IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

In the matter between:	CASE NO: 2022/040174
DIMENSION DATA FACILITIES (PTY) LTD	First Applicant
DIMENSION DATA INVESTMENTS SOUTH AFRICA (PTY) LTD	Second Applicant
NTT LIMITED	Third Applicant
and	
IDENTITY PROPERTY CO (PTY) LTD	First Respondent
IDENTITY FUND MANAGERS (PTY) LTD	Second Respondent
IDENTITY PROPERTY FUND 1 *en commandite* partnership	Third Respondent
JEREMY JOHN ORD	Fourth Respondent
STEVEN JEFFREY NATHAN	Fifth Respondent
GRANT MARTIN CAMPBELL BODLEY	Six Respondent
ATHANASIOS MISSAIKOS	Seventh Respondent
BRUCE WATSON	Eighth Respondent
JASON MATHEW GOODALL	Ninth Respondent
IDENTITY PROPERTY CO SECURITY SPV (RF) (PTY) LTD	Tenth Respondent
STREBIS (PTY) LTD	Eleventh Respondent
MARTIN EPSTEIN	Twelfth Respondent
KULA INVESTMENT SOLUTIONS (PTY) LTD	Thirteenth Respondent
THE REGISTRAR OF DEEDS	Fourteenth Respondent

THIRD TO NINTH AND ELEVENTH RESPONDENTS'

APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the third to ninth and eleventh respondents (collectively "**the Respondents**") (the first respondent being in Business Rescue) intend to apply, on a date to be arranged with the registrar of this Court, for leave to appeal to the Supreme Court of Appeal of South Africa alternatively to the full Court of this division, against the whole of the judgment and orders including the orders for costs of Fisher J ("**the learned Judge**"), delivered at Johannesburg on 25 November 2024 ("**the Judgment**"), in the application instituted by the applicants under the above case number ("**the Application**").

TAKE NOTICE FURTHER THAT the order that the Respondents will seek on appeal is that the order at paragraph 438 of the Judgment be replaced with an order that the Application be dismissed with costs, including the costs of two counsel, on scale C.

For the sake of convenience, the same nomenclature used in the Application papers and in the Judgment is adopted below.

The grounds upon which the Respondents rely in this application are as follows:

The Court erred in regard to the applicants' reliance on hearsay evidence

1. Fundamental to the findings and outcome in the application is the learned Judge's extensive reference to and reliance on email exchanges having the status of inadmissible *hearsay* material which the applicants required leave of the Court to introduce.

2. In paragraph [42] of the judgment the learned Judge found as follows:

> *"[42] To my mind there is no material hearsay evidence sought to be adduced. The case of the applicants is based on the email exchanges and contractual documents the former being admitted as having been*

sent and received; the latter being admitted as having been concluded".

3. The learned Judge erred in finding that "*there is no material hearsay evidence sought to be adduced*", particularly in that the extra-curial statements and the correctness of their contents (from which the learned Judge drew unjustified inferences) do not fall within the personal knowledge of the applicants' deponents (particularly their main deponent Levin) and fit the classic definition of *hearsay*.

4. The learned Judge accordingly failed to properly consider whether the *hearsay* material should be admitted under a recognised exception or to determine the probative value or weight to be attached to the *hearsay* material.

5. Having regard to the nature of the proceedings, viz. *application* proceedings, the learned Judge erred in the approach taken to interpreting these exchanges, and drawing far reaching inferences from them, having the further effect that-

   5.1. the findings in the judgement were not open to be made;

   5.2. a regrettable and highly prejudicial overreach resulted from entirely unjustified findings of dishonesty and impropriety;

   5.3. the Respondents were not afforded a fair opportunity to present their case.

