THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 61/2024

In the matter between:

HARALAMBOS PROKAS N O	**FIRST APPELLANT**
FOTINI PROKAS N O	**SECOND APPELLANT**
PRINIA INVESTMENT CAPITAL (PTY) LTD	**THIRD APPELLANT**

and

ZOVIFLO (PTY) LTD	**RESPONDENT**

Neutral citation: *Haralambos Prokas N O and Others v Zoviflo (Pty) Ltd* (61/2024) [2025] ZASCA 18 (13 March 2025)

Coram: MEYER, MATOJANE and KOEN JJA and BLOEM and MODIBA AJJA

Heard: 19 February 2025

Delivered: 13 March 2025

Summary: Contract – interpretation of – whether Joint Venture Agreement (JVA) and Nominee Shareholders Agreement (NSA) concluded on the same day are inter-dependant – formation of contract – offer and acceptance – offer contained in written document signed by one party – whether revoked before acceptance – whether on proper application of test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* valid JVA and NSA established.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Twala J sitting as a court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside and substituted with the following:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Koen JA (Meyer and Matojane JJA and Bloem and Modiba AJJA concurring):

Introduction

[1] This appeal considers whether the respondent, Zoviflo (Pty) Ltd (Zoviflo), established its claim to ownership of 80% of the issued shareholding in the third appellant, Prinia Investment Capital (Pty) Ltd (PIC). The Gauteng Division of the High Court, Johannesburg (the high court) found that it did. It declared Zoviflo to be the owner of the shares and directed PIC to issue a share certificate to it and to take all steps to effect registration of its ownership in PIC's security register. It directed the first and second appellants, Haralambos Prokas NO (Mr Prokas) and Fotini Prokas NO, in their capacity as trustees of the Prinia Heritage Trust (the trust), to pay the costs of the application, such costs to include the costs of two counsel. The appeal is against that order with the leave of this Court.

Zoviflo's version

[2] In the founding affidavit Mr Jabulani Christopher Mepha (Mr Mepha), who states that he is the sole director of Zoviflo, alleges that following discussions over

an extended period involving Mr Prokas, Zoviflo and a Mr Andrea Zissimides (Mr Zissimides), a joint business venture was to be created to acquire, maintain, develop, let and alienate properties, or rights in properties. Although he does not identify the person who represented Zoviflo, it could only have been a Mr Nic Georgiou (Mr Georgiou). What was envisaged was that there would be a holding company with a wholly owned subsidiary, which would be the administrative hub of the group and the operating company. It, in turn, would hold shares in various companies housing different projects.

[3] Mr Mepha has no personal knowledge of the discussions but was informed of the broad outline thereof. He alleges that the parties were advised by an attorney, Mr Mario Kyriacou (Mr Kyriacou), who had personal knowledge of the discussions. A confirmatory affidavit by Mr Kyriacou was filed.

[4] Later, to give structure to the venture, a Joint Venture Agreement (the JVA) and a Nominee Shareholders Agreement (the NSA) were prepared. Copies of these documents are annexed to the founding affidavit. The parties to the JVA were the trust, Zoviflo and ZJ Purchase Assist (Pty) Ltd (ZJ). ZJ was at all material times represented by Mr Zissimides. The parties to the NSA were the trust and Zoviflo.

[5] The place where and the date when Mr Mepha's signature was allegedly affixed to the JVA and NSA are not recorded on the documents but were left blank. His signature was also not witnessed. He however alleges that he signed both the JVA and NSA on behalf of Zoviflo on 26 March 2020.

[6] The JVA bears the signature of Mr Prokas on behalf of the trust. It is dated 9 March 2020 and reflects the place of signature as Rosebank. It bears the signature of a single witness to his signature, which apparently is that of a Ms Phoebe Malan (Ms

Malan). The copy of the JVA also bears the signature of Mr Zissimides, on behalf of ZJ. His signature is dated 26 March 2020, and the place of signature is reflected as Fourways. The signature of Ms Malan similarly appears as the sole witness to his signature.

[7] The copy of the NSA annexed to the founding affidavit bears the signature of Mr Prokas and Joalette Prokas on behalf of the trust,[1] but the place of signature and the date are left blank. None of the signatures on the NSA is witnessed.

[8] Zoviflo's application before the high court, in the words of Mr Mepha, 'in particular concerns the Nominee Shareholders Agreement'. The express terms of the NSA include the following:

'1. The *De Facto* Owner is the beneficial owner of ordinary par shares in [PIC] ("the Company") representing 80% of the entire issued ordinary share capital of the Company ("the Subject Shares"). The Nominee warrants that it is the actual owner of shares, which represent 15% of the issued share capital in Company.

