REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 4737/2017
26732/2017

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

01/03/2022

Judge Dippenaar

In the consolidated matter between:

COLUMBIA MEDIA **Applicant**

and

FANI TITI **Respondent**

AND

FANI TITI **First Applicant**

AQUEEL PATEL **Second Applicant**

VIDEOVISION ENTERTAINMENT CONSORTIUM PTY (LTD) **Third Applicant**

and

SIBUSISO PETER-PAUL NGWENYA **First Respondent**

COLUMBIA MEDIA PTY (LTD) **Second Respondent**

TSIYA RADIO PTY) LTD **Third Respondent**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 1st of March 2022.

DIPPENAAR J:

[1] This is a commercial court matter, wherein two applications were consolidated by order of court on 3 October 2019. By consent the applications were referred to oral evidence by way of order granted on 23 July 2021. The first is an application launched under case number 04737/2017 in terms of which Columbia Media (Pty) Ltd ("Columbia") seeks the setting aside of a notice in terms of s165(2) of the Companies Act[1] ("the Act") served by Mr Titi on 19 January 2017 and Mr Titi in a counter application seeks relief in terms of s165(4)(a) and (b) of the Act, appointing an independent person to investigate certain issues and directing Columbia to institute legal proceedings against Mr Ngwenya for the recovery of certain funds ("the s165 application").

[2] The second is an application launched by Messrs Titi and Patel and Videovision Entertainment Consortium (Pty) Ltd ("Videovision") (collectively referred to as "the Titi parties") against Mr Ngwenya, Columbia and Tsiya Radio (Pty) Ltd ("Tsyia") for certain declaratory relief and relief under ss 163(1)(a) and 163(1)(c) of the Act. ("the oppression

[1] 71 of 2008

application"). Mr Titi had sold portions of his shareholding in Columbia to Videovision and Mr Patel. Tsyia did not actively participate in these proceedings and no costs order is sought against it.

[3] For convenience Columbia and Mr Ngwenya will be referred to as "the applicants" and the Titi parties as "the respondents". Where appropriate the individual parties will be referred to by name.

[4] Despite the intricate and complicated background to the application and the various factual disputes including those pertaining to the validity of the various agreements concluded between the parties, the central issue which must be decided is a crisp one, namely the validity of the final preference share agreement and the addendum thereto. That issue is dispositive of the matter as the applicants will be entitled to relief if it is established that Mr Titi did not obtain a shareholding in Columbia and vice versa. The parties agreed that a consideration of the validity of the other agreements[2] was only relevant in the context of the credibility of the various witnesses.

[5] The parties agreed that if it is held that the final preference share agreement, the Videovision sale agreement and the Patel sale agreement, in terms of which Mr Titi subsequently sold a portion of his shareholding in Columbia are invalid, then: (i) Columbia was entitled to an order in terms of prayers 1 and 2 of Columbia's notice of motion under case number 4737/17 with costs, including the costs of two counsel and (ii) the Titi parties' oppression application and their counter application in the s165 application should be dismissed with costs, including the costs of two counsel.

[6] If on the other hand, it is held that any one of the final preference share agreement, the Videovision sale agreement and the Patel share agreement are valid, or that either of the transfers of the A Class shares or the preference shares in Columbia to Videovision or Patel are valid, the parties agreed that: (i) the Titi parties are entitled to an order in

[2] Being the Shanike sale agreement, Tsyia funding agreement, the first preferent share agreement, the second preferent share agreement and the reinstatement agreement

terms of the prayers of the oppression application with costs, including the costs of two counsel, (ii) the counter application in the s165 application should be upheld and (iii) the application in the s165 application should be dismissed with costs, including the costs of two counsel.[3] The validity of the sale agreements in terms of which Videovision and Mr Patel acquired a shareholding in Columbia follows on whether the final preference share agreement is valid.

[7] Considering the limited ambit of the issue requiring determination, it is not necessary to set out the undisputed facts in great detail. The genesis of the dispute lies in various agreements concluded between Mr Ngwenya and Mr Titi and their respective corporate entities, Columbia Media (Pty) Limited and Alphabet Street Properties 98 (Pty) Ltd ("Alphabet") over a number of years relating to the shareholding in various companies who owned certain radio stations.

[8] Both Mr Ngwenya and Mr Titi are sophisticated businesspeople and financiers,[4] who have operated in the financial industry for many years and are experienced in financing and other commercial agreements.

