IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: **C 933/2014**

In the matter between

MARCEL GOLDING	**APPLICANT**
And	
HOSKEN CONSOLIDATED INVESTMENTS LIMITED	**FIRST RESPONDENT**
HCI MANAGERIAL SERVICES (PROPRIETARY) LIMITED	**SECOND RESPONDENT**
SABIDO INVESTMENTS (PROPRIETARY) LIMITED	**THIRD RESPONDENT**
E.TV (PROPRIETARY) LIMITED	**FOURTH RESPONDENT**

FIRST AND SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I the undersigned

YUNIS SHAIK

do hereby make oath and say:

1. I am an adult male director of the First Respondent, and employed by the First Respondent as an executive.

2. I am duly authorised to depose to this affidavit on behalf of the First and Second Respondent.

3. The facts contained herein are within my personal knowledge, unless the context provides otherwise, and are both true and correct. In view of the very short time afforded to the First and Second Respondents to deal with the Applicant's founding papers, as well as the absence of key personnel from office of the First and Second Respondents, I have been constrained to rely on telephonic communications with them in order to obtain information for purposes of this answering affidavit. To the extent that such information constitutes hearsay evidence, I verily believe the truth of same and respectfully submit that having regard to the exigencies of this matter to which I refer below, this honourable court should have regard to such evidence.

4. Where I rely on any legal contentions or submissions, I do so on the advice of the legal representatives of the First and Second Respondents.

5. I have read the founding affidavit deposed to by the Applicant in the urgent application launched by him under the above case number ("**founding affidavit**") and wish to respond thereto as follows.

INTRODUCTION

6. At the outset I wish to point out that the Applicant was notified on 14 October 2014 of the charges relating to gross misconduct against him and that the disciplinary enquiry is scheduled to proceed on Monday 27 to Thursday 30 October 2014. The Applicant, through his attorneys threatened, in correspondence dated 17 October 2014, to bring the proceedings in question. The application however was only served on the First and Second Respondents, supported by a founding affidavit

deposed to by the Applicant, in excess of some 50 pages, on Wednesday 22 October 2014 at approximately 16h00.

7. The Applicant has accordingly, at his leisure, taken at the very least, 9 (nine) days to prepare and launch this application for ostensibly urgent relief to prevent amongst others a publicly listed company (the First Respondent) proceeding with a disciplinary enquiry chaired by an independent senior and experienced attorney into a serious complaint, involving *inter alia* dereliction of duty, gross negligence, dishonesty, breach of fiduciary duties and ethics. The founding affidavit is replete with extensive detail on matters relating to the merits of the complaints against the Applicant, which have no relevance to the relief being sought by the Applicant in his notice of motion.

8. In contradistinction to this obviously lengthy period of time taken by the Applicant, the Applicant afforded the First and Second Respondents, at best, four working hours to traverse an affidavit in excess of 120 pages including 17 annexures. Such a timetable is simply impossible to meet on any practical basis and accordingly, I respectfully submit that it amounts to an abuse of the process of this Honourable Court. Given what I have set out above, I respectfully submit that the abuse of process is a calculated one designed to prejudice the First and Second Respondents.

9. In order to prepare an answering affidavit responding to all of the allegations contained in the founding affidavit, it is necessary for the First and Second Respondents to consult with witnesses who have personal knowledge of the allegations. Some of these witnesses, including Mr John Copelyn ("**Copelyn**"), the Chief Executive Officer ("**CEO**") of the First Respondent, as the Applicant is well aware, is not currently in South Africa and is accordingly not easily contactable.

Other material witnesses in regard to certain factual allegations made by the Applicant are unavailable by virtue of religious commitments, as well as other commitments, which preclude consultations, which are necessary to enable the First and Second Respondents to adequately prepare an answering affidavit traversing all of the allegations made by the Applicant. Given these exigencies and the intolerable time limits imposed by the Applicant, it has simply not been possible to prepare an exhaustive response to the founding affidavit of the Applicant.

10. In light of the aforegoing, I am advised and submit that this calculated abuse of court process by the Applicant warrants, for this reason alone, the dismissal of the Application with costs.

11. In the event that the application is not dismissed on this basis, the First and Second Respondents will respond to only the salient allegations in the founding affidavit that fall to be ventilated to address the relief being sought by the Applicant. As I have already said, much of the material contained in the Applicant's founding affidavit is irrelevant, and falls to be struck out. The rights of the First and Second Respondents in this regard are expressly reserved.

12. Notwithstanding the aforegoing, I wish to record, for the avoidance of any doubt that having regard to my personal knowledge and also what has been conveyed to me by Messrs Copelyn and Govender, which information I verily believe to be true, the allegations by the Applicant are in all material respects denied, save where I address this to the contrary in this affidavit. For the sake of clarity I confirm that Mr Copelyn is the Chief Executive Officer of the Second Respondent and also the Chairman of the Third Respondent. Mr Govender is the Chief Financial Officer of the Second Respondent and a director of the Third Respondent.