2 The *De Facto* Owner does not wish to be reflected in the share register of the Company as the *De Facto* Owner of the Subject Shares. To this end, the Nominee has agreed to hold the Subject Shares as nominee for and on behalf of the De Facto Owner.'[2]

[9] Further provisions appearing in the NSA include that: the trust acknowledged that notwithstanding the registration of the shares into its name, it had no beneficial interest in and to the shares; the trust would not be entitled to receipt of any dividends or any other distributions; the trust confirmed that Zoviflo was the *de facto*, true and beneficial owner of the shares; the trust agreed to deliver to Zoviflo the share

[1] The trustees authorised by the Master to act as trustees of the trust are Mr Prokas and his mother, Fotini Prokas, the second appellant. It does not appear that she had signed any of the agreements. At the time of signature of the NSA it was wrongly believed that Mrs Joalette Prokas, the wife of Mr Prokas had been authorised to act as a trustee, when she had not. The trust has not raised the lack of involvement by Mrs Fotini Prokas as a ground to deny the authority of Mr Prokas to have represented the trust. A copy of the trust deed and who was authorised to represent the trust has not featured as an issue either before the high court, or in the appeal.

[2] The aforesaid two paragraphs are quoted because of the reliance placed upon them by Zoviflo, particularly in argument.

certificates in respect of the shares together with a share transfer form duly signed but blank as to the date and name of the transferee, and authorised Mr Kyriacou to sign any transfer form of the shares out of the name of the trust. The NSA agreement constituted the entire agreement between the parties with regard to the matters dealt with therein and no representation, terms, conditions or warranties express or implied not contained in the written agreement would be binding on the parties thereto.

[10] The terms of the JVA annexed to the founding affidavit include the following:

'2.1 "the/this Agreement" means this Agreement *together with any Annexures* hereto;

2.2 "Annexures" means all and *any documents* attached to and *referred to in this Agreement, the contents of which will be deemed to be incorporated herein;*

2.3 "Commencement Date" means the date on which the last of the Parties signs this Agreement;

2.4 "The Holding Structure" means the structure as set out in appendix "A" hereto, which shall regulate the corporate structure to be utilised to build the Portfolio;

2.5 "the identified Company's" mean [PIC], HJA Prinia (Pty) Ltd, Oaktree Investments (Pty) Ltd, Moxicorp Investments (Pty) Ltd, and HJA Prinia Office Parks (Pty) Ltd;

2.6 "Joint Venture" means the Joint Venture established in terms of this Agreement for the express purpose of acquiring and developing the Portfolio as well as any other property which the Management Committee may from time to time decide is to form part of the Portfolio;

2.7 . . .

2.10 "the Portfolio" means the property portfolio *to be built* by the JV through the acquisition of the Identified Company's, the SPV as well as such other entities as might be acquired to give effect to this Agreement;

2.11 "SPV" means [PIC] . . . acquired with a view to housing properties acquired or to be acquired and which will form part of the Portfolio;

2.12 "Participating Interest" means the percentage interest representing an undivided ownership interest by [the trust], Zoviflo and ZJ, as applicable, in the relevant assets and all property acquired for the purposes of the Joint Venture;

. . .

3 **RECORDAL**

The Parties record that they jointly wish to initially acquire the Identified Company's and subsequently such other entities and properties, as the JV may elect to, for the purpose of building the Portfolio.

4 . . .

5 **HOLDING STRUCTURE**

5.1 The Parties hereby agree that the Portfolio *will be built* in accordance with the Holding Structure.

5.2 It is agreed that the *Participating Interests* of the Parties shall be such that their entitlements shall vest in the SPV as well as each of the Companies, as set out in the Holding Structure or otherwise, *irrespective of the actual registered shareholding*.

5.3 The parties undertake to, *simultaneously* with the conclusion of this Agreement, to:

5.3.1 *conclude the Nominated Shareholders Agreement*; and

5.3.2 constitute the Management Committee envisaged in clause 6 below.

6 **MANAGEMENT COMMITTEE**

6.1 . . .

6.2 The Parties agree that the Management Committee shall comprise of no less than 3 (THREE) directors . . .

7 **PARTICIPATING INTEREST**

Upon formation of the Joint Venture the Participating Interest of the Parties will be:

7.1 [The trust] – 15% (FIFTEEN PERCENT);

7.2 Zoviflo – 80% (EIGHTY PERCENT);

7.3 ZJ – 5% (FIVE PERCENT).

. . .

13 **PROFIT SHARING**

The Parties agree that [the trust] will be responsible for providing the financing for all and any acquisitions undertaken and that once Zoviflo has been reimbursed for the actual reasonable costs associated with the properties provided to enable [the trust] to procure funding and once all expenses have been paid relating to such acquisitions that all and any profits will be distributed amongst the Parties in accordance with their respective shareholding.' (Emphasis added)

[11] The JVA also provided that it is the entire agreement between the parties. No appendix 'A' was annexed to the copy of the JVA. The date on which Mr Mepha

supposedly signed the JVA is left blank – which is significant, as it was a term of the JVA that it would only come into operation on the date on which the last of the parties signed it. On the evidence of Mr Mepha, this would be on 26 March 2020 which is when he says he signed the JVA and NSA.

The trust's version and its contentions

[12] The version advanced by Mr Prokas on behalf of the trust is that the total issued shareholding in PIC at all material times was wholly owned by the trust. He, on behalf of the trust, had dealings with Mr Georgiou since 2018 with a view to creating a private property fund as an investment venture (the fund). The fund would acquire various properties, and/or the shares in property owning companies, such as Moxicorp Investments (Pty) Ltd, Oaktree Investments (Pty) Ltd and HJA Prinia Office Parks (Pty) Ltd. The shares in these companies would be held by Prinia Asset Management (PAM), a company wholly owned by PIC.

