

REPUBLIC OF SOUTH AFRICA



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

Case Number: **24398/22**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
9 December 2025 _____	
DATE	SIGNATURE

In the matter between:

MULALO BRIDGETTE NETSHITOMBONI

First Applicant

MASHUDU NETSHITOMBONI

Second Applicant

and

REMEMBER SIPHO MAFUYEKA

First Respondent

RENDANI TAKALANI MAFUYEKA

Second Respondent

RWP CRECHÉ NPC

Third Respondent

AUBREY MAFUYEKA

Fourth Respondent

COMPANIES AND INTELLECTUAL PROPERTIES

COMMISSION OF SOUTH AFRICA

Fifth Respondent

SPACE SECURITIZATION (RF) (PTY) LTD

Sixth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

Introduction

- [1] The applicants' claim is based on a settlement agreement concluded between the first applicant and the first respondent on 29 March 2021. The relief claimed by the applicants will be dealt with in more detail *infra*.
- [2] The application is opposed by the first to fourth respondents, whom will collectively be referred to as "the respondents" or as cited.
- [3] The respondents brought a counter-application and the relief claimed therein is also based on the settlement agreement.

Background

- [4] The first applicant conducted the business of a crèche on premises leased from Space Securitisation (RF) (Pty) Ltd (the sixth respondent herein, hereinafter referred to as the ("landlord") in terms of a written lease agreement entered into between the parties on 21 February 2019. Clause 17.1 provides that the first applicant may not without the landlord's prior written permission cede her rights in terms of the agreement to another party.
- [5] Prior to the signing of the lease agreement, the first applicant had to erect a building on the premises to run the crèche from. Due to financial constraints the

first applicant sought an investor and was introduced to a certain Mr Pitso ("Pitso"). At some stage the relationship between the first applicant and Pitso soured and they parted ways on the understanding that the first applicant will refund the money Pitso invested in the creche.

- [6] The first applicant was in desperate need of another investor and was introduced to the first respondent by her pastor. To formalise their business relationship, the first applicant and first respondent (herein after referred to as "the parties" unless indicated otherwise) entered into a partnership agreement on 25 September 2017. The "*Nature of Partnership*" is defined as "*the objective of doing business of a day care centre or early childhood development centre (ECD) including everything associated with such a nature of business.*" The parties each held 50% interests in the partnership and would, according to the written partnership agreement, share in the profits and losses of the partnership accordingly.

- [7] I pause to mention that the crèche was registered as a private company known as the RWP Day Care Centre on 10 June 2015 and the parties are both directors of the company. Although the existence of the private company was not dealt with in the partnership agreement, it appears that the first respondent considered the private company at that stage as the owner crèche. His statement in this regard reads as follows:

"It is surprising to think that she can do as she pleases while we are both in partnership and codirectors in a company that owns the day care."

and

"When she signed the lease agreement on the 17th of February 2019, we were directors together in the private company of the crèche. The least she could have done would have been to sign the lease agreement on behalf of the company of the crèche"

- [8] Thus, and although the crèche is owned by the private company, the partnership is entitled to all the income generated by the crèche. The first respondent explained the reason for the forming of the partnership as follows: to "*govern our relationship in the crèche*". The relationship between the parties was, however, already regulated as co-directors of the private company that owns the crèche.

The company is in law entitled to the income generated by the business it owns and should keep proper record of its earnings for tax and other purposes. The fact that the business of the crèche is ostensibly conducted by two separate legal entities is legally untenable.

- [9] Notwithstanding the aforementioned anomaly, the parties registered the same crèche as a third legal entity in December 2020, to wit Non-Profit Company, RWP Crèche NPC (the third respondent herein, hereinafter the referred to as “NPC”). The first applicant and first respondent were also directors of this company and their spouses, the second applicant and the second respondent non-executive directors.
- [10] According to the first responded it was always the intention of the parties that the NPC would enter into the lease agreement referred to *supra*. The first respondent stated that the first applicant misled the landlord into believing that she is the owner of the crèche whereas the private company was the owner of the crèche at the time that when the lease agreement was entered into.
- [11] The business relationship between the parties run into difficulties when the first respondent accused the first applicant of misappropriating money belonging to the crèche. Although the parties, according to the first respondent, agreed that no cash payments in respect of the monthly fees for children attending the crèche will be accepted, the first applicant did receive cash payments. The cash was supposed to be deposited in the bank account of the crèche.
- [12] At some stage the first respondent became suspicious as the monthly payments that were received did not tally with the number of children attending the crèche. In order to investigate the discrepancy, the first respondent requested class lists from the teachers and a list of children attending the crèche from the first applicant. The number of children appearing on the class lists were in fact more than the number on the first applicant’s list and confirmed the first respondent’s suspicion that the first applicant was unlawfully taking money from the crèche.
- [13] A meeting was arranged for 29 March 2021, during which meeting the first applicant admitted that she had been taking money from the payments received from parents to pay for her debts in the amount of approximately R 37 000,00.

