FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A150/2010

In the appeal between:-

KWIDI CHRISTOPHER MAKWABA	1st Appellant
MOLEFI SIMEON LITHEKO	2nd Appellant
ETAPELE INVESTS (PTY)(LTD)	3rd Appellant
MATHABA BUSINESS INVESTMENTS (PTY) LTD	4th Appellant
TSELA TSHOEU INVESTMENTS (PTY) LTD	5th Appellant
UMYEZO LEISURE INVESTMENTS (PTY) LTD	6th Appellant
BELEGA WOMAN'S INVESTMENTS (PTY) LTD	7th Appellant

and

SUN INTERNATIONAL (SOUTH AFRICA) LTD	Respondent

CORAM: WRIGHT, J *et* EBRAHIM J *et* C.J. MUSI, J

HEARD ON: 24 JANUARY 2011

JUDGMENT BY: WRIGHT, J

DELIVERED ON: 10 MARCH 2011

INTRODUCTION:

[1] This is an appeal against the judgment of and relief granted by the Honourable Ms Justice Van Zyl in this Court on 15 February 2010. The court order is attached as pages 621 to

622 of the record.

[2] Relief was granted to the appellants to appeal to this Court by Judge Van Zyl, and the appeal was heard on 24 January 2011.

[3] In this Court the respondent is Sun International South Africa Ltd who was the applicant in the original application. Seven of the respondents in the Court *a quo* are the appellants in this appeal to the Full Bench of this Division. They will be referred to as the appellants.

[4] When the application was originally lodged, the appellants filed a notice of intention to oppose the application. But, before the application was heard, the legal representatives of the appellants and the respondent agreed to an order substantially in accordance with the relief provided for in the notice of motion and which was then made an order of court on 31 January 2009. This order is set out in paragraph [1] of the judgment of the Court *a quo*.

CONCISE HISTORY OF THE FACTS LEADING UP TO APPLICATION

[5] Prior to 1994 the respondent obtained a gambling license and conducted a casino in terms thereof in the vicinity of Thaba Nchu, which was then situated in an "independent state" or "homeland", Bophuthatswana. This casino, one can accept or at least safely assume, afforded a wealth of employment opportunities, and thereby some financial relief for the inhabitants of the rural area wherein Thaba Nchu is situated.

[6] In the latter part of the 1990's and anticipating the changes which then were to take place in South Africa and would, *inter alia*, entail the legalisation of gambling, the respondent commenced with steps in preparation of transferring its gambling license to Bloemfontein.

[7] Considering the effect which such transferral would have on the community, the respondent chose to consult with leaders of the Thaba Nchu Community clearly in order to obtain support for his proposed application for a gambling license in Bloemfontein. The respondent obviously knew that its application would be fortified if it could show that some of the gains which would be obtained by operating a casino in

Bloemfontein, will continue to reach and benefit the Thaba Nchu community.

[8] In order to achieve this, the respondent planned to obtain a gambling licence in the name of a separate company to grant shares in such company to a trust which would be established for the benefit of the community and to a company whose shares would in turn belong to several other companies and whose shares would be held by individuals, approved by the Free State Gambling Board, who could receive profits emanating from the gambling facilities in the form of dividends. Mangaung Sun (Pty) Ltd (the tenth respondent in the original application) became the separate company and licensee and Thabo Community Trust, which holds 11.1% of its shares, was established for the benefit of the community, and plays no part in these proceedings.

[9] According to the respondent it obtained the services of the first and second respondents and a certain Dr. Mynhardt to implement these plans. This would be done by means of five companies which are the third, fourth, fifth, sixth and seventh appellants and which, according to respondent, were “shelf”

companies, and will also be referred to in these proceedings as shelf companies. According to the plan the fourth, fifth, sixth and seventh appellants would each receive a 25% share in the third appellant which would directly obtain certain shares in the company Mangaung Sun (Pty) Ltd, which company, as mentioned previously, was the tenth respondent in the original application. It can also be noted that some of the shelf companies originally had other names.

