

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 2022/042145

DOH: 20 September 2023

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

SIGNATURE

**28 May 2024
DATE**

In the matter between:

NEW SALT ROCK CITY (PTY) LTD

First Applicant

ZAMIEN INVESTMENTS 102 (PTY) LTD

Second Applicant

CSHELL 80 (PTY) LTD

Third Applicant

And

KILKEN PLATINUM (PTY) LTD

First Respondent

KILKEN HOLDINGS (PTY) LTD	Second Respondent
KILKEN INVESTMENTS (PTY) LTD	Third Respondent
KILKEN ENTERPRISES (PTY) LTD	Fourth Respondent
DAVID GAVIN WILLOUGHBY	Fifth Respondent
SALIM AHMED BOBAT	Sixth Respondent
MIKAEEL MOTI	Seventh Respondent
IZAK SIEWERT WIID ROSSOUW	Eighth Respondent
ZUNAID ABBAS MOTI	Ninth Respondent
K2016200284 (PTY) LTD	Tenth Respondent
CLEVEPARK (PTY) LTD	Eleventh Respondent
GLENCORE INTERNATIONAL AG LIMITED	Twelfth Respondent
IMBANI MINERALS (PTY) LTD	Thirteenth Respondent
RUSTENBURG PLATINUM MINES LIMITED	Fourteenth Respondent
SOUTH AFRICAN REVENUE SERVICE	Fifteenth Respondent
MAHENDREN MOODLEY	Sixteenth Respondent

MANOGH MAHARAJ

Seventeenth Respondent

ASHRUF KAKA

Eighteenth Respondent

JUDGMENT

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON
CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 28
MAY 2024**

BAM J

A. Introduction

1. This is an interlocutory application to strike out a number of allegations, words, and annexures contained in the applicants' founding and replying affidavits, on the basis that the allegations, words, and annexures constitute evidence obtained by theft or illegal means, are argumentative, scandalous and/or vexatious, irrelevant and/or constitute impermissible attacks on credibility, and/or constitute a new matter.
2. The application is brought against the back drop of an application to declare the fifth, sixth, seventh, and eighteenth respondents delinquent directors as envisaged in Section 162(2) of the Companies Act¹ (the Act) together with ancillary relief (the main application). The main application is not before me.

¹ Act 71 of 2008.

The interlocutory application is brought by the first to the ninth, the eleventh, and eighteenth respondents in the main application, to whom I shall, for ease of reference continue to refer to as the Kilken respondents. I refer to the applicants as such.

B. The Law

i) Argumentative, scandalous, vexatious, and irrelevant matter, including impermissible attacks on credibility

3. It is convenient to begin by mapping out the law regulating the striking out of various matters. Rule 6(15) of the Uniform Rules reads:

‘The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.’

4. In *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others*, it was said that:

‘The rationale behind the striking out jurisdiction of the court is sound. It promotes orderly ventilation of the issues, promotes focus on the real issues, prevents proliferation of issues, unnecessary prolix and irrelevancies that unduly burden records in application proceedings.’²

5. The court in *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* described scandalous, vexatious, and irrelevant allegations thus:

² (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) (19 March 2015), paragraph 120.

‘Scandalous’ allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a “vexatious” matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and “irrelevant” allegations do not apply to the matter in hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.³

6. In the context of the material sought to be struck out in the Helen Suzman application, the court further commented:

[29] The allegations in the struck-out material amount to reckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process. The object appears to be to scandalise and use the court to spread political propaganda...

[30] These assertions or conclusions are scandalous, vexatious or irrelevant.

Courts should not lightly allow vitriolic statements of this kind to form part of the record or as evidence. And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of robustness.⁴

7. Included in the material that should find no accommodation or space in a proper court process would be attacks on credibility made on affidavit, which the respondents are complaining about in the present proceedings. Two requirements must be met before a striking out application can succeed. They are:

‘(i) the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; and,

³ (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014), paragraph 27.

⁴ note 3, paragraph 29 - 30.

