REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASES NO: 7284/2021
8958/2021

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

……………………… ………………………….
DATE SIGNATURE

In the matter between:

FINRITE ADMINISTRATION (PTY) LTD	**First Applicant**
"TIGERWIT" INVESTMENT (PTY) LTD	**Second Applicant**
TRUSTEES FOR THE TIME BEING OF THE IVORY TRUST	**Third Applicant**
BHEKISISA JAMES SHONGWE	**Fourth Applicant**
KARIN MATTHEWS	**Fifth Applicant**
REUBEN OLIFANT	**Sixth Applicant**

And

SA MADIBA INVESTMENT (PTY) LTD	**First Respondent**
WESSEL PETRUS VAN DER MERWE	**Second Respondent**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**Third Respondent**

Together with	**Case no: 2021/8958**
BHEKISISA JAMES SHONGWE	**First Applicant**
TIGERWIT INVESTMENT (PTY) LTD	**Second Applicant**
MATSAMO CAPITAL (PTY) LTD	**Third Applicant**
RUEBEN OLIFANT	**Fourth Applicant**
MOTHOMANG DIAHO	**Fifth Respondent**
And	
WESSEL PETRUS VAN DER MERWE	**First Respondent**
SA MADIBA INVESTMENT (PTY) LTD	**Second Respondent**
KHUMBULA NDLOVU	**Third Respondent**
ARASHAD HARTLEY	**Fourth Respondent**
LIZA LORENDANA ROETS	**Fifth respondent**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**Sixth Respondent**

This judgment was handed down remotely by circulation to the parties' representatives by email and uploaded to the Caselines electronic platform. The date and time for hand-down is deemed to be **on 10 February 2022.**

J U D G M E N T

MOLAHLEHI, J:

[1] This judgment concerns two applications launched on an urgent basis by the applicants seeking relief in two parts: Part "A" and "B". Part "A" is an interim interdict against the first and second respondents, Mr van der Merwe and SA Madiba Investment (Pty) Ltd ('SA Madiba') and the interdicts are to operate pending the finalisation of applications in Part "B".

[2] Concerning Part B, the application under case number 7284/2021 was instituted by Finrite Administration (Pty) Ltd ('the Finrite application') and relates to an agreement of the sale of shares concluded in January 2021 between Ivory Trust and SA Madiba. The other application was instituted by Matsamo Capital (Pty) Ltd ('Matsamo Capital') under case number 8958/2021 ('the TigerWit application')[1] concerns an alleged verbal sale of shares agreement between Matsamo Capital and Mr van der Merwe or SA Madiba. Finrite is not a party to the Tigerwit application, and Matsamo Capital is not a party to the Finrite application.

[3] The urgent applications were all heard on 10 March 2021 but were subsequently removed from the roll by agreement between the parties.

[4] The applications in Part B were referred to case management. On 2 June 2021, a directive was issued that the applications be heard together and that the hearing would commence with the Tigerwit application.

[5] The first and second respondents, Mr van der Merwe and SA Madiba have opposed both applications and filed a counter application. They seek an order directing Finrite to make monthly payments to Tigerwit, and interdicting Finrite from making those payments directly to Mr Shongwe. For ease of reference, the first and second respondents will interchangeably and collectively be referred to as 'the respondents'.

Condonation application

[1] Although the name "TigerWit" is spelt with "W" in an uppercase, in the judgment, except in a quotation, a lower case is used.

[6] The respondents filed their answering affidavit late and subsequently requested condonation for such late filing. Considering the explanation and reason provided for the lateness and in the interest of justice, I see no reason why the application should be refused. Condonation is accordingly granted

The Parties

[7] Finrite and Tigerwit are private companies registered in accordance with the company laws of South Africa. Tigerwit is a majority shareholder in Finrite. Tigerwit is 100% owned by SA Madiba, whose sole director is Mr van der Merwe.

[8] Matsamo Capital is a company registered in accordance with the company laws of South Africa and is black-owned as contemplated in the Broad–Based Economic Empowerment Act,[2] ('the BEE Act'). The shareholders in Matsamo Capital are the fourth applicant, Mr Shongwe, the sixth applicant, Mr Olifant and Dr Diaho.

[9] The third applicant is the Ivory Trust, an *inter vivos* trust registered in terms of the Trust Property Control Act,[3] with the Master of the High Court. The trustees are fifth applicant, Mrs Matthews and one Mr Lotter. Mrs Matthews is the executive trustees and executive chairperson of the Ivory Trust.

[10] According to the applicants, Ivory Trust was a 44% shareholder of Finrite's issued share capital until the conclusion of the impugned transaction to be discussed later in the judgment. Following the impugned transaction, it now holds 19% of the issued share capital.

[2] Act number 53 of 2003.
[3] Act number 57 of 1988.

[11] SA Madiba is a private company registered in accordance with the company laws of South Africa and is 100% owned and controlled by Mr van der Merwe.

[12] Mr van der Merwe is also a non-executive director of Finrite through SA Madiba. There is no dispute that he is the person who introduced Tigerwit to Ivory Trust and Finrite.

[13] The Companies and Intellectual Property Commission ('CIPC') is cited in these proceedings as an interested party as envisaged in section 187 (2) of the Companies Act[4].

THE TIGERWIT APPLICATION

[14] In the Tigerwit application, the applicants seek an order in the following terms:

> "29.1 Declaring that the (oral) agreement concluded between, on the one part, the first and third applicants (Mr Shongwe and Matsamo Capital respectively), and the opposing respondents on the other part, for the transfer of the entire issued share capital in Tigerwit by the opposing respondents to Matsamo Capital (the share transfer transaction), is valid and binding.
>
> 29.2 Declaring that anything done and transactions concluded pursuant to the share transfer transaction are valid and enforceable.
>
> 29.3 Directing the opposing respondents to effect the transfer of shares in Tigerwit from SA Madiba to Matsamo Capital within ten (10) days of the order.
>
> 29.4 Declaring Mr van der Merwe to be a delinquent director."

[4] Act number 71 of 2008.

[15] In support of the contention that a binding oral agreement was concluded between the parties, the applicants rely on various contemporaneous documents attached to their papers such as annexures KM2.1, KM2.2 and KM 2.3.

[16] KM2.1 is a covering email dated 18 August 2019 to Mrs Matthews, attached thereto is the BEE offer from Tigerwit signed by Mr Shongwe.

[17] KM2.2 is the actual BEE offer by Tigerwit signed by Mr Shongwe, making it clear that Tigerwit would acquire 51% in Finrite. It included the following:

> "Finrite indicated that they require to secure an [sic] Black Empowerment Investor to secure that Finrite continue [sic] its current growth pattern and achieve the required transformation goals... Tigerwit is a Black Owned company that focuses on investing in strategic sectors of the economy."

[18] KM2.3 is the profile of Tigerwit which amongst others provided that:

> "Tigerwit investments is a black-owned, controlled and managed investment company that focuses on strategic investments and Corporate Finance Services."

