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

Case Number: 21687/2021

In the matter between:

**PHATHISANI NDEBELE** First Applicant

**EMVELO HOLDINGS (PTY) LTD** Second Applicant

and

**INDUSTRIAL DEVELOPMENT CORPORATION OF  
SOUTH AFRICA** First Respondent

**BUYELWA PATIENCE SONJICA** Second Respondent

**ODIWEB (PTY) LTD** Third Respondent

**THE COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION** Fourth Respondent

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**JUDGMENT**

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**STRYDOM, J**

*Introduction*

[1] This matter arises from a commercial lending transaction in which the first respondent, the Industrial Development Corporation of South Africa (IDC), loaned R57 million to the third respondent, Odiweb (Pty) Ltd (Odiweb), an entity whose issued share capital was 100% held by second applicant, Emvelo (Pty) Ltd (Emvelo). Mr Ndebele, the first applicant, held 100% of Emvelo's issued share capital.

- [2] The pivot on which this matter hinges is the exercise of a Call Option by the IDC (IDC Call Option) in terms of a shareholders' agreement, entered into by the IDC, Emvelo, and Odiweb when Odiweb failed to repay the IDC loan by the repayment date. The shareholders' agreement provides that Emvelo could exercise an option (Emvelo Call Option) before 1 April 2015 to acquire the IDC's 49.17% interest in Odiweb and its loan account against it. This it did in March 2015, but it came to naught as Emvelo could not put up the required funds to discharge the debt that Odiweb had to the IDC. In the event, on 2 April 2015 the IDC exercised its option to acquire Emvelo's 50.83% shares in Odiweb (IDC Call Option) and proceeded to appoint the second respondent in this matter, Ms Buyelwa Patience Sonjica (Ms Sonjica) as a director of the board of Odiweb. This led to an arbitration between Emvelo and the IDC, and on 19 September 2018, the first exercise of the IDC Call Option came to be abandoned by the IDC.
- [3] Having withdrawn its first exercise of the IDC Call Option, the IDC exercised its second Call Option on 6 March 2017. The applicants' now challenge the validity and legality of the IDC's exercise of the IDC Call Option. They seek various declaratory orders, including a declaration that the terms of the IDC Call Option and the IDC Call Option Price are *contra bonos mores* and against *Ubuntu*; alternatively, impossible to perform, and *pro non scripto*.
- [4] The IDC opposes the relief sought and counterclaimed for the striking out of certain allegations contained in the applicant's founding papers. Odiweb and Ms Sonjica, the second respondent, oppose the cost order sought against them and also filed an application to strike out certain paragraphs of the applicants' founding affidavit. No relief is sought against the fourth respondent, the Companies and Intellectual Property Commission, and, unsurprisingly, it has not engaged in the litigation.
- [5] Ms Sonjica was a director of Odiweb. She resigned as a director during or about February 2022. This is the date after this application was filed by the applicants. She together with Odiweb, launched an application for the striking of certain matter in the founding affidavit. The second respondent and third respondent filed an answering affidavit which encapsulated allegations

concerning the striking out application. The further purpose of this affidavit was to oppose the cost order sought against Ms Sonjica in the main application.

*Background and context.*

- [6] The IDC is an organ of state created in terms of the Industrial Development Corporation Act<sup>1</sup> (the IDC Act) with its objectives set out in section 3 thereof.<sup>2</sup> Essentially, sections 4(b) and (c) of the IDC Act empower the IDC to lend monies to companies and acquire shares in such borrower companies.
- [7] In 2009 Emvelo, represented by Mr Ndebele, approached the IDC for funding for the establishment of a solar power electricity generating plant in the Northern Cape (the Project). The IDC agreed to provide funding for the project and came on board as a financing/equity partner. It was agreed amongst the parties that the Project was to be developed through an entity called Ilangaletu (Pty) Ltd (Ilangaletu), a bidding consortium comprising, as shareholders, Emvelo (15%) the IDC (35%), the DBSA (35%) and Siemens (15%).
- [8] Land acquisition was required for the Project's implementation and conduct. Four key properties were identified: one property upon which the Project would be established; another property that borders the Orange River and was necessary for access to water; and two further properties required for "right of way" (the Project properties). It was agreed amongst the parties that the Project properties would vest in Odiweb – as the elected vehicle that would purchase and own the land and from which it would earn income from leasing the land for the purposes of the Project. This newly established entity, however, lacked the funds to pay for the land, and so did Emvelo the initial sole shareholder in Odiweb. Thus, Emvelo sought financial assistance from the IDC, as one of the financing partners in the Project.

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<sup>1</sup> Act 22 of 1940.

<sup>2</sup> Id at section 3 provides, *inter alia*, that:

The objects of the corporation shall be to facilitate, promote, guide, and assist in, the financing of-

- a) new industries and industrial undertakings; and
- b) schemes for the expansion, better organization and modernization of and the more efficient carrying out of operations in existing industries and industrial undertakings, to the end that industrial development within the Union may be planned, expedited and conducted on sound business principles.

- [9] The IDC provided a loan in the amount of R59 841 473.10 (the IDC shareholders' loan) to fund Odiweb's acquisition of the Project properties. As security for extending the IDC shareholders' loan, the IDC and Emvelo agreed that the IDC would acquire 49.17% of Emvelo's shareholding in Odiweb at a nominal value, with Emvelo retaining the balance of 50.83% of the shares in Odiweb. The nominal value determined was R59. The terms of this transaction were recorded in a Sale of Shares Agreement, and are reflected, *inter alia*, in clause 2.1(16) read with clause 4. This is common cause between the parties and there is no need to refer to this agreement any further suffice to state that the entire Sale of Shares Agreement was subject to a suspensive condition requiring signature by the parties of a shareholders' agreement to regulate their relationship in Odiweb. This condition was fulfilled and terms of which were recorded in a Shareholders' Agreement concluded by Emvelo, the IDC and Odiweb on 22 May 2014 (the Shareholders' Agreement). It is in this agreement that the IDC and Emvelo Call Options are contained.
- [10] In terms of a Pledge of Shares Agreement forming part of the Shareholders' Agreement, as security for the obligation which Emvelo might have had to the IDC, arising from or out of the IDC Call Option referred to in clause 7 of the Shareholders' Agreement, Emvelo pledged its 50.83% shareholding (61 ordinary shares) in Odiweb in favour of the IDC.
- [11] In broad context, the contractual arrangement between the parties and Odiweb regulated the IDC's funding for the acquisition by Odiweb of immovable properties that would be used for the Project; determined that the IDC Shareholders' loan to Odiweb had to be repaid by 1 April 2015, otherwise, the IDC could exercise the IDC Call Option and implement the Pledge of Shares Agreement. Upon exercise of the IDC Call Option, the IDC would become Odiweb's 100% shareholder. Clauses 7 and 8 of the Shareholders' Agreement lie at the heart of the relief claimed by the Applicants. I will deal with these clauses in more detail later in this judgment when it is more appropriate to do so.
- [12] When Odiweb failed to repay the IDC Shareholders' loan the IDC exercised the IDC Call Option finally on 6 March 2017 (the Second Call Option) in

