

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

CASE NO: 61961/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

DATE: 25 May 2023

In the matter between:

KHUTSO NAKETSI COMMUNAL PROPERTY ASSOCIATION
[Registration No.: C[...]]

Applicant

and

KHUTSO NAKETSI AGRI (PTY) LTD
[Registration No: 2[...]]

1st Respondent

HPN BESTUUR (PTY) LTD
[Registration No: 2[...]]

2nd Respondent

**THE MEC FOR RURAL DEVELOPMENT AND LAND
REFORM, NORTH-WEST PROVINCE**

3rd Respondent

GKL AUDITORS
[Practice No: 9[...]]

4th Respondent

JUDGMENT

K STRYDOM, AJ

Khutšo e kae?

*Ke e hlokile ke sa totoba,
Ke ntšhiše mahlo dinameng,*

*Ge ke sa hlwe ke bolela gona!
Le ge ke robotše nka se e bone.
Gobane malao a ka ba ka no a tloša,
Ba re ke robetše nagengtšhweu;
Ke swanetše go thotela nagengntsho.
Khutšo e kae?*

- HMI Lentsoane (1975)

Introduction

1. The deep, emotional connection between peace and land, was acknowledged by the drafters of the Constitution¹ and culminated in Section 25 thereof, in terms of which land restitution is done. This case concerns the practical realities that follow the initial bliss of righting a wrong.

2. In early 2019, the Government, in fulfilment of its constitutional duties, bought a megafarm of 1923 hectares for approximately R460 million. The land was returned to the 325 household beneficiaries of the community of Skeerpoort, for whom, it may have seemed like, the dream had finally come true, and peace has come.

3. By 30 September of that same year, the community had lost all control over the management of the land.

Relief sought

4. In order to regain control, the Applicant, the Communal Property Association representing the beneficiaries, has brought this application for:

- a. A declaration of invalidity/ voiding of a share transfer agreement; and
- b. A mandamus to force the first Respondent to convene a meeting, in terms of Section 61(3) of the New Company's Act, for the removal of the second Respondent's representative directors in the first Respondent.

¹ The Constitution of the Republic of South Africa, 1996

5. The first and second Respondent, apart from denying the applicant's entitlement to this relief, has also raised the defence of *lis alibi pendens*, based on a preceding action it instituted.

The parties

6. The Applicant is the Khutso-Naketsi Communal Property Association, registered on the 15th of September 2008, in terms of the Communal Property Association Act 28 of 1996. It is the owner of the farm and is charged with utilising it to the benefit of the land claim beneficiaries.

7. The first Respondent, Khutso Naketsi Agri (Pty) Ltd, is a company, duly incorporated and registered on the 3rd of April 2019 ("the company"). It leases the farm from the applicant and is essentially the vehicle through which the farm is controlled and managed. For the reasons discussed below, the Applicant holds 70% of the company and the second Respondent 30%

8. The second Respondent, HPN Bestuur (Pty) Ltd, forms part of the HPN Boerderie group, the erstwhile owner of the farm.

9. The third Respondent, the MEC, did not file any opposing papers. However, counsel appeared on its behalf, on the day of hearing, to confirm that it will abide by the Court's decision.

10. The fourth Respondent, the auditors of the first Respondent, having been cited as an interested party, did not participate in the proceedings.

Background

11. Being a "megafarm", the post settlement success of the farm depended on, not just the acquisition of the land and implements, but also the transfer of the

necessary skills to manage such a labour-intensive and technical project. To this end, and in terms of a post settlement plan (“the post settlement plan”),² Mr HPN Pretorius (and therefore by implication the Second Respondent), having successfully built up the farm since 1978, was the logical choice to assist and act in a mentorship capacity.

12. In terms of the post settlement plan, it was agreed that the Applicant and the second Respondent would form a company responsible for the management of the farm. The Applicant would lease the farm to this entity. The second Respondent would hold 30% of the shares in this company and the Applicant 70%. Each would have 2 representative directors on the board of the company.

