THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 453/2020

In the matter between:

JARED MICHAEL WATSON NO
(in his capacity as executor of the
Estate Late Gavin Joseph Watson) **APPELLANT**

and

LULAMA SMUTS NGONYAMA **FIRST RESPONDENT**

THUNDER CATS INVESTMENTS 92 (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Watson NO v Ngonyama and Another* (Case no 453/2020) [2021] ZASCA 74 (9 June 2021)

Coram: NAVSA and ZONDI JJA and KGOELE, GOOSEN and ROGERS AJJA

Heard: 20 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 9 June 2021.

Summary: Application for restoration of shares – claim that shares donated on the basis of misrepresentation that persons with BBBEE credentials would benefit – case withdrawn against registered shareholder – entities alleged to be beneficial shareholders not cited – order by court against individual alleged to have made representation incapable of execution – issues including ownership of shares involving corporate structures complex – motion proceedings inappropriate.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Kathree-Setiloane J sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the high court is set aside and substituted as follows:

'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Navsa JA (Zondi JA and Kgoele, Goosen and Rogers AJJA concurring)

Background

[1] This is an appeal against an order of the Gauteng Division of the High Court, Johannesburg (Kathree-Setiloane J). In the proceedings before the High Court, the applicants were the present respondents, namely Mr Lulama Ngonyama (Ngonyama) and Thunder Cats Investments 92 (Pty) Ltd (Thunder Cats). The respondents were Mr Gavin Watson (Watson) and Bosasa Youth Development Centres (Pty) Ltd (Bosasa Youth). The dispute concerned certain shares in a company called Ntsimbintle Mining (Pty) Ltd (Ntsimbintle). The high court's order reads as follows:

'1. [Watson] *is ordered to immediately take whatever steps are necessary* to restore to [Thunder Cats] the shares in Ntsimbintle (being 1.7% which is equal to 33.3% of the 5.1% (550) shares that were substituted for the shares donated by [Ngonyama] to [Bosasa Youth], together with all dividends earned and interest thereon at the rate of 10% per annum from the date when the shares were donated (i.e. first registered in the name of [Bosasa Youth]).

2. [Watson] and [Bosasa Youth] are ordered and directed to pay the costs of the application as well as the costs in the striking out application, such costs to include the costs of two counsel.' (My emphasis.)

The appeal is before us with the leave of the high court. At the outset, it is necessary to emphasise that the nature of the order is important, especially the highlighted part, which should be borne in mind as the issues that arise in the appeal are explored.

[2] Watson passed away on 24 August 2019, after the high court's order and before the high court granted his application for leave to appeal. He is represented in this appeal by the executor of his estate, Mr Jared Michael Watson (the executor). The basis for the order, the role of the parties leading up to it, and the grounds of appeal will all become clear against the background set out in the paragraphs that follow. This case shows, yet again as have other cases, how lucrative, for some, Broad-based Black Economic Empowerment (BBBEE) initiatives can prove, and the attendant predictable drama that unfolds when the relationship between the protagonists breaks down.

[3] In the paragraphs that follow I deal with the historical background. First, from the perspective of the present respondents who initiated motion proceedings in the high court below and obtained the order set out above. Second, I deal with the basis of the opposition to that order being granted, and then the decision of the high court on which it was based.

[4] What is set out in the following 23 paragraphs is, in the main, the version, on affidavit, of the first respondent, Ngonyama. Mr Sabelo Macingwane (Macingwane) whose name, as will be seen, featured prominently in the litigation in the high court, did not participate in the appeal. He instituted action in the high court, which is pending, in which he seeks, essentially, the same relief as that sought and obtained by the present respondents. Macingwane's aborted, belated attempt to intervene in this appeal will be dealt with, in brief, later in this judgment. For now, it suffices to record that he advisedly did not participate in the appeal. I turn to deal with the respondents' version of events.

[5] Ngonyama, Macingwane and Watson concluded an agreement, in terms of which they would each take up an equal (33.3 percent) shareholding in an investment company to be formed, which would, in turn, take up shares in a mining company, which Mr Saki Macozoma, a prominent and influential businessman, intended to establish. The envisaged investment company, Quantum Leap Investments 715 (Pty) Ltd, was incorporated in February 2003. The name of that company was later changed to Nkonjane Economic Prospecting and Investment (Pty) Ltd (Nkonjane).

[6] The following were agreed to be the contributions of the three individuals in the investment company:

'(a) Mr Macingwane would provide his skill and labour and spend his time and efforts bringing the opportunity to fruition. He brought the opportunity to invest in the Mining Company;

(b) Mr Ngonyama would contribute his business acumen and leverage on relationships he had with stakeholders in the mining industry; and

(c) Mr Watson would provide working capital and management/administrative capacity to the investment company.'

The purpose behind the incorporation of Nkonjane was to participate in an opportunity that arose in relation to manganese mining. The mining company through which that objective was to be achieved, and which later came into being, was Ntsimbintle Mining (Pty) Ltd.

[7] Ngonyama, Macingwane and Watson had agreed, additionally, that, to meet black and female empowerment objectives, a portion of their equity in Nkonjane would be transferred, in equal shares, to historically disadvantaged women and youth. In order to achieve that end, it was decided to employ two separate companies which would each hold five percent of the shares in Nkonjane on behalf of each of the two identified interest groups. That would leave Ngonyama, Macingwane and Watson holding the remaining 90 percent of the shares in Nkonjane in equal shares of 30 percent. Put differently, they envisaged that each would contribute 3.33 percent of their respective shareholding to the empowerment companies, resulting in 10 percent of the shares in Nkonjane being held

by the two companies, and the three individuals, 30 percent each. This is how the shares in Nkonjane were originally issued and allotted.

[8] Ngonyama asserted that the aforesaid agreement was altered, because it was subsequently decided, after a discussion during 2003, that instead of two companies representing women and youth respectively, there should be one company representing a broad base of historically disadvantaged groups, with at least 250 individuals representing such groups holding shares in one company. It was decided that each of Ngonyama, Macingwane and Watson would increase their contribution from a collective 10 percent to a collective 25 percent, with each contributing 8.33 percent of their shareholding in Nkonjane to the envisaged new company. Thus, the three individuals would each hold 25 percent of the equity in Nkonjane, or 75 percent collectively, and the envisaged empowerment company 25 percent.

[9] The company through which BBBEE objectives were to be achieved, at the instance of Watson, but with which the other two were happy to go along, was Bosasa Youth. It was agreed, further, that Bosasa Youth would hold 25 percent of Nkonjane and would have at least 250 persons with BBBEE credentials, whom Watson had undertaken to identify as shareholders. Ngonyama asserted that it had been agreed that each of the three individuals would have the right to appoint his preferred groups of shareholders to participate in Bosasa Youth, but in the same breath, stated that Watson had been mandated and accepted the responsibility to ensure that the shareholders in Bosasa Youth had the appropriate credentials. According to Ngonyama, he and Macingwane had not nominated anyone as shareholders in Bosasa Youth and were content to rely on Watson's assurances 'from time to time' that the shares they had all donated were being held in Bosasa Youth, which 'was indeed a broad-based-black-economic-empowerment company'. It is necessary to pause to note that this part of the description by Ngonyama of the empowerment agreement is sketchy and does not explain whether or how the empowerment qualifications and shareholding would be monitored. There is no indication of precisely when, how or if any particulars of the shareholding were subsequently sought by Ngonyama and Macingwane, in the lengthy period before matters came to a head between them, and whether the 250-threshold shareholder representation, referred to

above, was insisted on by them. This part of the affidavit is nebulous. There also appears to be an inherent tension between reserving the right to appoint shareholders and then abdicating it. Ngonyama stated that he and Macingwane 'naively' accepted Watson's assurances. More about these aspects later.

[10] During 2003, the opportunity to benefit from manganese mining materialised and Nkonjane acquired its shareholding in Ntsimbintle. During 2004, Watson transferred his shares in Nkonjane, which he held through a nominee company, to Bosasa Operations (Pty) Ltd, which later became known as African Global Operations (Pty) Ltd. I shall refer to this company as 'Operations'.