- (ii) the court must be satisfied that if such a matter is not struck out, the party seeking such relief would be prejudiced.⁵

8. On the meaning of prejudice, the court in *Gordhan and Others v Public Protector and Others*, said that:

‘The phrase ‘prejudice to the applicant’s case’ clearly does not mean that, if the offending allegations remain, the innocent party’s chances of success will be reduced. It is substantially less than that.... If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party.’⁶

ii) New matter on reply

9. On the question of a new matter in a replying affidavit, it is trite that an applicant must make their case in the founding affidavit for that is the case which the respondent is called upon to either affirm or deny.⁷ The respondent is given one opportunity only to deal with the applicant’s cause of action and present evidence in opposition in the answering affidavit.⁸

iii) Evidence obtained by theft or illegal means

10. The legal position with regard to information obtained by theft or illegal means was dealt with in *Financial Mail (Pty) Ltd. and Others v Sage Holdings Ltd. and Another*⁹. There the court observed that an invasion of privacy may

⁵ *Beinash v Wixley* (457/95) [1997] ZASCA 32; 1997 (3) SA 721 (SCA); [1997] 2 All SA 241 (A); (27 March 1997), at p 24; *Lawyers for Human Rights v Minister in the Presidency and Others* (CCT120/16) [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) (1 December 2016), paragraph 19; *Gordhan and Others v Public Protector and Others* (36099/2098) [2020] ZAGPPHC 777 (17 December 2020), paragraph 61.

⁶ (36099/2098) [2020] ZAGPPHC 777 (17 December), paragraph 62.

⁷ *Director of Hospital Services v Mistry* (272/77) [1978] ZASCA 126 (9 November 1978).

⁸ *Gold Fields Limited and Others v Motley Rice LLC*, In re: *Nkala v Harmony Gold Mining Company Limited and Others* (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) (19 March 2015), paragraph 122.

⁹ (612/90) [1993] ZASCA 3; 1993 (2) SA 451 (AD); [1993] 2 All SA 109 (A) (18 February 1993)

take the form of: (i) an unlawful intrusion upon the personal privacy of another and (ii) the unlawful publication of private facts about a person. The court further noted that in demarcating the boundary between lawfulness and unlawfulness, a court must have regard to the particular facts of the case and judge them according to the contemporary *boni mores* (legal convictions of the community) and general sense of justice as perceived by the court.¹⁰

11. Illustrating the careful balancing act that a court would be called upon to do, the court in *Financial Mail* referred to the English case of *Lion Laboratories Ltd v Evans and Others* [1984] 2 All E R 417 (CA). The facts in the *Evans* case briefly were: the plaintiff, a manufacturer of an instrument used to measure the level of intoxication by alcohol, discovered that two technicians who had worked on the instrument and had thereafter left the plaintiff's employ had stolen copies of the plaintiff's internal and confidential correspondence, which indicated doubts as to the reliability and accuracy of the instrument. The technicians had furnished the same correspondence to a national daily newspaper for publication. The plaintiff managed to obtain an injunction (pending trial) against the newspaper restraining publication.

12. On appeal, the injunction was discharged with the court reasoning that even though the confidential information had been unlawfully obtained, it was necessary to weigh two competing public interests: firstly the public interest in the preservation of the right of organisations to keep secret confidential

¹⁰ The legal convictions of the community, since the advent of the Constitution, are now informed by the norms and values underpinning the Constitution, *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4, paragraph 34.

information and, secondly, the interest of the public in being kept informed of matters which are of real public concern. In that case, this meant weighing the public interest in maintaining the right of the plaintiff company to keep secret confidential information against the public interest in the accuracy and reliability of an instrument on which depended the liability of a person to be convicted and punished for a drink-driving offence. The court concluded the latter interest should prevail.

13. In *Bernstein and Others v Bester NO and Others*, the main issue pivoted around the legal and constitutional validity of Sections 417 and 418 of the Companies Act, Act 61 of 1973. The attack included the ground that the whole mechanism created under the two sections violates, amongst others, the right to personal privacy. In the course of entertaining the question whether the sections violated the right to privacy, the court, per Ackerman J, noted:

‘.....The honest conduct of the affairs of companies is a matter of great public concern today.’

This is particularly the case in South Africa at present. Such honest conduct cannot be ensured unless dishonest conduct, when it occurs, is exposed and punished and ill-gotten gains restored to the company.’¹¹

The court further remarked:

‘...Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.’