[13] Mr Zissimides, representing ZJ, became involved in the discussions regarding the fund during January to March 2019. By the later stages of 2019, there was still no formal structure in place to regulate this business venture. It became an issue of important discussion.

[14] Mr Prokas pressed Mr Georgiou for an agreement to regularise and formalise the relationship between Mr Georgiou, the trust and ZJ going forward. Mr Prokas and Mr Zissimides were in broad terms agreeable to an 80/20 split of the shareholding in favour of Mr Georgiou, if the latter introduced further unencumbered properties to the envisaged fund. Mr Georgiou had access to such properties through his son, Mr Michael Georgiou. As Mr Prokas also wanted Mr Zissimides to be part of their business dealings going forward, ZJ would acquire 5%

of the shareholding of the company, referred to as the special purpose vehicle, which would control the fund.

[15] Mr Prokas was subsequently invited by Mr Kyriacou to the latter's offices where he was handed a draft of the JVA. That was the first time Mr Prokas saw the JVA. He had not instructed Mr Kyriacou to prepare any agreement, and he had not discussed the terms thereof with Mr Kyriacou. He and Mr Georgiou had however previously discussed using a Special Purpose Vehicle (SPV) to house the envisaged fund. PIC was to be that vehicle.

[16] Mr Prokas had never heard of Zoviflo before. Zoviflo was mentioned for the first time in the JVA. He required more details thereof, including details of its shareholding and directorship. No mention was made of Mr Mepha. Mr Prokas did not know of a Mr Mepha at all.

[17] Mr Prokas was dissatisfied with various terms of the JVA and very reluctant to sign it. Mr Kyriacou was however insistent and strongly urged him to sign. Mr Prokas was at that stage financially exposed via various entities including the trust to Mr Georgiou for vast sums of money. He was concerned that if he did not sign the JVA it would create further stumbling blocks in formalising the envisaged Portfolio and hinder him in realising a return on the money he had invested. His signature was not witnessed.

[18] Mr Kyriacou made a copy of the JVA signed by Mr Prokas. Thereafter Mr Prokas left with the original JVA which he had signed. Having expressed his dissatisfaction with several terms of the proposed JVA, Mr Prokas said he had no reason to believe that Mr Kyriacou would provide the copy of the JVA to any other parties to sign, to create an agreement.

[19] Mr Prokas immediately drove to Mr Georgiou's offices where he confronted him with the terms of the JVA which did not correctly capture the terms he had discussed with Mr Georgiou. Mr Prokas viewed the JVA as a working document. At that stage the JVA had not been signed by any other party thereto.

[20] The objectionable terms of the proposed JVA included, amongst others: the inclusion of Oaktree, whereas Mr Georgiou had agreed to take Oaktree back and refund the trust; and it provided that the parties would be entitled to appoint a director to the management committee for each 5% participating interest held, which had not been agreed. Mr Prokas told Mr Georgiou that he was not proceeding with the JVA.

[21] Mr Georgiou assured Mr Prokas that the various objections he had to the JVA would be 'sorted out'. Mr Georgiou promised him that the terms would be revised to address his concerns. They parted on the basis that Mr Georgiou would revert to him, as promised.

[22] Mr Prokas was contacted by Mr Zissimides on 26 March 2020 and told that he had been contacted by Mr Georgiou, who told him that he, Mr Prokas, had signed the JVA, and that he, Mr Zissimides, should sign as well. Mr Prokas was horrified to learn that Mr Zissimides had gone to Mr Georgiou's office in Fourways on 26 March 2022 and signed the JVA. According to the copy of the JVA annexed to the founding affidavit, both Mr Zissimides' signature and that of Mr Prokas had allegedly been witnessed by Ms Malan. Ms Malan had not been present when Mr Prokas signed the JVA in the office of Mr Kyriacou. She could not have witnessed his signature to the JVA in his presence.

[23] Mr Prokas recorded the objections and concerns which he had conveyed to Mr Georgiou in an email addressed to Ms Malan on 30 March 2020. Ms Malan was Mr Georgiou's personal assistant. In the email he requested that various amendments be affected to the JVA. He also requested that the NSA, referenced in clause 5.2 of the JVA and required to be concluded simultaneously with the conclusion of the JVA, be drafted by a lawyer.

[24] Ms Malan responded to Mr and Mrs Prokas and Mr Zissimides per email some six weeks later on 12 May 2020. She attached a redrafted JVA (the second JVA). A copy thereof is annexed to the answering affidavit of Mr Prokas. It contains various amendments including, for example, the omission of Oaktree as an identified company, as Mr Prokas had required. Ms Malan asked the addressees of her email to read through the second JVA and confirm that all changes had been made to their satisfaction. This second JVA was signed by the trust and ZJ at Fourways on 12 May 2020. No version thereof signed by Zoviflo has been produced. Indeed, the second JVA was not mentioned in the founding affidavit at all.

[25] None of the terms of the first JVA was carried out and none of the shares was transferred, nor were any of the properties acquired by PIC as envisaged. Mr Prokas had never dealt with Mr Mepha. He was never advised of the signature of the NSA by Zoviflo (or anyone on its behalf). He learnt of the supposed signature thereof by Mr Mepha only when the NSA was served on him together with an Anton Pillar order more than two years later during 2022. Mr Georgiou did not honour any of his promises as contemplated in the first JVA and never introduced further potentially lucrative properties.