13. The company was to be a transitional structure, with the goal “...*to transfer a going concern to a new corporate governance structure without putting the on-going of the business at risk and to prevent job losses*”³. This arrangement would persist for five years, whereafter the community could either terminate the arrangement and acquire the 30% of the shares held by the second Respondent or could renew the management agreement with the second Respondent.

14. The company would be funded by both the third Respondent, to the tune of approximately R87 million (“the post settlement funding”), and the second Respondent (approximately R26 million).

15. The post settlement plan was accepted and the company was registered in April 2019. According to the shareholders agreement,⁴ the partnership so constituted would endure from 26 June 2019 until 24 June 2024 (five years), whereafter it will be terminated. Whilst it notes that there is an option to review, it,

² Project Information Memorandum and Post Settlement Plan: For the implementation of a sustainable business model to successfully complete the land restitution process of HPN Pretorius Boerdery. Prepared on behalf of Mr HPN Pretorius: 2019

³ Project Information Memorandum and Post Settlement Plan: For the implementation of a sustainable business model to successfully complete the land restitution process of HPN Pretorius Boerdery. Prepared on behalf of Mr HPN Pretorius: 2019, page 7

⁴ CaseLines, Section 0003(5), page 003-34 and 35

surprisingly, does not deal with the transfer of the 30% shares held by the second Respondent to the Applicant on termination.

16. When the post settlement funding from the third Respondent was not forthcoming, Mr HPN Pretorius loaned his own resources to the company to ensure that it would be operational. According to the second Respondent, as security for this “loan”, it was agreed that the second Respondent would take transfer of the 70% shares held by the Applicant in the company.

17. On the 19th of September 2019, Mr Milanzi, a director of the Applicant and the deponent to the founding affidavit, concluded the shares transfer agreement, allegedly on behalf of the Applicant. The agreement records the following condition:

“As soon as the post settlement support is available the 70% shares will be reallocated to Khutso Nakatsi CPA.”

18. It is common cause that, on the 4th of November 2019, the third Respondent approved the release of the post settlement funding.⁵⁵ For reasons not canvassed by the parties, only partial payment has since been made to the Applicant.

19. The share transfer agreement is the principal antagonist in this drama. Various allegations and counter allegations have been made by the parties in this application, as well as in the urgent applications that preceded it; the veracity of which do not need to be determined herein. It suffices to say that the relationship between the parties has soured to the extent that the Applicant wants the second Respondent’s two representative directors of the company removed as directors.

Issues for determination

20. The following issues need to be decided:

⁵⁵ In terms of the first and second Respondent’s joint practice note – revised (5 April 2023). The document is not signed, however the audit report establishes that it was uploaded by the attorney for the first and second Respondents.

- a. Are there disputes of fact that would necessitate dismissal/ referral to oral evidence?
- b. Does the preceding action, instituted by the First Respondent under case number: 2022-033405 render the determination under this application *lis pendens* and, if so, is this Court prohibited from deciding on the issue?
- c. Was the share transfer agreement validly concluded? This principally requires a finding on whether Mr Milanzi had the necessary authority to conclude the share transfer agreement on behalf of the CPA.
- d. If it is found that the Applicant remains a 70% shareholder in the Second Respondent, should this Court order the first Respondent to convene a meeting in terms of Section 61(3) of the new Companies Act?

(a) Disputes of fact

22) The second Respondent avers that it is the owner of 100% in the company, by virtue of the share transfer agreement. In view of this, it alleges that the Applicant no longer has the necessary standing to request a meeting in terms of Section 61(3) of the new Companies Act to apply for the removal of a director as they no longer have more than 10% of the shareholding by virtue of the share transfer agreement signed by Mr Milanzi.

23) Mr Milanzi, on the other hand, states that he does not recall signing the share transfer agreement and disputes a) that he signed it, alternatively b) that he was authorised to transfer the shares.

24) Mr South SC, advocate for the Applicant, in argument, conceded that this denial by Mr Milanzi, constitutes a real dispute of fact. To avoid such a dispute, the Applicant therefore agreed, for purposes of this application, that the matter be determined on the basis that Mr Milanzi had concluded the agreement.