accordance with the provisions of the Pledge of Shares Agreement between the parties and became the sole shareholder of Odiweb. The IDC, as now sole shareholder of Odiweb, appointed Ms Sonjica as director of the board of Odiweb. Mr Ndebele remained as a director until he was removed on 3 March 2021 as a result of the implementation of the second Call Option exercise.

[13] The applicants' take issue with the exercise of the Second Call Option by the IDC. They allege that the exercise constituted the purchase by the IDC of Emvelo's shares in Odiweb "for no real value", and that the purchase by the IDC of Emvelo's shares in Odiweb was, therefore, unprocedural, unlawful, and invalid, and they dispute its enforceability. The applicants also disputed the validity of Ms Sonjica's appointment as director of the board of Odiweb and the IDC's removal of Mr Ndebele as a director of Odiweb on the basis that the IDC had no right to seek his removal and that his removal will be detrimental to Odiweb.

*Issues for determination.*

[14] The Court is required to decide the following preliminary issues before determining the merits of the application—

- a. Condonation for the late delivery of the first respondents' answering affidavit. The delay is only 26 days. The application is not opposed by the applicants and was fully explained by the IDC. Condonation should be granted.
- b. Condonation for the late delivery of the second and third respondents' answering affidavit. This application was not contested before this court and should be granted.
- c. Striking out of certain allegations in the founding affidavit. This application is opposed. I will deal with this issue later in this judgment.

[15] On the merits, the following issues are to be determined:

- a. The validity of the IDC's exercise of the IDC call option and whether the IDC call option and the call option price is *contra bonos mores* and contrary to *Ubuntu*, alternatively, impossible to perform and *pro non scripto*.
- b. Whether the removal of Mr Ndebele, the first applicant, as a director of Odiweb was unlawful. Should it be found that the IDC call option was lawfully exercised whether it will mean that the removal of Mr Ndebele was also lawful?
- c. Whether Mrs Sonjica was lawfully appointed as a director.

*Summary of the applicants' main contentions.*

[16] In support of the relief sought the applicants' relied on the following broad contentions.

[17] The applicants contend that the IDC Call Option was not validly exercised for want of compliance with formalities, particularly in that the terms require payment to be made simultaneously with the exercise of the Call Option. They aver that payment of the nominal amount of R51 never took place, and in the absence of payment, the IDC never effectively exercised its Call Option.

[18] As stated earlier, the applicants further take issue with the terms of the IDC Call Option. They aver that the terms are inherently unfair, contrary to the spirit of *Ubuntu*, *contra bonos mores*, and *pro non scripto*. This contention encompasses a number of issues, mainly:

- a. Odiweb was the beneficiary of the IDC shareholders' loan, and not Emvelo.
- b. Despite these facts, the trigger for the IDC Call Option was not the failure by Odiweb to have to repay the loan, but the failure on the part of Emvelo, a fellow shareholder in Odiweb, to repay the IDC loan.
- c. Not only was Emvelo burdened with the obligation to repay a loan not advanced to it, but furthermore, the terms of the IDC Call Option required Emvelo to make the repayment within an excessively short period in circumstances where all the parties knew that the revenue stream that

Odiweb would enjoy by way of rental income to repay the IDC loan itself, would only come into operation some years in advance.

- d. The terms of the IDC Call Option, therefore, imposed an obligation on Emvelo, the non-recipient and non-beneficiary of the loan, to make payment whilst all parties knew that the actual debtor, Odiweb, would not have the ability to repay the loan within that same short time period.
- e. The time period in question, less than eight months, is markedly incongruous with the terms of the general body of loans made available by the IDC and other lenders for the project set out in the terms of the document named The Common Terms Agreement.
- f. With the IDC Call Option not having been validly exercised in the first place and the terms thereof themselves being inherently offensive to public policy, the IDC has not validly exercised its Call Option and has not acquired the shares of Emvelo in Odiweb.
- g. In the circumstances, there was no basis for the IDC to take initiative to have Mr Ndebele removed as a director of Odiweb and there was similarly no basis in law for the IDC to take the steps to appoint Ms Sonjica as a director of Odiweb. Therefore, both the removal of Ndebele as a director and the appointment of Ms Sonjica as a director of Odiweb is invalid.
- h. The Penalty imposed on Emvelo in terms of the IDC Call Option is two-fold: The first element is the imposition of the burden to repay a debt for which the true borrower was Odiweb, not Emvelo; The second element is the forfeiture of Emvelo's very valuable shares in Odiweb.
- i. The terms of the IDC Call Option are in conflict with the express terms of a Cession and Pledge.

[19] It should be noted that the applicants' abandoned prayers 5 and 7 of their amended Notice of Motion. In prayer 5 rectification of clause 2(43) of the Shareholders' Agreement was sought. In prayer 7 a remedy for the parties to engage to reach an agreement on the repayment of the IDC loan was sought.

[20] As to the first and second prayer for relief – the removal of Ms Sonjica as a director of Odiweb and directing the CIPC to remove the name of the Ms

Sonjica from its records as a director of Odiweb – they have been rendered moot by Ms Sonjica's resignation as a director of Odiweb on 22 February 2022. Moreover, the legality of her appointment is dependent on a finding in favour of the applicants' that the IDC Call Option was not and could not have been legally exercised. If the IDC Call Option was legally exercised, then the appointment of Ms Sonjica would in any event have been legally permissible.