[26] On or about 6 October 2020 Mr Prokas, his wife, and Mr Zissimides met at Mr Prokas' home. They passed a resolution, which was signed by all present, that

the joint venture contemplated in the second JVA too was, for a variety of reasons, null and void. The minutes of the meeting to that effect were delivered by Mr Prokas to Mr Georgiou personally on the same day. He explained to Mr Georgiou that the trust and ZJ no longer wanted to proceed with the envisaged joint venture fund.

[27] Mr Georgiou at first was somewhat hostile and taken aback but ultimately conceded to Mr Prokas that the agreement was null and void and that nothing had come of it. They 'left it at that'.

[28] At that stage neither the first JVA, nor the second JVA, nor the NSA which was based on the first JVA had been signed, with the result that none of these agreements had come into existence. From that point onwards Mr Prokas and Mr Georgiou parted ways. Mr Georgiou thereafter took over the management of the properties and controlled payments to the municipality and service providers.

[29] Mr Georgiou passed away on or about 10 September 2021. After his death, his son, Mr Michael Georgiou representing Zoviflo, attempted to engage with Mr Prokas regarding 'the creation of a new closed fund'. Mr Michael Georgiou at no point made any mention of Mr Mepha or any other representative of Zoviflo. During late October 2021 Mr Prokas expressly told Mr Michael Georgiou that there was no agreement in placed between his late father, the trust and ZJ.

[30] According to the records filed in the office of the Companies and Intellectual Property Commission Mr Mepha was appointed as a director of Zoviflo on 20 January 2022. Mr Mepha has however not provided any evidence as to how and in what circumstances he was appointed as a director of Zoviflo.

[31] Mr Prokas denies that the trust and Zoviflo agreed that Zoviflo would be the beneficial owner of the shares in PIC independently of the conclusion of a binding JVA, because the NSA is an ancillary agreement to, and entirely dependent on, the formation of the joint venture, and that never happened.

[32] The NSA was signed by Mr Prokas and his wife on behalf of the trust.[3] This was at some stage after March 2020 and before May 2020 (Mr Prokas could not remember precisely when). The NSA had, to his knowledge, not been prepared yet by 30 March 2020. It was only prepared by Mr Kyriacou after March 2020. This allegation was not pertinently disputed.

[33] Mr Prokas signed the NSA in contemplation of a legally binding and enforceable JVA, that could be implemented, being concluded. Once concluded and implemented the trust would in terms of the NSA continue to hold 80% of the shares in PIC, but beneficially for Mr Georgiou or a company of his. Their rights would therefore derive from the NSA. But it was always understood that the terms and conditions of the NSA would require to be concluded together with the JVA being concluded. The NSA would have no force and effect unless a valid JVA was concluded.

[34] The trust and PIC contend that the NSA was inextricably linked to and dependent on the successful implementation of the JVA and as the JVA was incomplete and ultimately not implemented, the NSA lapsed and could not be enforced. Further, that the authenticity and authority of Mr Mepha to sign the agreements were disputed: as regards authority, that he had not been appointed as a director of Zoviflo at the time he allegedly signed the NSA, and that no proper basis was advanced in support of his alternative contention that his conclusion of the

[3] It was mistakenly believed at the time that she was a trustee of the trust when she had not yet been authorised to act as a trustee.

agreements on behalf of Zoviflo was ratified subsequently. Finally, the trust contended that the agreements lacked clarity on their enforceability as standalone contracts, particularly as the parties were still engaged in further negotiations, which were eventually withdrawn and abandoned.

[35] The trust accordingly contends that as no valid and binding JVA was concluded, and as a result of it not being implemented, Zoviflo was not entitled to the relief claimed based on the NSA. The transfer of the shares was entirely dependent on there being a joint venture in the first place, and it would be linked to a valid JVA.

In the high court

[36] The high court found: that the NSA and JVA alleged to be concluded on 26 March 2020 were valid; that there was no merit to the argument that the JVA was merely a working document; that the JVA was reduced to writing and signed by the parties concerned; that the failure to successfully conclude and implement the addendum to the JVA had no bearing on the NSA; that the NSA and the JVA were concluded on the same day; that they are separate free standing agreements which meant that the NSA stood independent from the JVA; that the two agreements were not interrelated; that the enforceability of the terms of the NSA was unaffected by the absence of the JVA or the lack of the implementation thereof; and that the contention that Mr Mepha was not authorised to have concluded the NSA and JVA was without merit.

The issues

[37] The following issues arise for determination:

(a) whether the NSA was enforceable independently of the conclusion and implementation of the JVA;

(b) whether, assuming that they were inter dependent, a binding and enforceable JVA was nevertheless concluded and implemented, and ancillary thereto, whether the NSA was validly concluded; and

(c) whether the alleged conclusion of the NSA and JVA by Mr Mepha on behalf of Zoviflo was properly authorised.