6. The learned Judge incorrectly relied on such exchanges in finding that Ord,

Bodley and Missaikos had already formed an intention to invest in the limited partner of the Fund, at the time of approving the resolutions which gave rise to the Transaction.[1]

7. The learned Judge ought to have found as follows:

7.1. None of the correspondence relied upon was authored by Ord, Bodley and Missaikos.

7.2. As Watson was not a party to any of the correspondence between the so-called other "Protagonists", the contents of the correspondence exchanged between them was clearly inadmissible against Watson and, therefore, there was no basis for finding that Watson was a party to any so called "conspiracy".

7.3. It is not permissible to attribute statements (in this instance for the (impermissible) purpose of seeking to persuade the Court that a person has made an admission adverse to his/her interests) to persons other than those who made such adverse statements.

7.4. The applicants' reliance on such correspondence as evidencing that Ord, Bodley and Missaikos had decided to invest in the limited partner of the Fund, at the time of the relevant resolutions, amounted to inadmissible and indeed unreliable hearsay evidence from which highly speculative and indeed

[1] Judgment par 334

unreliable inferences were drawn.

7.5. There can be no expectation on the part of the Respondents to engage with the contents of the inadmissible hearsay exchanges. The fact that the exchanges occurred does not transform the material into admissible evidence calling for a response in these proceedings.

8. The learned Judge erred in not finding that no reliable inferences could be drawn from the selection of documents the applicants disclosed for purposes suited only to their case and particularly in reaching a highly prejudicial finding of conspiracy and dishonesty.

9. The learned Judge erred in not finding that the interests of justice would not be served by permitting the applicants' reliance on the extensive hearsay evidence which could only be properly tested in trial proceedings with the benefit of discovery and oral evidence. The discovery procedure in trial proceedings would have facilitated the drawing of inference from **all** relevant documents, including undisclosed documents in the applicants' possession which may be adverse to the applicants' case. Significantly the applicants were not prepared to make full disclosure of all relevant documents.[2]

The Court's erroneous conclusion that BEE was subverted

10. In paragraph 426 of the Judgment, the learned Judge found that the Executives (repeatedly and unfairly referred to in the Judgment as "*the*

[2] AA 50-80

Protagonists" and in one instance as "*the six White Protagonists*" - thereby reinforcing the unwarranted suggestion and innuendo of them acting *in concert* as *conspirators*) deliberately subverted "*the BEE Act and its scorecard and codes of good practice*".

11. The learned Judge erred in this finding, particularly in that:

11.1. there is no basis to suggest that the intended improved BEE structure and resultant improved score was not *in fact* achieved through the Transaction;

11.2. it was common cause that in terms of section 5 of the relevant BEE Code, relating to private equity funds, the B-BBEE ("**BEE**") score procured on the basis of the Transaction derived from the fact that the Fund would be managed by a fund manager that was, among other requirements, 51% owned by black people, and that the identity of the limited partner of the Fund had no bearing on the BEE rating. It was the fact that Fund Managers, as the manager of the Fund, was black-owned and controlled that was determinative in terms of section 5 of the relevant BEE Code (See AA par 175 and RA par 308);

11.3. there is nothing improper or inappropriate in the structure used in this instance, nor is there evidence (other than unreliable speculative inferences) that the structure was not what it purported to be;

11.4. but for the findings based on section 75 of the Companies Act or alleged common-law conflicts of interests, the BEE structure would not have been open to challenge or criticism.

12. Furthermore, insofar as paragraph 170 of the Judgment is to be understood as meaning that the NTT Holdings Group required the limited partner of the Fund to comprise black investors, the learned Judge erred in fact, as no such requirement existed.

The Court erred in regard to the *fiduciary duty* ground

13. The four grounds on which the applicants relied for an order declaring void the Transaction, and the agreements underpinning it, are the following:

13.1. the relevant Executives negotiated and approved the terms of the Transaction on behalf of DD Facilities while acting under an undisclosed conflict of interests and contrary to their interests and, consequently, breached section 75 of the Companies Act and/or their common law fiduciary duties ("**the fiduciary duty ground**");

13.2. Nathan as agent of DD Facilities and DD Investments negotiated and concluded the Transaction on their behalf while acting under a conflict of interests and contrary to the applicants' interests ("**the agent ground**");

13.3. Nathan accepted a *secret commission* from the Purchaser (Identity Propco) which wrongfully induced the conclusion of the

Transaction ("**the secret commission ground**"); and

13.4. the Executives defrauded the Seller (DD Facilities) ("**the fraud ground**").