The first applicant apologised for her conduct and was informed by the first respondent that an apology would not suffice as her conduct amounted to a breach of the partnership agreement and is a criminal offence.

- [14] The first respondent informed the first applicant that he could report the matter to the police, terminate the partnership agreement and follow disciplinary procedures to remove her as principal of the crèche as she could no longer be trusted. In order for the first respondent to reconsider opening a criminal case, the first applicant could either resign from the crèche before a disciplinary hearing is convened and/or could refund the money she stole. The first applicant refused to resign and/or to refund the money.
- [15] The first respondent thereupon informed the first applicant that he is terminating the partnership agreement and that he will lay a criminal charge of fraud against her. At that stage a certain Ms Shabangu intervened and the first applicant decided to call Mr Ayo and the second applicant for advice. Subsequent to discussing the matter with Mr Ayo, the second applicant and a cousin who is an advocate, the settlement agreement was drafted.
- [16] According to the first respondent, the first applicant discussed the settlement agreement on various occasions with Mr Ayo, the second applicant and Ms Shabangu and the agreement was several times amended at her request. It took three hours to finalise the settlement agreement, and the first applicant only signed the agreement once she was satisfied with the contents thereof.
- [17] The first applicant's version of the discussion differs somewhat. According to the first applicant, the first respondent who is a practicing attorney, threatened to have her arrested on a charge of theft unless she signed the settlement agreement that forms the subject matter of the dispute between the parties.
- [18] Clause 2 of the agreement recorded that the Partnership Agreement between the parties is cancelled and in terms of clause 3, the agreement is intended to govern the business relationship between the parties at RWP Creche.
- [19] Clause 4 recorded that the agreement commenced on 29 March 2021 "and *shall continue for an indefinite period until termination by notice or under circumstances that*

renders the agreement irrevocably broken down or as hereinafter provided.” (own emphasis)

- [20] Under the heading “**THE CAUSE OF THE AGREEMENT**”, it was, *inter alia*, recorded that the first applicant breached the partnership agreement through financial misconduct, that she entered into a lease agreement with the landlord in her personal name and that the settlement between the parties have been negotiated to save the first applicant from being dismissed and/or legal action being taken against her.
- [21] Clause 11 contains the terms of the agreement. The terms included, *inter alia*, that the first applicant is demoted to Deputy Principal of the crèche, that the partnership agreement is cancelled and that the lease agreement in respect of the crèche will be ceded to the company. Clause 11.8 dealt with the consequences of a breach of the agreement by the first applicant.
- [22] It appears that the first respondent, after the conclusion of the settlement agreement, started to conduct the business of the crèche in the name of the NPC.
- [23] Shortly after the signing of the settlement agreement and on 21 March 2021, the first respondent forwarded the settlement agreement to the landlord and requested the landlord to cede the lease agreement to the NPC. The landlord responded on the same day and informed the first respondent in no uncertain terms that it does not consent to the cession. Mr van der Merwe (“van der Merwe”) acting on behalf of the landlord made the following remark in respect of the contents of the settlement agreement: *“Your attached settlements content is extremely concerning as it states Bridgette [first applicant] has been demoted, yet she is a director of your non-profit company!”*. Although the first respondent alleged that he resolved the matter with van der Merwe there is no documentary proof that the landlord has changed its stance.
- [24] The first applicant felt aggrieved by the terms of the settlement agreement and sought legal advice. On 7 April 2021 A J Masingi Attorneys addressed a letter to the first respondent informing him that the first applicant gives notice of the cancellation of the agreement in terms of clause 4. The first respondent was

further informed that the cancellation of the settlement agreement revives the partnership agreement and will regulate the business relationship between the parties.