[9] The backdrop to the present dispute is the shareholding in MRC Media Company (Pty) Ltd ("MRC") in which Makana Investment Corporation (Pty) Ltd, ("MIC") Kagiso Media Investments (Pty) Ltd, Tsiya Radio (Pty) Ltd ("Tsyia") and Victory Parade Trading 55 (Pty) Ltd held a shareholding. The MRC shareholders' agreement contained a restriction on the sale of MRC's shares, particularising the manner of offering them to existing shareholders before they could be offered to bona fide third parties. MRC's assets were its shares in companies that owned two radio stations, Radio iGagasi and

[3] Statement of common cause facts and issues in dispute, paragraphs 96 and 97, dated 8 July 2021
[4] According to the agreed list of issues, Mr Ngwenya is the executive chairperson of MIC, the former chairman of MRC, and former director and chairperson of various companies, including Cadiz Holdings Ltd, Cadiz Holdings (Pty) Ltd, Cadiz Asset Management, Cadiz Corporate Solutions (Pty) Ltd, Airlink (Pty) Ltd, Alumicor SA (Pty) Ltd and Realm Resources (Pty) Ltd. Mr Titi is the Chariman of Investec Bank Ltd PLC, Investec Ltd, Investec PLC and Kumba Iron Ore Co Ltd.

Radio Heart ("the radio stations"). MIC and Tsiya were also shareholders in Shanike Investments No 42 Corporation ("Shanike"), which owned a radio station, Khaya FM.

[10] During late 2007 and early 2008 MIC was in urgent need of funding. Its board resolved that it would sell its shares in Shanike and MRC together with various shareholder loans it held against the underlying radio stations. The MIC board approached Mr Ngwenya, who in turn approached Mr Titi with a proposal that the two of them acquire MIC's shares in Shanike and MRC. At the time, Mr Ngwenya was the chairperson of MIC, MRC and the two radio stations, Radio iGagasi and Radio Heart and Mr Titi sat on the board of MRC, Radio iGagasi and Radio Heart.

[11] Messrs Ngwenya and Titi decided to acquire the MIC assets in their respective companies that would hold those investments, through Columbia and Alphabet respectively. During April 2008, Columbia and Alphabet during April 2008 concluded two separate agreements with MIC for the acquisition of the MIC assets.

[11.1] The "Alphabet agreement" in terms of which Alphabet and Columbia would acquire MIC's shares in MRC and MIC's loan against the two radio stations[5].The Alphabet agreement contained various conditions precedent, including a provision that Kagiso, Tsyia Radio and Victory Parade would waive their entitlement to any right of pre-emption in respect of the shares being sold in the agreement. [6] The conditions precedent were not met and the agreement lapsed. The lapsing of the agreement is one of the contested issues between the parties.

[11.2] The "Shanike agreement" in terms of which Alphabet and Columbia would acquire MIC's shares in Shanike. The conditions precedent in the Shanike agreement

[5] In terms of the agreement MIC's shares in MRC were separated out into two classes, A, ordinary shares holding only voting rights in MRC and B ordinary shares, holding the economic interest in the MRC shares.
[6] Clause 2.1.3

were fulfilled and the agreement was implemented. Those shares were sold to Tsyia pursuant to the Shanike sale agreement.

[12] Mr Ngwenya could not raise his portion of funding required to purchase the MIC assets. Mt Titi agreed to advance the required funding to him. The agreements which were concluded between them thereafter, lie at the heart of the present dispute.

[13] It was common cause that Mr Ngwenya had signed and initialed all the relevant agreements here in issue, including the final preference share agreement. He also signed various other documents including share certificates in Columbia in favour of Mr Titi, Videovision and Mr Patel. Reference will be made to the relevant documents in evaluating the evidence.

[14] In summary, the applicants' case was that the final preference share agreement is invalid as it was induced by fraud or *iustus error*. According to the applicants, the intention of the agreement was to provide for loan finance by Mr Titi to Columbia and was never to result in Mr Titi acquiring preference shares or equity in Columbia. As such there was never any consensus between the parties, thus vitiating the said agreement. The applicants contended for a misrepresentation by Mr Titi and Ms Banchetti, the attorney who, according to the applicants, represented both Mr Titi and the applicants, as the terms and implications of the final preferent share agreement were never discussed or negotiated with Mr Ngwenya and such information was withheld from him. Mr Ngwenya was presented with documents to sign at indicated areas without the opportunity to read and consider them properly. Mr Ngwenya was further never told of the lapse of the Alphabet agreement which regulated the loan finance from Mr Titi. As Mr Ngwenya was not dealing with strangers there was no reason for him to be on the alert and his unilateral mistake in signing the documents was reasonable in the circumstances.

