, at best for the applicants it would only have extended the date of prescription to 18 February 2023, nine months before the present application was issued, by which stage the debt had already prescribed.

[65] The respondents contend, correctly in my view, that contrary to the suggestion by the applicants in reply, Mr Johnson's emails of 26 February 2021 and 1 September 2021 cannot be interpreted as being an acknowledgement of liability in terms of the sale of shares agreement, as that those emails only dealt with Zalo's proposal, namely that as it wished to retain its shares, it was prepared to increase its

offer in respect of the proposed share buyback from R6.75 million to R10 million, and the proposed payment terms of the R10 million offer.

[66] These emails do not include any admission of liability or acknowledgement of the respondents' indebtedness arising from the sale of shares agreement. The proposed share buyback agreement stands on an entirely separate footing to the sale of shares agreement.

[67] Insofar as the applicants contend that Mr Searson's email of 13 November 2023 constitutes an acknowledgement of liability under the sale of shares agreement, this is simply not borne out by the facts, and such email has in any event been struck out. It is moreover clear that the alleged acknowledgment, if any, which is relied upon by the applicants was made after the debt had already prescribed.

[68] In the circumstances I am satisfied that the defence that the applicants' claim for specific performance has prescribed, should be upheld. For this reason, the claim for alternative relief, being the claim for specific performance of the sale of shares further falls to be dismissed.

Material disputes of fact regarding the alleged conclusion of the Share Buyback Agreement

[69] The applicants seek final relief on motion. As there was no referral to oral evidence, the court must determine the matter on the facts stated by the respondent, together with the admitted facts averred by the applicants. Unless the dispute is not genuine, the respondents' denials are bald or uncreditworthy, or their version raises such obviously fictitious disputes, or is 'palpably implausible, farfetched or so clearly untenable' that it clearly falls to be rejected.[20]

[70] The applicants contend that the contents of a series of emails, exchanged in the period from 6 February 2023 to 23 May 2023 (the buyback emails), are proof of

[20] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)* 1984 (3) SA 623 (A) at 634I-635D. *National Director of Public Prosecutions v Zuma* (2009 2 SA 277 (SCA) at para [26].

the conclusion of the alleged share buyback agreement. The respondents' denial of the conclusion of such an agreement is detailed, properly raised and could not be said to be 'demonstrably and clearly unworthy of credence'.[21]

[71] According to the applicants, the express terms of the alleged share buyback agreement in terms of the relevant emails are the following:

> 71.1 Mr Lötter would nominate a private company, yet to be formed at the time that the alleged share buyback agreement was concluded that would subscribe for 1 285 shares being 30% of the issued shareholding of Zalo.
>
> 71.2 Once the shares had been issued to the new company, Zalo would repurchase all of those shares, in the following manner:
>
> > 71.2.1. On the effective date when the shares were issued to the new company, Zalo would re-purchase 128 shares, for payment of the total amount of R1 million as at the effective date as a show of good faith by and between the parties for conclusion of the proposed transaction.
> > 71.2.2. Zalo would re-purchase 128 shares on or before 15 December 2023, for an amount of R1 million.
> > 71.2.3. Zalo would re-purchase 386 shares on or before 15 December 2024, for an amount of R3 million; and
> > 71.2.4 Zalo would re-purchase 643 shares on or before 15 December 2025, for an amount of R5 million.

[72] The applicants bear the onus of proving that each of the above terms was expressly agreed to by the parties in the relevant emails.

[73] Moreover, it appears from the notice of motion, it is clear that the terms of the agreement which are sought to be enforced are different to those set out in the founding affidavit. In particular, the applicants seek an order directing that:

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[21] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para [56].

73.1. Zalo be directed to issue 1 285 shares to Leorah Trading, the second applicant.

73.2. Upon the allotment of these shares to Leorah Trading, Zalo be directed to reacquire the shares for the sum of R10 million to be paid as follows:

73.2.1. R2 million on or before 15 December 2023 against the transfer and reacquisition of 128 of the shares by Zalo.
73.2.2. R3 million on or before 15 December 2024 against the transfer and reacquisition of 386 of the shares by Zalo.
73.2.3. R5 million on or before 15 December 2025 against the transfer and reacquisition of 643 of the shares by Zalo.