[11] In 2007, there was a sale of some of the shareholding in Ntsimbintle to a Chinese investor and each of the shareholders, including Nkonjane, contributed a pro rata share of their shareholding to facilitate the sale. After the sale was implemented, Nkonjane held 2 200 shares in Ntsimbintle, which translated into a 20.04 percent shareholding in that company. Bosasa Youth's 25 percent shareholding in Nkonjane meant that it indirectly held 5.1 percent of the shares in Ntsimbintle. Since one-third of Bosasa Youth's 25% shareholding in Nkonjane (i.e. 8.33 percent) had been donated to it by Ngonyama, the latter's donation equated indirectly to 1.7 percent of the shares in Ntsimbintle, which, it will be recalled, features in the order set out in para 1 above.

[12] The proceeds of the sale of some of the shareholding to the Chinese investor became available for distribution. The proceeds of the sale were held in Nkonjane's bank account. Macingwane, at the time, was employed by Nkonjane. A conflict arose between him and Watson concerning an alleged attempted unauthorised transfer by Macingwane of those proceeds into his attorney's bank account. It resulted in Macingwane facing disciplinary proceedings and, ultimately, he was dismissed as an employee of Nkonjane. The funds from the proceeds of the sale to the Chinese investor remained in Nkonjane's bank account.

[13] Following on the deterioration in their relationship, litigation ensued between Watson and Macingwane, and the claims instituted by the former against the latter, for

repayment of monies allegedly lent and advanced, were held by a court to have prescribed. After that, the relationship between Watson, Macingwane and Ngonyama broke down completely.

[14] Due to this breakdown in the relationship, Watson indicated a desire to exit their Nkonjane arrangement. This was at a time when the mine at the centre of the investment had become productive and started to look lucrative. Consequently, Mr Macozoma, referred to earlier, through an investment company in which he held an interest, sought to buy out the shares held in Ntsimbintle by the then constituent shareholders of Nkonjane, at R33 million for each of their 25 percent shareholding. In other words, the total shareholding of Nkonjane in Ntsimbintle was valued at R132 million (4 x R33 million).

[15] Ngonyama and Macingwane refused to sell. Bosasa Youth and Operations, on the other hand, were desirous of selling. Through Watson, they approached Ngonyama and Macingwane to obtain their consent to sell, as they were required to, by virtue of the Nkonjane shareholders' agreement. The following parts of Ngonyama's affidavit in relation to the request for consent is significant:

'Applicants indicated that they required that the one Bosasa company, [Bosasa Youth], have a shareholding that was in accordance with the original agreement that applicants could nominate groups in the shareholding of that company i.e. I wanted to exercise the right to appoint a group of shareholders to hold shares in [Bosasa Youth].'

Watson denied that Macingwane and Ngonyama had such a right and insisted that Bosasa Youth already had a BBBEE shareholding.

[16] What is significant about the passage quoted in the preceding paragraph is that it is conspicuously silent on the ten-year time lag before Ngonyama forcefully asserted the right to nominate BBBEE shareholders, which Ngonyama stated earlier, they had, in 2003, abdicated to Watson. Nothing is said about what had transpired in the interim and why this important empowerment feature, which in the usual course gives legitimacy to transactions such as the one in question, had not been policed or enquired about. What is set out in para 9 above is equally relevant here.

[17] In order to facilitate the sale of shares to Macozoma's company, and after the relationship between the three protagonists had broken down, Bosasa Youth and Operations launched proceedings for the winding-up of Nkonjane. The Gauteng Division of the High Court, Johannesburg granted a liquidation order on 10 August 2012, which was upheld by this Court on 26 November 2013.[1]

[18] During the course of the winding-up, it was agreed that each Nkonjane shareholder would buy from the liquidator its pro rata portion of Nkonjane's shares in Ntsimbintle so that they would thereafter hold their shares directly in Ntsimbintle. At the time of liquidation, Nkonjane still held 20.4 percent of the shares in Ntsimbintle. The envisaged substitution was implemented in October 2016. At that time, according to Ngonyama, he and Macingwane were firmly under the impression that the 'beneficial shareholders' in Bosasa Youth had BBBEE credentials.

[19] At the time the litigation culminating in the present appeal was launched, Ngonyama's investment vehicle, Thunder Cats, held 5.1 percent of the shares in Ntsimbintle; Turquoise Moon Trading 8 (Pty) Ltd (Turquoise Moon), Macingwane's investment vehicle, held 5.1 percent in Ntsimbintle; Bosasa Youth held 5.1 percent; and Operations, held 5.1 percent on behalf of Watson.

[20] Ngonyama was emphatic that it was only in September 2017 that he and Macingwane learnt for the first time that at no relevant time had there been BBBEE shareholders in Bosasa Youth and that Bosasa Youth was a wholly owned subsidiary of Operations, which itself was wholly owned by Bosasa Empowerment and Management Services (Pty) Ltd, later renamed African Global Holdings (Pty) Ltd (Holdings), the holding company of the group of companies formerly known as the Bosasa Group. The decision of this Court upholding the liquidation of Holdings sets out some particulars of the group, including how it captured negative media attention nationally and how the operating companies within the group were wholly owned subsidiaries of Operations. Ngonyama

[1] *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others* [2013] ZASCA 164; 2014 (5) SA 1 (SCA).

insisted that the shareholding structure of Bosasa Youth was wholly at odds with and in breach of the mandate by Ngonyama and Macingwane to Watson. There was, in fact, so Ngonyama said, no shareholding by historically disadvantaged individuals or groups as initially envisaged.

[21] In Ngonyama's view, a manifestation of Watson's duplicity and treachery is a letter written on his behalf by his attorneys, in which, at para 8, they were emphatic about how he had achieved, through Bosasa Youth, the 'strategic imperative of youth social development and women's shareholding'. The following parts of the letter, dated 21 August 2013, in response to claims by Ngonyama's attorney, are material:

'2. The issues and assertions that you raise in your letter under reply have been raised *ad nauseam* by your clients over a number of years, and at each such instance, your clients have been advised by Mr Watson and others in no uncertain terms that their contentions regarding a rectification of the [Nkonjane] share register are baseless, without foundation, and denied.

3. The terms and implication of the agreements contended for in your letter under reply are again denied. All discussions and agreements regarding the shareholding in Nkonjane as recorded in the minutes and resolutions of Nkonjane, to which your clients were party, are correctly recorded in the share register of Nkonjane.

4. The correct position regarding the respective parties' shareholding in Nkonjane as recorded in the Nkonjane share register is confirmed in an affidavit deposed to by the then company secretary of Nkonjane, Mr Terrence Perry, on 14 August 2007, as amended by his supplementary affidavit deposed to on 3 June 2008, correcting point 4 of the original affidavit. Copies of the aforesaid affidavits are annexed hereto for ease of reference.

5. You will appreciate from that deposed to by Mr Perry that the assertions contained in your letter under reply are clearly wrong, all the more so as your clients were party to the discussions and resolutions transferring the shares of Nkonjane as set out in the attached affidavits. It does not behove your clients at this stage to contend otherwise, and were they to do so, they would as a matter of law be estopped from asserting a position contrary to that set out in the Nkonjane share register, as supported by the Nkonjane minutes and attached affidavits.

6. Moreover, and in any event, any claim that your clients may have had in relation to the rectification of the Nkonjane share register has long prescribed, and there accordingly exists no legally enforceable basis for the contention set out in your letter under reply.

7. Your clients' assertions in relation to the shareholding in [Bosasa Youth], are similarly baseless, without foundation, and denied.