- [25] The first respondent responded on the same day and informed AJ Masingi Attorneys that the cancellation was not accepted because the first applicant did not advance reasons for her decision to cancel the agreement. It appears that the import of clause 4 escaped the first respondent.
- [26] The first respondent informed AJ Masingi Attorneys that he has suspended the first applicant with immediate effect from the crèche until the legal dispute is resolved.
- [27] The first respondent, furthermore, informed the first applicant that a formal disciplinary investigation will be held against her. The first charge is “**GROSS INSUBORDINATION** – *in that on the 7th of April 2021 and on many occasions before that you have conducted yourself towards me as a director and investor in the crèche in a subordinate way by refusing to provide me with your qualifications when I requested them for the new position you are in...*”
- [28] It is not clear on what conceivable basis in law one director can act in an insubordinate manner against the other director. In law co-directors are equal in status. The first applicant denied the first respondent’s authority to subject her to disciplinary proceedings and pointed out that a resolution to this effect was not taken by the directors. In his answering affidavit the first respondent boldly denies the allegation and, without providing any detail, simply stated that the disciplinary hearing was “*duly constituted*”. Notably no resolution to support the first respondent’s denial is attached to the answering affidavit.
- [29] The “*Disciplinary hearing*” was held on 22 April 2021 and in a letter dated 26 April 2021 the first respondent informed the first applicant that she was dismissed as an “*employee*” of the RWP crèche. The first applicant was advised of her right to approach the CCMA in the event that she deemed her dismissal unfair.

[30] The first applicant did refer the matter to the CCMA, and the CCMA held that it *“lacks jurisdiction to entertain the dispute as there is no employment relationship between the parties.”*

[31] On 26 April 2021 the first and second respondents in their respective capacities as director and non-executive director of the NPC, held a purported meeting of directors and resolved to remove the first and second applicants respectively as director and non-executive director and to appoint the second respondent as a director and the fourth respondent as a non-executive director of the NPC. No notice of the meeting was given to the first and second applicants.

RELIEF CLAIMED BY THE APPLICANTS

[32] Based on the facts set out *supra*, the applicants claim the following relief:

- “1. Reviewing and setting aside a settlement agreement entered into between the First Applicant and the First Respondent at Bloemfontein on the 29th March 2021.*
- 2. In the alternative to prayer 1 above, an order in terms of which a settlement agreement entered into between the First Applicant and the First Respondent at Bloemfontein on the 29th March 2021 is declared null and void.*
- 3. In the alternative to prayers 1 and 2 above, an order in terms of which the cancellation of the settlement agreement entered into between the First Applicant and the First Respondent at Bloemfontein on the 29th March 2021 is declared lawful and valid.*
- 4. An order in terms of which a partnership agreement entered into between the First Applicant and the First Respondent on the 25th September 2017 is restored and / or reinstated.*
- 5. An order in terms of which a resolution taken on 26 April 2021 by the First and Second Respondent which removed the Applicants as its Directors of the Third Respondent is declared unlawful and invalid.*
- 6. An order in terms of which the Applicants removal from the Third Respondent is declared unlawful and invalid.*

7. *An order in terms of which the dismissal of the First Applicant from her employment is declared unlawful and invalid.*
8. *An order in terms of which the First to Third (sic!) Respondents are ordered to reinstate the First Applicant to her position as a Principal of the Third Respondent retrospectively with all her salaries and benefits.*
9. *An order in terms of which the First, Second, Fourth and Fifth Respondents are ordered to restore Applicants' memberships (sic!) in the Third Respondent immediate effect and on similar conditions to those of prior their removal.*
10. *An order in terms of which the Fifth Respondent is ordered to remove / cancel membership (sic!) of Fourth Respondent from the Third Respondent."*
12. *An order in terms of which the Respondents are ordered to pay the costs of this application."*

Opposition and discussion

[33] In opposing the relief claimed by the applicants, the respondents raised four points *in limine*, but only persisted with two of the points at the hearing of the matter.

First point in limine: Res Judicata

[34] The first applicant issued a previous application in the urgent court against the same parties, based on the same cause of action and claiming the same relief. The application was struck from the roll due to a lack of urgency and was later on withdrawn by the applicant.

[35] Notwithstanding the withdrawal of the application, the respondents contend that the present application, in which the same relief on the same cause of action between the same parties is claimed is *res judicata*. The point is misconceived. The first requirement for the successful reliance on *res judicata* is a final judgment. [See: *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A)]

[36] In *casu* the respondents did not allege, nor could they prove that a previous judgment that is final exists. In the premises, the point stands to be dismissed.

