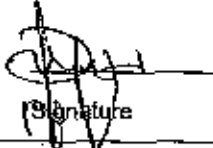


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: A5029/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
15/06/2023	
Date	Signature

In the matters between:

SA MADIBA (PTY) LTD

First Appellant

WESSEL PETRUS VAN DER MERWE

Second Appellant

and

FINRITE ADMINISTRATION (PTY) LTD

First Respondent

TIGERWIT INVESTMENTS (PTY) LTD

Second Respondent

**THE TRUSTEES FOR THE TIME BEING
OF THE IVORY TRUST**

Third Respondent

BHEKISISA JAMES SHONGWE

Fourth Respondent

KARIN MATTHEWS

Fifth Respondent

REUBEN OLIFANT

Sixth Respondent

**COMPANIES AND INTELLECTUAL
PROPERTIES COMMISSION**

Seventh Respondent

And:

SA MADIBA (PTY) LTD	First Appellant
WESSEL PETRUS VAN DER MERWE	Second Appellant
and	
BHEKISISA JAMES SHONGWE	First Respondent
TIGERWIT INVESTMENTS (PTY) LTD	Second Respondent
MATSAMO CAPITAL (PTY) LTD	Third Respondent
REUBEN OLIFANT	Fourth Respondent

Coram: Mudau, Keightley JJ and Farber AJ

Heard on: 31 May 2023

Summary: Two applications involving substantially the same parties and the same subject matter were heard together by the court of first instance. Despite the disputes of facts which had arisen it found in favour of the applicants in both matters.

The law relating to the adjudication of applications where disputes of fact are found to exist and the circumstances under which the respondent's version may be ignored was restated. In regard to the latter enquiry courts are to consider the facts in their entirety and where relevant factual matter is ignored for that purpose a material irregularity will be committed. A court of appeal will under those circumstances be entitled to intervene and substitute its findings for that of the court of first instance.

The court of appeal found that the court of first instance failed to take relevant and material factual matter into account when dealing with the dispute of facts. Its finding was consequently set aside and substituted with a decision dismissing the applications with costs.

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by e-mail and by being uploaded onto CaseLines: The date and time for hand-down is deemed to be 15 June 2023.

ORDER

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

In the result the following orders are issued:

1. The appeals in relation to the applications under case numbers 7284/2021 and 8958/2021 are upheld with costs, such costs to include the costs consequent upon the engagement of two counsel.
2. The orders of the Court *a quo* are in each instance substituted with the following orders:

The application is dismissed with costs.

JUDGMENT

FARBER AJ:
INTRODUCTION

- [1] On 16 February 2021 Finrite Administrators Proprietary Limited ("**Finrite**"), Tigerwit Investments Proprietary Limited ("**Tigerwit**"), the Trustees for the Time Being of the Ivory Trust ("**the Ivory Trust**"), Mr. Bhekisisa James Themba Shongwe ("**Mr Shongwe**"), Ms. Karin Matthews ("**Ms. Matthews**") and Mr. Reuben Olifant ("**Mr. Olifant**"), as the first, second, third, fourth, fifth and sixth applicants respectively, instituted motion proceedings under Case Number 7284/2021 against SA Madiba Investments Proprietary Limited ("**SA Madiba**") and Mr. Wessel van Der Merwe ("**Mr. Van Der Merwe**"), as the first and second respondents respectively. ("**the Finrite Application**"). The dominant relief sought was an order declaring that the contract of sale concluded on 5 January 2021 by the Ivory Trust, as seller, and SA Madiba, as purchaser, in respect of 250 shares in the issued share capital of Finrite ("**the impugned agreement**") was invalid and fell to be set aside. Concomitantly, an order was sought directing restitution under the impugned agreement.
- [2] Additionally, an order was sought directing SA Madiba "and/or" Mr. Van Der Merwe to transfer to the Ivory Trust some 50 shares held by SA Madiba in Finrite, which shares had been transferred to SA Madiba in consideration of services rendered by Mr. Van Der Merwe to the Ivory Trust, such services said to be *"for introducing Tigerwit as a broad-based black economic empowerment shareholder (as that term is defined in the Broad-Based Black Economic Empowerment Act, 2003) ... to Finrite and the transaction advisory services in relation thereto."* Finally, a substantive order was sought declaring Mr. Van Der Merwe a delinquent director in terms of section 162(2)(a) and (b)(i) of the Companies Act of 2008.