8. In this regard, on 23 April 2013, for strategic reasons relative to the views of the DME, the shareholders of Nkonjane agreed to each transfer 5% of their respective shareholding in Nkonjane to [Bosasa Youth], in total 25% of Nkonjane. [Bosasa Youth's] ultimate shareholder beneficiaries (held through [Holdings], and in turn [Operations]) are Mela Womans Investments (Pty) Ltd, (33.3%), Nzunzo Investments (Pty) Ltd (18.5%), the Bosasa Employees Trust (22.2%) and Mpako Investments (Pty) Ltd (26%). It follows that the aforesaid transfer to [Bosasa Youth] not only broadened the base of the Nkonjane shareholding, but also achieved the strategic imperative of youth social development and woman's shareholding.'

This letter, so Ngonyama contended, did not disclose, as stated above, that Operations, rather than historically disadvantaged persons held 100 percent of the shares in Bosasa Youth. (In what follows, the companies referred to in the latter part of para 8 of the letter quoted above will be referred to as Mela, Nzunzo and Mpako respectively.)

[22] An investigation of the 'ultimate shareholder beneficiaries', referred to in the attorney's letter, according to Ngonyama, revealed that one is a Watson Family Trust; the second too is a family trust; the third, which ostensibly is women-centred, essentially benefits, so it was said, only one individual; and the last claims to be a Bosasa Employees Trust, but it is clear, so Ngonyama alleged, that no employees had been identified to benefit from it. All roads, so Ngonyama asserted, lead back to Watson, particularly since two of the entities concluded agreements with Watson, vesting control over their shares in him or in the Watson Family Trust. It was all designed, so Ngonyama alleged, to enrich Watson and his family.

[23] Ngonyama's description of what his investigation into the corporate structures described in the letter as the 'ultimate shareholder beneficiaries' revealed bears repeating, in full:

'47. Each of these entities named "ultimate shareholder beneficiaries" has behind them as their controlling mind and beneficial owner [Watson] in that:

47.1 The sole shareholder of [Mpako] is the Gavin Watson Family Trust, IT608/2000. A copy of the share register for [Mpako] is attached marked "D". A copy of the trust deed is attached herewith marked "E". The beneficiaries of the Gavin Watson Family Trust are [Watson] and his family;

47.2 The sole shareholder of [Nzunzo] is the Archie Mkele Business Trust, IT355/2013. A copy of the share register is attached herewith marked annexure "F". The beneficiaries of the Archie Mkele Business Trust are Velile Archie Mkele and the Archie Mkele Family Trust. A copy of the Archie Mkele Business Trust is attached herewith marked "G";

47.3 The sole shareholder of [Mela] is Munirah Olivera.

47.4 The Bosasa Employees Trust, IT3305/02 is supposedly formed for the benefit of employees of [Holdings]. A copy of the trust deed is attached marked annexure "H". No employees were ever granted an option in terms of the original trust deed to entitle such employees to be beneficiaries. The definition of employee in the Trust has since been amended to mean "the Gavin Watson Family Trust". The Bosasa Employees Trust is therefore a vehicle for the benefit of [Watson] and his family trust.

48. Further to 47.2 and 47.3 hereinbefore, both Munirah Olivera and Velile Archie Mkele have concluded separate agreements with [Watson] in terms whereof the control and benefit of the shareholding by [Mela] and [Nzunzo], respectively, in [Holdings] vests in [Watson] and/or the Gavin Watson Family Trust.'

I pause to note that none of these entities were joined in the litigation in the high court.

[24] A careful reading of the aforesaid paragraphs and the documents in relation thereto reveal the following:

(a) That in respect of Mpako, the sole shareholder, per the share register, was the Gavin Watson Family Trust and the shares were acquired during April 2000;

(b) Nzunzo has seven directors, six of whom have names that suggest they are individuals from historically disadvantaged backgrounds, that the Archie Mkele Business Trust acquired the shareholding in December 2013 and, from the Trust Deed, it appears that the Trust was established during November 2013 'to accept and receive the Donation

from the Donor given on the date set out in the . . . preamble and to utilise such for the benefit of the beneficiaries';

(c) The donation to the Archie Mkele Business Trust was in the nominal amount of R100, the Trust Deed reflects Velile Archie Mkele and the Archie Mkele Family Trust as beneficiaries and the listed trustees are Velile Archie Mkele, Lindsay Alexa Watson, Mzolisi Goodwell Chiliwe and Petrus Stephanus Venter;

(d) No information is supplied by Ngonyama, or indeed, by anyone else, in relation to the date on which Mela became a shareholder of Bosasa Youth and no information at all is supplied about Munirah Olivera;

(e) The Bosasa Employees Trust Deed reflects that a company called Bosasa Empowerment Trust (Pty) Ltd, which was part of the Bosasa group of companies, wished to make share options available at fair market value to key staff members with effect from 1 March 2002, and that beneficiaries of the trust were to be employees to whom an option had been granted, employee meant 'anyone (including any executive director) employed in a full-time capacity by the Company', and trustees were to be appointed by directors of Operations;

(f) The first trustees of the Bosasa Employees Trust were Johannes Gumede, Themba Ishmael Mncwaba, Watson, Marilyn Carol Felicity Mkele and Terence Anthony Perry;

(g) Clause 21.1 of the Bosasa Employees Trust Deed provides that an option may be exercised at any time before the date stipulated by the Trustees when granting an option, which shall not be after the expiry of five years from the option date;

(h) The trust appears to have been established during April 2002 and no information is provided as to when it acquired shares in Holdings;

(i) The agreements, in terms of para 48 of Ngonyama's affidavit, referred to above, alleged to have been concluded with the named entities, vesting control in Watson, were not provided. In the affidavit of a Mr Petrus Venter, filed by the present respondents after the present appellants had filed their answering papers in the high court, reference was made to a Bosasa Group shareholders agreement, and an extract was quoted indicating that in certain defined circumstances Mpako had a call option to acquire the shares of Mela or Nzunzo in Holdings as the case might be. There is no evidence as to whether any of those defined circumstances ever occurred and, if so, whether Mpako ever exercised its call option. On the face of it, the extract from the shareholders agreement

fails to prove conclusively or at all that the shares of Mela and Nzunzo in Holdings/Operations were under the *de facto* control of Mpako or Watson.

[25] Ngonyama was adamant that the donation of the shares by him and Macingwane was premised on ensuring that historically disadvantaged individuals would benefit from an investment opportunity and would be entitled to lay claim to and enjoy the benefits thereof, including the receipt of dividends. He claimed that he and Macingwane were induced to make the donation on the strength of Watson's assurances concerning BBBEE shareholders and, had they known that in reality he intended to benefit himself and his family as described above, they would not have made the donation. The donations, so they claimed, were the very basis for Bosasa Youth's initial indirect, and now direct, 5.1 percent shareholding in Ntsimbintle.

[26] A supplementary affidavit was filed by Ngonyama's attorney, in which the attorney stated that he had gained access to affidavits made by Mr Venter (mentioned above) and a Mr Richard le Roux, which he presented to the high court. They appear to have been made in relation to an investigation into the tax affairs of the Bosasa Group. From Venter's affidavit it appears that he was employed within the Bosasa Group and that the companies within that group took instructions from Watson. The compelling conclusion, it was submitted, on behalf of Ngonyama, was that the shares in Bosasa Youth were not genuinely held by BBBEE shareholders. The affidavit by Le Roux lists a number of alleged corporate misdeeds by Watson. It was alleged that he had employed the resources of the Bosasa Group in his own interests. The essence of the affidavit by Mr Le Roux was that Watson controlled the Bosasa Group. It is to be noted that Venter and Le Roux did not make those affidavits in relation to the litigation in the high court and, furthermore, the outcome of the tax investigation and its conclusions are unknown.