Discussion

[38] It is important at the outset to be reminded what evidence the high court should have had regard to. Mr Mepha was not a party to the original discussions. He has not stated when and how he became associated with Zoviflo, other than that he is now its sole director. Nor has he disclosed when he gained personal knowledge of the fund, the workings thereof, and when and how he came into possession of copies of the JVA and NSA signed by Mr Prokas, which he then signed. To the extent that he dealt with factual issues not within his personal knowledge, his evidence constitutes inadmissible hearsay except to the extent confirmed by a person with personal knowledge of the events.

[39] But even to the extent that his evidence is confirmed by others, or was based on his personal experience, where disputed, the version of the trust and PIC must prevail in accordance with the trite principles established in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints* (*Plascon-Evans*).[4] Zoviflo had elected to argue the matter on the affidavits. Motion proceedings resolve disputes on common cause facts. Where the facts are not common cause, they cannot be resolved on probabilities.[5]

[4] *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A).
[5] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 26.

[40] Turning then to the issues that have been identified for determination, I deal first with the issue of the interdependence of the NSA and the JVA based on the assumption that they are valid and binding agreements. I do so for reasons of convenience, as Zoviflo pursued the relief which was granted by the high court 'in particular' based on the NSA as a free-standing agreement. It is only if the NSA is not enforceable as a separate agreement, that the validity of the JVA, which Zoviflo argued was concluded and implemented, would arise. In that context too, certain conclusions will be expressed as to the existence and validity of the NSA, which would provide an additional basis upon which the appeal should succeed. If the conclusions reached on the first two issues dispose of the appeal, then the third issue relating to the authority of Mr Mepha would only be of academic interest, unnecessary to decide, and it will not be considered in this judgment.

Is the NSA independent of the conclusion of the JVA?

[41] The case presented by Zoviflo, which the trust and PIC had to meet, was that it had concluded two valid, binding and legally enforceable agreements, namely the JVA and NSA on 26 March 2020. It was however with 'primary reliance' on the NSA, as a separate self-standing agreement, that Zoviflo sought to claim the transfer of the shareholding. It relied on the wording of the NSA which has already been alluded to in more detail above, for its contention that it is the *de facto* beneficial owner of 80% of the par shares in PIC. It places much reliance on the provision of the NSA that it constitutes the entire agreement between the parties with regard to the matters dealt with therein and that no representations, terms, conditions or warranties express or implied not contained in the agreement would be binding on the parties. It relies inter alia on *Sonarep SA (Pty) Ltd v Motorcraft (Pty) Ltd*[6] and *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*.[7]

[6] *Sonarep SA (Pty) Ltd v Motorcraft (Pty) Ltd* 1981 (1) SA 889 (N).
[7] *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 328E.

[42] The version of the trust which is to the effect that the two agreements were interlinked and interdependent has also been detailed above. The JVA expressly required the simultaneous conclusion of the NSA and the provisions of the two agreements show an interdependence in that the NSA owes its existence to the conclusion and implementation of the JVA, without which it had no purpose.

[43] The issue of whether the NSA and JVA would be interrelated depends on an interpretation of the two agreements. That requires that regard be had holistically to the text, context and purpose of the agreements.[8] Interpretation begins with the text and its structure, which have a gravitational pull that is important. Context is crucial, and together with purpose may be used to elucidate the text.[9] The language used should not be overridden by extraneous contextual factors, unless ambiguity exists. *A contrario* (to the contrary) where ambiguity exists, regard should plainly be had to the context.

[44] Our courts, as explained in *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*,[10] have navigated away from a restrictive narrow peering at words and considering words in a document in isolation. They have, correctly, stressed that a restrictive consideration of words without regard to context is to be avoided. Following from this, and as an inevitable corollary, the distinction between context and background circumstances has been jettisoned.

[45] Examining firstly the express wording of the documents: The JVA expressly required the simultaneous conclusion of the NSA. It defined the 'agreement' to include the annexures, and annexures to include documents referred to therein. It

[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[9] *Capitec Bank Holdings Ltd v Coral Lagoon Ltd* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).
[10] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) para 61.

further deemed the contents of the NSA, being a document referred to in the JVA, to be incorporated into the JVA.

[46] Those provisions alone would make the contractual arrangement governing the establishment and conduct of the joint venture, although physically embodied in two documents, a single all-encompassing agreement. It is difficult to envisage agreements ostensibly dealing with different subject matter becoming and being more interdependent and forming a single wholly contained vinculum, than the terms of the one being expressly incorporated into the other. The deemed provisions will impose aspects of reciprocity in respect of the parties' agreement. Being deemed to be incorporated into the JVA, any failure or material breach of the terms of the JVA would impact on the deemed conjoined agreement.