[15] The respondents on the other hand disputed the alleged invalidity of the final preference share agreement and contended that the applicants agreed to its terms and signed the final preference share agreement and the addendum, pursuant to which the applicants' issued shares and share certificates.

[16] It was common cause that the applicants bore the onus in proving that the agreements were induced by fraud or iustus error[7], given that the applicants had admitted that Mr Ngwenya signed the agreement on their behalf.

[17] Only two witnesses testified at the hearing, Mr Ngwenya and Mr Titi. Their versions are irreconcilable and the evidence must be evaluated on the basis enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[8]. The evidence in the matter comprised of the various affidavits filed in the applications[9] and the oral evidence led at the hearing. Mr Nassel-Henderson and Ms Banchetti, who deposed to confirmatory affidavits in the application proceedings, were not called as witnesses. Both Mr Ngwenya and Mr Titi confirmed their evidence as set out in the various affidavits in the two applications. In accordance with the rules of the commercial court, the parties agreed that those affidavits would stand as their evidence in chief. The evidence presented at the hearing in main dealt with cross examination.

[18] The evidence of Mr Ngwenya was riddled with inconsistencies and implausible responses. It is not necessary to particularise all of them. The objective evidence and the probabilities are dispositive of the matter.

[19] Before considering the evidence, it is necessary to refer to the applicable principles. As a starting point it is apposite to refer to *Brink v Humphries & Jewell (Pty) Ltd ("Brink")*[10], wherein the Supreme Court of Appeal explained:

> *"The law gives effect to the sound principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his/her signature, while, at the same time, protecting such a person if he/she is under a justifiable misapprehension, caused by the other party who requires such signature, as to the effect of the document".*

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[7] George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A) at 470A-C
[8] Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA) at para [5]
[9] Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (5) SA 246 (SCA) at par [32] p258H-I
[10] 2005 (2) SA 419 (SCA) para [2]

[20] A contracting party may avoid an otherwise binding agreement on the grounds of fraud or *iustus error*, which arises only in narrow circumstances and where, as here, signature of the agreement is admitted, the applicants bear the onus[11].

[21] It is trite that in order to establish a fraud by positive representation, it was incumbent on the applicants to prove[12]: (i) a positive representation of fact by Mr Titi or his representative[13] to the applicants; (ii) which is material and would have induced a reasonable person to enter into the contract; (iii) which was false; (iv) known to be false by Mr Titi; (v) intended to induce the applicants into contracting; and (vi) induced the conclusion of the contract. In the case of a fraud by an omission, the applicants must establish that Mr Titi was under a duty to speak and deliberately breached this duty to deceive Mr Ngwenya. It is further trite that there is no *numerus clausus* of circumstances under which a contracting party is under a duty to make a disclosure of a fact or circumstance known to him prior to a contract. In general, such a duty exists when an honest businessperson would have expected a contracting party to make disclosure of a fact known to them[14].

[22] It is trite that to establish a *iustus error*, a party must prove[15]: (i) a misrepresentation by the other party; (ii) that it was material, i.e. would have misled a reasonable person; and (iii) that the misrepresentation induced the contract. As held by the Supreme Court of Appeal in *Slip Knot Investments 777 (Pty) Ltd v Du Toit*[16]*("Slip Knot")* in determining whether a mistake is *iustus* our courts have posed the following question:

> *"Has the first party- the one who is trying to resile- been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself?...If his mistake is*

[11] George v Fairmead (Pty) Ltd 1958(2) SA 465(A) at 472A-C.
[12] Quartermark Investments (Pty) Ltd v Mkhwanazi 2014 (3) SA 96 (SCA) para [14]; Feinstein v Niggli 1981 (2) SA 684 (A) at 696-697
[13] Odendaal v Ferraris 2009 (4) SA 3131 (SCA) para [30]
[14] Odendaal v Ferraris supra para 29.Banda v Van der Spuy 2013 (4) SA 77 (SCA) para 22; Ellis v Cilliers NO 2016 (1) SA 293 (WCC) par 50
[15] Brink v Humphries supra para 2 and 8 ("Brink"); Sonap Petroleum (SA)(Pty) Ltd (formerly known as Sonarep (SA)(Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A) at 240B
[16] [2011] ZASCA 34 (28 March 2011) para [1].

due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound".