[27] On the basis of what is set out in the preceding paragraphs Ngonyama considered himself entitled to cancel the donation and demand the return of the shares they had donated. He and Thunder Cats caused a letter to be served on Watson and Bosasa Youth cancelling the donation and calling on Watson *and* Bosasa Youth to take all the necessary steps to restore the shares to them. The demand was not met. This

necessitated the approach to court by Ngonyama, seeking against both Bosasa Youth and Watson the restoration of his donation to Bosasa Youth to his investment vehicle, Thunder Cats, together with all dividends earned, and interest thereon. Macingwane, as stated earlier, did not join in the application. Ngonyama referred to the payment of the total dividend of R300 million paid by Ntsimbintle in July 2017 and claimed that he was entitled to his proportionate share of that dividend on the shares he had donated to Bosasa Youth (effectively 8.33 percent of the total dividend, being one-third of the 25 percent share of the dividend attributable to Bosasa Youth).

[28] Watson and Bosasa Youth both opposed the application. The principal deponent on behalf of both Watson and Bosasa Youth, peculiarly, was Mr Johannes Gumede. It is important to have regard to what Mr Gumede, at the outset, stated in his affidavit. He commenced by stating that he is a businessman and 'a former director of [Bosasa Youth]'. He went on to state that he had also been a director of Nkonjane until its liquidation. Eight paragraphs later he stated the following:

'Whilst I was not involved in Nkonjane from its inception, I have discussed the relevant background with [Watson] who will file an affidavit confirming what is set out below.'

[29] Watson, it will be apparent from what is set out by Ngonyama, was one of the three main actors in the events leading up to the litigation in the high court and in related litigation. Yet, the sum total of Watson's affidavit in relation to the merits of Ngonyama's claims is one sentence, in the standard form:

'I have read the answering affidavit . . . by Johannes Gumede and I confirm its contents as true and correct in as far as it relates to me.'

[30] What is set out in the two preceding paragraphs gives cause to consider carefully what is said by Gumede, in his affidavit, and then, ultimately, to consider its weight and value as against what was asserted by Ngonyama.

[31] In sketching Bosasa Youth's two defences Gumede explained that it was always contemplated that Nkonjane would be closely associated with Operations in seeking investment opportunities. He contended that it was always clear to both Ngonyama and

Macingwane that Bosasa Youth was a wholly owned subsidiary of Operations, which, at material times, held 50 percent of the shares in Nkonjane (25 percent directly, and 25 percent indirectly through Bosasa Youth). That was a recurring theme in Bosasa Youth's defence. Put differently, this line of defence appeared to be that the alleged false representation by Watson does not bear scrutiny, since Ngonyama and Macingwane were always aware of the Bosasa corporate structure, that Operations held 100 percent of Bosasa Youth's shareholding and, because it was going to provide the working capital, it would not tolerate a dilution of its shareholding below 50 percent on the basis suggested by Ngonyama. While it was admitted that BBBEE remained a key objective of Operations and Bosasa Youth, Gumede insisted there had been no agreement in the terms alleged by Ngonyama.

[32] The other defence, asserted a little more emphatically than the first, was that whatever claims concerning the return of the shares that Ngonyama and Macingwane might have had against Watson and/or Bosasa Youth were compromised under the so-called 'Fluxmans agreement'. Gumede claimed that, already during August 2013, Turquoise Moon and Thunder Cats were threatening litigation to reclaim the donated shares. Gumede acknowledged that after the relationship between the three individuals broke down the winding-up of Nkonjane followed. After the winding-up order was confirmed by this Court three joint liquidators were appointed. The discussions involving the interested parties centred around how Nkonjane's assets were to be distributed.

[33] Gumede confirmed that after discussion with the liquidators, agreement was reached, in terms of which Nkonjane would sell its shares in Ntsimbintle to each of Operations, Bosasa Youth, Turquoise Moon and Thunder Cats, and that each would subsequently hold 25 percent of the shares. That agreement was reduced to writing, the Fluxmans agreement, named after the firm of attorneys which drafted it, and signed by the parties in September 2016. In terms of that agreement, the total number of shares held by Nkonjane in Ntsimbintle was 2 200, and the parties would each buy 550 shares at a price of R24 545.45 per share, translating to a sum of R13 499 997.50, payable by each party. It is clear from the Fluxmans agreement that it was essentially a substitution

agreement with the ‘purchasers’ assuming liability, effectively, only for realisation costs, namely, the liquidation realisation costs of the seller (including capital gains tax).

[34] Gumede contended that although Ngonyama and Macingwane had claimed as far back as August 2013 that they were entitled to the return of the shares, they were nonetheless content to sign the agreement without their presently formulated claim being included in the Fluxmans agreement and agreed to Bosasa Youth purchasing its 25 percent shareholding. It will be recalled that Ngonyama was adamant that he and Macingwane had only discovered in September 2017 that the empowerment shareholding had not materialised. Gumede suggested that the recently asserted claim for the return of the shares was opportunistic and was an expedient attempt to lay claim to the substantial dividend referred to above.

[35] Gumede was adamant that the Fluxmans agreement constituted a compromise or *transactio* and that it was not open to Thunder Cats, subsequently, to reclaim the shares. According to him, the respondents could not contend that they are entitled to 33.3 percent of the shares when they had agreed, after a negotiated settlement, to accept 25 percent against payment.

[36] It is necessary to record that Gumede did not, in his opposing affidavit, specify the nature and extent of the discussions he had conducted with Watson, presaged in para 9 of his affidavit, concerning the allegations made against him and the conclusion of the agreements alleged by Ngonyama. Gumede’s affidavit deals with Ngonyama’s affidavit in generalised terms, without challenging the specifics or the details, which one would have expected Watson to have provided. The opposition is based mostly on inferences sought to be drawn from the delay by Ngonyama in formally bringing the claim for the restoration of the shares, presentations by Macingwane about the corporate entities that were involved in the manganese opportunity, what was envisaged in the future, an exchange of correspondence with a potential investor, and the conclusion of the Fluxmans agreement. Significantly, Gumede does not in his affidavit mention Watson by name and it will be recalled that Watson in his confirmatory affidavit confirms Gumede’s affidavit insofar as it relates to *him*.

[37] Gumede also stated the following:

'47. I have been advised that the existence of these purported agreements constitute a factual dispute, which in applications such as the present, are generally determined on the basis of the factual version provided by respondents. On this version, as supported by the documents referred to above, the present application must fail.

48. However, I have also been advised that, in view of the effect of the Fluxmans agreement, this issue has in any event become moot.'

[38] In dealing with the initial agreement as alleged by Ngonyama about empowering women and formerly disadvantaged youths, set out in para 6 above, the following response by Gumede is material:

'It is correct that Quantum Leap Investments 715 (Pty) Ltd *[i.e. Nkonjane]* initially had a shareholding as set out in paragraph 14, but this changed less than three months later in that the shareholding was amended to reflect the true agreement between the parties, *viz* that Bosasa Youth and Bosasa Operations would between them hold at least 50% of the issued shares in Nkonjane.'

[39] At para 56 of Gumede's answering affidavit the following appears:

'The transfer of shares in Nkonjane to Bosasa Youth was made pursuant to the general understanding between the parties that Bosasa Operations and Bosasa Youth would between them hold 50% of the issued shares in Nkonjane. This is also the basis upon which matters proceeded and was accepted by all until the parties fell out with each other during about 2010.' As can be seen, no details are provided as to how this general understanding came about or why, for that matter, the initial agreement was implemented on the terms alleged by Ngonyama (namely with two empowerment companies collectively owning 10 percent of the shares in Nkonjane). There is also no explanation as to how BBBEE was to be accomplished if the Bosasa group would effectively hold 50 percent. Gumede did not join issue with the allegations by Ngonyama's attorney in the supplementary affidavit filed on Ngonyama's behalf.

[40] In relation to Ngonyama's allegations that his investigations into the ultimate beneficiaries of the donated shares revealed that it all redounded to the benefit of Watson and his family, Gumede responded by stating that the contents of those paragraphs were

irrelevant and that it was at all relevant times known that Operations held all the shares in Bosasa Youth.

[41] It is necessary to record for completeness that there is presently in place, at the instance of the respondents, a high court order interdicting Ntsimbintle from paying out one third of any dividends due to Bosasa Youth, pending the outcome of this appeal, or ultimately an appeal to the Constitutional Court. The interdict was sought and obtained in February 2021.