¹¹ (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 (27 March 1996), paragraph 50, 67

C. Background

14. In order to appreciate the complaints raised by the respondents, it is necessary to set out a generous background. For ease of reading, the background is arranged along the following headings: (i) the relationship between the applicants and the first to the fourth respondents; (ii) the Interdict proceedings; (iii) the Sec 163 application; iv) the settlement of the Sec 163 application; and v) referral to Case Management; and vi) the alleged discovery of evidence of further prejudicial conduct.

i) Relationship between the applicants and the first to the fourth respondents

15. The applicants are minority shareholders in the first respondent, Kilken Platinum (Pty) Ltd, with a stake of 35.1% shareholding. The majority stake of 64.9% is held by the second, third and fourth respondents. The parties' relationship is governed by, amongst others, the Shareholders' Agreement (SA), Memorandum of Incorporation (MOI) and the provisions of the Act. The first respondent carries on business as partnership/joint venture with the thirteenth respondent as Kilken/Imbani JV. The main business of the first respondent is the treatment of low grade concentrate¹² which it sells back to the RPM, the fourteenth respondent.

ii) The Interdict proceedings

16. A dispute arose between the applicants and the first respondent, during April 2021 which led to the applicants issuing a demand in terms of Section 345

¹² arising from the mining of Platinum Group-metals

(1) of the Companies Act 61 of 1973 (the Old Act). The demand saw the first respondent launching urgent proceedings during the month of May in the Durban High Court to interdict the applicants from liquidating it (the Interdict Proceedings). Those proceedings culminated in a consensual order.

(iii) The Sec 163 application

17. After the interdict proceedings, and in order for the parties to resolve their differences, a meeting was held. The meeting was called by Zunaid Moti, the ninth respondent in the present proceedings, as a representative of the majority shareholders in first respondent and it was attended by him and Lutzkie, where Lutzkie represented the applicants. Those discussions, it would appear, came to nought for, on 23 July 2021, the applicants, led by Lutzkie, launched an urgent motion for relief from oppressive or prejudicial conduct, as provided for in Section 163 of the Act, where the applicants raised a plethora of complaints.

18. Among the complaints raised by the applicants were the following: a) they have been prevented or denied free and unfettered access to the first respondent's financial records and or books of accounts; b) they have been excluded from managing the affairs of the first respondent, whereas in terms of the SA they were entitled to elect 50% of the Board's representation; c) the majority were obstructing calls for shareholder meetings; and d) the affairs of the first respondent were being conducted in a reckless and prejudicial manner that disregarded the applicants' interests.

19. The respondents refuted all allegations of oppressive or prejudicial conduct and provided positive evidence to substantiate their defence. The respondents claimed, as they do in the present proceedings, that the application was part of a series of abusive strike litigation brought by the applicants in order to paralyse and destroy value in the first respondent. It was further claimed that the application was brought to coerce the respondents to submit to the extortionate demand made by Lutzkie during the meeting in June 2021 that the majority buy out the applicants for R800 million. Lutzkie and the applicants deny the claims of extortion and the attendant threat. However, they maintained, as they do in these proceedings, that that price was not out of kilter with the value of the first respondent.

iv) Settlement of the Sec 163 application

20. The application was enrolled for 31 August 2021 but was not heard on that day. Instead, it was scheduled to be heard on 16 February 2022 by way of special allocation. On the eve of the hearing (15 February 2022), the applicants sought an order referring the disputes in the Sec 163 application, including the question whether a valid settlement agreement had been concluded, to trial. The court did not grant the order. Instead, in May 2022, when it delivered its judgment, it found that the Sec 163 application had indeed been compromised/resolved by the October 2021 settlement agreement and ordered that the application be removed from the roll. The applicants were called upon to pay the costs of the application, including the costs occasioned by the employment of two counsel.

v) Referral to case management

21. It is common cause that nothing came of the settlement agreement. Both sides claim that the other breached agreement. In June 2022, the applicants cancelled the settlement agreement, which the respondents accepted as a further repudiation of the agreement on the part of the applicants. In August 2022, the applicants instituted proceedings on motion to recover what they claimed was due to them based on the respondents' alleged failure to perform in terms of the settlement agreement. This application is referred to between the parties as the Rouwkoop application.