[10] According to the affidavit of Dr. Mynhardt, who conducted this process with the first and second appellants, the following was the position (although disputed to some extent by the appellants):

> "3.2 Die applikant het my, ter voorbereiding van die oordrag van die lisensie vanaf Thaba Nchu na Bloemfontein, genader om onder andere met agtergeblewe gemeenskappe in Botshabelo en Thaba Nchu distrikte te skakel ten einde by voormelde agtergeblewe gemeenskappe vas te stel wat die gemeenskapspersepsie is en sal wees rakende die oordrag en verskuiwing van applikant se casino lisensie en om aan applikant aanbevelings te maak oor hoe die

agtergeblewe gemeenskappe se behoeftes en verwagtings aangespreek kan word.

3.3 In uitvoering van my opdrag het ek gesprekvoering tussen die applikant en geselekteerde individue van die Thaba Nchu-Botshabelo gemeenskappe bewerkstellig en vir daardie doel individue geïdentifiseer wat, op sterkte van hulle ervaring in die gemeenskap, sinvolle insette kon lewer.

3.4 Ek het onder andere die eerste en tweede respondente as sodanige individue geïdentifiseer en hulle is op my aanbeveling deur die applikant na 'n vergadering genooi om voormelde doelstelling aan te spreek en te fasiliteer.

3.5 Die agtergeblewe gemeenskappe het op 'n demokratiese proses besluit wat ek kortliks 'n loodskomitee sal noem en ek het besluit dat die eerste en tweede respondente daarop moet dien.

3.6 Ek was saam met die eerste en tweede respondente nou betrokke by die strukturering van die verskillende entiteite wat die applikant in konsultasie met die agtergeblewe gemeenskappe en met hulle goedkeuring struktureer het ten einde die oordrag van die casino lisensie vanaf Thaba Nchu na Bloemfontein te fasiliteer."

[11] Whether a person qualified to hold shares depended thereon whether such person passed a probity test applied by the

Free State Gambling and Racing Board (the third respondent in the original application) but, moreover, such shareholders need to have been black in order to comply with black empowerment legislation and/or policies which the respondent knew, or envisaged, would be in place at the time when the application for the transferral of the gambling licence was to be considered.

[12] Although the first and second respondents maintained that they were at least primarily the representatives of the community, it was initially agreed between the respondent on the one hand and respectively the first appellant, the second appellant and Mynhardt on the other hand, that each of the other three would as compensation, or part compensation for their services, receive or be allocated .9% of the shares of the company which would hold the gambling license in Bloemfontein.

[13] However, subsequently and in June 2004, the respondent paid R200 000,00 to each of the said gentlemen (1st and 2nd respondents and Mynhardt) as a first instalment towards a total payment of R400 000,00 and in October 2005, paid a

further R200 000,00 to each of them.

[14] The respondent mentions in its founding affidavit to the application the following, which is strenuously denied by the appellants:

> "9.5 The first and second respondents would, by donation, transfer the shares in the companies to the shareholders who would be identified and qualified to obtain same.
>
> 9.6 The first and second respondents would resign as directors of the shelf-companies and effectively 'hand' the shelf-companies over to the shareholders.
>
> 9.7 The first and second respondents would not no longer hold any shares in either Mangaung Sun or Etapele, Mathabo, Tsela, Tshoeu, Umyezo and Belega."

[15] The appellants' version is further succinctly summarised in paragraph [14] of the court *a quo*'s judgment and their reply to respondent's main argument (set out in paragraphs [16] to [21] of the judgment) in paragraphs [22] to [25] of the judgment.

<u>MAJOR DISPUTE BETWEEN THE PARTIES</u>

[16] The major dispute between the parties relates to six

documents, which are attached as annexures "C1" to "C6" to the founding affidavit.

[17] The first appellant was involved in the first of these agreements as set out in annexure "C1" to the founding affidavit, and he signed this document personally. The relevant part reads as follows:

> "We initially agreed that you would be allocated a shareholding of 0,9% in Mangaung Sun (Pty) Ltd ("the Company") in recognition of and consideration for the services you had rendered in preparation of the Company's bid for a casino licence at Bloemfontein.
>
> We subsequently agreed. And it is hereby confirmed, that you will relinquish any right or expectation in respect of the aforesaid or any other shareholding in the Company. In stead, in recognition of and consideration for the aforesaid services you had rendered, we shall pay to you the sum of R400 000.00 (four hundred thousand rand) in two equal instalments, as follows:
>
> - R200 000.00 forthwith upon the final and irreversible announcement of the

approval of the Company's applications to the Free State Gambling and Racing Board to conduct a casino operation at Bloemfontein, following, if applicable, the determination in favour of the Company of any review, appeal or other proceedings to which the said announcement may be subject; and

- R200 000.00 forthwith upon the opening by the Company of the aforesaid casino to paying members of the public.