13. Insofar as is necessary for the determination of this application, the First and Second Respondents reserve their right to supplement their answering affidavit at a later stage, if needs be.

URGENCY

14. In addition to all of the aforementioned procedural challenge, I am advised that the urgency contended for by the Applicant in this application, is self-created, and also amounts to an abuse of the process of court. I accordingly also submit that the application falls to be dismissed due to lack of urgency.

15. In regard to the issue of urgency, the Applicant deals tersely with the alleged urgency of his application in paragraphs 141 to 144 of the founding affidavit, the contents of which are denied.

16. The basis of the Applicant's alleged urgency has been constructed on two grounds; namely that a disciplinary enquiry is to commence on Monday, 27 November 2014, and that the annual general meeting of the Second Respondent will commence on 30 October 2014. In regard to this latter ground the Applicant indicates that this application must be determined before the annual general meeting because he is "required to chair that meeting and because he is up for re-election as a director". It is noteworthy that the Applicant's second ground of urgency is predicated entirely on his status as a director, of the Second Respondent, and not an employee of either the First, or for that matter, the Second Respondent. Even on the Applicant's own affidavit he does not assert – indeed not even suggest – that he has been removed or suspended as a director of the Second Respondent. I respectfully submit that this second leg of the urgency case relied on by the Applicant has no

connection whatsoever to the relief that he seeks, is irrelevant and falls to be disregarded.

17. The fact that the Applicant is standing for re-election as a director of the First Respondent at such meeting only serves to emphasise that the Applicant has no contractual legal entitlement to be a director arising out of any employment contract and that such decision falls solely within the discretion of the members of the First Respondent and with respect, has absolutely nothing to do with his position as an employee of the First and Second Respondents. There is accordingly no basis for the suggestion that there is any urgency associated with such AGM which will only address issues of directorship and no employment related issues. Legal argument will be addressed on this issue at the hearing of the matter. I reiterate that the Applicant is expected to attend the annual general meeting of the Second Respondent in his capacity as director.

18. In regard to the first ground advanced by the Applicant to create urgency – the convening of a disciplinary enquiry – three points bear mention, namely:

18.1. The Applicant participated in the board meeting of the First Respondent which discussed his conduct, and was a participant in the unanimous agreement of the board to appoint a board sub-committee to consider the conduct of the Applicant and to make recommendations arising therefrom including the possibility of referring the conduct engaged in by him in regards the First Respondent to a disciplinary enquiry.

18.2. Moreover, he participated fully in the process established by the appointment of the sub-committee referred to above, even making submissions to that body. It was only when that body made the recommendation to refer the

issue to a disciplinary enquiry – an outcome agreed to by the Applicant at the board meeting referred to in paragraph 18.1 above – that the Applicant bethought himself on the validity of the process that he himself had set in motion. I respectfully submit that all of the assertions by the Applicant as to urgency to address the establishment and process of the disciplinary enquiry, is not only self-created, but is entirely disingenuous.

18.3. The disciplinary enquiry is to be chaired by a senior and experienced attorney and no basis is suggested by the Applicant as to why he would not receive a proper and fair hearing nor why the disciplinary hearing in and of itself creates any urgency. The Applicant has not advanced a single fact or made any allegation to demonstrate why the convening of a disciplinary enquiry, in which all of his rights are reserved to address the merits of his allegations, on the substance of the complaint against him, falls to be set aside urgently. Argument will be addressed on this issue.

19. The relief sought by the Applicant in this application is most extraordinary. I pause to mention that the order sought by the Applicant is all-encompassing and not only includes orders to uplift his suspension as an employee of the First and Second Respondents (which employment he accepts) but an order declaring that he is also an employee of the Third and Fourth Respondents (in respect of which no suspension, nor any disciplinary action has yet been taken) and an order intended to prevent the First and Second Respondents from exercising its rights and fulfilling its legal obligations to take disciplinary steps against an executive alleged to have committed acts of gross misconduct by way of a disciplinary hearing chaired by an independent chairperson and in compliance with the requirements of the Labour Relations Act 66 of 1995 as amended ("**the LRA**"). I am advised and submit that the

application is an attempt to delay the commencement of the disciplinary proceedings and the Applicant provides no justification for this.

20. The Applicant has been aware of the date of the disciplinary enquiry since 14 October 2014 and only now opportunistically approaches this court on an urgent basis, approximately 2 (two) court days before the enquiry is scheduled to proceed. The urgency is manifestly self-created.

21. The Applicant makes reference to the First Respondent's AGM scheduled to take place on Wednesday, 30 October 2014 as a justification for seeking urgent relief. For the reasons stated above, the AGM relates solely to the issue of the Applicant's possible reappointment as a director of the First Respondent, to which he has no contractual employment right or entitlement and is entirely irrelevant to the employment law charges to be considered by the disciplinary enquiry.