[23] In *Slip Knot*, the Supreme Court of Appeal[17] held that the decisive question to be asked in cases where there is no misrepresentation has been formulated as follows:

Did the party whose actual intention did not conform to the common intention expressed lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?...To answer this question, a three-fold enquiry is usually necessary, namely firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation, and thirdly, was the other party misled thereby…the last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?

Was there a misrepresentation by Mr Titi and was Mr Ngwenya misled?

[24] In his affidavits and evidence Mr Ngwenya did not articulate the misrepresentation relied on in concrete terms. The applicants' case evolved from their founding papers to the evidence ultimately presented at the hearing. Initially it was contended that Mr Ngwenya though Columbia and Mr Titi through Alphabet concluded the Alphabet and Shanike agreements but *"through the dubious actions of the respondent a totally different vehicle as opposed to what is reflected…was used to acquire the shares in MRC and Shanike"*. The dubious action was that Mr Titi caused Mr Ngwenya to sign a barrage of agreements to create the impression that he willingly diluted his shareholding in Columbia. By failing to implement the original agreement Mr Titi robbed Mr Ngwenya of his right to 50% of the shares in MRC and Shanike. In further affidavits their case was that Mr Ngwenya intended to conclude a written funding agreement to raise his contribution for the purchase of the MRC shares and the Shanike assets. The first preference share agreement was not however the funding agreement he intended to conclude as it made provision for Mr Titi to acquire equity in Columbia and provided for preference share funding rather than loan funding. In evidence Mr Ngwenya was emphatic that he would never have agreed to any funding which would have given Mr Titi

[17] With reference to National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A) at 479G-H and Sonap supra

equity in Columbia as it made no financial sense. He conceded in cross examination that it was envisaged that Mr Titi would acquire a preference shareholding in Columbia.

[25] According to Mr Ngwenya he signed the final preference share agreement without being afforded time to consider its contents as he was provided agreements and documents from Mr Titi or Ms Banchetti with flags indicating where his signature was required, delivered via a driver, which required immediate signature so that the agreements could be returned. As he trusted them both implicitly, he signed such documents without reading them as he had no reason to doubt that the documents would not reflect the parties common goal. According to Mr Ngwenya, Ms Banchetti was representing both him and Mr Titi and he was not represented by Mr Nassel Henderson at the time the second preference share agreement was negotiated.

[26] The applicants, correctly in my view, did not persist with their contention of a fraudulent misrepresentation in argument. I am not persuaded that the applicants established any misrepresentation on the part of Mr Titi or Ms Banchetti for the reasons that follow.

[27] The documentary evidence presented constitutes objective evidence which was not placed in dispute, nor was the authenticity of any document challenged.

[28] The undisputed evidence established that Mr Ngwenya, Columbia and Mr Titi during mid 2008 signed and initialed an earlier preference share agreement in terms of which Mr Titi would acquire and preference shares and equity in Columbia (“the first preference share agreement”), which had lapsed as the conditions precedent were not met. This agreement was to provide Mr Ngwenya, through Columbia, with the funding required for the Alphabet agreement and the Shanike agreement and predated the Columbia loan agreement contended for by Mr Ngwenya. Mr Ngwenya ignored that preference and equity shareholding for Mr Titi in Columbia had been agreed between the parties before the conclusion of the Columbia loan agreement.

[29] In terms of the Tsyia funding agreement concluded during December 2008 between Tsyia, Investec Bank Ltd, Columbia and Mr Titi, Investec advanced R32 million to Tsyia in return for preference shares and equity. It provided for Columbia to subscribe for certain ordinary shares in Tsyia equating to 25% of Tsyia and representing 50% of the assets contemplated in the original Alphabet and Shanike transactions. Tsyia issued the said shares to Columbia in February 2009. The Investec agreement also utilised the mechanism of preference shares and equity in respect of the funding provided. It also puts pay to Mr Ngwenya's contention that he was robbed of the benefit of the Shanike transaction. The undisputed evidence further established that as at June 2013 Mr Ngwenya owned 50% of Columbia, which owned 25% of Tsyia which in turn owned 59.96% of MRC and which then owned 100% of the radio stations.