*Summary of the IDC's main contentions.*

- [21] The IDC opposes the relief sought by the applicants based on several grounds. First, the IDC states that there is no evidence that the applicants were in a weak bargaining position *vis a vis* the IDC, or that the acquisition of Emvelo's shares at a nominal value was unfair and unreasonable. Secondly, the IDC argues that the transaction between the parties is a common type of equity finance transaction and is not inherently unfair or *contra bonos mores*. Thirdly, the complaint about the nominal purchase price for the shares in Odiweb is unsupported by evidence, as the company had no assets and had not traded before. The applicants have not presented any evidence that suggests that Odiweb's shares are, or were then, worth "*many millions of Rands*" as the applicants now claim in this application. The applicants have simply failed to put up any evidence at all underlying the value of Odiweb's shares — including the valuation report that was allegedly commissioned by the applicants. Lastly, the Cession and Pledge in Security-Guarantee which lead to the payment of fair value for shares related to a company called KPC. It has no application to the IDC Call Option and IDC Call Option Price.
- [22] According to the IDC, it exercised the second Call Option validly as payment for the shares was made to Emvelo. The IDC asserted that its previous payment of the R51, defined in the Shareholders' Agreement as the "IDC Call Option Price", stood to its credit and there was no need to make another payment for the shares. To exercise the call option contemplated in clause 7 of the Shareholders Agreement payment had to be made simultaneously upon the call option exercised. The credit which stood met the requirement of simultaneous payment.



*Analysis.*

[23] As I noted earlier, the rights and obligations of the parties, were, *inter alia*, regulated by way of a Sale of Shares Agreement and a Shareholders' Agreement. The introduction to the Shareholders' Agreement succinctly encapsulates the contractual and factual relationship between the parties. This introduction is not repeated in this judgment.

[24] From a reading of this introduction to the Shareholders' Agreement, signed on 22 May 2014, it should be noted that the IDC introduced loan capital into Odiweb which would mean that in ordinary course, the IDC Shareholder's loan would become repayable by Odiweb. The IDC and Emvelo as the only shareholders in Odiweb, however, agreed to further terms which would have caused any one of the shareholders to become a 100% shareholder of the Odiweb shares through an arrangement of call options. The "IDC Shareholder Loan Repayment Date" was defined to be 1 April 2015. The "Company" was defined in the Shareholders' Agreement as Odiweb and the "IDC Shareholders Loan" means the shareholders loan in the name of the IDC in the books of the Company. Considering that the Shareholders' Agreement was finally signed on 22 May 2014, this would mean that it was a relatively short-term loan. The relevant clauses in the Shareholders Agreement dealing with the call options and related matters provide as follows:-

[25] Clause 7, titled "IDC Call Option" provides that:

7.1 If the [IDC loan] has not been repaid by the IDC Shareholder Repayment Date, IDC shall be entitled to exercise a Call Option on the entire 50.83% of the issued Shares (consisting of 61 shares) held by Emvelo in the Company (Emvelo Call Shares) for a call option price of R51 (IDC Call Option).

7.2 IDC shall give notice in writing to Emvelo that it exercises the call option (IDC Call Option Exercise Notice) and shall simultaneously deliver a duplicate original of the IDC Call Option Exercise Notice to the Secretary together with the IDC Call Option Price.

7.3 Upon receipt of the IDC Call Option Exercise Notice, Emvelo shall immediately upon being called upon do so (sic), sign all and any documentation required to transfer the Emvelo Call Option Shares to IDC pursuant to the /DC Call Option as prepared by the Secretary and deliver its original share certificates to the Secretary for purposes of implementation of such transfer.

7.4 Emvelo shall simultaneously with the signature of the documentation referred to above, execute an out-and-out cession of its right, title and interest in and to any loan account that Emvelo may hold in the Company, in favour of IDC, as part of the transfer of Shares being implemented without being entitled to any claim for payment in addition to the IDC Call Option." [own emphasis]

7.5 As security for its obligations under the IDC Call Option, Emvelo shall execute a pledge of the Emvelo Call Shares in favour of IDC in usual format and deliver both the executed pledge of shares (Emvelo Share Pledge) and the share certificate evidencing Emvelo's ownership of 61 Shares to the IDC in satisfaction of this requirement. Upon exercise of the Emvelo Call Option and payment of the Emvelo Call Option Price, the Emvelo Share Pledge shall thereupon be cancelled and the original pledge document and share certificate shall be returned to Emvelo.

[26] Clause 8, titled "Emvelo Call Option" reads:

8.1 Emvelo may at any time prior to the IDC Shareholder Loan Repayment Date, exercise a call option constituted in its favour by IDC, to acquire IDC's 49.17% shareholding in the company (IDC Call Option) for a nominal amount of R49, plus the amount required to repay the IDC Shareholder Loan in full as at the date of exercise of the Emvelo Call Option (i.e. the capital amount of the IDC Shareholder Loan plus interest accrued at the Prime rate plus 2%) (Emvelo Call Option Price).

8.2 Emvelo shall give notice in writing to IDC that it exercises the call option (Emvelo Call Option Exercise Notice) and shall simultaneously:

1. deliver a duplicate original of the Emvelo Call Option Exercise Notice to the secretary; and

2. establish a bank guarantee (which shall in every respect be acceptable to IDC) for payment of the full amount of the Emvelo Call Option Price into a bank account nominated by IDC against transfer of the IDC Call Shares into Emvelo's name by the Secretary.

8.3 Upon receipt of the Emvelo Call Option Exercise Notice, IDC shall immediately upon being called upon to do so, sign all and any documentation required to transfer the IDC Call Shares to Emvelo pursuant to the Emvelo Call Option as prepared by the Secretary and deliver its original share certificate/s to the Secretary for purposes of implementation of such transfer.