(b) Lis alibi pendens

Legal principles

25) The requirements for a successful plea of *lis alibi pendens* are trite: the impugned issue must be based on the same cause of action in respect of the same subject matter of pending litigation between the same parties.⁶ The requirements are similar to that of a plea of *res iudicata* and regard may be had to the authorities pertaining to *res iudicata*, when determining *lis pendens*.⁷

26) “Cause of action” refers to every fact which would be necessary for the plaintiff to prove, order to support his right to the judgment of the Court.⁸ However, when used in the context of *lis alibi pendens*, the sameness of the cause of action is determined with reference to “*the identity of the question which is a second time raised...*”⁹

27) The two-pronged approach to determine this “sameness”, was set out in *Nestlé*¹⁰ and is summarised in Amlers as follows¹¹ :

“The requirement of the same cause of action is satisfied if (1) the other proceedings involve determination of a question that is necessary for the determination of the case in which the plea is raised and (2) substantially determinative of the outcome of that latter case_[Underlining and numbering my own]

28) The approach should therefore be based on the outcome of the similar legal questions to be answered in both cases. If the determination of the question in one case disposes of the claim (or portion thereof) in the other, a defence of *lis alibi pendens*, may apply. Invariably it would require a common-sense and practical

⁶ *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 SCA para 16

⁷ *Van As v Appollus and Others* 1993 (1) SA 606 (C) at 608J; *Wolff NO v Solomon* (1898) 15 SC 297 at 307; *Marks and Kantor v Van Diggelen* 1935 TPD 29 at 37

⁸ *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16; and *Cook v Gill* L.R. 8 C.P. 107.

⁹ *African Farms & Rownships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A)

¹⁰ *Nestlé (SA) (Pty) Ltd v Mars Inc* [2001] 4 All SA 315 (A), 2001 (4) SA 542 (SCA)

¹¹ Amler’s n5 supra page 251

analysis of the respective cases, guided by the outcome sought in each and the similar question's effect thereon.

29) This approach was, for instance, followed in in *Standard Bank of South Africa Limited v Tsheola Dinare Tour and Transport Brokers (Pty) Limited*.¹²

“Put in another way, the cause of action for the payment of the debt owing under the instalment agreement would not be nullified by the return of the vehicles. The legal force to pay what is due to the applicant remains despite the success or the failure in the first application”.

30) These requirements, however, represent the essentials that a party needs to prove to raise the plea of *lis alibi pendens*. The Court still has an overriding discretion to hear a matter, regardless of finding it is *lis alibi pendens*. As was held in in *Eksteen v Road Accident Fund*:¹³

“[53] . . . When a Court upholds a plea of lis alibi pendens it has the discretion to stay one or other of the two actions. A Court is vested with such discretion because it is prima facie vexatious to bring two actions in respect of the same subject matter.

[54] The High Court before which the second action was pending undoubtedly enjoyed a wide discretion to determine whether the interests of justice dictated that the second action should be allowed to proceed.”

31) In exercising its discretion, the considerations fairness, equity and convenience should be the guiding lights for the Court. In seeking these out, the Court must, amongst other, delve into the merits to determine whether the party relying on the doctrine has a *bona fide* defence. ¹⁴

¹² *Standard Bank of South Africa Limited v Tsheola Dinare Tour and Transport Brokers (Pty) Limited* (22011/21) [2022] ZAGPJHC 301 (6 May 2022)

¹³ *Eksteen v Road Accident Fund* (873/2019) [2021] ZASCA 48

¹⁴ *Nordbak (Pty) Ltd v Wearcon (Pty) Ltd and others* (2009)(6) SA 106 (W) at 114I-J; *Loader v Durson Bros (Pty) Ltd* 1948 (3) SA 136 (T) at 139; *Van As v Appollus and Others* 1993 (1) SA 606 (C) at 610F.

32) The finding of the Court would bind the subsequent Court by virtue of the doctrine of issue estoppel. Reflecting the guiding lights for *lis pendens*, Friedman JP, in *Bafokeng*¹⁵ pointed out that issue estoppel is also founded on a policy to of avoidance of multiplicity of actions:

“There is a tension between a multiplicity of actions and the palpable realities of injustice. It must be determined on a case-by-case foundation without rigidity and the overriding or paramount consideration being overall fairness and equity.”