[47] The JVA and NSA are expressly and inextricably linked by the wording of not only clause 5.2 and 2.2 of the JVA, but also contextually and purposefully, based on the evidence of Mr Prokas. Mr Mepha was in no position to contradict the evidence of Mr Prokas. Various other provisions also demonstrably point to their interdependence, which must be viewed in the light of the parties' intention and the context overall.[11]

[48] At worst for the trust, contrary to what is set out above, it might be contended that the wording of the two agreements is vague and does not make it clear whether they are interdependent. Such a vagueness would permit and indeed require that extraneous contextual factors be taken into account to remove any such ambiguity.[12]

[11] *Novartis SA (Pty) Ltd v Maphil (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA).
[12] *Capitec Bank Holdings Ltd v Coral Lagoon Ltd [2021]* ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

[49] Although the separate JVA and NSA documents sought to address different aspects, they relate to the same prospective purpose, namely shareholding in and establishing the corporate structure which was to acquire and develop the Portfolio. If it was not for the JVA, having as its purpose to build up the Portfolio, there would be no reason and purpose for the NSA to be concluded.[13]

[50] It was never contemplated that the parties wanted to hold shares in PIC, with an 80:15:5 shareholder split, merely for the sake of creating a corporate structure in isolation. PIC already existed with the trust as its sole shareholder. It would continue to do so in that form, if there was no JVA. The shareholding was to be changed simply to accommodate the aspirations to be achieved in PIC implementing the joint venture.

[51] The two agreements were clearly interdependent. Without the joint venture there would be no purpose to have a special purpose vehicle, that is PIC, to administer the Portfolio.

[52] More significantly, *ex facie* the JVA, the undivided ownership of the parties in and to the relevant assets and property to be acquired, would not necessarily follow the shareholding split provided in the NSA. It was to be regulated by their participating interest. Without the JVA there would be no agreement on the Participating Interest of the trust, Zoviflo and ZJ. The provisions of the JVA in this regard accordingly potentially modified the consequence that one might expect if only the NSA was to be implemented. The concept of a participating interest is a matter of importance because it would determine the undivided ownership shares of the parties in the relevant assets and all property acquired for the purposes of the joint venture.

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[13] Cf *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 (5) SA 494.

[53] The percentage shareholdings in PIC, as partially regulated in terms of the NSA, would also not afford carte blanche to the shareholders to utilize any corporate structure, as might normally be the prerogative of shareholders through their elected directors to decide, and which would apply if the NSA was an entirely separate instrument. The corporate structure to be adopted by PIC was not what the shareholders would determine, but would be the Holding Structure, as defined in the JVA and set out in what should have been appendix 'A' thereto.

[54] The fact that appendix 'A' was not annexed makes the JVA incomplete. But more significantly in the present context is that it does not remove the fact that the corporate structure in PIC was prescribed (or to be prescribed) and imposed on PIC. The parties intended that the NSA had to be applied subject to, or dependent on these provisions of the JVA.

[55] If there is no valid JVA then the common underlying assumption on the basis of which the parties contracted with each other fell away. Consensus on all the terms of their agreement would be lacking, and the NSA could not be enforced separately.

[56] Without a binding and enforceable JVA for the express purpose of acquiring and developing the Portfolio, as well as any other property which the Management Committee may from time to time decide to form part of the Portfolio, there would be no need for an SPV, or to regulate the shareholding in PIC. The conclusion of a valid NSA was an imperative only in relation to the conclusion of a valid JVA. Absent a valid and binding JVA, there is no need for the NSA. It is the successful simultaneous conclusion of a valid and binding JVA and NSA that was contemplated and which the parties intended.

[57] The NSA also sought to preclude the trust from disclosing trade secrets of PIC. Having regard to the range of potential trade secrets listed,[14] these could only arise on the conclusion and implementation of a binding and enforceable JVA. That too points to the two agreements being interdependent and inextricable linked.

[58] To seek to enforce the one agreement when the other has failed would be unconscionable and contrary to what the purpose of the agreements had been in the context in which they were negotiated.

Was a valid and binding JVA concluded

[59] Accepting that the NSA and JVA are inter-linked, and that the NSA cannot be enforced unless there was a valid and binding JVA, the issue for determination becomes whether a valid and binding JVA was nevertheless concluded. Zoviflo maintains that the first JVA was legally valid and binding, and that it was implemented.

[60] The issue is not whether whatever joint endeavour Mr Georgiou and the trust might have pursued prior to the preparation of the JVA, even if it was anticipated that they might become part of the Portfolio contemplated in the JVA, had been implemented. The issue is whether the first JVA relied upon by Zoviflo, which was to have led to the creation of the Portfolio, was concluded. In answering that question the version of the trust again must prevail wherever there are material factual disputes.

[61] The NSA and JVA do not reflect the date on which Mr Mepha allegedly signed them. He has alleged that both were signed by him on 26 March 2020. If that

[14] The secrets listed related to customers, contractual arrangements, financial relationships, financial details, names of prospective clients, financial structures and operating results and remuneration paid to employees, all only capable of arising from the implementation of the JVA.

is so, then Mr Mepha's signature would be the last to complete all the signatures to the two agreements. If both the NSA and JVA were finally signed and thus concluded on the same day, the contemporaneity requirement in clause 5.2 of the JVA would ostensibly be satisfied. But the NSA and JVA could not have been signed by Mr Mepha on 26 March 2020.

[62] Mr Mepha could not have signed the original of the first JVA, because it was in the possession of Mr Prokas who had removed it with him when he left the office of Mr Kryciou. The uncontroverted evidence of Mr Prokas was that he viewed the JVA he had signed after pressure from Mr Kryciou, as a work in progress. It was not signed with the intention for the trust to be bound by its terms.