- [3] I pause to mention that in these proceedings Mr. Van Der Merwe and SA Madiba filed a counter application in which they sought orders directing Finrite to make certain payments to Tigerwit as remuneration under the retainer which it had concluded with Finrite. An interdict prohibiting Finrite from making those payments to Mr. Shongwe was concomitantly sought.
- [4] On 23 February 2021 Mr. Shongwe, Tigerwit, Matsamo Capital Proprietary Limited ("**Matsamo**"), Mr. Olifant and Dr. M. Diaho ("**Dr. Diaho**"), as the first, second, third, fourth and fifth Applicants respectively, instituted motion proceedings under Case Number 8958/2021 against Mr. Van Der Merwe, SA Madiba, Mr. K. Ndlovu, Mr. A. Hartley and Ms. LL Roets, as the First, Second, Third, Fourth and Fifth Respondents respectively ("**the Tigerwit application**"). They sought declarations to the effect that Matsamo and SA Madiba had concluded an oral agreement in October 2019, in terms whereof Matsamo had purchased the entire issued share capital of Tigerwit from SA Madiba for the sum of, R1,000.00 and that the agreement was valid and enforceable. Specific performance thereunder was also sought.
- [5] Both applications were opposed. They were by agreement heard together.
- [6] In a single composite judgment, the Court *a quo* held in favour of the Applicants in the Finrite matter. The agreement between the Ivory Trust and SA Madiba for the acquisition of 25% of the issued share capital in Finrite was set aside and restitution was ordered. Additionally, SA Madiba was directed to re-transfer the 5% shareholding in Finrite which it had acquired from the Ivory Trust as a result of the services which Mr. Van Der Merwe had rendered to it as the so-called "*transaction advisor*". Mr. Van Der Merwe was moreover declared a delinquent director. Costs followed the event.

- [7] The Tigerwit application was also upheld. It was found that an agreement for the acquisition by Matsamo from SA Madiba of the entire issued share capital of Tigerwit had in fact been concluded and that it was valid and effectual in all respects. Performance thereunder was decreed.
- [8] It is perhaps as well to mention that the Applicants in the Tigerwit matter sought an order declaring Mr. Van Der Merwe a delinquent director. The Court *a quo* however made no finding on that leg of the case.
- [9] Leave to note and prosecute an appeal to this Court was sought from and granted by the Court *a quo*. This judgment is in the appeal.

THE COMMON CAUSE MATRIX OF FACT

- [10] There is a common thread which runs through the Finrite and Tigerwit applications and the factual matrix which underpins both is either common cause or not open to serious challenge. The facts which underpin it are chronologically detailed in the paragraphs which now follow.
- [11] Finrite was established in 1993 and at all material times it carried on business in the field of financial administration. Since 2015 its entire issued share capital was held by the Ivory Trust, an entity which was formed to hold the interest of the Matthews' family in Finrite. Ms. Matthews seemingly played the dominant role in the affairs of the Ivory Trust and, through it, in the affairs of Finrite.
- [12] During July 2019 Mr. Van Der Merwe and Ms. Matthews were introduced to each other by a mutual acquaintance. Mr. Van Der Merwe, a chartered accountant, a businessman and a director of companies, came to learn that Ms. Matthews was at the time negotiating the sale by the Ivory Trust of the

shares which it held in Finrite. Mr. Van Der Merwe, seemingly gained the confidence of Ms. Matthews, for he was to advise her on the disposal and matters related thereto.

- [13] Mr. Shongwe and Mr. Van Der Merwe were known to each other and for some months prior to August 2019 they had engaged in discussions relating to the setting up of an investment company for their joint benefit. These discussions included the possible acquisition by Mr. Shongwe through Matsamo, a company controlled by him, of a shareholding in Tigerwit. It bears mention that the entire issued share capital of Tigerwit was at the time owned by SA Madiba, a company under the control of Mr. Van Der Merwe.
- [14] On 18 August 2019 Mr. Van Der Merwe submitted a written offer to Ms. Matthews for the acquisition by Tigerwit of 51% of the issued share capital of Finrite for a consideration of R12,000,000.00. Mr Shongwe signed the offer in his capacity as the Chief Executive Officer of Tigerwit.
- [15] The offer reflects the following in paragraph 2 thereof: -

"2. Rationale and Strategy

Finrite indicated that they require to secure a Black Empowerment Investor to secure that Finrite continue its current growth pattern and achieve the required transformation goals. Tigerwit will acquire a 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. This will inter alia include active participation at board level, strategic planning, assist with client relationships and attend strategic meetings and if required will take an executive roll within Finrite. Tigerwit has access to various platforms and customers to assist Finrite to maintain its growth pattern. Within the Tigerwit shareholding structure black women represent 30% of the shareholding."