[19] The version of the applicants in the Tigerwit application is set out in the founding affidavit of Mr Shongwe. His testimony, in brief is that Tigerwit was originally a shelf company and all its shares were held by SA Madiba and or Mr van der Merwe. After Mr van der Merwe approached him, he became involved in the company and was told that Finrite was looking for a BEE partner.

[20] After accepting the offer to participate in the BEE project, the issue was then the creation of a vehicle through which the transaction would be facilitated. In response Mr van der Merwe indicated that he had a shelf company that could be used for that purpose. The understanding of the use of the shelf company was that it would expedite the BEE transaction as it already had a bank account through which it could transact.

[21] According to Mr Shongwe, following the agreement on the use of Tigerwit (at the time named Cannistraro Investment (Pty) Ltd) ('Cannistraro') as a vehicle for the BEE transaction, he and Mr van der Merwe concluded an oral agreement that the issued share capital to the value of R1 000,00 would be transferred from SA Madiba to Matsamo Capital. Mr Shongwe had nominated Matsamo Capital as an entity through which he would hold shares in Tigerwit. It was further agreed that Mr van der Merwe would action the transfer of the shares in Tigerwit and recover the payment thereof in the amount referred to earlier from Tigerwit.

[22] Two things happened following the above, and effective 6 August 2019: (a) an application was made to CIPC to add to the board of directors of Tigerwit, Mr Olifant and Dr Diaho as new directors; and (b) Mr Van der Merwe resigned as a director.

[23] Acting as the transaction adviser in the BEE transaction, Mr van der Merwe introduced Tigerwit to Ivory Trust and Finrite. In terms of the transaction, which was on the version of the applicants concluded in October 2019, Tigerwit acquired 51% of Finrite's issued share capital.

[24] In lieu of payment for the services rendered in putting together the BEE transaction, Ivory Trust transferred 5% of its shareholding in Finrite to SA Madiba, a vehicle nominated for that purpose by Mr Van der Merwe.

[25] As concerning the conduct of Mr van der Merwe, the applicants seek an order declaring him a delinquent director in terms of section 162(2)(a) and (b)(i), read together with section 162(5)(c)(i); (iv)(aa) and (bb) read together with section 77(3)(c) of the Companies Act.

[26] SA Madiba and Mr van der Merwe opposed the application and raised four *in limine* points, namely: (a) Mr Shongwe does not have authority to institute the application; (b) the transaction in Tigerwit is invalid for non-compliance with the provisions of section 44 of the Companies Act; (c) disputes of fact have arisen on the affidavits; and (d) the 'clean hands' doctrine must be applied.

[27] At the hearing it was agreed that the above points are intertwined with the evidence on the merits and thus should be considered together with the merits of the dispute. In my view, as will appear later, the key issue upon which the application turns is whether there exist a dispute of fact regarding the oral agreement alleged by the applicants.

[28] In his answering affidavit Mr van der Merwe disputes Tigerwit was a shelf company at the time Mr Shongwe was nominated to its board. According to him, Tigerwit had since 2007 (using the name Cannistraro) traded in property development.

[29] He further disputes that Mr Shongwe, representing Matsamo and him representing SA Madiba concluded an oral agreement to transfer the shares in Tigerwit to Matsamo. He (Mr Shongwe) was, according to him, invited to acquire the shares in Tigerwit to assist, among others, with the running of its affairs.

The authority of Mr Shongwe

[30] The respondents challenge the authority of Mr Shongwe in signing the resolution to institute the proceedings against them. They contend that the other directors were not invited to the meeting where the resolution was adopted as required by the Companies Act.

[31] Mr Shongwe, in the founding affidavit, avers that he is “duly authorised to represent the other applicants and to bring this application on their behalf” and attaches the relevant resolutions.

[32] The procedure to follow in challenging the authority to institute proceedings on behalf of a juristic person such as Tigerwit, is provided for in Rule 7(1) of the Uniform Rules of Court. Rule 7 of the Rules provides:

> “Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application”.

[33] The rationale for the procedure set out in Rule 7 and the requirement to comply with it in challenging the authority of a litigant to institute proceedings on behalf of a legal entity has been explained in several judgments, in particular *Unlawful Occupiers of the School Site v City of Johannesburg,*[5] where the court held that:

> "14…The import of the judgment in Eskom is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court . . ." [6]

[34] The respondents in the present matter have not utilised the above procedure, and thus their challenge stands to fail.

Provisions of Section 44__

[35] The respondents contend that the alleged oral agreement pleaded by the applicants did not comply with the provisions of section 44 of the Companies Act because it amount to financial assistance for the purchase of the shares of Tigerwit.

[36] Section 44 of the Companies Act,[7] provides:

> "(1) In this section, "financial assistance" does not include lending money in the ordinary course of business by a company whose primary business is the lending of money.
>
> (2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the

[5] [2005] 2 All SA 108 (SCA).
[6] See also *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred to with approval in *Ganes and another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624I-625A.
[7] Act number 3 of 2008.

company or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4).

(3) Despite any provision of a company’s Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless- (a) the particular provision of financial assistance is-

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) (ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that-

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) A decision by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with-

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4)."

[37] It is clear from the above provisions of section 44 that to invoke the provisions of that section certain factual allegations need to be made. The section does not provide for a general prohibition against financial assistance unless provided otherwise in the Memorandum of Incorporation and certain requirements are met. It is required of the board in providing financial assistance to be satisfied that the solvency and liquidity requirements of the company will not be compromised immediately after providing financial assistance and that assistance is given on terms that are fair and reasonable to the company. In other words, the question is whether the company will not, consequent the financial assistance be prejudiced by such a transaction.

[38] In Lipschitz v UDC Bank Ltd,[8] the SCA held that in assessing whether a transaction amounted to financial assistance it must be ascertained whether there was indeed financial assistance and the transaction exposed the company to risk.

[39] In the present instance the respondents contend that there is non-compliance with the provisions of section 44 because the applicants have not in their papers alleged compliance.

[40] There seem to be no basis why the applicants needed to make such allegations when the provisions of section 44 are not in issue. There is no allegation in the respondents' papers that, if indeed financial assistance was provided, it was prejudicial to Tigerwit. There is also no allegation by the respondents that payment of the amount of R1 000.00 was ever made. Accordingly the point raised by the respondent's stands to fail.

[8] 1979 (1) SA 789 (A)

Disputes of fact

[41] In considering the alleged dispute of fact, it is important to bear in mind that the applicants are seeking final relief on the basis of the papers before this court. They, therefore, have to show a clear right to the relief sought.

[42] The factual disputes alleged by the respondents have to be determined based on the principles set out in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Limited.*[9] The principles are summarised by Adams J in the unreported judgment *Mkoko v Sibeko and Another,*[10] as follows:

> "[17] The general rule is that a court will only accept those facts alleged by the applicant which accord with the respondent's version of events. The exceptions to this general rule are that the court may accept the applicant's version of the facts where the respondent's denial of the applicant's factual allegations does not raise a real, genuine, or *bona fide* dispute of fact. Secondly, the court will base its order on the facts alleged by the applicant when the respondent's version is so far-fetched or untenable as to be rejected on the papers."