[30] It was undisputed that during December 2009 Mr Ngwenya and Mr Titi conducted negotiations to agree to an agreement which would replace the lapsed first preference share agreement. A copy of the draft agreement was provided to Mr Ngwenya on 7 December 2009. Various drafts of the agreement were provided to him and he finally only signed the agreement on or about 7 January 2010. The objective evidence and contemporaneous documents pertaining to these negotiations illustrate that Mr Nassel Henderson provided Mr Ngwenya with comments on the draft second preference share agreement which included a table comparing the terms of the first preference share agreement with the proposed draft, which expressly addressed the terms which Mr Ngwenya contended are objectionable and were not drawn to his attention. These comments included a comment that the *"basis of restructuring needs to be explained"* specifically pertaining to the issuing of preference and A class shares to Mr Titi. A query was also raised regarding the permitted transferee clause in the agreement relating to Mt Titi acquiring shareholding in Columbia. The comment sheet of Mr Nassel Henderson thus drew attention to the very issues Mr Ngwenya claimed ignorance of.

[31] Mr Ngwenya conceded in cross examination that he would had read the comment sheet and that he read the email sent by Mr Titi to Ms Banchetti in which he was copied which expressly addressed both Mr Titi's preference and equity shareholding as well as the other email correspondence that was passed between the various role players. His

own evidence thus established that the equity and preference shareholding of Mr Titi was brought to his attention.

[32] Mr Ngwenya did not immediately sign the second preference share agreement when it was presented to him. He did not sign it until about 7 January 2010 after certain amendments had been effected and amendments to the terms were negotiated relating to an equal recognition of Mr Ngwenya's right to transfer his shares to a permitted transferee and the removal of the arrear dividends clause with a penalty rate. Mr Ngwenya's version flies in the face of the contemporaneous correspondence.

[33] These facts further illustrate that Mr Ngwenya did not blindly trust Mr Titi and Ms Banchetti as he alleged as he did not sign the second preference share agreement on various occasions when he was asked to do so during the course of the negotiations. The contemporaneous documentary evidence further established that Mr Ngwenya was indeed assisted by Mr Nassel Henderson considering the entire tenor of the correspondence which further illustrated that Mr Nassel Henderson himself was under that impression as his conduct is consistent with that of a lawyer representing a client. Mr Ngwenya's denial that he was assisted by Mr Nassel Henderson and his insistence that the latter was representing MIC's interests are not borne out by the undisputed factual and documentary evidence. Although Mr Nassel Henderson provided a confirmatory affidavit in the applicants' papers, he was not called as a witness to corroborate Mr Ngwenya's version.

[34] Mr Ngwenya's version that Ms Banchetti represented both him and Mr Titi throughout was not corroborated by any objective evidence. Even if it is accepted that initially, when their interests were aligned in acquiring MIC's shareholding, that was the case, their interests were no longer aligned in respect of the funding provided by Mr Titi and no evidence was provided that Mr Ngwenya ever formally enlisted her services as attorney.

[35] In those circumstances, the adverse inference sought to be drawn by the applicant against the respondents' failure to call her as a witness is not supported and cannot be

drawn. On the other hand, the adverse inference respondents contended for by applicants' failure to call Mr Nassel Henderson is indeed justified.

[36] On 7 January 2009, Mr Ngwenya initialed and signed the second preference share agreement. That agreement was reinstated by way of agreement on 14 September 2010, extending the fulfilment date for the suspensive conditions to the second preference share agreement.

[37] It was common cause that on 4 October 2010, Mr Ngwenya initialed and signed the final preference share agreement, styled *"Columbia Falls Preference Share and A Share Subscription Agreement*" both personally and for Columbia. That agreement was also signed by Mr Titi. The contents of the final preference share agreement was substantially a re-enactment of the second preference share agreement, save that the interest provisions were removed. Such removal was to the financial benefit of Mr Ngwenya. The effect of that agreement was to provide for the creation and issuing of preference shares and A shares in Columbia to Mr Titi.

[38] I agree with the applicants that Mr Ngwenya was never confronted in cross examination with Mr Titi's version that they had met, broken bread and discussed the terms of the final preference share agreement. However, even if Mr Ngwenya's version is accepted that Mr Titi did not sit down and expressly discuss the implications of the final preference share agreement with him, that is not dispositive of the issue. The terms of the final preference share agreement were substantially the same as those of the second preference share agreement, specifically in relation to Mr Titi acquiring preference shares and equity in Columbia. I have already dealt with the circumstances surrounding the conclusion of the second preference share agreement and Mr Ngwenya's knowledge and involvement therein. Mr Ngwenya is not an unsophisticated businessperson but an experienced financier well aware of the implications of commercial agreements.