- [16] Mr. Van Der Merwe when submitting the offer to Ms. Matthews provided her with a written profile of Tigerwit. Paragraph 1 of the profile records the following: -

"1. WHO WE ARE

Tigerwit Investments 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 experienced empowerment partners who can add value and growth to investee companies."

- [17] On 19 August 2019 Mr. Van Der Merwe resigned as a director of Tigerwit. On that occasion Mr. Olifant, Dr. Diaho and Mr. Shongwe were appointed to its board.

- [18] The offer which Mr. Van Der Merwe had submitted to Ms. Matthews was seemingly attractive for on 14 October 2019 the Ivory Trust, Tigerwit and Finrite concluded an agreement in terms of which Tigerwit acquired 51% of the issued share capital of Finrite from the Ivory Trust for a consideration of R12,000,000.00. Mr. Van Der Merwe played an advisory role in relation to that transaction and as a result the Ivory Trust transferred 50 shares (constituting 5% of its issued share capital) which it held in Finrite to SA Madiba, a company controlled by Mr. Van Der Merwe. In consequence the shareholdings in Finrite were reconstituted. Tigerwit (as to 51% thereof), the Ivory Trust (as to 44% thereof) and SA Madiba (as to 5% thereof) now held its issued share capital.

- [19] Following thereon, the following was posted on Finrite's website: -

"OUR SUCCESSFUL PARTNERSHIP WITH TIGERWIT INVESTMENTS

Finrite's evolution has seen us transform over the years. A tight family business, the company was bought by Glenrand MIB in 2007. Aon SA then acquired Glenrand in 2011, and the family bought the business back in 2015. 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. Tigerwit, as a strategic partner, is committed to active involvement in this business to make a strong contribution, both commercially and in continued transformation.

Its involvement has brought with it strong commercial and governance discipline in the areas of strategy formulation and execution, as well as business development.

Over the years, Finrite has transformed from a small business into one of the most respected black-owned leaders in the insurance administration sector. Our partnership with Tigerwit has further strengthened our strategic outlook and operations with their hands-on involvement in the business.

The strategic relationship has also brought with it strong commercial and governance discipline in the areas of strategy formulation and execution, as well as business development."

[20] On 28 October 2019 Mr. Shongwe was appointed as a director of Finrite.

[21] On 30 October 2019 the Ivory Trust and Tigerwit concluded a shareholders agreement in relation to Finrite.

[22] On 15 November 2019 Mr. Shongwe was appointed the executive chairman of Finrite's board of directors.

[23] On 21 November 2019 under cover of an e-mail of that date Mr. Van Der Merwe sent a suite of agreements in draft to Mr Shongwe. The agreements in the suite dealt with the sale by SA Madiba to Matsamo of the entire issued share capital of Tigerwit and the acquisition by Matsamo of SA Madiba's claims against it, all for sum of R10 000.00. It also made provision for the

resignation of Mr. Van Der Merwe as the sole director of Tigerwit, the sale back by Matsamo to SA Madiba of 1% of the issued share capital of Tigerwit and the grant to SA Madiba by Matsamo of an option to acquire 48% of Tigerwit's issued share capital for the par value of its shares, which option was to endure until 2030.

[24] On 22 December 2019 Mr. Van Der Merwe advised Ms. Matthews that his investment company (presumably SA Madiba) wished to acquire 22% of Finnrite's share capital from the Ivory Trust.

[25] On 5 March 2020 Mr. Van Der Merwe addressed an e-mail to Mr. Shongwe recording, inter alia, that *"We need to finalise all the outstanding documentation ... please my friend let us make sure our things are up to date, so that we do not run at the last moment."* Some days later, on 14 March 2020 Mr. Van Der Merwe in a WhatsApp message to Mr. Shongwe asked him whether he had "looked at the Tigerwit agreements". Mr. Shongwe responded thereto by WhatsApp, stating that he had been "delinquent" but that he would attend to the matter.

[26] During September 2020 Tigerwit, SA Madiba and the Ivory Trust concluded a shareholders agreement in respect of Finnrite. Clause 7.2 provided that *"Should any 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 "offer") his/its sale equity, in writing, to the other shareholders (such shareholder(s) being referred to as the "offerees" hereafter) pro rate to their respective shareholdings in the company."*

[27] On 27 October 2020 Mr. Shongwe addressed an e-mail to Mr. Andre Haupt (apparently a banker), which e-mail was copied to Mr. Van Der Merwe. This e-mail was cast in the following terms: -

"Hi Andre

I am not sure I understand your e-mail...please clarify!