You undertake that neither you nor any member of your immediate family, each of whom you hereby represent to be authorised to bind hereto, will seek to become a direct or indirect shareholder of the Company, except by means of publicity traded shares on a recognised stock exchange.” (My emphasis)

He also signed annexure “C2” which contains the following:

“In terms of our letter of agreement dated 23 July 2003, payment of the first instalment of R200 000,00 is now due to you following the successful outcome of Mangaung Sun’s application to conduct a casino project at Bloemfontein.

We take the opportunity to confirm our understanding that our agreement will furthermore entail that you will henceforth have no direct or indirect contact, communication or liaison with any of the directors, trustees or other decisionmaking structures of our company or any of the legal entities which own form part or are otherwise related or associated to us, in regard to any aspect of the business affairs of Mangaung Sun (Pty) Ltd.

Your failure to adhere to this could jeopardise the second instalment which is still due to you, and also lead to other steps being taken against you.”

[18] On 7 October 2005 a further letter was written on behalf of respondent to the first appellant which was delivered by

hand, and this document is attached as annexure “C3” to the founding affidavit. The relevant portion reads as follows:

> “Attached hereto is a copy of the letter of agreement entered into with you on 24 July 2003, in terms of which the second and final instalment of R200 000,00 will be paid in today or against receipt of your bank account details.
>
> We take this opportunity to remind you of the terms of our agreement as set out in the attached letter, and in particular the undertaking on the part of you and your family not to have any direct or indirect shareholder involvement with Mangaung Sun (Pty) Ltd. We expect this undertaking to be honoured and will protect Mangaung Sun’s rights accordingly.”

[19] Similar written agreements were concluded with the second respondent as will appear from annexures “C4” and “C5” and the letter dated 7 October 2005 (annexure “C6”). It is also common cause that the first and second respondents indeed received payment of the amount of R400 000,00 which amount was also paid to Dr. Mynhardt.

[20] In the judgment of the Court *a quo* the abovementioned documents are set out completely, as well as the appellants’ version with regard to these agreements as set out in the

opposing affidavit. According to them the appellants would be entitled to retain their shares in the shelf companies and they only signed the documents in question because if they did not sign, they would forfeit the last payment of R200 000,00 which would be paid to them as a final payment. They consequently alleged that there was no consensus between the parties to the agreement as set out by respondent. The Court *a quo* therefore, with reference to the three requisites for the granting of a final interdict, the well-known judgments in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (AD) at 634 H – 635 C and **COOPERS & LYBRAND AND OTHERS v BRYANT** 1995 (3) SA 761 (A) at 767 E – 768 E, considered the various arguments with regard to the agreements relied upon by the respondent. The Court *a quo* also took pains to point out that other cases accentuated the fact that businessmen do not always use language with the precision which commends itself to lawyers, and that sometimes the most important agreements are set out in crude and summary fashion.

[21] The Court *a quo* then proceeded to exhaustively consider all

the arguments raised by the legal representatives of the parties with regard to these agreements, and its conclusions cannot be faulted as most (practically all) of these arguments were not repeated in either the heads of argument filed in this appeal or in the arguments addressed to the court in this appeal. It is unnecessary to deal with all these points, and this judgment will concentrate on the arguments on which the appellants mainly relied during this appeal.

[22] However mention must be made of the following conclusions which the Court *a quo* came to:

(a) that there was no distinction drawn between first and second respondents on the one hand and Mynhardt on the other hand. It is clear that Mynhardt was prepared to accept the amount and was no longer involved in legal proceedings against the respondent.

(b) With regard to the argument that annexures "C1" to "C6" only referred to the ,9% shareholding in Mangaung Sun (the original tenth respondent), the Court *a quo* specifically referred to the following words:

> "We subsequently agreed and it is hereby confirmed that

> you will relinquish any right of expectation in respect of the aforesaid or <u>any other shareholding in the company</u>."
> (The Court *a quo*'s emphasis)

The Court *a quo* therefore came to the conclusion that to accept that the first and second appellants will retain an indirect shareholding in the company (Mangaung Sun) by means of their shareholding in one of the shelf companies would be inconsistent with the further paragraph that they will not in future seek to become indirect shareholders of Mangaung Sun. It would also lead to an absurdity to interpret paragraph 2 of the 2003 agreements to mean, or to have result, that first and second appellants would retain their indirect shareholding in Mangaung Sun because they can obviously not be shareholders in the shelf companies but then not be allowed to have contact with the directors etc. of those companies.