[63] But even assuming, on the basis of *caveat subscriptor* (let the signer beware), that Mr Prokas' signature to the first JVA should be construed as binding the trust[15] to the terms contained in the first JVA, the JVA thus signed simply contained an offer, being the terms on which the trust would be prepared to contract with Zoviflo and ZJ. That offer could be revoked, in accordance with general contractual principles, at any stage prior to acceptance, by the revocation being conveyed to the offeree, in this instance Mr Georgiou representing himself and Zoviflo.

[64] Mr Prokas did revoke the offer contained in the first JVA before any other party could have signed it. After leaving Mr Kryciou's office he met with and made it clear to Mr Georgiou that he was not happy with its terms. Only Mr Georgiou could have represented Zoviflo at that stage. Represented as such, Zoviflo agreed that the terms of the JVA would still be 'sorted out'. Neither Zoviflo nor ZJ, at that stage, had accepted the JVA. The offer in the first JVA signed by Mr Prokas could

[15] Whether Mr Prokas as one of two co-trustees of the trust, acting alone where the other trustee had not signed, depending on the terms of the trust deed could bind the trust has not been considered. Any possible lack of authority to bind the trust was not raised and has not been considered.

therefore be revoked and his conduct is consistent only with it having been revoked and it being understood to be revoked. There was nothing left which was capable of acceptance by Zoviflo, or Mr Mepha on its behalf. Up to that stage there had been absolutely no involvement by Mr Mepha. Mr Prokas did not even know of his existence. And this has not been disputed.

[65] The subsequent conduct of the parties is also consistent with the offer contained in the first JVA having been revoked and an acceptance by Zoviflo that the first JVA could no longer give rise to a binding agreement on the terms contained therein. Consistent with his attitude that the terms of the first JVA were unacceptable, not open for acceptance and still needed be revised and agreed, Mr Prokas on 30 March 2020, four days after the NSA and JVA on Zoviflo's version had allegedly been signed by Mr Mepha supposedly giving rise to enforceable agreements, sent an email to Ms Malan raising the various points of objection he had raised with Mr Georgiou. In addition, he requested that the nominee shareholders agreement referred to in the JVA be drafted by a lawyer. That is consistent with Mr Prokas' direct evidence that at that stage no JVA had been concluded, and the NSA did not exist. As the NSA still had to be drafted, as requested on 30 March 2020, it could not possibly have been signed by Mr Mepha on 26 March 2020.

[66] Mr Prokas stated that he could not remember exactly when but admits that he and his wife (the latter erroneously) signed the NSA after March 2020, (which would be consistent with the contents of his email of 30 March 2020) and before May 2020. That is the best he could recollect. He explained why they had signed. It was in contemplation of a valid and acceptable JVA being concluded. That is what Mr Georgiou had undertaken would happen. It has not been suggested, that when Mr Prokas signed the NSA, it had already been signed by Mr Mepha. Mr Mepha would still have to sign the NSA.

[67] If the JVA and NSA had been signed by 26 March 2020, as alleged by Mr Mepha, then one would have expected Ms Malan and Mr Georgiou on receiving the email of 30 March 2020 to have responded that the offer in the JVA signed by Mr Prokas was still considered as a valid and extant offer, that it had not been revoked, and more importantly: that the first JVA had been accepted by Mr Mepha four days earlier by signing the JVA; that a NSA had previously been prepared (and signed by Mr Prokas and his wife); that there accordingly was no need to have an NSA prepared by an attorney; and that the NSA had already been duly signed by Mr Mepha on behalf of Zoviflo on 26 March 2020.

[68] After all, apart from being Mr Georgiou's assistant and no doubt acting on his instructions, on Zoviflo's version, Ms Malan had allegedly witnessed the signatures of Mr Prokas on behalf of the trust and Mr Zissimides on behalf of ZJ on 9 March 2020 and 26 March 2020 respectively. Her immediate and expected response would have been that the agreements were complete, having been signed by all the parties thereto four days before the email. But that was not her response.

[69] Instead, consistent with the trust's version, Mr Georgiou and Ms Malan entertained Mr Prokas' objections to the JVA. On 12 May 2020, almost six weeks after Mr Prokas' email, Ms Malan replied per email, attaching a revised JVA, referred to as the second JVA in the answering affidavit. The email read:

'Guys, Please read through this again and confirm that all changes as discussed was made to your satisfaction. Once everyone confirms, we can print *and get it signed*.' (My emphasis.)

[70] Plainly, not only had it become accepted that whatever offer by the trust contained in the first JVA signed by Mr Prokas had been revoked and was no longer open for acceptance, but there was a further or counteroffer contained in the second JVA. The second JVA which was sent under cover of Ms Malan's email of 12 May

2020 varied the terms of the first JVA. Although signed subsequently by the trust and ZJ, the second JVA was never signed by Zoviflo. It remains incomplete and unenforceable. Zoviflo did not even refer to it in its founding affidavit.

[71] Whatever offers to conclude any JVA and NSA that might still have existed, were finally revoked by the resolution adopted by the trust and ZJ on 6 October 2020 that the joint venture would not be proceeded with. This decision was delivered and communicated to Mr Georgiou. Mr Prokas' evidence was that on 6 October 2020 the first JVA, the second JVA and the NSA had not been signed with the result that not only had the JVA not come into existence, but the NSA had also not come into existence.