[37] I pause to mention that the respondents endeavoured during address to extent the point by relying on the settlement agreement as an absolute bar to claiming the same relief that was settled by the parties. A party is bound by its pleadings and as the point was not raised in the respondents' answering affidavit, I do not propose to deal with the new point.

Second point in limine: Non-compliance with Rule 53

[38] This point is raised in respect of the review relief claimed by the applicants in prayer 1. In addressing the point, the respondents did not only rely on the procedural defect, to wit; that the notice of motion does not comply with the procedure prescribed in rule 53 for review applicants but also dealt with the merits of the relief. I, therefore, deem it prudent to, at this stage, deal with the merits of the relief claimed in prayer 1.

Review: competent relief

[39] Review proceedings fall within the ambit of administrative law and contracts are governed by the law of contract. These are two very distinct and different branches of the law. It is inconceivable that a party to a contract could obtain relief under the guise of administrative law. The relief claimed in prayer 1 is legally untenable and stands to be dismissed. In the premises, the provisions of rule 53 are not applicable to the application and the second point in *limine* is for this reason dismissed.

Declaring the settlement null and void

[40] It is common cause between the parties that the first respondent informed the first applicant that he will report her to the police. It is, furthermore, common cause that the aforesaid statement led to the signing of the settlement agreement.

[41] The question is whether the statement amounts to duress or coercion. If so, the contract may be set aside only if the threat was made unlawfully or *contra bones mores*. A threat will be *contra bones mores* if the person making the threat

acquires more than he/she is entitled to. [See: *Hohne v Super Stone Mining (Pty) Ltd* 2017 (3) SA 45 (SCA)]

- [42] Having regard to the admission by the first applicant that she took money from the crèche for personal gain, I am of the view that the first respondent did not acquire more than he would have been entitled to if the settlement agreement was not signed. Consequently, the applicants have not made out a case for an order declaring the settlement agreement *void* due to duress.

Declaring the cancellation of settlement agreement lawful and valid

- [43] Clause 4 of the settlement agreement clearly and unambiguously gives the parties the right to cancel the agreement by notice. In *Amler's Precedent of Pleadings*, Harms, 7th edition, the learned author dealt with this aspect at p115, as follows: "*The right to cancel a contract unilaterally in the absence of a breach depends on the terms of the contract.*"

- [44] In the result, the applicants are entitled to an order that the settlement agreement has been lawfully and validly cancelled.

Settlement agreement to be restored and/or reinstated

- [45] The applicants' contend that the cancellation of the agreement entails that the settlement agreement should be reinstated. The consequences of a cancellation by notice have been described by Kerr in *The Principles of the Law of Contract* 6th edition at 703 as follows:

"..a major change in the history of the parties' contractual relationship has taken place but certain adjustments may still have to be made between them (the parties). In the case of cancellation, the major change is that no further performance by either party is due; obligations to perform in future is terminated, brought to an end, no longer exist; but rights already accrued, due and enforceable, can be pursued and whatever adjustments the law allows in respect of the default by one party can be enforced."

- [46] In other words, the period during which the settlement agreement existed is recognised, not nullified. The settlement agreement existed from 29 March 2021 until its cancellation by the first applicant by notice on 7 April 2021. Clause 11.5

records that the partnership agreement is “*hereby cancelled*” which entails that the cancellation of the partnership agreement by the settlement agreement occurred on 29 March 2011. In the result the partnership agreement was already cancelled when the first applicant cancelled the settlement agreement.

[47] In the result, no legal basis exists to order the restoration or reinstatement of the partnership agreement and the relief claimed in prayer 4 cannot be granted.

Resolution taken on 26 April 2021 by the first and second respondents be declared unlawful and invalid

[48] Schedule 1 to the Companies Act, 71 of 2008 contains provisions pertaining to non-profit companies. In terms of paragraph 5 directors are appointed as follows:

(1) *If a non-profit company has members, the Memorandum of Incorporation must-*

(a) set out the basis on which the members choose the directors of a company; and

(b) if any directors are to be elected by the voting members, provide for the election each year of at least one-third of those elected directors.

(2) *If a non-profit company has no members, the Memorandum of Incorporation must set out the basis on which directors are to be appointed by its board, or other persons.”*

[49] The parties have failed to attach the company’s Memorandum of Incorporation, and it is unclear on the papers on what basis the applicants and the first and second respondents were appointed as directors and non-executive directors. Insofar as the removal of the first and second applicants as directors are concerned, section 71 of the Act provides for the procedure to remove a director of a company.