[74] In terms of the notice of motion the alleged share buyback agreement contemplated 1 258 shares in Zalo being allocated to Leorah Trading. The emails relied upon do not however include any reference to Leorah Trading, nor is there any mention that Leorah Trading was intended to be a party to the alleged share buyback agreement.

[75] Leorah Trading was described as a party to the alleged share buyback agreement for the first time in the applicants' letter of demand of 16 August 2023, which was sent six months after the period during which the share buyback agreement was allegedly concluded.

[76] Consequently, there was clearly no agreement as to who the parties to the alleged share buyback agreement were, and there is a material factual dispute in this regard.

[77] The applicants have failed to allege and prove who the parties to the alleged share buyback agreement are, which is of course one of the *essentialia* of a sale agreement.[22]

[22] *Cooper NO and Another v Curro Heights Properties (Pty) Ltd* 2023 (5) SA 402 (SCA) at para [16].

[78] Furthermore, the terms of the alleged share buyback agreement as set out in the notice of motion contemplate that the 1 258 shares to be allocated to Leorah Trading would be repurchased by Zalo, however the payment terms set out in paragraphs 2.1 to 2.3 of the notice of motion only make provision for the repurchase of 1 157 shares, and on terms that differ from those alleged in the founding affidavit.

[79] There is no mention in the relevant emails that Mr Lötter would nominate a private company that would subscribe for 1 285 shares in Zalo, as contended for by the applicants.

[80] It appears from the email sent by Mr Meinesz to Mr Johnson on 13 February 2023, which dealt with the tax implications of the proposed share buyback transaction, that Mr Meinesz assumed that Mr Lötter would nominate a trust to take transfer of the shares, and that at that stage Mr Lötter had not yet nominated the entity which was to take transfer of the shares.

[81] The applicants did not refer to any correspondence which shows that an agreement was reached in terms of which Leorah Trading was to take transfer of the shares. The applicants cannot rely on the letter from the applicants' attorney of 22 February 2023, as that letter indicated that the applicants' attorney would assist Mr Lötter with registration of a new private company and would provide Lona Agri with the details of the new company 'upon receipt of the amended agreements.'

[82] It is not in dispute that no agreements were provided, nor is there any allegation in the founding affidavits that the respondents were ever provided with the details of the new company, that the new company was Leorah Trading or that the respondents agreed to enter into a contract with the Leorah Trading.

[83] More fundamentally, however, it is clear that in the email of 22 February 2023, Mr Lötter proposed different terms to those which had previously been proposed by Mr Johnson.

[84] Accordingly, the letter of 22 February 2023 does not constitute evidence of any agreement on the identity of the parties and there is no mention in any of the subsequent relevant emails that demonstrate any such agreement.

[85] The series of emails between Mr Johnson, Mr Meinesz, Mr Wiese and Mr Lötter between 6 February 2023 and 14 February 2023, clearly demonstrate that the parties were at that stage exploring various methods by means of which to structure the proposed share buyback.

[86] It appears from the applicants' attorneys email of 22 February 2023, that Mr Lötter regarded Lona Agri as a party to the proposed share buyback agreement, proposed different terms to those which had previously been proposed by Mr Johnson, and recognised that the proposed share buyback transaction would need to be agreed and implemented in accordance with the terms of written agreements, the nature and terms of which had not yet been agreed.

[86] Simply put, there was no share buyback agreement at this stage, as the terms of such an agreement had neither been finalised nor agreed, including the methodology by which the proposed share buyback transaction would be implemented.

[87] The proposed share buyback transaction would still need to be authorised by the Board and Lona Fruit, which at that time was the holding company of Zalo. Only once the requisite approvals had been obtained, would the draft agreements be prepared for further consideration and negotiation by the parties.

[88] Consequently, it is it clear at that as of 22 February 2023 and 8 March 2023, there was still no agreement as to the proposed terms of the share buyback. It is apparent from the applicants' attorney's email of 13 March 2023, that as at that date Mr Lötter and his attorneys were aware and accepted that the proposed share buyback transaction would still need to be authorised on the respondents' side, and that the necessary written agreements were to be prepared, the terms of which were yet to be agreed between the parties.

[89] On 23 May 2023, Mr Searson sent an email to Mr Lötter and his attorneys to which he attached a proposed draft cession agreement, between Lona Agri, Mr Lötter and Zalo, for their review and comment.