Yes on the Tigerwit Account Wessel is the only signatory at the moment but we can change that to include me as well, I am sure it will make things easier.

With regards to shareholding, I hold 100% of Tigerwit and Tigerwit holds 51% of Finnite Holdings/Finnite Administrators (I think the structure was sent to you, sir)

I hope this helps."

- [28] On 27 October 2020 Mr. Van Der Merwe addressed an e-mail to Mr. Shongwe recording the following: -

"Bheki

Some documentation is contradicting – We should inform the bank on the final structure i.e.

51% B Shongwe

49% SA Madiba

We still need to sign all 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 a DD.

Please send me your final comments on the Sale of Shares and Shareholders Agreement."

- [29] On 6 November 2020 Mr. Van Der Merwe commissioned an affidavit deposed to by Mr. Shongwe, which affidavit reads as follows: -

"This affidavit serves to confirm the following:

- 1. Finnite Administrators (Pty) Ltd is 51% Black Owned and 12.75% Black Female Owned.*
- 2. The ownership percentages as indicated in point 1 above represent net ownership.*
- 3. Modified flow-through principle was not applied in the ownership representations herein and as indicated in the BEE Certificate.*

By declaring that the aforementioned description is applicable to the following company, this document becomes legally binding ("Affidavit")."

[30] On 8 November 2020 Mr. Shongwe signed a declaration. It was commissioned by Mr. Van Der Merwe. The first paragraph of the declaration records the following: -

"I, the undersigned in my capacity as director of Finrite Administrators (Pty) Ltd, am providing this declaration to assist EmpowerLogic with a B-BBEE verification of Finrite at October 2020 The purpose of this declaration is to confirm that no fronting activity or Fronting Practices are present in the entity being verified."

[31] On 11 November 2020 Mr. Shongwe deposed to an affidavit, which affidavit was commissioned by Mr. Van Der Merwe. This affidavit, *inter alia*, records the following in relation to Finrite: -

"I hereby declare under Oath that:

- *The Enterprise is 100% Black Owned as per Amended Code Series 100 of the amended Codes of Good Practice issued under section 9(1) of the B-BBEE Act No 53 of 2003 as Amended by Act No 46 of 2013;*
- *The Enterprise is 49% Black Female Owned as per Amended Code Series 100 of the Amended Codes of Good Practice issued under section 9(1) of the B-BBEE Act No 53 of 2003 as Amended by Act no 46 of 2013;*
- *Based on the Financial Statements and other information available on the latest financial year-end of 28 February 2019, the annual Total Revenue was R10,000,000.00 (Ten Million Rands) or less and;*
- *Based on the shareholding structure we confirmed with Tigervit is 100% Black Owned and a Level One B-BBEE contributor and qualifies in terms of the Broad-Based Black Economic Empowerment Act 53 of*

2003 as Amended by Act No 46 of 2013 as a 135% B-BBEE procurement level partner."

[32] On 13 November 2020 Mr. Shongwe deposed to an affidavit, which affidavit was commissioned by Mr. Van Der Merwe. Mr. Shongwe in that affidavit confirmed the following: -

"We hereby confirm as follows:

- Tigerwit Investments (Pty) Ltd owns 51% of the ordinary shares in Finrite Administrators (Pty) Ltd*
- Tigerwit Investments (Pty) Ltd incurred no acquisition debt in financing their purchase of their Finrite Administrators shares. There is therefore no acquisition debt outstanding at Tigerwit Investments (Pty) Ltd;"*

[33] Towards the end of 2020 Ms. Matthews advised Mr. Van Der Merwe that the Ivory Trust wished to sell 25% of Finrite's issued share capital, which holding was comprised of 250 shares. In response thereto Mr. Van Der Merwe sent a WhatsApp message to Ms. Matthews recording that *"Karin jy het nog 44% Finrite Ek (my investment fund) sal graag 22% wil koop by jou – hoeveel wil jy he vir die 22%? In tussen Sal Ek jou help met 'n lening teen jou shares as ons nie die share deal betyds conclude nie"* There was some further discussion and on 5 January 2021 the Ivory Trust and SA Madiba concluded the impugned agreement. Ms. Matthews advised Mr. Shongwe thereof on the following day. However, and on the evening of that day Ms. Matthews repudiated the impugned agreement on the basis that Mr. Van Der Merwe had mislead her.