22. I am advised and so submit that should the Applicant have any issues relating either to his suspension or the timing of his disciplinary enquiry, these issues ought to be raised by the Applicant at the commencement of the disciplinary enquiry. Once the enquiry commences, the chairperson is obliged to address any preliminary issues and make a ruling on same. I deal with this further below. Accordingly, approaching the court for urgent relief is premature in the circumstances.

23. For these reasons, I am advised and submit that the Applicant has failed to establish that this application is urgent.

SUITABLE ALTERNATIVE RELIEF

24. The Applicant addresses the issue of suitable alternative relief at paragraphs 126 – 132 of the founding affidavit, the contents of which are denied.

25. The Applicant only referred an unfair labour practice dispute in relation to his suspension and the convening of the disciplinary enquiry to the Commission for Conciliation Mediation and Arbitration ("**the CCMA**") on 21 October 2014 in an obvious attempt to found jurisdiction for this court to grant interim relief.

26. I am advised and submit that the CCMA does not have jurisdiction to grant the following relief: "Declaring the instruction to me to attend a disciplinary enquiry to be unfair". Indeed, to clarify, neither the First nor the Second Respondents have or could issue an "instruction" to the Applicant to attend a disciplinary enquiry. He may avail himself of his right to attend the enquiry and to provide an appropriate explanation for what *prima facie* appears to be acts of gross misconduct, should he so choose. It is a matter for comment that he has elected not to do so and rather to seek the intervention of this Honourable Court to prevent a disciplinary hearing from addressing such matter.

27. It is further inexplicable that when an opportunity to vindicate his position at a disciplinary enquiry is presented to the Applicant as soon as Monday, 27 October 2014, the Applicant does not wish to avail himself of such opportunity. I point out that the Applicant would be entitled to request the disciplinary chairperson to uplift his suspension (pending the outcome of the CCMA hearing) and if the matter were to be dealt with expeditiously on the merits (as the First and Second Respondents desire) and provided the Applicant provides a satisfactory explanation for his alleged gross misconduct to the disciplinary chairman, he could be found not guilty of any misconduct by the end of this month and could return to work. Clearly, the Applicant is not in a position to address the merits of this matter and seeks the intervention of this Honourable Court to provide him with assistance as a result. It is

submitted, with respect, that this Honourable Court should not come to his assistance.

28. The CCMA is the appropriate forum to deal with such a dispute. An employee, irrespective of the position occupied by him/her and/or the amount he/she is paid, who has been aggrieved by the decision of his/her employer to suspend him/her and who wishes to challenge the fairness thereof is obliged to refer a dispute to the CCMA.

29. I am advised and submit that this Honourable Court will only intervene and grant relief in the most exceptional circumstances because in doing so, it inevitably usurps the jurisdiction of the CCMA and interferes with the employer's legal right (and indeed obligation) to hold a disciplinary enquiry.

30. The approach followed by employees who are in a better financial position than many others, such as the Applicant, to bypass this statutory process and approach the above Honourable Court on an urgent basis for the relief that only the CCMA can grant in terms the provisions of LRA without providing an exceptional justification for the deviation, cannot be justified and ought, with respect, not to be tolerated by this Honourable Court..

31. The Applicant concedes that his "real employers" have a right to discipline him. The Applicant however provides no basis as to why the First and Second Respondents (who are unquestionably his employers) are precluded from disciplining him for alleged serious acts of misconduct. Indeed, the Applicant participated in the sub-committee process which led to its conclusion that a disciplinary enquiry ought to be convened. If the Applicant held the view that the First and Second Respondents were not his employers and that accordingly could not discipline him, he certainly

did not raise this issue until the recommendation to convene the disciplinary enquiry was made.

32. Furthermore, the Applicant provides no explanation as to why he cannot raise this and the other arguments relating to the right of the First and Second Respondents to discipline him for the alleged acts of misconduct before the chairman of the disciplinary hearing.

33. It is suggested by the Applicant that there is something untoward associated with the appointment of Mr Koos Pretorius as the Chairman of the disciplinary hearing because he is "*hand-picked from the ranks of a particular firm of attorneys*" .

34. I am advised and submit that a disciplinary chairman is normally appointed from the ranks of the employer. Because of both the seniority of the Applicant and the lack of availability of any other senior employee of similar rank to the Applicant, who has not been involved with or has not formed a view in respect of the Applicant's alleged misconduct and the institutional knowledge of Mr Koos Pretorius in respect of the business that he is ideally suited to chair this disciplinary hearing and act as though he were an internal chairperson, whilst at all times acting in accordance with the law and fairness. The suggestion that he would not properly fulfil his instructions and mandate and provide the Applicant with a fair hearing in accordance with the law has no basis. Even if the Applicant had some basis for complaint against Mr Pretorius (and I deny that there is any such basis) he is entitled to seek his recusal and the First and Second Respondents will, upon any recusal, appoint another experienced attorney to chair the disciplinary hearing.

