IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED **YES/NO**

17 June2026 — DATE
H.F. FOURIE — SIGNATURE

In the application between:

CASE NUMBER: 4669/2024

NTIMENG JABULANE JOHANNES — **APPLICANT**

and

WATERZONE (PTY) LTD — **FIRST RESPONDENT**

LIDDLE CORNELIUS PETRUS — **SECOND RESPONDENT**

DEPARTMENT OF TRADE AND INDUSTRY — **THIRD RESPONDENT**

STANDARD BANK LIMITED — **FOURTH RESPONDENT**

AND

CASE NUMBER: 5911/2024

NTIMENG JABULANE JOHANNES — **APPLICANT**

and

WATERZONE (PTY) LTD	**FIRST RESPONDENT**
LIDDLE CORNELIUS PETRUS	**SECOND RESPONDENT**
DEPARTMENT OF TRADE AND INDUSTRY	**THIRD RESPONDENT**
RUZINHA SHAH	**FOURTH RESPONDENT**

JUDGMENT

FOURIE AJ

INTRODUCTION:

[1] In this Judgment, the court is called on to adjudicate two applications intertwined with one another stemming from a Broad-Based Black Economic Empowerment arrangement gone awry.

[2] This Judgment highlights the importance of entering into Broad-Based Black Economic Empowerment engagements on bona fide terms, to comply with the purpose for which the Broad-Based Black Economic Empowerment Act, 53 of 2003, was enacted, and remains important, but also addresses the effects once an arrangement in terms of the Broad-Based Black Economic Empowerment Act ultimately ends. The Judgment highlights the importance of transparency and bona fides between shareholders and directors as seen in the light of the Broad-Based Black Economic Empowerment Act.

[3] The Judgment further addresses the requirements for the rectification of an agreement, specifically when parties advance their case by way of motion proceedings and how the history and underlying facts of a case impact an ultimate decision on whether rectification of an agreement is ordered.

BACKGROUND:

[4] The Applicant, a major black male, was approached by the Second Respondent, then the sole member of the First Respondent, a close corporation, to obtain membership in the First Respondent.

[5] All the evidence before the Court indicates that the approach towards the Applicant was solely aimed to satisfy certain requirements of the First Respondent in terms of the Broad-Based Black Economic Empowerment Act, 53 of 2003. Simply put, the First Respondent, in order to become B-BBEE compliant and to continue securing certain work and contracts within the mining industry within which the First Respondent was operating, needed to secure and involve the Applicant as a member of the First Respondent.

[6] It is unfortunate, for reasons as will become apparent later in this Judgment, that it seems the only reason why the Applicant was approached was because of his race, and to serve as a proverbial “tick-box” for the First Respondent to secure certain contracts. The Applicant was gifted a 26% membership interest in the First Respondent, which, after the First Respondent was converted into a private company, equated to 26% of the shares held in the First Respondent.

[7] The parties attempt to persuade the Court that the 26% shareholding in the First Respondent was purchased by the Applicant, or alternatively would have been purchased by the Applicant through the company's dividend declarations from time to time. Nothing on the papers, however, suggests that a dividend to satisfy a purchase consideration of R 900 000.00 was ever made, or seriously necessitated. After the parties went at each other’s

throats, the purchase consideration for the 26% became some sort of an issue but, given that the Applicant has been part of the First Respondent for 14 years, and the First Respondent has secured the benefit of the Applicant forming a part of the First Respondent for that amount of time, the Court cannot seriously regard the initial shares to the Applicant as anything other than a gift.

[8] At a certain stage, and around February 2020, the B-BBEE rating of the First Respondent was seemingly held to be insufficient by certain of its contractors which led to the parties entering into what was phrased as a Share Option Agreement, where the Applicant could, on the terms of such an agreement, purchase and additional 25% of the shares in the First Respondent for a purchase consideration at the time of approximately R 30 million (Thirty Million Rand). Had the share option agreement been exercised, it would have meant that the Applicant would own 51% of the shares in the First Respondent.

[9] The status of the Share Option Agreement and whether there was ultimately a transfer of a further 25% of the shares in the First Respondent to the Applicant are among the contentious issues in the current application.

[10] It is further accepted that the catalyst moment to the current proceedings is a meeting in August 2024, where the Applicant was informed that he should make way for a black woman, preferably a disabled black woman, in order for the B-BBEE scorecard of the First Respondent to be improved. The Respondents do not deny the meeting and merely deny stating that the black woman ought preferably to be disabled.

[11] After the Applicant refused to hand over his shares and resign, he faced certain disciplinary enquiries regarding his employment.

[12] During the disciplinary process, the Applicant and the Respondents signed a document titled "Mutual Separation Agreement" on 19 September 2024.