22. By November 2022, there were four applications pending between the parties. They are, the Sec 163 application; the Rouwkoop application; the Winding Up application - issued in August 2022; and the Delinquency application - issued in November, from which the present interlocutory application to strike out springs. All four applications are opposed. The parties eventually found their way to Judicial Case Management during or about November 2022.

vi) Discovery of evidence of further prejudicial conduct

23. Following the case management meeting of April 2023, the respondents, in the Sec 163 application, provided access to the applicants to various records pertaining to the first respondent. Arising out of the information/records shared, the applicants claimed, in advancement of their case for relief against oppressive conduct, that they had discovered various unknown commercial transactions evidencing further prejudicial conduct on the part of the

respondents. The two transactions identified by the applicants are referred to by the parties as the KCo obligation and the Mazetti Management Fee. Mazetti Management Services (Pty) Ltd, (Mazetti) is an entity within the Moti Group of Companies. The first to the fourth are part of the same group. In terms of the Mazetti transaction, the first respondent paid R33 million to Mazetti, in respect of services rendered. The applicants claim that the transaction is a simulated exercise.

24. In so far as the KCo obligation goes, it is in fact a composite transaction made up of four related transactions. They are, (a) the Sale of Claims Agreement between Clevepark (Pty) Ltd, Clevepark, and Glencore, the twelfth respondent. Clevepark is an entity within the Moti Group of Companies; (b) the Security Cession involving the first respondent, Glencore and Rustenburg Platinum Mines, (RPM); (c) the Payment Direction Letter issued by the first respondent to RPM; and (d) the Facility Agreement, referred to as the DFF Facility by the respondents.

25. For present purposes, it needs to be born in mind that the respondents contend that the KCo obligation is funded from the first respondents free cashflows, and in that regard, has no bearing on the applicants' interests. The applicants contend otherwise. They claim that the entire income of the first respondent was ceded to Glencore. They claim that this was done without any corresponding benefit to the first respondent. The respondents are dismissive of the applicants' claims that they did not know about the KCo agreement. They say that not only did Lutzkie know about the KCo obligation, he agreed to it. As

for the Mazetti agreement, the respondents refer to the SA which provides that both shareholder groups will provide management and operational services to the first respondent. They state that Mazetti provided services to the first respondent and had to be paid accordingly.

26. Finally, the applicants claim that the first respondents' financial statements for 2020 (financials) are defective/fraudulent. This allegation too is disputed by the respondents.

D. Respondents' case for strike out

27. It is now appropriate to consider the respondents' application to strike out the various material from the applicants' founding and replying affidavits. Owing the large amount of material identified for striking out, it is convenient to approach the matter by following the themes set out in the Notice of Motion. It must be noted that certain of the material is liable to be struck out on several bases. In this regard, it may appear that there is unnecessary repetition but this is not the case.

(a) Evidence obtained by theft / illegally

28. The facts leading to the conclusion that certain evidence was obtained by theft or illegal means appear to be common cause or are not seriously disputed.¹³ The information appears to have been stolen by one van Niekerk, an erstwhile employee of the Moti Group. I refer in this regard to a decision of

¹³ The applicants' response is that they have no knowledge.

this court in *Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others*¹⁴.

29. What needs to be noted for present purposes is this: while the respondents refer to the annexed transcript relating to proceedings for the release of Mr van Niekerk from custody in Durban, and state that Lutzkie testified that van Niekerk gave him the stolen information, the transcript does not quite state so. The transcript demonstrates that Lutzkie testified that van Niekerk showed him the stolen information¹⁵.

30. The respondents further set out reasons for the court to consider exercising its discretion in favour of striking out the information obtained by theft. They cite, *inter alia*, Lutzkie's reticence to come clean about where he obtained the evidence. I have carefully considered the respondents' case for the outright exclusion of this evidence. While I have no hesitation in sanctioning that irrelevant material obtained by illegal means must be excluded, I have a different view of the material which, although obtained by theft, has relevance. I isolate the material I find relevant in the context of the main application after setting out the material that must be struck out. Owing to the large amount of the material that must be struck out, I label what is to be struck out by way of themes to indicate my reasoning.

¹⁴ (2023-050131) [2023] ZAGPJHC 771; 2023 (6) SA 578 (GJ) (3 July 2023), paragraphs 8.2 and 19.

¹⁵ Caselines 004-61.