[34] This was followed by an e-mail from Ms. Matthews to Mr. Van Der Merwe on

7 January 2021, wherein she, *inter alia*, recorded the following: "Following on our discussions last night, I want to reconfirm on record that we deem this transaction null and void. It is becoming clearer to me as I have consulted further that the process followed to arrive at the valuation you used to determine the value of the shares is prejudicial to my interests and that proper process may also have not been followed wherein all the shareholders are sighted with regards to this transaction. I do believe now that this transaction was not informed by factual accuracy given to me and may therefore, put me in contravention of prior agreements I have signed.

The R380 000.00 (three hundred and eighty thousand rands only) you have already paid as a deposit, will be refunded to you in full to enable this process to be started and done correctly without any potential legal comeback on me. Please send me your banking details.

I reiterate that I want a fair and transparent process to everyone concerned.

I appreciate your understanding in this regard and trust this will help us realign better going forward.

Look forward to your prompt response."

- [35] Mr. Van Der Merwe's response was delivered on the same day. He in an e-mail to Ms. Matthews recorded the following: "Dear Karin
I made it clear that I didn't agree to your request to cancel the agreement yesterday and deemed the agreement as binding until agreed otherwise in writing by both parties.
As mentioned I am more than willing to meet with you today or Friday including the shareholders of SA Madiba, Tigerwit and yourself". Ms. Matthew's response was curt for she by way of an e-mail wrote: "Thank you for your prompt response, please understand that I deem this transaction null and void cancelled forthwith. This is not going to change my position."

- [36] Correspondence thereafter ensued between the attorneys representing the parties. This included a letter which Mr. Van Der Merwe's attorneys addressed to the attorneys representing Mr. Shongwe, Ms. Matthews and Finrite, which letter recorded, *inter alia*, the following: -

- "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."

THE DISPUTES OF FACT AND THE TREATMENT THEREOF BY THE COURT A QUO.

THE IMPUGNED TRANSACTION WHICH FORMS THE BASIS OF THE FINRITE APPLICATION

[37] The basis upon which Ms. Matthews seeks to set aside the impugned transaction is set out in paragraph 38 of her supporting affidavit in the Finrite application thus: -

"THE IMPUGNED TRANSACTION IS UNLAWFUL

38. *The impugned transaction is unlawful for a number of reasons over and above its non-compliance with the provisions of the Shareholders Agreement*

38.1 *I had no intention of selling Ivory Trust's shares to SA Madiba in circumstances where those where those shares had not first been offered to both Tigerwit and SA Madiba in terms of clause 7 of the Shareholders Agreement and Tigerwit had declined to take up its proportionate allocation.*

38.2 *As far as I was aware and am still aware, Tigerwit is 100% owned by Matsamo Capital Proprietary Limited, an investment vehicle controlled by Mr Shongwe and his family. Ivory Trust would not have concluded the impugned transaction with SA Madiba based on a purported decision by Tigerwit not to take up its allocation, which decision was*

purportedly taken by Mr van der Merwe ostensibly as a 100% shareholder of Tigerwit.

38.3 *In other words, Ivory Trust would not have done the transaction with SA Madiba had I been aware that Mr van der Merwe claimed to be the owner of the shareholding in Tigerwit.*

38.4 *The impugned transaction was accordingly induced by a fraudulent misrepresentation on the part of Mr van der Merwe.*

[38] It is thus clear that in attacking the impugned agreement Ms. Matthews relies on two misrepresentations. The first was that Mr. Van Der Merwe had falsely represented to her that Tigerwit was wholly black owned as that term is understood under the provisions of the relevant legislation. The second is that Tigerwit was not interested in acquiring any additional shares in Finnrite and that there was no need to comply with clause 7.2 of the shareholders agreement. These representations are said to have been made either expressly or by conduct.

[39] Mr. Van Der Merwe denied the facts so relied upon. He stated that SA Madiba's acquisition of the Ivory Trust's 25% shareholding in Finnrite had nothing whatsoever to do with the question whether Tigerwit was black owned or not. It was pointedly and directly concerned with the need of Ms. Matthews to secure funding to enable her to buy a home on the Hartebeespoort dam. Similarly, the pre-emptive right in favour of Tigerwit under clause 7.2 of the shareholders agreement played no role in Ms. Matthews' decision to dispose of the shares in question to SA Madiba. These representations, so Mr. Van Der Merwe suggested, did not in any event induce Ms. Matthews to conclude the sale agreement (postulating that they had in fact been made) and consequently the case of the Ivory Trust to assail it was misplaced.