[13] It is noteworthy that the mutual separation agreement addresses only the termination of the Applicant's employment with the First Respondent.

[14] In the total of the document and its annexures spanning approximately eight pages, not a single word or inference is made to the shareholding of the Applicant with the First Respondent. A plain reading of the Mutual Separation Agreement indicates that it merely addresses the termination and separation of the Applicant and the First Respondent as an employee.

[15] The Respondents seek, as part of their defence, that the Mutual Separation Agreement be rectified as they contend that the agreement was intended to be an agreement incorporating the sale and purchase of the shares held by the Applicant in the First Respondent.

RELIEF SOUGHT:

[16] In September 2024, under Case Number: 4669/2024, the Applicant made an urgent application seeking amongst others:

[15.1] That the purported transfer of 25% of the shares/option shares from the Applicant’s name into the First and/or Second Respondent be declared unlawful and/or set aside.

[15.2] That the suspension of the Applicant by the First Respondent and/or Second Respondent be, and is hereby declared as unlawful and/or set aside.

[15.3] That the First and/or Second Respondents are hereby directed in order to surrender to the Applicant a SIM card relating to Mobile Number: 0[…].

[15.4] That the Second Respondent be interdicted from purporting to be the managing director of the First Respondent.

[15.5] That the First Respondent and/or the Second Respondent be and is hereby directed to furnish the Applicant within 24hours of the Order, with:

[15.5.1] All the share sale and purchase agreements.

[15.5.2] All minutes and resolutions of shareholders within the past 5 years.

[15.5.3] All minutes and resolutions of directors within the past five years.

[15.5.4] The company's memorandum of incorporation.

[15.5.5] The company's share register.

[15.5.6] The company's asset register; and

[15.5.7] All records of audited financial statements.

[15.6] That the First Respondent and/or the Second Respondent be and are hereby interdicted from disposing of the assets of the First Respondent, including, but not limited to, the funds held by the First Respondent with the Fourth Respondent's Bank in a certain bank account number.

[17] The initial application was struck from the roll for want of urgency.

[18] After the initial application was struck for want of urgency in November 2024, the Applicant made a further application under Case Number: 5911/2024, in which the Applicant sought:

[17.1] That the settlement agreement entered into between the Applicant and the Second Respondent pertaining to the termination of the Applicant's employment be and is thereby declared to be of full force and effect.

[17.2] That the First Respondent be and is hereby ordered to comply with the terms of the agreement within 5 (five) days from the date of receipt of this Order.

[17.3] That the deregistration of the Applicant as a director of the First Respondent be and is hereby declared unlawful, invalid and will be set aside.

[17.4] That the appointment of Rozinha Shah as a director of the First Respondent be and is hereby declared unlawful, invalid or is hereby set aside.

[17.5] That the Third Respondent be and is hereby directed to immediately amend his records and reinstate the Applicant as a director of the First Respondent.

[19] Similarly, the second application was struck from the roll for want of urgency.

EVALUATION OF RELIEF SOUGHT:

[20] The prayers in a Notice of Motion identify the relief which the Applicant seeks. It is therefore vital that the prayers be correctly framed and stated with precision. When framing the prayers in the notice of Motion, regard

must be had to what the relief is that the Applicant is entitled to and the proposed orders covering all the practical aspects necessary to render the relief effective. The importance further lies therein that Court Orders which will emanate from the prayers in the Notice of Motion, if granted, ought to be effective.**[1]**

[21] In litigious processes, whether it be in motion proceedings or action proceedings, a Court will not interpret what it is that an Applicant ultimately seeks to achieve. An applicant needs to formulate the relief they seek to ultimately achieve the goal they hope the litigious process will bring them. For instance, a litigant cannot in their Notice of Motion seek a declaratory order and during argument develop their case ultimately seeking an interdict.

[22] The norm of a fair trial means each side being given an unambiguous warning of the case they are to meet, moreover, these requirements are not mere subtleties as between advisories, the Court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up your case as you go along is an anathema to orderly litigation and cannot be tolerated by a Court. Counsel's duty of diligence demands an approach to litigation which best assists a Court to decide the question, and no compromise is appropriate **[2]**.

[23] A party cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another **[3]**.

[24] The clearest example of the aforesaid in the current matter is the relief sought by the Applicant by way of a declarator Order in respect of the transfer of 25% of the shares in terms of the share option by the Respondents from the Applicant's name into the First and/or Second Respondent's name.

[25] During argument, it emerged that the Applicant, in essence, sought that the Court declare that the Share Option Agreement had been invalidly or irregularly cancelled by the First and Second Respondents. The manner in which the case was initially represented, however, represented that at a certain stage the Applicant was the holder of the complained of 25% shares, making him a 51% majority shareholder and that the First and Second Respondents irregularly transferred 25% of the shares out of the name of the Applicant.