8.4 IDC shall simultaneously with the signature of the documentation referred to above, execute an out-and-out cession of its right, title and interest in and to any loan account that IDC may hold in the Company, in favour of Emvelo, as part of the transfer being implemented, and without being entitled to any additional claim for payment in addition to the Emvelo Call Option Price.

[27] Much confusion was caused, in my view, by both parties' wrong interpretation of the series of agreements. The applicants based their case on the allegation that Emvelo was obliged to repay the IDC Shareholder's loan, made to Odiwed, to the IDC. I do not find any clause in these agreements which created an obligation for Emvelo to repay the IDC Shareholder's loan on or before 1 April 2015.

[28] The loan was made to Odiweb, and it remained responsible for the repayment. It was only if Emvelo elected to exercise its Call Option that an obligation would have arisen to repay the IDC the outstanding balance of its loan account in Odiweb. Should the loan remained unpaid by Odiweb as of 1 April 2015 then the IDC could have elected to exercise its Call Option in terms of clause 7 of the Shareholders' Agreement. Emvelo could at any stage after the IDC Shareholders Loan was advanced to Odiweb exercise its Call Option, in terms of clause 8. But if it did, it had to pay, not repay, the outstanding balance of IDC Loan account held against Odiweb to the IDC at the time of the exercise of the

call option. If this transpired the IDC would have fallen out of the picture and Emvelo would again have been the sole shareholder of Odiweb.

[29] Effectively, Emvelo would have repaid the IDC Shareholders' loan but now Emvelo would have become the loan provider to Odiweb. Emvelo would have then become the holder of the loan account in the books of Odiweb. The IDC Shareholders' loan would then not be described as such in the books of Odiweb anymore as the IDC would no longer have been a shareholder.

[30] The IDC added to the confusion by averring that it advanced the Shareholder's loan to Emvelo and that Emvelo was obliged to repay the loan on or before 1 April 2015. It could not have been a Shareholders' loan to Emvelo, which the latter made to Odiweb for the simple reason that the IDC never became a shareholder of Emvelo. The allegation by the IDC that it was common cause between the parties that Emvelo was indebted to the IDC was in fact not so.

[31] The applicants' persisted in their version that the debt was that of Odiweb but that it was expected of Emvelo to make the repayment thereof. In my view, the agreements are clear in their terms. The indirect effect of the agreements caused is what caused confusion. When the Loan Agreement and relevant agreements were entered into the parties knew that Odiweb was not going to generate sufficient, or any income, to repay the debt within a couple of months. Consequently, the parties knew that should the IDC have exercised its Call Option Emvelo would have lost its shareholding. The parties contracted on the understanding that Emvelo could have obtained alternative funding to repay the IDC debt by 1 April 2015. The *quid pro quo* should this have happened would have been that Emvelo would again have obtained 100% of the shares of Odiweb, depending on its arrangement with the new funder. All of this can be construed to be that the IDC indirectly extended a loan to Emvelo. In my view the references by the IDC that it advanced a loan to Emvelo and not to Odiweb does not render the version of the IDC unreliable. Indirectly, it advanced a loan to Emvelo. In my view, the matter can be decided on the papers regardless of the incorrect factual allegations.

[32] The IDC shareholders' loan was not repaid on or before the loan repayment date (i.e., 1 April 2015), and Emvelo did not provide a bank guarantee for the repayment thereof. As a result, the IDC exercised the IDC Call Option on 2 April 2015 (the First Call Option). They notified Emvelo in writing and took control of the shares, which Emvelo had pledged to the IDC as security for loan repayment. This made the IDC the sole shareholder of Odiweb. It should be noted that the IDC claims to have paid R51 to Emvelo Holdings (Pty) Ltd as part of the option exercise, but I will address this issue later in my judgment. Following this, the IDC appointed Ms Sonjica as director of Odiweb, and later in 2021, Mr Ndebele was removed from the Board of Odiweb.

[33] The applicants expressed their dissatisfaction with the IDC's exercise of the First Call Option. Necessarily, it should be noted that prior to the IDC's exercise of the First Call Option, Emvelo attempted to exercise the Emvelo Call Option but was unsuccessful due to not meeting the contractual requirements. The applicants expressed their dissatisfaction in a letter to the IDC, dated 7 April 2015, sent by Emvelo. In this letter, signed by Mr Ndebele, Emvelo referred to the IDC shareholder's loan as "*bridging finance*" and stated that the IDC had taken a "*shareholding in Odiweb as a security measure for its bridging loan*". Emvelo highlighted that the repayment of the IDC loan was based on the assumption that financial closure of the Project would have been achieved by 30 July 2014, allowing Emvelo 8 months to "*to mobilise the capital to repay the IDC shareholder loan*". In this letter the rights of the parties were acknowledged to exercise the Call Options, but Emvelo argued that financial closure only occurred on 11 February 2015, a mere 3 months before the loan repayment date. Emvelo, therefore, requested an extension of the repayment deadline, which was ultimately granted during the arbitration process. As a result, the first Call Option was withdrawn, but the R51 that was paid for the Odiweb shares to Emvelo was never repaid. The importance of this letter speaks for itself as this provides the context within which the agreements were entered into between the parties. The Court will have to consider whether the terms, and the implementation of these terms, rendered, within this context, the agreements *contra bonos mores* and contrary to *Ubuntu*.

[34] On 6 March 2017, Odiweb still had not repaid the IDC shareholder's loan, leading the IDC to exercise its second Call Option as per clause 7 of the Shareholders' Agreement (the second Call Option). By exercising this second Call Option, the IDC once again became the sole shareholder of the Odiweb shares, in accordance with the terms of the Shareholders' Agreement and the Pledge of Shares Agreement. The applicants remained dissatisfied with the exercise of the call option and filed the current application.

*Was the IDC Call Option price paid?*

[35] The applicants allege that the amount of R51 was not paid into the bank account of Emvelo Holdings (Pty) Ltd, the party to the Shareholders Agreement but was rather paid into the account of Emvelo Eco Projects (Pty) Ltd. To provide evidence for this the court was referred to annexure's "Y" and "Z". In the applicant's replying affidavit two further documents were attached marked "A1" and "A2".