[39] From the facts it cannot be concluded that Mr Ngwenya was not aware of the terms of the final preference share agreement and the implications thereof. The converse is true. Mr Ngwenya's subsequent conduct supports this conclusion.

[40] On 27 October 2010, Mr Ngwenya signed the various CIPC documents to give effect to the final preference share agreements' establishment and issuing of new classes of shares. The following day, Mr Ngwenya signed, personally and for Columbia, an addendum to the final preference share agreement, extending the fulfilment date for its conditions precedents. The addendum was headed "ADDENDUM TO THE COLUMBIA FALLS PREFERENCE SHARE AND "A" SHARE SUBSCRIPTION AGREEMENT CONCLUDED ON 4 OCTOBER 2010".

[41] On 12 December 2011, Mr Ngwenya also signed the share certificates giving Mr Titi preference shares and A class shares in Columbia.

[42] During June 2011 Mr Titi sold a portion of his preference and A class shares in Columbia to Videovision. During February 2014, Mr Titi sold a further portion of his preference and A class shares to Mr Patel. Columbia was a party to the latter sale of shares agreement.

[43] Mr Ngwenya did not object to these transactions and signed the share certificates in favour of Videovision and Mr Patel as well as the amended share certificates of Mr Titi without demur.

[44] In relation to the sale of shares agreement concluded with Mr Patel, Mr Ngwenya on 27 January 2014 signed a waiver of rights for A shares and preference shares in Columbia. The waiver was a single page document, the relevant part of which provided:

> *"RE: COLUMBIA MEDIA PROPRIETARY LIMITED ("THE COMPANY")*
>
> *I hereby unconditionally and irrevocably waive any and all rights and entitlements, including any rights of pre-emption which I may have in respect of the sale by Fani Titi of 33 "A" shares and 270 preference shares in the issue share capital of the company to Aqueel Patel."*

[45] Mr Ngwenya gave effect to the waiver by signing Mr Patel's A share and preference share certificates. Mr Ngwenya could not explain why he signed the documents. His version was that he did not consider them. For the first time during cross examination

when pressed for an explanation on this issue, Mr Ngwenya contended that he had expected Mr Titi to receive preference shareholding in Columbia, whilst his previous evidence expressly contested this.

[46] These facts support the probability that Mr Ngwenya well knew that Mr Titi had acquired a preference and equity shareholding in Columbia. I conclude that there was no misrepresentation on the part of Mr Titi as contended for by Mr Ngwenya.

[47] Even if it were to be accepted that Mr Ngwenya was mistaken regarding the contents of the final preference share agreement, Mr Ngwenya still bears the onus to demonstrate that a reasonable person would have been misled. As stated by Cloete JA in *Brink*[18]:

> "*The conclusion just reached does not put an end to the enquiry. In view of the decision in this Court in Sonap Petroleum Sa (Pty) ltd (formerly known as Sonap SA (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A) at 240B, it cannot be argued that a signatory's mistake is justifiable merely because it was induced by the other party. The further question must be asked: would a reasonable man have been misled? It is this objective enquiry which primarily enables a court to prevent abuse of the Justus error defence in cases such as the present.*"

[48] For the reasons stated hereunder, the applicants also fail at this hurdle and I conclude that a reasonable person in the position of Mr Ngwenya would not have been misled.

[49] The fact that Mr Titi would acquire both preference shares and A class shares in Columbia was not hidden in the documentation[19]. The heading and purpose of the final preference share agreement made it clear what the subject matter of the agreement was. Both the second and the final preference share agreements were titled in bold on the covering page "COLUMBIA FALLS PREFERENCE SHARE AND "A" SHARE SUBSCRIPTION AGREEMENT".

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[18] Supra para 8

[19] Slip Knot supra para [12]; Van Huyssteen NO and Another v Mila Investment and Holding Company (Pty) Ltd [2017] ZASCA 84 paras [20]-[24] discussing the principles of quasi mutual assent

[50] The introduction pages of those agreements recorded the basis for the transaction in detail, the relevant portion of which provided:

> "*..Titi, Tsyia Group and Columbia agreed that Titi would enter into this preference share agreement with Columbia with the intention that once the preference share resolution is registered with the Registrar of Companies, the capital sum should be repaid to Titi in order to enable him to subscribe for preference shares. As part of the commercial arrangement between Ngwenya and Titi, Ngwenya undertook to procure that Columbia would issue the "A" shares to Titi and so enable Titi to participate in the profits of Columbia*".