35. It is a matter for comment and fundamentally disturbing that the Applicant has chosen not to address these concerns about the disciplinary chairperson , as he is

entitled to, at the disciplinary hearing. Instead he has decided to engage in public and unseemly litigation to ostensibly protect his interests. This litigation is entirely unnecessary because there is ample alternative relief available to the Applicant, both in the form of raising the issues complained by him directly before the chairman of the disciplinary enquiry and/or approaching the CCMA in relation to suspension on the basis that it constitutes unfair conduct relating to suspension as contemplated by section 186(2)(b) of the LRA. I respectfully submit that this application is contrived most opportunistically as part of a stratagem engaged in by the Applicant to reach a better agreement regarding his departure (which he has already conceded has been the subject matter of discussions) and to provide him with leverage in respect thereof. It has nothing to do with protecting his employment law right to a fair disciplinary hearing which has been more than addressed.

36. Likewise, the allegations made by the Applicant that the disciplinary enquiry cannot proceed on the basis that the First and Second Respondents are not his "real employers" constitute an *in limine* issue that the Applicant should raise with the chairperson of the disciplinary enquiry at the commencement of the disciplinary enquiry. Should the Applicant be unhappy with the ruling made by the chairperson he can either elect to proceed with the enquiry notwithstanding and in the event that the outcome is dismissal, refer an alleged unfair dismissal dispute to the CCMA; or refuse to participate further in the enquiry and if the enquiry proceeds in his absence and he is dismissed as a consequence, he can at that stage refer an alleged unfair dismissal dispute to the CCMA.

37. I am advised and submit that this statutory protection provided to executive employees in terms of South African employment law is one of the most expansive in the world and that there is ample suitable alternative relief available to the

Applicant other than approaching this court for an order in terms of the notice of motion. Indeed, it will be submitted that the hearing of this matter that this Honourable Court must, with respect, guard against senior employees abusing the process of court to bypass ordinary employment protections afforded to them simply because they have the financial means and ability to allege that the importance and urgency of their case justifies a more favourable and immediate dispensation being applied. There is, with respect, nothing associated with this matter that entitles the Applicant to a more favourable dispensation than the statutory norm.

38. Finally, the suggestion that this matter has anything to do with the independence of the media and the taking of disciplinary action against a senior employee for acts of gross misconduct should not be permitted because it constitutes an attempt to stifle the Applicant's beliefs with respect to the freedom of media and is, in breach of his constitutional rights read section 6 of the Employment Equity Act 55 of 1998 ("**the EEA**") is not a matter, with respect, that this court will entertain on an interim basis when there is absolutely no need or proper basis to do so. I state with emphasis that the Respondents have over the past 15 years steadfastly promoted and defended editorial independence.

39. Once again, if there were any justifiable basis to make such an allegation, the Applicant could easily lay the basis of such allegation and provide the evidence at his disciplinary hearing. He could then, if dissatisfied, enforce his legal rights which enjoy ample protection.. He has chosen, intentionally and for the purposes of distracting attention from the seriousness of the complaints of gross misconduct made by the First and Second Respondents to make sensational remarks in a public forum to use as a foil/defence for what I submit, is entirely indefensible gross misconduct. Indeed, such gross misconduct which has been seriously damaging to

the business of the First and Second Respondents deserves to be addressed at a disciplinary hearing without delay and adjudicated upon. The First and Second Respondents also have a constitutional right to engage in lawful business activities and to protect its proprietary interests which right would be unlawfully denied if the First and Second Respondents are precluded from taking disciplinary action in these particular circumstances. I respectfully submit that this Honourable Court may only intervene in domestic disciplinary proceedings if exceptional circumstances exist. There are no exceptional circumstances that exist in this matter and the founding affidavit does not contain any averments to suggest that the Applicant will be denied a fair hearing.

40. The Applicant does not suggest, nor does he provide any basis, that there is any *mala fides* associated with the appointment of an external chairperson or that as a consequence he will not receive a fair hearing, or that a grave injustice might otherwise result if the disciplinary enquiry proceeds. In the circumstances, and in accordance with the law, there is no basis upon which this Honourable Court should intervene and grant the relief sought.

41. In the circumstances, I am advised and submit that the application be dismissed on this basis with costs.

BACKGROUND

42. I would like briefly to place the following background to the decision by the First and Second Respondent to institute disciplinary action against the Applicant, on record:

42.1. The allegations against the Applicant which appear from the charge sheet attached to the founding affidavit and marked "**MG13**" are very serious and

prima facie justify the institution disciplinary enquiry (so much appears common cause), and if proven, the dismissal of the Applicant.

42.2. The Applicant is an employee of the First and Second Respondents and is employed to render managerial services to the Second Respondent and to its subsidiaries, including the First Respondent. That the Applicant is an employee of the First and Second Respondents is, I say, established beyond doubt, by the Applicant's acknowledgement of his acceptance of the share option scheme operated by the HCI Group. The communication to the Applicant dated 27 August 2014 expressly records the Applicant's position as an employee of the First Respondent, which by his signature in September 2014, he acknowledged. I annex hereto marked "**YS1**", a copy of the said communications signed by the Applicant. I also annex marked "**YS2**" a copy of the Applicant's payslip for the month of September 2014, which reflects the First Respondent as his employer.

