IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. 4616/2024

In the matter between:

MASIBULELE DONALD STURU PASIYA **APPLICANT**

and

SIYABONGA MFINGWANA **1ST RESPONDENT**

S AND K PANEL BEATERS AND USED SPARES CC **2ND RESPONDENT**

JUDGMENT

MOLONY AJ:

Introduction

[1] The applicant and first respondent in this matter are erstwhile business partners, having collaborated on the establishment of various businesses over many years.

[2] One such business is the second respondent, which started out life being incorporated as a company, with the applicant and first respondent being directors and shareholders.

[3] In the year 2000 the second respondent was converted to a close corporation by agreement between the applicant and the first respondent, with the applicant and first respondent being the members of the close corporation, each holding a 50% members' interest in the second respondent.

[4] Another entity, known as Save Our Souls Security Services (Pty) Ltd ('SOS'), of which the applicant and first respondent were directors and shareholders, at some point became embroiled in criminal proceedings relating to alleged non-payment of VAT and income tax.

[5] According to the first respondent he was criminally charged, along with the applicant, in 2005, relating to the affairs of SOS. The criminal charges were later withdrawn against the first respondent, this being conveyed to the first respondent on 6 November 2008 (with such decision apparently having been taken on 9 March 2007).

[6] According to the applicant, it was agreed (orally) between the applicant and the first respondent that the applicant should deal with the tax issues of SOS and, whilst attending to such issues, he would temporarily resign as a member of the second respondent to 'avoid casting negativity' on the running of the second respondent. The plan was for the applicant to then be reinstated as a member once the tax issues of SOS had been finalised. The resignation was effected on about 16 November 2006, with the second respondent thereafter holding 100% of the members' interest in the second respondent.

[7] The applicant avers that on 1 February 2024 the criminal issues were finalised, with him being acquitted. In order to demonstrate this, the applicant has annexed to the founding affidavit a judgment of Jolwana J (with which Collett AJ concurred) setting aside the conviction and sentence on appeal.

[8] Thereafter the applicant approached the first respondent to amend the founding statement of the second respondent, and restore the applicant's membership of the second respondent. As proof of such approach the applicant has annexed a letter of demand (demanding that the applicant's shareholding in the second respondent be restored) dated 12 June 2024, and sent by his attorneys of record to the first respondent.

[9] The applicant avers that the letter was drafted under the misapprehension that the first respondent was converted from a close corporation to a company. The

letter itself refers to the agreement between the applicant and first respondent being one where the first respondent agreed to hold the applicant's shareholding in the second respondent as the applicant's proxy, with the applicant not actively participating in the day-to-day operations of the business of the second respondent *qua* director (despite the applicant remaining as a director of the second respondent) pending final determination of the criminal proceedings.

[10] The first respondent sent a response via his attorneys of record, dated 9 September 2024, essentially refusing to accede to the applicant's demands.

[11] The applicant then approached this court (on 28 October 2024)seeking:

(a) A declaration that he is a member of the second respondent, holding 50% of the members' interest in the second respondent.

(b) That the first and second respondents be ordered to restore such membership by amending the founding statement of the second respondent to record as such.

(c) Costs, in the event of opposition.

The Respondents' Opposition

[12] The first and second respondents opposed the application.

[13] The applicant's resignation as a member of the second respondent is not in dispute, however the first respondent disputes the terms of the oral agreement, averring that during 2006 the first respondent and applicant verbally agreed to go their separate ways in respect of their business associations.

[14] One of the reasons for the parting of ways was that the first respondent found himself being criminally charged with the applicant, in regard to the affairs of SOS (which was a company solely run by the applicant), relating to issues of which the first respondent had no knowledge.

[15] According to the first respondent the agreement was that each party would retain those businesses in which they had invested more than the other party. This led to the out-and-out transfer of the applicant's members' interest to the first respondent, and the applicant's resignation as a member on a permanent basis.

[16] The first respondent averred that whilst the applicant and first respondent's business ventures were jointly owned, the amounts of money and resources invested in the development and running of each business was never equal. The first respondent thus contributed the capital used to establish the second respondent from his drawings as a tavern owner, and took out a bond on his house to secure a loan used to finance the business of the second respondent.

[17] When the applicant resigned as a member of the second respondent, the second respondent was still financed though the loan secured by the bond on the first respondent's house, as well as bank loans. The second respondent was, according to the first respondent, still in an accumulated loss and was in a factually insolvent position.

[18] The first respondent also, as per the agreement, resigned as a director of SOS and transferred his shares to the applicant. The first respondent annexed, to the answering affidavit, his resignation letter (dated 18 July 2006) and the relevant transfer of share form, duly signed. According to the first respondent he handed those documents to the applicant.

[19] The applicant disputed the above-mentioned arrangement, *inter alia* averring that he and the first respondent contributed equally to the financing and running of the businesses which they jointly owned – to do otherwise would not be sound business practice.

[20] The applicant annexed, to the replying papers, a deed of suretyship signed by the applicant, first respondent, and one Mr Pretorius (on 12 October 2000), in favour of a creditor of the second respondent (Business Partners Limited). According to the applicant the aforementioned suretyship serves to disprove that the second respondent was funded by the first respondent personally.