The following material is struck out:

- a) Paragraphs 37–50 and Annexures A1 and A5 - deal with the valuation of first respondent.
- b) Paragraphs 67 to 76 and Annexures B1 to B2 - deal with Moti's personal finances, including matters pertaining to Ferrochrome.
- c) Paragraphs 111 to 112 and Annexure H - deal with one Mark Lifman.
- d) Paragraphs 124 to 128 and Annexures I1 to I3 - deal with Moti's dealings with Investec and a former employee of the same bank.
- e) Paragraph 141 - refers to the settlement of October 2021 as false.
- f) Paragraphs 173 to 183 and Annexure K - discuss the death of one S Moosa.
- g) Paragraph 228 discusses minutiae dealing with office space.
- h) Paragraphs 232 and 234, Annexures M, N and P - deal with Mazetti and the number of its employees.
- i) Annexures Q1, Q2 and Q3 - identify the brokerage appointed to pursue the business interruption claim with the insurers.
- j) Paragraphs 243 to 244 and Annexures R1 and R2 - deal with Moti and Kaka's employment by African Chrome
- k) Paragraph 249, lines 5 to 12, paragraph 251 and Annexures S1 and S2 - discuss contracts between the Moti Group and G77 and another company.
- l) Annexures U2 to U4 - deal with settlement, in confidence, between the company and certain employees. This is a matter that would predominantly fall within the purview of management, in terms of governance. On that basis they are irrelevant to the issue of probity of the Board.

The following relevant paragraphs and annexures are retained:

31. Before I set out the material I find relevant, I must first set out the rationale behind retaining it, in light of the illegal means with which it was obtained. I refer in this regard to the reasoning in *Bernstein v Bester NO*¹⁶ that the right to privacy works along what has been described as a continuum. In this regard, privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of privacy shrinks accordingly.
32. To adopt the approach used in *Financial Mail*, one must weigh the public interest in the first respondent's right to keep private confidential information relating to its business against the public interest to see that companies or those responsible for running them are held accountable by the company's stakeholders. In my view, the latter public interest must prevail.
33. I now deal with the material and my reasons for relevance. I begin with paragraphs 99 to 103, including Annexures F and G. The main proceedings attack, amongst others, the probity of the Board of the first respondent. To this end, the first respondent's Board, charged with overseeing, *inter alia*, governance, risk and compliance would, firstly, have been informed about the law suit between its shareholders, leading to the resolution passed. This is with specific reference to the Sec 163 application, including the subsequent litigation involving the first respondent.

¹⁶ Paragraph 13, note 11 *supra*.

34. The claims made in these paragraphs, despite the reference to Moti, attack the reliability and accuracy of the first respondent's financial statements, which is a responsibility of the Board. The Board would have had to approve the October 2021 settlement entered into by Moti and Lutzkie to settle their disputes, including confirming that it was both legally and commercially feasible to the first respondent. It is in the interests of justice that the first respondent's Board be afforded the opportunity to file an affidavit responding to the claims that they allowed the first respondent to enter into a settlement agreement in October 2021 to settle a lawsuit with assets that were, in the case of the Rebosis shares¹⁷, encumbered and, in respect of the helicopter, not owned by the first respondent. If these allegations can withstand scrutiny that would be a serious indictment against the Board.

35. Paragraph 229 and Annexure L canvass the fact that there was no contra entry for the management fees paid by the first respondent to Mazetti in the latter's financial statements. Mazetti is part of the Moti group of companies. The position would be different if the payee in the transaction was a person at arms' length. Paragraph 233 and Annexure O, deal with the first respondent's tax return for the years 2014 through to 2022. The criticism raised in this paragraph is that the first respondent declared the same amount for income in the identified years. There can be no doubt that these are matters that are germane to the question of delinquency on the part of the Board of directors of

¹⁷ The shares are said to have been ceded to Glencore during May 2020 already.

the first respondent, notwithstanding that the applicants' interests only took effect from 2020.

36. Paragraphs 259–263 and Annexure U1 deal with the Voluntary Separation Agreement involving the CEO, including payment. This matter is relevant to the probity of the Board for the following reasons: The court takes judicial notice of the fact that the CEO ordinarily is an ex-officio member of the Board and reports to the Board. However, a settlement involving the exit (termination of employment) of a CEO cannot be a matter only for the Board. It is a matter requiring the shareholders to be informed and to make a decision. Thus, the applicants, *qua* shareholders, should have been involved in the exit of the CEO, including participating in the discussions regarding the proposed settlement.