14. The learned Judge declared the Transaction to be void, exclusively on the *fiduciary duty* ground, having erroneously found that:

14.1. the Executives' investment in the limited partner of the *Fund* constituted a *personal financial interest*, as intended in section 75(5) of the Companies Act 71 of 2008 ("**the Companies Act**");[3]

14.2. the Executives' version as to when they decided to invest in the limited partner of the Fund did not give rise to real disputes of fact and, as such, was to be rejected on the papers;[4]

14.3. there was no evidence of any *ratification* of the Transaction.[5]

15. The learned Judge erred both in law and fact in reaching such findings, by not properly applying:

15.1. the definitions of "*personal financial interest*" and "*related person*" in determining whether the relevant Executives had the relevant personal financial interest; and

15.2. the test applicable to resolving disputes of fact in motion

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[3] Judgment par 406 - 420
[4] Judgment par 334, 412
[5] Judgment par 424

proceedings.

16. The learned Judge ought to have found that the applicants cannot succeed under the fiduciary duty ground, because:

16.1. in the first instance the precise status, role and interest of each of the Executives must be assessed individually with reference to the evidence. There is no warrant for simply grouping them together and making generalised findings. The very different position of Watson, which the learned Judge identified but then ignored in her findings, for example, demonstrates why it is inappropriate and unfair to decide causes of action based on conspiracy to defraud on motion;

16.2. no *personal financial interest* existed within the meaning of section 75 which precluded the relevant Executive/s from participating in the approval of the relevant resolutions;

16.3. in any event, the fiduciary duty ground raised material disputes of fact, in one or more of the respects contemplated in **Room Hire**[6], which were incapable of proper determination on affidavit, and there were reasonable grounds as understood in **Moosa**[7] to require oral evidence and discovery in relation to allegations material to the applicants' and respondents' competing versions.

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[6] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)
[7] *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D)

17. The learned Judge ought in any event to have accepted the Respondents' version, including in relation to the structure utilised, and concluded that the applicants cannot succeed with their claim, on the Respondents' version.

18. The respects in which the learned Judge erred in regard to the fiduciary duty ground are expounded upon below.

Section 75 of the Companies Act

19. The learned Judge held that the investment of (all) the Executives in Areti (the limited partner of the Fund):

19.1. existed when the Transaction was approved; and

19.2. constituted a personal financial interest of the Executives within the meaning of section 75 (i.e. a *direct material interest* of the Executives, of a financial, monetary or economic nature, or which a monetary value may be attributed) (para 419);

20. The learned Judge held further that "*[i]t is obviously not in dispute that the involvement of the Protagonists in the conspiracy complained of is such that it would have required disclosure in terms of section 75 if it existed*" (para 21).

21. The learned Judge erred in law and fact, in concluding both that the Executives' investment in the limited partner of the Fund was (i) a personal financial interest of the Executives in terms of section 75 of the Companies Act and (ii) existed when the Transaction was approved.

22. The learned Judge ought to have found as follows:

22.1. The Executives' indirect participation in the limited partner of the Fund (the Executives' Areti Participation), regardless of when it was procured, did not constitute a *personal financial interest* in terms of section 75 of the Companies Act.

22.2. The DD Facilities Resolution and the DD Investments Resolution were the resolutions that approved the sale of the Campus to Identity Propco (later renamed "*Culross*). The Vendor Loan Resolution approved the provision of vendor finance; not the sale of the Campus.