[36] Annexure "Y" is a letter dated 1 August 2014 confirming the bank account number of Emvelo Holdings (Pty) Ltd at Standard Bank to be 4[...]. This bank account was opened on the same date as the letter Annexure "Z" which shows the payment, which was made to Emvelo Holdings, according to the ABSA Audit Trail, was made into account number 4[...]. In the answering affidavit, it was averred that payment was in fact made to Emvelo Holdings. It was stated that this bank account particulars were provided by Emvelo Holdings to the IDC, and it previously made payments into this account. In the replying affidavit the applicants repeated that the payment was made into account number 4[...], which is the account of Emvelo Eco Projects (Pty) Ltd according to a confirmation letter from Standard Bank, dated 15 March 2021. ("A2"). Annexure "A1" confirms the account number of Emvelo Holdings to be 4[...], as of 15 March 2021.

[37] After the first Call Option was exercised and the amount of R51 was paid the applicants never contended that Emvelo Holdings never received the payment. This argument was only advanced when this application was launched. The allegation by the IDC that the payment was received by Emvelo Holdings and

that this account number was provided to the IDC by Emvelo was never refuted. Neither did the applicants explain what the relationship between the two Emvelo entities was. The court would have expected of Emvelo to provide more particularity in this regard. The applicant elected to make bold and unsubstantiated allegations and the court accepts that the payment of R51 was made to Emvelo Holdings pursuant to the first Call Option. It was not repaid and accordingly stood to the credit of the IDC. The Court finds that the IDC call option price, pertaining to the second Call Option was received by Emvelo Holdings and that the second Call Option was validly exercised concerning this issue.

*Are the terms of the IDC Call Option contra bonos mores, contrary to Ubuntu, and/or impossible to perform and pro non scripto?*

[38] In the court's view, this question can be decided on the papers applying the *Plascon-Evans*' rule. It is trite, as a matter of common law, that agreements repugnant against the law and public policy are not recognised.<sup>3</sup> Before turning to consider the applicants' plea that the contract is not enforceable on the ground that it is *contra bonos mores* or contrary to public policy, it is instructive, as a starting point, to consider, the current legal position concerning agreements which are allegedly *contra bonos mores*.

[39] In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*<sup>4</sup>, the court described "public policy" thus:

"What is needed is a legal standard firm enough to afford guidance to the Court, yet flexible enough to permit the influence of an inherent sense of fair play. I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in public opinion. In determining and applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist in vacuo, the morals of the marketplace,

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<sup>3</sup> *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891 G.

<sup>4</sup> *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (7).

the business ethics and  
to be applied, are of major

that section of the community where the norm is  
importance in its determination.”

[40] In *Beadica 231 CC and Others v Trustees for the time being of Oregon Trust*<sup>5</sup>, the Constitutional Court considered whether a court can refuse to enforce an otherwise valid contractual term on the ground that, in its opinion, the contractual term is unfair and unreasonable. The court held that a court can refuse to enforce an otherwise valid contractual term only in the event that it finds that the contractual term in question is against public policy – *contra bonos mores*. Referring to its decision in *Barkhuizen v Napier*<sup>6</sup>, the court said of the content of “public policy” as follows:

“Public policy, as informed by the Constitution, imports ‘notions of fairness, justice and reasonableness’, takes account of the need to do ‘simple justice between individuals.’”

[41] Thus, to succeed with this complaint, the applicants must show that the terms which established the Emvelo Call Option and the IDC Call Option (i) in the eyes of the community, offends the general sense of justice; (ii) offends the morals of the community; (iii) goes against public opinion and public norms; and (iv) offends business ethics and the morals of the marketplace.

[42] In *Beadica*<sup>7</sup>, the Constitutional Court confirmed the test laid down in *Barkhuizen* for determining whether an agreement, or a provision of an agreement, is against public policy and said:

“The majority judgment held that determining fairness in this context involves a two-stage enquiry: ‘The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause’.”

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<sup>5</sup> *Beadica 231 CC and Others v Trustees for the time being of Oregon Trust* (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (*Beadica*).

<sup>6</sup> *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*).

<sup>7</sup> *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* at n4 at para 36.



[43] On the concept of *Ubuntu*, the court in *Beadica* accepted the description laid out in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*<sup>8</sup> where the notion of *Ubuntu* was explained. It said *Ubuntu* –

“[E]mphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”

[44] The Constitutional Court went on to hold that: (i) the law of contract dictates that agreements concluded by parties should be upheld and that this is necessary in order to ensure that the law of contract is predictable, so that parties may regulate their conduct accordingly; (ii) it is only where a contract is so unreasonable and so unfair so as to be against public policy that a contract can be overturned; and (iii) the subjective view of judges on the unfairness or unreasonableness of a contractual term is irrelevant; it is only whether a contract (or a term of a contract) goes against public policy (the general norms of society) that a Court should refuse to enforce it. It was held as follows:

“Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.”<sup>9</sup>

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<sup>8</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 38; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 17.

<sup>9</sup> *Beadica* at para 80.

[45] The court further held that:

“The rule of law requires that the law be clear and ascertainable. As stated by this Court in *Affordable Medicines*: ‘The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.’ The application of the common law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain ... [t]he enforcement of contractual terms does not depend on an individual judge’s sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the “idiosyncratic inferences of a few judicial minds”. This would introduce an unacceptable degree of uncertainty into our law of contract. The resultant uncertainty would be inimical to the rule of law.”

[46] Even the harsh consequences of a contract must be upheld by a court. In *Cato Ridge Gas Company (Pty) Limited v BP Southern Africa (Pty) Ltd*<sup>10</sup>, the court followed the principles laid down in *Beadica*, holding that:

“While it may be that the respondent insisting that the renovations take place now, as expressly permitted in terms of the lease agreement, rather than after the sale and transfer of the applicant’s business to a purchaser, as the applicant wants, would be harsh on the applicant and at least some of its employees, ‘a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh’.”

[47] More recently, the court in *Coega Development Corporation (Pty) Ltd v MM Engineering Services (Pty) Ltd*,<sup>11</sup> confirmed that the trite principle of *pacta sunt servanda* was, and still is, a cornerstone of our law as follows: “The principle *pacta sunt servanda* (agreements, freely and voluntarily concluded, must be honoured) is still one of the cornerstones of the law of contract.”<sup>12</sup>

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<sup>10</sup> *Cato Ridge Gas Company (Pty) Limited v BP Southern Africa (Pty) Ltd* [2021] JOL 53836 (GJ) at para 50.