[43] The other principle is that a bare denial of the applicant's material averments is insufficient to disqualify the applicant's relief sought on the motion.[11] In this regard, the courts also have cautioned against readily accepting allegations of a dispute of facts. As stated by Adams J in *Mkoko* in paragraph [19] of his judgment, an over-fastidious approach to a dispute raised on affidavits could seriously impede, delay adjudication of disputes and defeat the interest of justice.

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[9] 1984 (3) SA 623 (A).
[10] (8398/2020) [2020] ZAGPJHC 374 (7 December 2020).
[11] *Room Hire Co (Pty) Limited v Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

[44] The applicants' allegation that an oral agreement was concluded is set out in paragraphs 23 and 24 as follows:

> "23 Mr van der Merwe then agreed that the issued share capital of Tigerwit (Cannistraro Investment (Pty) Limited at the time) would be transferred, for R1, 000.00 from SA Madiba and/or himself to Matsamo Capital- which I had nominated as the entity through which I would hold shares in Tigerwit.
>
> 24. The agreement between Mr van der Merwe and I was oral. I believe that a draft written agreement was prepared, but I do not recall whether or not it was ever signed. We agreed that Mr van der Merwe was to action the transfer of the shares in Tigerwit and to recover the one thousand Rands (R1, 000.00) from Tigerwit account."

[45] The applicants contend that the intention of the parties concerning the conclusion of the oral agreement can be determined with reference to their conduct following the conclusion of said agreement. In this respect, reliance is placed on the conduct set out in paragraph 40 of the applicants' heads of argument wherein the following is stated:

> "40.1 The statement to key stakeholders and the announcement on the Finrite website of its empowerment credentials as a result of the BEE Transaction;
>
> 40.2 If no transaction at all had been concluded:
>
> 40.2.1 the appointment of Mr Shongwe as well as the fourth and fifth applicants ("Mr Olifant" and "Dr Diaho" respectively) as directors of Tigerwit cannot be explained;
>
> 40.2.2 the appointment of Mr Shongwe and Mr Olifant by Tigerwit as its representatives on the Finrite board cannot be explained; and
>
> 40.2.3 the execution of various agreements (the BEE transaction agreement and the shareholders' agreements among others) and other documents on behalf of Tigerwit by Mr Shongwe in the main, and sometimes by Mr Olifant, to the total exclusion of Mr van der Merwe cannot be explained."

[46] The contention that an oral agreement was concluded between the parties is further supported, according to the applicants, by: (a) the resignation of Mr van der Merwe as director of Tigerwit; and (b) Mr van der Merwe informing Mrs Matthews that he had spoken to Mr Shongwe about Ivory Trust's 25% stake in Finrite which was for sale.

[47] The respondents contend that the allegation that an oral agreement for the transfer of shares to Matsamo or Mr Shongwe is unsustainable because there is a substantial dispute of facts on the papers before the court. They do not dispute the conduct of the parties referred to above but contend that all the above arrangements were made in anticipation of the finalisation of the agreement.

[48] The respondents deny the existence of an oral agreement and contend that the draft written agreements exchanged between 20 February 2019 and October 2020 demonstrate an intention to conclude a written agreement. They, in particular, rely on a WhatsApp message addressed to Mr Van der Merwe by Mr Shongwe on 6 February 2019, where he proposed the shareholding structure of Tigerwit as follows: 50,1% to Matsamo Capital and 49% to SA Madiba to make the company black-owned and controlled.

[49] The respondents further contended that Mr van der Merwe had on a number of occasions reminded Mr Shongwe that formal written agreements were required for the transfer of shares to be concluded. According to them, no agreement of transfer of shares can be said to have been concluded because no agreement was signed, no closing meeting was held, no security transfer forms were ever signed, and no share certificate was ever handed over in respect of the proposed transaction regarding the Tigerwit shares.

[50] In paragraphs 55 and 56 of the answering affidavit, Mr van der Merwe states the following:

> "55. It was always the intention of both Mr Shongwe and myself that formal written agreements had to be signed for purposes of finalising any sale of shares within Tigerwit to Matsamo. This is confirmed in a WhatsApp of 5 March 2019 in which I indicated to Mr Shongwe that we needed to finalise the documentation. . .
>
> 56. Mr Shongwe accepted that a written shareholders' agreement had to be concluded and signed for the finalisation of any sale of shares in Tigerwit to Matsamo. This was confirmed by him via WhatsApp on 19 March 2019 and 12 June 2019 in which he said:
>
> > '... Let's not forget to sign of (sic) the Shareholders Agreement and register the directors as we/I..." and "... When do you think we should finalise the TigerWdocuments . . ."

[51] On 26 January 2019 Mr Shongwe responded to Mr van der Merwe's emails above indicating that he was obtaining legal advice on how to finalise the transaction between the two companies.

[52] On 3 July 2019, Mr Shongwe WhatsApped Mr van der Merwe informing him about the advice from his attorneys regarding the shareholding agreement.

[53] The draft agreements were again sent to Mr Shongwe during March 2020. On 14 March 2020, Mr van der Merwe sent another WhatsApp inquiring the following from Mr Shongwe: "Have you looked at the Tigerwit Agreements" Mr Shongwe responded as follows:

> "I have been delinquent I must confess, not the latest ones. I will get them and have them finalise our admin stuff early this coming week. My apologies."

[54] Mr van der Merwe again raised the issue of signing the agreement in response to an email that Mr Shongwe had addressed to First National Bank on 27 October 2020. The relevant part of the email reads as follows:

> "We still need to sign the documents relating to TigerWit (Cannistraro) Sale of shares and shareholders' agreement etc., as TigerWit is operating under a "Sworn Affidavit" but will not pass DD (due diligence).
> Please send me the last comments on the Sale of Shares and Shareholders Agreement."

[55] It is apparent from the papers that initially, Mr Shongwe and Mr van der Merwe engaged in discussions about setting up an investment company that could be used as a vehicle for securing investment opportunities. During those discussions, the opportunity to secure shares in Finrite arose.

[56] In light of the opportunity in Finrite, the parties decided to use Tigerwit as a vehicle to secure the shares in Finrite. Following this decision and in August 2019, Mr van der Merwe resigned as director of Tigerwit and Mr Shongwe, Mr Olifant and Dr Diaho were appointed as directors of Tigerwit. As indicated earlier, this is conduct that the applicants contend demonstrated the conclusion of the alleged oral agreement.

[57] In my view, it is not in dispute that before the opportunity in Finrite came about, Mr van der Merwe and Mr Shongwe had been discussing their partnership to pursue investment opportunities. Even on Mr van der Merwe's version the Finrite opportunity came to light for the first time in July 2019. The contention by the respondents that the draft agreements were never signed or a closing meeting convened does not, in my view, answer the issue of whether an oral agreement for the transfer of the shares from SA Madiba to Matsamo Capital was concluded. More importantly there is no evidence that the parties had agreed that the oral agreement would not take legal effect until

it was reduced to writing. There is also no evidence from the documentation relied on by the respondents, including the draft agreements that support the proposition that the oral agreement would not come into effect until reduced to writing.

[58] In my view, the intention of the parties has to be understood in the context of their conduct following the conclusion of the oral agreement.[12] It follows therefore that the applicants have made out a case that a binding oral agreement was concluded between the parties.