22.3. The Executives who participated in the approval of the DD Facilities Resolution and the DD Investments Resolution were Ord, Bodley and Missaikos.

22.4. A personal financial interest is defined in section 1 of the Companies Act as meaning "*a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed*".

22.5. Section 75(5) of the Companies Act provides that a director who has a personal financial interest or knows that a related person has a personal financial interest in respect of a matter to be considered at a meeting of the board, must *inter alia* disclose such interest and not take part in the consideration of the matter.

22.6. None of Ord, Bodley or Missaikos had a *direct interest* in the matters that were considered in terms of the DD Facilities and DD Investments Resolutions, as none of them was the purchaser under the agreements to be concluded pursuant to such resolutions.

22.7. Identity Propco, as purchaser of the Campus, had a direct interest in the matters considered in terms of the DD Facilities Resolution and DD Investments Resolution.

22.8. Identity Propco was, however, not a related person of any of Ord, Bodley or Missaikos.

22.9. To be a *related person* of Ord, Bodley or Missaikos, Identity Propco had to be controlled by Ord, Bodley or Missaikos in any manner contemplated in section 2(2)(*a*) to (d) of the Companies Act.

22.10. Ord, Bodley and Missaikos did not have control of Identity Propco, in terms of section 2(2)(a), (b), (c) or (d) of the Companies Act. More specifically:

22.10.1. Identity Propco is not a subsidiary of Ord, Bodley or Missaikos, in terms of section 3(1)(a) of the Companies Act (section 2(2)(a));

22.10.2. Identity Propco is not a Close Corporation (section 2(2)(b));

22.10.3. Identity Propco is not a Trust (section 2(2)(c));

22.10.4. Ord, Bodley and Missaikos have no ability to materially influence the policy of Identity Propco in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in sections 2(a), (b) or (c). In this regard, the Areti LPA (the limited partnership agreement) provides in clause 9.1 that the limited partner of Areti (itself an *en commandite partnership*) shall have no right to, and shall not, participate in the management and control of Areti's business or act for or bind Areti;

22.10.5. Nathan was neither a director nor public officer of the decision-making companies and therefore the provisions of section 75 of the Companies Act did not apply to him. In addition, his conduct and communications were therefore not attributable to any of the other Executives for the purpose of invoking the jurisdictional applicability of section 75 to them.

23. Accordingly, the learned Judge erred in concluding that the Executives' Areti Participation constituted a *personal financial interest* of the Executives in terms of section 75(5) of the Companies Act.

24. The learned Judge erred, in any event, in concluding that the Areti

Participation (incorrectly held to be a *personal financial interest* of the Executives) existed at the time of approval of the DD Facilities and DD Investments Resolutions.

25. The learned Judge ought to have found that there was no dispute that when the DD Facilities and DD Investments Resolutions were passed, on 30 August 2019, the Fund did not exist, Areti did not exist, the Areti Participation had not occurred, and the Executives' nominee and option agreements had not been concluded.

26. Thus, the learned Judge ought to have found that the Executives' Areti Participation did not, on any version, exist when the DD Facilities and DD Investments Resolutions were approved. At the very least, this is not a matter which could be decided against the Respondents on the papers.

27. As regards the applicants' contention that it was sufficient for purposes of section 75 of the Companies Act that the Executives at all relevant times *decided* to, and *knew that that they would*, procure the Areti Participation, the learned Judge should have found that section 75(5) of the Companies Act applies only where a personal financial interest <u>exists</u> in respect of a matter considered at a meeting of the board.

28. Thus, the learned Judge should have found that on the papers the relevant Executives (Ord, Bodley and Missaikos) had no requisite interest, let alone a personal financial interest, when the DD Facilities and DD Investments Resolutions were passed.

29. The learned Judge erred in any event in rejecting the Executives' version as to when they decided to take up the Areti Participation.