Submissions by parties

33) Mr HPN Pretorius and the second Respondent (as first and second Plaintiffs respectively) issued summons during October 2022 (“the action”), against the Applicant (first defendant), the company (second defendant) and the MEC (third defendant).

34) To avoid confusion, I will refer to the parties as they are in the application in the discussion forthwith. I will refer to the first Plaintiff in the action (not being a party in the application) as Mr HPN Pretorius.

35) Amongst others, the particulars of claim included a prayer for an order “confirming the 100% shareholding” of the second Respondent in the company, ostensible based on the Share Transfer Agreement.

36) The issue of *lis pendens* having been obliquely raised in the answering affidavit, it was noted, during the hearing of this matter, that neither party had sufficiently addressed this issue in their heads of argument. Given the importance and far-reaching effect of this determination on all parties involved, I afforded the parties the opportunity to supplement their heads of argument with regards to this specific issue.

¹⁵ *Bafokeng Tribe v Impala Platinum Limited and Others* 1999 (3) SA 517 (BHC) at 566B-C

37) Having raised, and relying on, the defence, the second Respondent bears the onus of proving the essentials of *lis pendens*.¹⁶

38) Referencing the two-prong approach, as set out in Amler's¹⁷ *supra*, it reasons as follows:

a) In the application, the Applicant seeks an order declaring it to be the holder of 70% shares in the second Respondent. This relief is opposed, based on the share transfer agreement, which the second Respondent avers is valid.

b) In the action, the second Respondent seeks an order declaring that they validly hold the disputed 70% shares. The Court in the action proceedings will inevitably be required to consider, and adjudicate upon, the validity and/or existence and/or legitimacy and/or procedurally compliant status of the share transfer agreement.

c) As the status of the share transfer agreement is a "...*determination of the question that is necessary for the determination of the present case*", it meets the first requirement for a successful plea of *lis pendens*.

d) The status of the share transfer agreement is substantially determinative of the applications outcome – and therefore meets the second requirement.

e) Referring to the SCA's finding in *Ceasarstone*¹⁸, it argued that a situation should be avoided where different Courts pronounce on the same issue, with the risk that they may reach different conclusions. As such, should

¹⁶ LTC Harms: Amler's Precedents of pleading 9th Ed. Page 250

¹⁷ Amler's n5 *supra* page 251

¹⁸ *Ceasarstone Sdot- Yam Ltd v The World of Marble 2000 (CC) and Other* 2013 (6) SA 499 SCA at par 2 and 3

this Court not uphold the defence, it, as well as the trial Court, will be saddled with the determination of the status of the share transfer agreement.

39) The Applicant's contentions are:

a) As the cause of action differs between the action and the application, the requirements for *lis alibi pendens* are not met. In the action the first Respondent seeks to enforce rights they "*obtained by way of an oral agreement which culminated in the conclusion of the share transfer agreement.*"¹⁹ There is no relief sought in the action to have the agreement declared valid

b) On the other hand, in the application, the Applicant seeks a declaration of invalidity of the share transfer agreement – "*a cause of action based on previously held rights which were ostensibly taken away.*"

c) In the alternative, even if the Court upholds the defence of *lis alibi pendens*, the Court has a discretion to still determine the issue.

Analysis of the action and application proceedings

40) When contextualising the particulars of claim in the action, it becomes evident that it is primarily aimed at enforcing payment allegedly due to Mr HPN Pretorius, in his personal capacity. It is based on an oral loan agreement he concluded with the Applicant and third Respondent collectively, following the failure of the third Respondent to *inter alia* provide the post settlement funding. The second Respondent, to generate operational funding, lent capital, crops and additional machinery and equipment to the company in order for the company to become operational. Claim 1 of the particulars of claim is for repayment of said loans to Mr HPN Pretorius.

