THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Case Number: 2025/095301

28 July 2026 [redacted]

DATE: SIGNATURE

In the matter between:

FRANK HANS KRISTEN	First Applicant
M & S CORROSION SASOLBURG (PTY) LTD	Second Applicant
MAKAYA CORROSION CONTROL (PTY) LTD	Third Applicant
ROUTE 59 SELF STORAGE (PTY) LTD	Fourth Applicant

and

JAMES DIETER KRISTEN	First Respondent
BDO SOUTH AFRICA INC	Second Respondent
ERNEST MOLLER	Third Respondent
JK SHARES (PTY) LTD	Fourth Respondent

This judgment was prepared and authored by Acting Judge S Johnson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 July 2026

JUDGMENT

JOHNSON AJ

Introduction

[1] This is an opposed application for the variation of a settlement agreement ("Settlement Agreement") handed down by Wilson J on 6 September 2023. The first applicant and first respondent agreed in terms of the settlement agreement that the fair value of the first respondents shares and loan account in the third and fourth applicants as on 6 September 2023, would be valued by the second respondent, failing agreement between the parties.

[2] The parties could not agree, and the second respondent was appointed, who in turn, appointed the third respondent. The second respondent was appointed based on their reputation as a major international auditing firm. The third respondent subsequently failed to prepare a provisional or final valuation and insisted that the parties agree on the financial information which was not possible.

[3] This application seeks a variation of the settlement agreement for the second respondent "BDO" (BDO Advisory Services (Pty) Ltd) to be replaced by PricewaterhouseCoopers ("PwC").

Background

[4] On 23 May 2023, the first and fourth respondents brought an oppression application in which it was alleged that the first applicant ("Frank") and Route 59 had breached section 163 of the Companies Act 71 of 2008 ("the ACT") by misappropriating at least R16 200 000.00 of monies from M&S and Makaya. The full amount allegedly appropriated was never fully determined by the JK respondents. An interim *ex parte* order was granted by Wepener J in favour of the first and fourth respondents on 5 June 2023.

[5] The applicant filed a reconsideration application on 15 June 2023 in terms of Rule 6(12)(c). Holland -Muter J dismissed the application for reconsideration on

18 July 2023. On 24 July 2023 the Rule Nisi was extended by Strydom J. On 6 September 2023 a settlement agreement was made an order of court by Wilson J.

[6] BDO was appointed on 6 December 2023 to determine the fair value of the shares and requested written submissions on 12 February 2024. The first and fourth respondents provided detailed submissions to BDO. On 20 May 2024 BDO was requested to comply with the court order and conduct the valuation.

[7] The first and fourth respondents rejected requests by the applicants that the parties' respective financial advisers convene in an attempt to reach an agreement in respect of the quantum of the loan accounts to be determined. This variation application was instituted on 23 June 2025. The respondents filed their answering affidavit and counter application on 22 July 2025.

[8] On 5 August 2025 the applicants filed their replying affidavit and answer to the counter application of the first and fourth respondents. The second and third respondents filed their notice to abide and explanatory affidavit. On 30 September the first and fourth respondents filed their reply in the counter application.

[9] On 11 December the first and fourth respondent filed their heads of argument and on 27 January 2026 they filed launched an application to compel the applicants' heads of argument. The applicants filed their heads of argument on 6 February 2026.

Submissions of Mr De Villiers

[10] Mr De Villiers, on behalf of the applicants submitted that the following facts are common cause facts. The second respondent did not act in accordance with the settlement agreement, and a new valuer should be appointed. The first and fourth respondents oppose the application on the basis that there is a dispute regarding the interpretation of the settlement agreement and seek a forensic audit which the applicant contends is not contained in the settlement agreement.