42.3. The First Respondent, acting on the directions of the Second Respondent has deployed the Applicant as its employee to render managerial services to various of the HCI Group subsidiaries. Included in the list of subsidiaries to which the Applicant has been deployed to render such managerial services on behalf of the First Respondent, are the Third Respondent and the Fourth Respondent. When such deployment takes place, the Applicant is appointed as a nominee director of the Second Respondent in that subsidiary. The Applicant is not an employee of that subsidiary and receives no remuneration whatsoever from any such subsidiary to which he has been deployed. His remuneration is paid to him solely by the First Respondent. Indeed, the Applicant does not even receive directors' fees in relation to his position as a

nominated director of the Second Respondent in the relevant subsidiaries. The only IRP5 issued to the Applicant is an IRP5 reflecting payments and remuneration received from the First Respondent. The First Respondent is in possession of all of the Applicant's IRP5's since inception of his employment with the First Respondent. Should the Applicant persist with his denial of his status as employee of the First Respondent, I will cause copies of these IRP5's to be placed before this Honourable Court by way of a supplementary answering affidavit. As proof of what I have said above regarding the Applicant not receiving directors' remuneration from inter alia the Third and Fourth Respondent, I refer to the Second Respondent's annual financial statements for the period ended 31 March 2014 and I annex hereto, marked "**YS3**", page 84 of those financial statements, which reflect that the Applicant does not receive any board fees from any company within the HCI Group, and that his remuneration is limited to salary, other benefits, bonuses and gains from share options in the Group.

42.4. The First and Second Respondents jointly exercise control and direction in relation to the employment activities engaged in by the Applicant at the subsidiary to which the Applicant has been deployed, namely the Third Respondent. Such control and supervision is exercised through the executive committee comprising, myself, Copelyn and Govender in addition to the Applicant.

42.5. Accordingly, in relation to the affairs of the Third Respondent, the Applicant was nominated by the Second Respondent as a director of the Third Respondent, but deployed as an executive employee of the First Respondent, to render managerial services on behalf of the First

Respondent to the Third Respondent. The Applicant is not an employee of either the Third Respondent or the Fourth Respondent, does not receive any remuneration from those entities as an employee and does not receive any directors' fees from those entities. Neither the First Respondent nor the Second Respondent has taken any disciplinary action against the Applicant in a capacity as employee of the Third or Fourth Respondent. The First Respondent renders managerial services to the Third Respondent and the Fourth Respondent in terms of a management agreement, for which it is paid a significant annual sum. These managerial services certainly include the executive services rendered by the Applicant, as employee of the First Respondent, but also include the managerial services rendered by inter alia Messrs Copelyn and Govender.

42.6. In the circumstances I emphatically deny the allegations by the Applicant that he is an employee of the Third and Fourth Respondents, and I reiterate that the Applicant is an employee of the First and Second Respondents.

42.7. It is common cause that the charges relate exclusively to the Ellies Transaction.

42.8. There is no dispute at all in regard to the Applicant instructing Investec Securities (Pty) Ltd ("**Investec**") to purchase of the Ellies shares between 13 March 2014 (18 days before the year end of the Second Respondent and its subsidiaries) and 1 July 2014, when the last purchase was made on the instructions of the Applicant. I place on record that Investec is the securities broker of the HCI Group and its sponsors. More importantly, Investec is one of the HCI Group's primary bankers. For the Applicant to have been able to persuade Investec to purchase the Ellies shares, he could only have relied

on his status as an executive employee of the Second Respondent. I shall return to the nature of the instructions given by the Applicant to Investec, in paragraphs which follow, but I make the point at this stage that it is only because of the Applicant's status as an executive employee of the First and Second Respondents that Investec would have acted on such instruction to not only buy the Ellies shares, but to warehouse them in a nominee account without allocating a purchaser for such block of shares, the cost of which exceeded R24 million.

42.9. It is also not in dispute that the Applicant had no authority at all from the First and Second Respondents to place such orders for the acquisition of Ellies shares. I have also been advised by Mr Copelyn and verily believe and aver that no instruction to such effect was ever issued by the Board of the Third Respondent – the entity which the Applicant has claimed that he sought to acquire the Ellies shares for. In my capacity as a director of the Second Respondent, I also have personal knowledge of any investments made or committed by the subsidiaries. To my own knowledge, the Third Respondent gave no authority to the Applicant to acquire the Ellies shares on its behalf. As the Applicant so eloquently avers in paragraph 101 of his founding affidavit, he received no formal mandate from the Board of the Third Respondent for his actions, and the high water mark of the "appropriateness" of his actions was that it was his "expectation that they would be ratified".