[50] Section 71(4) is peremptory and provides that a board must prior to considering a resolution for the removal of a director, give the director:

- “(a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and
- (b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.”

[51] The allegation by the applicants that they did not receive notice of the meeting of 26 April 2021, is not disputed by the respondents. The failure to comply with the provisions of section 71(4) renders the meeting and the resolution taken at the meeting void and the applicants are entitled to a declaratory order to this effect.

Dismissal from employment and reinstatement

[52] The relief claimed in this respect is *res judicata*. The CCMA via Commissioner Suria van Wyk had already ruled on this issue on 7 July 2021. The Commissioner made the following finding in paragraph 39 of the ruling:

- “39. Based on the aforementioned, I find that the relationship between the parties was not that of an employment relationship and therefore the CCMA lacks jurisdiction to entertain both the matters referred.”

[53] In the result, the relief claimed in prayers 7 and 8 stands to be dismissed.

Restoration of applicant’s memberships in the NPC and cancellation of fourth respondent’s membership

[54] As stated *supra*, no documents in respect of the NPC and whether it has members or not have been made available to court. Furthermore, the applicants have not averred that they were members of the NPC or that the fourth respondent is a member of the NPC. In the result, there is no factual basis to grant an order in terms of prayers 9 and 10 and the relief claimed therein is dismissed.

COUNTER-APPLICATION

[55] The respondents’ claim the following relief in the counterapplication:

- “1. *Declaring the settlement agreement between first applicant and first respondent dated 29th March 2021 valid, lawful and enforceable.*
2. *Compelling sixth respondent to cede the lease agreement signed between first applicant and sixth respondent to third respondent on the same terms and conditions as expressed in clause 11.6 of the settlement without having to repeat the lease period.”*

[56] The court has dealt with the relief claimed in prayer 1 *supra* and the relief in prayer 1 stands to be dismissed.

Compelling sixth respondent to cede the lease agreement

[57] None of the respondents are parties to the lease agreement between the first applicant and the landlord. The principle of privity of contract thus applies which entails that only parties to a contract may enforce the terms of the contract. [See, *inter alia*: *Sage Life Ltd v Van der Merwe* 2001 (2) SA 166 (W)]

[58] The relief claimed by the respondents is in direct violation of the trite principle of privity of contract and stands to be dismissed.

Costs

[59] No reason exists to deviate from the principle that the successful party is entitled to its costs, and such an order will be issued. I am' however, not prepared to order the NPC to pay costs. A non-profit company should utilise its income towards its stated object and not on legal squabbles between its directors. The applicants and the respondents have in various aspects misconceived the legal principles applicable to the relief claimed herein and in the exercise of my discretion counsels fees are payable on scale A.

Observation

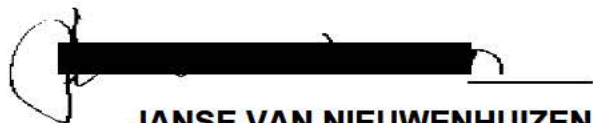
[60] In view of the facts of this matter, I deem it prudent to remind the parties of the objects and policies of non-profit companies as contained in Schedule 1 to the Companies Act, more particularly: that the Memorandum of Incorporation must set out at least one object of the company that must be either a public benefit object or another object stated in paragraph (1)(a)(ii); all the assets and income

of the NPC, however derived, must be applied for the advancement of the stated object and no member or director of the company is entitled to any part of the nett value of the NPC.

Order

[16] The following order is granted:

1. The cancellation of the settlement agreement entered into between the first applicant and first respondent on 29 March 2021 is declared lawful and valid.
2. The meeting held by the first and second respondents, ostensibly as directors of the third respondent, on 26 April 2021 is declared void and the resolution taken at the meeting is set aside.
3. The first, second and fourth respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved. Counsel's fees on scale A.
4. The counterapplication is dismissed.
5. The first, second and fourth respondents are ordered to pay the costs of the counterapplication, jointly and severally, the one paying the others to be absolved. Counsel's fees on scale A.



JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION

DATE HEARD:

11 September 2025

DATE DELIVERED:

9 December 2025

December 2025

APPEARANCES

Counsel for the Applicant: Adv MM Aphone

Instructed by: Siebani Attorneys

Counsel for the (1-4) Respondents: Adv LT Leballo

Instructed by: Mafuyeka & Associates