[26] The facts of the matter are simply that no option in respect of the Share Option Agreement was formally elected, no payment in respect of the further 25% of the shares was made, and the 25% shares were never transferred from any of the Respondents to the Applicant. As such, it is impossible for the Court to make a declaration on the lawfulness of the transfer of the 25% of the shares in the First Respondent, as such has never occurred. The Applicant does not seek any relief to afford them the right to elect to maintain the Share Option Agreement or to declare its cancellation invalid, and as such the Court will not pronounce on the same.

[27] The remaining issues, as per the respective applications, are simply whether the mutual separation agreement addresses only the Applicant's employment or the buyback of his shares. If the Court finds that the agreement deals solely with the employment of the Applicant, then certain necessary effects flow in respect of the shareholding with which the Applicant remains in the First Respondent. If the Court, however, finds that the Mutual Separation Agreement also deals with the sale of the Applicant’s shares in the First Respondent, then obviously the ancillary relief sought by the Applicant cannot be sustained.

EVALUATION OF RELEVANT FACTS:

[28] The parties are *ad idem* that the Applicant holds 26% of the shares in the First Respondent.

[29] It was also conceded during argument that the further 25% shares in terms of the Share Option Agreement were not transferred into the name of the Applicant, and the Applicant did not pay any purchase consideration for same to any of the Respondents.

[30] It is largely accepted that the rather nervous decisions made from within the ranks of the First Respondent emanated from an investigation into possible B-BBEE fronting, and the need of the First Respondent to optimise their B-BBEE status.

[31] In terms of the Broad-Based Black Economic Empowerment Act, 53 of 2003, I wish to point to the preamble thereof which states:

> *"Whereas, under apartheid, race was used to control access to South Africa's productive resources and access to skill;*
>
> *Whereas South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills;*
>
> *Whereas South Africa's economy performs below its potential because of the low level of income earned and generated by the majority of its people; and*
>
> *Whereas unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race; and*

In order to -

- *Promote the achievement of the Constitutional Right to Equality, increase Broad-based and effective participation of black people in the economy, and promote a higher growth rate, increased employment, and more equitable income distribution; and*

- *Establish a national policy on Broad-Based Black Economic Empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services."*

(**UNERLINED FOR EMPHASIS**)

[32] The Applicant complains that, as a minority shareholder, under the auspices of Section 163 of the Companies Act, 71 of 2008, he has been oppressed through the actions of the Respondents.

[33] Much is to be said in respect of the B-BBEE scheme the First Respondent has embarked upon. The Court finds it necessary to restate and highlight the importance of the whole of the preamble of the Act.

[34] The Act was not enacted or intended solely for historically white-owned companies to hand over money to black individuals, thereby entitling such companies to continue securing contracts because they had now met certain compliance requirements.

[35] Besides serving for the redistribution of wealth, the Act was incorporated to redistribute knowledge, experience, business acumen, and the practical know-how of how certain companies operate in order to enable previously disadvantaged groups to acquire such experience that would enable them to

perform on the same footing as other individuals who secured some sort of advantage previously to which other individuals were excluded.

[36] After 23 years, it is inexcusable and sad that a Court is necessitated to write on what can only be regarded as an irregular application of the Broad-Based Black Economic Empowerment Act and a misappreciation of what the Act seeks to achieve.

[37] The fact that the Applicant, after being a shareholder and a director of the First Respondent for approximately 14 years, is not properly informed on all the aspects of the First Respondent, whether it be the financials or the regulatory aspects, is indicative of the fact that the Applicant was not involved in the operations of the First Respondent in a manner in which he ought to have been. The only reasonable inference to be drawn is that the Respondents found it convenient for the Applicant to be utilised for his status in order to secure certain work without seriously giving effect to the involvement of the Applicant in the business and financials of the First Respondent.

[38] The Court must immediately state that the Applicant is not without blame in the situation, and that, for a period of 14 years, he seemed all too inclined to participate in the scheme in which he was involved. As much as the Respondents can be faulted for utilising the Applicant merely for his status, after 14 years, some blame is to be placed on the Applicant for failing to take steps to ensure his involvement in the management and finances of the First Respondent. If the Applicant felt aggrieved or excluded, as a director in the First Respondent, he had a fiduciary duty to obtain the information relevant to his involvement in the First Respondent and to ensure that he performed his mandate as a director, and/or exercised his rights as a shareholder appropriately.

[39] The relief the Applicant seeks in respect of certain documentation and information pertaining to the First Respondent is, in the Court's view,

indicative of the fact that the Applicant was not involved in the First Respondent in a manner in which he ought to have been. It might have been so that the Applicant signed the financial statements of the First Respondent for a period of time, but nothing before this Court indicates that the Applicant seriously understood the documents he was signing or the implications thereof.