[11] Mr De Villiers submitted that the settlement agreement renders the dispute *res judicata*. He referred to *Eke v Pa*rsons[1] where it was held:

> "Once a settlement agreement is made an order of court it becomes an order of court like all other court orders and is to be interpreted on the well -established test on the interpretation of court orders:
>
>> 'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the courts reasons for giving it must be read as a whole to ascertain its intention.'
>
> This is equally true of court orders following settlement agreements, of course with a slant that is specific to orders of this nature:
>
>> 'The Court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement.
>>
>> The intention of the parties is ascertained from the language used in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the court 'in the armchair of the author(s)" of the document. Evidence of the 'surrounding circumstances' is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide 'sufficient certainty'.'
>
> The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality between the parties; the *lis* becomes *res judicata* ("literally a matter judged"). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by

[1] 2016 (3) SA 37 (CC) at para 29-32

the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *madamus.*

Litigation antecedent to enforcement is not necessarily objectionable. That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non -compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which- depending on the nature of the litigation- might have entailed many days of contested hearing."

[12] It was argued that the valuer per the settlement shall decide on the valuation method in terms of para 4.3 of the settlement agreement. The further issue regarding the suggested new valuer by the applicant as PricewaterhouseCoopers ("PwC") was conceded by the respondent during oral arguments.

[13] Mr De Viliers contended further that the relief sought by the first respondent for a forensic valuation does not accord with the settlement agreement which provides for any recognised valuation method to be determined by the valuer.

[14] It was argued that the matter is *res judicata* and the first respondent is asking the Court to 'make' a contract between the parties and courts do not make agreements between parties. This was denied by the JK respondents. They contend that they seek an interpretation of the agreement by the court, insofar necessary, to vary the written wording to avoid a further dispute. They also contend that the words "any recognised method" does not exclude a forensic audit or investigation.

[15] The principles of *pacta sunt servanda* and privity of contract provide that contractual obligations must be honoured when a contract is entered into freely and voluntarily. The principle of freedom to contract applies since parties are free

to enter into contracts and decide the terms thereof. He referred to *Capitec Bank Holdings Limited and Another v Coral lagoon Investments 194 (Pty) Ltd*[2].

[16] The first respondent in essence seeks a further agreement based on the averment that a resolution should be reached though the determination of the true meaning of the settlement agreement. It was pointed out that the settlement agreement was typed by the attorney of the first and fourth respondents while the terms thereof were dictated by counsel of the first and fourth respondent. This was denied by the first and fourth respondents.

[17] It was submitted that the settlement agreement was made an order of court and does not provide for a forensic audit. The valuation of the businesses and the first and fourth respondents' shareholding is inherently an opinion not a precision calculation. The valuation of the shares is based on professional judgment. The valuation is based on variable factors which are considered by the analysis of available information and assumptions about the future which are all variable.

[18] It was submitted that clause 4.21 of the settlement agreement provides that "any dispute concerning or in connection of this agreement will be referred to arbitration…" It was contended that the court's jurisdiction to entertain any dispute is ousted. The JK respondents' counterclaim is a new remedy that they are seek, and the financials should have been investigated prior to the signing of the settlement agreement.

[19] Mr De Villers argued that the settlement agreement already protects the audit in that clause 4.4 provides for 'unfettered access', 4.5 provides for 'all payments made by the fifth and/or seventh respondent to the third respondent will be taken into account in the evaluation'.

[20] In his reply to submissions, Mr De Viliers submitted that the settlement agreement in full and final settlement cannot be varied, the *ex parte* oppression application is not relevant to the present application and the application to vary the valuer should stand. He also submitted that the court should not consider the

[2] 2022 (1) SA 100 (SCA).

personal conflict between the first applicant and the first respondent and conceded that the court does have jurisdiction to hear the application.

[21] In respect of costs, Mr De Viliers asked for party and party costs including costs of counsel on scale B.

The First and fourth respondents' submissions by Mr Desai

[22] Mr Desai submitted that the Court is required to determine whether the parties to the settlement agreement had agreed that the valuer, appointed to determine the value of the first and fourth respondents (" the JK respondents") shares, being 22% in the second applicant ('M&S") and 22% in the third applicant ("Makaya "), could investigate and inquire into payments made by M&S and Makaya to creditors of the fourth applicant ("`Route 59") for the purpose of determining the value of the JK respondents' shares.