[90] It is clear from this email and from the content of the draft cession agreement that at that stage it was contemplated by Zalo that the parties to the proposed share buyback agreement would be Lona Agri, which is not cited as a party to these proceedings, Mr Lötter and Zalo. There is no reference in the draft cession agreement of Lona Fruit or to Leorah Trading. They were not the contemplated parties to the agreement during these negotiations.

[91] It is quite clear that there was in fact no agreement on the terms of the proposed share buyback in the period 6 February 2023 to 23 May 2023. The first time that the applicants set out what they contend the terms of the "express written agreement" supposedly contained in the relevant emails are, is in Mr Lötter's attorneys' letter of 16 August 2023.

[92] It is evident from Mr Searson's response of 7 September 2023, that he specifically denied that the relevant emails constituted an express written agreement between the parties. He consequently denied that there had been any breach or repudiation of the alleged agreement, and that as far as Zalo and Lona Agri were concerned, the terms were those set out in the draft cession agreement.

[93] The applicants were thus forewarned that there were material disputes of fact but elected nonetheless to proceed by way of application. They did so at their peril. In such circumstances, the application falls to be dismissed.

Is the relief sought contrary to the 2008 Companies Act?

[94] The order sought by the applicants requires Zalo to issue shares that will equal 30% of the voting power of all the shares of that class held by shareholders of Zalo, immediately before the alleged share buyback transaction takes place.

[95] Shareholder approval for the issuing of shares in certain cases is provided for in Section 41 of the Companies Act 71 of 2008 (the 2008 Companies Act).

[96] Section 41(3) of the 2008 Companies Act provides, in relevant part, that an issue of shares, or a series of integrated transactions, requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions.

[97] If the applicants successfully prove that Zalo is obliged to issue 30% of the shares to Mr Lötter in terms of the alleged share buyback agreement, the share issue would first have to be approved by a special resolution of the shareholders of Zalo. It is not in dispute that no such resolution has been passed.

[98] In addition, the 2008 Companies Act imposes several mandatory requirements before Zalo can repurchase its shares as contemplated by the alleged share buyback agreement.

[99] Zalo's board of directors (the board) may only determine that Zalo is to acquire a number of its own shares if the decision to do so satisfies the requirements of s 46 of the 2008 Companies Act, which governs the distributions and/or transfers of company property to the holder of a share in a company.

[100] As the proposed share buyback transaction contemplates Zalo making payment of R10 million to Leorah Trading to repurchase the 1 285 shares that are supposedly to be issued to it, the transaction falls within the definition of *'distribution'*[23] in s 1 of the Companies Act and must therefore comply with the provisions s 46.[98]

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[23] Section 1 provides that *'distribution'* means a direct or indirect transfer by a company of money to or for the benefit of one or more holders of any of the shares of that company whether as consideration for the acquisition by the company of any of its shares, as contemplated in section 48.

[101] Section 46(1)(b) and (c) of the 2008 Companies Act provide that a company may not make any proposed distribution unless:

> 101.1 It reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and
>
> 101.2 The board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test, as set out in s 4, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.

[102] The applicants have failed to allege or show that the solvency and liquidity test will be satisfied if the relief sought by the applicants were to be granted, or that the board has taken a resolution as required by s 46(1)(c), and have therefore failed to show that there has been compliance with the mandatory provisions of s 46 of the 2008 Companies Act.

[103] The board would further be required to determine that Zalo acquires the shares allotted to Leorah Trading in accordance with the requirements of s 48(2)(a) of the 2008 Companies Act, which provides that, subject to s 48(3) and s 48(8), and if the decision to do so satisfies the requirements of s 46, the board of a company may determine that the company will acquire a number of its own shares.[24]

[104] Section 48(8) provides that a decision by the board of a company contemplated in s 48(2)(a) is subject to the requirements of ss 114 and 115, if it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares.

[105] As the relief sought by the applicants entails the issuing and buying back of shares which comprise 30% of Zalo's current shareholding, the provisions of s 48(2)(a) are triggered by the transactions contended for by the applicants and render the alleged transactions subject to ss 114 and 115.

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[24] Section 48(3) does not find application in this matter.

[106] In terms of s 48(8)(b), the repurchase by a company of more than 5% of its shares, as is the case contended for by the applicants in this matter, requires compliance with ss 114 and 115.