THE FINRITE APPLICATION

[59] The applicants in the Finrite application seek an order setting aside the following:

a. The sale of shares agreement (the impugned transaction) between Finrite, Ivory Trust and the SA Madiba concluded in January 2021, including anything that may have been done pursuant to that transaction;

b. The transaction in which Ivory Trust transferred 50 shares amounting to 5% of Finrite's issued share capital to SA Madiba as payment to Mr van der Merwe for introducing Tigerwit as a Broad-Based Economic Empower (BEE) shareholder to Finrite and for his services as transaction advisor; and

c. To have Mr van der Merwe declared a delinquent director in term of section 162 Companies Act 2008.

[12] See *Rane Investments Trust v Commissioner, South African Revenue Service* 2003 (6) SA 332 (SCA).

[60] The applicants further seek an order directing SA Madiba and Mr van der Merwe to transfer to Ivory Trust the 5% ordinary shares held in Finrite.

[61] It is common cause that before the conclusion of the January 2020 purchase and sale shares agreement in Finrite (the impugned transaction), Mrs Matthews was busy negotiating with a BEE group regarding the sale of shares in Finrite. Before the conclusion of that transaction, she was introduced to Mr van der Merwe, who in addition to advising her that Tigerwit would be interested in the purchase of the shares also informed her that the proposal from the group she was negotiating with was in the form of a hostile takeover.

[62] On 30 October 2019 a shareholders' agreement was concluded between Tigerwit and Finrite. This, the applicants contend, was a BEE transaction that was concluded based on the basis that Tigerwit was 100% black-owned and controlled.

Impugned transaction

[63] The case of the applicants concerning the impugned transaction is set out in the founding affidavit deposed to by Mr Shongwe and the supporting affidavit of Mrs Matthews representing both Ivory Trust and Finrite.

[64] Mr Shongwe testifies that Mr van der Merwe verbally informed him that Mrs Matthews had informed him that Ivory Trust was planning to sell shares representing 25% of Finrite’s issued shares capital. Mr Shongwe then requested him to obtain the evaluation of the shares so that an offer could be

made for the acquisition of the 25% shares of Ivory Trust in accordance with the pre-emptive rights provided for in the shareholders' agreement.

[65] He states further that he never, until January 2021 heard from Mr van der Merwe about the acquisition of the shares. On 6 January 2021, Ivory Trust and SA Madiba concluded the impugned agreement, which was brought to his attention by Mrs Matthews. She informed him that Mr van der Merwe presented to her the evaluation of the 25% stake in Finrite during December 2020. She further told him that she had the impression from Mr van der Merwe that Tigerwit would not invoke its rights in terms of the shareholders' agreement as it did not have funds to do so. The impression she had, based on the belief that Mr Shongwe was in control of Tigerwit was that the two had discussed the matter. The other thing that Mrs Matthews informed Mr Shongwe about was that Mr van der Merwe advised her that SA Madiba would buy a 25% stake in Finrite from Ivory Trust.

[66] During the above discussion Mr Shongwe denied having said that Tigerwit would not follow its rights and take its proportionate share of 25% in Finrite. He further informed Mrs Matthews that the impugned transaction was invalid as far as he was concerned.

[67] Following the above and on 18 January 2021, ENSafrica, applicants' attorneys of record, wrote a letter to Mr van der Merwe. They informed him that they regarded the impugned transaction to be unlawful and proposed a meeting between the parties.

[68] On 20 January 2021, the respondents' attorneys of record, Fluxmans Attorneys addressed a letter wherein they firmly contended that the impugned

transaction was lawful and binding because there was no signed shareholders' agreement.

[69] In the letter, Fluxmans Attorneys proposed a meeting between the parties, and in response, the applicants' attorneys stated the following:

> "Our clients stand by what is set out in our letter dated 18 January 2021 and do not believe that any useful purpose will be served in the meeting unless and until your client confirms, firstly, his acceptance that the purported Sale of Shares Agreement is void and, secondly, that he will cease and desist from contacting any of Finrite's clients, following which a meeting can be held in terms of clause 28.1 of the Shareholders Agreement."

[70] The respondents' attorneys responded to the above letter on 5 February 2021. The applicants aver that they were surprised by the response because it revealed something they did not expect or know about, namely, the shareholding in Tigerwit. In this respect, the respondents' attorneys responded as follows:

> "3. Our client owns 100% of the shareholding in Tigerwit. We are instructed that the share register confirms this fact.
>
> 4. The negotiations between our client and Matsamo Capital (Pty) Limited did not conclude any binding agreement despite draft documents being prepared, which were never signed.
>
> . . .
>
> 15. Our client therefore holds 81% of the shares in Finrite and the voting rights in respect of the balance of the shares held by the Ivory Trust which entails that in effect our client either owns or controls 100% of the shares in Finrite."

[71] On 9 February 2021, ENSafrica proposed a meeting to discuss the dispute about Tigerwit and Finrite. The meeting was held on 11 February 2021 but produced no positive results.

[72] In a letter dated 12 February 2021, Fluxmans Attorneys clarified their client's position regarding the issue of shares in the following manner:

> "3 .... no agreement was ever concluded between our client and Matsamo Capital (Pty) Ltd ("Matsamo") in respect of the shares held by our client in Tigerwit.
>
> 4. Any and all representations that were made regarding Tigerwit's ownership, were made on the understanding that an agreement would ultimately be concluded between our client and Matsamo. Despite agreements having been prepared and sent to Matsamo, no such agreements were concluded."

[73] Mr van der Merwe apparently adopted the above position on the basis that the agreements for the transfer of the shares from Tigerwit to Matsamo Capital had not been signed. The applicants contend that this is contrary to the provisions of the shareholders' agreement which provides for the following:

> "57.1 Should a shareholder (the "offeror wish to sell all or a portion of his/its shares and claims in the company (the "sale equity"), then the offeror shall first offer (the "offeree his/its sale equity, in writing, to the other shareholders (such shareholder(s) being referred to as the "offerees" hereafter) pro rata to their shareholding in the company. (clause 7.2);
>
> 57.2 The offer shall be open for acceptance in writing by the offerees for a period of 30 (thirty) days following the date of receipt of the offer by the offerees, (clause 7.3.2); and
>
> 57.3 The purchase price for the sale equity is payable in full and in cash within 20 business days of the date of final determination of sale equity sold to each offeree. (clause 7.3.3)."

[74] The applicants further contend that the offer to sell the 25% stake by Ivory Trust did not comply with the above provisions of the shareholders'

agreement, particularly when regard is had to the fact that the agreement with Tigerwit was intended to facilitate the BEE transaction. At the time, Mrs Matthews was not aware that Mr van der Merwe owned 100% shares in Tigerwit.

[75] In her supporting affidavit, Mrs Matthews provides the historical background of how Finrite, as a family business was bought from AON South Africa (Pty) Ltd in 2015. Ivory Trust was formed to hold the family interest in the business. She also points out that Ivory Trust needed to find a BEE partner to grow Finrite's business. The objective was also to comply with the country's transformation policy and thus embrace the BEE policy and legislative framework of the country's transformation policy. Its clients' dictates also influenced compliance with the BEE policy.