30. This rejection is expressed in paragraph 334 of the Judgment, where the learned Judge held that:

> "*...the defence of the Protagonists is that they only became involved in the Transaction after they gave their approvals at board level... this version is entirely without merit and can be rejected out of hand*".

31. The learned Judge ought to have found as follows:

31.1. Ord, Bodley and Missaikos denied that any of them had at the time of the DD Facilities and DD Investments Resolutions decided to invest in the limited partner of the Fund. This is a version that cannot be rejected out of hand on paper.

31.2. The denial that the Executives (specifically Ord, Bodley and Missaikos) had at the time of the DD Facilities Resolution and DD Investments Resolution decided to invest in the limited partner of the Fund was not a bald or vague denial. It was supported by the Executives' detailed version as to when and why they had decided to invest in the limited partner of the Fund, when the relevant loans were advanced, and was further supported by contemporaneous correspondence after the aforesaid resolutions stating that the Executives had not committed to the Fund.

31.3. By contrast, the applicants relied solely on inference about the intentions of Ord, Bodley and Missaikos, drawn from correspondence which the aforementioned Executives did not author. Such evidence is inadmissible against them and could never serve as a basis upon which to reject outright the Executives' version as to when Ord, Bodley and Missaikos decided to invest in the limited partner of the Fund.

31.4. The statement in the email of Nathan dated 9 June 2019 (RA9) that:

> "*I think we can do well with this and buy the whole thing …*",

did not in fact relate to the Campus.[8] The learned Judge referred to this as a "*defining piece of correspondence*" and as evidencing the intention of the "*Protagonists*" to obtain a beneficial interest in the Campus. The learned Judge with respect erred, as the quote "*I think we can do well with this and buy the whole thing…*" does not relate to the Campus, nor did the applicants themselves even assert this sentence of RA9 to pertain to the Campus - see RA par 83 and 84 and the fourth affidavit paras 104 and 105 where the parties dealt with the email in question.

31.5. Accordingly, insofar as the applicants contended that a decision by Ord, Bodley and Missaikos that they would take the Areti Participation was sufficient to constitute a *personal financial*

[8] Para [168]

interest in terms of section 75(5) of the Companies Act, there were real disputes of fact incapable of proper determination on affidavits.

32. Based on the above, the learned Judge ought to have found that on the Respondents' version - which cannot be safely disregarded or rejected (and in respect of which the applicants could not adduce admissible contradictory evidence):

32.1. The Executives' Areti Participation did not constitute *a personal financial interest* of the relevant Executives (Ord, Bodley and Missaikos), or any related person of Ord, Bodley and Missaikos, and, therefore, that they did not act contrary to section 75 of the Companies Act by participating in the approval of the sale of the Campus.

32.2. The Executives' Areti Participation in any event did not exist when the DD Facilities Resolution and DD Investments Resolutions were passed.

32.3. The allegation that the Executives at the time of the DD Facilities and DD Investments Resolutions decided to and knew they would invest in the limited partner of the Fund did not suffice for purposes of section 75(5) of the Companies Act. For section 75(5) of the Companies Act to apply, a personal financial interest had to be present, which was not in this instance the case.

32.4. There was in any event a real dispute of fact as to when the Executives (specifically Ord, Bodley and Missaikos) had decided to take up the Areti Participation, and whether they had already done so when the DD Facilities and DD Investments Resolutions (or for that matter the Vendor Loan Resolution) were approved. This issue was thus incapable of proper determination on affidavit.

33. Accordingly, the learned Judge ought to have dismissed the Application, on the basis that the relevant Executives were not shown to have breached section 75 of the Companies Act, *alternatively* that the fiduciary duty ground, insofar as it concerns section 75 of the Companies Act, involved real disputes of fact incapable of proper determination on affidavit.