[40] The Respondents' persistent opposition to the handover of the required information and documentation to the Applicant is perplexing, to say the least. The documents and information sought are all documents and information to which the Applicant is either entitled by way of statute alternatively which on a commonsense interpretation of the rights and obligations of the Applicant as shareholder and director ought to have been and remain information to which the Applicant ought to be entitled. This Court finds no difficulty in ordering that the relevant information pertaining to a company, such as the information sought by the Applicant, ought to, as a right, be available to the relevant stakeholders in a company. The only reason the Court can find not to make available very relevant and important information of the company to the Applicant would be to avoid the Applicant from knowing the true state of affairs of the First Respondent.

[41] Accordingly, the relief the Applicant seeks in this regard ought to be granted.

THE MUTUAL SEPARATION AGREEMENT:

[42] The crux in the matter lies in what the parties truly intended the mutual separation agreement to entail.

[43] The Applicant seeks an order declaring the agreement to be in full force and effect and ordering the Respondents to comply with it.

[44] The Respondents do not dispute that the agreement is in full force and effect, but seek, by way of their answering affidavit, that the relief sought pertaining to their compliance with the contract be suspended until the Applicant hands over the shares in the First Respondent to the Respondents in terms of what the Respondents phrase as the rectified agreement.

[45] When interpreting a contract, the Court must have regard to the language used, the context in which it is used, and the purpose of the provisions in the contract **[4]**.

[46] When evaluating how the principles, specifically as laid down in Endomeni *supra,* were to cohabit with the Parol Evidence Rule, the Court in Capitec Bank Holdings (Pty) *supra* referred to the matter of University of Johannesburg **[5]** where the Court stated that:

> *"Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a Court's recourse to extrinsic evidence is not limitless because interpretation is a matter of law and not of fact, and accordingly interpretation is a matter for the Court and not for witnesses. It is also true that to the extent that evidence may be admissible to contextualise the document (since context is everything) to establish its factual matrix or for the purpose of identification, one must use it as conservatively as possible. I must, however, make it clear that this does not detract from the injunction on Courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the approach to contractual interpretation enjoins a Court to err on the side of admitting the evidence. There would, of course, still be sufficient check against any*

undue reach of such evidence because the Court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight."

[47] The aforesaid is specifically important under circumstances where the Respondents seek the Court to read the mutual separation agreement in a certain context and to find that a rectification of the agreement is warranted because, as the Respondents state, the mutual separation agreement ought not to refer to the employment of the Applicant, but to the sale of the Applicant's shares held in the First Respondent also.

[48] The starting point for any contractual evaluation is surely that, when signed by both parties, the contract in its current form can *prima facie* be accepted as the contract the parties wished to enter into.

[49] The aforesaid is commonly referred to under the principles of *pacta sunt servanda,* which entails that the parties are bound to the agreements they conclude.

[50] The privacy and sanctity of contracts entail that contractual obligations must be honoured when the parties have entered into a contractual agreement freely and voluntarily. The notion of the privacy and sanctity of contracts goes hand-in-hand with the freedom to contract, taking into consideration the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract**[6]**.

[51] The Constitutional Court stated that, moreover, contractual relations are the bedrock of economic activity, and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, they will be incentivised to contract with other parties for their mutual

gain. Without this confidence, the very motivation for social co-ordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed. The fulfilment of many of the rights promised by our constitution depends on the sound and continued economic development of our country. Certainty in contractual relationships fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if the Courts denied the principle of *pacta sunt servanda***[7]**.

[52] Save for the face value of the wording of the document, which only deals with the termination of the Applicant's employment with the First Respondent, the contract contains what is commonly referred to as a “non-variation” clause. Although it would not be the case that no contract with a non-variation clause could ever be rectified, the existence of this clause in a contract cannot be disregarded **[8]**.

[53] At the time the mutual separation agreement was entered into, disciplinary action was pending against the Applicant, and the Applicant's employment was suspended.

[54] It is not uncommon for disciplinary processes not to reach finality and for parties to settle their disputes informally rather than formally, by way of a disciplinary outcome.

[55] In essence, the Respondents aver that the mutual separation agreement failed to reflect the following crucial terms:

> *“63.1. The determination of the employment relationship was referenced to the termination of the Applicant’s directorship in respect of the company as well as the Applicant’s employment with the company.”;*

"63.2. The payments to be made to the Applicant specified in Annexure "A" to the mutual separation agreement as well as the transfer of ownership of the motor vehicle and other assets were payment in respect of the Applicant's shareholding in the company as well as compensation for the termination of the Applicant's directorship and employment contract.";

"63.3. The payments and transfer of assets were intended to be in full and final settlement of the business relationship between the parties including the shareholding in the company, the directorship of the company and the employment contract with the company."