[76] According to Mrs Matthews, the BEE transaction referred to earlier was concluded in October 2019 in terms of which the ownership of 51% of the shareholding in Finrite by Tigerwit was welcomed. This was because of the belief and understanding that Tigerwit was majority black-owned and controlled. This is particularly revealed by what was posted on the website of Finrite where the following was stated:

> "The company is now black majority-owned by Tigerwit Investments. In October 2019 Finrite concluded a deal with Tigerwit, which ensured that the company became one of the most transformed financial administrators in South Africa."

[77] Mrs Matthews, states in her affidavit that whilst working on a BEE deal with another group, she was introduced to Mr van der Merwe by her acquaintance. After that, she discussed that transaction with him. He advised her that the deal she was negotiating was in the form of a hostile takeover,

and instead, she should look at another option. Following this, Mr Shongwe was introduced to her by Mr van der Merwe.

[78] Mr van der Merwe then proceeded to deal with the details of implementing the proposed transaction. He initiated it through an email dated 18 August 2019 wherein he stated the following:

> "Aangeheg is die offer van Bheki (Mr Shongwe).
> OPSOMMEND:
> Hy koop 51% en jy hou 49% - Hy wil besgiheid bou saam met iemanand soos jy. Sy woorde is dat jou balans van 49% baie meer werd gaan wees as die hele Finrite nou . Prys R12m, R5m nou en R7m 21 dae na 31 Maart 2020.
> Finrite moet net R8m Profit before Tax maak."

[79] He states further in the same email that:

> "Ek het hom bietjie "gestoei" op die tyd issue maar hy voel gemaklik dat Tigerwit baie waarde kan toevoeg by Finrite.
> My ondervinding die laaste 3 jaar wat hom ken (hy sit op n board wat ek ook Non executive is) is dat hy n redelik "hands on" persoon is -so hy raak meer betrokke as die gewone BEE belegger wat ek al gesien het.
> Ek heg Tigerwit se profile ook aan vir jou.

[80] Attached to the email was an offer signed by Mr Shongwe as CEO of Tigerwit to purchase 51% of the share capital in Finrite. Paragraph 2 of the attached offer was headed **"Rational and Strategy"** and provides:

> "Finrite indicated that they require to secure a Black Empowerment Investor to secure that Finrite continues its current growth pattern and achieve the required transformation goals. Tigerwit will acquire s 51% of the issued share capital in Finrite. Tigerwit is a Black-Owned company that focuses on investing in strategic sectors of the economy. Tigerwit takes an active supporting approach in companies they invest in…Within Tigerwit shareholding structure black women represent 30% of the shareholding."

[81] Attached also to the email is the profile of Tigerwit which amongst others, under the heading **"WHO WE ARE"** provides:

> "TigerWit investment is a black-owned, controlled and managed Investment company that focuses on strategic Investments and Corporate Finance Services. The company was founded out of the need to provide an investment platform for companies looking for strategic and operationally experience empowerment partners who can add value growth to investment companies."

[82] The events that led to the impugned transaction as set out by Mrs Matthews in her affidavit are briefly that Ivory Trust decided towards the end of 2020 to realise some of its investment in Finrite. She informed Mr van der Merwe of this and that 250 shares representing 25% of Finrite's share capital are to be sold. In terms of the shareholders' agreement the offer to sell had to be made to both Tigerwit and SA Madiba in proportion to their shareholding in Finrite. For this reason, she requested him to inform Mr Shongwe about the decision. As appears earlier, Mr Shongwe was informed on the decision and accordingly requested Mr van der Merwe to obtain the evaluation of the shares.

[83] The process of finalising the sale was communicated between Mrs Matthews and Mr van der Merwe through a WhatsApp. Mr van der Merwe evaluated the 25% issued share capital of Finrite at R1.5 million.

[84] On 6 January 2021, Mrs Matthews spoke to Mr Shongwe who was surprised to hear that the shares had already been evaluated and that the impugned transaction was also concluded. He was also surprised to learn that Tigerwit would not be buying shares in Finrite because of lack of funds.

[85] Following the above Mrs Matthews informed Mr van der Merwe that she regarded the impugned transaction as null and void as no due process was followed. She also tendered to refund the R380 000,00 part payment towards the R1.5 million value of the shares.

The case of the respondents

[86] In opposing the application, the respondents raised two preliminary points, namely that, (a) the primary transaction relied on by the applicants is void due to the non-fulfilment of the suspensive conditions, and (b) there is a dispute of fact which cannot be resolved on the papers.

[87] According to Mr van der Merwe an offer in writing for the purchase of the shares in Tigerwit was made to Matsamo Capital, represented by Mr Shongwe.

[88] In paragraphs 45 and 46 of the answering affidavit, Mr van der Merwe, referring to the issue raised in the Tigerwit matter states the following:

> "45. During 2019, I invited Mr Shongwe to enter into a written agreement with SA Madiba for the acquisition of shares in Tigerwit for purposes of exploring a potential transaction with Finrite.
>
> 46. The idea was for Mr Shongwe to acquire shares in Tigerwit and assist with funding on transactions introduced by Reign Capital and assist with the day-to-day activities on Tigerwit."

[89] Following the above email, the parties discussed and exchanged messages through WhatsApp regarding funding investment opportunities through Tigerwit.

[90] On 6 February 2021, Mr Shongwe sent a WhatsApp message to Mr van der Merwe suggesting the structure of the shareholding in Tigerwit, including making the structure black-owned. Mr van der Merwe was not opposed to the idea as long as the standard protection was maintained.

[91] As mentioned earlier in the Tigerwit application, during February 2019 Mr van der Merwe sent to Mr Shongwe a draft written shareholders' agreement for Tigerwit for his consideration. Mr Shongwe confirmed receipt of the offer and requested a meeting to discuss the draft.

[92] In relation to the impugned transaction, Mr van der Merwe disputes having discussed the BEE credentials with Mrs Matthews. His understanding was that he was to advise her regarding the sale of the shares of Ivory Trust in Finrite.

[93] He confirms that at the time of discussing the sale of the shares of Ivory Trust to Tigerwit, with Mrs Matthews, was busy discussing the deal between Matsamo Capital, represented by Mr Shongwe and SA Madiba represented by him. With the hope that the deal would succeed, he introduced Mr Shongwe to Mrs Matthews as representative of Ivory Trust. He does not dispute that at the time of introducing Mr Shongwe to Mrs Matthews she was in discussion with a potential buyer of the Ivory Trust shares.

[94] According to Mr van der Merwe the initial discussion about Tigerwit buying shares in Ivory Trust did not involve Mr Shongwe. The sale of shares agreement between Ivory Trust and Tigerwit was concluded in October 2019.

The sale of shares and claims agreement which contains suspensive conditions, was signed by both Mrs Matthews and Mr Shongwe.

[95] The respondents contend that the applicants' application stands to fail because they (applicants) have failed to plead the suspensive conditions of the agreement on which they rely for their cause of action. Their contention in this respect is that the applicants ought to have pleaded the suspensive conditions and produce proof that the conditions precedent of the acquisition and shareholders' agreement have been fulfilled.