42.10. In amplification of the aforementioned misconduct in breach of his fiduciary responsibility to act only in accordance with the authority vested in him by the Board, the Applicant has arguably behaved even more egregiously in his calculated attempts to hide these acquisitions from the First and Second

Respondents and indeed the Third Respondent at the time that he was causing these acquisitions to be made. In this regard I refer to paragraph 86 of his founding affidavit.

42.11. For the Applicant to suggest that his non-disclosure at the time of his causing these acquisition to be made, was acceptable and that he had the expectation of such transactions being ratified, is factually, entirely mendacious. It is noteworthy that the Applicant has failed to disclose that in response to his conveying of the opportunity in relation to Ellies, that he had with Mr Copelyn and Mr Govender, in or during August 2013, both Messrs Copelyn and Govender were not in favour of the proposal, and told him so. Mr Copelyn conveyed to him that he had no interest in the HCI Group acquiring a minority stake in Ellies, being a public listed company and Mr Govender advised him that the HCI Group had no interest in Ellies. The aforegoing has been conveyed to me by Messrs Copelyn and Govender and I verily believe the correctness of such statements. It is accordingly patently untrue that there was no response from Messrs Copelyn and Govender in respect of the Ellies suggested investment, made by the Applicant. I have also been advised by Mr Govender, verily believe and aver, that the Applicant had told him that he had called together the management team of the Third Respondent, prior to the August 2014 Board meeting of the Third Respondent, at which he made his disclosures regarding the Ellies transaction, to try and persuade them of the appropriateness of the acquisition of a stake in Ellies. The management team of the Third Respondent rejected this as an opportunity. At the time of this disclosure by the Applicant to Mr Govender, Mr Govender reported this to me.

42.12. I respectfully submit that it is entirely implausible that the Applicant could have harboured the belief that his actions would be ratified. I have been advised by Mr Copelyn, verily believe and aver, that in his discussions with the Applicant regarding the Applicant's conduct, the Applicnat never contended that he believed that his actions would be ratified. On the contrary, he told Mr Copelyn, that he had "gotten ahead of himself", and had acted without authority. I have also been advised by Mr Govender that this statement was also made to him by the Applicant.

42.13. However, I say that in any event, he could not have believed that ratification was appropriate in these circumstances, by virtue of the express provisions of a shareholders agreement which regulates the relationship between the Second Respondent, the Third Respondent, the Fifth Respondent and others in relation to their shareholding in the Third Respondent.

42.14. The Second Respondent is party to the Shareholders Agreement between the Third Respondent, Rembrandt Group Limited and Self-Nurturing Investments Proprietary Limited concluded on 31 March 2000, ("**the SHA**"). The SHA has been attached as a supplementary annexure "**MG18**" to the Applicant's founding affidavit.

42.15. Exhibit 2.2.37 of the SHA, which is titled "Specially Protected Matters", sets out the limitations of power imposed on the parties thereto, *inter alia* with regard to investing and/or divesting and/or acquiring shares and/or acquiring or incorporating direct or indirect subsidiaries and/or materially changing the nature of the business of the Third Respondent. These specially protected matters requires approval on the basis of consensus of the Board, at least to

the extent of 80 percent. The SHA itself stipulates the processes and procedures applicable to specially protected matters.

42.16. The Ellies transaction engaged in by the Applicant demonstrably did not meet the requirements set out in Exhibit 2.2.37 of the SHA, as read with the relevant paragraphs of that agreement and was not authorised or approved by the Board of the Third Respondent. Whilst I am advised that legal argument will be addressed on this issue at the hearing of this matter, clauses 2, 3, 9, 10, 11 and 19 of Exhibit 2.2.37 of the SHA in particular were not complied with. These clauses read as follows:

"2.The assumption of any obligation (whether actual or contingent) by the company or any of its subsidiaries, present and future, outside the ordinary course of business or outside the Business Plan or the approved annual budget, provided that in such latter instance the deviation, either on its own or together with prior deviations, is in excess of 10%."

"3.Any capital investment or expenditure by the Company or its subsidiaries, present and future, or any disposal of any of the capital assets of the Company or of its subsidiaries present and future, not identified in the approved annual budget, provided that this paragraph 3 shall not apply if the capital investment (or capital investments which are connected) or the expenditure (or expenditures which are connected) or the fair value of the capital assets being disposed of through one or a series of connected transactions, is less than R20 million or 10% of the current budgeted turnover of the Company, whichever is the greater."

"9.The requisition or incorporation by the Company of any direct or indirect subsidiaries."

"10. The acquisition by the Company or any of its subsidiaries, present and future, of any shares or interest in any company, other form of legal entity, business, partnership or other undertaking of whatever nature."

"11.a material change in or a material addition to the nature of the Business of the Company or the Business of any of its subsidiaries, from time to time."