[107] As the share buyback transaction relied on by the applicants in the alternative is a transaction listed in s 114(1)(e),[25] Zalo would have had to retain the services of an independent expert to compile a report on the possible consequences of the proposed course of conduct as contemplated by s 114(2). That report, in terms of s 114(3), would have had to be furnished to the board by the independent expert,[26] and would have had to:

> 107.1 Include all prescribed information relevant to the value of the securities affected by the proposed arrangement.
>
> 107.2 State the *material effects that the proposed arrangement will have on the rights and interests* of those holders of securities likely to be affected by it; and
>
> 107.3 Evaluate the *material adverse effects of the proposed arrangement,* any compensation that may be paid to those adversely affected and any other beneficial effects.

[108] In terms of s 115(2)(a) of the 2008 Companies Act, the proposed share buyback transaction must be approved *'by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64(2).'*

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[25] The re-acquisition by Zalo of its securities (shares).

[26] *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* 2022 (6) SA 67 (SCA) at para [13] – [15].

[109] Moreover, s 115(2)(c) provides that the proposed share buyback transaction requires the approval of a court in certain circumstances, in particular where the proposed special resolution is opposed by at least 15% of the voting rights that were exercised on that resolution. Within 5 business days after the vote, any person who voted against the resolution requires Zalo to seek Court approval or if the Court, on an application within 10 business days after the vote by any person who voted against the resolution, grants that person leave, in terms of s 115(6), to apply to a Court for a review of the transaction in accordance with the provisions of s 115(7).

[110] The applicants cannot, by means of a court order, dispense with these mandatory statutory conditions. Nor is it competent for this court to make an order directing Zalo to implement an agreement which was concluded in breach of the 2008 Companies Act.

[111] The objective of the legislature and the purpose of s 41(3) of the 2008 Companies Act is the protection of shareholders by restricting the directors' power to issue shares without shareholders' approval beyond the 30% limitation. Section 41(3) was enacted to prevent an excessive or impermissible dilution of existing shareholding without shareholders' consent, through the issue of shares or the conclusion of a series of transactions as a result of which shares are issued in excess of the 30% limitation.[27]

[112] In *Reezen Limited v Excellerate Holdings Limited and Others*[28] the court noted that a transaction in violation of s 41(3) is to be regarded as void, because if voidness is not the result then the section would not serve the purpose of protecting the shareholders as it is intended to do, the purpose and object of the restriction enacted in s 41(3) would be undermined. The mischief it was aimed to prevent would be ignored and directors would be disincentivised from adhering to the restriction in exercising their extraordinary power to issue shares without shareholders' consent.[29]

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[27] *Reezen Limited v Excellerate Holdings Limited and Others* 2018 (6) SA 571 (GJ) at para [25].
[28] At para [25].
[29] *Reezen Limited* at para [25] and [28].

[113] The applicants' contention that Zalo must seek to have the alleged share buyback agreement set aside in terms of s 218 of the Companies Act is misconceived. In this matter, it is not in dispute on the papers that the provisions of s 41(3), s 46(1)(b), s 46(1)(c), s 48(2)(a), s 48(8), s 114 and s 115 have not been complied with.

[114] It is well settled that while a contract entered into without the shareholders' consent is not void, the contract cannot be enforced until the shareholders have consented or ratified the contract.[30]

[115] The applicants' argument that there is no need for a *'formal special resolution'* because Lona Fruit (the first respondent) is supposedly the *'100% shareholder'* of Zalo and was allegedly '*fully aware of what was being done and agreed upon'* is based on a fundamentally incorrect factual premise.

[116] Lona Agri, the sole shareholder in Zalo, is not a party to these proceedings and, according to the applicants, is not a party to the alleged share buyback agreement. The applicants have failed to allege that Lona Agri was aware of or consented to the alleged share buyback agreement.

The *Turquand* Rule

[117] The applicants, placing reliance on the *Turquand* Rule, aver that even if there is non-compliance with 'its own internal procedures', Zalo is bound in terms of section 20(7) of the Act, which provides that:

> 'A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in

[30] *Farren v Sun Service SA Photo Trip Management (Pty) Ltd* 2004 (2) SA 146 (C) para [10] – [11].

the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.'

[118] The *Turquand* rule, in essence, is that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities.[31]

[119] The question that then arises is whether the requirement for a special resolution for a fundamental transaction, such as in terms of section 115 is '*formal and procedural*'. If the conclusion or implementation of the transaction is dependent on the ultimate approval of the shareholders, it is a decision and therefore a matter of substance and cannot be a mere '*formality*' or '*procedure*'.