(c) The Court *a quo* also found confirmation of the aforesaid interpretation from the relevant background circumstances from which it was clear to her that the contract concluded was to cause a "clean-break" with the first and second appellants. She then says the following:

"Both the representatives of the applicant on the one hand and the First and Second Respondents on the other hand, at that stage knew that First and Second Respondents' entitlement to a retainer has lapsed, but that the other two (then still outstanding) elements or forms of benefits that were previously discussed and agreed upon to a certain extent, were the direct and the indirect shareholding in Mangaung Sun. These are therefore matters that were probably present to the minds of the parties when they concluded these 2003 agreements. With this in mind, and considering the further contents of the 2003 agreements, as well as that of the 2004 agreements, the words 'any other shareholding in the company' can only be interpreted as to mean that the parties intended in that way to refer to the indirect shareholding by means of the shareholding in Sixth to Ninth Respondents."

(d) The Court *a quo* stated the following with regard to the 2004 agreements:

"[47] With regard to the interpretation of the **2004** agreements, I am of the view that the intention of the parties is very

> clear from the pain and ordinary meaning of the words used therein. It is also in no way contradictory to or destructive of the terms of the **2003** agreements, because it specifically uses the word '*furthermore*' which is indicative of the fact that this agreement with regard to an undertaking not to have any contact in any manner with the directors etc. of **Mangaung Sun** or any of the legal entities related to **Mangaung Sun**, was a subsequent agreement in addition to the agreement concluded in **2003**. At the same time it in any event also corresponds with and constitutes an almost natural consequence of what was previously agreed in the **2003** agreements."

(e) The Court *a quo* specifically points out why the 2005 letters cannot only refer to the 2003 agreements and not to the 2004 agreements, and concludes that the primary reason why reference was made to the 2003 agreements, was to refresh first and second appellants' memory as to why the second payment of R200 000,00 was then due and payable, and nothing more and nothing less.

(f) The Court *a quo* consequently came to the conclusion that the contracts in question could not be interpreted as the appellants alleged in their opposing affidavits and that appellants attempt to rely on a lack of consensus with regard to the said agreements could not be accepted.

(g) The Court *a quo* also mentions the following with regard to a possible defence based on undue influence:

> "Insofar as First and Second Respondents purported to rely thereon that they entered into the written agreements under undue influence, they bore a burden of proof that they are not bound by the terms and conditions of the agreements on the strength thereof. Respondents dismally failed to show this and Mr Daffue, correctly so, conceded this during his argument."

[23] With regard to the applicable company law principles this aspect was never referred to in argument before this court, and the Court *a quo*'s conclusions with regard thereto, as set out in paragraphs 52 to 55 of her judgement, can be accepted.

<u>THE APPELLANTS' ARGUMENT RAISED ON APPEAL</u>

[24] Mr. Van Rhyn, who appeared on behalf of the appellants, argued that in deciding whether there is sufficient doubt with

regard to respondent's case, the court must take cognisance of both parties' conduct before and after the agreement in question. The court should not easily decide the matter in one party's favour where there is a factual dispute which may raise some doubt with regard to the respondent's version. In this regard he then referred to **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD**, *supra*, as confirmed by the Constitutional Court in **THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS; ZUMA v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS** 2009 (1) SA 1 (CC) at p. 18 J, as well as **McCAIN FROZEN FOODS (PTY) LTD v BEESTEPAN BOERDERY (PTY) LTD** 2003 (3) SA 605 (TPD).

[25] Although the final payments were made to the first and second appellants in October 2005, they were still dealing with the shares at a much later date. Mr. Van Rhyn referred in this regard to sub-paragraph 12.6 of the appellants' version as set out in the opposing affidavit. He also referred to the letter written by respondent on 24 April 2001, and attached as annexure "16" in volume 4 of the papers. This

document, however, more readily supports the respondent's version and is dated 24 April 2001, that is before annexures "C1" – "C6" were written.