[56] The fact that the Applicant's employment was tied to his directorship is not a contentious issue, and the Applicant conceded that, upon termination of his employment, his directorship likewise terminated. Although the general terms governing director appointments were circumvented by the Applicant and the Respondents in the current matter, both the Applicant and the Respondent seemed to accept this *sui generis* approach to directorship and employment.

[57] The only question, accordingly, is whether the mutual separation agreement ought to be rectified to include the purchase of the Applicant's shares.

[58] The Respondents, in their answering papers, stated that they would apply for the mutual separation agreement to be rectified to correctly reflect the parties' common continuing intention. After the signing of the Answering Affidavit in November 2024, and up until the date of the hearing, no such application was forthcoming.

[59] The Respondents contend that this application is not the forum for such rectification to be sought, and that although no counterapplication for the rectification of the agreement has been made, the issues as raised by the

Respondents ought to be indicative of a *bona fide* defence, and that when the matter is ultimately on trial in an action process, rectification would be sought.

[60] Rectification of a written agreement is a remedy available to parties in instances where an agreement reduced to writing, through a common mistake, does not reflect the true intention of the contracting parties. A mistake is a *sine qua non* for rectification.

[61] In ***Brits v Van Heerden*** **[9]** the Court stated that:

> *"The mistake does not have to relate to the writing itself, but it might relate to the consequences thereof. The mistake may be that of only one party; the mistake may be induced by misrepresentation or fraud, but there must be a mistake. In my view, the crux of the matter is that the mistake, be it a misunderstanding of fact or law, or be it an incorrect drafting of the document, must have the effect of the written memorial not correctly reflecting the parties' true agreement."*

[62] In ***Leyland*** **[10]** the Court held that:

> *"A written agreement which fails to express the true intention of the parties accurately may be rectified as to make it accord with the parties' common intention. If the party seeking rectification can prove an actual agreement anterior to or contemporaneous with the writing with which the written agreement, owing to a mutual mistake, fails to conform, the Court will rectify the erroneous instrument."*

[63] It is trite that the onus is on the party claiming rectification to show, on a balance of probabilities, that the written agreement does not correctly express what the parties had intended to set out therein.**[11]**

[64] As to the moment in time that is relevant, it was held that the following has to be proved:

> *"The written document does not reflect the true intentions of the parties – this requires that the common continuing intention of the parties as it existed at the time when the agreement was reduced to writing be established."* **[12]**

[65] In ***Tesven*** **[13]** the court held that:

> *"To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record, is to enforce what was not agreed, and so overthrow the basis on which the contract rests in our law. The onus is on the party claiming rectification in this case, the Appellant, to show on a balance of probabilities that it should be granted."*

[66] In ***Soil Fumigation Services*** *supra,* the Court held that the onus is difficult to prove, and a party seeking to obtain a rectification must show the facts entitling him to obtain that relief in the clearest and most satisfactory manner.

[67] This Court is not requested to declare the rectification of the mutual separation agreement. The Respondent addresses the possible rectification of the agreement as a defence to the Applicant's claim, and requests the Court to find accordingly that a *bona fide* defence exists that ought to be referred to trial, alternatively for the Applicant's claim to be dismissed for making an application rather than instituting an action under circumstances where a dispute was known at the time of the issuing of the application.

[68] *"The Court has found that, when, as in this case the proceedings are launched by way of Notice of Motion, it is to the Founding Affidavit which a judge would look to determine what the complaint is …… and as been said in many other cases; "…….. an applicant must stand or fall by his petition*

*and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of the facts stated therein, because those are the facts which the Respondent is called upon either to confirm or deny".***[14]**

[69] It is trite that one ought to stand or fall by one's Notice of Motion and the averments made in one's Founding Affidavit. A case cannot be made out in the Replying Affidavit for the first time.**[15]**

[70] Reference is made to ***WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD AND ANOTHER*** **[16]** where the SCA held that:

"A real, ge

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 prove an answering (or counter-failing evidence) if they be not true or accurate, but instead of doing so rest his case on a bare or ambiguous denial, the Court would generally have difficulty in finding that the test is satisfied. I say (generally) because factual averments seldom stand apart from the broader matrix of circumstances, all of which need to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of the 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 a serious duty imposed upon a legal adviser who settles an Answering Affidavit to ascertain and engage the 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."

[71] In evaluating whether the defence raised by the Respondent is *bona fide* and real, a short evaluation on those terms is necessary.

[72] *Bona fide* refers to the Latin phrase "in good faith" or "honestly".