(b) Scandalous and vexatious

37. I have carefully reflected on the following paragraphs in the founding and replying affidavits. The paragraphs label the respondents as crooks involved in a criminal enterprise, funneling money from the first respondent in support of Moti and his lifestyle. The paragraphs use harmful descriptions such as fraud and syphoning money, without substantiation. The paragraphs and words are abusive. They are accordingly struck out. **Founding affidavit:** paragraphs 31,36 (lines 7 to 9), 43 Lines (9 to 12), 45 (lines 4 to 9), 47, 53, 58, (lines 3 to 6), 60 lines (9 to 11) 61, 62 (lines 5 to 9), 65 (lines 7 to 9), 76, 77 and 81.

38. **Replying affidavit:** paragraphs 18.1, 18.2, 52, (lines 5 to 7), 55 (lines 3 to 9), 58, 59, 62 (line 3), 66, 73, 76, 78, 81, 82, 83, (last line), 94 (third sentence),

94 (lines 13 to 15), 104 (lines 7 to 11) 105, 118 (lines 1 to 8), 128, 136, 137 (second sentence), 141 (lines 1 to 4), 148 (last sentence), 152 (last sentence), 173 to 185, 246 (last two sentences), 252.

(c) Irrelevant

39. The following paragraphs in the replying affidavit are irrelevant to the issues that must be entertained in the main application. They deal with Moti's personal finances, evidence of a loan by Moti to a third person, the sale of shares from Kilken companies, other than the first respondent to various people, and the death of one Mr Moosa: paragraphs 66 to 71, 72 (lines 1 to 10), 73 to 76, 105, 111 to 112, 124 to 128, 136, 140, 152 (last sentence), 173 to 183.

(d) Impermissible attack on credibility

40. The following paragraphs in the replying affidavit fall to be struck out. The applicants in the identified paragraphs use the word fraud/s, fraudulent, puppets liberally to refer to various transactions involving the first respondent and as a description of the members of the board. They make harmful and unsubstantiated accusations against Moti. They include personal dealings with third parties without any fathomable reason. I am persuaded that there is no rational basis on which to allow these paragraphs to remain in the replying affidavit. Thus, paragraphs 18.1, 18.2, 55, 58. 59, 62, (line 3), 66, 68, 72 to 74, 78, 81, to 83 (last line), 94 (third sentence), 95 (lines 13 to 15), 104 (lines 7 to 11), 105, 118 (lines 1 to 8), 124 to 128, 136, 137, 140, 141 (lines 1 to 4) 148

(last sentence) 173 to 183, 184 to 185, 246 (last two sentences) 252, 278 are struck out.

(e) New matter on reply

41. The respondents apply to strike out the following paragraphs in the replying affidavit on the basis that they constitute a new matter. In the event the court does not strike out the paragraphs, the respondents apply for leave to respond. With the exception of paragraphs 99 to 103, 229, 233, and 270 to 277, I am in agreement that the paragraphs be struck out. They are: paragraphs 66, 68, 72, 74, 111 to 112, 124 to 128, 136, 140, 141 (lines 1 to 4) 173, to 183, 184, 228, 232 , 234, 237, 243, 244, 249 (lines 5 to 12) 251, 278.

42. I have previously provided reasons for the relevance of paragraphs 99 to 103, 229, and 233. I now provide reasons for retaining paragraphs 270–277. According to the applicants, Annexure T1 demonstrates that on 12 October 2020, the first respondent purchased the helicopter for a consideration of R30 million, which amount, according to T2, was financed by the Balen Family Trust (Balen) for payment to the fourth respondent.

43. The allegation is that this is the same helicopter that was sold to a third party in July 2020. However, when T3, financials for Balen and T5, financials for the first respondent are analysed, the applicants allege that the loan does not appear to have been accounted for. Instead, the loans disclosed by the first respondent from a related party are those from Waleed, in the amounts R46 million and R35 million during 2019, whereas, according to T4, Waleed

Financials, there are no loans to related parties. I hasten to state that this is not about the October settlement, but the reliability and accuracy of the financial statements of the first respondent, which is the responsibility of the Board. The Balen Trust and Waleed are part of the Moti group. These are matters highly relevant to the charges of lack of probity against the Board of the first respondent. It is thus in the interests of justice that the first respondent's Board be afforded the opportunity to address them.