[42] The high court in adjudicating the application brought by Ngonyama identified the issues for determination as follows:

'(a) Whether Mr Watson misrepresented to Mr Ngonyama and Mr Macingwane the true nature of Bosasa Youth and if so, whether that misrepresentation induced them to each donate 8.33% of their shares to Bosasa Youth; and

(b) Whether the Fluxman's Agreement constituted a "compromise agreement" in respect of the shares.'

[43] As to the conflicting versions concerning the existence of the BBBEE agreement, the high court held as follows:

'[19] On consideration of the two divergent versions, I conclude that Mr Watson's denial of equal shareholding amongst the three parties and that Bosasa Youth would broaden the base of the strategic imperative of youth, social development and women's shareholding, falls within the exceptional category of being so far-fetched or clearly untenable that this Court would be justified in rejecting it merely on the papers.

[20] It is clear from the evidence that since inception of [Nkonjane], the three parties had always . . . contemplated that they were equal partners; each bringing something important to the table and that youth, social development and women's shareholding was imperative to their agreement. This is not denied by Watson. In the light of this omission, Watson's version that the parties agreed that he would hold 50% shares is far-fetched and untenable. As correctly contended for by the applicants, there is no plausible basis for Mr Ngonyama and Mr Macingwane to have each donated 8,33% of their shares for the benefit of Mr Watson and his family. Nor is there a conceivable basis for Watson himself to have donated shares he beneficially owned, to another entity that he had "already" beneficially owned. As I understand the evidence, it demonstrates no

rational or commercial reason for the two black shareholders to form a fourth company to give the white shareholder an additional tranche of shares each – without any payment or other consideration for the additional shares.

[21] Significantly, Mr Watson does not dispute that the three parties entered into an agreement to take up shareholding in an investment company to be formed by them *[i.e. Nkonjane]*, and that the investment company would in turn hold shares in Ntsimbintle, the Mining Company. Nevertheless, he seems to suggest that the initial agreement between the three parties was subsequently changed to reflect that Bosasa Youth and Bosasa Operations would between them hold at least 50% of the issued shares in [Nkonjane] and that this was always within the contemplation of the parties as all finances and capital invested in [Nkonjane] came from Bosasa Operations.

[22] This assertion is without foundation as it contradicts Mr Watson's own admission that the initial shareholding was split equally between the three parties each being allocated 30%, and that the women and youth companies were allocated a total of 10% of the shares.

[23] It was never within the contemplation of the parties that Mr Watson would get additional shares. This appears to be a recent concoction of Mr Watson. It, therefore, comes as no surprise that Mr Watson's recent version is contradicted by his attorney's letter of 21 August 2013, which supports a finding that the intention behind the donations of the shares was to achieve empowerment of black women and youth. Mr Watson also tenders no explanation for why he initially agreed to an equal allocation of shares if the contributions made by each party had been known from the outset.

[24] Taking these crucial considerations into account, I find that Mr Watson has not raised a real, genuine or *bona fide* dispute of fact. This leaves me with no option but to reject his version and accept the applicants' averments as they are not *bona fide* disputed.'

[44] In relation to the alleged misrepresentation by Watson and the inducement to make the donation, the high court was persuaded that Ngonyama had established that part of his case. In this regard, Kathree-Setiloane J referred to the letter by Watson's attorney, dated 21 August 2013, in which it was indicated that the shareholder beneficiaries would be four entities with BBBEE credentials. The following paragraphs of the judgment are relevant:

'[26] His attorneys of record stated in that letter, to the applicants' attorneys, that the transfer of the parties' 25% shareholding in [Nkonjane] to Bosasa Youth "not only broadened the base of the

Nkonjane [Investment Company] shareholding, but also achieved the strategic imperative of youth social development and woman's shareholding". It, however, turns out that that was a misrepresentation as Mr Watson and members of his family were the ultimate shareholder beneficiaries of [Mela], Nzunzo, the Employee Trust and Mpako.

[27] Mr Watson owed Mr Ngonyama and Mr Macingwane a duty to disclose that both he and members of his family were the ultimate shareholder beneficiaries of these entities. Mr Watson held out and represented to Mr Ngonyama and Mr Macingwane that he would attend to ensuring that the shares they wanted to donate to a BBBEE [entity] would in fact be donated to such an entity, and that entity was Bosasa Youth. Neither of these representations was true because Mr Watson transferred the shares to Bosasa Youth – the antithesis of a BBBEE entity – beneficially owned and controlled by him and his family members.

[28] The issue in question is one of beneficial ownership; the giving effect to an agreement entered into in good faith – to meet the transformation objectives of the agreement between the parties – in line with the transformational vision of South Africa's Constitution. In failing to disclose the true beneficial ownership of Bosasa Youth to Mr Ngonyama and Mr Macingwane, and in appropriating shares intended for a BBBEE entity, Mr Watson acted in breach of the agreed terms. This was plainly motivated by greed and dishonesty.

[29] As a partner in [Nkonjane] and having nominated Bosasa Youth as the empowerment entity, Mr Watson owed Mr Ngonyama and Mr Macingwane a duty to disclose that he and his family were the ultimate shareholder beneficiaries in these entities. Since Mr Ngonyama and Mr Macingwane acted on Mr Watson's representation that the shareholders of Bosasa Youth met the requirements of youth, social development and women's shareholding, there was no obligation on them to ascertain who the ultimate shareholders were in [Mela], Nzunzo, the Employee Trust or Mpako. In *Tubane v Machakela* the court held that:

"It is generally accepted that a person to whom a misrepresentation has been made is under no obligation to ascertain whether it is a misrepresentation and may rely on it without making further enquiries even if the ascertainment of truth would be a simple matter and he was negligent or stupid in not ascertaining it."

[30] Since Mr Watson occupied a position of trust in relation to Mr Ngonyama and Mr Macingwane, he was duty-bound to act in good faith in his dealings with them and not to overreach or deceive them.'

[45] In relation to the claim by Gumede of the compromise by way of the Fluxmans agreement, the high court, inter alia, said the following:

'[39] At the time of concluding the Fluxman's Agreement, there was no dispute regarding the genuineness of BBBEE shareholding in Bosasa Youth as according to the applicants, Mr Watson had done what he undertook, and was mandated, to do. In other words, they were of the belief that he had ensured that Bosasa Youth's shareholders were BBBEE shareholders. Their only contention was that Mr Watson had failed to cause beneficiaries appointed by each of them to be appointed as shareholders in Bosasa Youth. However, at this point, neither Mr Ngonyama nor Mr Macingwane knew that Bosasa Youth did not have genuine BBBEE beneficial shareholders. They only discovered this in 2017. Therefore, if that dispute did not exist at the time, it cannot possibly be argued that the Fluxman's Agreement settled it.

[40] The Fluxman's Agreement quite clearly did not constitute a settlement agreement or compromise in respect of the current dispute which concerns the genuine BBBEE beneficial shareholding in Bosasa Youth. This fact only became known to Mr Ngonyama and Mr Macingwane in September 2017, when a "*whistle-blower*" brought the true facts to their attention. This was long after the Fluxman's Agreement was concluded. The Fluxman's Agreement could, accordingly, have never settled the current dispute concerning the BBBEE beneficial shareholding of Bosasa Youth.

[41] The Fluxman's Agreement was entered into solely on the basis that [Nkonjane] was finally liquidated due to a deadlock between the parties for reasons unrelated to the real or genuine BBBEE beneficial shareholding of Bosasa Youth. . . .'

[46] The high court went on to make the order referred to in para 1 above. It is against the conclusions referred to in the preceding paragraphs and the resultant order that the present appeal is directed.