<sup>11</sup> *Coega Development Corporation (Pty) Ltd v MM Engineering Services (Pty) Ltd* [2002] ZACCQBHC 12; JOL 54271 (ECP).

<sup>12</sup> *Id* at para 37.

[48] The starting point, therefore, is that the terms of IDC Call Option and the Emvelo Call Option must be respected in accordance the *pacta sunt servanda* principle. The Court can elect to invalidate those terms – and thus refuse to uphold them for the purposes of the present case – only in the event that the Court finds that those terms are *contra bonos mores*. The Court's subjective view of the terms is irrelevant; it is whether those terms offend public policy (including the morals and ethics of the marketplace) that this Court can refuse to uphold those terms, as the applicants presently seek.

[49] Against the above background, clauses 7 and 8 of the Shareholders' Agreement, quoted earlier in this judgment, must be considered within the context of the reason and purpose of these clauses. Emphasis will be more focussed on the Call Option, and on the reasonableness of clause 7 as this option was exercised. The applicants' attack remains, however, also against the alleged unreasonableness of clause 8 as this clause required of Emvelo to pay the IDC the outstanding Shareholders' loan owed by Odiweb to the IDC.

[50] To decide whether these clauses are against public policy reference must again be made to the impact of these clauses and what in context were required of the parties. Emvelo should have obtained the land on which the Project would have been established. It could not raise the finances and was under pressure to perform against the option to buy the land. The IDC was approached to provide "*bridging finance*" or a short-term loan. It was agreed that the properties would be transferred into a special-purpose vehicle, Odiweb. This was the reason why the Sale of Shares Agreement and the Shareholders Agreement were entered into between Emvelo and the IDC, as well as Emvelo, the IDC, and Odiweb, respectively. Also, the security agreements. Emvelo, as represented by the first applicant, a seasoned businessman, elected to enter into these agreements on the terms as they stood. Importantly, should Emvelo have been able to raise long-term finance it could have again obtained all the shares of Odiweb by paying the amount the IDC has paid to have the properties transferred into the name of Odiweb. Emvelo contributed nothing as far as payment of the immovable properties is concerned. Despite this Emvelo held the majority of the shares in Odiweb.

[51] In terms of the contractual arrangement, Emvelo was offered the opportunity to obtain alternative funding to replace the IDC Shareholders Loan. If this could have been achieved Emvelo would have retained 100% shareholding in Odiweb. It would then have been in the position to reap the benefits of the long-term money-making prospects it alleges would have followed. If it could not pay the loan on behalf of Odiweb the IDC, the party which as paid for the immovable properties would become entitled to obtain all the shares in Odiweb.

[52] In my view, this structure made good commercial sense and there is nothing inherently unfair if implemented according to its terms. It does not militate against public policy as there is nothing inherently unfair in this bargain. When the agreement was signed on 22 May 2014 Emvelo must have known that financial closure of the bigger project might have been delayed. In any event, the second Call Options remained as options and the second call Option was only exercised on 6 March 2017 by which time Emvelo still could not obtain finance to exercise its Call Option, which included taking over the IDC loan account within Odiweb.

[53] The applicants complained about the unfairness of the IDC call option price. For a mere R51, the IDC could obtain the 61 shares of Emvelo in Odiweb, representing 50,83% of the issued shares. It was argued that fair value should have been paid and not the contractually agreed price. It was argued that where the IDC provided finance to other role players in the bigger Project the IDC agreed to pay fair value for shares. What was agreed between other parties has nothing to do with this Shareholders' Agreement. Fairness can only be determined having regard to this specific Shareholders' Agreement and weighing this against the public norm and policy not to allow agreements to be implemented which are so unreasonable and unfair that they should not be enforced according to its terms.

[54] To consider this "fair value" argument, the starting point should be the value of Odiweb shares when the second Call Option could be exercised. The Financial Statement of Odiweb as of 28 February 2017 indicated that the cost price of the land was R 59 841 693 and the *Loans from Shareholders* stood at R63 557 945. The liabilities exceeded the value of the assets.

[55] Odiweb shares could not have been worth millions of Rands as averred by the applicants. Over time these shares could have increased in value if Odiweb repaid the shareholders' loan account from the proceeds of rental agreements, but this is not of relevance as the IDC Shareholder's loan was, at the time when the agreement was entered into, envisaged as a short-term loan to provide bridging finance for Emvelo to obtain all the shares in Odiweb. There is no evidence to support the contention of the applicants that the IDC agreed to be the long-term financier of Odiweb. This is whilst the other shareholder, Odiweb, has advanced no money to Odiweb.

[56] Clearly, the provision of a short-term loan facility structured as in this case is not so unreasonable that it can be described as unreasonable or a penalty. Moreover, nothing prevented Odiweb, or Emvelo, from obtaining finance from a third party to substitute the IDC shareholder's loan. In essence, Emvelo now expects the IDC to remain to be a long-term financier. To have expected the IDC to pay fair value for the shares of Emvelo would have resulted in there being only one winner. Emvelo, who had not put any financing into Odiweb would have obtained value for its shares whilst the only funder would have had to pay further amounts regardless of its existing loan funds.

[57] It was argued that Odiweb should have repaid its own loan to the IDC, and it should not have been expected of Emvelo to repay the loan. This argument holds no water. Emvelo has put no money into Odiweb but held 50,83% of the shares. To obtain 100% it had to take the IDC out of the picture by taking over the shareholder's loan in the name of Emvelo. After this transaction, Emvelo would have been in the same situation as the IDC after it exercised its loan option. Emvelo would have held all the shares in Odiweb which would still have owed the properties valued at approximately R60 million, but also with a claim against its shareholders' loan account in the amount of approximately R60 million. Emvelo could then have reaped the fruit of lucrative rental contracts and could have used the income to pay off the loans.