"19.Any transaction in which any shareholder or director, or any entity directly or indirectly controlled by or under common control (direct or indirect) with, such shareholder ("interested party") has a direct or indirect material interest which does not apply to all shareholders or directors as the case may be, generally, excluding only such transactions as are proven by the interested party, to the satisfaction of the shareholder who together comprise a Predictive Majority or Shareholders, to have been concluded on a wholly arms length basis on commercial terms obtainable in the open market."

42.17. Given the clear and unambiguous provisions of the SHA referred to above, the only understanding that the Applicant could have had regarding these transactions was that he required the express consent of the Third Respondent's Board to conduct any such transactions.

42.18. The Applicant is employed by the First and Second Respondent and has been assigned to the Third Respondent to perform managerial services as its CEO. In addition to his aforesaid position as a senior executive, he is also a nominee director of the Second Respondent to the Board of the Third Respondent, and he is bound to comply fully with the terms of the SHA, not

only as a director of the Third Respondent, but as a director of the Second Respondent, who is bound by the SHA.

42.19. Even more egregious, is the disclosure made by the Applicant to Messrs Copelyn and Govender, on the day before the Third Respondent's Board meeting held in August 2014, that he caused the Ellies shares to be housed in a nominee account with Investec, unallocated to an identifiable purchaser, so that he could avoid the disclosure requirements set out in Section 122(1)(a) of the Companies Act 2008. Both Messrs Copelyn and Govender have conveyed this to me and I verily believe the truth thereof.

42.20. His conduct has not only exposed the Second Respondent to claims of breaches of the SHA by its co-shareholders in the Third Respondent; it has also raised potential breaches of certain provisions of the Companies Act 2008.

42.21. The First and Second Respondent's serious concerns in respect of the Ellies Transaction were raised directly with the Applicant at the board meeting of the Second Respondent, held on 8 October 2014 which board meeting was duly constituted. I was present at that board meeting. The Applicant was given an opportunity to explain his conduct in respect of the Ellies Transaction and more specifically his failure to notify the Board thereof and to obtain its approval. The Applicant's response was essentially that he is an entrepreneur and "he got ahead of himself".

42.22. In view of the seriousness of the matter and the nature of the complaints, a decision was made by the Board to appoint and mandate a sub-committee to investigate the Ellies Transaction and to consider whether disciplinary action

may be necessary. This decision was unanimous and in fact supported by the Applicant. The sub-committee comprised the following persons:

42.22.1. Mr V Mphande, the Lead Independent Non-Executive Director of the Second Respondent.

42.22.2. Dr Moreto Molefi, the Head of Social and Ethics Committee of the Board of the Second Respondent.

42.22.3. Mr Lesley Maasdorp, the Head of the Audit Committee of the Board of the Second Respondent.

42.23. As part of its investigations, the sub-committee interviewed the Applicant and Mr Copelyn, the Chief Executive Officer of the First Respondent. As a result of its investigations, the sub-committee recommended that due to the seriousness of the allegations the Applicant should be suspended and a disciplinary enquiry be instituted against him. The reason for suspending him pending the finalisation of the disciplinary enquiry was based on his responses during the investigation conducted by the sub-committee as it became apparent that the Applicant may potentially act contrary to the interests of the first and second respondents and his fiduciary duties. All of the aforegoing was conveyed to me by Mr Mphande, who chaired the special sub-committee, and whose statements I verily believe to be true.

42.24. I was further advised by Mr Mpande that the Applicant was given an opportunity by the sub-committee to make representations regarding the Ellies transaction and the appropriate action to be taken as a consequence thereof, including possible disciplinary action. The Applicant would have understood that suspension was to be considered by the sub-committee prior

to the convening of the disciplinary enquiry. This is so by reference to paragraph 111 of his own affidavit. He does not complain that he was not given an opportunity to address the sub-committee on suspension. His only complaint is that the sub-committee did not report its finding to the Board of the Second Respondent to allow it to deliberate on whether disciplinary action was warranted or suspension was required. This last mentioned point advanced by the Applicant, is in any event a passing strange given that he was fully aware that the Board of the Second Respondent had mandated the sub-committee to make a decision in regard to disciplinary proceedings. There was no need for the sub-committee to refer back to the Board in order to render its recommendation as binding. The Board had already empowered it to take a decision in this regard. Insofar as the Applicant seeks to challenge his suspension before this Honourable Court on Friday 24 October 2014, I pause to mention that another opportunity presents itself before the disciplinary chairman on Monday 27 October 2014, as the disciplinary chairman is fully empowered to deal with both the issue of suspension and the disciplinary action on that date.

43. It is therefore apparent from the brief factual background set out above that the institution of disciplinary action against the Applicant was not as a result of the reasons mentioned by the Applicant in his founding affidavit, which are denied.

44. In the short time available to the First and Second Respondents it is simply not possible to exhaustively traverse the allegations contained in each individual paragraph of the founding affidavit. To the extent that any statement, allegation or contention contained in any paragraph of the founding affidavit of the Applicant, is inconsistent with or contrary to what I have said in this affidavit, such statement,

allegation or contention must be taken to be denied. I expressly reserve the right of the First and Second Respondent, to supplement this affidavit, at a later stage should it be necessary to deal with these statements, allegations or contentions to enable this Honourable Court to dispose of this application.