[26] The respondent dealt with this aspect when it became aware that the first and second appellants were still holding meetings, and mentions the following in the founding affidavit:

> "40.2 The applicant [referring to Sun International] only became aware of the majority of the facts herein contained and the state of affairs after Laura Grobler had consulted with Phatshoane Henney Inc, with whom Liebenberg is associated, on 16 July 2009. During her consultation with counsel on 16 July 2009, Liebenberg telephonically discussed and pointed out the consequences to me. I immediately requested a memorandum setting out same, in order to afford the directors of the applicant an opportunity to consider the applicant's position. This memorandum was e-mailed to me on 16 July 2009 and it was only on receipt thereof that the magnitude of matters were fully realized and appreciated."

A good reason was, therefore, given why no action was taken at an earlier date. Mr. Van Rhyn however reiterated that this aspect could only be resolved by evidence, and therefore requested that if the court did not reject respondent's version on the papers, the matter should have been referred to oral evidence.

[27] With regard to the submission in appellants' heads of argument (though not mentioned in argument) that Mynhardt would have received a much better deal from respondent than first and second appellants (because he would not relinquish shares in the third to seventh appellant), this had been fully dealt with by the Court *a quo* in the following paragraphs:

> "However, this submission loses sight of the fact that it is evident from the aforesaid annexures '13', '14' and '16' that Applicant throughout its dealings and negotiations with the three promoters, dealt with them on the exact same footing. At no stage was any distinction drawn between First and Second Respondents on the one hand and **Mynhardt** on the other hand. This lack of distinction between them can probably be explained by the fact that it appears that **Mynhardt**, at that stage, also received benefits as a result of **Kgutso Promotions'** indirect shareholding in **Mangaung Sun**, as he clearly was involved with

Kgutso Promotions, as was, *inter alia*, evident from the following that was stated in annexure '14':

> 'We note your nomination of dr. Mynhardt as the new Kgotso representative. ... The nomination of dr. Mynhardt presumably arises from his participation in Kgutso Promotions.'

[41] Therefore, in my view, the agreed benefits (at that time) which the three promoters were to derive as a result of their services rendered to and on behalf of Applicant, consisted, with regard to all three of them, of three elements, being a retainer fee, promised direct shareholding in **Mangaung Sun** and benefits via indirect shareholding in **Mangaung Sun** and/or participation in a company which held or was to hold indirect shareholding in **Mangaung Sun**.

[42] However, the Applicant avers that subsequent to the aforesaid agreement and superseding that agreement, it concluded an agreement with all three the promoters with the essential effect that in lieu of all the benefits the three promoters would previously have received, they agreed to each receive **R400 000.00**, payable in two payments, on condition that they no longer have any involvement

whatsoever with **Mangaung Sun** and/or Fifth to Ninth Respondents. Considering that it is evident that First and Second Respondents during the alleged conclusion of this agreement, were no longer receiving any retainer fee and at that stage they would obviously not have started receiving any dividends as a result of their direct or indirect shareholding in **Mangaung Sun**, **Mynhardt's** allegation to the effect that at that stage First and Second Respondents were desirous to rather receive the **R400 000.00** instead of the benefits of shareholding, even to the extent that they did not take up his suggestion that they demand **R500 000.00**, has in my view an inherent credibility to it."

[28] With regard to the Court *a quo*'s reliance on **NOVICK AND ANOTHER v COMAIR HOLDINGS LTD AND OTHERS** 1979 (2) SA 116 (W) at 131 A – D, appellants quote from the following **LAMBONS (EDMS) BPK v BMW (SUID-AFRIKA) (EDMS) BPK** 1997 (4) SA 141 (SCA) at 154 C:

> "Ek vind dit hoogs onwaarskynlik dat 'n groot organisasie soos die respondent so 'n belangrike en ingewikkelde ooreenkoms sommer informeel met 'n enkele opmerking oor die telefoon sou sluit."

In their heads of argument Mr. Wessels replied to this that the **BMW** matter referred to an oral agreement while the contracts involved in this matter are in writing, and that the matter is therefore distinguishable.

[29] All further relevant arguments raised by appellants are dealt with in the remaining paragraphs of this judgment.

RESPONDENT'S REPLY TO THE APPELLANTS' MAIN ARGUMENT

[30] Mr. Wessels, who together with Mr. Gilliland, appeared for the respondent argued that where there is no real, genuine or *bona fide* dispute of fact, or where the facts which appear in the opposing affidavit are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers, the court has a duty to grant an order in terms of the application. This is especially so where the respondent was obliged to approach the court to obtain the interdict.