[58] In essence, the applicants' complaint is that the option of IDC to sever its ties with Odiweb should not have included a term that provided for repayment of the Odiweb shareholders loan by Emvelo but if the loan is not repaid then the IDC

had to pay the fair value of the shares. Payment of the fair value of the shares when call options were to be exercised was not what the parties agreed upon and the payment of nominal values, in my view, made commercial business sense. In my view, there is nothing unfair in this transaction or *contra bonos mores* the applicants, who bore the onus seeking the avoidance of the enforcement of the relevant clauses, failed to discharge this onus. Mr Ndebele and Emvelo were provided with an opportunity to obtain alternative finance to replace the IDC loan but failed to obtain such finance. It was only fair that the party which paid for the immovable properties should be placed in a position to obtain all the shares in Odiweb.

[59] The argument advanced by the applicants that the IDC Call Option conflicts with the express terms of the Cession and Pledge in Security-Guarantee which obliges the IDC, in the event of the pledge being exercised, to pay fair value for the shares of Emvelo in the related operating company, KSI, is without merit. This Cession and Pledge in Security-Guarantee relates to a different entity called KPC and has no application to the IDC Call Option and IDC Call Option Price. The IDC could have decided for many reasons why in one case a call option price should be set at a nominal value and in other cases set at fair value. Moreover, without the full factual matrix leading up to the agreement to pay fair value this court is not in a position to compare separate agreements with one another.

[60] As far as the application of *Ubuntu* is concerned the applicants argued that Mr Ndebele is a black entrepreneur who depended upon the IDC as a state-owned enterprise to provide the necessary support for the successful implementation of the many steps required for the Project. It was argued that neither Emvelo nor Mr Ndebele had independent sources of funding and regarded the IDC as a “big brother”. This argument means that the IDC was under some obligation to assist the applicants’ as they had no independent money to finance their participation in the Project and more specifically to finance Odiweb.

[61] In my view, in this instance where in this application the Court is dealing with an individual businessman who wants to make money for himself or his entity, does not require that the concept of *Ubuntu* should come to the assistance of

the applicants. The implementation of these contractual terms has nothing to do with the communal nature of society which carries in it the ideas of humaneness, social justice, and fairness. Group solidarity does not enter the fray. Compassion is not called for where a party's sole aim is to make money and to achieve this it freely and voluntarily entered into a commercial contract. By not accommodating the applicants' either by allowing Emvelo to remain a shareholder in Odiweb or to pay fair value for its shares, the concepts of respect, human dignity, conformity to norms, and collective unity are not compromised. This line of defence to avoid the consequences of the agreements entered into by Emvelo should fail.

[62] I now turn to the second and third respondents' defences. The second and third respondents did not enter the arena on the merits of the main application, but their opposition was aimed at the cost order sought against them and to support the striking out application. In the main, the contentions on behalf of the second and third respondents are as follows:

62.1 The primary dispute is quintessentially a shareholder dispute between the applicants and IDC. The applicants, however, cited Odiweb and Ms Sonjica as respondents and requested that the Court should direct that Ms Sonjica should "*pay the costs of this application jointly and severally*" with the IDC.

[63] In their founding affidavit, according to the second and third respondents, the applicants, unfortunately, made various assertions that deserve to be struck out by the Court under Rule 6(15) for being scandalous, vexatious, or irrelevant. If such matter is not struck out from the record, the second and third respondents will be prejudiced. The objectionable paragraphs are paragraphs 48, 87, 88, 89, 90, 91, 92, and 156 of the applicants' founding affidavit.

[64] As indicated hereinabove, the relief relating to the removal of Ms Sonjica as a director is moot. Ms Sonjica resigned as a director of Odiweb in late February 2022. Giving judgment on whether she ought to be removed as a director of Odiweb will produce no tangible result, but merely an opinion.

[65] No case for the relief that Ms Sonjica must pay the costs of this application is made in the applicants founding affidavit. The applicants only make that case in reply when prompted by objections from Ms Sonjica. Moreover, this is essentially a dispute regarding who the rightful shareholders of Odiweb are, the fight does not involve the second and third respondents. Ms Sonjica did not appoint herself — she is not a shareholder in Odiweb.

*Application to strike-out.*

[66] Striking out in an affidavit is regulated by Rule 6(15) of the Uniform Rules of Court which provides that:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.”

[67] Tritely, the requirements which must be satisfied before an application to strike out matter from any affidavit are two-fold: first, the matter sought to be struck must be scandalous, vexatious, or irrelevant; In the second place, the court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.<sup>13</sup>

[68] In *Power Guarantees (Pty) Ltd and Others v Fusion Guarantees (Pty) Ltd*, the court was occasioned to deal with an application for striking out in an affidavit, to which Senyatsi J stated: “The test for irrelevance of the allegations forming the subject of the application is whether the allegations do not apply to the matter before court or do not contribute in any way to a decision of the matter.”<sup>14</sup>

[69] In dealing with the approach set out above, the IDC, Odiweb, and the second respondent, Ms Sonjica, have applied to strike out certain portions from the

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<sup>13</sup> *Beinash v Wixley* 1997 (3) SA 721 (SCA).

<sup>14</sup> *Power Guarantees (Pty) Ltd and Others v Fusion Guarantees (Pty) Ltd* [2022] ZAGPJHC 292 (6 May 2022).



applicants' founding affidavit. There exists some overlapping of the paragraphs which these parties seek to strike out. These applications are brought on the basis that the paragraphs, which are directed at its former directors — especially Mr William Smith, impermissibly contain irrelevant material to the proper adjudication of the relief sought by the applicants, and/or are scandalous, vexatious, and their admission would be prejudicial to, *inter alia*, the second and third respondents.