45. I do however wish to annex the following documents for the sake of completion:

45.1. The response of the First and Second Respondent to the letter from the Applicant's attorneys dated 17 October 2014, is attached as annexure "**YS4**" hereto;

45.2. Copy of a tax invoice issued by the First Respondent for managerial services rendered to the Fourth Respondent is attached as annexure "**YS5**" hereto.

45.3. During the course of the afternoon of 23 October 2014 the Applicant's attorneys served a Rule 11 notice on the Attorneys of the First and Second Respondents attaching the shareholders agreement. I accordingly refrain from attaching the document.

BALANCE OF CONVENIENCE

46. I am advised and submit that by requesting that the parties go through a process of discovery and agreeing common cause and disputed facts, the objective was to facilitate the expeditious finalisation of the disciplinary proceedings and not to delay the process.

47. The Applicant was suspended on 13 October 2014, the charges were presented to him on the next day and the hearing is scheduled to commence on 27 October 2014. The First and Second Respondents have acted swiftly in proceeding with disciplinary action against the Applicant and there is no prejudice caused to him as

his suspension, pending the outcome of the disciplinary enquiry, is with pay and therefore any prejudice flowing from the suspension is contained.

48. I am advised and submit that the period of the suspension is for a limited period in that the Applicant is suspended pending the outcome of the disciplinary enquiry which is scheduled to proceed on 27 to 30 October 2014. Having regard to the nature of the allegations against the Applicant, and the evidence to be led by the First and Second Respondents to prove such allegations, the First and Second Respondents are of the view that the disciplinary enquiry will be concluded no later than 30 October 2014. Accordingly the Applicant would not be suspended for an inordinately long time. I reiterate that the Applicant is entitled to raise his continued suspension at any time before the chairperson of the disciplinary enquiry and the chairperson is empowered to make a decision thereto in accordance with law and fairness. This application is unnecessary.

49. I am advised and submit notwithstanding the fact that the Applicant had been personally involved in negotiations on behalf of the Third and Fourth Respondents; the Applicant was not the only representative of the third and fourth respondents who were involved in these negotiations, and directing the day to day activities of the third and fourth respondents.

50. These responsibilities can be fulfilled by another senior representative of the third and fourth respondents. Accordingly, no prejudice has been caused for the Third and Fourth Respondents by the applicant's suspension.

51. I am advised and submit that it is not the Court's duty to ensure that the reputation of the Applicant is not tarnished or that his standing in the community is not

impacted. The alleged damage to the Applicant's standing in the community is therefore not a sufficient basis for the granting of urgent relief.

52. Save to admit that I agreed to adjourn the disciplinary enquiry to allow the Applicant to attend the Second Respondent's annual general meeting; I was not inclined to withdraw the charges against the Applicant.

53. In the event that the suspension is uplifted the potential that the Applicant may commit further gross misconduct is material, especially in light of his response to the Board on 8 October 2014.

54. In light of the fact that, as a result of the launching of the urgent application, the First and Second Respondent was obliged to issue a SENS announcement in respect of the disciplinary proceedings against the Applicant, including a statement that the Applicant has been suspended pending the finalisation of the disciplinary enquiry, the uplifting of such suspension may negatively affect the share price and cause significant prejudice for the First and Second Respondents.

55. The disciplinary hearing has been arranged for a period of 4 days intentionally to permit all of the complaints to be addressed and adjudicated upon. Many of the issues to be raised at the disciplinary hearing appears to be common cause and provided the Applicant constructively engages and provides the First and Second respondents with his cooperation and explanation of his conduct there is no reason why the disciplinary enquiry cannot be finalised within such period. It is submitted that the balance of convenience favours the First and Second Respondent and the serious consequences that may arise if a person in the position of the Applicant is allowed to remain in his position pending the outcome disciplinary enquiry.

56. In light of the aforegoing, I am advised and so submit that the balance of convenience favours the First and Second Respondents and the application should be dismissed with costs.

CONCLUSION

57. I deny that the Applicant is entitled to the relief sought in terms of his notice of motion for the reasons set out above.

58. I respectfully submit that the application be dismissed with costs on the basis that the Applicant has not satisfied the requirements for the granting of the relief sought in terms of the notice of motion.

59. Wherefore, the first and second respondents pray that this application be dismissed against the applicant together with an order for costs.

_____

YUNIS SHAIK

I CERTIFY that this Affidavit was SIGNED and SWORN TO before me at CAPE TOWN on this the 23rd day of OCTOBER 2014, the Deponent having acknowledged that he knows and understands the content of this Affidavit, the Regulations contained in Government Notice No 1258 of 21 July 1972 and R1648 of 19 August 1977, having been complied with.

_____

COMMISSIONER OF OATHS