

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

SUMMARY OF JUDGMENT

STRYDOM, J

Summary: *Contra bonos mores – ubuntu – pacta sunt servanda* principle. Commercial transaction subject to contractual terms and obligations agreed to by the respective parties.

In the instant case the IDC provided bridging finance to Odiweb (Pty) Ltd, a company used by the IDC and Emvelo Holdings (Pty) Ltd to hold property on which a solar plant was to be established in the Northern Cape. The IDC and Emvelo were the shareholders. The loan was repayable within a short period, but if not paid within the period, the shareholders could, in terms of a shareholders' agreement, exercise call options to obtain all the shares of Odiweb. As provider of all the funding to obtain the immovable properties registered in the name of Odiweb, the IDC could exercise its call option and pay only a nominal price for the shares held by Emvelo. For Emvelo to exercise its call option to obtain the shares of the IDC, Emvelo had to pay a nominal amount to the IDC as well as the IDC's outstanding loan account in Odiweb.

The applicants were dissatisfied with the terms of the IDC call option and price as well with the terms of Emvelo's call option to pay to the IDC its loan account. The court was called to determine whether the terms contained in a shareholders' agreement, as challenged by the applicants, are contrary to public policy or inimical to the values enshrined in the constitution (Ubuntu), and alternatively, impossible to perform and *pro non scripto*. The applicants further averred that the IDC call option was not validly exercised as the nominal amount was not paid.

Held: On the facts the court found that the nominal amount of R51 was paid as required by the terms of the shareholders agreement.

Held: Public policy generally favours the utmost freedom of contract, and it is trite law that the power to declare contracts contrary to public policy may only be exercised sparingly and only in the clearest of cases where the facts and circumstances justify a departure from the terms of an agreement. 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 alleged disparity in the bargaining positions of the parties and the terms contained in the concluded suit of agreements cannot be said to be offensive to public policy – also not against the morals and ethics of the marketplace. The challenged exercise of the IDC

Call Option could also not be gainsaid, and therefore constitutes a valid and lawful exercise.

Held: On the concept of *ubuntu*, it is unfathomable that the morals and ethics of the marketplace would be offended by the terms and intent of the shareholders agreement.

Further held: A party cannot walk away from contractual agreements he freely and voluntarily concluded, simply because it would be difficult to meet its terms. Accordingly, the Court held that the terms of the agreement were neither illegal nor *contra bonos mores* or *pro non scripto*. The terms of the IDC Call Option and the IDC Call Option Price must be respected in accordance with the *pacta sunt servanda* principle. The IDC was the only financier of Obiweb and for Emvelo to have obtained all the shares in Obiweb it made good commercial sense that Emvelo had to pay the IDC the outstanding amount of its loan account in Obiweb. The IDC could not have been forced to remain as the sole financier for many years and waited for Obiweb to repay the IDC's loan account whenever it was in a financial position to do so.

Held: Pursuant to this finding the applicant's prayer to be reinstated as a director was dismissed.

The court also dealt with an application to strike out evidence from the founding affidavit filed on behalf of the applicants. The legal principles applicable were restated and an order was made striking out offensive and irrelevant matter from the founding affidavit.