[72] When the resolution of that meeting was communicated to Mr Georgiou, he conceded to Mr Prokas that the agreement was null and void, and that nothing had come of it. It was left at that. It is not surprising then that Zoviflo contends that '[t]he present application in particular concerns the Nominee Shareholder's Agreement'. That is because there is no binding JVA (and indeed also no valid NSA). Mr Mepha's version that the JVA and the NSA had been signed by him on 26 March 2020 falls to be rejected.

[73] Again, Mr Prokas' evidence that Mr Georgiou accepted, having received the resolution of 6 October 2020 from him, that the agreements had all come to an end, is supported by the subsequent conduct of Mr Georgiou. Mr Georgiou took no steps to enforce any of the agreements during the remainder of his life. On the contrary, Mr Georgiou took over the management of the properties and had control over the payments due to the municipality and service providers in respect thereof, as if there was no joint venture. This is further indicative of the fact that the joint venture had failed.

[74] Mr Mepha would not have known that Mr Georgiou, after October 2020 had accepted that the entire deal was off. The signing of the incomplete NSA and JVA, signed by the other parties, but not by Zoviflo because the offers contained therein had become withdrawn, was opportunistic of Zoviflo and/or Mr Mepha or the person at whose behest Mr Mepha appended his signature. It sought to isolate and enforce the terms of the NSA without any regard to the terms of the JVA, the context and the interdependence of the NSA and the JVA, and the dealings the parties had.

[75] To summarise, Zoviflo has not established that there was a valid NSA or JVA which could be enforced. Accordingly, it is not necessary to consider the only remaining issue being Mr Mepha's authority to have signed the agreements on behalf of Zoviflo at the time when he alleged he did so.

The alternative argument

[76] Mr Louw SC, on behalf of Zoviflo, maintained that the appeal fell to be dismissed on an alternative basis. He argued that Zoviflo owned the 80% shares even prior to any of the agreements being signed, and that the NSA recognised that the shareholding was owned by Zoviflo. Thus, Zoviflo always was and remained the true owner of the shares and as no formalities, such as a share certificate or document evidencing rights of ownership is required,[16] if the JVA and/or the NSA are invalid, Zoviflo's ownership remained. It was therefore simply vindicating its shares.

[77] That argument cannot succeed. Zoviflo has provided no factual basis for its contention that it had already become the owner of the 80% shares before the NSA was purportedly concluded. The acknowledgement in the NSA that Zoviflo was the *de facto* and beneficial owner is insufficient to discharge the onus of establishing

[16] *Standard Bank of SA Ltd and Another v Ocean Commodities Inc and Others* 1980 (2) SA 175 (T).

ownership. Ownership is a conclusion of law and is not established by a mere assertion but by pleadings the facts to establish ownership.

[78] The basis for ownership advanced in support of this alternative argument was also not the basis on which the delivery of the shares was claimed. Further, the version of the trust, which must prevail, is that the shares in PIC were held and owned by the trust. But most significantly, the argument that Zoviflo before the conclusion of the NSA was already vested with the ownership of the shares, and that the NSA acknowledged that as a fact, contradicts the direct evidence of Mr Mepha.

[79] Mr Mepha stated under oath that Zoviflo is 'the holder' of 80% of the issued shares of PIC, on the basis that '*this position has obtained since the parties concluded the [NSA*] in that the shares, being personal rights of the Trust against [PIC] *were there and then ceded to Zoviflo*'. (Emphasis added) On its own version, Zoviflo thus claims its right of ownership on the strength of the NSA and if it has any rights of ownership these could only be derived from the NSA,[17] not any antecedent transaction. This is also consistent with Mr Mepha's statement elsewhere that '[*the NSA] read with the [JVA] moreover contemplates the registration of Zoviflo as shareholder to the value of 80%* in PAM and the special purpose vehicles, the subsidiaries of PAM'. (Emphasis added.)

[80] At best for Zoviflo, it was the NSA which contemplated delivery of ownership of the shares by some form of delivery, possibly *constitutum possessorium*, meaning that 80% of the shares owned and until then held by the trust would, in terms of the NSA, thereafter continue to be held by the trust, but henceforth as nominee of Zoviflo as the true owner.

[17] Ownership of shares involves rights that may be ceded or held beneficially without registration – *Standard Bank of Southern Africa Limited v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 180H.

[81] It is not necessary to consider this alternative argument further. As the entitlement to ownership of the shares would, on Zoviflo's version, derive from the NSA, absent a valid NSA, Zoviflo had not established that it is the owner of the 80% shares.

Conclusion

[82] The appeal accordingly succeeds. The costs of the appeal must follow the result of the appeal. The high court should have dismissed Zoviflo's application with costs. Both sides employed two counsel. It is appropriate that the costs orders include the costs of two counsel where so employed.

[83] The following order is granted:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside and substituted with the following:
'The application is dismissed with costs, including the costs of two counsel where so employed.'

P A KOEN
JUDGE OF APPEAL

Appearances

For the appellant:	M P van der Merwe SC (with him C Sterk)
Instructed by:	Couzyn Hertzog & Horak, Johannesburg
	Van der Merwe & Sorour, Bloemfontein
For the respondent:	P F Louw SC
Instructed by:	Mayet & Associates Inc., Johannesburg
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