[40] The Court *a quo* resolved the dispute in favour of the Applicants in the Finrite application, at least in respect of the question whether Tigerwit was at the operative time black owned or not. On this score the Court *a quo* in paragraphs [123] to [124] and paragraphs [126] to [127] of the judgment held thus: -

"[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.*

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

[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. The contract and any other transaction associated therewith is vitiated by misrepresentation. It would be against the 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 share on behalf of Finrite."*

- [41] Mr. Van Der Merwe was declared a delinquent director in the Finrite application on the basis that he had committed a fraud on Ms. Matthews, the Ivory Trust and Finrite in representing that Tigerwit was black owned.
- [42] The Court *a quo* did not deal with Tigerwit's right of pre-emption and the statement said to have been made by Mr. Van Der Merwe to Ms. Matthews in relation to its attitude to the acquisition of additional shares.

**THE CONCLUSION OF SALE BETWEEN SA MADIBA AND MATSAMO IN
RELATION TO ENTIRE ISSUED SHARE CAPITAL OF TIGERWIT WHICH
TRANSACTION FORMS THE BASIS OF THE TIGERWIT APPLICATION**

- [43] The dispute of fact in the Tigerwit application concerns the question whether SA Madiba and Matsamo, therein represented by Mr. Van Der Merwe and Mr. Shongwe respectively, concluded an oral agreement in October 2019 for the acquisition by Matsamo of the entire issued share capital of Tigerwit.
- [44] The Court *a quo* resolved this issue in favour of the applicants in the Tigerwit application. After a careful and close analysis of the facts it stated the following in paragraphs [57], [58] and [122] of the judgment: -

[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 whether an oral agreement for the transfer of the share from SA Madiba to Matsamo Capital was concluded. More importantly there is no evidence that the parties 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 agreements. It follows therefore that the applicants have made out a case that a binding oral agreement was concluded between the parties.

[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."

THE LAW GOVERNING MOTION PROCEEDINGS IN RELATION TO DISPUTES OF FACT

*[45] It is trite that in situations where final relief is sought, motion proceedings are designed to determine legal issues based on common cause facts. They are not designed to determine probabilities and thus to resolve factual issues through that expedient. Generally speaking, final relief on motion will only be granted if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify the order sought (see in this regard *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (AD) at 634E – 635C). Different considerations will apply if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so*

clearly untenable that the court is justified in rejecting them merely on the papers (see in this regard *National Director of Public Prosecutions v Zuma* 2009 (2) SA 279 (SCA) at par. 26 and *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP) at par. 5).

[46] It will thus be seen that a court will not necessarily treat all disputes of fact at their face value for to do so would permit a respondent to raise fictitious issues of fact, thereby delaying the hearing of the matter to the prejudice of the applicant. Thus, a hollow denial or a detailed but fanciful and untenable version does not create a dispute of fact (see *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 423; *Truth Verification Testing Centre CC v PSE Truth Detection Centre CC* 1998 (2) SA 689 (W) at 698 E-J and *Ripoll-Dausa v Middleton* 2005 (3) SA 141 (C) at 151A – 153C). The enquiry in each case is a question of fact. It does not rest on a matter of discretion. On this score the court must on a conspectus of the evidence as a whole determine whether there is a real dispute of fact that cannot be satisfactorily resolved without the aid of oral evidence (*Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (AD) at 197 A – D and *Ismail v Durban City Council* 1973 (2) SA 362 (N) at 374 A-B)

APPLICATION OF THE LAW TO THE FACTS

THE FINRITE APPLICATION

[47] As more fully emerges from paragraph [40] the Court *a quo* set aside the impugned transaction on the basis of an acceptance by it that Mr. Van Der

Merwe fraudulently represented to Ms. Matthews that Tigerwit was wholly black owned.

[48] As stated in paragraph [39], Mr. Van Der Merwe denied having made the representation and that (if made) it induced Ms. Matthews to conclude the impugned agreement. On this score he made reference to his interaction with Ms. Matthews in relation to her urgent need to raise funds for the acquisition by her of a new home on the Hartebeespoort dam.

[49] It is of course true that Mr. Van Der Merwe continuously gave out to the world at large that Tigerwit was a black owned enterprise. This is plainly evident from what is said in, inter alia, paragraphs [15], [16], [19] and [29] to [32]. I shall consequently assume without deciding that Mr. Van Der Merwe was complicit in making a representation to the effect that Tigerwit was a black owned enterprise. I will moreover assume that the representation came to the knowledge of Ms. Matthews. Mr. Van Der Merwe's version, however, clearly and unequivocally raises the case that Ms. Matthews' wish to dispose of 25% of the issued share capital of Finrite had nothing to do with questions of black empowerment, more particularly the identity of the true owner of the total issued share capital of Tigerwit. The representation relied upon by Ms. Matthews (postulating that Mr. Van Der Merwe had in fact made it) could thus hardly have induced her to conclude the impugned agreement.