[23] Mr Desai submitted that the valuation contemplated in the settlement agreement was no simple evaluation of shares. In his answering affidavit, the first applicant depicts the misappropriation of M&S and Makaya funds as "loans" to route 59: the ledger of M&S reflects a loan of R30 800.00 to Route 59; and the `ledger of Makaya reflects a loan of R489 895.00. These amounts are not what is alleged by the first and fourth respondents which is R16 200 000.00 and which they demonstrated was misappropriated. The amounts in the first applicant's hearsay trial balance reflects amounts of R2751 526.00 and R4828 863.00 does not tally with either the general ledgers or the hearsay trial balance. The reason for this is that the first applicant is intent on avoiding paying the first and fourth respondents the true value of what is owed.

[24] The relevant clauses of the settlement agreement read as follows:

> "4.3 through the employment of any recognised valuation method, such method to be determined by the valuer in his sole discretion
>
> 4.4 [Route 59, M&S Sasolburg and /or Makaya] shall provide the valuer with unfettered access to all accounts, documentation and information as may be required by the valuer, upon reasonable demand of such information having been requested in writing by the valuer.

> 4.5 All payments made by [M&S Sasolburg and /or Makaya to Route 59] will be taken into account in the evaluation.
>
> 4.7 the valuer shall have all such powers as he, in his sole discretion, may deem necessary to determine the value of [the JK respondent's] shares in [M&S Sasolburg and/or Makaya] to be acquired by the first applicant as above;
>
> 4.11 the valuer's report shall be final and binding between all parties…;"

[25] Mr Desai contended that the valuer had "unfettered access" to the books of Route 59 in terms of 4.4 of the settlement agreement and that the court was required to interpret the provisions of the settlement agreement to include a forensic audit/ evaluation. He contended that, even though the word "forensic" was not expressly stated in the settlement agreement it is implied in the settlement agreement. This was disputed by Mr De Villiers who contended that to do so would require the court to contact on behalf of the parties.

[26] Mr Desai referred to *Novartis v Maphil*[3] which held:

> "Interpretation is a process of attributing meaning to the word used in the document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provisions in light of the document as a whole in circumstances attendant upon its coming into existence. Whatever the nature of the document, considerations must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provisions appear; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used…The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[3] 2016 (1) SA 518 (SCA) at para 23

[27] It was submitted that the "distinction between background and surrounding circumstances" is no longer consistent with the approach to interpretation and "interpretation does not stop at a perceived literal meaning of those words but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being[4].

[28] Mr Desai submitted that the purpose of the settlement agreement was to bring a full and final settlement of the dispute which was common cause. The interpretation of the clauses must be commercially sensible therefore the information to be considered by the valuer must be wider rather than narrower.

[29] Mr Desai referred to *Bester and Others v Lebra Developments (Pty) Ltd and Others*[5], in which this court rejected an argument that a forensic audit was not required on the basis that the allegations of mismanagement and unauthorised payments were such that only a forensic audit would determine the fair value of the shares. The Court held:

> "However, the shareholders would require an insight into the financial affairs of Lebra for the 2018, 2019 and 2020 financial year period. The fair value would have to be determined through an accurate and justifiable valuation of the shares. Such value can only be achieved after a forensic audit is undertaken with an audit opinion expressed. In this manner one would ensure that the applicant's valuation of its 10% is not inflated and that by this time the potential profits may have been realised."[6]

[30] Mr Desai argued that similar allegations have been made in casu in respect of payments made to Route 59's creditors. The JK respondents are unable to determine if other payments were made. The settlement agreement makes provision for this in paragraph 4.5. If such payments are hidden, the financial statements will not be accurate and will not be able to be relied upon.

[31] BDO was appointed as an expert valuer which required it to decide on the method to be used to value the shares. He referred to *Total South Africa (Pty) Ltd v Bonaiti Developments (Pty) Ltd; Total South Africa (Pty) Ltd v Valdave*

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[5] [2022] ZAGPPHC 211
[6] *Id* at para 59

Investments (Pty) Ltd; Total South Africa (Pty) Ltd v Dave White Holdings (Pty)Ltd[7], which found that the appointment of a third party as an expert valuer meant that such party would be at liberty to consider any relevant determination when making a valuation.

[32] Mr Desai therefore submitted that from the background and surrounding circumstances and context (including the oppression application and orders granted), the express wording of the settlement agreement meant that the valuer would investigate and enquire into the alleged misappropriation of styled payments made to Route 59. The valuer had the requisite powers to do so as well as any forensic powers and access to the books of account.