[47] Before considering the correctness of the conclusions reached by the high court and the appropriateness of the order, it is necessary to record the following. First, there was an application to intervene in the appeal, filed two weeks before the commencement of the current court term, by Macingwane and his investment vehicle, Turquoise Moon, on the basis that a decision in the appeal in favour of Ngonyama and Thunder Cats as well as in their favour would obviate the need to continue with the action they had instituted in the high court. This, at the eleventh hour, and without that action having been

withdrawn. Subsequently, the attorneys who filed the intervention application were substituted by ENSafrica. They advised Macingwane and Turquoise Moon to withdraw the application after, predictably, it was opposed by the appellant. The application to intervene was subsequently withdrawn without costs being tendered. Worse still, after the would-be interveners served the notice of withdrawal, they saw fit to nevertheless file a replying affidavit so as not, in their words, to leave unchallenged allegations in the answering affidavit in the application to intervene. A tender of wasted costs followed after that issue was raised by the appellants. After costs were tendered the attorney on behalf of Macingwane and Turquoise Moon communicated with the Registrar of this Court with a request that they be excused from attendance at the hearing of the appeal. The Registrar was directed to advise that the attendance of counsel on behalf of Macingwane and Turquoise Moon was required. Counsel attended and delivered an unconditional apology, accepting that a replying affidavit after an application of withdrawal was filed could serve no purpose other than to burden the court. The apology was accepted, but it is necessary to emphasise and send a message to all practitioners that this is an unacceptable manner of litigating. Also ignored was the practice direction as to pagination of interlocutory applications, laid down in a judgment of this Court more than three years ago, to this effect:

'[I]n future practitioners should ensure that opposed interlocutory [applications] in this court are paginated and indexed. The founding papers in an interlocutory application should, when served, already be paginated and be accompanied by a preliminary index; further affidavits in the application should continue the pagination and should already be so paginated when served, and should be accompanied by an updated index. In so far as needs be, the attorneys for the litigants should liaise with each other to ensure that the system of pagination and updated indexing is implemented without confusion.'[2]

These were but two of a series of procedural and substantive missteps in the present litigation, and regrettably is beginning to emerge as an unwelcome trend in litigation in this Court.

[2] *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others, Mathibane and Others v Normandien Farms (Pty) Ltd and Others* [2017] ZASCA 163; 2019 (1) SA 154 (SCA) para 84.

[48] The second aspect that it is necessary to address involves the liquidation of Bosasa Youth, the existence of which this Court had not been informed of by the parties. The provisional liquidators sought, even more belatedly than Macingwane and Turquoise Moon, to intervene in the appeal. It was then that this Court's attention was drawn, pertinently, to the liquidation of Bosasa Youth. The application was filed a few days before the hearing of the appeal (again with disregard to the pagination directive). The Registrar was directed immediately to write to the parties, requiring that they supply a response on affidavit to a number of questions. We required to be informed about the precise time when Watson, Gumede or the executor became aware of the winding-up of Bosasa Youth, especially since it was, as imparted by the liquidators, a voluntary winding-up, of which one or more of them would have been apprised. Bosasa Youth appeared to have been placed in liquidation before the matter was argued in the court below and this Court wanted to know why Kathree-Setiloane J was not informed of that fact. The application for leave to appeal appeared to have been made at the instance of Bosasa Youth in its pre-winding-up guise. Who would have given the instructions to do so? We required that question also to be answered.

[49] The attorney on behalf of Ngonyama and Thunder Cats, in response to the directive, filed an affidavit from which the following emerged. Bosasa Youth had resolved in February 2019 to place itself in voluntary liquidation. At around the same time Ngonyama was informed of this fact. According to Ngonyama's attorney, the attorneys for the provisional liquidators were soon thereafter advised of the high court case against Watson. On 14 March 2019, a separate application was launched in the high court to take Bosasa Youth out of liquidation and was successful before Ameer AJ but the liquidators immediately filed an application for leave to appeal. On 19 March 2019, counsel on behalf of Ngonyama and Thunder Cats handed Kathree-Setiloane J a draft order, to set out the relief they now sought, in terms of which they were going to proceed only against Watson personally, and would not seek any relief against Bosasa Youth. Put differently, they were withdrawing the claim against Bosasa Youth. It does not appear that counsel for any of the parties informed Kathree-Setiloane J of Bosasa Youth's liquidation and the pending challenge to it. On 20 March 2019, Ameer AJ granted leave to appeal against his order.

The appeal was upheld by this Court,[3] which had the effect of confirming the liquidation of Holdings and its subsidiaries, including Bosasa Youth, from the date of the resolution. Ngonyama's and Thunder Cats' attitude was that they were entitled to act as they did, because they had informed the liquidators of the case brought by Ngonyama and Thunder Cats. Furthermore, so they contended, since the liquidation itself was being challenged, Bosasa Youth was thus not in liquidation at the time the application was moved before Kathree-Setiloane J, and consequently, there was no duty on any of the applicants to have informed the court, because the liquidators were aware of what had occurred. I disagree. The duty is one owed to the court. Since the liquidators had already filed their application for leave to appeal against Ameer AJ's judgment, his setting aside of the liquidation resolution was suspended, and Operations and its subsidiaries arguably remained in liquidation, even though that status was uncertain. In any event, I have no doubt that had Kathree-Setiloane J been informed of what was in process she would have postponed hearing the matter pending the finalisation of the appeal process. That this would have been the correct thing to do is borne out by what is set out later in this judgment concerning the impact of the withdrawal of the application against Bosasa Youth, the enforceability of the order set out in para 1 above, and the concession on behalf of the counsel for Ngonyama in relation to the avenues available to the respondents as against the liquidators in the event of the appeal either being upheld or dismissed. Counsel on behalf of the executor, while accepting that Watson, Gumede and the executor, because of the voluntary liquidation, must have known thereof at the time of the hearing before Kathree-Setiloane J, was emphatic that he had not been informed by his clients and did not know about it. Counsel's assurance is accepted, but again, in respect of all the parties to the litigation, this is no way to litigate.

[50] The affidavit on behalf of Ngonyama and Thunder Cats, in response to this Court's directive, went on to state that at the time that the application for leave to appeal was argued, Bosasa Youth was in liquidation and the high court had been informed of it, but that it was of no moment, as the claim against Bosasa Youth, which was now under

[3] *Murray and Others NNO v African Global Holdings (Pty) and Others* [2019] ZASCA 152; [2020] 1 All SA 64 (SCA); 2020 (2) SA 93 (SCA).

the control of the liquidators, had been withdrawn. Kathree-Setiloane J's judgment on the application for leave to appeal does not support that assertion. At the commencement of that judgment, she refers to the second applicant, Bosasa Youth, in its pre-liquidation guise ('the second applicant') stating that *it* had withdrawn its application and tendered wasted costs. There is no reference to the liquidators at all. The costs order was against the second applicant, which was not cited as the company in liquidation or referred to in any manner in that incarnation. In any event, the crucial time for the court to have been informed was at inception, at the commencement of the hearing of the application in the high court.

[51] This Court has consistently insisted from as far back as 1949 that it would not deal with matters where a third party that may have a direct and substantial interest in the litigation was not joined in the suit or where adequate steps could not be taken to ensure that its judgment will not prejudicially affect that party's interests. It is clear that an order without the involvement of such a party will not be *res judicata* against it. See in this regard *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659-660; *Old Mutual Life Assurance Company (SA) Ltd and Another v Swemmer* [2004] ZASCA 140; 2004 (5) SA 373 (SCA) para 12; and *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* [2005] ZASCA 12; 2005 (4) SA 212 (SCA) paras 64-67.

[52] It is clear from the cited authorities that even were it to be averred that a third party had waived its right, it should nevertheless be heard on that aspect as well as on whether it would submit to the judgment. An agreement between the remaining parties does not excuse the non-joinder of an essential third party, in this case the provisional liquidators, who might very well have a different perspective on the erstwhile asserted defences to Ngonyama's claim and might well be in possession of relevant documentary or other information on which they ought to be heard. The withdrawal of the case against Bosasa Youth did not excuse the court below from considering *mero motu* whether its joinder and continued presence was obligatory and whether, without its continued presence, any order made would be effective. When the company was placed in provisional liquidation that consideration did not fall away. That Kathree-Setiloane J was

not informed of that fact at the time that the application was argued did not excuse Ngonyama and Thunder Cats from their obligation to join the liquidators and not withdraw the case against them. It was clear, as indicated earlier, from what was stated in the affidavit on behalf of Ngonyama, in response to this Court's directive, that the withdrawal of the case against Bosasa Youth was a stratagem to avoid having to deal with the liquidation and what might ensue in the event of it being upheld on appeal.