Ratification in terms of section 75(7) of the Companies Act

34. Having found that the Transaction falls to be set aside in terms of section 75(5) of the Companies Act[9], the learned Judge concluded that the Transaction was not ratified by DD Investments, the shareholder of DD Facilities. This conclusion was reached on the basis that "*there [was] no evidence of any ratification either behind the scenes or otherwise*".[10]

35. If the Transaction required ratification by DD Investments in terms of section 75(7) of the Companies Act, the learned Judge erred in accepting the applicants' version that the Transaction was not ratified.

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[9] Judgment paragraph 419
[10] Judgment paragraph 424

36. In accepting the applicants' version, the learned Judge erred by not applying the principles enunciated in **Room Hire** and **Moosa**.

37. The learned Judge ought to have found that the dispute as to whether the Transaction was ratified could not be determined on motion, because:

37.1. a real dispute of fact existed as explained in **Room Hire**, this including circumstances where the respondent "*state[s] that he can lead no evidence himself or by others to dispute the truth of applicant's statements, which are peculiarly within applicant's knowledge, but he puts applicant to the proof thereof by oral evidence subject to cross-examination*"; and/or

37.2. there was, based on **Moosa**, a need for oral evidence, as reasonable grounds exist to doubt the correctness of the applicants' allegations, particularly in regard to information peculiarly within the knowledge of the applicants.

38. The learned Judge ought instead to have found as follows:

38.1. The dispute concerning the ratification of the Transaction concerned a matter peculiarly within the knowledge of the applicants.

38.2. There were reasonable grounds to doubt the applicants' version that DD Investments did not ratify the Transaction.

38.3. Such reasonable doubt arose from the fact that the applicants

alleged that they acquired knowledge of the Executives' interest in the Transaction in **May 2021**, yet the NTT Holdings South African business continued to rely upon the Transaction as the basis for its Level 2 BEE Score until **August 2022**.

38.4. This continued use of the Transaction as the basis of its BEE status thus endured for more than 16 months from the time the applicants purportedly acquired knowledge of the Executives' alleged "*interest in the Transaction*". This was conduct entirely inconsistent with a decision not to ratify the Transaction.

38.5. Statements were made by Kapp as the DD Africa CEO in the Press and in letters sent to clients of DD Africa confirming the ratification of the Transaction on or about 25 January 2022, which were never retracted. These statements were made 9 months after the applicants purportedly acquired knowledge of Executive's Areti Participation. This too was conduct completely inconsistent with a decision not to ratify the Transaction.

39. Thus, in concluding that there was no ratification on the basis that there was "*no evidence*" of such ratification, the learned Judge erred in not applying the test applicable to motion proceedings. The learned Judge ought to have found, based on the facts outlined in paragraph 38 above, that there were reasonable grounds to doubt the version of the applicants, and a real dispute of fact pertaining to the issue of ratification, meaning the Application was incapable of proper determination on affidavit.

40. The Court erred further in law and fact by concluding in paragraph 426 of the Judgment that the Transaction was incapable of being 'remedied', premised on the learned Judge's incorrect conclusion that the involvement of the Executives subverted "*the BEE Act and its scorecard and codes of good practice*".

41. The learned Judge should have concluded that the Transaction was capable of being ratified (to the extent that it had to be ratified), and ought to have found that the question whether the Transaction was ratified was incapable of determination on affidavit.

Common law fiduciary duties

42. Insofar as the applicants relied under the fiduciary duty ground on breaches of common law fiduciary duties by the Executives as a basis to contend that the Transaction was *voidable and a/voided*, the learned Judge erred in not finding that real disputes of fact exist in regard to at least the following, certain of which are in addition to requirements under section 75:

42.1. whether those Executives who participated in the approval of the Transaction, at the time of such approval, were truly conflicted because they had a personal financial interest in the Transaction or already knew at the time that they would be investing in the limited partner of the Fund;

42.2. whether the applicants would not have entered into the Transaction, had they known of the Executives' alleged

involvement in the Transaction and whether any alleged interest would be material, i.e. the requirement of materiality (not an element of section 75);

42.3. whether the Campus was sold below market value;

42.4. whether the Executives precluded the applicants from selling the Campus to a purchaser of their choosing;

42.5. whether the applicants *elected* to a/void the Transaction.