[73] A Respondent cannot be allowed to contrive a defence simply in order to avoid the eventualities of a Judgment to be granted against them. The facts of each matter will display whether the point taken by the Respondent indeed exists or whether the defence was something that was non-existent but came into existence during the drafting of opposing papers in order to escape Judgment being granted against a party.

[74] Whether the defence is real would be evident from the supporting evidence provided by a Respondent when alleging their defence. If a Respondent makes a vague or unsubstantiated claim, it would not pass the threshold of convincing the Court dealing with the matter that the defence has any substance and is to be regarded as real.

[75] It would only be in circumstances of a Court being convinced of the *bona fides* of a Respondent's defence, substantiated sufficiently, for the Court to

be able to accept the defence as real, that the general principles of **Plascon-Evans** with reference to **Stellenbosch Farmers Winery** would find application, and rightly so, as the Court in those matter already expressed that vague denials or far-fetched or clearly untenable defences would justify a rejection of a purported defence.[1]

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[1] The general rule when dealing with disputes of fact in motion proceedings is as set out in **PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD [**1984] ZASCA 51; 1984 (3) SA 623 (A), where the court referred to *Stellenbosch Farmers' Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 E-G, held as follows:*

"….. Where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order ….. In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact (Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3 SA 1155 (T) at pp 1163-5. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under rule 6(5)(g) of the uniform rules of court and the court is satisfied as to the inherent credibility of the applications factual averments, it may proceed on the basis of the correctness thereof an include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which it seeks ……. More ever, there may be exceptions to this general rule, as for example where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

*Our courts are required to robustly approach disputes of fact in **Soffiantini V Mould 1956 (4) SA 160 (E)**, the court outlined this approach and stated as follows:*

"In the case of Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 T at 1165 Murray, then AJP said: "A bare denial of the applicant's material averments cannot be regarded as sufficient to defeat the applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondents to enable the Court to conduct a preliminary examination ….and to ascertain whether denials are not fictitious intended merely to delay the hearing. Soffiantini v Mould, at 154 E-H."

[76] This Court reiterates the dictum as per **Soffiantini, *supra*** that a Respondent must provide enough evidence to the Court for the Court to be able to ascertain whether denials are not fictitious or aimed at delay.

[77] When evaluating the defence raised by the Respondent, being that of rectification, the Court cannot merely evaluate the contract in isolation.

[78] The Court is necessitated to evaluate the relationship between the parties, how the relationship came into existence, the conduct of the respective parties and the circumstances under which the contract was entered into, either in its current or written form, alternatively in its rectified form as requested.

[79] The Applicant in the current matter was approached to form part of the First Respondent to satisfy certain B-BBEE requirements. When the Respondents no longer needed the Applicant to satisfy their B-BBEE requirements, they sought to replace the Applicant with a candidate that would satisfy such requirements.

[80] Had the Applicant not been the B-BBEE partner of the Second Respondent and a sale and purchase of shares were sought to be undertaken, this Court has very little difficulty in believing that a totally different approach to the matter, as in the current circumstances, would have been undertaken.

[81] The Respondents contend that the mutual separation agreement ought not to reflect only the employment of the Applicant, but also the purchasing of the Applicant's shares as held in the First Respondent.

[82] The Respondents, however, fail to advance to the Court why a reasonable inference could be drawn that this should be the case.

[83] The Court cannot overlook that the share option agreement entitled the Applicant to purchase 25% of the shares in the company for an amount of R 30 600 000.00 (Thirty Million six hundred thousand rand), which amounts to an amount of R 1 224 000.00 (One Million two hundred and twenty-four thousand rand) per share.

[84] The Court accepts that several variables may come into play in the ultimate valuation of shares, but to overlook, in totality, the value of the company that the parties themselves, at a certain stage, placed on these shares would not be proper.

[85] The Respondents say that the agreement between the parties ought to be rectified for the employment dispute between the parties to be settled, and for the shares of the Applicant to be reflected to be purchased for the following amounts:

[81.1] A once-off payment of R 1 000 000.00 (One Million Rand)

[81.2] R 42 000.00 (Forty-two thousand rand) per month for 48 months.

[81.3] An Amarok vehicle to be transferred into the Applicant's name.

[86] Accordingly, the payment by the Respondent reflects approximately R 4 000 000.00 (Four Million Rand). I say approximately because no sufficient evidence on this point was led.

[87] The Respondents provide no substantiating proof to explain how the value of the shares in the First Respondent is reduced from approximately R 30 000 000.00 (Thirty Million Rand) to R 4 000 000.00 (Four Million Rand).

[88] The only supporting evidence pertaining to the value or financial well-being of the First Respondent is noted on the B-BBEE report in which the First Respondent indicates their turnover to be R 82 600 000.00 (Eighty-two Million six hundred thousand rand) per year. The Court again accepts that the aforesaid ought not to be regarded as indicative of the value of the shares in the company, but this is the only information provided by the parties from which the Court could make any sort of inference.