[53] In *Transvaal Agricultural Union*, this Court set out the two tests to determine whether a party has a direct and substantial interest in the outcome of the litigation:

'The first was to consider whether the third party would have *locus standi* to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.'[4]

The consequences spelt out in the last part of that dictum is what the rules on obligatory joinder at common law sought to prevent.

[54] In the present case, the case on behalf of Ngonyama has the potential to dilute Bosasa Youth's shareholding in Ntsimbintle, as it challenges its role in the acquisition of the BBBEE shares and potentially reduces its prior entitlement to dividends. It also has a potential knock-on effect on Operations, Holdings and shareholders (Mela, Nzunzo, Mpako and the Bosasa Employees Trust). Ngonyama might consider that all these parties were mere fronts or Watson's puppets, but even if Kathree-Setiloane J was of the same view (her judgment does not say so), those entities, including the liquidators of Operations, may strongly disagree. How can the provisional liquidators of Bosasa Youth not have a substantial and direct interest in the litigation conducted in the high court? It is to be noted that in their application for leave to intervene they, unsurprisingly, indicated that they had no present inclination to recognise Ngonyama's claim. Counsel on behalf of Ngonyama was constrained to accept that the liquidators would not, in the face of the withdrawal of the claim against Bosasa Youth, be bound to do so. Counsel suggested

[4] Paragraph 66.

that our reasoning, if we were to dismiss the appeal, might have persuasive value if the liquidators were to be approached afresh to recognise the claim. Exactly what that entailed was not made clear. The exclusion of the liquidators from the litigation in the high court and the withdrawal of the claim against Bosasa Youth is what led to the order set out in para 1 being framed in that manner. Its intelligibility and enforceability were challenged in submissions before us and I shall, in due course, address that issue.

[55] The withdrawal of the claim and the non-joinder of the liquidators, or the failure to inform Kathree-Setiloane J of their existence, and then later, of the pending appeal, are reason enough to vacate the decision of the court below and return it for reconsideration.[5] I will however, for practical purposes to enable all interested parties to make informed choices, deal with the issues identified by the court below and two more that were raised before us. I do so because of a range of options available to Ngonyama and Thunder Cats, aside from a favourable result in this appeal. The provisional liquidators, before whom Ngonyama and Thunder Cats could put in their claim for the return of the shareholding in Ntsimbintle, and their claim to dividends, are now firmly in place. There is a pending action instituted by Macingwane and Turquoise Moon, which Ngonyama and Thunder Cats, notionally, could join. Additionally, it is necessary to bear in mind, as intimated by counsel on behalf of the liquidators, who had been entrusted with a watching brief, but was available to and did answer questions posed by this Court, that there are presently investigations, in terms of s 417 of the Companies Act 61 of 1973, into the affairs of the Bosasa group of companies.[6] The outcomes of those investigations will most certainly be material to the issues raised in the present litigation. In this context, returning the matter for reconsideration might well prove an exercise in futility, especially since the proceedings in the court below were on motion and the issues that I refer to hereafter cannot be resolved on the evidentiary material presented in the court below and in the absence of necessary parties.

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[5] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) 637 (A) at 659.

[6] Section 417, which provides for investigations into the trade dealings, affairs or property of a company in liquidation, has continued application due to the provisions of the Companies Act 71 of 2008.

[56] I now turn to deal with the question of whether the conclusions by the high court were justified. In respect of the alleged misrepresentation by Watson, the high court was justified in being critical of Watson's explanation that it was always understood that Operations and Bosasa Youth would hold at least 50 percent of the shares in Nkonjane. It does not explain away the conceded earlier agreement to donate shares to two companies, which would advance BBBEE objectives and provide opportunities for women. More fundamentally, the assertions by Ngonyama involve discussions with and agreements concluded with Watson, who rather than deal with them head-on, chose to have Gumede advance his case by way of general remarks and seeking to have inferences drawn. In *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] ZASCA 118; [2017[4 All SA 624 (SCA), this Court, in dealing with affidavits drawn in the manner resorted to by Watson and Gumede, said the following:

'This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.'[7]

That is the case here. There is no direct engagement by Watson with the allegations by Ngonyama.

[57] However, the problem for Ngonyama is that his own version of the agreement in relation to BBBEE shareholding, and the verification thereof, is inconsistent and vague. The version vacillates between reserving the right to appoint suitable shareholders and abdicating it to Watson. One is unable to tell whether or how there was going to be any monitoring of BBBEE shareholding. There is an unexplained ten-year hiatus, with apparently no enquiries made by Ngonyama or Macingwane as to compliance, and then, remarkably, when there is an offer to purchase the shares in Nkonjane, ten years later and his consent is sought, Ngonyama, suddenly, 'wanted to exercise the right' to appoint shareholders in Bosasa Youth, in accordance with the initial agreement. That appears to be a belated attempt by him, in 2013, to put in place that which was envisaged initially.

[7] Paragraph 31. See also *Eskom Holdings SOC Limited v Masinda* [2019] ZASCA 98; 2019 (5) SA 386 (SCA) para 3.

Put differently, it appears that what was being proposed by Ngonyama was to set right that which all three of the parties had neglected to see to for almost a decade and to ensure that persons with the appropriate empowerment credentials would benefit from the manganese mining opportunity. He did not at that stage seek the return of the shares.

[58] It must be so that the empowerment objectives agreed upon by the three parties was set as a future goal. I have grave doubts that the conclusion can be reached that right from inception, in 2003, when the empowerment objectives were first mooted and agreed upon, that Watson had decided then already not to meet them. He could not have known that the other two parties would, for such a lengthy period, be largely inert. It appears that all three parties were for a time content to provide, through Bosasa Youth, for obvious reasons, an improved empowerment façade for Nkonjane. The statement that Ngonyama accepted 'naively' the assurances by Watson is far too glib. It took a further five years after the letter from Watson's attorney in August 2013 concerning empowerment credentials before Ngonyama launched the application in the high court. This time the stakes involved an increased share of the R300 million dividend and those that would be declared in the future.

[59] I am unable to conclude as confidently as did Kathree-Setiloane J that there was a misrepresentation that induced the donation of the shares. The donation was made because of what the three participants envisaged in the future, namely that previously disadvantaged persons would benefit from manganese mining. Put differently, there is material doubt as to whether, at the time Ngonyama and Macingwane donated shares to Bosasa Youth, Watson made any fraudulent misrepresentation as to an existing fact (cf *Ferrari and Others v Gunner* [2015] ZASCA 5 (SCA) para 31) or as to what he intended to do in the future, i.e. as to his state of mind (*Presidency Property Investments (Pty) Ltd and Others v Patel* [2011] ZASCA 73; 2011 (5) SA 432 (SCA) para 28). He may at that time (2003) honestly have intended Bosasa Youth to be directly or indirectly controlled by BBBEE interests. We do not know as a fact that Bosasa Youth was not initially so held; the investigations on which Ngonyama based his assertions concerned the way in which Bosasa Youth was held at a much later time. The foundation of Ngonyama's case – that

Watson's fraudulent misrepresentation had induced the donation – was thus not without its frailties. The uncertainties that arise from Ngonyama's own version of events, concerning the BBBEE component, alluded to earlier, would have given me cause for pause to reach that conclusion quite as emphatically in motion proceedings as did the high court.