[96] In support of their contention that the conditions precedent ought to have been pleaded, the respondents rely on the principle set out in *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd,*[13] where the court distinguished the actual terms of a contract from the conditions precedent. In this respect, the court (per Hoexter JA) held that a condition is not part of the obligation set out in the contract but rather an external fact upon which the existence of the obligation depends. The implication of a condition precedent in a contract is that an obligation or a right is suspended until the happening of an event described by the condition precedent. Thus an obligation arising from a term of a contract can be enforced through specific performance. In general, there lies no action to compel the performance of a condition precedent.

[97] In *Kate's Hope Game Farm (Pty) Limited v Terblanchehoek Game Farm (Pty) Limited,*[14] the SCA in following its decision in *Resisto* held:

> “"The rule is that the litigant, whether the plaintiff or the defendant, relying on a contract that is subject to a condition must plead and prove the condition and its fulfilment.”

[13] 1963 (1) 632 (A) 644E-F.
[14] [1997] 4 All SA 185 (A).

[98] The above approach was followed in *Oberholzer v Glocell (Pty) Ltd and Another,*[15] where the court (per Kubushi J), dealing with the issue of an exception held that:

> "[8] A condition precedent or suspensive condition is an agreement to suspend the operation of the contract until the fulfilment of the condition. Thus, it is a trite principle of our law that the fulfilment of a suspensive condition must be pleaded and proved by the party seeking to enforce the agreement."

[99] However, in the *Oberholzer* matter, the court found that the circumstances of the exception raised by the defendant that required the fulfilment of the suspensive condition was based on the acceptance of the offer of employment. If this presumption was correct then, the court observed, the plaintiff would have been obliged to plead fulfilment of the suspensive condition. The plaintiff did not have to plead the suspensive condition because the pleaded case was based on the employment contract and not the offer of employment. For this reason, the court found that the plaintiff did not have to plead the suspensive condition.

[100] In applying the principles set out in the authorities above and for the reasons set out below, I agree with the applicants that the issue of pleading the suspensive conditions does not arise in the present matter.

[101] A simple evaluation of the common cause facts in this matter reveals that the rights and obligations were created by the shareholders' agreement and the acquisition agreement. In other words, the existence or otherwise of such agreements and their conditions are not in dispute. It also seems not in

[15] (20338/2015) [2017] ZAGPPHC 415 (26 July 2017).

dispute that the agreements were only to come into operation upon the fulfilment of certain conditions.

[102] In my view, considering the circumstances of this case, there was no need to plead the suspensive conditions in their application as he applicants' case is not based on the enforcement of any of the contracts, but as pleaded in the notice of motion in seeking to declare the sale and purchase of the 250 shares in Finrite, a transaction concluded between Ivory Trust and SA Madiba on 5 January 2021, to be invalid.

[103] Turning to the merits in the Finrite application**,** it is common cause that the BEE transaction was concluded in October 2019 with the assistance of Mr van der Merwe. It was a transaction involving Tigerwit, Ivory Trust and Finrite. In terms of this transaction, Tigerwit, according to the applicants, became a 51% shareholder of Finrite. As a result of these transactions, Finrite announced to the public, the BEE Commission and other business entities, that it was a black majority-owned company in accordance with the BEE Act. This transaction was concluded with the assistance of Mr van der Merwe who, as indicated earlier, was awarded 50 shares representing 5% of the issued shares in *lieu* of his compensation for assisting with the transaction. In that process, Mr van der Merwe introduced Mr Shongwe as the director and chairperson of Tigerwit.

[104] The applicants contend that Mr van der Merwe fraudulently misrepresented to them that Tigerwit was 100% black-owned and thus satisfied the requirements of the BEE goals of Finrite.

[105] It turned out later, according to the applicants, that in effect, Mr van der Merwe owned 100% shares of Tigerwit, as a white person within the definition

of the BEE Act. In this respect, Mrs Matthews states in paragraph 28 of her affidavit in support of the founding affidavit that:

> "28 Of course, Ivory Trust and Finrite would not have concluded the BEE Transaction if there had been an unanswered question about Tigerwit being 100% black owned. That is not what the documents sent to me by Mr van der Merwe on 18 August 2019 reflect.
>
> 29 Based on Mr van der Merwe misrepresentation, the impugned transaction was concluded on 5 January 2021 between Ivory Trust represented by SA Madiba represented by Mr van der Merwe and me."

[106] As indicated earlier, following the BEE transaction Finrite, Tigerwit and Ivory Trust concluded a shareholders' agreement on 30 October 2019, and sometime after that, Mr Shongwe was appointed executive chairman of the board of Finrite on 15 November 2019.

[107] In support of the contention that a BEE transaction between the relevant parties was concluded, Mr Shongwe relies on the following contemporary documents:

(a) An affidavit signed by him and commissioned by Mr van der Merwe on 6 November 2020, which confirms that Finrite is 51% black owned;

(b) A declaration signed by him and commissioned by Mr van der Merwe on 6 November 2020, which confirms that no fronting activity or Fronting Practices are present in Finrite;

(c) An affidavit signed by him and commissioned by Mr van der Merwe on 13 November 2020 to confirm Ownership Fulfilment as per the BBBEE Codes of Good Practice that Tigerwit has no outstanding loans on its 51% shareholding in the equity of Finrite;

(d) A letter signed by Mr Olifant dated 4 November 2020 in which he confirms that the directors of Tigerwit authorised him to sign the B-

BBEEE exempted Micro Enterprise affidavit on behalf of the company; and

(e) An affidavit signed by him and commissioned by Mr van der Merwe on 11 November 2020 confirming that Tigerwit is 100% black owned and 40% black female owned.

[108] The other document referenced in this regard is the letter from Finrite's auditors which confirmed the structure of Finrite's shareholding as being:

> "28.1 Ivory Trust - 44%
> 28.2 Tigerwit - 51%
> 28.3 SA Madiba - 5%."

[109] It is common cause that during September 2020, Finrite, Ivory Trust and SA Madiba concluded a new shareholders' agreement. Mr van der Merwe contends that this agreement is of no force and effect because it was never signed. However, there is no evidence to suggest that the agreement would not be of any force and effect unless reduced to writing.

The impugned transaction

[110] It is not in dispute that Mr van der Merwe had a discussion with Mrs Matthews about the possible sale of issued shares of Ivory Trust in Finrite to Tigerwit. This includes the proposal that he would act as an advisor in facilitating the sale of the portfolio of shares in Finrite. He further acknowledged having mentioned to Mrs Matthews that Tigerwit would be interested as a potential investor in Finrite. He had a relationship with Mr Shongwe, whom he eventually introduced to her.

[111] Mr van der Merwe disputes having discussed with Mrs Matthews Tigerwit's BBE credentials. He testified that when he discussed with Mrs Matthews, he was also in discussion with Mr Shongwe regarding Matsamo Capital and SA Madiba in securing shares in Tigerwit.