[50] Perhaps more importantly, I am persuaded for reasons which will presently emerge that there is a dispute of fact in relation to the question whether an oral agreement was concluded by SA Madiba and Matsamo in relation to the sale of the entire issued share capital of Tigerwit. This holds the implication that on the papers the identity of the true owner of Tigerwit's shares cannot

safely be determined. It might be either Mr. Van Der Merwe or Mr. Shongwe. This holds a further implication, namely that until this critical issue is resolved in further litigation Mr. Shongwe's version as to the ownership of Tigerwit may well hold true. And if that be so then the representation said to have been made Mr. Van Der Merwe to Ms. Matthews will not have been false. In short it has not been established on the papers that the representation said to have been made by Mr. Van Der Merwe was false, assuming, of course, that it was in fact made.

[51] I am consequently in respectful disagreement with the Court *a quo*'s finding on this leg of the case. As such its decree that restitution was to be effected under the impugned agreement and its declaration of delinquency constitute matters of dissonance. Both were squarely based on the Court *a quo*'s finding that Mr. Van Der Merwe had committed a fraud *vis-a-vis* Ms. Matthews in regard to the conclusion of the impugned agreement. A finding to that effect is difficult to sustain.

[52] There is moreover a clear answer to Ms. Matthews' complaint in relation to the representation by Mr. Van Der Merwe that Tigerwit was not disposed to acquiring further shares in Finrite and that consequently clause 7 of the shareholders agreement required no further consideration. Mr. Van Der Merwe may possibly still have been the sole shareholder of Tigerwit with competence to waive the right of pre-emption which Tigerwit might otherwise have enjoyed.

[53] The case of the Ivory Trust for the restoration to it of the 50 shares which had been transferred to SA Madiba is also fraught with difficulty. To begin with no recognized cause of action for the recovery of those shares was formulated in

the pleadings. A court of law cannot grant substantive relief on the basis contended for, namely that *"Mr. Van Der Merwe should not be allowed to benefit from his own unlawful conduct. It is for that reason, as well as the further reasons set out in the founding affidavit, that I ask the Court to direct SA Madiba and/or Mr van der Merwe to return the 50 shares representing 5% of Finnite issued share capital to Ivory Trust. This should be for no consideration, given Mr van der Merwe's unlawful conduct in relation to the very BEE transaction he advised me to proceed with"*. Moreover, there is a sharp divide as to what Mr. Van Der Merwe was supposed to do as the so called *"transaction adviser"* and whether he did it or not.

THE TIGERWIT APPLICATION

[54] There can be little doubt that the conduct of Mr. Van Der Merwe after August 2019 is entirely consistent with the contention that he had on behalf of SA Madiba concluded an oral agreement with Matsamo for the acquisition by the latter of the entire issued share capital of Tigerwit. On varied and numerous occasions over an extended period of time he represented that Tigerwit was a black owned entity. This emerges from, inter alia, paragraphs [15], [16], [19], [27], [29], [30], [31] and [32]. On the face of it these representations could only have been made had the oral agreement relied upon by Mr. Shongwe been concluded. On this score Mr. Van Der Merwe's protestations that he acted in the manner in which he did by virtue of his assumption, understanding and certainty that an agreement for the acquisition by Matsamo from SA Madiba of Tigerwit's entire share capital would in fact be concluded rings hollow.

- [55] To compound matters Mr. Van Der Merwe relinquished control over Tigerwit. Thus, on 19 August 2019 he resigned as a director of it. It will moreover be recalled that on that occasion Mr. Olifant, Dr. Diago and Mr. Shongwe were appointed as its directors. Moreover, important documents were executed on behalf of Tigerwit by Mr. Shongwe and not Mr. Van Der Merwe. It is also significant that Mr. Shongwe came to be at the helm of the affairs of Finrite.
- [56] The conduct of Mr. Van Der Merwe is thus totally out of keeping with that of an experienced chartered accountant, director of companies and businessman -unless, of course, Matsamo had acquired the total issued share capital of Tigerwit.
- [57] The conduct of parties may represent a very important consideration in determining the existence or non-existence of a particular state of affairs. Such conduct, for example, may be decisive in determining whether a contract between them has become binding and of full cause and effect, notwithstanding that their agreement might contain words such as "*subject to signing of agreement*". (See in this regard the far-reaching decision in *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani 2016 (2) SA 307 (SCA)*).
- [58] Had it stood alone the conduct of Mr. Van Der Merwe would have been decisive in determining whether his denial of the conclusion of the agreement of August 2019 between SA Madiba and Matsamo was *bona fide* or not.
- [59] However, the undisputed evidence of Mr. Van Der Merwe's conduct did not stand alone. It is in this regard common cause that shortly after the alleged conclusion of the disputed agreement, Mr. Van Der Merwe submitted a suite of draft agreements to Mr. Shongwe dealing with the same subject matter. The terms embodied in these drafts are self-evidently quite different to the terms