[33] It was submitted that the first applicant and Route 59 are contending that a forensic audit was not agreed to, to avoid the disclosure and accounting.

[34] Mr Desai submitted that the first applicant and Route 59 perpetrated a 'Route 59 scheme' which enabled them to misappropriate the monies of M&S and Makaya for the purpose of devaluing the shares of the JK respondents.

[35] Documentary evidence found by the JK respondents indicates that through the Route 59 scheme, the first applicant and Route 59 misappropriated R16 200 000.00. Through the scheme:

a. M&S and Makaya pay the creditors of Route 59 as if they were direct creditors of M&S and Makaya.
b. No entry was made in the books of account of M&S and Makaya as against Route 59, except for a loan amount to Route 59 of R30 800.00; and in Makaya's books for a loan of R489 895 00.

[36] The trial balance relied on by the first applicant reflecting Route 59 as a debtor of M&S and Makaya and prepared by the auditors, was not confirmed under oath. It was further alleged by the first applicant that Route 59 formed part of the same group of companies as M&S and Makaya and the loans to and from the group as included in the financial statements of M&S and Makaya includes loans to Route 59. There is no basis for the first applicant to assert that Route 59 forms

[7] 1981 (2) SA 263 (D)

part of the group of companies. The group's financial statements disclose that Route 59 does not form part of the group, and the financials do not depict any loans to Route 59.

[37] The allegations are hearsay and have no probative value. In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[8], with reference to *Galp v Tansley NO and Another*[9] it was held:

> "…, [I]t is trite law that our courts have consistently countenanced the admission of hearsay evidence."

[38] Mr Desai argued that the value of the misappropriation has not been determined or agreed. If that were so the settlement agreement would not include such wide provisions, including that the valuer be provided with "unfettered access to all accounts, documentation and information as may be required", by Route 59 who is not part of the group, and that Route 59 would account.

[39] On 12 February the BDO requested written submissions from the parties to assist with its determination of the fair value of the shares. The JK respondents provided detailed submissions on 25 March 2024. JK respondents set out its discovery that the first applicant unlawfully appropriated funds in the second and third applicants for his personal benefit in the amount of R16 million over 3 years, grounds for its reasonable belief that more funds may be involved as reasons why the financials could not be relied on and a request for further investigations covering the period since inception of M&S and Makaya. BDO then informed the parties that the allegations placed the accuracy of the financials in dispute and the request for a forensic audit was beyond its powers in terms of the settlement agreement.

[40] Mr Desai argued that the conclusion of BDO that a forensic audit was beyond its powers is not supported by the settlement agreement, in particular paragraphs 4.4, 4.5 and 4.7. According to Mr Desai the clauses are sufficiently wide to

[8] 1999 (2) SA 279 (T) at 339 F-G
[9] 1966 (4) SA 555 (C)

include a forensic audit and that BDO could have conducted a forensic audit and were empowered to do so in terms of the settlement agreement.

[41] Mr Desai submitted that the applicant contends that the Court's jurisdiction is ousted because the settlement agreement has an arbitration clause, yet the applicant brought the application to this court and by doing so he submitted to the jurisdiction of this court. Mr Desai referred to the case of *Eskom Rotek Industries SOC Ltd v Geo-X (Pty) Ltd*[10]. Mr Desai argued in this regard that the only reason the applicant has raised the issue of arbitration is to avoid the consideration of the counterclaim brought by the JK respondents by this Court. I agree with this contention of Mr Desai.

[42] Mr Desai contends that the settlement agreement is not a final determination in respect of the valuation of the accounts are concerned and BDO will not complete the valuation of the shares. BDO stated in the email dated 16 May 2024 that it could not proceed unless an agreed set of financials were provided it could not proceed with the valuation.

[43] It was further contended that there would be no purpose to change the valuer where the same dispute will always emerge. The valuation will not be possible, and the answer would remain the same. An accounting process with full and frank disclosure is required to resolve the dispute.