[89] The Respondent alleges that it was the common and continuing intention of the parties for the contract to be for the purchasing of the shares held by the Applicant in the First Respondent. The Court needs to evaluate the aforesaid against the backdrop of the initial application brought by the Applicant prior to the entering into the mutual separation agreement.

[90] It is evident that the Applicant sought certain highly relevant and crucial documents and information. The information sought by the Applicant has not yet been provided by the Respondents to the Applicant.

[91] Absent the documents being provided to the Applicant, the question is to be asked how the Applicant would be in any sort of a position to make a true and *bona fide* evaluation and calculation of the value of the shares held in the First Respondent.

[92] The Respondent did not take the Court into its confidence by indicating how the settlement amount was ultimately calculated. The Respondents gave no indication that the calculation of the settlement amount was explained and discussed between the parties, ultimately leading to the conclusion of the agreement. The aforesaid is crucial under circumstances where the Respondent alleges common continuing intention. If the settlement was not premised upon mathematical calculations, and a globular settlement premised upon no facts, then at the very least the same ought to have been explained.

[93] Absent an explanation of how the settlement amount was calculated, the Court has difficulty in accepting that common intention exists in respect of a rectification.

[94] The Applicant complained throughout the papers filed that he was excluded from the First Respondent's business operations and had no knowledge of the First Respondent's financials or the true value of his shares.

[95] Absent any of the requested documents being provided to the Applicant, at the very least it could have been expected of the Respondent to explain how the alleged settlement amount was calculated and agreed on.

[96] The Applicant was not the author of the mutual separation agreement. The document was drafted by the Respondents. The Respondents could have utilised any wording in the contract but elected to phrase it as they ultimately did.

[97] The Respondents explain that the document was generic and that, therefore, no particularity was given. Given the importance of the document, if it were indeed intended for the purchase of shares, it simply makes no logical sense that it would be drafted as it was.

[98] It would be reasonable and probable that parties, amidst an employment-related dispute, could finalise their disputes by way of a settlement agreement. The Applicant has been employed by the First Respondent for a considerable amount of time, in one form or another, and if the parties jointly part their ways in respect of the Applicant’s employment in the terms agreed on, the same is to be expected as a reasonable explanation.

[99] Without any supporting documentation substantiating the value of the First Respondent at the time of the agreement, indicating how the shares were valued or highlighting the circumstances or the discussions which ultimately

led to the conclusion of the mutual separation agreement, the Respondents requests the Court to find that the Applicant signed a document, ending his employment with the First Respondent, and wanted to sell the shares he held with the First Respondent for an amount of money, absent knowing how his shares were valued, and absent certain crucial documentation which he sought to make an informed decision pertaining to his involvement in the company.

[100] The Respondents have simply failed to indicate that their purported defence under the circumstances of the matter is *bona fide.*

[101] The Respondents have further failed to raise, with sufficient particularity and by providing sufficient ancillary proof, a real defence.

[102] The burden of proving that rectification of the mutual separation agreement ought to be found lay with the Respondents.

[103] More was required of the Respondents than simply stating that the agreement at hand needs to be rectified. Even though the Respondents do not seek by way of counterapplication an order of rectification, to establish whether a real and *bona fide* dispute exists, the Court needs to evaluate whether, on the facts before me, the relevant elements justifying rectification present themselves, absent which the defences raised by the Respondents ought not to be sustained and the Court needs to find in favour of the Applicant.

[104] Having rejected the defence raised by the Respondent in respect of rectification, there exists no reason why compliance with the mutual separation agreement ought not to be ordered.

[105] Although there is no real dispute between the parties regarding the validity and effect of the agreement, the Court shall exercise its discretion to

facilitate the matter between the parties by making a declaration in this regard.

APPOINTMENT OF ANCILLARY DIRECTORS:

[106] The Court has already touched on the removal of the Applicant as a director and the appointment of Rozinha Shah as a director in the First Respondent. By accepting termination of his employment, the Applicant accepts his resignation as a director in the First Respondent. The relief sought in this regard is accordingly moot.

[107] The Second Respondent, as a majority shareholder in the company, could sell any of his shares, hand over or donate them to Rozinha Shah, or simply appoint her as a director to act on behalf of the shares he holds.

[108] The Applicant has failed to make out a case for the removal of Rozinha Shah as a director of the First Respondent, and as such the Applicant's claim in this regard needs to fail.

COSTS:

[109] Although certain portions of the respective applications have become moot or the Applicant has been unsuccessful in other respects, the Applicant has been successful on the main issues between the parties.