[70] The specific paragraphs from the first and second applicants' founding affidavit that the IDC finds objectionable and seeks to strike them out in their entirety are 46, 48, 50.13, 90 – 92, 96, 150, 155, and 156. Furthermore, the IDC seeks to strike out a portions of paragraph 45 insofar as it states:

*“This request was the first salvo from the IDC directed at excluding Emvelo and I from the Ilanga CSP 1 Project”;*

[71] Paragraph 50.6.19, insofar as it states that:

*“destined Emvelo to failure in its ability to repay the IDC loan within the prescribed very short time.”;*

[72] Paragraph 104, insofar as it states that the IDC is *“oppressive and vindictive.”*

[73] Paragraph 110, insofar as it states that,

*“the IDC through its attorneys addressed a secret letter to the IPP...”*

[74] Paragraph 134.10, insofar as it states that,

*“(t)he IDC is unable to simply rely on the draconian and one-sided provisions of the shareholders agreement imposed by it against Emvelo...”*

[75] And paragraph 136 – the heading above paragraph 136 insofar as it states:

*“[f]urther steps by the IDC in relation to the IDC's unlawful and unjustified campaign of terror against me.”*

[76] The specific paragraphs Odiweb and Ms Sonjica find objectionable and seeks to strike out is the second sentence of paragraph 48, and paragraphs

52.1,85,86 87, 88, 90, 91, and 92 of the applicants' founding affidavit. The part of paragraph 48 that Odiweb finds objectionable reads:

“The truth of the facts subsequently revealed is that William Smith is merely a stooge of the IDC and does their bidding without exercising independent thought in breach of his fiduciary duties to act in the best interests of Odiweb.”

[77] It is well established that an application to strike out will not be granted unless the applicant is prejudiced. The prejudice, so it is argued, is that Mr Smith has not been cited as a respondent and is unable to defend himself against the unsubstantiated and unfounded attacks contained in paragraph 48 of the founding affidavit that undermine his integrity and good name. It is submitted that these allegations can “properly” be said to fall within the ordinary meaning of what the Oxford Dictionary describes as irrelevant matter: “allegations which do not apply to the matter in hand, or which do not contribute one way or another to a decision of such matter”.<sup>15</sup>

[78] It is also submitted that the assertions in paragraphs 87, 88, 90, 91, and 92 of the applicants' founding affidavit are a continuation of the unfounded and unsubstantiated attack on Mr Smith's integrity and good name that is mounted by the applicants through paragraph 48 of their founding affidavit. Odiweb and Ms Sonjica further finds objectionable the applicants' assertions against Mr Smith in these paragraphs on the basis that they are unnecessarily insulting, combative, and rude; they cannot just be ignored. The paragraphs, it is argued, are additionally irrelevant for purposes of this case and will not contribute one way or the other to its decision.

[79] In response to questions from the Court as to why the use of the word ‘Stooge’ was employed when referring to Mr Smith, it was contended, with reference to an email dated 18 September 2015, in which Mr Smith responded to a follow-up from Mr Ndebele concerning a business opportunity to Odiweb, in which he responded:

“Morning Pancho

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<sup>15</sup> Third Respondent's Heads of Argument CaseLines Bundle Vol 024-17 at para 37, citing Mohamed CJ in *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA); [1997]2 All SA 241 (A) at 733D- E.

I'm awaiting feedback from the IDC team and we'll get back to you hopefully next week

Thanks

Regards"

[80] The crux of the applicant's version is that the inclusion of these paragraphs in their founding papers provides important context. Specifically, they point to the alleged attempts to divert rental amounts, failure to take advantage of a corporate opportunity, failure to arrange a meeting with DM5, and Mr Smith's support of Ms Sonjica's appointment as evidence of him being influenced by the IDC and not fulfilling his fiduciary duties. They suggest that these allegations support their contention that Mr. Smith was acting as a puppet or stooge of the IDC.

[81] From the mosaic of all the evidence, I am not able to find justification for the contents of the second sentence of paragraph 48. Also paragraphs 90 – 92, 150, and a portion of paragraph 156 of the first and second applicants' founding affidavit, for they do not lend themselves to be relevant to the relief sought or are an unwarranted attack on the integrity of the IDC appointed director Mr Smith. In the circumstances, I am persuaded that the matters under attack are irrelevant to the issues in this case, and in my view, a proper basis for prejudice has been advanced for their exclusion from the pleadings. In the exercise of my discretion, I conclude that the applications to strike out must succeed to the mentioned extent.

[82] The application of applicants should be dismissed with costs, including the cost of two counsel so employed. The cost of the striking out applications should follow the result. Ms Sonjica should be awarded cost of the main application in so far as she had to enter the fray as a cost order was sought against her. It should be noted that if Ms Sonjica did not resign as director of Odiweb before the hearing of this application the Court, having dismissed the applicants' application would not have ordered the removal of Ms Sonjica as director. Moreover, there was no reason to seek a cost order against the second respondent and she was entitled to oppose such cost order sought.

[83] On the premises, I make the following order:

## Order

1. Condonation is granted for the late filing of the first respondents' answering affidavit.
2. Condonation is granted for the late filing of the second and third respondents' answering affidavit.
3. The application is dismissed with costs, including the costs incurred by the first respondent in respect of Part A of the application. Such costs are to include the costs of two counsels.
4. The first and second applicants are ordered, jointly and severally, to pay the cost of the second respondent's costs pertaining to her opposition to the cost order which was sought against her.
5. The striking out application of the first respondent as well as the striking out application of the second and third respondents are upheld as follows:
  - 3.1 Paragraphs 90 – 92, and 150 of the first and second applicants' founding affidavit are struck out, as well as the following portions of paragraphs 48 and 156:  
  

48   *"...The truth of the facts subsequently revealed is that William Smith is merely a stooge of the IDC and does their bidding without exercising independent thought in breach of his fiduciary duties to act in the best interest of Odiweb."*

  

156   *"This is evident from the half-baked efforts in an attempt to remove me as a director and from the irresponsible conduct of their puppet director, Mr Smith who has:"*
6. The first and second applicants are ordered, jointly and severally, to pay the costs of the second and third respondents' rule 6(15) application.

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**R STRYDOM**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

For the Applicants:

Mr KJ Van Huyssteen

Instructed by

Fluxmans Attorneys.

For the First Respondent:

MS Baloyi SC, assisted by TL Marolen

Instructed by

Cliffe Dekker Hofmeyr Inc.

For the Second and Third

Mr Thato Reuben Seroto

Respondents

DM5 Incorporated.

Instructed by

31 May 2023

Date of hearing:

25 July 2023

Date of Judgment