¹⁹ Applicant's supplementary heads of argument para 3.5

41) In claim 2, an order “*confirming the 100% shareholding*” of the second Respondent in the company “*until monies due in terms of the Skeerpoort post settlement plan inclusive of interest thereon has been paid*” to Mr HPN Pretorius, and/or the Applicant has “*made its contribution towards the capital account*” of the company “*alternatively all amounts lent and advanced have been repaid*” to Mr Pretorius,” *with interest thereon..*” is sought

42) Similarly, claim 3, although phrased as an interdict prohibiting the Applicant from interfering with the second Respondent’s access to and control of the company, is aimed at enforcing payment. The Applicant may, for instance, not frustrate the second Respondent’s access to the company premises, until repayment is made to Mr Pretorius.

43) From the outset, it is noted that the conditions, upon which the second Respondent seeks to retain the 100% shareholding, are much broader than what is contained in the share transfer agreement itself. As previously indicated, the agreement only requires that the post settlement funding become available. It makes no reference to payment thereof, interest, amounts lent or advanced or any other forms of monies owed.

44) Additionally, as it is common cause that the third Respondent approved the release of the post settlement funding in November, (2 months after the conclusion of the share transfer agreement) the reference to “payment”, in the Particulars of claim, further denotes a basis for claim 2 (remaining the 100% shareholder), that does not arise from the share transfer agreement alone.

45) The right to enforce payment of the post settlement funding belongs to the applicant and not the second Respondent. This is evidenced by, for instance, the formulation of claim 4 of the particulars of claim. In terms thereof, the second Respondent (as Plaintiff) seeks an order on behalf of the Applicant (a defendant) against the third Respondent (a defendant) for payment of the post settlement funding in the amount of R50 million.

Finding on the lis pendens defence

46) Having regard to the aforementioned analysis, has the second Respondent proven the essentials needed to uphold a defence of *lis pendens*?

47) I am of the view that, whilst the question regarding the validity of the share transfer agreement might be similar, it would not be substantially determinative in the action.

48) In the action, Mr HPN Pretorius wants the third respondent to make repayment of loans he advanced to the company. The second respondent only comes into play as the holder of the security. However, the security held, pertains to the provision of the post settlement funding, due to the applicant. Despite its prayer to claim 4, the second Respondent has not alleged any basis upon which it has the necessary *locus standi* to bring such a claim on behalf of the Applicant.

49) Accordingly, save for claim 2, the only relief claimed that pertains to the second respondent, as plaintiff in the action, lies in the interdict sought in claim 3. This relief has nothing to do with the validity of the share transfer agreement.

50) The declaratory order (pertaining to the 100% shareholding) sought in claim 2, as previously stated, seeks to enforce conditions for the return of the 70% that are much broader than what is contained in the written share transfer agreement. While the trial Court might have to have regard to the validity of the share transfer agreement, it would therefore not be the only determination that would have to be made for the first respondent to succeed in terms of the claim.

51) Therefore., whilst the validity of the share transfer agreement may be necessary for the determination of the claims in the action, it cannot be said to be substantially determinative of the outcome thereof:

- a) The duty to repay any monies due to Mr HPN Pretorius, is not affected by the validity of the share transfer agreement. Insofar as the second Respondent relies on the share transfer agreement to enforce payment by the

third Respondent to the Applicant, the claim is not the second Respondent's to bring.

b) The declaration of 100% shareholding sought by the second Respondent is similarly aimed at enforcing payment of amounts due to Mr HPN Pretorius or the Applicant. The conditions not met, upon which the second Respondent seeks to retain the 70% shares in the action, are not the same as those on which it seeks to do so in the application.

c) A declaration of invalidity of the share transfer agreement, would not lead to a declaration that the overarching oral agreement, in terms of which it was concluded, is also invalid. If the terms of the oral agreement are proven, (including the transfer of shares as security) the second Respondent may still enforce same – just not on the basis of the invalid share agreement. Simply put, it could still force the Applicant to transfer the shares as agreed.

Court's discretion

52) In the event that I am incorrect, in finding that the first Respondent did not discharge its onus, I am still enjoined to exercise my discretion in deciding whether or not the issue should be decided before this Court.