[110] The Court finds no reason why the Applicant ought not to be indemnified for the reasonable costs incurred in pursuit of the respective applications.

CONCLUSION:

[111] The Applicant was made part of the First Respondent to satisfy the First Respondent's B-BBEE requirements. As soon as the Applicant's involvement with the First Respondent became troublesome and the First Respondent required a higher B-BBEE rating, the relationship between the parties turned sour.

[112] In all matters between shareholders and directors, the principle of utmost good faith finds application. The non-involvement of a director or shareholder, or the failure to provide information or documentation to a director or shareholder, seemingly only because such a party is either a minority shareholder or a so-called B-BBEE partner, is unacceptable and offends public policy.

[113] If a shareholder or a director is sufficiently involved in the dealings of a company in the manner in which it ought to be expected, when that party ultimately wishes to dispose of their shares, for whatever reason, an informed decision pertaining to such can be made. Absent all available information for a party to make an informed decision, it cannot be expected of a person to make an informed decision regarding the counter performing value to be received for the sale of their shares.

[114] When the parties elect to contract with one another, it can be expected of a party alleging that the full terms of their agreement are not found in the contract as it stands to provide the Court with sufficient information to prove a common and continuing intention not currently reflected in the contract. Absent a party satisfying the requirements of rectification as a defence, the raising of a possible defence of rectification will generally not be accepted as real and *bona fide*, and the contract as is would be accepted as the true agreement between the parties.

ORDER:

[115] For all the aforesaid reasons the following Order is made:

1. Prayers 3, 4, 5, 6, and 8 of Case Number: 4669/2024 are dismissed.

2. Prayers 5, 6, and 7 in Case Number: 5911/2024 are dismissed.

3. The First and Second Respondents are ordered to furnish the Applicant, within 5 (five) days of this Order, with:

A) All share sale and purchase agreements in the First Respondent;
B) All minutes and resolutions of shareholders' meetings from 1 January 2021 to date of Judgment.
C) All minutes and resolutions of directors from 1 January 2021 to date of Judgment.
D) The Company’s memorandum of incorporation.
E) The Company’s share register.
F) The Company asset register.
G) All records of audited financial statements from 1 January 2021 to date of Judgment.

4. The mutual separation agreement entered into between the Applicant and the Second Respondent pertaining to the termination of the Applicant’s employment with the First Respondent is declared to be of full force and effect.

5. The First Respondent is ordered to comply with the terms of the mutual separation and settlement agreement within 10 (ten) days from this Court Order, and where monthly repayments are to be made, then on such terms as per the agreement between the parties.

6. In respect of both matters, Case Number: 4669/2024 and Case Number: 5911/2024, the First and Second Respondents shall jointly and severally pay the Applicant’s costs on a party and party Scale B.

H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MIDDELBURG

Counsel for the Applicant:	Adv DD Mosoma
Counsel for the Respondents:	Adv JJ Brett SC
Judgment reserved on:	28 May 2026
Date of delivery:	17 June 2026

[1] Agri Piet Retief v Mkhondo Local Municipality & Another (5219/2022) [2024] ZAMPMBHC 10 (14 February 2024)

[2] MMK obo MK (Case Number 497/2024) [2025] ZASCA 136 (25 September 2025) at paragraph 34

[3] MMK *supra* at paragraph 15

[4] Natal Joint Municipal Pension Fund v Endomeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)
See also Capitec Bank Holdings v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) (9 July 2021)

[5] University of Johannesburg v Auckland Park Geological Seminary and Another University of Johannesburg v Auckland Park Theological Seminary and Another (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC) ; 2021 (6) SA 1 (CC) (11 June 2021)

[6] Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotels Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017)

[7] Beadica 231 & Others v Trustees for the time being of Oregon Trust & Others (CCT 109/19) [2020] SACC 13

[8] Brisley v Drotsky 2002 (4) 1 (SCA) at 11B-H

[9] Brits v Van Heerden 2001 (3) SA 257 (C) at 282(C)

[10] Leyland SA (Pty) Ltd v Rex Evans Motors (Pty) Ltd 1980 (4) SA 271 (WLD) at 272 F-G

[11] Soil Fumigation Services Lowveld CC v Camefit Technical Products (Pty) Ltd 2004 (6) SA 29 (SCA)

[12] Prop Fokus 40 (Pty) Ltd v Ven Handel 4 (Pty) Ltd (2007) (3) ALL SA 18 SCA at 22

[13] Tesven CC v South African Bank of Athens [1999] 4 ALL SA; 2000 (1) SA 268 (SCA) (28 September 1999) at paragraph 16

[14] Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H – 636B

[15] Betlane v Shelly Court CC 2011 (1) SA 388 (CC)

[16] Wightman t/a JW Construction V Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at 13