E. Conclusion and Costs

44. With regard to costs, the applicants failed to exercise restraint. To overwhelm the court with so much material that had to be analysed for purposes of striking out on the various grounds, must be discouraged. Thus, in the exercise of this court's discretion, the applicants will be called upon to pay costs on a punitive scale.

F. Order

- i) The following paragraphs and annexures are to be retained and are not struck out: paragraphs 99 to 103, including Annexures F and G; paragraph 229 and Annexure L; paragraph 233 and Annexure O; paragraphs 259 to 263 and Annexure U1; and paragraphs 270–277, including Annexures T1 to T4.
- ii) The following paragraphs are struck out on the basis that they were obtained by illegal means and are irrelevant: paragraphs 37–50 and Annexures A1 and A5; paragraphs 67 to 76 and Annexures B1 to B2; paragraphs 111 to 112 and Annexure H; paragraphs 124 to 128 and Annexures I1 to I3; paragraph 141;

paragraphs 173 to 183 and Annexure K; paragraph 228; paragraphs 232 and 234, Annexures M, N, P; Annexures Q1, Q2 and Q3; paragraphs 243 to 244 and Annexures R1 and R2; paragraph 249, lines 5 to 12, paragraph 251 and Annexures S1 and S2; and Annexures U2 to U4.

iii) The following paragraphs from the founding affidavit are scandalous and vexatious, and are accordingly struck out: paragraphs 31, 36 (lines 7 to 9), 43 Lines (9 to 12), 45 (lines 4 to 9), 47, 53, 58, (lines 3 to 6), 60 lines (9 to 11) 61,62 (lines 5 to 9), 65 (lines 7 to 9), 76, 77 and 81.

iv) The following scandalous and vexatious paragraphs are struck out from the replying affidavit: paragraphs 18.1, 18.2, 52, (lines 5 to 7), 55 (lines 3 to 9), 58, 59, 62 (line 3), 66, 73, 76, 78, 81, 82, 83, (last line), 94 (third sentence), 94 (lines 13 to 15), 104 (lines 7 to 11) 105, 118 (lines 1 to 8), 128, 136, 137 (second sentence), 141 (lines 1 to 4), 148 (last sentence), 152 (last sentence), 173 to 185, 246 (last two sentences), 252.

v) The following paragraphs are struck out for irrelevance: paragraphs 66 to 71, 72 (lines 1 to 10), 73 to 76, 105, 111 to 112, 124 to 128, 136, 140, 152 (last sentence), 173 to 183.

vi) The following paragraphs constitute impermissible attack on credibility and are accordingly struck out: paragraphs 18.1, 18.2, 55, 58. 59, 62 (line 3), 66, 68, 72 to 74, 78, 81, to 83 (last line), 94 (third sentence), 95 (lines 13 to 15), 104 (lines 7 to 11), 105, 118 (lines 1 to 8), 124 to 128, 136, 137, 140, 141 (lines 1

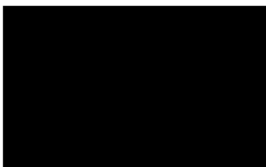
to 4) 148 (last sentence) 173 to 183, 184 to 185, 246 (last two sentences) 252, 278.

vii) The following new matters are struck out from the replying affidavit:

Paragraphs 66, 68, 72, 74, 111 to 112, 124 to 128, 136, 140, 141 (lines 1 to 4) 173 to 183, 184, 228, 232, 234, 237, 243, 244, 249 (lines 5 to 12) 251 and 278.

viii) In relation to the new matters in the applicants' replying affidavit, the respondents must serve and file their answering affidavit within 20 days from date of this order.

ix) The applicants are to pay the respondents' costs, on a scale as between attorney and client, including the costs occasioned by the employment of two counsel.



N.N BAM

JUDGE OF THE HIGH COURT,

PRETORIA

Date of Hearing: 20 September 2023

Date of Judgment: 28 May 2024

Appearances:

Applicants' Counsel: Adv J.J Brett SC with Adv J.G
Smit

Instructed by: Gothe Attorneys
Queenswood, Pretoria

First to the Ninth, Eleventh, and

Eighteenth Respondents' Counsel: Adv A. R Bhana SC with
Adv T Dalrymple

Instructed by: Knowles, Husain Lindsay Inc.
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