53) On the considerations of fairness and equity, the effect of upholding the defence on the Applicant would be severe. The entire purpose of the transfer of land was to ensure that previously disenfranchised communities have the right to, not only own and benefit from their land, but also to have a say in how it is controlled and managed. The Applicant is the chosen representative body of the community to affect this right. As this right is entrenched in the Constitution, any unreasonable delay in affecting it, would be unconscionable. It is not clear from the papers at what stage the action proceedings are. However, it is common knowledge that the trial roll

is severely congested and dates for hearings are allocated at least a year in advance.²⁰

54) On the other hand, the second Respondent holds the shares as a form of security to enforce a right to funds not due to it, on the basis of a loan which it did not supply. Additionally, insofar as there are any rights due to the second Respondent, its particulars of claim make it clear that it has the usual enforcement mechanisms available to it. A decision to refuse to uphold the defence, will not affect any of these remedies or the trial Court from deciding on them.

55) The aforementioned considerations also apply to the issue of convenience. With regards to the crisp issue pertaining to validity, I have had regard to the merits of the second Respondent's averment that the share transfer agreement is valid. The issue is severable from the remainder of the claims in the particulars and, as discussed below, can be decided on a simple and clear basis, which is fully canvassed in the papers. As such, it would be convenient for this Court to decide the issue.

56) Additionally, the second Respondent's interpretation of the dictum in *Ceaserstone* (as per paragraph 34(e) *supra*) is incorrect. A refusal to uphold the defence, would not result in both this Court and the trial Court being "saddled" with the same determination. The defences of *lis alibi pendens* and *res iudicata* were developed exactly to avoid Courts being so saddled. The Court in *Ceaserstone*, in paragraph 2, (one sentence prior to the portion referred to by first Respondent) makes as much clear:

"The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation."

(c) Validity of the share transfer agreement

²⁰ Upon querying the registrar, it seems that dates are presently already being allocated for May 2025 in some matters.

57) Mr Brand SC, advocate on behalf of the Second Respondent correctly conceded that, as the second Respondent is relying on the existence of the share transfer agreement and the validity thereof, it bears the *onus* to prove compliance with the statutory and prescribed requirements for the valid conclusion of the agreement.

58) The second Respondent, in support of its contention that Mr Milanzi was authorised to conclude the share transfer agreement, refers to the confirmatory affidavits of Mr S Pretorius and Ms MJS Swart. During argument it was conceded that the deponent to the answering affidavit, Mr HPN Pretorius, had no direct knowledge of the signing of the share transfer agreement and that his averments contentions in this regard are based on those contained in these confirmatory affidavits.

59) In his affidavit, S Pretorius confirms that he was present when the share transfer agreement was signed, that there were “quite a few members of the Applicant present” and that they discussed the share transfer agreement comprehensively. He notes that these members never raised and/or discussed any reservations prior to the signing of the agreement. He states that Mr Milanzi had the necessary authority and signed the share transfer agreement in the presence of “the majority” of the “members of the Applicant”. For present purposes, I will disregard the contradiction between “quite a few” and “the majority” and assume that he meant “the majority” in both instances.

60) In her affidavit, Ms Swart contends that Mr Milanzi signed the agreement in her presence. He had the blessing of “the majority of the Applicant” as he signed it in their presence without any reservation being raised.

61) The second Respondent submits that these averments are sufficient to prove compliance with the prescribed requirements for valid authority in terms of the CPA’s constitution and the Communal Property Association Act 28 of 1996 (“the CPA act”)

62) Section 12 of the CPA Act makes it clear that any disposal or encumbrance in respect of the whole, or any part of immovable property or any real right in respect thereof, necessitates the consent of the majority of the members present at the general meeting.

63) However, the constitution of the Applicant (“the CPA constitution”)²¹ builds in an even higher threshold to be met: any such disposal is regarded as special business for which a special resolution needs to be passed at a special general meeting.²² A special general meeting must be convened on 21 days’ notice; which notice must indicate that voting on the decision to be taken will be done on the basis of an ordinary majority. Voting at general meetings is to be done by the heads of household and not individual members, with each head of household having one vote. For a quorum, 50% of the heads of household need to be present at the meeting.