[44] With regard to the type of orders that should be varied Mr Desai referred to *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others*[11] where it was held:

> "Interpreting Court Orders
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> The order with which a judgment concludes has been described as the "executive part of the judgment", because it defines what the court requires of the parties who are bound by it.. For this reason, it was said in *Ntshwaqela* that although the order must be read as part of the entire judgment, and not as a separate document, the order's meaning, if clear and unambiguous, cannot be restricted or extended by anything else stated in the judgment. The modern approach is not to undertake

[10] [2023] ZAGPJHC 1140 (11 October 2023)
[11] 2022 (1) BCLR 1 (CC) at para 12

> interpretation in discrete stages but as unitary exercise in which the court seeks to ascertain the meaning of a provision in the light of the document as a whole and in the context of admissible background material. This principle applies to the interpretation of court orders, as decisions of this Court make plain." [footnotes omitted]

[45] It was contended that the words "all payments…", in clause 4.5 is important in respect of the intention at the time of the settlement agreement, since several misappropriations took place in the manner described above by the first respondent.

[46] The first respondent had no financial oversight in M&S or Makaya as they were run by the first applicant. In *Snyman v De Kooker NO and Others*[12], the SCA with reference to *Doyle v Fleet Motors PE (Pty) Ltd*[13] held:

> "In the present case, there is no dispute that the trustees stand in a fiduciary relationship to the appellant as both an income and capital beneficiary. The appellant averred that the trustees' accounting to her was inadequate for her to have a full understanding of the trust's financial position. In Doyle v Fleet Motors, it was held that if it appeared from the pleadings that a plaintiff who is entitled to an account had already received an account which he averred was insufficient, he or she is entitled to press for his or her claim for a due and proper account".

[47] Accordingly, it was submitted by Mr Desai that the settlement agreement was entered into on 6 September 2023, prior to the submission of the requested financial document of from BDO. The documents submitted were insufficient. If the valuation is taken on the *ipse dixit* of the first applicant, the first and fourth respondents will be 'short changed'. The rendering of the account depends on the circumstances and what was made available for inspection.

[48] It was further submitted that settlement agreement with regard to the accounting was not a final definitive order which cannot be varied/ revisited by the court and is not dispositive of the court's jurisdiction. It was interlocutory in the sense that it was conditional upon the accounting. It would become final and definitive after

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[12] 2024 (6) SA 136 (SCA) at para 27
[13] 1971 (3) SA 760 (A) at 762 E-763D

the shares are valued. The court can vary/revisit the order since the accounting process which first has to be to be carried out made provision for that.

[65] In respect of costs Mr Desai asked for punitive costs on scale C.

Issues to be determined

[49] Against this background, the following issues are to be determined by this Court:

a. Whether the court is empowered to vary the settlement agreement.
b. Whether the contention by the applicants that the interpretation of the relevant clauses amounts to a variation of the settlement agreement by the court.
c. Whether upon the interpretation of the settlement agreement, in particular paragraphs 4.4, 4.5 and 4.7, it can be implied that a forensic audit can be conducted.

Evaluation

[50] The applicant is seeking a variation of the settlement agreement in respect of the replacement of the previous valuer BDO with a new valuer, PwC. There was a dispute regarding who the new valuer should be prior to the hearing of the application. The JK respondents conceded to the appointment of PwC at the hearing. The appointment of PwC is therefore not in issue.

[51] The applicant contends that the matter is res judicata and that this court has no power to vary the settlement agreement in full and final settlement which was made an order of court by the order of Wilson J on 6 September 2023. I was referred to the case of Eka v Parsons where the Constitutional Court found that a settlement agreement, once made an order of court is a binding contract between the parties and Courts typically will refrain from interfering with settlement agreements which are entered into freely and voluntarily.

[52] I agree with the contention of Mr de Villiers that a settlement agreement, once made an order of count, becomes a binding contract. The counts will generally not change the terms of binding contracts between parties. As per the principle of *pacta sunt sevanda*, courts should typically refrain from interfering with the

terms of a settlement agreement that was entered into freely and voluntarily and in full and final settlement. However, the contention by Mr De Villiers that if the clauses in the settlement agreement are interpreted to determine its true meaning it is a variation of the settlement agreement which the Court is not empowered to do is misplaced.