43. In respect of each of the above disputed facts, the learned Judge ought to have found that the version of the Respondents could not be rejected outright on the papers.

44. The learned Judge ought to have found that the Respondents' version gives rise to real disputes of fact. The learned Judge ought in this regard to have found as follows:

44.1. The denial that the Executives had at the time of the DD Facilities and DD Investments Resolutions decided to invest in the Fund was not a bald or vague denial. It was supported by the Executives' detailed version as to when they had decided to invest in the limited partner of the Fund, when the relevant loans were advanced, and supported by contemporaneous correspondence after the DD Facilities and DD Investments Resolutions stating that the Executives had not committed to the Fund.

44.2. By contrast, the applicants relied solely on inference about the intentions of Ord, Bodley and Missaikos unreliably drawn from correspondence which they did not author. Such evidence was inadmissible against them and could never serve as a basis upon which to reject the Executives' version as to when they decided to invest in the limited partner of the Fund.

44.3. It was clearly not *material* to the applicants whether the Executives invested in the limited partner of the Fund. The applicants' most senior executives (Sawada and Okuno) failed to deliver confirmatory affidavits to refute the Respondents' version regarding the ongoing MBO discussions and how this would have informed NTT Holdings' thinking as to who may be interested in investing in the limited partner of the Fund, anticipated that this may include the Executives and were indifferent to this possibility.

44.4. After the applicants allegedly acquired knowledge of the Executives' Areti Participation, the applicants' conduct was consistent with an election to abide by the Transaction, evidenced by its continued use of the Transaction for its BEE status until August 2022, and public statements by DD Africa's CEO that the Transaction was ratified, which were never retracted. This conduct was entirely inconsistent with an election to avoid the Transaction (even if it was voidable).

44.5. The Respondents did not preclude the applicants from

procuring a purchaser of their choosing, nor was it sold below market value. The Transaction was considered by numerous top officials of the applicants (including Sherriffs (NTT Limited CFO) and Burry Curtin (DD Africa CFO)), all of whom were in favour of the Transaction, including the sale price, and approved it.

44.6. No expert evidence was presented by the applicants to support their allegation that the Rental Enterprise was sold below market value.

44.7. The suggestion that the Executives "*snatched at a bargain*" and were seeking to enrich themselves is most unfortunate and they need to be vindicated in their reputations.

45. Accordingly, the learned Judge should have found that:

45.1. there were material genuine disputes of fact concerning the applicants' contention that the Transaction was voidable at common law, and avoided, on account of alleged undisclosed conflicts of interest on the part of the Executives who approved the Transaction; and

45.2. the fiduciary duty ground was not established or at the very least, was incapable of proper determination on affidavit.

46. The learned Judge further erred in the "*restitution*" order granted in not addressing or making the necessary order for the reciprocal restitution

against the restitution ordered. The order does not take into account the steps that would be required on account of an "*unwinding*" of the Transaction.

47. It is in the interests of justice that the Respondents be afforded an opportunity to redeem their tarnished reputations in view of the particularly serious and scathing findings made against them. That in itself justifies leave to appeal. The Judgment ought not to be the final word on this.

48. In view of the manner in which findings were made, more particularly by inference from select documents, many of which the Executives are not the authors, and further having regard to the numerous legal issues at play, the learned Judge erred in awarding costs on a punitive scale, once again expressing strong condemnation of the Respondents.

49. The learned Judge ought to have found that, given the applicants' election to not to apply for a referral of the Application to trial or oral evidence, the appropriate order to grant was a dismissal of the Application, on the basis that the decision to proceed by motion was in the circumstances inappropriate, alternatively on the basis that the applicants could not succeed on the Respondents' version.

DATED at **SANDTON** this the 3rd day of **DECEMBER 2024.**

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