[120] The import of the above sections is that the shareholders of Zalo must give their consent to, or ratify, the issuing of shares equivalent to 30% of its issued share capital as well as the proposed share buyback. This is for the protection of the shareholders. The application of the Turquand rule must therefore be precluded as it would deprive them of that protection, and would, in effect, render these provisions nugatory, in contravention of the settled legal principles.

[121] Ms Adhikari emphasised that it is well established that a court will reject an interpretation of a statute that would render a provision ineffective and nugatory, even if it results in constitutional compliance, [32] and that the *Turquand* rule is a species of estoppel and therefore cannot be raised to cure an action that is *ultra vires*, as opposed to one that is *intra vires* (within one's legal powers), but suffers some other defect.[33]

[122] The *Turquand* rule accordingly cannot be invoked in circumstances where to uphold it would be tantamount to a court approving an illegality or allowing a

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[31] In *AfrAsia Special Opportunities Fund (Pty) Ltd v Royal Anthem Investments 130 (Pty) Ltd* [2016] 4 All SA 16 (WCC) Binns-Ward J confirmed the common law rule named after the matter of *Royal British Bank v Turquand* has been preserved in South African law.

[32] *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para [41].

[33] *Merifon (Pty) Limited v Greater Letaba Municipality and Another* (2022 (9) BCLR 1090 (CC) at para [42]. See also *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd* 2015 (4) SA 623 (WCC) at para [25].

contravention of a statute.[34]Even if the applicants were entitled to invoke the Turquand rule.

[123] The relief sought by the applicants requires antecedent compliance with each of the aforesaid mandatory provisions of the Companies Act and they are not entitled to dispense with those requirements by seeking relief from the Court, the effect of which would be to do so.

[124] In any event it is clear from what is set out above that at all relevant times the applicants were well aware that the proposed share buyback transaction required the approval of Zalo's shareholders, and that such approval had not yet been obtained. The applicants cannot invoke the *Turquand* rule as they were not and could not reasonably have been under the impression that Zalo had complied with its internal procedures.

The relief sought is contrary to Zalo's Memorandum of Incorporation

[125] The respondents further argued that Schedule 2 of Zalo's Memorandum of Incorporation (MOI) sets out the matters which require the approval of Zalo's shareholders by means of a special resolution. These include the allotment and / or issue of any shares of any class by Zalo (clause 8); and the purchase by Zalo of any of its own shares (clause 9).

[126] The MOI provides that the directors of Zalo do not have the power in the absence of a special resolution of the shareholders to take any such actions. Thus, the conclusion of the share buyback transaction, in the absence of approval of the shareholders by means of a special resolution, is in any event *ultra vires* the powers of the directors and therefore cannot be saved by the *Turquand* rule.

Conclusion and costs

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[34] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) at para [11] – [13] and [16]. See also *Stand 242 Hendrik Potgieter Road Ruimsig Pty) Ltd v Göbel NO and Others* 2011 (5) SA 1 (SCA) at para [23].

[127] For all the reasons set out above, the application falls to be dismissed with an appropriate costs order.

[128] In determining what would be an appropriate costs order, I have taken into consideration that in an email transmitted on 1 December 2023, the respondents' attorneys informed the applicants' attorneys that in their view the founding papers are fatally defective. This email contained privileged communications and was marked *'without prejudice'* and is accordingly not attached to the answering affidavit, but the allegation that the email was transmitted, and the content thereof is not denied in reply - the applicants deny that there are material disputes of fact and contend that the respondents admitted their claim.

[129] In my view, the application was ill-advised, however I do not believe that the applicants' conduct is so egregious as to warrant a punitive costs order. I do however agree with Ms Adhikari that this matter is of such a degree of complexity that it is appropriate for an order for costs on a party and party scale to be granted on Scale C.

[130] The following order shall issue:

1. The application is dismissed.

2. The costs of this application shall be paid by the applicants, jointly and severally, on Scale C, the one paying the other/s to be absolved.

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HOLDERNESS J
JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

APPEARANCES

For the Applicant:	Adv C Welgemoed
Instructed by:	Van Der Spuy Inc
For the Respondent(s):	Adv Adhikari
Instructed by:	Hayes Inc
Date of Hearing:	27 January 2025
Judgment delivered on:	12 May 2025