[51] Had Mr Ngwenya, on his version, bothered to read the documents or even consider the broad terms of the agreement it would have been clear that the agreement pertained to preference shares and A class shares and meant that Mr Titi would participate in the profits of Columbia. Mr Ngwenya is not an unsophisticated person. To the contrary he is a very sophisticated businessman and financier with extensive knowledge of financial transactions over a long period of time.

[52] On Mr Ngwenya's own version he failed to read and consider any of the relevant agreements, the waiver and the various share certificates. That is not the conduct of a reasonable businessman. Even if the inconsistencies and improbabilities in Mr Ngwenya's evidence are ignored, his own version that he did not read the final preference share agreement is destructive of any prospect of success as a party cannot rely on his mistake if it was due to his own fault. As endorsed by the Supreme Court of Appeal in *Botha v Road Accident Fund*:[20]

> "*However material the mistake, the mistaken party will not be able to escape from the contract it his mistake is due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, that is, failing to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to his own carelessness or inattention*"

[53] Moreover, whatever subjective beliefs Mr Ngwenya may have held, his conduct objectively and reasonably represented to Mr Titi that the applicants were binding

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[20] 2017 (2) SA 50 (SCA) para 11, quoting from RH Christie & GB Bradfield Christie's The Law of Contract in South Africa 6th ed (2011) at 329-330

themselves to the final preference share agreement and its addendum and that the agreements reflected their common intention.[21]

[54] Contractual liability does not only arise where there is consensus or a real meeting of the minds but also by virtue of the doctrine of quasi mutual assent[22]. Thus even where there is no consensus contractual liability may nevertheless ensue. As stated in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*[23]:

> "Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (iustus) and it would have to be pleaded".

[55] I conclude that a conspectus of the facts and the probabilities do not support Mr Ngwenya's version and that the applicants failed to discharge the onus of proving either a fraud or *iustus error.* In light of the agreement reached between the parties alluded to earlier, it follows that the applicants must fail and the respondents are entitled to the relief sought.

[56] I turn to the issue of costs. There is no reason to deviate from the normal principle that costs follow the result. I am persuaded that the costs of two counsel are warranted, considering the complexities. This was the agreement between the parties.

[57] In the counter application under case number 4737/17, costs of two senior counsel was sought on an attorney and client scale against Columbia. Mr Ngwenya was not cited as a party in that application. In the proceedings under case number 26732/17 the respondents on the papers sought a costs order jointly against Columbia and Mr Ngwenya.

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[21] Hlobo v Multilateral Motor Vehicle Accidents Fund 2001 (2) SA 59 (SCA) para [12]-[13] and the authorities cited therein.[

[22] Slip Knot supra para [9]; Van Huyssteen NO and Another v Mila Investment and Holding Company (Pty) Ltd [2017] ZASCA 84 paras[20]-[24]

[23] 1958 (2) SA 473 (A) at 479G-H; quoted with approval in Slipknot para [9]

[58] At the hearing, the respondents sought costs on an attorney and client scale and a joint and several costs order in both matters against Columbia and Mr Ngwenya to ensure that Mr Ngwenya ultimately bears the costs of the litigation. Reliance was placed on the discretion afforded to a court under s165(10) of the Act to make an appropriate costs order and it was argued that it would be appropriate to do so.

[59] In light of the relief sought in the respective notices of motion and the agreement reached between the parties pertaining to costs,[24] which does not provide for a punitive costs order or joint costs orders against Mr Ngwenya, I am not persuaded to deviate from their agreement in relation to costs.

[60] I grant the following order[25]:

Case number 2017/04737

[1] The application is dismissed;

[2] It is directed in accordance with the provisions of s165(4)(a) of the Companies Act 71 of 2008 ("the Act") that the applicant appoints an independent and impartial person or committee to investigate the demand constituting annex SPN6, namely the taking of such steps, including the institution of legal action, as are appropriate to recover from Sibusiso Peter-Paul Ngwenya ("Mr Ngwenya") the cumulative sum of R1 970 087,17, constituting the property of the applicant alleged to have been appropriated by Mr Ngwenya, and to report to the applicant's board of directors thereon as contemplated in s 165(4)(1)(i) to s165(4)(1)(iii) of the Act;

[3] It is directed in accordance with the provisions of s 165(4)(b) of the Act, that the applicant institute legal proceedings against Mr Ngwenya as contemplated in the

[24] As reflected in their statement of issues dated 8 July 2021, referred to earlier in this judgment.
[25] The draft order provided by the respondents deviates in certain respects from the relief sought in the application papers. Insofar as such relief is concerned and it is not by agreement between the parties, the relief is limited to that sought in the notice of motion.

demand for the recovery from Mr Ngwenya of the sum of R1 970 087,17 within a period of 30 days from date of this order;

[3] The applicant is directed to pay the costs of the application, including the costs of two counsel.