[112] In the meantime, he entered into the negotiations of a potential shareholding in Finrite through Tigerwit. Mr Shongwe was not part of those negotiations.

[113] He disputes ever being asked by Mrs Matthews to prepare an evaluation of the shares. According to him the discussion about the sale of the shares of Ivory Trust commenced in December 2020 when Mrs Matthews indicated that she was interested in purchasing a property in Hartbeespoort for R12 million. The agreement was concluded on 5 January 2021 between SA Madiba and Ivory Trust, represented respectively by Mr van der Merwe and Mrs Matthews and on 7 January 2021, SA Madiba paid R380 000.00 as part payment of the shares.

Clean hands doctrine

[114] The respondents in the answering affidavit contend that the applicants are not entitled to the relief sought because they have approached the court, not with clean hands. In this regard, it is alleged that the applicants are motivated by the desire to suppress the whistleblowing by Mr van der Merwe. In this regard, the respondents allege that the applicants have committed several irregularities, which are being investigated by the Financial Sector Conduct Authority (‘FSCA’).

[115] The clean hands rule was explained in capital *Klokow v Sullivan,*[16] where the court held that:

> "Before the now famous decision in *Jajbhay v Cassim* in 1939, a party seeking to extricate himself from the consequences of an illegal or immoral contract had to demonstrate that he had come to court with clean hands. The "clean hands doctrine", derived from English law, is similar in effect to the Roman law maxim in *pari delicto potior est conditio defendentis*, which operated as an absolute bar to the grant of relief to the plaintiff. As a general rule, a plaintiff who was found to be in *pari delicto* was hence unable to recover any money paid or property handed over to a defendant pursuant to it; and if a plaintiff based his case on such a contract in formulating his pleading, he would fail on this basis alone."[17]

[116] The alleged irregularities upon which the respondents rely on in contending that the applicants have committed irregularities can be categorised under the following headings:

(a) Payment of personal expenses for both Mr Shongwe and Mrs Matthews.

(b) Mismanagement of the financial affairs of Finrite.

(c) Personal relationships and HR management.

[117] In relation to the payment of personal expenses of both Mr Shongwe and Mrs Matthews the respondents allege the following:

(a) Monies owing to Tigerwit were directly paid to Mr Shongwe's bank account instead of Tigerwit.

(b) Mr Shongwe utilised Finrite funds to pay personal expenses of Mrs Matthews in loans estimated at R4, 5 million.

(c) Purchase of furniture for the personal home of Mr Shongwe.

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[16] 2006 [1] SA 259 [SCA].
[17] At para 17.

[118] In relation to the allegation of mismanagement of the financial affairs of Finrite it is alleged that funds intended for COVID-19 –TERS were transferred to Finrite's client's trust account.

[119] As concerning the personal relationships, it is alleged that Mr Shongwe:

a) Regularly verbally abuses Finrite's staff members;
b) Practices nepotism and has appointed his wife and other family members; and
c) Failed to provide Mr van der Merwe with relevant information as the director of Finrite.

[120] In my view, the clean hands doctrine finds no application in this matter because the respondents' allegations are yet to be investigated. In the absence of the outcome of an investigation, the allegations remain unsubstantiated, including those relating to the FSCA investigation.

Disputes of fact

[121] Similar to the Tigerwit application, the respondents contended that the applicants are not entitled to the relief sought because there exist a dispute of facts.

[122] The principles governing the approach to allegations of disputes of fact, which are applied in this matter, were discussed earlier in the Tigerwit matter and thus need not burden this judgment further. Having considered the facts

and the circumstances of this matter in its totality, I am not persuaded that the respondents have made out a case for the alleged disputes of fact.

Evaluation

[123] As I understand, the case of the applicants concerning the impugned transaction is that Ivory Trust and Finrite concluded the January 2021 agreement under the misconception that Tigerwit complied with the BEE criteria that it was black-owned and controlled. The contention in this regard is that the agreement was concluded based on the misrepresentation made by Mr van der Merwe that Tigerwit satisfied the requirements for BEE status.

[124] It is trite that misrepresentation may take two forms, namely (a) fraudulent misrepresentation, the consequence of which is that the contract is void *ab initio*, and (b) innocent misrepresentation, which would render the contract voidable at the instance of the innocent party.[18]

[125] The consequence of fraudulent misrepresentation is explained in *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another,*[19] as follows:

> "[29] It is trite law that fraud is conduct which vitiates every transaction known to the law. In affirming this principle, this court, in *Esorfranki Pipelines (Pty) Ltd*, referred with approval to Lord Denning's dicta in *Lazarus Estates Ltd v Beasley*, when he said:
>
> > "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . .".

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[18] *Trollip v Jordaan* 1961 (1) SA 238 at 252H.

[19] (Case no 201/19) [2020] ZASCA 74 (29 June 2020).

[126] The respondents contend that the applicants are not entitled to the relief sought because of the provisions of clause 8.1 of the Sales of Shares and Claims Agreement which prohibits reliance on representation made before the conclusion of the agreement.[20]

[127] In my view, Mr van der Merwe's representation leading to the conclusion of the impugned transaction illustrate prior conduct that caused or attributed to the false impression that Tigerwit was a black-owned and controlled company.[21] The contract and any other transaction associated therewith is vitiated by misrepresentation. It would be against public policy to allow him to rely on clause 8.1 of the Sale of Shares and Claims Agreement to escape liability for his fraudulent misrepresentation that materially influenced Mrs Matthews to agree to the sale of the shares on behalf of Finrite.

Counterclaim

[128] The counter claim arose from the secondment of Mr Shongwe by Tigerwit to act as CEO of Finrite. This, according to the respondents took place in October 2019 when Tigerwit was mandated to provide professional services to Finrite.

[129] In terms of the mandate Finrite undertook to pay Tigerwit a professional fee of R175 000.00 per month for services rendered. This arrangement was complied with by Finrite between October 2019 and January 2021 after that

Mr Shongwe and Mrs Matthews changed and directed the payment to Mr Shongwe.

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[20] Clause 8.1 of the Sales of Shares and Claims Agreement provides: "This document contains the entire agreement between the parties in regard to the subject matter hereof and none of them shall be bound by any undertakings, representations, warranties, promises or the like not recorded herein."

[21] See *Dibley v Furter* 1951 (4) SA 73 (C); see also *Cloete v Smithfield Hotel (Pty) Ltd* 1955 (2) SA 622 (O).

[130] In my view, the counterclaim is unsustainable in light of the finding on Mr van der Merwe's misrepresentation. In other words, the mandate agreement is vitiated by the misrepresentation by Mr van der Merwe.

Delinquency

[131] The applicants' case in seeking to have Mr van der Merwe declared a delinquent director is based on the provisions section 162 of the Companies Act. The relief is made in both applications, TigerWit and Finrite.

[132] In the Finrite application the applicants complain that Mr van der Merwe breached his fiduciary duty in misrepresenting the BEE status of Tigewrwit. In this in respect they allege that he represented that the shares in Finrite were to be acquired by way of a BEE transaction when that was not the case. According to them this amounted a breach of his fiduciary duty towards Finrite.