[53] In their counter application the JK respondents explain that they are not seeking the Court to make a contract between the parties. The JK respondents seek the interpretation of the relevant clauses in the settlement agreement, and insofar as is necessary to vary the written wording thereof to avoid a further dispute. I agree with this contention and accordingly, in interpreting the relevant clauses, this Court is not setting out to vary the settlement agreement.

[54] The main issue is the interpretation of the relevant clauses and whether a forensic audit/valuation is implied in the words of the relevant clauses as opposed to a fair value valuation exclusively.

[55] In the interpretation of the relevant clauses, the starting point is the manifest purpose of the settlement agreement. It is common cause that the manifest purpose of the settlement agreement was to bring about the full and final settlement and speedy resolution to the sale of the shares of the JK respondents.

[56] In addition, the settlement agreement was made to settle the litigation brought by the JK respondents for relief in terms of Section 163 of the Companies Act 71 of 2008.

[57] Mr De Villiers relied on 4.3 of the settlement agreement which states that the valuer in terms of the settlement agreement shall decide the valuation method, while Mr Desai submitted that the terms of paragraphs 4.4, 4.5 and 4.7 were wide enough to include the undertaking of a forensic audit. Clauses 4.2 and 4.3 of the settlement agreement state as follows:

> "4.2. the value of such shares and loan accounts to be determined by the valuer shall be determined- as at date of the Court Order;
>
> 4.3. through the employment of any recognised valuation method, such method to be determined by the valuer in his sole discretion;"

[58] The words ‘any recognised valuation method’: while the phrase is grammatically simple, it implies a wide discretion to consider ‘any valuation method’. The plain meaning is ambiguous since different methods could mean a different valuation. There is also a conflict between the wide discretion in the words “any” and the words “sole discretion”.

[59] In consideration of the interpretation of clause 4.3, I have considered firstly, the purpose of the settlement agreement, the language used and the contextual setting in which the settlement agreement was made. At the time of the settlement agreement, the manifest purpose of the parties was to reach a resolution of the dispute. The settlement negotiations took place after the ex parte application and reconsideration application. Apparent from the evidence the nature of relationship between the first applicant and first respondent is clearly an acrimonious relationship.

[60] At the time the settlement agreement was drafted both parties were aware of allegations of misappropriation by the first respondent against the first applicant. The background of the litigation at that stage would not have inclined the first applicant to agree to a full investigation into the financials of the business’ in question and the first respondent would not have agreed to anything other than full disclosure and account of the financials in question.

[61] The first respondent expected that the appointed valuer, would be mandated to determine the true value of the shares in light of the misappropriation. If he subjectively believed that the valuer would be restricted in his duty to determine true value of the shares, he would not have agreed to the terms of the settlement. Subsequently, the documents that were disclosed by the first applicant were disputed by first respondent as a true reflection of the financials and the purpose of the settlement agreement could not be fulfilled.

[62] The first respondent pertinently took issue with the financial documents submitted to BDO by the first applicant and Route 59 on the basis that the reports on which it is premised have not accounted for the manner in which the amounts which they admit is made up or which transactions form part thereof. Apart from that, the auditors of the first applicant and Route 59 have not confirmed the

amounts submitted under oath, rendering the evidence submitted to BDO hearsay evidence. It was further submitted that the first applicant and Route 59 are contesting a forensic audit to avoid financials and accounting for the purpose of devaluing the relevant shares.

[63] The words in clauses 4.4, 4.5 and 4.7:

> "4.4 [Route 59, M&S Sasolburg and /or Makaya] shall provide the valuer with unfettered access to all accounts, documentation and information as may be required by the valuer, upon reasonable demand of such information having been requested in writing by the valuer.
>
> 4.5 All payments made by [M&S Sasolburg and /or Makaya to Route 59] will be taken into account in the evaluation.
>
> 4.7 the valuer shall have all such powers as he, in his sole discretion, may deem necessary to determine the value of [the JK respondent's] shares in [M&S Sasolburg and/or Makaya] to be acquired by the first applicant as above;"

[64] The words "unfettered access to all accounts, documentation and information" in clause 4.4, implies a wide rather than a narrow interpretation. According to the Oxford dictionary "unfettered" is an adjective that means not limited or restricted in any way. It describes something or someone that is completely free from controls, regulations or controlling influences. The words "as may be required by the valuer" implies that the valuer could have requested whatever was required to determine the fair value of the shares.