Case number 2017/26732

[1] It is declared that:

[1.1.] The first applicant is the holder of 34% of the A class shareholding in the second respondent, constituting 34 A Shares;

[1.2] The second applicant is the holder of 33% of the A class shareholding in the second respondent, constituting 33 A Shares;

[1.3] The third applicant is the holder of 33% of the A class shareholding in the second respondent, constituting 33 A Shares;

[1.4] The second respondent's conduct (as represented by the first respondent) and that of the first respondent, has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the applicants and the first respondent has exercised his powers as a director of the second respondent in a manner that is oppressive or unfairly prejudicial to and that fairly disregards the interests of the applicants and as contemplated by sections 163(1)(a) and/or 163(1)(c) of the Companies Act 71 of 2008 ("the Act");

[1.5] The first, second and third applicants are collectively entitled to nominate at least one director for appointment to the board of the second respondent and have in fact so nominated a director;

[1.6] The first and second respondents are obliged to procure the appointment of the director so nominated by the first, second and third applicants;

[2] The first and second respondents are directed to convene a shareholders' meeting of the second respondent within 30 days of date of this order in accordance with s 61(3) of the Act and to cause the appointment of the applicants' nominee as a director of the second respondent at such shareholders meeting in accordance with the provisions of clause 14.2 of the Columbia Falls Preference Share and A Class Subscription agreement dated 4 October 2010 (annex FAV-24);

[3] The third respondent is:

[3.1] Directed to retain all monies that are, or may become due to the second respondent in a separate interest bearing account held at a first class bank, such interest to be held for the benefit of the second respondent;

[3.2] Interdicted and restrained from effecting payment of any monies due, owing and payable by it to the second respondent, whether at the instance of the first respondent or otherwise, pending compliance with the provisions of [4] hereunder;

[4] It is directed that the order in [3] above shall operate until such time:

[4.1] As the appointment of the applicants' appointed director to the board of the second respondent has been validly effected by the Companies and Intellectual Property Commission (CIPC); and

[4.2] The board of the second respondent, at a duly convened meeting of the second respondent, at which the applicant' nominated director is present, has:-

[4.2.1] Resolved to open a bank account in the name of the second respondent with an identified financial institution;

[4.2.2] Given effect to the terms of such resolution;

[4.2.3] Communicated to the third respondent the details of such bank account and supplied the third respondent with a resolution of the board of directors of the second respondent reflecting the due and proper adoption of a resolution to that effect thereat;

[5] The third respondent is directed to effect payment of all monies referred to in [3.1], including interest thereon, into the bank account communicated in terms of [4.2.3] above;

[6] It is directed that the first and second respondents cause all monies paid by the third respondent to the second respondent, by or in respect of the second respondents shareholding in the third respondent, to be distributed in accordance with the provisions of clause 9 of the Columbia Falls Preference Share and "A" Share Subscription Agreement, dated 4 October 2010 (annex FAV-24);

[7] Notice as contemplated by section 165(2) of the Act is dispensed with in terms of section 165(6) and the applicants are granted leave to bring these proceedings in the name and on behalf of the second respondent and without affording the second respondent time to respond to the demand and in accordance with subsection 165(4) of the Act;

[8] The costs of the application, including the costs of two counsel, are to be paid by the first and second respondents

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 22, 23 November, 01 December 2021
DATE OF JUDGMENT	: 01 March 2022
APPLICANT'S/ 1ST AND 2ND RESPONDENT'S COUNSEL	: Adv. V. Notshe SC : Adv. M. Msomi
APPLICANT'S/ 1ST AND 2ND RESPONDENT'S ATTORNEYS	: Ramushu Mashile Twala Inc : Mr G Twala/ Mr S Moyo
APPLICANTS/RESPONDENT'S: COUNSEL	: Adv. A. Sawma SC : Adv. D. Watson
APPLICANTS/RESPONDENT'S ATTORNEYS	: Tugendhaft Wapnick Banchetti & Partners Mr Kantor/Mr Verwey