[21] In my view the above-mentioned suretyship demonstrates nothing more than the fact that the applicant signed as one of the sureties in regard to securing one of the loans (the applicant's own version refers to more than one loan from various financial institutions) obtained to establish and fund the second respondent. The second respondent was a joint venture, at the time, and such a suretyship (a copy of which was provided in a vacuum without further financial information) accordingly takes the matter no further.

[22] The applicant also disputed that the first respondent handed the applicant resignation documents in regard to SOS, and annexed a CIPC disclosure certificate (issued on 26 June 2024) which still lists the first respondent as a director of SOS.[1] The aforementioned certificate, according to the applicant, contradicts the first respondent's version of events, resulting in the logical inference being drawn that the applicant's version of the agreement is correct.

[23] The fact that the first respondent remained a director of SOS does little to contradict the first respondent's version of events, as it was readily apparent that the first respondent claimed to have handed the relevant documents to the applicant (and thus left it to the applicant to submit such documents).

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[1] The CIPC search also lists SOS as having been deregistered in approximately 2009, with status being changed to 'unknown' on 21 June 2024 (the same month in which the applicant sent the letter of demand to the first respondent).

[24] The first respondent averred, *inter alia*, that the dispute of fact in regard to the oral agreement between the applicant and the first respondent (in relation to membership of the second respondent) meant that the matter fell to be decided in terms of the *Plascon-Evans* rule, and that the applicant had known, due to the correspondence exchanged in 2024, that such a dispute of fact existed, yet continued via application proceedings as opposed to action proceedings.

[25] It was further submitted on the respondents' behalf that the applicant had failed properly to address the requirements of an interdict (as a mandamus formed part of the relief sought by the applicant).

[26] The applicant averred that the first respondent's failure to annex evidentiary proof to the answering affidavit (in the form of the loan agreements, the mortgage bond relevant to the second respondent, and the second respondent's financial statements), coupled with the documentation annexed to the applicant's replying affidavit, meant that there was no material dispute of fact, or that any such dispute could not be cured on the papers filed. The first respondent, submitted the applicant, had a duty to substantiate his allegations with documentation, which had not occurred. The applicant baldly denied the financial status of the second respondent, and provided no reason for such denial.

[27] The requirements for an interdict, it was submitted on the applicant's behalf, could be inferred from the contents of the applicant's papers.

Relevant Law & Analysis

[28] The matter of *National Director of Public Prosecutions v Zuma*[2] provides useful guidance in regard to disputes of fact in motion proceedings:

> '[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common-cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[29] The applicant seeks final relief, and it is clear that the matter turns on the facts relating to the terms of the original oral agreement between the applicant and the first respondent, which are in dispute. Additionally, the applicant was aware of such dispute prior to launching this application.

[30] The above-mentioned dispute of fact is material as, if the first respondent's version of events (along with that which is not in dispute) is correct, then the application cannot succeed. As already noted, the applicant's averments in reply which, according to the applicant, signalled the death-knell of the respondents' version of events, do not, in my view, take the matter any further, nor do they adjust the probabilities in favour of the applicant.

[2] 2009 (1) SACR 361 (SCA).

[31] Whilst the fact that the applicant sought such relief, after all the time that has elapsed since his resignation, suggests he was following the agreement in accordance with his alleged version, the first respondent's version of events is equally probable due to the significant lapse of time.

[32] It is furthermore improbable that the applicant would resign his membership from the second respondent temporarily, in order not to cast negativity onto the smooth running of the business of the second respondent due to the criminal allegations relating to SOS, when the first respondent had also been charged in those criminal proceedings (with charges only being withdrawn after the applicant resigned from the second respondent).

[33] The applicant's attorneys' confusion about whether or not the second respondent was a company or a close corporation suggests the lack of involvement with the affairs of the second respondent (on the part of the applicant) that was alleged by the first respondent.

[34] Absent a referral to oral evidence, the issue of the applicant and the first respondent's diametrically opposed versions in regard to the terms of the oral agreement, cannot be resolved.

[35] It was submitted on behalf of the applicant, during argument, that a referral to oral evidence would be appropriate. Such request was not made at any stage in the applicant's papers, and the applicant in fact denied that there was a material dispute of fact.

[36] In addition, it is evident that the applicant was aware of the dispute of fact prior to launching the application, but nonetheless proceeded with this application. The applicant should not, therefore, be permitted to belatedly make such request when the proverbial shoe pinched.

[37] The application accordingly, given the obvious material disputes of fact, falls to be dismissed.

Costs

[38] There has been no reason advanced as to why costs should not follow the result.

Order

The following order is hereby issued:

The application is dismissed with costs.

N MOLONY

ACTING JUDGE OF THE HIGH COURT

***Appearances*:**

For the Applicant:	Adv Buthelezi *instructed by* Ndebele du Plessis Attorneys c/o Zilwa Attorneys **MAKHANDA**
For the 1st & 2nd Respondents:	Adv Nxumalo *instructed* by SM Mfingwana Attorneys Inc c/o Mfundo Ntshwaxa Attorneys **MAKHANDA**
Heard on:	18 September 2025
Judgment delivered:	22 January 2026