[65] The words "all payments made" in clause 4.5, is grammatically simple and implies all payments, without exception. The words "the valuer shall have all such powers, as he in his sole discretion, may deem necessary to determine the value of the shares", imply that the valuer had a wider rather that a limited discretion to determine the value of the shares.

[66] In this regard it is difficult to understand the decision of BDO to refuse to continue with the determination of the fair value of the shares. Apparent from the evidence, after receiving the information from both the first applicant and the first and fourth respondents BDO became aware of the dispute. At that stage it was within its

mandate in terms of all the relevant clauses to initiate a forensic audit in order to determine the value of the shares. However, BDO stated that it was not within their mandate to conduct a forensic audit.

[67] It was submitted that the BDO was able to go beyond the financial statements submitted to it. Its power to determine the value necessitated conducting a forensic audit. BDO was made aware of the allegations of misappropriation. It had before it the full disclosure of the first respondent and the documents submitted by the first applicant. The conduct of the first applicant by making payments to Route 59, claiming it was part of the group of companies, required BDO to investigate further.

[68] The first applicant has not addressed the reason for the refusal to fulfil its mandate and subsequent withdrawal of BDO at all in the application. Rather, it was contended that the matter is res judicata and that this court has no power to vary the settlement agreement in full and final settlement which was made an order of court by the order of Wilson J on 6 September 2023.

[69] The JK respondents contend that the dispute involves the refusal to disclose financial statements. When BDO requested financial disclosure from the parties, the JK respondents made full disclosure. The dispute remains what was disclosed by the first applicant and the contention is that the first applicant did not make full disclosure.

[70] The financial statements supplied by the first applicant and Route 59 have not accounted for the manner in which the amounts which they admit is made up or which transactions form part thereof. Furthermore, the auditor who audited the accounts submitted by the first applicant to BDO did not confirm the amounts submitted under oath. The trial balance relied on by the first applicant is unreliable and the true value of the shares remains undetermined.

[71] What is evident from the submissions and the evidence is that a forensic audit and a fair value determination are two distinct processes. While a forensic investigation entails financial detective work, a share valuation determination entails only a determination of the fair value of the shares by means of different

methods which can yield different results. In terms of the settlement agreement the valuer in his sole discretion may decide on the method to be employed.

[72] In light of the allegations made by the first respondent, a fair valuation determination cannot be accurately determined until a forensic audit is complete. The fair valuation expert would need the finalized finding/s of the forensic audit to normalize the financial statements before applying a valuation model to determine the fair value of the shares.

[73] I find accordingly that the fair value determination cannot rationally be achieved without ascertaining the true state of the financials by means of a forensic audit. It is therefore my view that the forensic audit is an implied and necessary preliminary step to giving effect to the purpose of the settlement agreement.

[74] It would make sense that the same auditing firm replacing BDO utilize their respective internal forensic and valuation specialists to complete their mandate in two sequential phases. To hold otherwise would not be just and equitable.

[75] I have had regard to the affidavit of BDO Advisory's Mr Michael Nicholas Rayner, on behalf of BDO. It evidences a number of incorrect assertions that were made by the first applicant in relation to the inability of BDO to continue with the valuation of the shares. Firstly, as a point of departure, BDO were incorrectly cited in the papers before Court. The correct citation is BDO Advisory Services (Pty) Ltd. The third respondent is therefore incorrectly described as an associate director of BDO SA Inc. when in fact he is the associate director of BDO Advisory.

[76] Secondly, the incorrect statements made by the first applicant as stated by Mr Rayner relate to the first applicant laying the blame on BDO and asserting that BDO did not comply with the settlement agreement by refusing to complete the valuation based on financials it provided to BDO. Mr Rayner states that BDO had no knowledge of the dispute when appointed to conduct the valuation of the shares. Soon after its engagement BDO became aware that the various financial information that was provided was disputed. BDO then raised the issue with the parties, representatives by email and pointed out that it is alleged that the historical financial information presented in the financial statements and trial

balances are not reflective of the actual operational results of the second and third applicants.