64) Section 8(6)(e) of the CPA Act states that the constitution of a communal property association shall be deemed to be public knowledge. It effectively precludes the second Respondent from relying on the doctrine of ostensible authority *vis-a-vis* Mr Milanzi, as it is deemed to be aware the requirements for authority as per the CPA’s constitution.

65) The second Respondent, by virtue of this section, needs to prove that the CPA’s constitution was complied with, e.g., that proper notice was given, that a quorum was reached and that a vote was taken for a special resolution in favour of the agreement being concluded. Neither of the confirmatory affidavits proves that these prescribed requirements were complied with, either in the actual signing of the agreement or in granting Mr Milanazi the authority to sign such an agreement.

66) The second Respondent, during argument, contended that the failure of the members, present at the signing of the share transfer agreement, to object thereto,

²¹ In its answering affidavit, the second Respondent initially denied that the CPA constitution was the final and only one. However, in terms of the first and second Respondent’s revised practice note uploaded to Caselines on 5 April 2023, it is common cause that the CPA constitution is the only one it has had since inception.

²² CaseLines, Section 003(3), page 003-9 at clauses 10 and 14

constitutes a form of tacit consent. Considering the aforementioned provisions, consent cannot be given tacitly and requires voting and a special resolution to be passed.

67) In any event, even if the tacit consent construct were to be applicable, the voting (or the consent) needs to be given by the majority of the heads of households and not the majority of the members of the Applicant. The deponents were clear in stating that the majority of the members were present, but silent on the heads of household.

68) I accordingly find that the share transfer agreement is void for lack of authority. Consequently, the status *quo ante* prevails and the Applicant is declared to be the holder of the 70% shares in the first Respondent.

(d) The convening of the 61(3) meeting for removal of directors

69) Does my finding *supra* and the resultant declarator of the Applicant's ownership of the shares, entitle the Applicant to, by way of Court order, force the first Respondent to convene a meeting in terms of section 61(3) of the new Companies Act for purposes of removal of directors in terms of section 71?

70) In the present case, the question has to be answered in the negative.

71) A demand is a pre-requisite for such a meeting to be convened. The demand to have a shareholders' meeting held²³, *in casu*, does not comply with Section 71 of the Companies Act, Act 71 of 2008.

72) Section 71(2)(b) states that the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to the vote. In terms of Section 71(4)(a) the resolution must be attached to the notice

²³ Found on Caselines at 003-41

73) Whilst the Applicant's notice does reflect the directors' right to make presentations and attaches the proposed resolution, it fails to comply with the further requirement contained in Section 71(4)(a): "*Notice of a meeting, including a copy of the proposed resolution and a statement setting out the reasons for the resolution with sufficient specificity to reasonable permitting the director to prepare and present a response.*" [Underlining my own]

74) No statement setting out the reason is attached separately or included in the demand (or the resolution). In the absence of a valid demand, this Court cannot order that such a meeting be convened.

(e) Costs

75) Costs usually follow the result. There are no factors in the present matter that would justify a departure from this principle. The validity of the share transfer agreement being the dispositive issue for determination, the Applicant is entitled to the costs of the application.

76) The first and second Respondents opposed the application. However, based on the erroneous belief regarding ownership of the shares, the first Respondent was the puppet to the second Respondent's ventriloquy –

77) It now having been found that this is not the case, it would be farcical to order that the first Respondent, which is 70% owned by the Applicant, pay the Applicant's costs.

ORDER

78) In the result, it is ordered that:

1. It is declared that the share transfer agreement dated 19 September 2019 is void.

2. The Applicant is declared to be the holder of 70% of the authorised and issued share capital in the first Respondent.

3 The second Respondent is ordered to pay the Applicant's costs.

**K STRYDOM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of hearing:

11 April 2023, with supplementary heads of argument being filed on 21 April 2023 by both parties.

Judgment delivered:

25 May 2023

Appearances:

For the Applicant:

Counsel: Adv South SC
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For the first and second Respondents:

Counsel: Adv Brand SC with Adv De Kock
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