[31] In this respect Mr. Wessels referred to the matter of

<u>WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD AND ANOTHER</u> 2008 (3) SA 371 (SCA) where the following paragraph is specifically of importance:

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other

> party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[32] Mr. Wessels also argued that in an application of this nature, which essentially entails an order for specific performance of a prohibition, a referral to oral evidence will serve no purpose as oral evidence will most probably not contribute to the question whether the court should exercise its discretion to grant an order or specific performance. In this respect he referred to **TROSKIE EN 'N ANDER v VAN DER WALT** 1994 (3) SA 545 (O).

[33] In short, the respondent argued that according to appellants there was no consensus when the documents (annexure "C1 – "C6") were signed, but they do not explain or accurately reflect why there was no consensus.

[34] As appears from a letter written by respondent to the second appellant as early as 24 April 2001 it is set out that the first and second appellants received certain sums of money (the first appellant R430 000,00 and second appellant R143 000,00) to cover their costs and time (which is set out in the documents). They also mentioned that they have completed the period of promoter activity and that the continuance of any promoter activity, as well as any remuneration applicable, will need to be approved by the respondents. See annexure “16” on page 283 of the record.

[35] It is also common cause that the two amounts of R200 000,00 each were paid by the respondent to first and second appellants during June 2004 and October 2005 respectively and that after termination by the respondent of the promoter relationship with the first appellant and second appellant, the latter two could not have acted as promoters on behalf of the respondents.

[36] The second appellant’s resignation as the then sole director of Tsela Tshoeu Investment and Umyezo Leisure Etapele Investments took place on 17 June 2003 and 23 October

2003 as appears from annexure “G1” to the founding affidavit on p. 134 of the papers, as well as annexure “D2” thereto on p. 87 of the papers. The first appellant also resigned as the then sole director of Mathabo Investments on 8 July 2003 as appears from annexure “F3” on p. 102 of the papers. Reference can also be made to the fact that the submission of Mathabo Investments membership list to the Free State Gambling Board, as attached as annexure “F12” on pp. 126 – 127, indicates that neither the first nor the second appellant would be a member, or a shareholder, of the latter company.

[37] The respondent is in agreement with the argument raised by the appellants that the court can look at the events which took place before and after the documents in question (annexure “C1” – “C6”) to interpret these documents and the abovementioned documents (referred to in paragraph [36]) and the timing thereof (2003) confirm the respondent’s version with regard to what took place immediately after the signing of the first agreement. (Annexure “C1” and “C4” were signed on 24 July 2003.) That was shortly before the first and second appellants resignations as referred to above.

[38] Mr. Wessels also pointed out that the first and second appellants' version loses sight of the "Special Terms and Conditions" attached to the licence granted to Mangaung Sun, the result of which is that the shareholding of the empowerment companies can never be said to be the appellants' sole prerogative.

[39] The confirmation of these aspects can also be inferred from the transferral of shares as set out in annexure 18C to the opposing affidavit on p. 294 of the papers as well as paragraph 1.2 of annexure 26 to the opposing affidavit on p. 305 of the papers. The date of the latter document is March 2007! It is quite clear that the shares had already been transferred long ago.

[40] One gets the impression that Mr. Wessels's argument is correct that the first and second appellants originally took steps to implement annexure "C1" – "C6", but later changed their minds and decided to see if they could reap further benefits from obtaining, or holding, shares in the companies in question.

[41] With regard to the appellants' second ground of appeal as set out in the notice of appeal (and which was not proceeded within argument), the respondent argued that if the court finds that the agreements between the first appellant and the second appellant on the one hand and the respondent on the other is valid and binding then, surely, the respondent may prescribe the shareholding of the empowerment company to the extent and limited thereto that the first appellant and second appellant may not be shareholders thereof.

[42] The first and second appellants' lame explanation for (and bold and unsubstantiated averment that) the payment of R400 000,00 and/or the second payment of R200 000,00 was apparently, and to some extent, accepted under duress, emphasises their inability to explain the fact that they, objectively spoken, and for a considerable period of time, accepted the terms and conditions recorded in the letters. The external manifestation, and subsequent conduct of the parties, confirm the conclusion of the agreement, for example:

(a) the first and second appellants' resignation as directors of some or all the empowerment companies; and

(b) the submission of a members list (of the empowerment companies) which excluded the first and second appellants.