[77] The representations made on behalf of the JK respondents demanded a forensic audit relating to allegations concerning expenses of approximately R16.2 million which are illegitimate and would have a direct impact on the profitability of the businesses. According to Mr Rayner, BDO were not engaged to conduct a forensic investigation as part of the valuation, and they could not conduct the valuation based on disputed financial information.

[78] BDO did conduct in depth reviews of the historical financial affairs of the second and third applicants and the extensive amount of information provided by the legal representatives of the JK respondents in respect of alleged irregular expenditure. BDO also engaged with potential forensic experts to provide the parties with a solution. They also completed the valuation analysis workbooks, which can be adjusted arising from any findings by any future forensic analysis as demanded by the first respondent and recommended by BDO.

[79] To my mind, even though BDO did not decide to itself conduct a forensic audit, it assisted the JK respondents by performing reviews on the historical financial affairs of the second and third applicants, engaged potential forensic experts to provide a solutions and has completed valuation workbooks subject to potential adjustments arising from any findings by forensic analysis demanded by the JK respondents. BDO said they were able assist up to a point, but later they stopped and refused to continue. More importantly, BDO recommended that a forensic audit be conducted as part of the valuation.

[80] After the reconsideration application Holland -Muter J in his judgment at paragraph 8 said the following:

> "It is impossible to unwind the interwoven structures of the various companies and group structures. There are several instances where the third respondent [Route 59] appears to be a vehicle to serve some of the parties, in particular the first respondent [the first applicant]. The applicants aver that ongoing alleged misappropriation of monies by the First Respondent of the Fifth to Seventh

Respondents monies over the past three years amounted to more than R16 million."

[81] It is apparent from the evidence that BDO refused to continue with the valuation. The reasons it gave is that there was a dispute concerning the amounts submitted by the parties and it was not mandated to conduct a forensic investigation as requested by the JK respondents and the parties could not reach agreement on the disputed amounts. I find that it cannot be said that BDO, through any fault of their own, refused to complete their mandate and finalise the valuation. The reason for BDO not being able to complete the valuation is incomplete financials that were submitted by the first applicant. In this instance the issues could not be resolved to achieve finality and certainty.

[82] In *SA Breweries Ltd v Shoprite Holdings Ltd*[14], on the role of an expert valuer, the SCA held:

> "In summary, what is required is that all issues submitted must be resolved in a manner that achieves finality and certainty.

[83] The auditors appointed to replace BDO may request the completed valuation analysis

workbooks which may be supplemented and adjusted as required by any forensic audit.

[82] In sum, having considered all the evidence and the manifest purpose of the settlement agreement, the words in the relevant clauses in light of the ordinary rules of grammar and syntax, the context and circumstances in which the provisions were drafted, I find that the commercially sensible meaning of the relevant clauses is that a forensic audit is implied in the words of the relevant clauses even though the actual words "forensic audit" are not expressly stated in the settlement agreement.

[14] 2008 (1) SA 203 (SCA) at para 22

Order

[83] In the result the following order is made:

1. By agreement between the parties, the settlement agreement granted on 6 September 2023, before the Honourable Wilson J, is varied to delete all references to “BDO” (BDO Advisory Services Pty Ltd) and replaced by PwC (PricewaterhouseCoopers).
2. The counter application succeeds.
3. Pursuant to the terms of the Settlement Agreement, a forensic audit, even though not expressly written in, is implied in the words in clauses 4.3, 4.4, 4,5 and 4.7 of the Settlement Agreement.
4. The determination of the value of the shares is to take place in two phases as follows:
   (i) Phase 1: a forensic investigation into the alleged misappropriation and non-disclosure by the first applicant, and;
   (ii) Phase 2: a fair value determination of the shares based on the adjusted, normalized financial results from phase 1, if any.
5. The Applicant shall pay the costs on the scale as between attorney and client on scale C.

[redacted]

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S JOHNSON

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

For the Applicants: Adv Mr R.F de Villiers

Instructed by: Denys Zeederberg Attorneys Inc

For the Respondents: Adv M Desai

Instructed by: Andraos & Hatchett Inc.

Date of Hearing: 10 June 2026

Date of Judgment: 28 July 2026