Legal principles

[133] Section 76 (2) of the Companies Act prohibits any director of a company from using his or her position or information obtained while acting in that capacity to gain advantage for himself or herself or any other person.

[134] The Companies Act sets out four grounds upon which a director could be declared delinquent. Section 162 (5) (c) of the Companies Act provides that a director must be declared a delinquent if whilst a director he or she:

"(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 76(2)(a);

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(a);

(iv) acted in a manner—

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77(3)(a), (b) or (c);

(d) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism, for substantially similar conduct, in terms of any legislation;

[135] In dealing with the grounds for declaring a person a delinquent director the SCA in Ginhwala v Grancy Property Ltd,[22] held that:

> "… One starts with a person who grossly abuses the position of director, we are not talking about a trivial misdemeanour or an unfortunate fall from grace. Only gross abuses of the position of director qualify."

[136] The SCA further held in paragraph 143, that gross abuse of power by a director involves:

> ". . .taking personal advantage of information or opportunity available because of the person's position as a director. This hits two types of conduct. The first, in one of its common forms, is insider trading, whereby a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others. The second is where a director appropriates a business

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[22] 2017 (2) SA 337 (SCA). At paragraph 143)

opportunity that should have accrued to the company. Our law has deprecated that for over a century.

[137] Section 76 [2] [a] it provides that:

"(2) A director of a company must –

(a) not use the position of director, or any information obtained while acting in the capacity of a director –

(i) to gain an advantage for the director, or for another person other than the company or a wholly owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company."

[138] The common features of the above grounds of delinquency is that they involve "serious misconduct on the part of a director." In Lewis Group Ltd v Woollam and others,[23] the court held that:

"the relevant causes of delinquency entail either dishonesty, wilful misconduct or gross negligence. Establishing so called 'ordinary' negligence, poor business decision making or misguided reliance by a director on incorrect professional advice will not be enough."

A finding of delinquency

[139] It is clear that Mr. van der Merwe is the sole director of Tigerwit. It is also clear from the papers that he facilitated the transaction between Tigerwit, Ivory Trust and Finrite.

[23] 2017 [2] SA547 [WCC] at paragraph 18,

[140] The defence of Mr van der Merwe against the complaint of delinquency is that no agreement was concluded between Matsamo and or Mr Shongwe regarding the shareholding in Tigerwit and thus he remained the sole shareholder in that company.

[141] It is evident that even if the contention of Mr van der Merwe that no oral agreement was concluded between Tigerwit and Matsamo and or Mr. Shongwe, he in the circumstances had a duty to disclose the shareholding status of Mr. Shongwe in Tigerwit. The mandate given to him was to put in place a BEE vehicle to be used to empower Finrite and advance its business interest. His very first email to Mrs Matthews titled "Offer from Tigerwit Investment – Bheki Shongwe," sets out that Mr Shongwe would be purchasing 51% shares of Finrite and Mrs Matthews would keep the 49% in Finrite. And more importantly, the email, which was signed by Mr Shongwe, as the Chief Executive Officer of Tigerwit, confirmed that the intention and the objective of Finrite was to achieve a BEE status. As alluded to earlier Finrite in engaging Mr van der Merwe and mandating him to conclude the transaction that are relevant to this application sought to secure a Black Empowerment Investor and to enhance its growth pattern and achieve the required transformation goals.

[142] It is even more telling that the profile of TigerWit which is attached to the email stated that it was a "black owned, controlled and managed investment company…"

[143] It is clear from the above that Mr van der Merwe as a director deliberately misrepresented the status of Tigerwit. He represented to Finrite, Mrs Matthews, that Tigerwit was black owned and controlled which was clearly misleading.

[144] Accordingly, I find Mr van der Merwe's misrepresentation as to the status of Tigerwit amount to a serious misconduct, warranting a sanction as envisaged in the Companies Act.

Order

[145] In the premises the following order is made:

a) **In relation to the Tigerwit application:**

1. It is declared that the second respondent, SA Madiba (Pty) Ltd represented by Mr van der Merwe concluded an oral agreement with the third applicant, Matsamo Capital (Pty) Ltd, represented by Mr Shongwe, for the transfer of the issued shares in the second applicant, Tigerwit for R1,000.00.

2. The oral agreement referred to in the above paragraph is valid and enforceable including any act undertaken and transaction concluded pursuant thereto.

3. The first and or the second respondents are directed to transfer to the third applicant (Matsamo), and for R1,000.00, all of the issued shares in the second applicant (Tigerwit), to the third applicant (Matsamo) within 10 (ten) days of the date of this order.

4. The first and or second respondents are directed to cooperate with the applicants and take any such steps, and sign any such

documents, as may be necessary to give effect to the order in paragraph 3 above;

5. The Sheriff of the Court, is directed and authorised to take such step as may be necessary, should the first and or second respondents fail to either diligently or timeously take any of the steps required to be taken in terms of paragraph 3 above, on behalf of or in substitution of the first and/or second respondents.

6. The Sheriff shall be indemnified against any loss or damage that any party may suffer as a result of any act or omission of the Sheriff of the Court pursuant to this Order.

7. The first and second respondents shall pay the costs of this application on the party and party scale the one paying the other to be absolved.

b) In relation to the Finrite application:

1. The following transactions or agreements are declared to be invalid and are set aside:
   1.1 The purported sale and purchase of 250 shares in the first applicant ("Finrite").
   1.2 The transection or agreement (the impugned transection") concluded between the first applicant (“Ivory Trust") and the first respondent (“SA Madiba”) on 5 January 20 21 and anything done pursuant of consequent

thereto.

2. Ivory Trust is directed to return to SA Madiba against the return of such shares as may have been transferred pursuant to the impugned transaction, or any such other person who paid or made over such consideration to Ivory Trust on behalf of SA Madiba, any payment or other consideration received by it in respect of the impugned transaction;

3. SA Madiba and or Mr van der Merwe are directed to transfer to Ivory Trust for no consideration, the 50 (fifty) ordinary shares, comprising 5% (five percent) of the shares held by SA Madiba in Finrite.

4. SA Madiba and Mr van der Merwe are directed to cooperate with the applicants and to take any such steps, and sign any such documents as may be necessary to give effect to the orders in paragraph 1 to 3 above.

5. The Sheriff or his or her deputy is directed and authorized, should SA Madiba and or Mr van der Merwe fail to either diligently or timeously take any of the steps required in terms of paragraph 4 above.

6. The Sheriff shall be indemnified against any loss or damage that any of the parties may suffer as a result of the act or omission performed pursuant to this order.

7. Mr van der Merwe is declared a delinquent in terms of section 162 of the Companies Act for a period not exceeding 7 (seven) years from the date of this order.

8. The first and second respondents shall pay the costs of this application on the party and party scale the one paying the other to be absolved.

____

E Molahlehi

Judge of the High Court.

Gauteng Division.

Johannesburg

Appearances

Counsel for the applicant: Mr. Ndumiso Luthuli

Instructed by: ENSAFRICA

Counsel for the respondent: Mr. Kevin Van Huyssteen

Instructed by: Fluxmans Attorneys

Date of hearing: 16 August 2021

Date of judgment: 10 February 2022