[43] Mr. Wessels argued further that the meetings held later (and mainly after 2005) were unilaterally convened by first appellant and second appellant to hijack the empowerment companies. Confirmation thereof is to be found, according to Mr. Wessels, in the following:

(a) Paragraphs of the founding affidavit which read as follows:

"23.1 I respectfully refer the Honourable Court to annexure 'F11' hereto, being a copy of a letter addressed to the General Manager: Free State Operations of the Windmill Casino and Entertainment Centre (thus the Tenth Respondent). In paragraph 7 of the letter it is clearly indicated that one **Fezile Flip Wetes** is disqualified to be a shareholder of Mathabo Business Investments (Pty) Ltd. When annexure 'F9' and 'F10' are read in conjunction and in context, it is clear that **Fezile Flip Wettes** was awarded a share in Mathabo. This is but a single example of the chaos which the First Respondent has and is in the process of causing, since the issue of shares to **Wettes** was in disregard of the fact that he never qualified to hold shares in Mathabo. Such conduct no only prejudiced the Applicant but, jeopardised the validity of the casino license awarded to the Tenth Respondent by the Board as the conditions for the license have thereby been breached.

23.2 To compound the problem, the First Respondent retained shares in Mathabo despite informing the Board, as per annexure 'F12', which was an annexure to Mathabo's business history disclosure form and which formed part of Mangaung Sun's casino license application, that he would not be a shareholder of Mathabo. The result thereof is that the First Respondent was never probed to qualify to become a shareholder by the Board, which is a prerequisite for shareholding in Mathabo (due to the fact that it has an interest in the gambling industry). This fact further contravenes the Tenth Respondent's obligation to comply with the casino license conditions.

23.3 Moreover, the First Respondent has caused himself to be an indirect shareholder of Mangaung Sun, as he is a shareholder of Mathabo which, in turn, holds shares in Etapele which, in turn, holds shares in Mangaung Sun. He also, as a consequence, has '*indirect contact, communication or liaison with any of the directors,* *trustees or other decision making structures of our company (the Applicant) or any of the legal entities which own, form part of or are otherwise related or associated to us (the Applicant), in regard to any aspect of the business or affairs of Mangaung Sun (Pty) Ltd*'."

(b) The second appellant resigned as a director of Tsela Tshoeu Investments on 8 July 2003. The second appellant's contention therefore that he, during July 2009, was the sole shareholder of Tsela Tshoeu Investments despite the terms of his agreement with respondent, justified the order that he be prohibited from contravening a meeting of shareholders of Tsela Tshoeu Investments.

(c) The same argument applies to second appellant's involvement in the convening of meetings of shareholders of Imyezo Leisure Investments and Belega Women's Investments.

[44] Mr. Wessels therefore argued that the first and second appellants' role in convening the meetings, justified the respondent's steps to prohibit any further meetings of the empowerment companies, which prohibition is clearly aimed

at unlawful meetings until the shareholding in or of the empowerment companies has been established by an order of court.

[45] The above contentions, which can generally be accepted, overwhelmingly refute the second appellant's contentions with regard to the signing of annexure "C1" – "C6", and also confirm that the Court *a quo* was correct in rejecting first and second appellants' version as false and untenable, and that it was entitled to adjudicate the application on the evidence presented by the respondent. Although it is not necessary to decide, as Mr. Wessels contends, that first and second appellants have (or attempted to) hijack the shelf companies, it can be concluded that when considering the facts and circumstances before and after the annexure C agreements were concluded, there is no reason to doubt that these agreements are binding, and the appeal can therefore not succeed.

COSTS AND ORDER

[46] Mr. Wessels argued that the application is voluminous and involved both, in respect of the facts and the applicable legal

principles, and that the respondent's employment of two counsel was therefore prudent. This was not disputed by Mr. Van Rhyn.

[47] The following order is therefore made:

1. The appeal is dismissed with costs.
2. The respondent is entitled to the costs of two counsel.

G.F. WRIGHT, J

I concur.

S. EBRAHIM, J

I concur.

C.J. MUSI, J

On behalf of appellants: Adv. A.J.R. van Rhyn SC
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On behalf of respondent: | Adv. M.H. Wessels SC
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/sp