[60] The court below was, however, correct to reach the conclusion that the Fluxmans agreement did not constitute a compromise. A compromise or *transactio* is a contract whose purpose is to prevent or to put an end to existing litigation.[8] The basis for the Fluxmans agreement is set out in para 41 of the judgment of the court below, recorded in para 45 above. The Fluxmans agreement was concluded to deal with the deadlock between the shareholders concerning the sale of their shares to Macozoma's investment company and was unconnected to the dispute about the BBBEE shareholding and, as noted by the court below, that dispute had not yet come to a head.

[61] Before us the compromise point had 'morphed' into what was set out in the appellant's heads of argument in this Court. We were assured that the argument in that form had been presented before Kathree-Setiloane J, but that she had omitted to deal with it in the judgment. The argument before us was that the Fluxmans agreement constituted an insurmountable obstacle to the claim for the restoration of the shares. The appellant contended that in light of the high court's correct finding that the Fluxmans agreement was a stand-alone agreement, in terms of which Bosasa Youth acquired its shares in Ntsimbintle, it was a true purchase and sale agreement, and not, as contended for by the respondents, a share substitution agreement. There was therefore no causal link between the donation on the terms contended for by Ngonyama and the shares presently held by Bosasa Youth in Ntsimbintle. Simply put, the argument was that the shares held by Bosasa Youth in Ntsimbintle were due to the Fluxmans agreement, which had not been set aside and in respect of which the liquidators of Nkonjane had not been joined, and that this presented an insurmountable obstacle to the claim for the restoration

[8] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 921A-D.

of the shares. I disagree. The Fluxmans agreement, viewed contextually, was, as asserted by the present respondents, a share substitution agreement. I did not understand counsel for the appellant to contend that, in the event of a conclusion to that effect, the argument was otherwise sustainable.

[62] There is, however, an even more fundamental problem for the respondents. The appellant contended, quite vigorously, that the order by the high court set out in para 1 was incompetent. It is to that issue that I now turn. The high court's judgment on the true ownership of the shares in question (i.e. the donated shares, the recovery of which Ngonyama and Thunder Cats sought in the high court) is less than clear. To begin with, at para 26 of the judgment, the high court, when dealing with the question of the misrepresentation, concluded that Watson and members of his family were the ultimate shareholder beneficiaries of Mela Woman, Nzunzo, Mpako and the Bosasa Employees Trust. In the next paragraph, the high court stated that Watson owed Ngonyama and Macingwane a duty to disclose that he and his family were the ultimate beneficiaries. At para 28, Kathree-Setiloane J stated that the question is one of beneficial ownership and that by appropriating shares intended for people or groups with BBBEE credentials Watson acted in breach of the agreement. The high court went on to state that there was no obligation to ascertain who the ultimate shareholders were of the entities referred to in para 26 of the judgment. At para 43, Kathree-Setiloane J had regard to the relief sought by Ngonyama, including a declarator that he was the lawful owner of the shares that had been donated by him. Kathree-Setiloane J then went on, after considering the objection by the appellant to that relief being granted, namely, that Ngonyama was on his own version not the owner of the shares, but that Thunder Cats was. Kathree-Setiloane J had regard to the amended relief sought by the respondents, which was that 'Watson, inter alia take whatever steps are necessary to restore to Thunder Cats the 550 shares in [Ntsimbintle]'.

[63] It seems to me, with respect, that Kathree-Setiloane J used the expression 'beneficial ownership' rather loosely. In the sphere of corporations, the beneficial ownership of shares refers to the case where shares, although registered in the name of

a nominee, are in truth owned beneficially by a person whose name does not appear on the company's share register. Bosasa Youth is the registered shareholder of the disputed shares. Kathree-Setiloane J did not positively find that Bosasa Youth was not also the beneficial owner of the disputed shares. The *lis* against Bosasa Youth was withdrawn. Absent a rectification of Ntsimbintle's share register or the dispute between Bosasa Youth and the present respondents concerning the ownership of the shares being finally adjudicated, any order made that involves Bosasa Youth's liquidators having to restore the shares held in their name is of no value. It is not binding on them. This just highlights the folly of withdrawing the case against Bosasa Youth and not informing the high court of the liquidation and not involving the liquidators. I can see no value in the order being framed in the manner set out at the end of the preceding paragraph. It cannot be executed. Put differently, it has no practical effect.

[64] During argument it was put to counsel for the respondents that there was little more that Watson (or now his executor) could do in furtherance of the order than requesting the liquidators to transfer the disputed shares to Thunder Cats. There is no juridical basis for the grant of an order requiring a party to make such a request, particularly not a request to the very party against whom the relief should have been sought in the first place but against whom a litigant has withdrawn his claim. The request would also be futile, because we know that the liquidators will not comply with it. Counsel suggested that there might be other steps that Watson (or now his executor) would have to take, such as suing various parties to establish that Ngonyama or Thunder Cats is the beneficial owner of the disputed shares or that they must be returned to them. This is wholly unrealistic. An order which does not clearly convey to the party bound thereby what he needs to do in order to avoid a finding of contempt does not comply with the rule of law's requirement of reasonable certainty (*Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) para 10 read with para 14). It also has to be borne in mind that the entities said by Ngonyama's attorney to be the 'ultimate shareholder beneficiaries' were not joined as respondents and the order does not bind them in the contestation about ownership of the shares.

[65] Moreover, there are other layers of corporate ownership and interests involved, namely, Operations, of which Bosasa Youth is a wholly owned subsidiary, and Holdings above them. They were not involved in the contestation. There is also Ntsimbintle's share register and shareholding that will be affected. The rights to be on the register may be independent of the right to ownership of the shares.[9] Questions of ownership of shares, as opposed to questions related to rectification of a share register, are more often than not dealt with by way of a trial, rather than on motion, especially where the issue is one of complexity or difficulty.[10]

[66] The first error by Ngonyama was to withdraw the case against Bosasa Youth, a necessary party, and then not involving the liquidators. In fact, the respondents studiously and strategically avoided dealing with them. Furthermore, the exclusion of entities who had a direct and substantial interest in the litigation, such as those said to be the ultimate share beneficiaries, was an error. Then, the high court compounded these missteps by not considering the issues set out earlier in this judgment. Kathree-Setiloane J, understandably, was influenced by the denial by Gumede of the existence of any agreement of a BBBEE component and was moved to ensure that Watson did not get away with it. However, the high court ought to have paused to consider that Ngonyama's version concerning the BBBEE agreement and how the dispute ultimately developed raised a number of uncertainties that required further exploration and could not be resolved in motion proceedings. In relation to the ownership of the shares, the high court ought to have appreciated that, without the involvement of Bosasa Youth and other interested parties, this issue could not effectively be resolved. The robust approach followed by the high court in resolving all the issues on affidavit, given all the issues discussed above and the complexities involved, was not appropriate. A court order must be framed in terms that are capable of being enforced.[11] The order, as explained above, is ineffective and cannot be executed upon.

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[9] *Jeffery v Pollak and Freemantle* 1938 AD 1 at 18.
[10] See *Henochsberg on the Companies Act 71 of 2008* (Vol 1) at 208(8A) and the authorities there cited, also *Peer v Greenhouse (Pty) Ltd* 1952 (4) SA 614 (N) at 616-618, *Verrin Trust & Finance Corporation (Pty) Ltd v Zeeland House (Pty) Ltd and Others* 1973 (4) SA 1 (C) at 9G-11A and at 13C-H, *Boorman v Steynberg NO and Another* 2001 (2) SA 1116 at 1123B-1125C.
[11] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319; 2016 (3) SA 37 (CC) at para 73.

[67] For all the reasons aforesaid, the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the high court is set aside and substituted as follows:

‘The application is dismissed with costs, including the costs of two counsel.’

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M S NAVSA

JUDGE OF APPEAL

Appearances:

For appellant:	J H Loots SC, with him P-S Bothma
Instructed by:	Van Wyk & Associates, Cape Town
	Symington De Kok, Bloemfontein
For respondents:	L J Morison SC, with him T Scott
Instructed by:	Knowles Hussain Lindsey Inc, Sandton
	Claude Reid Inc, Bloemfontein