which Mr. Shongwe alleged had been agreed upon in August 2019. Mr. Shongwe was on a number of occasions requested by Mr. Van Der Merwe to comment on the drafts which he undertook to do. I have no reason to suppose that he was unaware of the facts that the drafts were in detail, form and structure quite different to the terms of the agreement which Mr. Shongwe states was concluded some months earlier. Strikingly, Mr. Shongwe at no stage suggested that there was already an agreement in place and that the drafts were superfluous. He moreover did not protest that terms quite inimical to the terms of the oral agreement were now being raised.

[60] Mr. Van Der Merwe's conduct in submitting the drafts to Mr. Shongwe is consistent with at least one notion, namely that an agreement for the acquisition by Matsamo of Tigerwit's entire issued share capital was still under negotiation and that no final agreement had as yet been arrived at in regard thereto.

[61] The prior conduct of Mr. Van Der Merwe so heavily relied upon by the Court *a quo* is somewhat blunted by the submission by him to Mr. Shongwe of the drafts in question, Mr. Shongwe's reaction thereto and, at least one plausible inference which might arise from that submission and reaction. It should moreover be remembered that Mr. Shongwe's version in relation to the conclusion of the oral agreement and its terms was most tersely stated in the papers. There is in this regards no suggestion where and under what circumstances the agreement was concluded. Vagueness surrounds the time of the conclusion thereof and it may well be that Mr. Shongwe's version is based on a reconstruction of the conduct of Mr. Van Der Merwe as detailed in paragraphs [14] to [17], [19] to [20], [22] and [27] to [32].

[62] Despite the existence of a strong preponderance of probability in favour of the version of Mr. Shongwe, I am of the view that Mr. Van Der Merwe has raised a triable issue which simply cannot be ignored on the basis that it is contrived and does not constitute a *bona fide* dispute. The issue in my judgment cannot be resolved without oral evidence and the real advantages that such evidence holds for the trier of fact.

MISDIRECTION

[63] The findings of the Court *a quo* in both the Finrite and Tigerwit applications are factual in nature. A Court of appeal will not lightly interfere with factual findings. It will however do so where it is of persuasion that there has been a material misdirection which goes to the core of the matter. In that event the Court of appeal will be free to make its own findings in the matter (See in this regards *Taljaard v Sentrale Raad Koöp Assuransie Bpk* 1974 (2) SA 450 (AD) at 451 E - F; *Allie v Foodworld Stores Distribution Centre (Pty) Ltd* 2004 (2) SA 433 (SCA) at paragraph [37] to [41] and *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at paragraph [5].)

[64] I am respectfully of the view that the Court *a quo* misdirected itself in both matters by omitting to consider material facts.

THE APPROPRIATE REMEDY

[65] The appeals in both the Finrite and Tigerwit applications must be upheld.

- [66] The question now arises whether the applications ought simply to be dismissed with costs or whether they are to be referred to either trial or oral evidence.
- [67] I incline to the former approach. It must prior to their institution have been manifest to the applicants in both matters that there was a dispute of fact in relation to core issues. These disputes were proclaimed on a number of occasions. Despite this the applicants chose to proceed by way of application. They ought not to have done so. Moreover, the applicants chose to argue the matter before the Court *a quo* on the basis of the papers. They did not either prior to the commencement of argument or during the course thereof seek a referral either to trial or oral evidence. In these circumstances I am of the view that the application should simply have been dismissed with costs.

THE ORDER

In the result the following orders are issued:

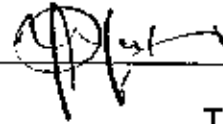
3. The appeals in relation to the applications under case numbers 7284/2021 and 8958/2021 are upheld with costs, such costs to include the costs consequent upon the engagement of two counsel.
4. The orders of the Court *a quo* are in each instance substituted with the following orders:

The application is dismissed with costs.


G Farber

ACTING JUDGE OF THE HIGH COURT

I agree



T P Mudau

JUDGE OF THE HIGH COURT

I agree



R M Keightley

JUDGE OF THE HIGH COURT

Date of Hearing: 31 May 2023

Date of Judgment: 15 June 2023

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